

  
**MEDIA LAW LETTER**

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## Federal Shield Law Bill Passes the House

On October 16, the House of Representatives overwhelmingly passed a bill that would create a federal shield law. The bill, called the “Free Flow of Information Act of 2007” (H.R. 2102), would provide a qualified privilege against disclosure of sources and information. The House vote comes after a nearly three-year effort to pass a federal shield law bill.

H.R. 2102 was introduced in early May by Reps. Rick Boucher (D-VA) and Mike Pence (R-IN), among others, and won wide support from Democrats and Republicans in the House, passing with a vote of 398 to 21 (with 12 abstentions). During the debate on the floor, strong support came from House Judiciary Committee Chairman John Conyers (D-MI).

On the day of the vote, the administration issued a statement in which senior advisors pledged they would recommend that the President veto the bill on grounds that it “could severely frustrate – and in some cases completely eviscerate – the Federal government’s ability to investigate acts of terrorism and other threats to national security.”

Supporters of the legislation were able to defeat an amendment put forward by Rep. Lamar Smith (R-TX) that would have effectively gutted the bill. One of the revisions sought by Rep. Smith would have provided for the compelled disclosure of a confidential source when it “will help to prevent or identify criminal misconduct specified by the Attorney General.”

As for the scope of the Bill, those engaged in “journalism” “for a substantial portion of [their] livelihood or for substantial financial gain” may claim protection under the bill. “Journalism” is defined as “the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.”

The Senate Judiciary Committee passed a version of the Free Flow of Information Act (S. 2035) out of committee on October 4, but it has not yet been scheduled for a vote on the Senate floor.

### Free Flow of Information Act of 2007 (Engrossed as Agreed to or Passed by House)

HR 2102 EH  
110th CONGRESS  
1st Session  
**H. R. 2102**  
**AN ACT**

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

#### **SECTION 1. SHORT TITLE.**

This Act may be cited as the “Free Flow of Information Act of 2007”.

#### **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.**

(a) Conditions for Compelled Disclosure- In any matter arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information obtained or created by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person--

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than the covered person) of the testimony or document;

(2) that--

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person--

(i) there are reasonable grounds to believe that a crime has occurred; and

(ii) the testimony or document sought is critical to the investigation or prosecution or to the defense against the prosecution; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is critical to the successful

*(Continued on page 4)*

*(Continued from page 2)*

completion of the matter;

security with the objective to prevent such harm;

(3) in the case that the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that--

(A) disclosure of the identity of such a source is necessary to prevent, or to identify any perpetrator of, an act of terrorism against the United States or its allies or other significant and specified harm to national

(B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively;

(C) disclosure of the identity of such a source is necessary to identify a person who has disclosed--

(i) a trade secret, actionable under section 1831 or 1832 of title 18, United States Code;

(ii) individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), actionable under Federal law; or

(iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer actionable under Federal law; or

(D)(i) disclosure of the identity of such a source is essential to identify in a criminal investigation or prosecution a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information; and

(ii) such unauthorized disclosure has caused or will cause significant and articulable harm to the national security; and

(4) that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.

(b) Authority to Consider National Security Interest- For purposes of making a determination under subsection (a)(4), a court may consider the extent of any harm to national security.

(c) Limitations on Content of Information - The content of any testimony or document that is compelled under subsection (a) shall--

(1) not be overbroad, unreasonable, or oppressive and, as appropriate, be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.

(d) Rule of Construction- Nothing in this Act shall be construed as applying to civil defamation, slander, or libel claims or defenses under State law, regardless of whether or not such claims or defenses, respectively, are raised in a State or Federal court.

(e) Exception Relating to Criminal or Tortious Conduct- The provisions of this section shall not prohibit or otherwise limit a Federal entity in any matter arising under Federal law from compelling a covered person to disclose any information, record, document, or item obtained as the result of the eyewitness observation by the covered person of alleged criminal conduct or as the result of the commission of alleged criminal or tortious conduct by the covered person, including any physical evidence or visual or audio recording of the conduct, if a Federal court determines that the party seeking to compel such disclosure has exhausted all other reasonable efforts to obtain the information, record, document, or item, respectively, from alternative sources. The previous sentence shall not apply, and subsections (a) and (b) shall apply, in the case that the alleged criminal conduct observed by the covered person or the alleged criminal or tortious conduct committed by the covered person is the act of transmitting or communicating the information, record, document, or item sought for disclosure.

### **SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.**

(a) Conditions for Compelled Disclosure- With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered

*(Continued on page 5)*

*(Continued from page 3)*

person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) Notice and Opportunity Provided to Covered Persons- A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)--

(1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and

(2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.

(c) Exception to Notice Requirement- Notice under subsection (b)(1) may be delayed only if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.

#### **SEC. 4. DEFINITIONS.**

In this Act:

(1) COMMUNICATIONS SERVICE PROVIDER- The term `communications service provider'--

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).

(2) COVERED PERSON- The term `covered person' means a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person. Such term shall not include--

(A) any person who is a foreign power or an agent of a foreign power, as such terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) any organization designated by the Secretary of State as a foreign terrorist organization in accordance with section 219 of the Immigration and Nationality Act (8 U.S.C. 1189);

(C) any person included on the Annex to Executive Order No. 13224, of September 23, 2001, and any other person identified under section 1 of that Executive order whose property and interests in property are blocked by that section;

(D) any person who is a specially designated terrorist, as that term is defined in section 595.311 of title 31, Code of Federal Regulations (or any successor thereto); or

(E) any terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II)).

(3) DOCUMENT- The term `document' means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(4) FEDERAL ENTITY- The term `Federal entity' means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.

(5) JOURNALISM- The term `journalism' means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

Passed the House of Representatives October 16, 2007.

Attest:  
Clerk.

## Newspaper Execs Arrested in Dispute Over Publication of Sheriff's Home Address

The co-founders of the alternative Phoenix, Arizona weekly newspaper *New Times* were arrested this month in a battle over the publication of truthful, readily available information about the home address of a local sheriff. The arrests occurred after *New Times* published an article disclosing that the paper had received a grand jury subpoena as part of a criminal investigation into the disclosure of the sheriff's address.

The arrests received wide publicity and condemnation. Maricopa County Attorney Andrew Thomas dropped all criminal charges the next day and fired the special prosecutor who was handling the matter for the state. The County Attorney's office later sent out a press release describing the arrests as "the result of a miscommunication."

### Background

In 2004 *New Times* began investigating real estate holdings of Maricopa County Sheriff Joe Arpaio. That year the paper published an article on the issue that included Arpaio's home address. The article was published in hard copy and on the newspaper's website. The sheriff's home address was already available to the public on other websites, including some county websites.

Despite the availability of the address, the county attorney commenced a criminal investigation against *New Times* for violating a state statute that prohibits publication on the Internet of certain personal information about public officials.

Arizona Revised Statute ("ARS") § 13-2401 provides in relevant part that:

1. It is unlawful for a person to knowingly make available on the world wide web the personal information of a peace officer, justice, judge, commissioner, public defender or prosecutor if the dissemination of the personal information poses an imminent and serious threat to the peace officer's, justice's, judge's, commissioner's, public defender's or prosecutor's safety or the safety of that person's immediate

family and the threat is reasonably apparent to the person making the information available on the world wide web to be serious and imminent.

2. The statute only applies to addresses published on the internet, and not through other means, such as newsprint or television.

Dennis Wilenchik, a private practitioner appointed as a special prosecutor in the matter, issued a grand jury subpoena to the newspaper. Michael Lacey and Jim Larkin, executives of *New Times*, responded by publishing the subpoena as part of an article headlined "Breathtaking Abuse of the Constitution." Lacey and Larkin were arrested a day later. A week before their arrest, the newspaper had filed [a complaint](#) in federal court in Phoenix, arguing that ARS § 13-2401 is unconstitutional.

### Grand Jury Subpoena

The grand jury [subpoena](#) to the newspaper was remarkably broad. It subpoenaed all documents related to the newspaper's articles about Sheriff Arpaio's real estate dealings, as well as all documents related to the newspaper's federal court complaint challenging the constitutionality of ARS § 13-2401. Perhaps most shocking was a demand for information – such as the IP addresses – of all users who had accessed the *New Times*' website since 2004.

Although the executives are no longer under criminal investigation for the publication of Arpaio's home address, the case contesting the constitutionality of ARS § 13-2401 is not dead. The complaint challenges the statute as applied and on its face.

The county attorney is preparing a response to the *New Times*' complaint.

*New Times* is represented in this matter by Michael J. Meehan, Munger Chadwick P.L.C. in Tucson; and Tom Henze and Janey Henze, Gallagher & Kennedy, P.A., Phoenix.

## Utah Reporter Held in Contempt for Interviewing Jury Pool Member Ordered to Prepare 'News Report' for Court

A Utah trial court held a local broadcast reporter in contempt for interviewing a jury pool member, during the jury selection phase of a recent high-profile criminal trial. *See State of Utah v. Warren Steed Jeffs*, No. 061500526 (Utah Dist. Ct. Oct. 23, 2007) (Shumate, J.).

The court issued a highly unusual ruling that the reporter could purge the order of contempt by “producing a news-cast addressing a public need.” The judge did not request that the report be broadcast, only that a copy be delivered to the court.

### Background

Katie Baker, a reporter for KUTV 2 News in Salt Lake City, was covering the recent criminal trial of Warren Jeffs, the leader of a controversial Mormon fundamentalist sect called the Fundamentalist Church of Jesus Christ of Latter Day Saints. Jeffs had been on the FBI’s ten most wanted list for arranging marriages with underage girls. In September, he was tried and convicted of “accomplice rape” for arranging the marriage of a 14 year old girl.

The case attracted a great deal of publicity in Utah and the trial judge issued a Decorum Order which prohibited any media contact or interviews with prospective jurors until the trial was completed.

During jury selection process, Katie Baker obtained an interview with a jury pool member and portions of the interview were broadcast on KUTV. Baker was not aware of the

### Order of Contempt

After the conclusion of the criminal trial, Judge James L. Shumate issued a ruling holding Baker in contempt. Although Baker testified that she had not actually read the Order, the judge found that his Order would be “meaningless if the ‘I forgot to read it all’ excuse was accepted.” The judge concluded she knew about the Order and willfully and knowingly violated by preparing the interview for broadcast.

Finally, Judge Shumate wrote that Baker could purge the finding of contempt if within 90 days she produced a report addressing a public need within her station’s broadcast market. “There is no need for KUTV to broadcast this work,” he concluded. “This Court does not presume to tell a television station what is or is not worth its broadcast resources. However,

the work involved in Ms. Baker’s production is adequate to serve the educational objective that the Court has in this Order.”

### Appeal Planned

The reporter will file a motion within the next week requesting that Judge Shumate reconsider and vacate the order. Among other grounds, the motion will argue that (1) the reporter’s conduct in failing to comply with a provision of a court order of which she had no actual knowledge cannot, as a matter of law, constitute contempt of court under Utah law; (2) the provision in the order prohibiting news reporters from communicating with and publishing information about prospective jurors is unconstitutionally vague and overbroad; and (3) a Court ordering a journalist to report a news story upon penalty of contempt violates the First Amendment.

*Jeffrey J. Hunt, Parr Waddoups Brown Gee & Loveless, Salt Lake City, Utah, represents reporter Katie Baker in this matter.*

**The reporter will file a motion  
within the next week  
requesting that Judge  
Shumate reconsider and  
vacate the order.**

**SAVE THE DATE**

**November 7, 2007**

**MLRC ANNUAL DINNER**

*New York City*

## MLRC Calendar of Events November 2007

NOVEMBER 7, 2007

### MLRC Forum

*Media Going Digital: Advising Clients on their Internet Operations*  
*Moderated by Barbara Wall, Gannett*

Panel will include:

Andy Mar, Microsoft Corporation; Jon Hart, Dow, Lohnes & Albertson  
Karole Morgan-Prager, The McClatchy Company; Ken Richieri, New York Times Company

Grand Hyatt, Conference level  
2:30-4:30 P.M.

RSVP [dseiden@medialaw.org](mailto:dseiden@medialaw.org)

### MLRC Annual Meeting

Grand Hyatt, Conference level  
5:00-6:00 P.M.

### MLRC Annual Dinner 2007

Honoring David Fanning,  
Creator and Executive Producer of the PBS series, FRONTLINE  
Grand Hyatt, Empire Ballroom  
6:00 P.M. Reception  
7:30 P.M. Dinner

[Registration for tables and individual seats](#)

NOVEMBER 8, 2007

### Planning Meeting for NAA/NAB/MLRC CONFERENCE 2008

12:30-1:30 P.M.

Davis Wright Tremaine

1633 Broadway (betw. 50th and 51st St.), Suite 2700

All are invited to discuss ideas for the Conference in 2008

RSVP [dseiden@medialaw.org](mailto:dseiden@medialaw.org)

NOVEMBER 9, 2007

### Defense Counsel Section Breakfast

7:00 A.M. – 9:00 A.M.

Proskauer Rose LLP Conference Center

1585 Broadway (betw. 47th and 48th St.), 26th Floor

[Registration for seats](#)



## Fire Sparks Free Speech Fight In Boston

By Thomas W. Kirchofer

On October 3, attorneys for the Boston Firefighters' Union obtained an ex parte temporary restraining order against WHDH-TV, blocking the television station from broadcasting the alarming results of autopsy reports for two firefighters who perished in the line of duty. *Boston Firefighters Union, IAFF Local 718 v. WHDH-TV, Channel 7*, SUCV2007-04341 (Sup.Ct. Oct. 3, 2007); *rev'd*, 2007-J-455 (Mass.App.Ct. Oct. 4, 2007).

Although the Massachusetts Appeals Court overturned the prior restraint the next day, the injunction prevented the TV station that obtained the story first from broadcasting it – even as its competitors made it the day's top story.

### *The Prior Restraint*

The events leading up to the case began more than a month earlier. On the evening of August 29, 2007, two firefighters responding to a restaurant fire died when the building's roof collapsed. The men were lauded as heroes for their sacrifice, and thousands of people attended their funerals.

However, WHDH uncovered a bombshell: according to confidential sources, autopsy results indicated that one of the firefighters was legally drunk at the time of his death, while the other had cocaine in his system.

The union – citing privacy principles - obtained the TRO in Suffolk Superior Court immediately after learning of WHDH's scoop on October 3. WHDH's lawyers learned of the TRO at about 1 p.m. They quickly gathered cases on prior restraints and raced to the courthouse for a preliminary injunction hearing that afternoon.

At the preliminary injunction hearing, the Union relied on, M.G.L.A. c. 38, § 2, which declares that autopsy reports "shall not be deemed to be public records" and grants the Chief Medical Examiner the power to make rules regarding the disclosure of autopsy results.

The rules laid out a few basic steps regarding the dissemination of autopsy results – and they pretty clearly did not envision disclosure of the results to the press without the consent of the next of kin. 505 C.M.R. 1.00. The union also cited *Globe Newspaper Co. v. Chief Medical Examiner*, 404 Mass. 132 (1989), in which the Massachusetts Supreme Judicial Court refused to grant a newspaper access to autopsy records, stating

that "[t]here is a strong public policy in Massachusetts that favors confidentiality as to medical data about a person's body." *Id.* at 135.

However, WHDH had decades of Supreme Court precedent on its side. In perhaps the best-known prior restraint case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Supreme Court rejected the Nixon Administration's efforts to enjoin newspapers from publishing the "Pentagon Papers" – confidential documents relating to the American war effort in Vietnam that someone stole and leaked to the press.

At the hearing, WHDH's lawyer tried to shift the court's attention away from the red herring privacy issues raised by the Union, arguing that this was a classic example of a prior restraint and presumptively unconstitutional.

Nevertheless, the court entertained an argument that an injunction should issue because WHDH had not obtained its information in compliance with the statute and regulations. From a constitutional perspective, the issue didn't matter because if WHDH damaged the union, the union would have a full spectrum of remedies available after the broadcast.

Ruling from the bench, the court issued the injunction. Based on the state's privacy laws, the court held that, "If one was to say it was a prior restraint on free speech, it is a justified prior restraint on free speech."

### *WHDH Loses the Scoop*

The hearing ended just shy of 5 p.m. and WHDH's counsel rushed next door to the Appeals Court, but a security guard told her the clerk's office had closed for the night. The station's lawyers made numerous phone calls that evening in an effort to make an emergency appeal, but the courts had all closed. Any relief would have to wait until the following morning.

Meanwhile, the hearing had attracted the attention of Boston's other media outlets. Because the Union had only sought an injunction against WHDH, the firefighters' secret quickly became the night's top story as its competitors raced to report the news.

While WHDH lawyers worked on a brief for the Appeals Court, the rest of the Boston media reported the news that WHDH had been prepared to report first. The story led all the evening newscasts and made the front pages of the morning papers. WHDH, however, led its newscast with a precisely wo-

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## Fire Sparks Free Speech Fight In Boston

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ded story about how the Court had blocked its plan to report that at least one of the firefighters was “impaired” at the time of the fatal fire. WHDH then ran a story about the Court proceedings, and told its viewers it planned an immediate appeal.

WHDH had uncovered the hottest story in town, but as a result of the injunction, WHDH lost the chance to report the news first. WHDH had lost the scoop.

### *Appeals Court Dissolves Prior Restraint*

WHDH’s appeal was argued the next day. Appeals Court Justice Andrew R. Grainger found in favor of WHDH, and he issued a written opinion that reinforced the First Amendment’s protections against prior restraints.

“[A]ny prior restraint on expression comes [to the Court] with a heavy presumption against its constitutional validity,” Grainger wrote. *Boston Firefighters Union, IAFF, Local 718 v. WHDH-TV, Channel 7*, No. 2007-J-455

(Mass.App.Ct. filed Oct. 4, 2007) at 4 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). Judge Grainger dissolved the Superior Court’s injunction and fully restored WHDH’s First Amendment right to report the news. He also put to rest the Union’s argument that because WHDH obtained the information from a confidential source and not in accordance with the statutes and rules, that an injunction was appropriate. “[T]he inability of the press to require the government to disclose information that is not part of the public record does not support a restraint on speech with respect to information already known to the press,” Justice Grainger wrote.

After a day of damage, WHDH regained its rights.

*Thomas W. Kirchofer is an associate with Edwards Angell Palmer & Dodge LLP in Boston. Partners Michael T. Gass and Jordana B. Glasgow of the firm represented WHDH in this matter. The Boston Firefighters Union was represented by Paul Hynes.*

The screenshot shows the WHDH-TV website interface. At the top, there is a navigation bar with links for Auto, Education, Theatre Performances, Decision 2008, Health, Program Schedule, and Contact Us. Below this is a main menu with links for HOME, LOCAL, NATIONAL, WORLD, WEATHER, TRAFFIC, BUSINESS, SPORTS, and ENTER. A secondary navigation bar includes Features, News Team, eUpdate, Events, Where's My Movie, and Closing Bell on Your Cell. The main content area displays the article title "Alcohol level challenged in firefighter autopsy results" with a sub-headline "BOSTON -- Questions have been raised about the autopsy results of a firefighter killed in the line of duty." The article text discusses the case of Paul Cahill and the theory of alcohol generation after death. To the right of the text is a photograph of two firefighters in uniform. Below the photo is a "Related Links" section. The page also includes a date stamp "Saturday, October 6, 2007" and an "XML" link.

