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MLRC MEDIALAWLETTER

Reporting Developments Through October 31, 2008

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MLRC 2008 First Amendment Leadership Award

FOR EXTRAORDINARY CONTRIBUTIONS TO FREE SPEECH AND PRESS

Harold W. Fuson, Jr. of The Copley Press

On September 17, 2008, at the biennial NAA/NAB/MLRC Media Law Conference, MLRC was honored to present its First Amendment Leadership Award to Hal Fuson, Senior Vice President and Chief Legal Officer The Copley Press, Inc. – and MLRC's former Chairman of the Board.

The award was created to honor individuals who have made stellar contributions to the development of the law of the First Amendment and the institutions that promote the First Amendment. It is intended for lawyers who have achieved senior status in our ranks, but whose work on behalf of free speech and free press should never be allowed to retire.

Boisfeuillet "Bo" Jones, Jr., Vice Chairman of the Washington Post Company and Chairman of the Washington Post, presented the award. Here is a transcript of his remarks.

Bo Jones: It's a pleasure to be here supporting, as the award states, those among us of senior status.

A basic job of in-house media lawyers is to enable the news folks to get a story published – and not get sued. At times, this can be pretty simple, as in: How about attributing to the divorce complaint that statement about the preacher and the goat.

But much of the time it is not. Much of what must be done is to slog through a lot of detail, make sure the facts are supported, check sourcing and attribution, make sure the story is fair, deal with complaints after publication, and more. You know the drill.

By universal acknowledgement, chief among those who have done it best – and by example and writings have taught others – is Hal Fuson.

Hal is the model of the straight-forward, common-sensical, practical, unpretentious counsel. His low-keyed way and sense of humor put people at ease. Reporters and editors have viewed him as a great ally, not as a dentist they must reluctantly see as a last resort.

Hal never told them how he would write the story, or try to impress them with his expertise. He simply helped them do their jobs.

While his easy style has made him very effective, it tends to obscure how tough-minded he is, and how committed he has always been to see important stories brought to the public.

There's no secret about what made Hal so comfortable with journalists and their mission. He was editor-in-chief of his college newspaper, the Grinnell Scarlet & Black. He got a masters degree in journalism at Columbia. He worked as a reporter at his hometown paper in Galesburg, Illinois, and as an editor at The Houston Post. Then he taught journalism at Texas Southern University and the University of Illinois. This was all in the decade before he started at The Los Angeles Times as staff counsel in 1979, then several years later at The San Diego Union - Tribune as general counsel.

One story from his early legal days exemplifies Hal in action. A reader called to complain about an ad and asked what responsibility the newspaper had to make sure the ad was not misleading. Hal explained what the limits on reviewing an ad were, unless questions were raised about it in advance. "Is that all you do?" the reader retorted. Hal responded, "What do you expect for a quarter?"

And that is Hal. He cuts the legal Gordian knot with disarming wit. On complex issues, he makes a clarifying, simple, effective response. His ability to make it human, and make it fun, is readily seen in his highly readable and useful book *"Telling It All - A Legal Guide to the Exercise of Free Expression."* A couple of examples: In noting that long ago under English common law truth was not a defense in libel actions, Hal wrote,

"Fortunately, that notion got lost in the hold of the *May-*

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Harold W. Fuson: MLRC 2008 First Amendment Leadership Award

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flower and has had little currency in American law, at least since the adoption of the Constitution. The British, in one of their rare gestures toward free speech, have abandoned it as well."

In describing how lawyers try to lure reporters into testifying in lawsuits, Hal warns,

"If an effusively flattering approach to the reporter elicits a warm feeling of inordinate self-importance, many of the practical and legal barriers to appearing in court may dissolve. So, for criminy's sake, keep your mouth shut. If you must say something, suggest the caller talk to your lawyer or your superior."

You get the idea. Any conversation or meeting with Hal will be laced with comments like these. All right on point.

The same attributes that have made Hal so valuable to his own newspapers have made him a leader nationally. He has supported in every way possible organizations dedicated to fostering the interests of the First Amendment and keeping the media informed of developments in the law. For almost three decades, as a committee member, director, or chairman, he has served the ANPA, NAA, MLRC, California Newspaper Publishers Association, and other organizations. As a leader he has been effective at spotting and prioritizing issues, building consensus around a course of action, and handling the mavericks – if I may use that word.

The work in legal affairs and legislative matters is often not glamorous and can be quite detailed, whether it be on shield laws, electronic access to public records, open court records, or libel decisions. Many here can think of dozens of amicus briefs and other submissions that Hal has supported, and improved. He may make only a few seemingly minor suggestions to the draft, and then afterwards you realize just how wise his advice was.

Hal is self-effacing and does not seek credit for what he has done. Yet he always delivers, with excellent and timely work. He has been tireless and unflappable. And he has done it all while helping navigate Copley Press.

Of course Hal has loved the work. Is it the passion of his life? No, that honor goes to his wife, Pam, his children, and his grandchildren. Have I mentioned the four grandchildren? But, luckily for us, he is still a true First Amendment addict – and can't get away from the stuff for long.

No one deserves this award more than Hal. Some of our colleagues around the country have called to say they wish they could be here today. So it's a real privilege for me to be with all of you to pay tribute to this much admired and beloved figure, for his lifetime leadership in advocating for free expression and in supporting the institutions that promote it. Hal Fuson.

MLRC Calendar

PLEASE VISIT **WWW.MEDIALAW.ORG** FOR MORE INFORMATION

November 12, 2008
MLRC ANNUAL DINNER
New York City

November 13, 2008
*MLRC Defense Counsel Section Annual Meeting and LUNCH

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NAB/NAA/MLRC Media Law Conference Explores "New Legal Visions for the Evolving Media World"

Panel speaking on how the internet changes media and politics. From left: Sam Stein, Tom Gensemer, Albert Hunt and John Harris

Last month over 300 MLRC members and friends gathered in Chantilly, Virginia for our biennial conference on media law practice and litigation. The Conference featured break out sessions on content gathering, publication issues and digital publishing issues; and a wide range of boutique sessions covering entertainment law, ethics, prepub/prebroadcast review, press credentials, FCC, advertising, insurance, depositions, managing materials and trial techniques.

MLRC Chairman Ralph Huber

The Conference also included informative and timely panels looking at international law developments; the impact of digital information, blogging and fundraising on the presidential campaign; recent media trials; legislative initiatives; and what REALLY is the Next Big Thing.

The Conference also included a memorable reception at the Smithsonian Air & Space Museum.

MLRC gives its special thanks to Conference Chairs Mary Ellen Roy, *Phelps Dunbar LLP,* David S. Bralow, *Tribune Company* and Daniel M. Waggoner, *Davis Wright Tremaine LLP*

Thanks to our Conference sponsors for their generous support.

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NAB/NAA/MLRC Media Law Conference Explores "New Legal Visions for the Evolving Media World"

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

Boutique Sessions Leaders

Entertainment Law
Jonathan Anschell, *CBS Broadcasting Inc*. (Chair)
Peter R. Rienecker, *Home Box Office, Inc*. (Chair)

Media Legal Ethics
Richard M. Goehler, *Frost Brown Todd LLC* (Chair)
Mark L. Tuft, Cooper, *White & Cooper LLP* (Chair)

Pre-publication/Pre-broadcast Review
Carol Jean LoCicero, *Thomas & LoCicero PL* (Chair)
Linda Steinman, *Davis Wright Tremaine LLP* (Chair)
Trish Stembridge Sprain, *Cable News Network* (Chair)

Press Credentials
George Freeman, *The New York Times Company* (Chair)
Judith R. Margolin, *Time Inc*. (Chair)

What Every First Amendment Lawyer Needs to Know About the FCC
Mark J. Prak, *Brooks, Pierce, McLendon, Humphrey & Leonard, LLP* (Chair)
Charles Sennet, *Tribune Company* (Chair)

Advertising and Promotion for Publishers and Broadcasters
Nancy Felsten, *Davis Wright Tremaine LLP* (Chair)
Terri J. Seligman, *Loeb & Loeb LLP* (Chair)

Defamation and Privacy Depositions 101
Susan Grogan Faller, *Frost Brown Todd LLC* (Chair)
James E. Stewart, *Butzel Long P.C.* (Chair)

Media Insurance Issues
Chad E. Milton, *Marsh Inc./Marsh & McLennan Companies* (Chair)
Rick Fenstermacher, Risk Management Solutions, Inc. (Chair)

Search and Destroy (Not): Managing the Media's Materials in an Electronic Age
Tom Clyde, *Dow Lohnes PLLC* (Chair)
Robert Hawley, *Hearst Corporation* (Chair)

Trial Techniques
Chairs: Charles Brown, *Attorney-at-Law*
Nancy W. Hamilton, *Jackson Walker L.L.P.*