## Florida Court Reverses Injunction Prohibiting Television Station From Broadcasting Documents

By Judith M. Mercier and Charles D. Tobin

A Florida appeals court has overturned an injunction that prohibited an Orlando television station from broadcasting the contents of documents about a political consultant that the station lawfully obtained from a source. *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 2007 WL 2890115 (Fla. 5th Dist. Ct. App. Oct. 4, 2007).

The court found that – even though the documents purportedly included medical records and attorney-client communications – the plaintiff, Douglas M. Guetzloe, had failed to meet his "heavy burden" to justify entry of the prior restraint.

### Background

Guetzloe is a well-known Central Florida political operative. A source, who bought the 80 boxes of records at auction from a storage facility after the facility said Guetzloe had failed to pay his storage bill, brought the records to Post-Newsweek station WKMG after recognizing Guetzloe's name on the documents.

After WKMG advised Guetzloe that it intended to publish portions of the contents of the records in its broadcast, Guetzloe filed suit in the state court in Orlando seeking declaratory and injunctive relief and replevin. Guetzloe asserted privacy interests in the records, claiming that they contained medical records and attorney-client communications.

Without notice to WKMG, Guetzloe sought a temporary injunction. Circuit Court Senior Judge Rom W. Powell granted Guetzloe's *ex parte* motion and enjoined WKMG from publicly airing the contents of the records. When it received notice, WKMG moved to dissolve on the basis that the injunction was "an unconstitutional prior restraint on its right to broadcast news based on lawfully obtained information." A few days after the hearing on WKMG's dissolution motion, the trial court refused to set it aside, but modified the injunction to solely prohibit the publication of medical records of Guetzloe and his family and communications between Guetzloe and his attorneys.

### Reversal of Unconstitutional Prior Restraint

The Florida Fifth District Court of Appeal, in an opinion by Judge Vincent G. Torpy, Jr., on October 5, 2007, reversed the tempo-

rary injunction. In doing so, the court followed traditional prior restraint law in recognizing that "the censorship of publication has been considered acceptable only in 'exceptional cases'" and holding that Guetzloe failed to meet his "heavy burden" for the imposition of such censorship.

The court acknowledged that "in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, such as the one at issue here." The court held that Guetzloe did not establish that the records in the boxes are "sufficiently sensitive," giving rise to a privacy interest that would outweigh WKMG's First Amendment right to broadcast them. The court rejected the lower court's reliance on HIPAA, finding it inapplicable under these facts, and also rejected Guetzloe's constitutional right of privacy arguments, holding that those privacy rights only apply in actions involving the government.

The court also noted that regardless of Guetzloe's claim that the storage company did not have legal authority to auction his documents, he offered no proof that WKMG engaged in unlawful conduct to gain possession of the documents. Finally, the court held that Guetzloe's claim that some of the documents contain attorney-client communications also would not justify a prior restraint.

According to the court, attorney-client privilege may only justify a prior restraint, if ever, when a defendant's fair trial rights are at stake, according to the court (citing *United States v. Noreiga*, 752 F. Supp. 1045 (S.D. Fla. 1990)).

*Judith M. Mercier and Charles D. Tobin are partners in the Orlando and Washington, D.C. offices, respectively, of Holland & Knight LLP. Along with Sanford L. Bohrer (in Miami) and David C. Borucke (in Tampa), they represented amici curiae Florida Association of Broadcasters, Tribune Company, Inc., Fox Television Stations, Inc., The Hearst Corporation, E.W. Scripps, Company, News-Journal Corporation, The New York Times Company, Gannett Company, Inc., The Associated Press, The Washington Post, Cable News Network, Inc., The Florida Press Association, The First Amendment Foundation, Monterey Campbell, Jack A. Kirschenbaum and Maureen A. Vitucci, of Gray Robinson, P.A., Melbourne, Florida, represented WKMG. Frederic B. O'Neal, Windermere, Florida, represented Douglas Guetzloe.*

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**The court acknowledged that "in over two centuries, the Supreme Court has never sustained a prior restraint involving pure speech, such as the one at issue here."**

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## Ethics Charges Proceed Against Boston Judge Who Won Libel Suit

By Bruce W. Sanford and Bruce D. Brown

On October 15, 2007, the public hearing into ethics charges brought by the Massachusetts Commission on Judicial Conduct against Superior Court Judge Ernest B. Murphy took place in Boston, the latest twist in the long-running legal battle Murphy started when he filed a libel suit against the *Boston Herald* over articles it published in 2002.

The articles recounted an insensitive statement about a young rape victim that sources in the District Attorney's office attributed to Murphy. The judge won a \$2.1 million jury verdict in February 2005, which the state's Supreme Judicial Court upheld on May 7, 2007. See *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. May 7, 2007); see also "Supreme Judicial Court Affirms Verdict Against Boston Herald," *MLRC MediaLawLetter* May 2007 at 3. The *Herald* has since paid the judgment to end the case.

### *Ethics Charges*

The misconduct charges against Murphy were made public on July 11, 2007 just after the *Herald* satisfied the judgment. They stem from Murphy's two extraordinary letters to Patrick J. Purcell, publisher of the *Herald*, in the wake of the 2005 verdict. See "Massachusetts Judge Apologizes for Letters to Herald Seeking to Deter Newspaper's Appeal: Victorious Trial Plaintiff Sent Letters on Court Stationery," *MLRC MediaLawLetter* December 2005 at 9-10. In its July 11 charging documents against Murphy, the Commission on Judicial Conduct stated that Murphy's behavior "constitutes conduct prejudicial to the administration of justice and unbecoming a judicial officer, brings the judicial office into disrepute, and violates the Code of Judicial Conduct."

The Supreme Judicial Court (SJC) appointed retired Chief Justice of the Land Court, Peter Kilborn, as the hearing officer in the case. Now that the evidence has been aired at a hearing, Kilborn will make a recommendation to the Commission as to any punishment for Murphy. The Commission will then make a final recommendation to the SJC, which has the ultimate decision on any sanctions against Murphy. At the October 15 hearing, Murphy argued that he wrote the letters to Purcell in an attempt to settle the case and to spare him and

his family a lengthy legal battle. In another unusual development, weeks after the announcement of the ethics charges but before the hearing date was set, Murphy petitioned Massachusetts Governor Deval Patrick to grant him early retirement with a 75% tax-free disability pension. Murphy's request was based on his claim that, in 2007, he is now suffering from post-traumatic stress disorder as a result of the libel case he filed in 2002. Patrick immediately denied Murphy's petition.

### *SJC Denied Petition for Rehearing*

The ethics charges against Murphy came only a month after the Supreme Judicial Court on June 4, 2007 denied the *Herald's* Petition for Rehearing. The Petition highlighted several factual and legal errors in the SJC decision. The most blatant and confounding mistake was the SJC's misstatement of the testimony of the key witness in the case, prosecutor David Crowley.

In its decision, the court wrote that "Crowley testified that the plaintiff had said words to the effect of 'she needs to get on with her life and get over it.'" But Crowley never testified that Murphy used the phrase "she needs to get on with her life," and the *Herald* argued that the court's misquotation of Crowley created the impression that he viewed the statement about the young rape victim as compassionate when, in fact, Crowley was on the record at deposition calling the comment from Murphy "insensitive." See *MLRC MediaLawLetter* May 2007 at 4.

A previous MLRC newsletter had reported that the Petition was denied but did not discuss the content of the short, defiant order the Court issued.

In its June 4 order, the court agreed to make changes to the testimony from Crowley, and in effect agreed that the basis of its previous ruling – that Wedge knowingly twisted the quote related by Crowley to make it appear Murphy had made a callous comment – was no longer valid. In moving the case away from deliberate falsification, however, the court denied that its errors required a change in the outcome of the case.

Even if Wedge didn't "positively know at the time of publication that the story is false," he still acted with reckless disregard for the truth, according to the June 4 order.

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## Ethics Charges Proceed Against Boston Judge Who Won Libel Suit

*(Continued from page 12)*

The evidence of such a finding was that Wedge wrote an “incendiary story” about a judge intending that it create a “media sensation” and without a “credible source.” Wedge’s sources were three prosecutors, two of whom he had used for years without a single disputed story. In the SJC’s view, relying on prosecutors who are critical of judges by itself practically carries the day on actual malice.

The court saved its most defensive posturing for last, lashing out at the *Herald* for including in its Petition for Re-hearing reference to a 1997 op-ed written by the author of the Murphy decision, Judge John Greaney, in which he stated that it pays to be “skeptical” of judicial horror stories” and chided the *Herald* for contributing to the “popular wrath” against judges by publishing accusations that are “whipped up.” Instead of recognizing that the *Herald* had simply used the judge’s op-ed as a vehicle to point out the flaw in the court’s actual malice reasoning, the SJC complained that the Petition amounted to an unfair accusation of bias and a “completely unsupported . . . ad hominem attack.”

The court tried to dignify Greaney’s angry op-ed by noting that it related to his work at the time on the court’s Judiciary-Media Committee – a committee at whose meetings, the court failed to recall, he was known to have vocalized his unhappiness with the *Herald*.

Massachusetts has never been better as a jurisdiction for sports fans, but it has never been worse as a jurisdiction for a media libel defendant.

*Bruce W. Sanford and Bruce D. Brown of Baker & Hostetler LLP represented the defendants in the appeal. M. Robert Dushman, Elizabeth A. Ritvo, and Jeffrey P. Hermes of Brown Rudnick Berlack Israels LLP represented the defendants at trial. Michael Avery of Suffolk Law School and Howard M. Cooper of Todd & Weld LLP represented the plaintiff in the appeal. Michael E. Mone of Esdaile, Barrett & Esdaile represents Judge Murphy in the pending disciplinary proceeding before the Commission on Judicial Conduct.*

### **Bulletin 2007 No. 1 (Feb. 2007 ):**

## **MLRC 2007 REPORT ON TRIALS AND DAMAGES**

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## Illinois Supreme Court Justice and Newspaper Settle Claims

By Steven P. Mandell and Brendan J. Healey

A defamation dispute full of novelties – a defamation lawsuit by the Chief Justice of a state court, the first anti-SLAPP motion in Illinois, the creation of an absolute judicial deliberation privilege, and a high-profile federal lawsuit against several state court judges – ended the way so many cases do, with a settlement.

This month Illinois Supreme Court Chief Justice Robert Thomas and Shaw Suburban Media Group, Inc., which publishes the *Kane County Chronicle*, resolved Justice Thomas's state court defamation lawsuit and the newspaper dismissed its federal court lawsuit.

The publisher and Bill Page, former columnist for the *Chronicle*, spent years defending Illinois State Supreme Court Justice Bob Thomas's defamation and false light lawsuit.

In November, 2006, a jury returned a \$7 million verdict, which the trial judge reduced to \$4 million on post-trial motions. See "Illinois Jury Awards Chief Justice \$7 Million in Libel Suit Against Newspaper," *MLRC MediaLawLetter* Nov. 2006 at 7; "Judge Reduces Illinois Supreme Court Chief Justice's Defamation Award," *MLRC MediaLawLetter* April 2007 at 11.

The parties cross appealed, and then the case really got hot. In May, Shaw and Page sued Chief Justice Thomas as well as his Illinois Supreme Court colleagues, the three Illinois appellate court justices handling the appeal and the trial court judge. Shaw and Page alleged violations of their civil rights under Section 1983. See "Publisher and Columnist Sue State Judges for Federal Civil Rights Violations," *MLRC MediaLawLetter* June 2007 at 3.

During the pendency of the appeal and the federal court case, Shaw and Page asked the Supreme Court to vacate all of its prior orders (including the order assigning the case to

the trial judge) on the ground that most of the Justices had acted as witnesses on one hand, adjudicators on the other. The Supreme Court determined that it did not have a quorum to vacate the orders it had previously entered.

In late August the Illinois governor signed an anti-SLAPP bill into law. In late September, Shaw and Page became (what are believed to be) the first litigants in the state of Illinois to bring a motion based on the new statute when they filed a motion for relief from judgment in the trial court. See "Illinois Becomes Latest State to Enact Anti-SLAPP Legislation," *MLRC MediaLawLetter* Sept. 2007 at 23.

In late September, Shaw and Page fired one final salvo when they asked the intermediate appellate court to vacate the decision creating an absolute judicial deliberation privilege as well as orders assigning the case to an appellate panel from another district. Shaw and Page asked for this relief on the grounds that the orders were the fruit of the Supreme Court's initially flawed orders.

All of those matters (federal lawsuit, state appeal, anti-SLAPP motion, and motion to vacate) were pending when the parties mediated the case before a magistrate judge in late September. On the second day of mediation, the parties reached agreement, and several years of litigation came to an end.

*Steve Mandell, Steve Rosenfeld, Steve Baron and Brendan Healey of Mandell Menkes LLC and Bruce Sanford, Lee Ellis and Bruce Brown of Baker & Hostetler represented Shaw Suburban Media Group, Inc. and Bill Page. Joseph A. Power, Jr. and Todd A. Smith of Power Rogers & Smith, P.C. represented Chief Justice Thomas in the original action. The office of Illinois Attorney General Lisa Madigan represented the judges in this matter.*

### MLRC ANNUAL DINNER

WEDNESDAY, NOVEMBER 7TH, 2007, NEW YORK CITY

MLRC will bestow its WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on

DAVID FANNING, Creator and Executive Producer, FRONTLINE

Followed by a Panel Discussion: *Witnesses to Our Time: Independent Voices of the Documentary*

Lowell Bergman – Heidi Ewing – Alex Gibney  
Moderated by Judy Woodruff

## Ohio Court Reaffirms Breadth of “Substantial Truth” Doctrine

By Maureen Sheridan Kenny

Late last month, Ohio’s Eleventh District Court of Appeals clarified the meaning of the term “substantial” in the “substantial truth” doctrine, holding the defense applies to publications containing minor, alleged inaccuracies as long as the “gist” or the “sting” of the publication, taken as a whole, is truthful. *Young v. Russ*, 2007 WL 282 2004 (Ohio App. 11th Dist., Sept. 20, 2007) (O’Toole, J.)

### **Background Facts**

In 2003, appellant George Young filed a defamation claim against Gannett’s WKYC-TV3 and investigative reporter Richard Russ. Appellant, a head custodian and lunchroom monitor at a Painesville elementary school, claimed the media defendants defamed him when they broadcast two news stories containing allegations that he used improper physical force in disciplining students in the lunchroom during school hours.

Specifically, the broadcasts included footage of two children, one who accused the appellant of “lift[ing] him up by the neck,” and the other who accused appellant of “choking [him] up” while the appellant was disciplining them as part of his responsibilities as a lunchroom monitor.

The stories also contained footage from the children’s parents, who voiced their concerns regarding appellant’s actions, and the school district’s superintendent, who claimed that the district was “looking into” the allegations. Finally, while appellant refused an on-camera interview with WKYC, the news story included appellant’s denial of the allegations along with his claim that the parents’ accusations represented nothing more than a “witch hunt.”

Both broadcasts stated that the school district and the local police were in the process of investigating the children’s allegations and that the appellant had been temporarily reassigned to an assignment that did not involve direct contact with students. After a two-week trial, a jury in Lake County, Ohio returned a unanimous defense verdict, finding that the broadcasts were substantially truthful. See *MLRC MediaLawLetter* March 2006 at 13. Mr. Young appealed, alleging the jury verdict was against the manifest weight of the evidence and the trial judge erred in instructing the jury on the relevance of retraction stories, the prerequisites for punitive damages, and the professional

standard of care for reporters.

Appellant argued the jury verdict was against the manifest weight of the evidence because one of the children who claimed the appellant “picked him up by the neck” subsequently changed his story when interviewed by the police. According to the police officer, the child “recanted” his allegation against the appellant and admitted that he made it up to avoid getting into trouble for his bad behavior in the lunchroom. Appellant also argued that the story was “inaccurate” because it allegedly depicted the appellant as a child abuser.

### **Appeals Court Decision**

In rejecting appellant’s argument, the appellate court focused on two components of the “substantial truth” doctrine. First, the substantial truth doctrine requires the jury to examine the publication or broadcast “as a whole.” The court relied on *Horvath v. Meyer*, 1982 Ohio App. LEXIS 15776 (11th App. Dist. 1982), in holding: “It is not necessary to prove the literal truth of an accusation in every detail. It is sufficient to prove that the imputation is substantially true, or as it is often put, to justify the ‘gist’ or ‘sting,’ or the substantial truth of the defamation.”

Second, the appellate court emphasized that the news broadcasts “merely revealed allegations, not conclusions.” While the broadcasts included a thorough recitation of the children’s and parents’ contentions, it also made clear that “as of the date of the broadcasts, there was no concrete answer regarding whether appellant George Young used unreasonable force on the students.”

As such, the appellate court affirmed the verdict, finding that the jury properly utilized a holistic approach in determining that the “gist” of the news stories was truthful.

### **Failure to Retract Irrelevant**

Appellant argued the trial court erred in excluding evidence related to WKYC’s failure to publish a retraction or a follow-up story. Specifically, appellant wanted to introduce documentary evidence demonstrating that Russ and WKYC were aware that, subsequent to the subject broadcasts, the police and school district “cleared” the appellant of any wrongdoing.

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## Ohio Court Reaffirms Breadth of “Substantial Truth” Doctrine

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The media defendants objected on two grounds. First, the relevant inquiry for defamation is whether the defendant acted with the requisite degree of fault—either actual malice or negligence—at the time of the publication, not sometime thereafter.

Second, Ohio law explicitly provides that, to the extent a media defendant’s failure to publish a retraction can ever be relevant, it is only when the plaintiff demanded such a retraction (which the appellant did not do here).

The trial court ruled that WKYC’s failure to publish a retraction or follow-up was wholly irrelevant to appellant’s defamation claim. The appellate court affirmed, holding that the temporal nature of defamation claims precludes evidence related to subsequent actions or inaction on the part of media defendants.

Focusing on the defendants’ state of mind at the time of publication, the appellate court held: “Although a follow-up story would have added completion to the story, information acquired [and actions taken] after the publication [are] not relevant.”

### *Punitive Damages*

Appellant took issue with the trial court’s determination that proof of actual malice is a prerequisite for his entitlement to punitive damages. Appellant argued that, because this case involved libel per se, damages are presumed and he could recover compensatory and punitive damages based on a mere finding that the media defendants were negligent.

The appellate court disagreed and reasoned that appellant’s argument directly contradicted the Supreme Court’s mandate in *Gertz v. Welch*, 418 U.S. 323 (1974) that courts “may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the *New York Times* test may recover compensation only for injury.”