Content Gathering Breakout
Stephanie Abrutyn, *Home Box Office, Inc.* (Chair)
Gayle Sproul, *Levine Sullivan Koch & Schulz, L.L.P.* (Chair)
Robert A. Bertsche, *Prince, Lobel, Glovsky & Tye, LLP*
Landis C. Best, *Cahill Gordon & Reindel LLP*
Guylyn Cummins, *Sheppard Mullin Richter & Hampton LLP*
Jonathan R. Donnellan, *The Hearst Corporation*
Karen I. Kaiser, *Tribune Company*
Robert P. Latham, *Jackson Walker L.L.P.*
Thomas S. Leatherbury, *Vinson & Elkins LLP*
James A. McLaughlin, *The Washington Post Company*
Karl Olson, *Levy, Ram & Olson LLP*
Jeffrey S. Portnoy, *Cades Schutte LLP*
Elizabeth A. Ritvo, *Brown Rudnick Berlack Israels LLP*
Indira Satyendra, *ABC, Inc.*

Publication Breakout
David Giles, *The E.W. Scripps Company* (Chair)
Charles D. Tobin, *Holland & Knight LLP* (Chair)
Toby Butterfield, *Cowan, DeBaets, Abrahams & Sheppard LLP*
Kai Falkenberg, *Forbes.com LLC*
Rachel E. Fugate, *Thomas & LoCicero PL*
Amy B. Ginensky, *Pepper Hamilton LLP*
John C. Henegan, *Butler, Snow, O'Mara, Stevens & Cannada, PLLC*
Ashley Kissinger, *Levine Sullivan Koch & Schulz, L.L.P.*
James A. Klenk, *Sonnenschein Nath & Rosenthal LLP*
David L. Marburger, *Baker & Hostetler LLP*
Dean Ringel, *Cahill Gordon & Reindel LLP*
Steve Rogers, *Showtime Networks Inc.*
Saul B. Shapiro, *Patterson Belknap Webb & Tyler LLP*
Stacey Wolf, *Cable News Network*

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Jerry S. Birenz, *Sabin Bermant & Gould, LLP* (Chair)
Sherrese M. Smith, *Washingtonpost.Newsweek Interactive* (Chair)
James M. Chadwick, *Sheppard Mullin Richter & Hampton LLP*
Johnita P. Due, *Cable News Network*
Jeremy Feigelson, *Debevoise & Plimpton LLP*
Karlene Goller, *Los Angeles Times*
Mark Hinueber, *Stephens Media Group*
Samir Jain, *Wilmer Cutler Pickering Hale and Dorr LLP*
David M. Keneipp, *Fox Television Stations Inc.*
Joshua Koltun, *Attorney-at-law*
Mary E. Snapp, *Microsoft Corporation*
Briana Thibeau, *Dow Lohnes PLLC*
S. Jenell Trigg, *Leventhal Senter & Lerman PLLC*
Lynda K. Marshall, *Hogan & Hartson LLP*

International Media Law Sessions
Jan F. Constantine, *The Authors Guild* (Chair)
Kevin W. Goering, *Sheppard, Mullin, Richter & Hampton LLP* (Chair)
David E. McCraw, *The New York Times Company* (Chair)
Moderators:
Robin Bierstedt, *Time Inc.*
Lynn Oberlander, *The New Yorker*
Robert D. Balin, *Davis Wright Tremaine LLP*
Gillian Phillips, *News International Group*
Panelists:
David Korzenik, *Miller Korzenik Sommers LLP*
Elisa Rivlin, *Simon & Schuster*
David Tomlin, *The Associated Press*
David Vigilante, *Turner Broadcasting System, Inc.*
Eduardo Bertoni, *Due Process of Law Foundation*
Jens van den Brink, *Kennedy van der Laan*
S tephen Fuzesi, Jr., *Newsweek, Inc.*
Caroline Kean, *Wiggin & Co.*
Leslie Power, *SBS*

Campaign 2008 Beyond the Digital Divide: How the Internet, Blogging, and Targeted Research and Fundraising are Changing Political Campaigns and the Way the Media Covers Them
Laura R. Handman, *Davis Wright Tremaine LLP* (Chair)
Moderator:
Albert R. Hunt, Executive Washington Editor, *Bloomberg News*
Panelists:
Jay Carney, Washington Bureau Chief, *Time Magazine*
John F. Harris, Editor-in-Chief, *The Politico*
Tom Gensemer, Blue State Digital, *Hillary Clinton for President*
Angela "Bay" Buchanan, President, *The American Cause*
Sam Stein, Political Reporter, *The Huffington Post*

Trial Tales Chair:
Thomas B. Kelley, *Levine Sullivan Koch & Schulz, L.L.P.*
Panelists:
Deanna K. Shullman, *Thomas & LoCicero PL*
Daniel J.Gleason, *Nutter, Mc Clennen & Fish*
Robert P. Latham, *Jackson Walker LLP*
Steven P. Mandell, *Mandell Menkes LLC*

Legislating the First Amendment: Paradigm or Paradox?
Moderator:
Kevin M. Goldberg, *Fletcher, Heald & Hildreth, PLC*
Panelists:
Paul J. Boyle, *Newspaper Association of America*
Teri Henning, *Pennsylvania Newspaper Association*
Kathleen A. Kirby, *Wiley Rein LLP*

Media Law 2.0: So What Really IS the Next Big Thing?
Dale M. Cohen, *Cox Enterprises, Inc.* (Chair)
Introduction:
Lee Levine, *Levine Sullivan Koch & Schulz, L.L.P.*
Panelists:
Veronica Dillon, *The Washington Post Company*
Kurt Wimmer, *Gannett Co., Inc.*

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MLRC ANNUAL DINNER

The Presidency and the Press

Wednesday, November 12, 2008

Reserve your table and seats now.

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2008 ANNUAL MEETING AND LUNCH

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Vice President, Research & Development Operations
The New York Times Company

With

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Senior Partner, Mediaedge: cia

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Newspapers Seek Supreme Court Review of Third Circuit Decision Allowing a "Supersealed" Case

Cert Petition Should Be Heard in November

By Robert C. Clothier

Two legal newspapers in Pennsylvania have filed a petition for writ of certiorari with the United States Supreme Court seeking reversal of a Third Circuit decision that blessed the complete sealing of a civil case, including all records, proceedings and even dockets, at both the trial and appellate levels, for a period of seven years. *See The New York Law Publishing Company, The Legal Intelligencer and The Pennsylvania Law Weekly v. Jane Doe, C.A.R.S Protection Plus, Inc. and Fred Kohl, seeking review of Doe v. C.A.R.S. Protection Plus, Inc. et al.*, Nos. 06-3625, 06-4508 (3rd Cir. May 30, 2008).

The petition was joined by the Reporters Committee for Freedom of the Press and 29 media organizations around the country.

If cert is granted, this appeal could help establish and/or clarify several important principles. First, it could result in a Supreme Court decision extending the right of access to civil proceedings, an issue the Court has never addressed. Second, it could severely sanction "super-sealed" cases that have become more and more prevalent. And it could clarify the proper method by which closure orders can be challenged.

The Third Circuit's Decision

On May 30, 2008, the Third Circuit filed a "precedential" decision that was the first sign of the existence of a case that had been completely sealed, including the docket sheets, for seven years.

The decision reversed the Western District of Pennsylvania's granting of summary judgment in favor of the defendants, C.A.R.S Protection Plus and Fred Kohl, who had been sued under Title VII by a former employee proceeding under a pseudonym, Jane Doe, who alleged that the defendants discriminated against her because she exercised her constitutional right to have an abortion.

In one paragraph, the Third Circuit also affirmed the District Court's sealing of the entire case, ruling that it was not an abuse of discretion even though the public and press were not given notice and opportunity to be heard, and no on-the-record findings supporting closure were made.

Until the Third Circuit's May 30, 2008 decision, the lawsuit was completely sealed from public view. All proceedings were closed. All judicial records were sealed. Even the docket was sealed. As far as the public knew, the case did not exist.

For example, if a member of the public or press, using the PACER system, entered the number for the case in the District Court, PACER reported: "This case is SEALED." No information about the case was given, not even the parties or type of case. (Of course, no member of the public or press would have been able to do so, because, until the Third Circuit's decision, the case number was unknown.) Or if one gave the name of the parties in this case, PACER reported: "Sorry, no person found." Similarly, if one used PACER to access the Third Circuit's dockets and entered the case numbers for the appeals, PACER responded: "Case under seal." Or if one gave PACER the name of the parties in this case, PACER stated: "No case found with the search criteria."

Within days of the Third Circuit's decision, the Legal Intelligencer and the Pennsylvania Law Weekly, both published by The New York Law Publishing Company (part of the Incisive Media (formerly ALM Media) family), filed emergency motions seeking (1) intervention, (2) rehearing en banc of the Third Circuit's panel decision and (3) access to the Third Circuit's own records and proceedings. The media made it clear that they did not seek any information that would disclose the identity of plaintiff Jane Doe.

Before any party had responded, the Third Circuit denied the motions, even the papers' request for leave to intervene for the purpose of seeking access. The Third Circuit suggested, however, that the papers "pursue this matter with the District Court upon remand." When the papers were considering filing a motion for rehearing en banc, they were told that any such filing would not be accepted because the papers had not been permitted to intervene in the proceeding.