Appellant next claimed that *Gertz* was inapplicable because his case involved the narrow “private issue” exception announced in *Dun & Bradstreet v. Greenmoss Bldrs., Inc.*, 472 U.S. 749 (1984). *Dun & Bradstreet* dispensed with the plaintiff’s burden to prove actual malice prior to recovering presumed or punitive damages, but only under limited circumstances where the speech involved issues of purely private concern—i.e., speech that is solely for the individual interest of the speaker and its specific audience.

The appellate court rejected appellant’s position, reasoning that this case involved media defendants who broadcast a story about “a public school employee, and the incidents occurred on school grounds, involved public students, and were investigated by the public school district as well as the local police department.” As such, the appellate court affirmed the trial court’s determination that the speech involved a public issue and the appellant was thus subject to *Gertz*’s rule restricting entitlement to presumed or punitive damages.

### *RTNDA Guidelines Not Binding on Reporters*

Finally, appellant objected to the trial court’s jury instructions regarding the authoritative nature of the Radio and Television News Director Association’s (“RTNDA’s”) Code of Ethics. At trial, the appellant’s expert testified at length regarding the media defendants’ alleged “violation” of specific guidelines contained in the RTNDA Code of Ethics. Upon objection, the trial judge instructed the jury that, while the RTNDA Code may be relevant to the issue of ordinary care, it is composed of “guidelines” that do not have the binding effect of law. Specifically, appellant claimed the following portion of the trial court’s limiting instruction was “misleading”:

These guidelines were not promulgated or mandated by any government agency and there is no binding legal effect to the guidelines with respect to establishing what ordinary care means under the circumstances of this case.

In holding the instruction was proper, the appellate court noted that the trial court did not instruct the jury to disregard the guidelines. Indeed, the trial court advised that the jury was “free to consider” the RTNDA Code, along with any other relevant facts, in determining whether the defendants exercised ordinary care. The limiting instruction nevertheless was necessary to clarify that the “appellees were not legally bound by those guidelines.”

*Maureen Sheridan Kenny is a Senior Attorney at Squire, Sanders & Dempsey L.L.P. and an Assistant Professor at Case Western Reserve Univ. School of Law in Cleveland, Ohio.*

*Steven A. Friedman, Maureen Sheridan Kenny, and Robin Weaver of Squire, Sanders & Dempsey L.L.P., Cleveland, represented appellees in this matter. Appellant was represented by Don C. Iler and Nancy Iler, Cleveland.*



## Pennsylvania Newspaper Loses Private Figure Libel Trial

By Niles S. Benn and Terence J. Barna

Following an eight day trial, a Pennsylvania jury this month awarded a private figure plaintiff \$305,250 in damages against a local newspaper and one of its reporters in a libel case over a news report about a murder investigation. *Joanne Kerrick v. Kelly Monitz and Hazleton Standard-Speaker, Inc.*, No. 2995-C-2004 (Ct. Comm. Pleas Luzerne County, Pa. Oct. 11, 2007).

### Background

Hazleton *Standard-Speaker* reporter Kelly Monitz was assigned to cover a Pennsylvania State Police press conference on Monday, June 2, 2003 regarding an investigation into the brutal murder of an alleged drug dealer. The murder took place on Wednesday, May 28, 2003 at one location and the body then transported in a van to a remote location. The van was subsequently set on fire with the deceased individual still in the van.

At the press conference the State Police provided those present with various documentation, including Criminal Complaints and Affidavits of Probable Cause, as well as photographs of certain suspects involved in the crime. The documentation also included the name of Joanne Kerrick, the plaintiff, as well as the name of Jessica Kerrick, a 16-year old girlfriend of one of the suspects.

On Tuesday June 3, 2003, the Hazleton *Standard-Speaker* published an article by Monitz titled "Hunt for Alleged Killer Intensifies." The article erroneously identified Joanne Kerrick as being an individual who assisted in cleaning up the murder scene and assisted in hiding the guns.

Although, the article began on the front page of the *Standard-Speaker*, the language at issue appeared on page seventeen of the June 3, 2003 edition. The entire article totaled approximately 1,500 words with the contested language on page seventeen comprising approximately 177 words.

The testimony in the case revealed that Monitz received a telephone call from Joanne Kerrick on the morning of the publication, Tuesday, June 3, 2003, relative to the article. Specifically, Joanne Kerrick advised that she was erroneously identified and that, in fact, it was her 16-year old daughter, Jessica, who had been involved in the matter. "I said, it wasn't me. It was my daughter. You can talk to my daughter. She's right here."

The reporter testified that she checked her paperwork while the plaintiff was still on the phone, acknowledged the

error, apologized and made arrangements to speak with the plaintiff later that day, around lunchtime. The plaintiff denied making definite arrangements to meet or speak with the reporter.

The reporter further testified that she called the plaintiff's house around noon, and continued to do so for about 45 minutes, but that there was no answer. Fearing for the plaintiff's safety, the reporter testified that she had called both the state police and local police to advise as to her concerns, but the authorities would not send someone out to investigate. Accordingly, the reporter made the decision, on her own, to travel to the plaintiff's house to make certain that she was safe. Upon arriving, the reporter sat in her truck for some time mulling over the thought as to whether her own safety would be in jeopardy. At the time, not all of those accused of taking part in the murder were in police custody.

The reporter then proceeded to the plaintiff's house and knocked on the door. A girl answered the door, and after the reporter identified herself and advised why she was there (to check on the safety of the plaintiff) she was informed that the plaintiff was okay, but not at home. The reporter was then invited into the house. At the time, only two individuals were at the plaintiff's residence, her 16-year old daughter, Jessica, and a friend of Jessica. The reporter proceeded to interview the girls and left the residence when asked to do so by the plaintiff's daughter. The reporter provided her telephone number and asked that Jessica tell her mother about her presence.

The reporter then wrote a second article based upon information provided by the plaintiff in her telephone call of June 3, 2003, as well as information provided during the interview with her daughter. The reporter testified that she spoke with her managing editor about the error that appeared in the article of June 3, 2003 and that he advised her to correct the error. That conversation occurred prior to the reporter going out to the plaintiff's residence. When she had returned to the newsroom, she prepared a corrective article.

She presented that article to her managing editor who was of the opinion that it was a sensitive and sympathetic way to resolve the issue by correcting the error without repeating the error, by giving it prominence on the first page above the fold, and by printing it promptly on June 4, 2003. Furthermore, the managing editor felt that by printing the corrective article in the manner described, it would be more beneficial than just placing a correction on Page 2 in the standard correction box of the

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newspaper wherein it would just set forth that the plaintiff had been misidentified in the preceding day's article. In that regard, the managing editor testified that by publishing a corrective article, the newspaper could, "number one present it in a way where no one could miss it, and number two, not add to whatever damage might have been done by the original error."

The newspaper, through its managing editor, felt that running a standard correction would merely call attention to the original error and that a corrective article would be a more appropriate way to resolve the matter for the plaintiff and her daughter.

The corrective article was published on the front page of the Wednesday, June 4, 2003 edition of the *Standard-Speaker*. It properly identified the parties, indicating that the plaintiff had no involvement with the murder or its cover-up. In that regard, the article stated that plaintiff "didn't know about the murder of an alleged drug dealer until police arrested her daughter's 16-year old boyfriend on homicide charges."

The article also clarified that the plaintiff's 16-year old daughter, not the plaintiff, "helped her boyfriend hide the two guns used to kill [the victim] in her basement the day after the murder, according to court papers. She also helped clean the West Hazleton apartment where the murder took place, the affidavit said." The article did not contain an apology, it did not specifically admit the error or restate any of the incorrect information. Furthermore, the article did not use the words "correction" or "misidentification" and did not contain a "correction" heading. The article published the correct information in a format that the managing editor thought would be least harmful to the plaintiff.

Following the publication of the June 4 article, neither the newspaper nor the reporter received any phone calls from the plaintiff indicating her concern with the June 4 article. In fact, the defendants heard nothing further from the plaintiff until her complaint was filed on May 4, 2004.

Defendants filed Motions seeking to exclude, among other things, all testimony regarding plaintiff's alleged emotional harm. Although defamation is a cause of action that allows compensation for mental distress in the form of general damages, the courts of this Commonwealth have historically been concerned with the issue of the recovery of damages for psychic injuries, including difficulties in proving causation and the danger of fraudulent or exaggerated claims. The plaintiff claimed to have suffered emotional distress damages as a result of the June 3, 2003 article. However, plaintiff and some of plaintiff's own witnesses acknowledged at deposition that the involvement of plaintiff's daughter, Jessica, in the underlying murder investigation and subsequent

stress upon the plaintiff. The plaintiff offered no medical or psychological testimony in support of her alleged emotional distress.

Given the emotional harm admittedly caused by her daughter's criminal involvement, the Defendants took the position that the plaintiff needed to offer expert testimony as to the issue of emotional distress itself and the causation of same because the jury would not be able to differentiate between any emotional harm caused by the article in question and the emotional harm caused by her daughter's involvement in the matter. The defense argued that requiring medical testimony in this case would serve the purposes of addressing the issue of causation and guarding against the danger of exaggerated emotional damage claims. If ever there was a case where the subject matter of the testimony on emotional damages was beyond the knowledge, information or skill possessed by an ordinary juror, this would be that case.

The Judge disagreed, ruling that the plaintiff did not need to offer expert testimony in order to establish her allegations of emotional damage. Clearly, this ruling adversely affected the defense, in that the plaintiff's allegation alone, that she sustained emotional damage as a result of the article, was left to the jury to determine without the input of expert testimony being provided to evaluate whether her daughter's involvement in the police investigation and subsequent detention had a negative impact on the plaintiff's emotional being.

### *Experts Testify at Trial*

Jack C. Doppelt, a Journalism Professor at the Medill School of Journalism, Northwestern University, was qualified by the Court to testify on behalf of the Defendants as an expert on newsroom standards and practices and journalistic ethics. It was Professor Doppelt's testimony that the corrective article published on June 4, 2003 was indeed a "correction" within accepted journalistic standards and that it was within acceptable journalistic standards for the reporter to have interviewed a 16-year old girl outside of the presence of her mother and, furthermore, that the publishing of that interview was also acceptable.

The defense expert further testified that the newspaper went above and beyond acceptable standards and practices for corrections by publishing an article that not only corrected the facts, but also did not repeat the error and displayed sympathy towards plaintiff and her daughter.

Conversely, plaintiff's expert, Professor Christopher Harper, an Associate Professor in the Department of Journalism, Temple University, opined that the corrective article failed to follow generally accepted newsroom standards and practices relating

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to corrections in that there was no specific admission of a mistake. Professor Harper also testified that the article failed to contain an apology. Professor Harper also indicated that the reporter failed to follow generally accepted newsroom standards and practices by interviewing plaintiff's 16-year old daughter, outside the presence of her mother.

***Trial Testimony on Damages***

Plaintiff testified that she had worked as a home health care aide for a local non-profit company from November of 1992 until her termination on June 9, 2003. In this job, plaintiff went to the homes of elderly "clients," and provided companionship and assistance with bathing, dressing, cleaning, and shopping. Plaintiff became a full-time employee in the year 2000 having previously worked on a part-time basis. Defendants introduced testimony via the employer's human relations representative and related documentation that the plaintiff was terminated because "after an evaluation of the program it was determined that the [employer] was no longer in need of [plaintiff's] services."

This reasoning and explanation was consistent with plaintiff's account of what was told to her by her employer on June 9, 2003. However, it was the plaintiff's testimony that she believed that she had lost her job as a result of the June 3, 2003 article. The employer's human relations representative further testified that the plaintiff's position was never filled after June 9, 2003.

Plaintiff also testified that she felt sad and angry and became less caring after publication of the article and the loss of her job. Plaintiff stated that her clients and other people treated her differently after publication of the June 3<sup>rd</sup> article and that she was shunned and ignored by others. Specifically, plaintiff recounted an incident where a neighbor called her a "murderer" while out walking a dog and testified that a local restaurant and private club would not serve her. These incidents occurred during the summer of 2003. At the same time, testimony was presented that individuals that had known the plaintiff on a personal basis did not think anything differently of her after reading the article of June 3, 2003.

While she felt sad and angry following publication of the article in question, plaintiff also testified that she was upset during the time period her daughter was being investigated by the police. Plaintiff admitted that she was emotionally disturbed by the fact that her daughter was being investigated for her

participation in the crime and because of her having to serve approximately eight (8) months to a year in a juvenile detention facility. In summary, plaintiff testified that the incident involving her daughter was "very trying". Plaintiff testified that she allowed the four (4) murder suspects to stay at her house the night of the murder, believing that they had been evicted from their apartments and had nowhere to go. Plaintiff admitted that her daughter had been dating the 16-year old suspect for about two (2) months. On cross examination, plaintiff was questioned as to the language of one of the probable cause affidavits provided to the reporter by the police which indicated that plaintiff's daughter told the police that her boyfriend had lived with her for a month prior to the murder. The plaintiff adamantly denied this fact and stated that he had slept over "a couple of times".

Plaintiff testified that following the loss of her job in June of 2003 she had secured employment through at least three (3) temp agencies and had obtained at least two (2) jobs on her own. One of the jobs plaintiff secured without assistance was at a nursing home doing personal care work similar to the work she performed from 1992-2003. However, plaintiff testified that she did not like the way this nursing facility treated their clients so she quit after less than a month. Plaintiff also testified that during the summer of 2003 she had applied for a night shift job at a convenience store but that she believed she was not given the job because of the publication.

It was the position of the defendants that they had made a mistake in misidentifying the plaintiff in the June 3, 2003 article. It was their belief that the article of June 4, 2003 was an appropriate correction and placed the Plaintiff in a favorable light that would not have occurred if the error were repeated or if it was stated that the Plaintiff had been misidentified. The Defendant-Newspaper's posture was that they acted in conformance with journalism standards and practices by correcting the error promptly and prominently and that the article, itself, was an admission of the error that had existed in the previous day's publication.

The Defendant-Newspaper also had taken the position that the Plaintiff did not lose her job as a result of the article in that the article had been appropriately corrected. Additionally, the Defendant-Reporter did not believe that she had done anything inappropriately when she interviewed the Plaintiff's minor daughter in that she had gone to the house innocently and during the conversation that she had had with the plaintiff, that morning, the plaintiff offered to allow the reporter to speak to the minor on the telephone. *(Continued on page 20)*

**Pennsylvania Newspaper Loses Private Figure Libel Trial**

*(Continued from page 19)*

During trial, it was also brought to the jury’s attention that in January of 2006 through the first week of trial, the June 3, 2003 article had appeared in the archive section of the newspaper’s website. It was also mentioned that the newspaper failed to remove the newspapers from convenience stores and newspaper racks on June 3, 2003 after it became known to the Newspaper that the article was in error. Premised upon these issues, the Plaintiff had requested punitive damages.

**Damages**

Prior to the charge to the jury by the Honorable Thomas F. Burke, Jr., Judge of the Luzerne County Court of Common Pleas, oral argument occurred as to the issue of punitive damages and Judge Burke ruled that he would not instruct the jury that punitive damages were applicable. Because this matter involved defamation per se, the trial judge felt that liability had occurred and that the issue before the jury related to the

harm caused to the plaintiff, if any, by means of such publication.

Plaintiff’s initial demand had been \$1.5 million and during trial that demand was reduced to \$700,000.00. The plaintiff’s demand during trial remained at \$700,000.00. The trial took a total of eight (8) days to complete and the jury heard testimony from two (2) experts and more than twelve (12) witnesses. The jury deliberated for approximately two and a half hours before announcing its verdict, which was as follows:

Actual harm to plaintiff’s reputation: \$16,500.00; emotional distress, mental anguish and humiliation: \$51,250.00; and economic loss: \$237,500.00.

The parties are currently pursuing a Settlement Agreement that would circumvent appeals by either side.

*Niles S. Benn and Terence J. Barna, Benn Law Firm, York, Pennsylvania, represented the Defendants in this case. Plaintiff was represented by Cletus Lyman and Michael T. Sweeney*

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Prepared by the Media Law Resource Center Employment Law Committee, this pamphlet provides a practical overview of defamation and privacy issues in the workplace and is intended to assist non-lawyers – supervisors and human resource professionals – who face these issues on a daily basis.

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## Pennsylvania Newspapers Win Libel by Implication Trial Over Reports on Domestic Abuse Petition

By John C. Connell

On July 31, 2007, a jury of the Pennsylvania Court of Common Pleas for Lancaster County reached a verdict for the defense in a trial that involved plaintiff's claim of defamation by implication. *Weber v. Lancaster Newspapers, Inc., et al.* (No. CI-98-13401, Pa. Ct. Common Pleas., Lancaster County). The jury found that the complained of statements were substantially true or, alternatively, protected by the fair report privilege.

### Background

Plaintiff, Gail Weber, is an attorney who provided legal counsel to Quarryville Borough in her capacity as an associate attorney with the Shirk Reist law firm which, at all relevant times, had been appointed as and acted in the capacity of Borough solicitor.

Weber became involved in a professional and personal relationship with Patricia Kelley, the Acting Police Chief of Quarryville Borough. As a consequence, she was drawn into a domestic dispute between the Acting Police Chief and Dawn Smeltz, Kelley's lesbian lover. Specifically, Smeltz filed a Protection From Abuse ("PFA") Petition which identified Kelley as the only named defendant. However, in the allegations of abuse supporting that PFA Petition, Smeltz stated:

Patti's friend, Gail Weber, phoned me at work, harassing me.

Concerned about how the controversy would adversely affect the qualifications of the Acting Police Chief, the Borough commenced an investigation. Due to the apparent conflict of interest caused by Weber's actions, the investigation was undertaken not by the Shirk Reist law firm as solicitor but by specially appointed independent counsel.

This controversy garnered much attention given the public profiles of the Acting Police Chief, who was the leading candidate for permanent assignment to the chief's position, and Weber, who had functioned publicly in the role of solicitor to the Borough.

The newspaper defendants reported these and related events, specifically and accurately stating the literal truth that Weber was accused of harassing the Acting Police Chief's lover. Specifically, after

six paragraphs detailing the PFA allegations against Kelley, the language in the article in question reads as follows:

Smeltz also accused Gail Weber, an attorney who Kelley is now living with, of making harassing calls to her at work...

Respondent then sued for defamation.

In 1998, Weber sued Ledger Newspapers, publisher of the local *Solanco Sun Ledger*, and Lancaster Newspapers, Inc., publisher of the *Intelligencer Journal*, *Lancaster New Era* and *Lancaster Sunday News*. Plaintiff asserted seven claims that published reports of her being variously identified in relation to the allegations of the PFA Petition were defamatory for, among other reasons, falsely implying that she was a co-defendant in that domestic violence proceeding.

### Summary Judgment

Once discovery was complete, the defendants moved for summary judgment. The grounds for relief included failure to plead with the requisite specificity, no defamatory meaning, substantial truth, fair report privilege, no clear and convincing evidence of actual malice against a public official/figure, and no probative evidence of reputational or other injury proximately caused by the statements at issue.