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The Petition for Writ of Certiorari

In early September 2008, the papers filed a petition for writ of certiorari with the United States Supreme Court. The papers made several arguments.

First, they argued that the lower courts' complete sealing of a case, including its dockets, without notice and opportunity to be heard, without on-the-record findings and individualized determination, and without permitting the papers to intervene was contrary to existing Supreme Court precedent. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

Second, they argued that the Third Circuit's ruling conflicted with the decisions of other circuit courts that had held that secret cases and dockets are facially unconstitutional. *See, e.g.*, *The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993), *cert. den. sub nom.*, *Times Pub. Co. v. U.S. District Court for the Middle District of Florida*, 510 U.S. 907 (1993).

> *… the Third Circuit's decision so far departed from the accepted and usual course of judicial proceedings... as to call for the exercise of the Supreme Court's supervisory powers.*

Lastly, they argued that the Third Circuit's decision so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for the exercise of the Supreme Court's supervisory powers. They said that the decision raised "numerous troubling questions," most notably: "How many other cases are completely sealed?"

Perhaps not coincidentally, on the same day that the papers filed their cert petition, the Third Circuit issued an order that was clearly directed to the papers. Because the case was sealed, however, the papers did not know about the order until the Third Circuit, two days later, unsealed the order and sent a copy to the parties' and papers' counsel. In the order, the Third Circuit sought to "clarify the scope of remand regarding the [Third Circuit's] sealing order" and explained: "It is not our intention that the order we entered sealing the record on appeal would prevent the District Court from considering the issue anew; indeed, our order suggesting further pursuit of this issue was intended to reflect our view that the District Court was the better court in which this issue could be litigated…" The Third Circuit said that "the District Court should feel free to decide this issue unfettered by our rulings to date."

The papers responded to the Third Circuit's "clarifying" order with a letter to the Supreme Court disclosing the existence of the Orders and explaining why the Third Circuit's suggestion did not resolve the issue. The district court had no authority to unseal the Third Circuit's own records and proceedings. Moreover, the Third Circuit's precedential decision blessing "super-secret" cases remained the law of the Third Circuit and made it highly unlikely the district court would change its mind.

Supporting this petition was a brief filed by the Reporters Committee for Freedom of the Press and 29 media organizations including ABC, AP, CBS, Dow Jones, McClatchy, NBC, New York Times, Time Magazine, Tribune and the Washington Post. They argued that the Third Circuit's decision implicitly repudiated the consensus among circuit courts that there is a right of access to civil proceedings and warranted the Supreme Court's review to make clear that the right of access extends to civil as well as criminal cases. They also asked the Supreme Court to "clarify when and how the public may intervene to challenge a closed proceeding"; they argued that intervention (as opposed to petition for mandamus) is the appropriate and most "widely recognized" method of challenging closure orders. Lastly, they argued that the "total secrecy below" was a drastic departure, conflicted with other circuit's rejection of such secrecy, and thus warranted the Court's attention.

The defendants, who had asked the Third Circuit to reverse the district court's sealing of the case, neither supported nor opposed the petition, perhaps because the underlying case had reached a settlement.

Plaintiff Jane Doe, however, filed a response that made no substantive argument that the sealing of the case was appropriate and consistent with Supreme Court precedent. To the contrary, she asserted that she had no interest in con-

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tinuing to litigate the matter because the underlying case had settled and she was "willing to unseal the record" so long as there were "limited redactions to protect her identity." Because this end result was no different than what the papers sought, she argued that there was "no case or controversy," thus making the matter "moot" and depriving the courts of "jurisdiction."

Doe also asserted that cert is inappropriate because the Third Circuit gave the papers the opportunity to pursue the matter with the district court. Given that alternative, she argued, the Supreme Court would be unnecessarily ruling on a constitutional issue that was not "ripe." In so arguing, she made several interesting admissions – that the issues raised by the papers were "neither presented nor considered below or on appeal" to the Third Circuit, and that the lower courts did not have "any record on which to address the merits of the issue…" These points, of course, *supported* the cert petition by showing how the lower courts failed to follow the procedures mandated by Supreme Court precedent.

Doe also argued that allowing intervention violates Federal Rules of Civil Procedure Rule 24(b)(3) because it would "unduly delay" and "prejudice" Doe's rights, *i.e.*, Doe's interest in concluding the now-settled litigation. Accepting cert would "force Ms. Doe, an individual of limited means, to continue this litigation beyond the settlement, likely for years." Doe argued that the papers have another, "better," alternative -- "the remedy of mandamus." The implication of her argument was that the papers arguably could establish the requirements of mandamus, *e.g.*, that the papers could "demonstrate a clear abuse of discretion or conduct amounting to a disruption of judicial power." Once again, Doe's arguments bolstered the reasons for granting cert.

The Supreme Court is expected to rule on the petition in November.

Robert C. Clothier, Abraham C. Reich and Brett A. Berman of Fox Rothschild LLP represent petitioners The New York Law Publishing Company, the Legal Intelligencer and the Pennsylvania Law Weekly. Allison Hoffman, Chief Legal Officer of Incisive Media, and Fabio Bertoni, Deputy General Counsel of Incisive Media, represent Petitioners. Gary M. Davis and Fredric E. Orlansky represent plaintiff/respondent Jane Doe. Dean E. Collins represent defendants/respondents C.A.R.S. Protection Plus and Fred Kohl. Lucy A. Dalglish, Gregg P. Leslie and John Rory Eastburg represent the Reporters Committee for Freedom of the Press and the 29 media organizations supporting the Petitioners.

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New Jersey Appellate Division Applies News Privilege to Book about Donald Trump

In a published opinion, the New Jersey Appellate Division reversed a ruling of a New Jersey trial court that would have required Timothy L. O'Brien, a reporter for *The New York Times*, to produce confidential and non-confidential materials and information collected in the course of researching and writing a book about Donald Trump. *Trump v. O'Brien*, No. A-3905-06T2 (N.J. App. Ct. Oct. 24, 2008).

Background

O'Brien wrote a 2005 book titled *TrumpNation: The Art of Being the Donald* about the life of Trump. Some of the information contained in the book had been gathered in the course of O'Brien's reporting on Trump for *The New York Times.* In January 2006, Trump sued O'Brien, along with his book publisher, alleging that O'Brien's inclusion of an estimate from three anonymous sources that Trump was worth "somewhere between $150 and $250 million," which appeared among other estimates from a variety of sources including Trump employees and Trump himself, was false, and damaged his business interests.

In the course of discovery, Trump sought the research materials and information for the book, including the identities of the three confidential sources of the allegedly defamatory information regarding Trump's net worth. O'Brien asserted the newsperson's privilege and on that basis refused to produce information about the confidential sources, as well as interview notes, and other newsgathering and editorial material. Trump moved to compel production, and the trial court granted the motion, holding that New York law governed and did not extend a news privilege to the book because the book was entertainment rather than news.

O'Brien appealed the Order, arguing that the book contained news, including some information published in *The New York Times*, and should therefore be afforded the protections of the news privilege under either New York or New Jersey law.

Privilege Extends to Books Under NY Law

First focusing on the New York Shield Law, the court held that, contrary to the lower court's interpretation, New York legislation and case law had extended the protections of the news privilege to an "author who obtains news in confidence for dissemination to the public through the medium of a published book." Noting that O'Brien had sufficiently demonstrated that the sources that provided the allegedly defamatory information were confidential, the court further concluded that it would be "anomalous" not to recognize authors as beneficiaries of the news privilege because it would result in the same sources being protected when used in a *Times* article, but not when cited in a book, which would create both a "tortured" reading of the shield law and an "indefensible result."

> ***… information about Trump was, regardless of tone, "a matter of public interest and thus "news" protected by the Shield Law."***

The Book is News

The Appellate Division also rejected the lower court's determination that *TrumpNation* was not news because the tone of the book was "breezy" "irreverent" or "facetious." The court identified a "danger, recognized in the allied areas of privacy law and defamation, in simply weighing the entertainment value against the news value . . . and according Shield Law protection or not on our essentially subjective view of which is weightier." Citing *Time Inc. v. Hill*, 385 U.S. 374, 388 (1967), a privacy case, the court stated that "the line between the two is too elusive to form a basis upon which to gauge the extent of critical and absolute press protections."

he court engaged in a lengthy analysis of New York law pertaining to newsworthiness and, relying on both unpublished reporter's privilege cases and privacy cases, found that information about Trump was, regardless of tone, "a matter of public interest and thus "news" protected by the Shield Law." The court therefore

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New Jersey Appellate Division Applies News Privilege to Book about Donald Trump

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reversed the lower court's decision and found that *TrumpNation* was subject to the absolute protection of confidential sources provided by the New York Shield Law.

Qualified Privilege Not Overcome

The court also reversed the lower court's order requiring discovery of nonconfidential materials and information. Reviewing the record below, the court indicated that Trump had not made a showing that the discovery of nonconfidential sources that he sought was relevant, necessary, and unavailable from other sources, as required by the New York Shield Law. The court specifically noted that at the time of the motion hearing, no depositions had occurred to provide a basis for Trump to overcome the qualified statutory privilege.