After a hearing on May 11, 2004, the trial court issued an order and opinion filed May 20, 2004 granting summary judgment to all defendants. In doing so, the trial court premised its decision solely on the fair report privilege. Noting that the PFA Petition "clearly constitutes a public court document" which also was "the source of the allegedly defamatory statements", the trial court ruled that the defendants "have clearly established a 'privileged occasion' and the plaintiff has failed to challenge the applicability of the privilege in this case." Thus, the existence of the privilege was established.

The trial court then turned to the issue of abuse of the privilege. In this regard, the trial court first noted the propriety of court's deciding this issue since, consistent with the law, "the evidence is so clear no reasonable person would determine the issue before the court in any way but one". As to the merits, the trial court correctly found that in this case the source of the "gist" or "sting" is the fact that the Plaintiff was named in a protection from abuse petition and an allegat-

(Continued on page 22)

## Pennsylvania Newspapers Win Libel by Implication Trial Over Reports on Domestic Abuse Petition

(Continued from page 21)

ion appeared in the petition that the Plaintiff phoned Smeltz at work harassing her. The newspaper articles alleged to be defamatory report that Weber, an attorney with the Shirk Reist firm, was named in a protection from abuse petition. The articles also contain reference to the alleged harassing phone call by Weber. Admittedly, some articles refer to the phone call(s) as “threatening” rather than “harassing” as the language in the petition reads. The Plaintiff argues that this change is not a fair and accurate report of the petition. The Court disagrees. With respect to the fair report privilege, the courts have said that it is not necessary for the report to be “set forth verbatim by the newspaper.” *Sciandra*, 409 Pa. at 600, 187 A.2d at 589. Arguably, if the word “threatening” had been used in the petition and the defendants had replaced it with “harassing” the argument would still be made that a greater “sting” exists. This is really a matter of word choice. The articles are a fair account of what is contained in the petition and therefore, the Court believes that the fair report privilege has not been abused in this case. The trial court then properly granted summary judgment. 2004 WL 5149404, 33 Media L. Rep. 1223 (Pa.Com.Pl. May 19, 2004).

### Interlocutory Appeal

On June 6, 2004, plaintiffs filed an appeal. In a January 11, 2005, non-precedential decision, a panel of the Superior Court (Del Sole, P.J., Lally-Green, M. Popovich, JJ.) ordered the matter remanded to the trial court for preparation of a Pa.R.A.P. 1925 opinion, while the panel retained jurisdiction. Subsequently, the trial court issued a supplemental opinion dated February 22, 2005, in which it elaborated on the reasoning in support of its earlier decision, which it re-affirmed. Following oral argument, the Superior Court then issued a published opinion dated May 24, 2005. 878 A.2d 63, 34 Media L. Rep. 1203, 2005 Pa.Super. 192.

That decision affirmed dismissal of six of the seven defamation claims, but remanded for trial of the seventh claim that plaintiff was “named” and “accused” and “charged” in the allegations of the domestic violence complaint with having phoned the victim at work harassing her. Significantly, though the trial court did not reach the issue of the applicable fault standard, on remand the Superior Court denied the defense the public official/figure defense as well as the actual malice fault standard.

Defendants then petitioned for review by the Pennsylvania Supreme Court, which declined to hear the further appeal. 588 Pa. 759, 903 A.2d 539 (July 26, 2006)(table) & 591 Pa. 666, 916 A.2d 634 (Jan. 3, 2007) (table).

### Trial -- In Limine Motions

Plaintiff filed several *in limine* motions, none of which succeeded. Specifically, the trial court denied each of plaintiff’s motions (1) to continue the trial date (with unsuccessful interlocutory appeal), (2) to certify interlocutory order for appeal, (3) to conform the burden of proof to the ruling of the Superior Court, *e.g.*, seeking to eliminate plaintiff’s burden to prove defamatory meaning, falsity, and disrepute, as well as to bar the defenses of truth and “fair report” privilege (with interlocutory appeal undecided at verdict and then mooted), (4) to preclude certain evidence based on the Superior Court decision, *e.g.*, the lesbian affair (with interlocutory appeal undecided at verdict and then mooted), (5) to recuse the trial judge (with unsuccessful interlocutory appeal), and (6) to discontinue prosecution against the *pro se* defendants (no interlocutory appeal).

The trial commenced on July 23, 2007. Jury *voir dire* revealed significant anti-media sentiment (working against the media defendants) and significant anti-gay sentiment (working against the plaintiff who was a lesbian, whose affair with another woman was the original impetus for the domestic violence complaint).

The issues for trial included: (1) whether the published statements, that plaintiff was “named” and “accused” and “charged” in the allegations of the domestic violence complaint with having telephoned the victim at work harassing her, were defamatory; and (2) if the published statements were defamatory, whether they were privileged as “fair report” without any showing of abuse, *i.e.*, no sting greater than the underlying subject which was reported.

The case was tried before Judge Paul K. Allison. Plaintiff’s case in chief consumed 5 days of trial, the defense, 1 day, with one additional day for closing arguments and jury deliberations.

### Trial Strategy: Plaintiff

The trial theme of the plaintiff was that she had been mentioned in the domestic violence complaint but not accused or named or charged, and the reporting to this effect imparted a defamatory spin to the publication implying that plaintiff was a defendant. Plaintiff was given prominence in the headline and articles out of proportion to her mere mention in the domestic violence complaint. Plaintiff successfully moved to bar not only the “public figure” defense *per* the Superior Court ruling, but also the “public official” defense together with the actual malice fault standard. At trial, plaintiff was deemed a private figure to whom the negligence fault standard applied. Plaintiff attempted to cast the conclusion of her employment as a constructive termination, with consequential damage in the form of lost employ-

(Continued on page 23)

## Pennsylvania Newspapers Win Libel by Implication Trial Over Reports on Domestic Abuse Petition

(Continued from page 22)

ment opportunity. However, no witness was offered to testify that they understood and believed the “spin” plaintiff was asserting, and in turn thought any less of plaintiff.

Plaintiff argued to the jury that the articles were defamatory for communicating a sting greater than that contained in the complaint by effectively accusing plaintiff of the conduct alleged in the complaint, inaccurately and unfairly conveying the impression that plaintiff was the co-defendant in the domestic violence complaint, giving plaintiff prominence in the headline and article layout greater than that in the complaint, and failing to check corroborating sources.

Plaintiff further asserted that defendants abused any privilege that they may have otherwise enjoyed. Plaintiff claimed that, because of the defamatory publications, she was involuntarily terminated from her law firm and also suffered non-economic loss in terms of emotional distress, ridicule and humiliation.

### ***Trial Strategy: Defense***

The trial theme of the defense was that the published statements were literally and substantially true, the articles were a fair and accurate report, the published statements were not the proximate cause of any alleged damage, and any “injury” she complained of was the result of the choices she had made, not anything that defendants reported.

The defense employed several successful tactics:

First, defendants opposed plaintiff’s discontinuance of prosecution against the *pro se* defendants at the beginning of trial in order to retain the ability to treat the *pro se* defendants as adverse parties on examination, then did not object to discontinuance at close of trial.

Second, defendants moved to preclude any reference by plaintiff to any of the six (6) factual grounds which plaintiff had originally asserted in support of her defamation claim and which the Superior Court had ruled were not actionable. When plaintiff’s counsel repeatedly attempted to ignore this ruling, the defense moved for sanctions and the judge temporarily dismissed the jury and threatened plaintiff’s counsel with contempt.

Third, defendants moved to *voir dire* a potentially dangerous “lay opinion” witness out of the presence of the jury in order to carefully circumscribe his testimony and to avoid the risk of the jury hearing certain opinion evidence despite speaking objections.

Fourth, defendants persuaded the trial court to include in the jury charge the “public concern” defense under Pennsylvania statute.

Fifth, defendants persuaded the trial court to exclude from the jury charge plaintiff’s proposal that the fair report privilege could be overcome by a showing of negligence, though the trial court did not articulate the governing fault standard.

Defendants then successfully argued to the jury that the published articles truthfully conveyed the substance of the allegation in the complaint according to the ordinary meaning of the language used and understood by the average reader, and or fairly and accurately reported the allegation against plaintiff without any showing of abuse, and communicated a matter of public concern which is a statutory defense under Pennsylvania law.

Defendants also successfully asserted that the alleged actions of the defendants were not a proximate or factual cause of the purported economic loss suffered by plaintiff, and that plaintiff’s damages were non-existent. Defendants offered evidence that plaintiff voluntarily left her employment and averred that plaintiff had no affirmative proof of disrepute by anyone who rejected her or thought less of her. The defense economic and vocational experts confirmed the absence of proximate cause and the fact of plaintiff’s unemployability prior to the publications.

### ***Verdict***

Closing arguments were heard on July 31, 2007, and a 10-2 defense verdict of no cause for action was rendered on the same day after approximately fifty (50) minutes of deliberation by the jury. Post-trial motions have been withdrawn by plaintiff, and no appeal is pending or being pursued.

*John C. Connell of Archer & Greiner, P.C., represented Ledger Newspapers. George C. Werner of Barley Snyder LLC, represented Lancaster Newspapers, Inc. Plaintiff was represented by Ralph D. Samuel and Lynn Malmgren of Ralph D. Samuel and Co., P.C.*

## Summary Judgment for ABC and Fox on FBI Agent's Libel Claims

By Charles L. "Chip" Babcock and Ryan Pittman

In two cases decided on August 31, the Court of Appeals for the Second District of Texas ruled in favor of ABC and FOX, rejecting claims by an FBI agent that they published defamatory statements about him. *Abdel-Hafiz v. ABC, Inc.*, NO. 2-06-244-CV, 2007 WL 2460251 (Tex. App.—Fort Worth 2007, no pet. h.) and *Fox Entm't Group, Inc. v. Abdel-Hafiz*, NO. 2-06-353-CV, 2007 WL 2460235 (Tex. App.—Fort Worth 2007, no pet. h.).

The plaintiff alleged that ABC and FOX, and a number of their correspondents and affiliates, were liable for defamation because they reported that he refused to follow orders in FBI investigations because of his religious beliefs, an allegation he claimed was untrue. The plaintiff sought \$3.5 million in damages plus exemplary damages from the defendants in each of the two cases.

Affirming summary judgment for the ABC defendants, a unanimous panel of the court determined that the plaintiff failed to produce more than a scintilla of evidence of actual malice and that there was no evidence that ABC deliberately omitted or juxtaposed information to present a substantially false impression of the plaintiff.

Reversing and rendering the trial court's denial of summary judgment for the FOX defendants, a unanimous panel of the court found that there was no genuine issue of material fact with respect to the plaintiff's claim that FOX broadcasted defamatory statements with actual malice.

### Background

Gamal Abdel-Hafiz, an FBI agent who is Muslim, became the subject of national media attention when three FBI agents and an assistant U.S. attorney stated in interviews that Abdel-Hafiz refused to secretly tape record terrorism suspects because they were Muslim.

Born and educated in Egypt, Abdel-Hafiz came to the United States in 1984 and became a U.S. citizen in 1990. The FBI hired him as a language specialist in January 1994, and by 2001, he was serving as assistant legal attaché to the U.S. embassy in Saudi Arabia. Abdel-Hafiz claimed that the allegation that he refused to follow FBI orders was untrue. The allegation appeared on ABC's *Primetime*

*Thursday* broadcast and in a related article on ABC's web site. On FOX's *The O'Reilly Factor*, similar allegations were broadcast. Abdel-Hafiz sued ABC and FOX separately.

In the ABC lawsuit, the trial court granted Disney Enterprises, Inc.'s special appearance, dismissed the claims against Belo Corp., WFAA-TV, L.P., and WFAA of Texas, Inc., and granted summary judgment for ABC. Abdel-Hafiz appealed the summary judgment, contending that there were genuine issues of material fact about whether ABC acted with actual malice and whether ABC chose its material with actual malice and omitted material facts and juxtaposed facts in a material way so that the gist of the broadcast and article was false. In the FOX lawsuit, the trial court denied FOX's motion for traditional and no-evidence summary judgment. FOX sought interlocutory appeal of the trial court's order, contending that there was no evidence that FOX broadcasted defamatory statements with actual malice.

### The Opinions

In separate opinions written by Justice Dixon W. Holman, the Court of Appeals for the Second District of Texas unanimously ruled in favor of both ABC and FOX.

In affirming summary judgment for ABC, the court reviewed the allegedly defamatory statements in their entirety, the evidence pertaining to the state of mind of ABC's reporters and staff at the time the allegedly defamatory statements were made, and found that there was no evidence that ABC acted with actual malice toward Abdel-Hafiz, a public figure. Indeed, the court stated that "[t]here is no evidence in the record to show that ABC knew ... that the information was false or that it had serious doubts about the information at the time of publication."

As to Abdel-Hafiz's juxtaposition claim against ABC, the court noted that there was "no doubt that ABC's Broadcast was sensationalistic – filled with language like 'explosive allegations,' 'astounding,' 'a complete lie,'" but the court framed the juxtaposition inquiry instead as whether "ABC decided to omit portions of the [materials] it used with ... awareness the omitted or juxtaposed materials could create a substantially false impression of [Abdel-Hafiz]."

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## Summary Judgment for ABC and Fox on FBI Agent's Libel Claims

*(Continued from page 24)*

The court reviewed the allegedly defamatory statements and the context in which they were presented, and held that there was no evidence to support the claim that ABC deliberately omitted or juxtaposed the information. In so holding, the court recognized that “a publisher’s presentation of facts may be misleading but still not constitute a ‘calculated falsehood’ unless the publisher knows or strongly suspects that it is misleading.”

In reversing the trial court’s denial of summary judgment for FOX, the court considered Abdel-Hafiz’s claims that FOX purposefully avoided the truth and that FOX knew the statements made on its broadcast and the gist of its broadcast were false or that FOX acted with reckless disregard for their truth or falsity. The court rejected all three of Abdel-Hafiz’s claims.

With respect to purposeful avoidance, the court found that although FOX did not contact the FBI for an official statement, FOX did consult with more than one source, including an “unofficial” FBI source, in preparation for its broadcasts and did not doubt the credibility of its sources’ statements at the

time of the broadcasts. Thus, the court held that there was no evidence that FOX purposefully avoided the truth.

As to Abdel-Hafiz’s claim that FOX acted with actual malice, the court reviewed the allegedly defamatory statements in their entirety and the evidence pertaining to the state of mind of FOX’s reporters and staff at the time the allegedly defamatory statements were made. Based on its review of the record, the court found that there was no evidence that FOX acted with actual malice toward Abdel-Hafiz. The court reversed the denial of summary judgment for FOX and rendered summary judgment for FOX on all claims except for Abdel-Hafiz’s juxtaposition claim because the court stated that it “was not brought before the trial court in [FOX’s] motion for summary judgment.” FOX’s motion for rehearing regarding this matter is pending. The Court in both cases has denied Abdel-Hafiz’s motion for rehearing.

*Charles L. “Chip” Babcock, Bob Latham and Amanda Bush, Jackson Walker L.L.P., Houston, Dallas and Ft. Worth, represented FOX and ABC. Abdel-Hafiz was represented by Jeffrey Kaitcer.*

### **SAVE THE DATE**

**November 9, 2007**

*New York City*

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7:00 A.M. – 9:00 A.M.

Proskauer Rose LLP Conference Center

1585 Broadway (betw. 47th and 48th St.), 26th Floor

## Court Applies Functional Test to Find Blogger Is a Journalist

In granting summary judgment to a blogger on libel and related claims, a federal judge in South Carolina applied a “functional analysis” test to determine that the defendant “was engaged in news reporting or news commenting,” and thus exempt from Lanham Act claims. *BidZirk, LLC v. Smith*, Civil No. 06-109 (D. S.C. opinion and order Oct. 22, 2007) (granting summary judgment to defendant).

The same judge made a similar finding last year, when denying a preliminary injunction in the case. *BidZirk, LLC v. Smith*, Civil No. 06-109 (D. S.C. opinion and order April 10, 2006) (denying preliminary injunction).

### Background

The case stemmed from comments that Philip Smith posted on his blog about a company named BidZirk. BidZirk places customer’s items for auction on ebay.com. In March 2005, Smith consigned several items to BidZirk, but was dissatisfied with the prices he received for some of the items. In January 2006, he published complaints about BidZerk on his “Fix Your Thinking” blog (). The blog postings, which began with one titled “You Gotta Be Berserk To Use An eBay Listing Company!,” criticized the company and were illustrated with BizZerk’s logo.

BidZerk and its owners sued for defamation, trademark infringement and invasion of privacy. Smith counterclaimed based on BidZerk’s sales of his items. In March 2006, Magistrate Judge William M. Catoe recommended that the court deny plaintiff’s motion for a preliminary injunction against use of the logo. The magistrate cited a section of the Lanham Act, 15 U.S.C. § 1125(c)(3) (B), which makes “all forms of news reporting and news commentary” non-actionable under the statute. “This court has reviewed the four-part article posted by the defendant on his blog, and it appears that the defendant’s function was to report information to his readers.” *BidZirk, LLC v. Smith*, Civil No. 06-109 (D. S.C. report of magistrate March 21, 2006) (recommending denial of preliminary injunction).

In making this recommendation, Judge Catoe noted several articles from the Internet and news publications addressing the issue, including an article on the First Amendment Center web site advocating a functional analysis of the

question. See, e.g., David Hudson, “Blogging,” at <http://www.firstamendmentcenter.org/speech/internet/topic.aspx?topic=blogging2>

The plaintiffs objected to this conclusion before the district court, arguing that Smith’s postings were “cyber-gripping,” not news reporting or commentary.

After noting that “these terms are not defined in the Lanham Act,” and “there is no published case deciding whether a blogger is a journalist,” Judge Henry M. Herlong, Jr. applied a “functional analysis” test to determine whether Smith’s comments were news reporting or commentary. This test, he explained, “examines the content of the material, not the format, to determine whether it is journalism.” As a result of this analysis, Judge Herlong found that the BidZirk mark was used in the context of news reporting or news commentary and denied the motion for preliminary injunction. *BidZirk, LLC v. Smith*, Civil No. 06-109 (D. S.C. opinion and order April 10, 2006), at 5.

The 4th Circuit affirmed in an unpublished, per curiam opinion, which concluded only that the district court had not abused its discretion. *BidZirk, LLC v. Smith*, No. 06-1487, 2007 WL 664302 (4th Cir. March 6, 2007) (unpublished).

As the case proceeded, the trial court dismissed Smith’s counterclaims against BidZirk on jurisdictional grounds. *BidZirk, LLC v. Smith*, No. 06-1487, 2006 WL 3242333 (D. S.C. Nov. 7, 2006). But the court also denied various motions to dismiss or grant summary judgment on the remaining claims. See 2007 WL 626161 (D. S.C. Feb. 23, 2007) (denying plaintiff’s motion for judgment on the pleadings, and defendant’s motion to dismiss); 2007 WL 1574481 (D. S.C. May 30, 2007) (denying plaintiffs’ motion for summary judgment); and 2007 WL 1754293 (D. S.C. June 15, 2007) (denying defendant’s “motion for dismissal, judgment for slander of title, plea acceptance”).