Editorial Materials Privileged

Again reversing the lower court, the Appellate Division acknowledged that a reporter has an interest in "preventing intrusion into the editorial process." *Citing People v. Iannaconne*, 447 N.Y.S.2d 996, 997 (Sup. Ct. 1982). The court therefore held that the New York Shield Law and constitutional protections provide a privilege for information related to the editorial process.

Discovery Privileged if NJ Law Applies

The New Jersey Appellate Division agreed with the lower court that New Jersey law provides a generally broader news privilege than New York, and if it applied *TrumpNation* would plainly be covered by the news privilege. Citing *Kinsella v. Welch*, 362 N.J. Super. 143, 154 (App. Div. 2003), the court indicated that "all discovery sought by Trump would be protected by the New Jersey newsperson's privilege," which, "in the absence of a countervailing constitutional right . . . is absolute" regardless of whether it was obtained from a confidential source.

The court also noted that, while the conflicts-of-law issue was not yet ripe for determination, there was precedent supporting defendants' argument that "New Jersey has the greatest interest in protecting newsgathering activities, and thus New Jersey law should be applied to prevent the disclosure of the nonconfidential materials that the motion judge deemed discoverable in this case."

Timothy L. O'Brien, Time Warner Book Group, Inc., and Warner Books, Inc. were represented by Mary Jo White, Andrew J. Ceresney, and Andrew M. Levine of Debevoise and Plimpton LLP, and Mark S. Melodia, James F. Dial, and Kellie A. Lavery of Reed Smith LLP. Donald J. Trump was represented by Marc E. Kasowitz and Mark P. Ressler of Kasowitz, Benson, Torres & Friedman, and William M. Tambussi and William F. Cook of Brown and Connery LLP.

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NY Court Quashes Subpoenas as to a Majority of Discovery Sought by Donald Trump from *New York Times* Executives

On August 20, 2008, a New York trial court granted a motion to quash subpoenas issued pursuant to commissions issued by a New Jersey court to Arthur O. Sulzberger, Jr. and William Keller, two executives at *The New York Times*.

In quashing the subpoena to Keller and partially quashing the subpoena to Sulzberger, the court held that much of the information sought by plaintiff Donald J. Trump essentially was for the purpose of attempting to impeach the defendant and did not bear on the underlying defamation issues at the heart of the litigation, and was therefore not discoverable. *In re Trump v. Sulzberger*, 2008 N.Y. Misc. LEXIS 5256 (N.Y. Sup. Ct. 2008).

Background

As discussed in the preceding article, in January 2006 Donald Trump sued Timothy L. O'Brien and his publishers, Time Warner Book Group Inc. and Warner Books Inc. for defamation in New Jersey state court for a statement in the book *Trump Nation* estimating Trump's wealth.

In seeking discovery from Sulzberger, the CEO of the New York Times Company and the Publisher of *The New York Times*, and Keller, the Executive Editor of the *Times,* Trump obtained commissions from the New Jersey court, which found that Trump had shown a "good faith basis" for making his requests, that the requests did not represent a "fishing expedition or an attempt to harass or intimidate," and that the testimony of Sulzberger and Keller was relevant to the issue of actual malice. Trump then obtained an ex parte order from a New York trial court to subpoena Sulzberger and Keller.

In their motion to quash, Sulzberger and Keller argued that the subpoenas presented an unreasonable burden given that they were senior executives of a non-party organization with no direct knowledge of the information at issue, and that the information sought by Trump was tangential and not legitimately needed. Trump asserted that the testimony of Sulzberger and Keller was indispensable to showing that O'Brien acted with actual malice, as is required for a public figure such as Trump to sustain a claim for defamation. *New York Times Co. v. Sullivan*, 376 US 254, 279-280 (1964); *Lynch v. New Jersey Educ. Ass'n*, 161 NJ 152, 165 (1999); *Sweeney v. Prisoners' Legal Services*, 84 N.Y.2d 786, 792-793 (1995).

Trump further alleged that the discovery he sought from Sulzberger and Keller was reasonably likely to lead to the discovery of admissible evidence relating to: (1) alleged attempts by O'Brien to influence the *Times*'s decision to acquire serial rights to the book; and (2) whether the *Times* made efforts to ensure that O'Brien complied with *Times* policies on confidential sources. As to Keller only, Trump sought information about conversations with O'Brien about the lawsuit, and O'Brien's alleged "contemplated departure" from his position at the *Times* and his transfer to the Sunday Business section of the *Times*, which occurred in May 2006. As to Sulzberger only, Trump also sought information about two specific encounters with O'Brien, one via email and the other in person.

Subpoenas Issued Pursuant to Out-of-State Commissions

Under New York law, witnesses "may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state" when a court in another state issues a commission requiring the testimony of a New York witness. N.Y.C.P.L.R. 3102(e) (2008). Where a court in another state permits discovery from a New York witness, the New York court may make a limited inquiry as to: "(1) whether the witnesses' fundamental rights are preserved; (2) whether the scope of inquiry falls within the issues of the pending out-of-State action; and (3) whether the examination is fair." *In re Ayliffe & Cos.*, 166 A.D.2d 223, 224 (1st Dept. 1990) (internal citations omitted).

While recognizing that it was required to "afford the widest possible latitude in the conduct of … examinations" in a litigation pending in another jurisdiction, the New York court nonetheless examined whether the information sought by Trump bore on the issue of actual malice in the underlying defamation claim, and used its discretionary authority under N.Y.C.P.L.R. to quash the subpoenas as to the bulk of the discovery sought.

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Relationship of Information Sought to Actual Malice

The New York court recited New York and New Jersey defamation law, noting that both states require a public figure to show by clear and convincing evidence that the allegedly defamatory statements were false and that they were published with "actual malice," which is defined as knowledge of falsity, or reckless disregard as to whether the statements were false. *See Sullivan* at 279-280; *Sweeney* at 792-793; *DeAngelis v. Hill*, 180 NJ 1, 13 (2004). The court further noted that while "[s]pite, hostility, hatred, or the deliberate intent to harm demonstrate possible motives for making a statement, only evidence demonstrating that the publication was made with knowledge of its falsity of a reckless disregard for its truth will establish the actual malice requirement." *Citing DeAngelis* at 14.

In granting Keller's motion to quash and much of Sulzberger's motion to quash, the court examined Trump's discovery requests and found "that to a large extent the scope of inquiry does not bear on the issue of actual malice raised in the underlying defamation action, and that much of the information is essentially sought for the collateral purpose of impeaching O'Brien." The court noted that Trump claimed that discovery related to O'Brien's alleged attempts to influence the *Times* to acquire serial rights to the book was "necessary as to O'Brien's *credibility*," rather than to establish actual malice. (Emphasis supplied). Likewise, the court quashed the subpoenas to the extent that they sought information related to efforts by the *Times* to ensure O'Brien's compliance with internal standards concerning confidential sources because this information was sought to establish O'Brien's "veracity" rather than actual malice.

The court also quashed the subpoena directed only to Keller that sought discovery about O'Brien's alleged "contemplated departure" from the *Times*; O'Brien's transfer to the Sunday Business Section of the *Times*; and a conversation between Keller and O'Brien about Trump's lawsuit because this information fell outside of the issue of actual malice.

The court allowed limited discovery from Sulzberger as to one email between O'Brien and Sulzberger in which they discussed the book and one lunch meeting in which O'Brien and Sulzberger discussed the real estate business, because Sulzberger had "personal and direct knowledge" of these events, and the events could "arguably . . . have some significance bearing on the issue of actual malice."

David McCraw, in-house counsel at The New York Times Company, and David A. Schulz and Alia L. Smith of Levine Sullivan Koch & Schulz, LLP represented Arthur Sulzberger and William Keller. Donald Trump was represented by Marc E. Kasowitz, Daniel R. Benson, Mark P. Ressler, Maria Gorecki, and Rachel E. Lubert of Kasowitz, Benson, Torres & Friedman LLP and William M. Tambussi and William F. Cook of Brown & Connery LLP.

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Pennsylvania Supreme Court Upholds Absolute Protections of State Shield Law

Court Declines to Engraft "Crime-Fraud" Exception to Shield Law

By Robert C. Clothier

The Pennsylvania Supreme Court ruled that the protections afforded journalists by the Pennsylvania Shield Law, 49 Pa.C.S. § 5942, remain absolute even where the disclosure of information by a confidential source may have violated grand jury secrecy. *Castellani v. Scranton Times, L.P.*, 2008 WL 4351142 (Pa. Sept. 24, 2008) (Castille, Saylor, Eakin, Baer McCaffery (dissenting) JJ.).

In a 4-1 decision, the Court declined to engraft a "crime-fraud" exception to the Shield Law where a libel plaintiff sought to determine the identity of the source of allegedly defamatory information published by a newspaper. The Court, however, reserved for another day whether the same result would obtain where the government, not a private litigant, sought a reporter's evidence regarding the source of a grand jury leak in a criminal investigation or prosecution.

Underlying Libel Lawsuit & Lower Court Rulings

The plaintiffs, county commissioners, sued a local newspaper in Scranton, Pennsylvania over an article accusing them of "stonewalling" a grand jury that was investigating wrongdoing at a local prison. The accusations were attributed to "an unnamed source close to the investigation." Shortly after the article was published, the grand jury supervising judge found that there was "no breach of any secrecy" because the article's accusations "are completely at variance with the transcript" of the plaintiffs' testimony.

In discovery, the plaintiffs moved to compel the disclosure of the identity of the unnamed source. Granting the motion, the trial court held that when the Shield Law "clashes with the need to enforce and protect the foundation of the grand jury purpose, the Shield Law should relinquish its priority." The Pennsylvania Superior Court reversed the trial court's decision, ruling that "we, like the trial court, are forbidden from reading into the Shield Law an exception neither enacted by the General Assembly nor found by the Supreme Court as a result of a developing body of law." Plaintiffs appealed to the Pennsylvania Supreme Court.

Pennsylvania Supreme Court's Decision

The Pennsylvania Supreme Court determined that the result was governed by several prior decisions. In *In re Taylor*, 193 A.2d 181 (Pa. 1963), the Court ruled that the Shield Law protected reporters from having to disclose their sources to an investigating grand jury even though that result "will enable newsman to conceal or cover up crimes."

In *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987), the Court held that, at least in the context of libel actions, where the plaintiff has a protected interest in his or her reputation under the Pennsylvania Constitution, the Shield Law protected only information that could reveal the identity of a confidential source (and not other non-confidential source information).

Lastly, in *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003), the Court held that the Shield Law did not prevent disclosure to the prosecution statements made by a non-confidential source to a reporter.

Given the clear and absolute protection afforded confidential source information by these cases, the Court found no basis to "engraft upon the statute an exception which would not only contradict the well-established public policy underlying the Shield Law, but, as importantly, would contravene the statute's unambiguous text." The Court explained: "If the General Assembly disagreed with our interpretation [of the Shield Law in prior decisions], or wished to establish a crime-fraud exception to the Shield Law, it could easily have done so."

The Court rejected the plaintiff's contention that the analogous crime-fraud exception to the attorney-client privilege should extend to the Shield Law, finding that the Shield Law is, unlike the attorney client privilege, an absolute privilege and serves the recipient of the information (the reporter), not the source. The Court also noted that while the paper "may have published defamatory information, they did not commit a crime" by reporting information that may have violated grand jury secrecy. In a particularly valuable holding, the Court said: "[T]he news media have a

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right to report news, regardless of how the information was received."

The Court emphasized the fact that the context was a defamation case seeking monetary damages, not a criminal investigation or prosecution seeking "restoration of the grand jury's integrity." As a result, "the public's interest in the free flow of information to the news media is not presently in conflict with the public's interest in grand jury secrecy." With that, the Court did not rule out a different result "where the Commonwealth sought a reporter's evidence concerning the source of a grand jury leak in a criminal investigation or prosecution of that leak."

In that situation, "the Shield Law and the secrecy provision of the Grand Jury Act would be more directly in conflict." The Court did not resolve that issue: "[W]e need not determine whether there is any situation where the absolute language of the Shield Law would have to yield to a competing, constitutional value."

Dissenting Opinion

Placing great weight on "the constitutional interests in the protection of plaintiff's reputation," the dissenting opinion focused on the possibility that the "unnamed source" did not exist, given that the information supposedly provided by that source was ostensibly incorrect. Where a libel plaintiff "makes a colorable showing" that a source "may not, in fact, exist," the dissent found, the plaintiff should be able to compel the defendant to disclose the identity of the source. "Otherwise, the plaintiff is left without the ability to sustain his or her burden to show that the alleged defamer acted with actual malice." To the extent prior Pennsylvania Supreme Court precedent (*e.g., Hatchard*) did not permit such compelled disclosure, the dissent opined that those decisions should be overruled.

First Amendment Reporter's Privilege in Pennsylvania?

Although the Pennsylvania Superior Court, following numerous Third Circuit decisions, has held that there is a qualified First Amendment reporter's privilege, the Pennsylvania Supreme Court has not yet done so. In the *Bowden* case, the Court "assume[d], without deciding," that there was such a privilege (an issue it considered "thorn[y]"), and held that it did not protect a reporter from having to disclose statements made by an on-the-record source.

In the *Castellani* case, the paper did not assert the First Amendment-based reporter's privilege. The Supreme Court addressed the First Amendment privilege in a footnote when explaining the *Bowden* Court's treatment of the Shield Law. The Court neutrally described the constitutional privilege without stating one way or another that it is the law in Pennsylvania. This issue remains an open one.

Robert C. Clothier is a litigation partner in the Philadelphia office of Fox Rothschild LLP and chairs the firm's Media, Defamation & Privacy Law Practice Group. Kim M. Watterson, Kevin Charles Abbott, Walter Thomas McGough, Jr., Reed Smith, LLP, Pittsburgh; and John Timothy Hinton, Jr., Haggerty, McDonnell, O'Brien & Hinton, LLP, represented The Scranton Times. Plaintiff was represented by Sprague & Sprague, Philadelphia.

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Oregon Newspaper Uses Shield Law to Quash Subpoena Seeking Identity of Online Commentator

By Jessica Goldman

On September 30, 2008, a Portland, Oregon state trial court ruled that the state's Shield Law protects *The Portland Mercury* from having to divulge information about the anonymous poster of an allegedly defamatory comment on the newspaper's Internet blog. *Doe v. TS et al.*, No. CV08030693 (Clackamas Cir. Ct. Sept. 30, 2008) (Redman, J.).

Background

The Portland Mercury, a weekly newspaper, hosts a blog called "Blogtown, PDX" where the newspaper's reporters post articles and members of the public may post comments about the articles. To post a comment on Blogtown, members of the public sign up by identifying only an e-mail address and self-assigning a "screen name."

On January 31, 2008, *Mercury* reporter Amy Ruiz posted an article about activities at City Hall concerning mayoral candidate Sho Dozano. http://blogtown.portlandmercury.com/2008/01/busy_day_at_city_hall_part_2.php. Reader comments were posted in response by "Roads are not free" and "Selling Salem Snake PetroOil in PDX." The final comment was by "Ronald" who wrote:

> Now that Sho Dozano has severed all business ties with Terry Beard (cantakerous [sic] obnoxious dishonest new money pig self proclaimed god) of Beard Frame Shops and of TheBigBidet.com, oops, I mean Thebigday.com, I will vote for him. Many business leaders in Portland feel the same way. He really did himself a serious diservice [sic] when he decided to trust someone like Terry Beard. After hearing of how Terry Beard had mistreated so many, including his own employees, we couldn't understand why Sho was doing business with him. Thanks Sho for restoring out faith in you. Wow. What if Terry Beard ran for Mayor. That would be a joke. He thinks he is going to write a book on manners when he doesn't have any. I was in the booth next to him at Ringside, and all he did was brag about himself. Sad. Again, many of us are rooting for Sho here in Portland after he got rid of Terry Beard.

There were no further comments to Ms. Ruiz' post.

The Mercury provides access to Blogtown as a public service to permit members of the public a forum to comment on the posts made by the newspaper's reporters. The newspaper does not edit or fact-check the public comments. Rather, as with other blogs, *The Mercury* simply provides the server that passively posts the comments submitted. Once a member of the public has signed up to post comments on Blogtown, *The Mercury* has no way of confirming the accuracy of the e-mail address input in the sign-up form and the screen names usually do not identify the person posting a comment.

The only information the newspaper has about someone posting a comment is the list of numbers representing the IP (Internet protocol) address. An IP address, such as "192.168.100.1," generally identifies the Internet service provider from which an e-mail is sent but does not specifically identify the individual sender. *See* http//en/wikipedia.org/wiki/IP_address.

Third Party Subpoena to Newspaper

Terry Beard, the man derogatorily referenced in the blog comment by "Ronald," filed suit against "Ronald" and those who had posted comments about Beard on other blogs. Beard served a third-party subpoena on *The Mercury* contending that he could pursue his defamation claim against "Ronald" only if *The Mercury* would provide the information the newspaper had obtained from "Ronald" when he signed up to post comments on Blogtown. The subpoena demanded production of any documents referring to Terry Beard and any information supplied by "Ronald." *The Mercury* objected to the subpoena by letter, as required by court rule.

Three months later, Beard moved to compel *The Mercury*'s compliance with the subpoena. *The Mercury* opposed the subpoena based on the Oregon Shield Law and the First Amendment protection of anonymous speech.

Oregon Shield Law

The Oregon Shield Law provides in relevant part:

> (1) No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or

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> body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise:
>
> ***The source of any*** published or unpublished ***information obtained*** by the person ***in the course of*** gathering, receiving or ***processing information*** for any medium of communication to the public; or
>
> ***Any unpublished information obtained*** or prepared by the person ***in the course of*** gathering, receiving or ***processing information*** for any medium of communication to the public.