At a Sept. 17, 2007 status conference, defendant moved once again for summary judgment. Judge Herlong requested a memorandum in support of the motion, and, *suavemente*, also requested a memorandum from the plaintiffs as to why they should not be sanctioned for filing a *lis pendens* against Smith’s condominium and for asking abusive discovery requests.

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## Court Applies Functional Test to Find Blogger Is a Journalist

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### Summary Judgment Decision

After receiving the documents, the court granted summary judgment to the defendant on all claims. On the defamation claim, the Judge Hertzog held that Smith's statement that BidZerk president Daniel G. Schmidt was a "yes man" who "over promise[d] and under deliver[ed]" were "patently not defamatory."

The judge also found for the defendant on the plaintiff's invasion of privacy claims. Their false light claims failed, Hertzog ruled, because South Carolina has not recognized such an action, and because even if it did recognize such a tort, none of Smith's statements placed the plaintiffs in false light. The

court also dismissed plaintiffs' misappropriation claims, which were based on Smith's inclusion of a hyperlink to a local newspaper website featuring a picture of the plaintiffs, since Smith did not post the photograph on his own website.

Finally, on the Lanham Act claims, the court reaffirmed that defendant used the mark for the purpose of conveying newsworthy information to the public. Thus BidZirk's Lanham Act claim failed as a matter of law.

Finally, the court decided to sanction plaintiff's counsel \$1,000, payable to the defendant, for filing the improper lis pendens against defendant's condo.

*Plaintiffs were represented by Kevin Elwell of K. M. Elwell, P.C. in Greenville, S.C. Defendant represented himself pro se.*

## Ninth Circuit Grants Rehearing En Banc in Roommate.com Case Divided Panel Had Rejected Section 230 Defense

The Ninth Circuit granted rehearing en banc this month in *Fair Housing Council v. Roommate.com LLC*, No. Civ. 04-56916, 2007 WL 3013891 (Oct. 12, 2007). In May 2007, a divided panel, reinstated a housing discrimination lawsuit against a roommate matching website, holding that it was not entitled to immunity under ' 230 for user profiles created through online questions and prompts. See 2007 WL 1412650 (9th Cir. May 15, 2007) (Kozinski, Reinhardt, Ikuta, JJ.).

Judge Kozinski found that Roommate.com was not entitled to sec. 230 immunity for its user profiles because it created "new information" by categorizing and presenting user created information. Judge Reinhardt agreed and would have further treated Roommate.com as the creator of all portions of the user-created profiles, including personal essays written by users. Judge Ikuta wrote a separate opinion, curiously labeled as a concurrence, in which she dissented from the Court's holding, stating that *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir.2003) was binding precedent.

In *Carafano*, another panel applied Section 230 to dismiss defamation claims over a false profile posted on dating website. Judge Kozinski found that *Carafano* could be limited to unique facts where a "prankster" provided false information that was not solicited by the operator of the website.

## 1<sup>st</sup> Circuit Flips \$2.1 Million Punitive Damages Award; Upholds \$775,000 in Lost Wages

By Sigmund D. Schutz

The First Circuit this month reversed a \$2.1 million jury award of punitive damages in favor of a broker terminated by Merrill Lynch, but upheld a \$775,000 award of lost wages. *Galarneau v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 06-2410, 2007 WL 2964188 (1st Cir. Oct. 12, 2007) ((Torruella, Newman, Lynch, JJ.)

In a troubling section of the opinion, the Circuit upheld the lost wages award on a theory that plaintiff need not have proved causation where she was entitled to presumed damages for defamation per se.

### Background

The case arose from statements Merrill included in a U-5 form filed with the National Association of Securities Dealers after terminating a broker, Debora Galarneau. A U-5 form must be filed whenever a broker leaves a firm. Merrill listed the reasons for Galarneau's termination as inappropriate bond trading in a client's account and exercising time and price discretion in the accounts of three clients.

Galarneau admitted that she violated Merrill's policy on time and price discretion, but denied inappropriate trading. There was evidence that her trading activity was part of an investment strategy that had been repeatedly reviewed and approved by Merrill. At trial she presented expert testimony that her investment strategy was sound. After being terminated, Galarneau was unable to find employment as a stockbroker with other firms and sued for, among other things, defamation.

### First Circuit Decision

In a threshold ruling on appeal, the First Circuit determined that Merrill's failure to raise First Amendment arguments in the court below precluded the Circuit from applying any heightened scrutiny to jury's verdict. The court then affirmed the jury's defamation finding, concluding that expert testimony about the reasonableness of the trading activity, along with Merrill's prior review and approval of Galarneau's activities supported a finding that its statement in the U-5 form was false. The Court found

that this same evidence supported the required finding of "malice" – meaning knowledge of or reckless disregard of the statement's falsity – sufficient to overcome a common law conditional privilege applicable under Maine law.

In a troubling portion of the opinion the First Circuit rejected Merrill's argument that the award of \$775,000 in special damages (lost wages) should be reversed on the grounds that Galarneau had not proven causation. Neither Galarneau nor Merrill presented evidence at trial from the brokerage firms that had declined to offer Galarneau employment. Merrill argued, therefore, that Galarneau had not proven that the defamatory statement led to their decisions not to hire her.

The First Circuit affirmed the lost wages award, however, reasoning that Galarneau could recover lost wages as "presumed" damages without the need to prove causation. The Court explained "we see no reason why Galarneau was required to prove special damages in the first place." Since the statement related to her profession and was defamatory per se, the Court wrote, "she was entitled to recover her lost wages without having to prove causation." No Maine court has used that reasoning to affirm an award of special damages. Merrill is expected to file a petition for rehearing arguing, essentially, that the First Circuit apparently confused special and presumed damages.

Merrill was more successful in knocking out the punitive damages award. The First Circuit held that Galarneau failed to show by clear and convincing evidence the required malice – meaning ill will – by Merrill. "There was no evidence that Merrill Lynch made the statement in the U-5 with the intent to deprive Galarneau of a job. And Merrill's action in filing the U-5, knowing it "would almost certainly" hinder Galarneau's job prospects, even if established by clear and convincing evidence, "is not sufficiently outrageous to warrant punitive damages" under Maine's high bar for punitive damages.

*Sigmund D. Schutz is a partner with Preti Flaherty LLP in Portland, Maine specializing in media law. Plaintiff was represented by Rufus E. Brown, Brown & Burke, Portland, Maine; and Jensen Baird Gardner & Henry, Portland, Maine. Defendants were represented by Evan M. Tager, Mayer, Brown, Rowe & Maw LLP; James R. Erwin, Pierce Atwood LLP, and Eugene Volokh, UCLA School of Law.*

## MLB Strikes Out in Claim Over Fantasy Baseball

The Eighth Circuit Court of Appeals held this month that the use of player names and statistics in fantasy baseball does not violate the publicity rights of major league baseball players. *C.B.C. Distribution and Marketing, Inc. v. Major League Advanced Media, L.P.*, Nos. 06-3357/3358, (8<sup>th</sup> Cir. Oct. 16, 2007) (Arnold, Loken, Colloton, JJ.).

The Court reasoned that even if players' names were being used for commercial advantage within the meaning of Missouri right of publicity law, such use is protected by the First Amendment.

### Background

Fantasy baseball is a game in which participants create and manage imaginary teams made up of real-life major league baseball players. Participants "draft" players to assemble a team and then compete against other "teams" based on the real-life statistical performance of their players. Writer and editor Daniel Okrent is generally credited with inventing this form of fantasy baseball in 1980 – which he called "Rotisserie League Baseball."

Over the past 25 years, the popularity of fantasy baseball has grown enormously and the concept has extended to other professional sports. According to the Fantasy Sports Trade Association (FSTA), nearly 20 million people in the U.S. and Canada play fantasy sports games. Over 100 companies organize fantasy sports games, including media and internet companies, and participants frequently pay fees to play.

The plaintiff in the case, CBC Fantasy Sports ("CBC"), operates fantasy baseball and other fantasy sports games. From 1995 through 2004, CBC licensed its use of player names and statistics from the Major League Players Association. After the license agreement expired, the Players Association in 2005 granted an exclusive license to Major League Baseball Advanced Media LLP. Advanced Media is the production/multimedia wing of Major League Baseball, overseeing MLB.com and all of the individual teams' websites.

Advanced Media began providing fantasy baseball through its websites. It did not offer CBC a license to continue its use of player information, but instead proposed that CBC promote the MLB.com fantasy baseball games. In response, CBC brought a declaratory judgment against the Players Asso-

ciation to establish its right to use, without license, the names and statistics of baseball players for its fantasy baseball games.

### District Court Decision

The district court granted summary judgment to CBC, holding that it was not infringing any state law rights of publicity that belonged to major league baseball players. *See* 443 F. Supp.2d 1077, 1106-07 (E.D. Mo. 2006) (Medler, J.); *MLRC MediaLawLetter* Aug. 2006 at 33.

The district court reasoned that CBC was not using the names of players as symbols of their identities and with an intent to obtain a commercial advantage, as required under Missouri law. Alternatively, even if CBC was infringing the players' rights of publicity, the First Amendment trumped those rights.

Finally, the court rejected the Players Association argument that CBC's claims were barred by contract provisions in the license agreement. Under the license agreement CBC agreed that it would not "dispute" the validity of the license granted by the Players Association and that it would not

use the rights granted after expiration of the contract. The district court held these provisions were void and unenforceable as a matter of public policy.

### Court of Appeals Decision

The Court unanimously affirmed the district court ruling with respect to the right of publicity issues. The elements of a right of publicity claim under Missouri law are: (1) That defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage.

In contrast to the district court ruling, the Court of Appeals found it clear that CBC was using baseball players' identities in its fantasy baseball products for commercial advantage. While CBC's use of the players' names was not a typical advertisement or endorsement, Missouri law provides that a name is used for commercial advantage when it is used "in connection with services rendered by the user." *Citing*

(Continued on page 30)

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**Even if players' names were being used for commercial advantage within the meaning of Missouri right of publicity law, such use is protected by the First Amendment.**

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### MLB Strikes Out in Claim Over Fantasy Baseball

(continued from page 29)

*Doe v. TCI Cablevision*, 110 S.W.2d 363, 368 (Mo. 2003), cert. denied, 540 U.S. 1106 (2004) (the *Tony Twist* case).

But the Court unanimously agreed that the First Amendment trumped any publicity rights. All the information used by CBC is in the public domain and commands a substantial public interest. Moreover, use of the information for entertainment purposes is fully protected by the First Amendment. Citing *Cardtoons L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10<sup>th</sup> Cir. 1996) (“speech that entertains, like speech that informs, is protected by the First Amendment”).

Indeed, the Court noted that the facts of the case “barely, if at all” implicate baseball players interests in the right of publicity. CBC’s use of the players’ names in fantasy baseball does not interfere with their salaries or product endorsements. And since all players are included there is no false impression that player’s with “star power” are endorsing CBC’s games.

#### **Breach of Contract Issue**

Finally by a 2-1 vote, the Court affirmed on the breach of contract issue, but on different grounds. The Court declined

to follow the district court’s ruling that CBC’s agreement not to “dispute” the validity of the license or use the rights granted after expiration of the contract was unenforceable as a matter of public policy.

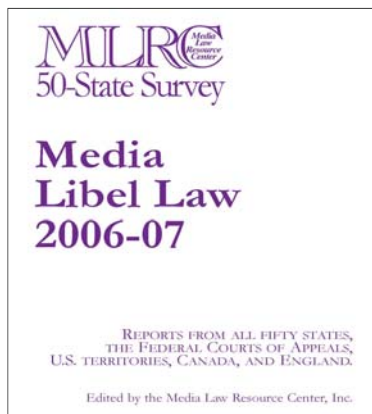
Instead, the Court found that these provisions were unenforceable because the Players Association violated an implied warranty provision of the contract. The license agreement provided that the Players Association “is the sole and exclusive holder of all right, title and interest” in and to the names and playing statistics of virtually all major league baseball players. “The Players Association did not have exclusive ‘right, title and interest’ in the use of such information, and it therefore breached a material obligation that it undertook in the contract.” CBC was therefore relieved of these provisions of the license agreement.

*CBC was represented by Neil M. Richards, Washington University School of Law; and Rudolph A. Telscher, Jr., Harness & Dickey, St. Louis, Missouri. The Players Association and Advanced Media were represented by Jeffrey H. Kass, Armstrong Teasdale, LLP, St. Louis; Michael J. Aprahamian, Foley & Lardner, Milwaukee, Wisconsin; Donald R. Aubry, Jolley & Walsh; Karen R. Glickstein, Shughart & Thomson; Virginia A. Seitz, Sidley Austin Brown & Wood, Kansas City, Missouri.*



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## California Clarifies Publicity Rights Of “Deceased Personalities”

By Bradley H. Ellis

On October 10, 2007, Governor Arnold Schwarzenegger signed SB 771 which, according to its Senate sponsor and the legislative history, clarifies that California’s protection of post-mortem publicity rights found in Civil Code § 3344.1 extends to individuals who died before 1985. The law takes effect on January 1, 2008.

### Background

California first recognized post-mortem publicity rights in 1984 with the enactment of Civil Code § 990 (now 3344.1). The statute provides that “any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without prior consent . . . shall be liable for damages. . . .” Cal. Civil Code § 3344.1(a)(1).

A “deceased personality” is defined as “any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death.” To avoid running afoul of the First Amendment, the statute exempts from its terms fiction and non-fiction entertainment and dramatic, literary and musical works, as well as uses in connection with any news, public affairs, or sports broadcast or account, or any political campaign.

The amendment to Section 3344.1 is the result of legal battles that began in March 2005 between the holder of rights in Marilyn Monroe’s residual estate, Marilyn Monroe, LLC (“MMLLC”), and the heirs of photographers Sam Shaw, Milton H. Greene and Tom Kelley, Sr. Marilyn Monroe died testate in on August 5, 1962.

Her will did not expressly bequeath a right of publicity, but contained a residuary clause leaving 75% of the residue of her estate to her acting coach, Lee Strasberg. His wife, Anna Strasberg, inherited the rights when he died in 1982. Ms. Strasberg formed MMLLC to which she transferred the intellectual property assets of the residue of Monroe’s will. Shaw, Greene and Kelley were contemporaries of Marilyn Monroe who collectively shot many of the most famous images of the star. The rights in those photographs passed to their heirs, who sought to exploit the often iconic images of the 1950’s sex symbol but objected to paying royalties demanded by MMLLC.

After various procedural machinations, two lawsuits were decided on summary judgment in the federal courts in Manhattan and Los Angeles.

In both cases, the heirs of the photographers prevailed when

the courts concluded that post-mortem publicity rights – defined by the statute to be property rights – did not come into being in California until the enactment of California Civil Code Section 990 in 1984.

According to the two courts, Ms. Monroe could not have bequeathed property rights that did not exist in 1962 when she died. See *Shaw Family Archives LTD., et al. v. CMC Worldwide, Inc and Marilyn Monroe, LLC*, No. 05 Civ. 3939 (S.D.N.Y. May 2, 2007) and *The Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc. et al*, No. CV 05-2200 MMM (C.D. Cal. May 14, 2007).

### Amendment to Right of Publicity Law

Expressly to abrogate those orders, the California Legislature amended Section 3344.1 to “clarify that individuals who died before Jan. 1, 1985 have the same rights as those who died after that date so that those who inherited the rights can continue to protect the images of great American icons like John Wayne, Alfred Hitchcock, Mae West, Bela Lugosi, and Marilyn Monroe.” Kuehl Publicity Rights Legislation Passes Legislature, September 10, 2007, <http://dist23.casen.govoffice.com/>.

The amendment provides that (1) the 3344.1 rights of publicity are property rights that are deemed to have existed at the time of death of any deceased celebrity who died prior to or after January 1, 1985; (2) such rights are transferable or descendible by contract, trust, or other testamentary instrument; (3) if not expressly transferred, such rights transfer with the residue of the estate; and (4) any subsequent owner of the rights may similarly transfer such rights.

The practical impact of the amendment beyond the context of the two lawsuits is difficult to assess, although it could be significant. The statute provides that a successor in interest to the publicity rights of the deceased personality may not recover damages unless that successor in interest has registered a claim of the rights with the Secretary of State. Those registrations now exceed 1100, out of which approximately 350 registrations relate to celebrities who died prior to 1985.

Challenges to the amendment are expected. Opponents of the bill – principally photographers from around the country – argued that the amendment is of “questionable constitutionality” because it “effects an unlawful taking of property, violates due process, unconstitutionally impairs existing contracts of not only photographers but also studios and other businesses.”

*Bradley H. Ellis is a partner with Sidley Austin LLP in Los Angeles.*

## Entertainment Law: California Jury Rejects Writer's Breach of Implied-in-fact Contract Claim Against Jim Jarmusch Movie

By Vincent Cox

On September 28, a Los Angeles federal court jury returned a defense verdict rejecting a writer's breach of implied-in-fact contract claim against the producers of the 2005 feature film "Broken Flowers." *Martin v. Focus Features, LLC*, No. CV 06-1684 (C.D. Cal.) (Lew, J.).

The case illustrates the many reasons why producers, writers, and production companies go to such great lengths to avoid entering into implied-in-fact agreements to pay for the disclosure of ideas.

A party who willingly accepts the disclosure of ideas from someone who has clearly conditioned the disclosure upon the consent by the recipient of the disclosure to pay the disclosing party the reasonable value of those ideas has entered into an implied-in-fact contract. This is the most important exception to the general principle that ideas are "free as the air."

Prior to 1978, ideas in unpublished works potentially could be protected by a variety of state law theories such as *quantum meruit*, implied-in-law contract, plagiarism, unjust enrichment, conversion, common law unfair competition, and interference with prospective advantage. Once the dividing line for federal and state authority was moved from publication (pre-1978) to fixation in a tangible medium of expression (post-1978), federal copyright law restricted state law authority for the protection of works within the subject matter of copyright to those theories of recovery which were qualitatively different from copyright, a test which has often been described as the "extra element" test.

Since a contract to pay someone for the service of providing the disclosure of an idea con-

tains the "extra element" of actual (not constructive) consent, the implied-in-fact contract theory survives preemption. *Grosso v. Miramax*, 383 F.3d 965 (9<sup>th</sup> Cir. 2004). Under current liberal federal and state pleading rules, it is comparatively simple for a plaintiff to plead a claim for breach of an implied-in-fact contract.

The plaintiff merely needs to plead that the defendant accepted the submission of plaintiff's idea, knowing that it had been tendered based upon defendant's implied promise to compensate plaintiff for the reasonable value of the idea in the event that the defendant made use of the idea.

However easy it may be to plead a claim for breach of implied contract, in order to prove the claim, plaintiff must be able to prove that a defendant willingly chose to enter into a financial obligation of uncertain magnitude, which was to be triggered by an event that was undefined, and indeed indefinable at the time that the idea was tendered. Sensible people generally avoid open-

ended financial obligations triggered by uncertain events. That is why production companies routinely refuse to accept unsolicited submissions and require parties who submit literary materials either to rely solely upon copyright law, disclaiming contractual remedies, or provide for highly specific contractual remedies including arbitration clauses and liability limits.