ORS 44.520(1).

The Mercury argued that a newspaper may not be compelled to identify the source of information or produce any "unpublished information" the newspaper has obtained in the course of "receiving" or "processing" information for a "medium of communication." "Unpublished information" refers to "any information not disseminated to the public" and includes "all … data of whatever sort not themselves disseminated to the public." ORS 44.510 (5). "Processing" and "receiving" must mean something other than the alternative verb that accompanies these words, "gathering … information," and "processing" is defined by the statute to have "its ordinary meaning and *includes, but is not limited to*, the compiling, *storing* and editing *of information*." ORS 44.510(3) (emphasis added).

In short, the Shield Law protects a newspaper from compelled disclosure when the newspaper is "gathering … information," "receiving … information," or "processing information." That means that a newspaper is protected in its conduct beyond mere gathering of information and includes the passive receipt or processing of information without any requirement that the information have been solicited or edited by the newspaper.

Anonymous Speech Protection

The Mercury also argued that the First Amendment independently protected the anonymous speech of "Ronald." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) ("an author's decision to remain anonymous … is an aspect of the freedom of speech protected by the First Amendment"). The importance of this bedrock principle has been reaffirmed in the context of the unique speech capabilities of the Internet.

As Internet technology has evolved over the past two decades, computer users have encountered a proliferation of chat rooms and websites that allow them to share their views on myriad topics from consumer products to international diplomacy. Internet bulletin boards, or "message boards," have the advantage of allowing users, or "posters," to express themselves anonymously, by using "screen names" traceable only through the hosts of the sites or their Internet Service Providers (ISPs). *Krinsky v. Doe*, 159 Cal. App. 4th 1154, 1158 (2008). The *Krinsky* Court explains:

> The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers' identities, the online forum allows individuals of any economic, political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field.

Id. at 1162.

Although the First Amendment protection of anonymous Internet speech is not absolute, it is significant. The First Amendment protects the identity of the anonymous speaker from compelled disclosure unless the plaintiff can first establish a *prima facie* case of defamation. *Id.* at 1172. "Requiring at least that much ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate criticism." *Id.* at 1171.

Trial Court Decision

The Clackamas County Circuit Court denied the motion to compel based only on the Shield Law. The court recognized that the plaintiff's position was that the statutory language "in the course of gathering, receiving, or processing information" is synonymous with "in the course of gathering news." The court rejected this proposition, concluding that the Shield Law was intended to have a wider scope than newsgathering. Straying from both the Shield Law and the facts before it, the court also noted in *dicta* that "[i]f the comment had been totally unrelated to the blog post [by the reporter], then the argument could be made that the Portland Mercury did not receive it in the 'course of gathering, receiving, or processing information for any medium of communication to the public.'"

Jessica L. Goldman is a member of Summit Law Group in Seattle, Washington. She represents The Portland Mercury.

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Lights Out on False Light in Florida

Supreme Court Rejects Tort

By Deanna K. Shullman

The Florida Supreme Court has rejected the false light invasion of privacy tort in Florida because it is duplicative of defamation and likely to impede constitutionally protected free speech. *Jews for Jesus, Inc. v. Rapp*, Case No. SC06-2491 (Fla. Oct. 23, 2008); *Anderson v. Gannett Co., Inc.,* Case No. SC06-2174 (Fla. Oct. 23, 2008). Five justices unanimously agreed to reject the tort. Two justices, new to the court since oral argument in the cases, did not participate in the decisions.

Illuminating False Light Law in Florida

Prior to these decisions, the Florida Supreme Court never had occasion to substantively consider the false light tort. False light originally was identified by tort scholar William L. Prosser in a 1960 law review article that expanded on Warren and Brandeis' 1890 theory of privacy. False light first made its way to the appellate courts in Florida in the early 1980s in a case in which the plaintiff claimed she had been cast in a false light because her late husband, a pilot killed in an airline crash, was subsequently portrayed in a book and movie about the doomed flight as a ghost who reappeared on subsequent airline flights. Then appellate Judge Harry Lee Anstead, now a justice of the Florida Supreme Court, rejected the claim, holding that Florida does not recognize a privacy claim premised upon relational rights to privacy. *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1982).

In the more than 25 years since *Loft* was decided, not a single appellate court in Florida has upheld a judgment for the plaintiff in a false light case. Many false light claims in Florida have failed under Florida's long-standing single cause of action rule, which requires litigants to bring claims premised upon false and defamatory speech as defamation claims and not as other torts. *E.g., Ovadia v. Bloom,* 756 So. 2d 137, 140-41 (Fla. 3d DCA 2000) (false light claim fails because defamation claim is barred by two-year statute of limitations); *Byrd v. Hustler Magazine, Inc.,*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983) (finding that because photograph, taken as a whole, did not convey a false impression, it was not defamatory and therefore could not be invasion of privacy by false light); *Clark v. Clark*, Case No. 93-47-CA, 1993 WL 528464 at * 5 (Fla. 4th Jud. Cir. 1993) (because news story was accurate, was not defamatory, and was, in any event, subject to the official action privilege, false light claim also failed).

For all practical purposes, for nearly twenty years, the future of false light in Florida looked dark.

But the landscape of the false light tort began to change after the Second District Court of Appeal's 2001 decision in *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355 (Fla. 2d DCA 2001), *rev. den.* 799 So. 2d 216 (Fla. 2001). In that case, the plaintiff claimed that a "60 Minutes" broadcast, though truthful, gave the false impression he beat his wife and children. The appellate court held that a plaintiff pursuing a false light claim was not required to prove falsity and instead could premise a false light claim upon truthful speech giving rise to a false impression.

The *Heekin* Court further questioned whether actual malice would be an element of the tort in these circumstances. The court went on to say that even if actual malice was required, knowledge or reckless disregard of the false light was all that would be required.

Heekin therefore provided plaintiffs with a claim against publishers of truthful information that could not be had under defamation law (which requires fault and is constitutionally constrained by several privileges and defenses) or the other privacy torts. A flood of false light litigation ensued.

The Dark Side of False Light: Anderson and Rapp

The most prominent case to emerge in the flood of false light litigation post-*Heekin* was *Anderson v. Gannett Company, Inc.* Case Nos. 2001-CA-1728 (Fla. Cir. Ct. Escambia County); 1D05-2179 (Fla. 1st DCA); 06-2175 (Fla. Sup. Ct.).

In *Anderson*, the plaintiff accused Gannett's *Pensacola News-Journal* of falsely implying that he murdered his ex-wife and got away with it in article that truthfully reported that Anderson shot and killed his wife and that law enforce-

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ment officials ruled the shooting a hunting accident. The article addressed the broader issue of the use of political clout to gain special favors.

Joe Anderson sued the newspaper for false light more than two years after the article at issue was published, so the defamation statute of limitations had run and no defamation claim could be brought.

At trial, plaintiff was not required to prove that the article created the false impression that he murdered his wife, and defendants were not allowed to prove that this alleged impression was true. Defendants' pretrial motions claiming that the statements were privileged under defamation law (the information complained of had been obtained from government sources) were rejected. The jury awarded Anderson roughly $18.3-million, the largest verdict against a news organization in Florida history.

On appeal, the First District Court of Appeal held that the two year statute of limitations applicable to defamation actions also applied to false light claims, and reversed the judgment in October 2006. *Anderson v. Gannett Co., Inc.*, 947 So. 2d 1 (Fla. 1st DCA 2006). The *Anderson* Court asked the Florida Supreme Court to determine which statute of limitations should apply to false light.

Shortly after the First District asked the state's high court to resolve the limitations issue, the Fourth District Court of Appeal certified to the Florida Supreme Court the question of whether Florida recognizes the false light cause of action at all. *Rapp v. Jews for Jesus, Inc.*, 944 So. 2d 460 (Fla. 4th DCA 2006). There, Edith Rapp sued Jews for Jesus for defamation and false light based upon an account by Bruce Rapp, Mrs. Rapp's stepson, in a Jews for Jesus newsletter.

Mrs. Rapp claimed the newsletter gave the false impression that she had joined Jews for Jesus or had accepted and adopted the organization's philosophies. The Fourth District Court of Appeal affirmed dismissal of the defamation claim because it agreed with the trial court that the statements were not defamatory. The appellate court, while expressing doubt as to the value of the false light tort, reinstated Mrs. Rapp's false light claims because it determined that a "major misrepresentation" of a person's religious briefs might support the highly offensive element of the false light claim. The appellate court, in reinstating the claim, asked the Florida Supreme Court to determine whether false light existed in Florida.

The two cases were consolidated for oral argument before the Florida Supreme Court. Oral argument took place in March 2008.

The Court Extinguishes False Light

Because of the significance of the question to be decided, both Gannett and Jews for Jesus were assisted in their appeals by several media organizations and First Amendment groups, which urged the Court to reject the false light tort. Many of the organizations participating as amici had been swept up in the flood of false light claims in the wake of *Heekin* and were concerned about the impact of a decision to recognize the tort on both existing litigation and their long-term ability to gauge what conduct might give rise to liability for false light.

... the absence of a false light tort does not create any significant void in the law not already filled by defamation...

The Amici urged the Florida Supreme Court to think more broadly than the statute of limitations issue in *Anderson* and the pleading standard for false light in *Rapp*, answer the certified question in *Rapp* in the negative, and reject the tort outright.

In answering the certified question in *Rapp*, the Court began by determining that it had never substantively considered a false light claim or discussed any of the competing policy reasons justifying the tort. The Court further found that the false light cause of action did not exist at common law. In declining to adopt false light as a new cause of action in Florida, the *Rapp* Court surveyed false light law in Florida and other jurisdictions and stated that its research had not revealed a single case in which a false light claim standing alone had been upheld.

Instead, concerns persisted about false light's overlap with defamation and its potential to chill speech in the absence of many of the First Amendment protections applicable to the more established defamation tort. Prosser, the

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creator of the false light tort, had himself wondered in his 1960 article whether false light's overlap with defamation might swallow up the latter tort.

Colorado and Texas, both cited by the Florida Supreme Court, had each recognized this problem in rejecting false light in those jurisdictions. As Colorado's Supreme Court had held, false light is "too amorphous a tort" and risks an "unacceptable chill" on free speech values. *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 904 (Colo. 2002). Texas's highest court had similarly held that the uncertainty of the false light tort "would have an unacceptable chilling effect on freedom of speech." *Cain v. Hearst Corp.*, 878 S.W.2d 577, 584 (Tex. 1994).

Agreeing with these prior decisions outside the state, the Court explained that false light duplicates defamation. Both torts can be premised upon literally truthful statements that give rise to a false implication, and both torts allow for recovery of reputational and emotional distress injuries in Florida. The only exception to the "remarkabl[e] similar [ity]" between the two, found the Court, was the distinction between the "highly offensive" element of the false light tort and the "defamatory" element of defamation.

As in the Colorado and Texas cases on which the *Rapp* Court relied, the Florida Supreme Court found that defamation law "has a defined body of case law and applicable restrictions that objectively proscribe conduct with 'relative clarity and certainty.'" But the subjective "highly offensive" standard of the false light tort "create[s] a moving target whose definition depends on the specific locale in which the conduct occurs or the peculiar sensitivities of the day" and therefore "runs the risk of chilling free speech because the type of conduct prohibited is not entirely clear," the Court explained.

Moreover, the Court noted that defamation by implication, as the tort is called when truthful statements give rise to a false and defamatory impression, is constitutionally constrained by several privileges and defenses long applicable to defamation claims, including a short statute of limitations period, pre-suit notice in many cases, and several constitutionally-mandated privileges.

The Court was troubled that the same privileges – which are "necessary to ensure the delicate balance between preventing tortious injury resulting from defamatory statements and protecting the constitutional right to free speech" – might not apply to false light claims. The false light tort, thus, might "persuade plaintiffs to circumvent these safeguards in order to ensure recovery, even though the same conduct could equally be remedied under defamation law."

Finding that the absence of a false light tort does not create any significant void in the law not already filled by defamation, and noting that a flood of recent false light claims might indicate an attempt to circumvent defamation law, the Court declined to recognize a cause of action for false light invasion of privacy in Florida. In deciding to reject the tort, Florida joined a growing number of jurisdictions who have similarly refused to recognize false light.

This author's unofficial count includes nine other states that have rejected the tort (Colorado, Massachusetts, Minnesota, Missouri, New York, North Carolina, Texas, Virginia, and Wisconsin), one state (South Carolina) in which the highest court has not yet addressed the issue but is likely to reject the tort based upon the law in the appellate courts there, and five states (Hawaii, New Hampshire, North Dakota, Vermont, and Wyoming) that have not had occasion to address false light.

The remaining 34 states currently recognize the tort in some form, but only four of them (Arizona, Oklahoma, Pennsylvania and Tennessee) recognize a false light claim based upon *truthful* publications, a concept the overwhelming majority of U.S. jurisdictions, now including Florida, explicitly rejects. All four of these states, contrary to *Heekin*, further require actual malice, defined as knowingly creating the false impression or recklessly disregarding the false impression created (i.e., intent). In addition, Oklahoma makes an exception for matters of public concern, which are not actionable. And in Arizona, public figures cannot bring false light actions based upon statements concerning the performance of their official duties.

Turning to the cases at hand, the Court quashed the Fourth District Court of Appeal's decision in *Jews for Jesus* to the extent it had reinstated the plaintiff's false light claim. The Court also accepted the premise that a defamation claim can be predicated upon damage to reputation in the eyes of a "substantial and respectable minority of the community" and quashed that portion of the appellate court decision that affirmed dismissal of Rapp's defamation claim.

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Lights Out on False Light in Florida

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One justice, Justice Wells dissented from that portion of the opinion. Justice Wells wrote that he would affirm dismissal of the defamation claim, stating that the "standard of a 'substantial and respectable minority' is plainly too vague to be a fairly applied standard." The Court did not otherwise consider the merits of the defamation claim, instead remanding the matter to the Fourth District Court of Appeal for further proceedings.

As to *Anderson*, the Court held that its rejection of the false light tort in *Jews for Jesus* rendered its consideration of the statute of limitations issue presented in the *Anderson* case moot. Anderson argued that the Court could not retroactively abolish a cause of action, so that his claim should stand. But the Court held that false light had not existed at common law and had never been recognized by the Florida Supreme Court. Therefore, Anderson could not recover against Gannett on that basis. The Court further disapproved of the 2001 appellate court decision in *Heekin* to the extent it had assumed the existence of the false light cause of action.

Both Anderson and Rapp may move for rehearing. Those motions must be presented to the Court by early November. Review of these decisions by the United States Supreme Court should not be possible as they are related to issues of state law and not federal law.

Deanna Shullman is a partner in Thomas & LoCicero PL's Fort Lauderdale, FL office. She, along with her partners Gregg Thomas, Carol LoCicero, Susan Bunch, Jim Lake, Jim McGuire and Rachel Fugate of the firm's Tampa office, represented the amici curiae in both Anderson and Rapp. Robert C. Bernius of Nixon Peabody, L.L.P., Washington, D.C., and Dennis K. Larry and Donald H. Partington of Clark, Partington, Hart, Larry, Bond and Stackhouse, Pensacola, FL, represented Gannett in the Anderson case. The plaintiff in Anderson was represented by Bruce S. Rogow, Fort Lauderdale, Beverly Pohl of Broad and Cassel, Fort Lauderdale, and Willie E. Gary, of Gary, Williams, Parenti, Finney, Lewis, McManus, Watson, and Sperando, Stuart, FL. The plaintiff in Rapp was represented by Barry M. Silver, Boca Raton, FL, with assistance from the Liberty Counsel, Lynchburg, VA.

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Ohio Newspaper Wins Libel Trial Over Erroneous Report on Indictment

Plaintiff Failed to Prove Mistake Was Negligent

By Rachelle Kuznicki Zidar

On September 26, 2008, an Erie County jury reached a defense verdict in a libel *per se* action filed by a private figure plaintiff against the *News Journal,* a newspaper published in Mansfield, Ohio. *Thomas S. Flippen v. Gannett Co., Inc., et al.,* No. 2006 CV 944 (Ct. Common Pleas). The jury found that the plaintiff failed to meet his burden of establishing via clear and convincing evidence that Defendants had acted negligently in making the publication.

Background

The genesis of the lawsuit was an August 22, 2006, article concerning the return of indictments by the Grand Jury in Richland County, Ohio. The newspaper incorrectly identified the charge filed against plaintiff as "unlawful sexual conduct with a minor (four counts)" when plaintiff was actually indicted for felony non-support of dependents. The article was based upon a news release from the Richland County Prosecutor's office that identified 57 individuals and the crimes for which they were charged.

The reporter wrote a front page story about two of the more noteworthy offenders and published a list identifying the 55 remaining indictees, including plaintiff, on page 5A. The article was also posted on the newspaper's Internet website.

Plaintiff learned of the publication approximately six weeks later and brought it to the defendants' attention. A correction clarifying the charges plaintiff was actually indicted for was printed in the *News Journal* the following day. The article was permanently removed from the Internet archives approximately six months later.

By all accounts, the mistake the reporter made in this case was an honest one. He simply switched one charge for another when creating the continued article containing 55 names of individuals charged with crimes. During discovery, it was learned that the indictee listed directly beneath Plaintiff was in fact charged with "unlawful sexual conduct with a minor." The testimony from the reporter suggested that he must have confused the two when reviewing the list from the Prosecutor's office in using it to draft his article.

The plaintiff in this matter did not live in the county in which the article was published, but in Erie County, approximately one hour away. During discovery, defendants uncovered plaintiff's prior reputation for run-ins with the law. In that regard, plaintiff had been convicted three times for driving under the influence, once for domestic violence and had been held in contempt on several occasions and eventually incarcerated in connection with his chronic failure to meet the child support obligations for his two children.