### Background

Plaintiff Reed Martin is a part-time professional journalist, part-time business school teacher, and part-time screenwriter. In connection with his work as a journalist, he would occasionally interview film company executives who would thereafter receive from Mr. Martin letters enclosing a copy of the forthcoming interview article, as well as a copy of Mr. Martin's screenplay, "Two Weeks Off," about a workaholic investigative journalist who decides to in-



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## Entertainment Law: California Jury Rejects Writer's Breach of Implied-in-fact Contract Claim Against Jim Jarmusch Movie

(Continued from page 32)

investigate his failed love life by going back to visit his old girlfriends. Martin also gave copies of his work to a talent manager named Glenn Rigberg.

In September 2003, Martin interviewed the president of Focus Features, David Linde. Thereafter in October 2003, he sent a letter to Linde enclosing his forthcoming interview article, as well as a copy of his screenplay, "Two Weeks Off." Although a package was received at the Focus Features offices, Focus had no record of actually receiving the plaintiff's screenplay, and Focus never responded to Martin's letter. As for the submission to talent manager Rigberg, there was no evidence of contact between Rigberg and defendants prior to completion of the defendants' screenplay.

Jim Jarmusch is an independent filmmaker, who has written and directed nine feature films. In 1998, a friend, Bill Raden, came up with the idea of a film to be triggered by the protagonist's receipt of an anonymous letter telling him that, unbeknownst to him, he was the father of a 20-year-old son who was coming to look for him. The idea was that receiving the letter would cause the protagonist to go back to visit his girlfriends from two decades ago. Jarmusch gave the idea some thought, and in 2001 he registered a four-page treatment with the Writers Guild, further developing the concept.

In 2002, Jarmusch was able to persuade Bill Murray to commit to star in a screenplay to be written based upon the concept, and in early 2004, Jarmusch wrote the screenplay for the film. In the spring of 2004, the screenplay was presented to a number of potential financing sources, and ultimately Focus Features won the auction for the right to distribute the film to be made based upon the screenplay. That film, "Broken Flowers," was a critical and commercial success.

Mr. Martin filed suit in the Central District of California, alleging that "Broken Flowers" both infringed his copyright in 12 versions of his screenplay, and that it was also a breach of an implied-in-fact contract that he alleged was a result of his submission of his screenplay to David Linde of Focus Features in October 2003.

### Trial Issues

Prior to trial, plaintiff withdrew his claims for copyright infringement, and the case was tried to a jury solely on a theory of breach of implied-in-fact contract.

Martin's claims suffered from the vulnerabilities commonly found in implied-in-fact contract claims. First, Martin's letter to Linde enclosing his screenplay was not the kind of letter that "clearly conditioned" disclosure upon a promise to pay. In fact, it gave the recipient of the letter no opportunity to refuse to accept disclosure, and under *Desny v. Wilder*, 46 Cal.2d 715, 739-41 (1956), such a "blurt-out" of the idea forecloses a claim for breach of an implied-in-fact contract.

Second, nothing about the disclosure carried the earmarks of a sale of ideas. Rather, it appeared that, at most, plaintiff was offering to sell the copyright in his screenplay, or was offering it as a sample of his writing in order to induce the recipient to consider hiring him as a writer on other projects. Under *Faris v. Enberg*, 97 Cal. App. 3d 309 (1979), the disclosure of ideas for purposes other than the sale of ideas cannot give rise to a claim for breach of an implied-in-fact contract.

A third vulnerability of the claim was that plaintiff attempted to argue that defendants had, by accepting receipt of his screenplay, agreed not to use the work without paying him, rather than entered into an agreement to pay him for the use of the work, should they choose to do so. The difference is consequential because there is at least district court authority for the proposition that an implied agreement not to use a copyrighted work is for all intents and purposes equivalent to copyright, and lacks the extra element required to avoid preemption.

*Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053 (C.D. Cal. 2000); *Endemol Entm't B.V. v. Twentieth Television, Inc.*, 48 U.S.P.Q.2d 1524 (C.D. Cal. 1998). But see *Architectronics, Inc. v. Control Systems, Inc.*, 935 F.Supp. 425, 438 (S.D.N.Y. 1996); see also *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1984) (enforcing contract to refrain from using idea in connection with pre-1978 submission, governed by 1909 Copyright Act).

Another vulnerability of the claim was that, since at the time of the submission to Focus Features, plaintiff was a New York resident submitting his work in New York to another New York resident, the place of making the contract, if it were made, was New York. Plaintiff was therefore subject to the requirement of New York law that, in order to state a claim for breach of an implied-in-fact contract, plaintiff must show that the ideas that he was submitting were novel as to the recipient of the screenplay. See *Apfel v. Prudential-Bache Securities, Inc.*, 81 NY.2d 470 (1993).

(Continued on page 34)

## Entertainment Law: California Jury Rejects Writer's Breach of Implied-in-fact Contract Claim Against Jim Jarmusch Movie

(Continued from page 33)

### Trial Testimony

Since none of these defense arguments had succeeded in the summary judgment motion filed prior to the trial, the trial commenced with the plaintiff relying heavily upon testimony from executives at Focus Features that they do not believe they have the right to use other person's screenplays without paying for them. They testified that, notwithstanding evidence that plaintiff had sent a package to Focus, they had no recollection of ever seeing or hearing about plaintiff's screenplay prior to the filing of the lawsuit. Plaintiff argued a grand conspiracy in which all the defendants' witnesses must have been fabricating their testimony that plaintiff and his works had nothing whatsoever to do with the film "Broken Flowers."

At trial, the defendant director/screenwriter testified extensively about the creative process that led him to create "Broken Flowers." The jury found that testimony quite persuasive, and returned a defense verdict in less than three hours. Particularly helpful to the jury was the 2001 Writers Guild registration which demonstrated that Jarmusch had his idea in place more than two years before plaintiff claimed he had submitted his screenplay to Focus Features.

The case offers many lessons. It illustrates how important it is for writers to document their creative process. It also demonstrates the need to be vigilant to avoid the receipt of unsolicited literary material. Since implied-in-fact contracts expose idea recipients to uncertain liability based upon an unknowable contingency, the targets of such disclosures must institute and maintain practices that preclude such claims, through the blanket refusal to receive unsolicited works, and by instituting a requirement that a submission may only be made after an appropriate written agreement has been signed by the submitting party.

*Vincent Cox and Louis Petrich of Leopold, Petrich & Smith, P.C., represented the defendants. Plaintiff was represented by John Marder, Michele Levinson and Daniel Clark of Manning & Marder, Kass, Ellrod, Ramirez, LLC.*

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## Supreme Court of Indonesia Awards Former President Suharto \$108 Million Against TIME Magazine

By Robin Bierstedt

The Supreme Court of Indonesia ruled against TIME magazine in a libel suit brought by former President Suharto. It threw out two lower court decisions in TIME's favor and awarded Suharto damages in the amount of one trillion rupiah, or approximately \$108 million.

### Background

The lawsuit arises from a May 24, 1999 cover story in TIME Asia entitled "The Family Firm" (the cover line is "Suharto Inc.") that detailed how Suharto and his six children amassed a \$15 billion fortune in "cash, property, art, jewelry and jets" amid a climate of corruption, collusion and nepotism during Suharto's 32-year rule. Suharto sued for libel in July 1999, naming TIME and six journalists, and demanded \$27 billion in damages.

The article is 14 pages long but Suharto challenged just four parts: (1) the "Suharto Inc." cover line; (2) artwork accompanying the article that shows Suharto embracing a house (belonging to one of his children); (3) a quote to the effect that Suharto doesn't pay his fair share of taxes; and (4) an allegation that Suharto transferred \$9 billion from a Swiss bank to one in Austria.

When he brought his lawsuit, many observers assumed that a foreign publication would not be able to get a fair trial in Indonesia when it was up against a former President who had appointed the judges hearing the case. Yet, for the first two rounds at least, that was not the case.

The trial began in March 2000 with a series of one-day hearings that took place every few weeks. TIME put on several witnesses, including journalism and linguistic experts who testified that the magazine had been responsible in reporting the story. Suharto put on no witnesses.

In June 2000 the three judge trial panel found for TIME. The court said that the article was published in the public interest and that Suharto had presented insufficient evidence to support his claims. They also said that TIME had followed accepted journalistic practices and had "covered both sides."

An intermediate appellate court affirmed TIME's trial victory in March 2001, and the case has been pending in the Supreme Court for the last six years.

### The Supreme Court's Judgment

When TIME won at trial, the decision was hailed as a victory for the rights of a free press in Indonesia. The Supreme Court's decision, on the other hand, has aroused considerable outrage in Indonesian circles, where it is viewed as a significant setback to democratic freedoms.

The ruling against TIME was made by a panel of three Supreme Court judges. The presiding judge, German Hudiarto, is a two star retired general of the army who once said he is indebted to Suharto because if it weren't for Suharto, he would never have been appointed a two star general.

While the Court's opinion is lengthy, it gives little rationale for either the ruling itself or the amount of the damages. The crux of the opinion is the following:

since the picture and writing...has been widely circulated, and turns out to have gone beyond the limits of decency, diligence and prudence, so that the act of tort that slander the reputation and honor of the Plaintiff as the Great General of the Indonesian Army (Retired) and as former President of the Republic of Indonesia, thus the civil accountability...can be granted according to sentiments of appropriateness and fairness...

The one trillion rupiah award is for "non-material" damages, to restore good name, reputation and good will. So-called "material" damages were rejected because they were not itemized in detail. In addition to monetary damages, the Court ordered TIME to publish an apology to Suharto three consecutive times in each of its editions and 10 other publications.

Fortunately in Indonesia there is an opportunity to challenge a Supreme Court ruling, which can be done once only and is limited to certain designated grounds. TIME will file a petition for review on the grounds of "manifest error" and new evidence. The petition will be considered by a different panel of judges. There is no oral argument before the Court.

*(Continued on page 36)*

## Supreme Court of Indonesia Awards Former President Suharto \$108 Million Against TIME Magazine

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### *Suharto's Standing in Indonesia*

The Indonesian government has pursued its own cases against Suharto. In 2000, two years after Suharto fell, the government then headed by Abdurrahman Wahid decided to prosecute Suharto for corruption. Wahid publicly said he thought Suharto and his family had appropriated between \$45 and \$75 billion. But Suharto's doctors claimed he was too ill to stand trial and in 2006 the corruption charges were dropped. In July 2007 the government filed a civil suit against one of Suharto's charity foundations for cheating the treasury, asking for

damages of \$1.5 billion.

On the international front, the World Bank and United Nations recently issued a joint Stolen Asset Recovery (StAR) Initiative, designed to fight global corruption. Its report, released last month, called Suharto the world's biggest embezzler of state funds, having stolen between \$15 and \$35 billion.

*Robin Bierstedt of Time Inc., along with her colleagues Andy Lachow, Nick Jollymore and Angus Emmerson, represent TIME in this case. TIME's Indonesian counsel is Mulya Lubis of Lubis, Santosa & Maulana in Jakarta.*

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## Book on Police Corruption Protected by Qualified Privilege Defense

By Amali de Silva

There has been speculation following the *Jameel v Wall Street Journal* case last year that the UK courts would still seek to interpret the *Reynolds* defense of qualified privilege very restrictively. However, in a momentous victory for media defendants, the Court of Appeal has held that allegations made in a book are protected by the *Reynolds* defense. *Charman -v- Orion Books* [2007] EWCA Civ 972 (Ward, Sedley, Hooper, JJ.).

### Background

In June 2003, The Orion Publishing Group (Orion) published a book by Graeme McLagan, an experienced and respected journalist with a long-standing interest in the issue of police corruption. The book was entitled "Bent Coppers - The inside story of Scotland Yard's battle against Police Corruption" and related the story of Scotland Yard's attempts to eradicate corruption in the force.

Michael Charman, a police officer, sued Orion and McLagan for libel in respect of a number of statements made in the book. The defences put forward by the defendants included *Reynolds* qualified privilege and statutory qualified privilege (the latter in respect of reports in the book of a House of Commons adjournment debate and a criminal trial).

At interlocutory hearings, the trial judge ruled that the case should be heard by judge alone, and that the qualified privilege defences should be tried first. He also ruled that the book did not mean that Charman was guilty of corruption, but that there were "cogent grounds to suspect that Mr Charman abused his position as a police officer by colluding with Brennan in the commission of substantial fraud by Geoffrey Brennan from whom he and Mr Redgrave received corrupt payments totalling £50,000."

### Trial of Qualified Privilege

The trial took place in June 2006. The trial judge, Mr. Justice Gray, accepted that the problem of police corruption was a matter of grave public concern and therefore of legitimate public interest but he found in favour of Charman, holding that the qualified privilege defenses failed for the following reasons:

The report was not neutral; McLagan had partially adopted a serious charge against Charman and failed to report the facts fully, fairly and disinterestedly.

The defendants had failed to show that they were acting responsibly in communicating the information contained in the book about Charman to the public.

The reporting of the adjournment debate in the House of Commons was protected by statutory privilege. However, the report of the criminal trial as a whole was skewed so as to give the readers a false and unfair impression of the allegations against Charman and was therefore not protected.

The defendants were granted permission to appeal on the basis that the case raised "important issues about the steps required of an author and publisher in order to qualify for a defence of the "Reynolds" type of qualified privilege, when the publication question is a book and not a newspaper article, where the topic is one of public interest but is also complex, and where the author has made attempts to obtain the claimant's side of the story."

### Court of Appeal Decision

The appeal was heard in March 2007 and judgment handed down in October. Lord Justices Ward, Sedley and Hooper were unanimous in allowing the defendants' appeal, ruling that the passages in the book complained of by Charman were responsibly reported and protected by *Reynolds* qualified privilege. The court also removed once and for all any doubts about whether *Reynolds* qualified privilege could apply to a book.

The court placed great emphasis on the House of Lords decision in *Jameel v Wall Street Journal Europe SPRL* (No. 3), stating that "Jameel has made an important contribution... for it reiterates the Reynolds principles but also clarifies their application."

The court reiterated that if the public interest was engaged, the report would be privileged if, considered as a whole, it satisfied the test of responsible journalism. However, the test of responsible journalism is "not intended to present an onerous obstacle to the media in the discharge of their function."

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### Book on Police Corruption Protected by Qualified Privilege Defense

(Continued from page 37)

Importantly in this case, the court stated that in assessing the responsibility of the report weight had to be given to the professional judgment of the journalist in evaluating material: “it is his [the journalist’s] assessment of that evaluation which is important, not the judge’s own evaluation of the material conducted with the benefit of hindsight and with the sharp eye of a trained lawyer.” The court considered that the trial judge erred in not making “sufficient allowance... for McLagan’s honesty, his expertise in the subject, his careful research, and his painstaking evaluation of a mass of material.”

In addition, the court clarified what was meant by “balance” in the context of Reynolds qualified privilege:

Balance, it should be appreciated, does not mean giving equal weight or credence to intrinsically unequal things – for example a telling accusation and an evasive reply... A more selective or evaluative account is quite capable of staying within the bounds of responsible journalism.

#### Neutral Reportage

The Court also provided helpful clarification of the “neutral reportage” defense. It stated the test to be as follows:

the defence [of neutral reportage] will be established where, judging the thrust of the report as a whole, the effect of the report is to not to adopt the truth of what is being said, but to record the fact that the statements which were defamatory were made... The protection is lost if the journalist adopts what has been said and makes it his own or if he fails to report the story in a fair, disinterested, neutral way.

Lord Justice Ward described it as the difference between a piece of investigative journalism where the journalist was “acting as the bloodhound sniffing out bits of the story from here and there .... not as the watchdog barking to wake us up to the story already out there.”

In this case, the appeal court agreed with the trial judge that neutral reportage did not apply.

#### Conclusion

When the House of Lords judgment in *Reynolds* was handed down in 1998, the new defense of public interest qualified privilege which it formulated was hailed as an important tool with which media defendants could defend freedom of expression on matters of genuine public interest which were responsibly reported.

In reality, however, the lower courts interpreted the defense so narrowly that it has rarely succeeded. The more liberal approach taken in *Jameel* and this case is therefore most welcome, showing “how far the courts have gone in releasing the shackles on the freedom of expression afforded to the media in matters of public interest.”

This means that the media can again give serious consideration to the publication of investigative journalism into matters of public interest, without fearing that over-zealous judges acting with the benefit of hindsight will second guess their editorial decisions several years later. Hard-hitting journalism is a viable proposition once more.

*Caroline Kean and Amali de Silva of Wiggin LLP and Adrienne Page QC, Matthew Nicklin and Adam Speker of 5RB represented the defendants in this matter. Louis Charalambous of Simons Muirhead & Burton and Hugh Tomlinson QC, Matrix Chambers, and Lucy Moorman, Doughty Street Chambers, represented the claimant.*



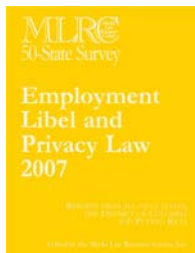
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## The Other Side Of The Pond: UK Media Law Update

By David Hooper

### *Charman -v- Orion Books [2007] EWCA Civ 972*

As discussed in more detail in this issue of the *MediaLawLetter*, *Charman* is a decision of considerable importance to publishers for whom, until the House of Lords decision in *Jameel*, the *Reynolds* defence had been a costly mirage. Messrs Justices Eady and Gray would inevitably find that there was some further step that the publisher could have taken to investigate the facts including delaying the publication date, when unlike newspaper editors they did not have the news deadline of the following day to justify publication.

In *Charman* the Court of Appeal felt that Mr Justice Gray had failed to look at the big picture and had given insufficient deference to the professional judgment of the author and had applied judicial hindsight to his evaluation of the editorial process. The Court of Appeal were satisfied that Graeme McLagan's book "*Bent Coppers: The Inside Story of Scotland Yard's Battle Against Police Corruption*" was a work of careful research and painstaking evaluation carried out honestly by a writer with considerable expertise on the subject of police corruption. The tone of the book was one of objective investigative journalism and the court emphasised that any lingering doubts should be resolved in favour of publication.

This should be a significant turning point for publishers. From a defence perspective the *Reynolds* defense is a particularly helpful weapon, as it significantly increases the risk for a claimant, who now has to factor in the unknowns of exactly what research an author such as Graeme McLagan would have undertaken. Previously the claimant faced a much lesser risk namely evaluating whether or not the author could prove that the defamatory material was true or fair comment.

There are two interesting footnotes to the case. The Appellate Courts have now found fault with the approach of two leading libel judges of first instance in their approach to such cases which distinctly favoured claimants. The pendulum should now swing back in favour of defendants. The case also threw up another controversial instance of the Police Federation looking after its own and throwing honest coppers' money at unmeritorious libel claims. With some understandable bitterness Mr McLagan whose life had been dogged by this case for four years expressed surprise that the Federation should support someone like *Charman* who had resigned following internal disciplinary proceedings.

not taken until the paperback edition had been published. A little *schadenfreude* is in order at the news that the Police Federation face a liability of £2 million in legal costs.

### *Prince Radu of Hohenzollern -v- Houston [2007] EWHC 2328*

There is a preliminary issue of *Reynolds* privilege to be decided in this claim where the Prince has sued a magazine which suggested that he might be an impostor who had falsely passed himself off as a royal prince. Very sensibly Mr Justice Eady has decided that this issue is really a matter of evaluation for a judge and that in accordance with principles of case management it is best decided by a judge rather than calling in a jury to make various findings of fact.

The *Loutchansky* case highlighted the complexities and uncertainties of having to get juries to decide stray issues of fact about the quality of the journalism. This decision will result in the saving of costs and will help build up case law as to what constitutes responsible journalism.

An interesting footnote about this case is that both sides are acting under a Conditional Fee Agreement, the result of which may make the case virtually unseizable as the lawyers have to establish that they were successful in the litigation to be paid!

### *Sheffield Wednesday Football Club -v- BBC [2007] EWHC 2375*

This case highlights an area of law which may become increasingly important in internet libel litigation. Claimants can, prior to commencing litigation, obtain what is known as a Norwich Pharmacal Order [1974] AC 133 prior to launching litigation to obtain disclosure of the identity of persons responsible for posting anonymously defamatory material on a website, see *Totalise plc -v- The Motley Fool Limited* [2001] EWCA Civ 1897.

The website operator or ISP will normally have their legal costs paid by the claimant. The court will normally make an order for disclosure provided that it is satisfied that the allegations are serious and that the claimant has a strong claim. Here these conditions were satisfied where there were allegations of greed and untrustworthiness against the chairman of a football club on a BBC sports website. These were not, of

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## The Other Side Of The Pond: UK Media Law Update

(Continued from page 39)

course, the views of the BBC, but the Corporation was required to provide information which would enable the person who had posted the material under the pseudonym Enchanted\_Fox.

### *Jones -v- Associated Newspapers Limited [2007] EWHC 1489*

In English libel litigation there is a considerable premium on making settlement offers which turn out to have been more favourable than what the claimant in fact receives at trial. The claimant can likewise under Part 36 of the Civil Procedure Rules achieve the same result by setting out the terms upon which he or she would be willing to resolve the case.

In this interesting decision a Member of Parliament was awarded £5,000 damages having eleven months earlier turned down a settlement offer of £4,999 plus an unqualified apology. Did that extra pound mean that the MP had done better than what he had been previously offered? No, said Mr Justice Eady. He would have been better off taking the £4,999 and receiving an unqualified apology.

In a contested libel action a successful claimant has to rely simply on the vindication of the jury's financial award rather than an apology. He does not receive an apology as of right. That is one of the key advantages of a negotiated settlement, namely that the claimant can be vindicated by an apology in a Statement in Open Court. In this particular case the MP had been subjected to some fairly bruising cross-examination about an incident which had not really enhanced his reputation.

An interesting undercurrent was that additionally Mr Justice Eady was not attracted to the idea of ordering indemnity costs plus interest on those costs which could amount to 10% over base rate where there was a conditional fee agreement. Not only would that produce an order for costs which might be disproportionate but there was no real need to award interest as the Claimant had not had to pay legal costs as the action proceeded and therefore was not being kept out of his money.

### *Murray -v- Express Newspapers Limited [2007] EWHC 1908*

There is an apparent discrepancy between the comments of Baroness Hale in the *Campbell -v- MGN* case and the decision in *Von Hannover* in the European Court of Human Rights as to whether it is lawful to publish photographs of individuals going about routine everyday activities in public places when there is no evidence that the taking of the photographs constituted harassment or caused distress.

Baroness Hale had indicated that taking a photograph of an individual popping out to collect a pint of milk would be unlikely to infringe the laws of privacy. The European Court had taken the contrary view that such photographs of a person going about their normal daily life could fall within the scope of their private life.

In *Murray*, Mr Justice Patten supported the Anglo-Saxon view notwithstanding the fact that although the photograph had been taken in a public place, namely an Edinburgh street, it had been taken covertly and with a long lens. Furthermore, the photograph was of the 18 month old son of J. K. Rowling who had studiously protected her son's privacy. There was, however, no evidence of harassment or distress and the judge was of the view that an individual engaged in innocuous routine activity in a public place has no expectation of privacy. A similar conclusion has been reached in New Zealand, *Hosking -v- Runting* 2005 INZLR 1.

Leave to appeal has been given and UK lawyers await the result with interest. The case is of particular interest for its analysis of the claims which can be brought in respect of such matters under the Data Protection Act 1998.

### *Racial and Religious Hatred Act 2006*

This legislation came into force on 1 October 2007 and amends Section 29 Public Order Act 1986. It punishes using threatening words or behaviour intending to stir up racial or religious hatred. The legislation has the worthy aim of extending protection to all religions groups, but it was fortunately toned down on freedom of speech grounds when it had been intended to extend the legislation to behaviour or words which merely abused or insulted religious groups.

The Act is a salutary reminder of the minefield that can be entered once writers produce works such as Satanic Verses. There is an interesting freedom of speech defence built into the Act which one hopes to see replicated elsewhere in similar legislation.

### *Terrorism Legislation*

As from 1 October 2007 there is a further addition to the armoury of counter-terrorism legislation which could impact on news gatherers. Section 49 under Part 3 of the Regulation of Investigative Powers Act 2000 is implemented with effect from 1 October 2007 which can require the disclosure of

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## The Other Side Of The Pond: UK Media Law Update

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decryption keys with a refusal carrying five years imprisonment if the matter concerns terrorism or national security or two years in other cases.

### Data Protection

This is an area of increasing relevance to the law of privacy. The Information Commissioner has produced various guidance which indicates that he is taking a wider view of the interpretation of personal data than did the Court of Appeal in *Durrant -v- Financial Services Authority* [2004] FSR 28. This can be seen in the Working Party's Opinion 4/2007 on the concept of personal data which was adopted on 20 June 2007. A further indication of his thinking is to be found in the

consultation on a new framework Code of Practice for Sharing Personal Information which was published on 13 October 2007. Details can be found on the Commissioner's website [www.lco.gov.uk](http://www.lco.gov.uk).

### Worldwide Press Freedom Index

At the top of the lists are Iceland, Norway and Estonia. The United Kingdom is in 24<sup>th</sup> place (out of 169 which is the position occupied by Eritrea). The land of the First Amendment sits in 48<sup>th</sup> place. Perhaps it will do better when there is a Federal Shield law and fewer journalists are sent to prison by the US courts.

*David Hooper is a partner with Reynolds Porter Chamberlain in London.*



## First Amendment Speakers Bureau Publishing Online

The MLRC Institute will soon roll out a second topic for presentation through its First Amendment Speakers Bureau: Publishing Online.

We are looking for volunteers to give talks and help organize presentations.

This topic will address:

- the media's use of the Internet
- news organizations' interaction with their audience online
- the use of content submitted by readers and viewers
- blogs, whether kept by media staff, readers or others
- liability for defamation for statements made online
- copyright and privacy law

Speakers will have access to a turn-key set of presentation materials prepared by the MLRC Institute. As with talks on the reporter's privilege, the first topic taken up by the Speakers Bureau, presentations on publishing online will be done at colleges, high schools, bookstores, and libraries, and before rotary clubs, chambers of commerce and other civic organizations.

The MLRC Institute has received a grant from the McCormick Tribune Foundation to develop and administer the First Amendment Speakers Bureau.

If you are interested in joining the Speakers Bureau or in helping to organize a presentation in your area, please contact

John Haley  
MLRC Institute Fellow  
MLRC Institute  
(212) 337-0200, ext. 218  
[jhaley@medialaw.org](mailto:jhaley@medialaw.org)

## Florida Newspaper Fights Florida Election Commission's Attempt to Label it "Electioneering Communication"

By Robert Rivas

This is not a joke. The Florida Elections Commission ruled that a startup, small town newspaper was not a newspaper, but an "electioneering communication," as that term is defined in Florida's analog to the McCain-Feingold federal election law.

In light of a ruling in September by the U.S. District Court for the Northern District of Florida, the newspaper is now free to publish once again without the FEC's regulation. *Hanway v. Linthicum, et al.*, No. 4:06 Civ. 399 (N.D. Fla. Sept. 25, 2007) (Hinkle, J.). The ruling came only after tortured litigation and a surprise ending. More on that later.

### Background

In October 2004, the first issue of the *Wakulla Independent Reporter* was mailed, free of charge, to all 12,000 postal addresses in Wakulla County, which occupies the space between Tallahassee and the Gulf of Mexico. If Wakulla County is famous for anything, it is for the "first magnitude" Wakulla Springs, where the 1954 movie *The Creature from the Black Lagoon* and the original Johnny Weissmüller *Tarzan* films were made. There, the electorate is bitterly divided between environmentalists, who hope to save the magnificent springs from pollution, and those who favor unchecked real estate development.

Deeming the quarterly newspaper to be "anti-growth," the pro-development forces filed a complaint with the FEC, alleging that the *Reporter* was an "electioneering communication," as defined by the Florida election code, Chapter 106 of Florida Statutes. The only basis for this allegation was that the first issue appeared in the run-up to the November 2004 general election, and, within the newspaper's dozens of articles on diverse topics, two sentences accurately reported the votes of five county commissioners in favor of two proposed land development projects. Two of those commissioners happened to be running for reelection.

After the second and third quarterly issues of the *Reporter* had been published, the FEC ruled that the *Reporter* was an "electioneering communication." Its owner, Julia Hanway, and her publishing company, Florida MicroType Graphics, were therefore required to register, file reports of contributions and expenditures, and publish a conspicuous disclaimer that the

*Reporter* was not affiliated with any candidate, or be subject to fines and even possible imprisonment.

Refusing to submit to the FEC's regulation, Hanway instead discontinued publishing from mid-2005 until mid-2006. She finally found support from the American Civil Liberties Union of Florida, which filed suit in federal district court for a declaratory judgment that Florida law, as applied, was overbroad under the First Amendment to the extent it swept the *Reporter* under its definition of "electioneering communication." Hanway resumed publishing and published another eight issues while the ACLU-supported action was pending.

### Florida's Campaign Finance Law

Meanwhile, Florida aggressively defended the FEC's position before U.S. District Judge Robert Hinkle. The Florida election code's definition of "electioneering communication," a concept created to capture "soft money" expenditures, was copied from Section 203 of the McCain-Feingold Act.

The FEC argued that its prerogative to regulate the *Reporter* was established by the holding in *McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003). In contrast, the *Reporter*, noting that *McConnell* merely turned back a *facial challenge* to the constitutionality of McCain-Feingold's definition of "electioneering communication," argued that *McConnell* said little or nothing to help resolve Hanway's *as-applied challenge* to the Florida election code's definition of "electioneering communication."

### Newspaper's Summary Judgment Motion

In February 2007 Judge Hinkle held a combined pre-trial conference and oral argument on Hanway's motion for final summary judgment. The FEC's lawyer unexpectedly announced – having taken the opposite position at all times prior to the hearing, even in opposition to the final summary judgment motion – that the FEC would never again attempt to investigate or prosecute the *Reporter's* publisher. The FEC was now convinced that the *Reporter* was a "newspaper," and therefore was exempt from the coverage of the election code's definition of "electioneering communication."

Because there was no apparent question whether the FEC might actually prevail in the action, the entire hearing was

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## Florida Newspaper Fights Florida Election Commission's Attempt to Label it "Electioneering Communication"

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converted into a debate solely about whether the FEC could secure a dismissal for mootness. Judge Hinkle removed the case from the March 2007 trial calendar and took the mootness argument under advisement. The only real issue remaining was whether the "voluntary cessation doctrine" precluded a dismissal of the action as moot.

Only four months later, in *Wisconsin Right to Life v. Federal Elections Comm'n* 127 S. Ct. 2652 (2007), the Supreme Court's ruling eliminated any remaining argument that the FEC might have prevailed on the merits. The court held that the definition of "electioneering communication" was constitutional as applied only if a publication "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

This was the position the *Reporter* had taken all along. In fact, no reasonable person could have interpreted the *Reporter* – even on examining only the October 2004 issue – as being

published to promote any candidacy. The *Reporter* had argued that the definition of a "newspaper" was not important because, even if the *Reporter* was "not a newspaper," it was not an "electioneering communication," either. In fact, the paper labeled itself a "news publication," as stated on its masthead.

On September 25, 2007, Judge Hinkle rendered a 15-page order (no citation was available as this article was being written) saying the *Reporter* was "plainly" a newspaper and the FEC was wrong to

rule otherwise. The opinion noted that the FEC "saw the light only on the courthouse steps — indeed, in the courtroom itself, during the summary judgment hearing."

Nonetheless, Judge Hinkle's final judgment dismissed the case as moot, holding that it would be "farfetched" for Hanway to fear prosecution by the FEC after its representation to him in his court. So, from now on, the newspaper is a newspaper is a newspaper.

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### **the Reporter was "plainly" a newspaper and the FEC was wrong to rule otherwise**

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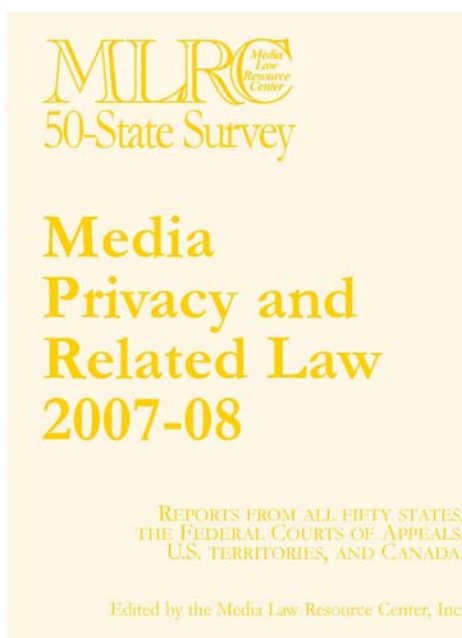
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## Washington Supreme Court Strikes Down Statute Barring False Statements in Political Advertisements

For the second time in 10 years, the Washington Supreme Court struck down the state's attempt to prohibit false statements in political advertisements. *Rickert v. State of Washington Public Disclosure Commission*, No. 77769-1, 2007 WL 2891498 (Wn. Oct. 4, 2007).

Describing the statute as an illegal "censorship scheme," the Court vigorously reaffirmed that the state has no "independent right to determine truth and falsity in political debate."

### *Statutory Background*

Almost ten years ago, in *State ex. rel. Public Disclosure Comm'n v. 199 Vote No! Comm.*, 135 Wn.2d 618, 957 P.2d 691 (1998), the Washington Supreme Court struck down as unconstitutional on its face a prior statute purporting to regulate false political advertisements.

The statute made it an offense, punishable by a fine of up to \$10,000, for a person to "sponsor with actual malice ... Political advertising that contains a false statement of material fact ...."

The statute was then amended to apply only to statements regarding a candidate for public office. Wash. Code § 42.17.530(1)(a) provides in relevant part that

It is a violation of this chapter for a person to sponsor with actual malice:

- (a) Political advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office. However, this subsection (1)(a) does not apply to statements made by a candidate or the candidate's agent about the candidate himself or herself

But the Washington Supreme Court held that the changes did not save the statute. While the court noted that 14 states have similar statutes, (see sidebar) and that courts in some states have upheld these statutes, "the notion that the government, rather than the people, may be the final arbiter if truth in political debate is fundamentally at odds with the First Amendment."

### *Candidates Dispute*

The case arose out of a 2002 election between incumbent State Senator Tim Sheldon, the Democratic candidate, and challenger Marilou Rickert, the Green Party candidate. During the campaign, Rickert mailed a brochure which stated that she "supports social services for the most vulnerable of the state's citizens," and claimed that Sheldon, in contrast, had "voted to close a facility for the developmentally challenged in his district and is advocating for the site to be turned into a prison."

Sheldon had, in fact, voted against the budget bill which eventually closed the Mission Creek Youth Camp. And the camp was a medium-security facility for juvenile offenders, not a facility for the developmentally disabled.

Sheldon won the Nov. 5, 2002 election with over 78 percent of the vote. On Nov. 13, a week after the election, at Sheldon's request Rickert wrote letters to several local newspapers retracting her statement that Mission Creek was a facility for the developmentally disabled. She later stated that she had based her statements on information given to her by lobbyist Dave Wood. Since Wood lobbies for developmental disability facilities, she assumed – without checking – that the Youth Camp was such a facility.

### *Campaign Law Complaint*

On Nov. 19, Sheldon filed a complaint over Rickert's brochure with Washington's Public Disclosure Commission, which is charged with enforcing the state's campaign finance and practice laws. After investigating the complaint and holding an administrative hearing, the Commission concluded that the statements in Rickert's brochure were false, that they were material to the campaign, and that she had acted with actual malice. The Commission then imposed a \$1,000 fine. [\*In Re Enforcement Action Against Marilou Rickert\*](#), Case No. 03-147 (Wash. Pub. Discl. Comm'n final order Aug. 19, 2003).

Rickert appealed the ruling to Thurston County Superior Court, which affirmed the commission's decision. The judge also upheld the constitutionality of § 42.17.530 (1)(a).

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**Washington Supreme Court Strikes Down Statute Barring False Statements in Political Advertisements***(Continued from page 44)*

On further appeal, the Washington Court of Appeal reversed, ruling that the revised statute was unconstitutional because it regulated protected speech and was not narrowly tailored to advance a compelling state interest. *Rickert v. Public Disclosure Comm'n*, 129 Wn App. 450, 119 P.3d 379 (Sept. 7, 2005).

***Washington Supreme Court Ruling***

The Commission appealed to the Washington Supreme Court, which affirmed in a 5-4 ruling. The majority opinion, written by Justice James M. Johnson and signed by three other justices, agreed with the lower court that the statute regulated political speech and was subject to a “strict scrutiny” analysis. Applying such a test, the majority concluded that “[b]ecause RCW 42.17.530(1)(a) does not require proof of the defamatory statements it prohibits, its reach is not limited to the very narrow category of unprotected speech identified in *New York Times [v. Sullivan]* and its progeny.”

The majority criticized the statute on a number of grounds: it required no proof of harm; it did not advance the government’s interest in preventing direct harm to elections; it was under inclusive because it specifically excluded a candidate’s statement about himself; and its enforcement procedures are likely to have a chilling effect on speech.

Chief Justice Gerry Alexander filed a separate one-paragraph, concurring opinion, stating that “the majority goes too far in concluding that any government censorship of political speech would run afoul of the First Amendment.” Judge Alexander concluded that although in his view the government may penalize defamatory political speech, the statute is unconstitutionally overbroad because it also prohibits nondefamatory speech.

The dissent, written by Justice Barbara A. Madsen and joined by three other justices, stated that “[w]hen cases decided by the United States Supreme Court are properly applied, it is obvious that RCW 42.17.530(1)(a) infringes on no First Amendment rights.”

Since the statute required a statement be made with actual malice in order to be prosecuted, the dissent states, and false statements made with actual malice are not protected by the First Amendment, the strict scrutiny test should not apply.

On Oct. 18, the Public Disclosure Commission asked for rehearing.

*Before the Washington Supreme Court, the Commission was represented by William B. Collins, Linda A. Dalton, and Jean Marie Wilkinson of the Washington Attorney General's Office. Rickert was represented by Venkat Balasubramani of Seattle and Aaron Hugh Caplan of the ACLU of Washington.*

**Other State Statutes Punishing False Statements in Political Campaigns**

Colo. Rev. Stat. Ann. § 1-13-109

Fla. Stat. § 104.271

Mass. Gen. Laws Ch. 56, § 42

Minn.Stat. § 211b.06

Miss. Code § 23-15-875

Mont.Code § 13-37-131

N.C. Gen. Stat. § 163-274(8)

N.D. Cent. Code § 16.1-10-04

Ohio Rev. Code § 3517.21

Or. Rev. Stat. § 260.532

Tenn. Code § 2-19-142

Utah Code § 20a-11-1103

W. Va. Code § 3-8-11

## **“Let the Sun Shine” in Our Federal Courts Progress of the “Sunshine in the Courtroom Act of 2007”**

By Maureen Sheridan Kenny

In a continuing effort to drag our reluctant federal courts into the 21<sup>st</sup> century, Representatives Chabot and Delahunt proposed H.R. 2128, the “Sunshine in the Courtroom Act of 2007,” earlier this year.

This bill, along with its companion Senate Bill 352, seeks to dismantle the long-standing and oft-criticized rule prohibiting cameras in federal courtrooms. The proposed Act affords presiding judges in federal district and appellate courts the discretion to “permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides.”

Late last month, proponents and opponents of the bill lined up to testify before the Committee on the Judiciary in its “Hearing on Cameras in the Courtroom.”

### ***Television In Modern Society***

In his statement before the Committee on the Judiciary, key opponent and District Court Judge John R. Tunheim referred to the following “eloquent” language from *Estes v. Texas*, 381 U.S. 352 (1965) regarding televised proceedings: “The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable.”

In reversing a criminal conviction based in part on the televising of the pre-trial and trial proceedings, *Estes* continues to serve as the linchpin for the opponents’ claim that television impedes a fair trial.

The bills’ opponents, however, seemingly fail to acknowledge that *Estes* was decided over four decades ago when television was more of a novel medium than the pervasive, omnipresent reality that it is today. Indeed, in *Estes*, Justice Harlan foretold the necessity of the Court’s revisiting this issue if prompted by future technological developments.

“[T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination . . . .”

According to the proponents of H.R. 2128, that day has come.

Judge Nancy Gertner from the United States District Court for the District of Massachusetts best summarized the current state of affairs in testifying: “Public proceedings in the 21<sup>st</sup> century necessarily mean televised proceedings.” Implicitly criticizing the continued resistance to televised judicial proceedings, Judge Gertner noted: “Public access’ means something different today than it meant years ago, and all of the institutions of the government have to adjust to it.”

Indeed, Judge Gertner testified, federal courts have consistently deferred to the realities of modern times by allowing electronic access to court papers, reconfiguring courtrooms to allow media access (including overflow courtrooms with monitors), and incorporating technology in the courts that allow the participants to present all information on screens. Allowing cameras in the courtroom merely represents the latest in a long line of thoughtful developments rationally tied to the demands of our ever-changing society.

Aside from technology’s role in placing television at the epicenter of public discourse, proponents of the bill also pointed to its role in making cameras much less intrusive. Barbara Cochran, President of the RTNDA, testified:

“Technological advances in recent decades have been extraordinary, and the potential for disruption to judicial proceedings has been minimized. The cameras available today are small, unobtrusive, and designed to operate without additional light. Moreover, the electronic media can be required to ‘pool’ their coverage in order to limit the equipment and personnel present in the courtroom, further minimizing disruption.”

This current technology stands in stark contrast to that referred to in *Estes*, where the courtroom was described as a “forest of equipment,” containing numerous huge cameras with “cables and wires snaked over the floor.” In supporting the bill, Congressman Ted Poe likened cameras in courtrooms to the cameras currently used in Congressional proceedings:

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**“Let the Sun Shine” in Our Federal Courts Progress of the “Sunshine in the Courtroom Act of 2007”***(Continued from page 46)*

“The camera that I had in my courtroom was just like the one inside this room. No one here notices the camera—the cameras today are small and unobtrusive. It does not interfere with this Committee’s proceedings. It does not make the Members pander to the camera. But the camera allows the public to witness the proceedings when they are not able to sit inside the room.”

Indeed, even *Estes* anticipated that future improvements could warrant a different result: “When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.”

***Discretion to Deny or Limit Cameras***

The bills’ opponents presented a parade of horrors that *could* occur if cameras are allowed in federal courtrooms, including a chilling effect on witnesses and judges, “grandstanding” by attorneys, and jurors’ misperception of their role. The opponents did not, however, adequately address the plain text of the proposed Act that requires judges to deny or limit cameras if they determine that the cameras could have these adverse effects.

First, as to the chilling effect on witnesses, the Act requires judges to inform each non-party witness of the right to have his or her image and voice obscured during testimony. If the witness so requests, the judge “shall order the face and voice of the witness to be disguised or otherwise obscured in such manner as to render the witness unrecognizable to the broadcast audience . . . .”

Judge Tunheim argued this safeguard was inadequate because providing witnesses “the choice of whether to testify in open or blur their image and voice would be cold comfort given the fact that their name and their testimony will be broadcast to the community.” Judge Gertner disagreed, noting that notorious cases automatically generate a highly charged courtroom atmosphere, regardless of the presence or absence of cameras. “In high profile cases, with the sketch artist present, the courtroom filled to the rafters with people, the question is whether the presence of cameras materially changes the atmosphere, and in my experience, it does not.”

Second, the proposed Act allows the Judicial Conference of the United States to promulgate advisory guidelines to which a judge “may refer in making decisions with respect to the management and administration of photographing, recording, broadcasting, or televising . . . .”

Despite this explicit grant of authority within the Act, the Judicial Conference remains staunchly opposed to the bill. In criticizing the Judicial Conference’s position, Fred Graham of Court T.V. stated that, “by opposing this bill, the members of the Judicial Conference seem to be questioning their judicial brethren’s ability to exercise their discretion wisely and to follow the advisory guidelines that the Conference itself would issue.”

Finally, the Act provides that the presiding judge “shall not permit” cameras in the courtroom if the “judge determines the action would constitute a violation of the due process rights of any party.” Thus, while the Act generally affords district and appellate judges a great deal of discretion, they have *no* discretion to elevate the media’s First Amendment rights above the parties’ Fourteenth Amendment due process rights. Indeed Judge Gertner noted that the limited breadth of the proposed Act is likely its best virtue. “[T]he strength of the bill is that it does not require cameras, insist on them, encourage them. Rather, it allows judges to exercise their discretion to permit cameras in appropriate cases, subject to fair limitations. I, for one, would like to try.”

The narrow scope and non-mandatory nature of the proposed Act leads one to wonder why its opponents are so vehemently opposed to it. Opponents may claim that, while individual judges retain the discretion to allow or disallow cameras, the court of public opinion will force unwilling judges to allow them.

Indeed, *Estes* warned of this societal pressure, stating that, “where one judge in a district or even in a State permits telecasting, the requirement that the others do the same is almost mandatory.” This concern loses its luster when one examines the distinction between “almost mandatory” and “mandatory.” Moreover, if a judge truly has the strength of conviction in determining that cameras should be excluded or limited in a particular case, that judge should have little problem defending his or her decision.

After all, that is what judges are paid to do—make decisions and stand behind them. Congressman Poe best articulated this sentiment in his testimony before the Committee on the Judiciary: “Some members of the bar and judges may not want the public to see what is going on inside the courtroom because they don’t want the public to know what they do in the courtroom. Candidly, maybe these people shouldn’t be doing what they are doing if they don’t want the public to know.”

*Maureen Sheridan Kenny is an Assistant Professor at Case Western Reserve University School of Law and a Senior Attorney at Squire, Sanders & Dempsey L.L.P. in Cleveland, Ohio.*

## FCC Fines Comcast for Sponsorship ID Violations

By Michael Quinn

The FCC's Enforcement Bureau recently issued a series of Notices of Apparent Liability against Comcast Corporation ("Comcast"), for monetary forfeitures totaling \$20,000, associated with five origination cablecasts featuring Video News Releases ("VNRs") that did not contain sponsorship identification. Comcast has signaled its intent to vigorously oppose payment of the NALs, on the grounds that its use of the video material did not require identification and that Congress did not intend for the sponsorship identification rules to apply to cable operators.

### Background

In general, television newsrooms utilize VNRs in a similar way that newspapers utilize print news releases. VNRs often consist of prepackaged news segments and additional footage, sometimes created by public relations firms, and may appear in a format that mimics a "typical" news story (e.g., a reporter, played by an actor, doing a "stand up" in front of the U.S. Capitol or other location.) Other VNRs provide information about selected products or services, with accompanying footage, but without actors.

The sponsorship identification rules as applied to cable operators, which are substantially identical to the rules applied to broadcasters, are located in Sections 317 and 507 of the Communications Act of 1934, as amended (the "Act") and Section 76.1615 of the Commission's rules.

Although Section 317 of the Act references "radio stations" only, the Commission has ruled that the sponsorship identification requirements also apply to origination programming by cable operators. See *Amendment of the Commission's Sponsorship Identification Rules (Sections 73.119, 73.289, 73.654, 73.789 and 76.221)*, Report and Order, 52 FCC 2d 701 (1975), ¶37 ("We see no reason why the rules for such cablecasting should be different from those for broadcasting, for the consideration of keeping the public informed about those who try to persuade it would appear to be the same in both cases.") Section 76.5(p) of the FCC's rules defines origination cablecasting as "programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator."

In general, the rules require that a cable operator disclose and identify, at the time of the cablecast, the name of the sponsor of a program, if that entity has directly or indirectly

paid consideration to the cable operator in exchange for the cablecast. The prominent exceptions to this rule are advertisements, where it is clear that the mention of the name of the product constitutes a sponsorship identification, and cablecasts of feature motion picture films produced initially and primarily for theater exhibition that mention a product or service.

Cable operators also are required to exercise "reasonable diligence" to determine whether any matter aired requires specific sponsorship identification. Under the FCC's rules, the base forfeiture penalty for violations of the rule is \$4,000 per violation.

### Complaint Against Comcast

In November 2006, the Center for Media and Democracy (the "CMD") filed a complaint with the FCC, claiming that in September 2006 Comcast had aired VNRs during newscasts appearing on local channel CN8 without proper sponsorship identification. (The CMD has lodged similar complaints against dozens of other broadcast and cable origination stations.) The FCC subsequently issued Letters of Inquiry to Comcast regarding this practice.

The VNRs appearing on CN8 featured a series of products and services, including "Nelson's Rescue Sleep," Wheaties cereal, Allstate Insurance, Trend Micro Software's "Remote File Lock," and Bisquick food products. CN8 did not announce, at the time of the cablecasts, that the VNRs had been provided by outside sources.

In response to the Letters of Inquiry, Comcast acknowledged that the programs had indeed been cablecast, but no violation of the FCC's rules took place because: (1) Section 76.1615 of the FCC's rules is invalid, since the statutory provision underlying the rule, Section 317 of the Act, does not apply to cablecasting; and (2) CN8 and its employees did not receive, and were not promised, any consideration from any source in exchange for cablecasting the VNRs. Accordingly, even if the sponsorship identification rule applied to cable operators, such identification was not necessary in this case.

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## FCC Fines Comcast for Sponsorship ID Violations

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### *Notices of Apparent Liability*

In the Notices of Apparent Liability released in September 2007, the FCC's Enforcement Bureau disagreed, first refusing as a threshold matter to revisit its earlier conclusion that the sponsorship identification rules apply to origination programming by cable operators. Second, it found that although Section 76.1615 of the FCC's rules generally does not require sponsorship identification when the service or property is provided to the cable operator without charge, identification will nevertheless be necessary if there is "too much focus" on a product or brand name in the video matter provided to the operator.

The Bureau found that in the case of each VNR, although CN8 received the material at no charge, there was "too much focus"

on the unidentified sponsor. Accordingly, the Bureau determined that sponsorship identification was necessary and issued a monetary penalty of \$4,000 for each violation.

(The Notices of Apparent Liability were adopted and released on or near the one-year anniversary of the dates of the cablecasts in question. By statute (47 U.S.C. § 503(b)(6)), the FCC is prohibited from issuing forfeitures if the alleged violation took place "more than one year prior to the date of issuance of the" Notices of Liability.)

Comcast has indicated that it will appeal the fines, likely to the full FCC and perhaps in federal court if necessary. The FCC also is continuing to investigate the other allegations raised by the CMD, with additional fines against broadcasters and cable operators likely forthcoming.

*Michael W. Quinn is Vice President & Assistant Chief Counsel, Litigation, for Time Warner Cable.*

## 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, (212) 337-0200, ext. 214, [mgangat@medialaw.org](mailto:mgangat@medialaw.org).**

## Update: Fees Awarded After City's Sign Code Declared Unconstitutional

By Cynthia L. Hain

A Florida medical facility has recovered its legal fees and costs following a court ruling that a municipality had violated its First Amendment rights. *Solantic, LLC v. City of Neptune Beach*, Dkt. No. 3:04-00040-CV-J-25-MMH (M.D. Fla. Sept. 21, 2007).

The City of Neptune Beach had imposed fines pursuant to its sign code for the operation of Solantic, LLC's electronic variable message center sign, known as an "EVMC sign." Then on interlocutory appeal of the denial of Solantic's bid for preliminary injunction, the Court of Appeals for the Eleventh Circuit finally decided that Neptune Beach's sign code was an unconstitutional content-based restriction and a prior restraint on speech. See *MLRC MediaLawLetter* Feb. 2006 at 45.

Finally, last month on remand from the Eleventh Circuit, the district court entered a consent order enjoining the enforcement of Neptune Beach's sign code and awarding Solantic \$126,753.21 in fees and costs.

### Background

Solantic in January 2004 sued Neptune Beach in state court, alleging the city's sign code violated its First Amendment rights as an unconstitutional content-based restriction and a prior restraint on speech. Neptune Beach removed the action to federal court, where the city prevailed on Solantic's bid for a preliminary injunction. *Solantic, LLC v. City of Neptune Beach*, Dkt. No. 3:04-00040-CV-J-25-MMH (M.D. Fla.). The district court found that the sign code was a constitutional, content-neutral time, place, and manner restriction that did not place unbridled discretion in the hands of licensing officials. Solantic filed an interlocutory appeal to the Eleventh Circuit.

### Eleventh Circuit's Decision

On appeal, Solantic asserted that the district court abused its discretion in denying its motion for a preliminary injunction because the sign code was facially an unconstitutional, content-based restriction on speech; the permit requirement was an unlawful prior restraint; and the code restrictions were vague, as applied to Solantic. The Eleventh Circuit

reversed the district court based on the first two challenges, not reaching the vagueness issue. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005).

The Eleventh Circuit held that although the sign code had numerous content-neutral restrictions regarding the form the signs could take, the messages that were exempt from these restrictions, and from the permitting process, rendered the code a content-based regulation that could not survive strict scrutiny.

The Eleventh Circuit declared that the city's sign code was not narrowly tailored to achieve the city's stated interests in aesthetics and public safety. Importantly, the court further found that even if the code was narrowly tailored, interests in aesthetics and traffic safety are not compelling government interests, and therefore, are insufficient to justify the content-based distinctions in the code.

The Eleventh Circuit *sua sponte* refused to sever the exemptions as a means of curing its deficiencies. The sticking point for the court was that the general regulations and exemptions were not so inseparable in substance that it would be clear the city would have enacted the ordinance without the exemptions. Consequently, the ordinance had to fall in its entirety.

The Eleventh Circuit also found that Neptune Beach's sign code was an unconstitutional prior restraint because it contained no time limits for making permitting decisions. The absence of any time limits in the permitting process vested in the licensing official unbridled discretion and thus violated First Amendment prior restraint principles.

Finding that Neptune Beach's sign code violated the First Amendment on its face, the Eleventh Circuit reversed and remanded the case to the district court solely to consider Solantic's request for permanent injunctive relief and for a declaration that it is not liable for accrued fines.

### On Remand

On remand, Solantic and Neptune Beach consented to the entry of an order, permanently enjoining the enforcement of the sign code against Solantic, expunging all fines assessed against Solantic under the sign code, removing restrictions and limitations on Solantic's sign permit, removing all liens on the property imposed through enforcement of the unconstitutional sign code, and dismissing any state court action to enforce such liens. The district court entered the consent order and granted

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**Update: Fees Awarded After City's Sign Code Declared Unconstitutional***(Continued from page 50)*

Solantic 45 days to file its motion for fees and 45 days for Neptune Beach to respond to the motion.

Solantic filed its motion for fees and costs, seeking \$138,607.54 in fees and \$3,468.92 in costs. The fees and costs were a combination of work performed by the law firm handling the administrative proceedings and proceedings in the district court prior to the appeal, as well as the fees and costs for another firm's handling of the appeal and proceedings on remand.

Neptune Beach offered no objection to the costs sought by Solantic; however, it argued that some of the attorneys' fees were unnecessary, duplicative and excessive and the hourly attorney rate was above the upper limits of the highest rates of comparable attorneys. The city suggested that a fee award of \$83,091 or \$94,643 would be appropriate.

Regarding the attorneys' hourly rates, Neptune Beach's expert stated in his affidavit that the upper limit for an attorney's hourly rate was \$300 for comparable attorneys. The district court disagreed, finding that the hourly rates ranging from \$200 to \$370 per hour were in line with the rates of attorneys with reasonably comparable skills, experience and reputation and reasonable based upon recent attorney awards given under similar situations.

The district court agreed with Neptune Beach that a portion of the attorneys' hours should be reduced because of block billing, that the fees for mediation should be reduced, and the fees for a second mock argument should not be awarded. The court, however, disagreed with Neptune Beach's additional argument that having more than two attorneys on a case was *per se* excessive.

Applying the factors in *Johnson v. Georgia Highway Expressway, Inc.*, 488 F.2d 714 (5th Cir. 1974), the district court concluded that the case was complex, and the time and skill required significant. The court remarked that the results obtained were very good if not excellent, and the experience, reputation and ability of Solantic's attorneys very high. Ultimately, the court awarded Solantic \$123,284.29 in fees and \$3,468.92 in uncontested costs, resulting in a judgment in favor of Solantic and against Neptune Beach in the amount of \$126,753.21. The award amounted to a recover of 100% of Solantic's costs and over 90% of its fees.

*Stephen H. Grimes, Lawrence J. Hamilton II, and Cynthia L. Hain, Holland & Knight LLP, represented Solantic, LLC. The City of Neptune Beach was represented by Ernest H. Kohlmyer III, Bell, Leeper & Roper, P.A., and Christopher A. White, Christopher A. White, P.A.*

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