Plaintiff's less than stellar reputation, combined with his minimal to nonexistent employment during the five years preceding the lawsuit, presented strong arguments that plaintiff was not damaged by the publication. In the end, however, the jury never reached the issue of damages as it found plaintiff had failed to establish by clear and convincing evidence that the Defendants had acted negligently in making the defamatory statement.

Pre-Trial Proceedings

During the summary judgment proceedings, defendants argued unsuccessfully that the publication was substantially accurate and, therefore, protected by the impartial report privilege. In denying defendants' motion for summary judgment, the court also determined that plaintiff was a private figure and the publication defamatory *per se*.

At the final pre-trial, plaintiff's only demand was $3.4 million, leaving little choice for defendants but to try the case.

Motions In Limine

Defendants filed two motions i*n limine* in an attempt to keep plaintiff's experts from testifying. The first expert was a licensed social worker who sought to testify that plaintiff's mental anguish was consistent with others he has dealt with who have been falsely accused of sexual misconduct. However, the social worker had not actually interviewed or counseled plaintiff in any way and the court granted defendants' motion excluding the proffered testimony. The second motion *in limine* concerned the proffered testimony of a computer technician who was identified as an expert on scanning technology. His testimony was intended to establish

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how the electronic scanning of public records could minimize errors such as that at issue in this case.

The court conducted a *voir dire* examination of both experts. The computer technician was permitted to testify, but solely as to the state of the art regarding scanning technology. The expert was not permitted to express any opinion regarding the standard of care in the media industry, as he had no experience whatsoever that would qualify him to render such an opinion.

The case was tried before Magistrate Steven C. Bechtel, by agreement of the parties, concerning the following issues:

1. Whether the plaintiff had proven by clear and convincing evidence that defendants possessed the requisite degree of fault (in this case, negligence);

2. Whether the plaintiff sustained actual injury due to the publication; and

3. What damages, if any, plaintiff was entitled to recover.

The trial lasted three days. After approximately two and one-half hours of deliberation, the jury returned a defense verdict on the issue of negligence and, therefore, a general verdict was entered in favor of defendants.

Plaintiff's Trial Strategy

The theme of plaintiff's case was that, although he had had prior brushes with the law, those paled in comparison to reportedly being indicted for "unlawful sexual conduct with a minor," a term plaintiff's counsel equated with child molestation. Plaintiff further sought to establish that defendants were negligent through the testimony of his technology expert. The expert testified that scanning technology is readily available and minimizes transcription errors when an individual is attempting to reproduce a list such as that provided to the reporter, in this case, by the prosecutor's office. During cross examination, however, defense counsel pointed out that the expert had no experience whatsoever in the media industry and, therefore, could not testify whether the use of scanning technology by newspapers was prevalent.

Defense counsel also established that the reporter did not merely replicate the list received from the prosecutor's office, but selected two noteworthy crimes to write about and provided an altered listing of the remaining indictees (including the conversion of their dates of birth to ages) in the second part of his article. The point driven home to the jury was that reporters and newspapers are not in the business of merely replicating official court documents, but sifting through newsworthy public records and presenting the information in an interesting and understandable format.

Plaintiff attempted to blame the defamatory publication for his less than profitable career as an insurance salesman, even suggesting that potential customers recognized his name from the libelous article and refused to do business with him. Upon cross examination, however, it was established that plaintiff had been minimally employed, at best, prior to the publication of the article and was actually current for the first time in many years with his child support payments as of the date of trial.

Defense Strategy

The defense theme in this case was two-fold. The first and foremost strategy was to present persuasive evidence that the error made in this case was an innocent one and did not fall below the standard of care in the newspaper business. Secondly, the defense aggressively refuted plaintiff's claimed damages from both an economic and reputational standpoint.

… the expert gave specific examples of what he considered to be errors caused by reporters acting below the standard of care and opined that the article at issue was not such an instance.

Any inference of negligence the jury may have drawn from the publication of the incorrect charge was rebutted by the expert testimony of a managing editor of a similarly situated newspaper in a nearby county. The editor established that reporters routinely receive police reports and other public information concerning alleged crimes in a community and create stories based upon that information. The defense's expert witness also testified that, although mistakes are not acceptable and newspapers strive for 100% accuracy, humans are fallible and mistakes are inevitable.

Importantly, the expert gave specific examples of what he considered to be errors caused by reporters acting below the stan-

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dard of care and opined that the article at issue was not such an instance. In that regard, the editor testified under cross-examination that if perfection were the standard of care, all newspapers would fail.

Further, both the expert witness and the managing editor of the *News Journal* rebutted the testimony of plaintiff's expert that scanners should be utilized in the newsroom and clearly stated that this technology was not mainstream. In fact, the defendants' managing editor testified that they had tried to implement scanners years ago but found that the reporters spent more time "cleaning up" material scanned in than they did inputting original information.

Thus, at the close of evidence, the jury was left with only defendants' evidence that the newspaper at issue in this case adhered to or met the prevailing standard of care. To emphasize this point, defense counsel dwelled upon the jury instruction addressing negligence during closing statement clarifying that the standard of care was that care a reasonably careful person would use *under the same or similar circumstances*.

Defendants presented the expert testimony of an editor who had worked in the newspaper business all his life and testified that the mistake at issue was an innocent one and not the product of negligence. In contrast, plaintiff presented the testimony of a computer technician with no knowledge of the newspaper business regarding scanning technology. This latter testimony was apropos of nothing as it related to the jury's charge to determine whether the reporter in this case used the care that a reasonably careful reporter would under the same or similar circumstances.

Defense counsel also cast doubt upon the credibility of plaintiff's testimony, who sought to blame all his ills upon the publication at issue. In that vein, defense counsel argued that plaintiff seemed far more bothered by the obscure publication of a false charge against him buried in a list of 55 names on page 5A in a newspaper in a county in which plaintiff neither lived nor regularly worked, than the many legitimate convictions against him. In that light, it was questionable whether plaintiff suffered any actual harm at all. Certainly, plaintiff had not had a prosperous career prior to the publication of the article in so far as he had earned less than $20,000.00 in the past five years.

Accordingly, the jury would have had a difficult time finding more than nominal damages given that there was no evidence of established economic loss and Plaintiff failed to present any expert testimony concerning his mental health.

Significant Trial Rulings

At the close of plaintiff's case, defense counsel moved for and obtained a directed verdict on the following issues:

1. The absence of any evidence of constitutional malice; and

2. The publication involved a public issue and, therefore, plaintiff was not entitled to presumed damages but must establish actual harm.

The court determined that, although plaintiff was a private figure, the article addressed a matter of public concern insofar as it was about the return of indictments by the Richland County Grand Jury. Accordingly, pursuant to guidelines developed by *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985), 472 U.S. 749, and relevant Ohio case law, when a case involves an issue of public concern, a private figure is only entitled to presumed damages if actual malice is proven by clear and convincing evidence. This rule is applicable even when, as in this case, the statement was defamatory *per se*. That is, even though the plaintiff was a private figure and the statement concerning the alleged crime was defamatory *per se*, the plaintiff was limited to actual damages unless he presented clear and convincing evidence of actual malice.

Here, there was no evidence of actual malice and plaintiff was limited to proving negligence and actual damages.

Verdict

Closing arguments were heard on September 26, 2008, and, after approximately two and one-half hours of deliberation, the jury returned a defense verdict of no negligence by a 6-2 margin. Objections to the Magistrate's Decision are pending.

Rachelle Kuznicki Zidar and Rich Panza of Wickens, Herzer, Panza, Cook & Batista Co. in Avon, Ohio, represented the News Journal in this case. Plaintiff was represented by Mark A. Stuckey, Sandusky, Ohio.

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Oregon Supreme Court Affirms Fraud Judgment Against Yellow Pages Publisher

Court Found that Publisher Participated in Fraud

The Oregon Supreme Court affirmed a $1.58 million fraud judgment against Dex Media, the publisher of a local Yellow Pages, for publishing an advertisement falsely implying that a dermatologist was "board certified" in plastic surgery. *Knepper v. Dex Media et al.,* No. S055155, 2008 WL 4508531 (Or. Oct. 9, 2008) (De Muniz, Gillette, Durham, Balmer, Walters, and Linder, JJ.).

The court found that the publisher and doctor had jointed created the false advertisement and that it was the proximate cause of plaintiff's injuries suffered in a botched liposuction procedure.

Background

Timothy Brown, the doctor who performed the botched liposuction procedure on plaintiff, was board certified in dermatology but not in plastic surgery. Brown had advertised in the local Yellow Pages under Dermatologists. Brown was interested in attracting more liposuction patients and a Dex sales representative "mocked up" a new advertisement to be placed under the "Surgery, Plastic and Reconstructive" section of the Yellow Pages. The ad described Brown as "Board Certified" without specifying that his certification was in a different specialty. Brown's office manager objected to the ad as misleading but the sales rep insisted that the phrase be included to help Brown appeal to a broader range of potential patients. Brown, who had the final say, agreed to go along with the advice.

The plaintiff, M.M. Knepper, the woman mangled by the liposuction procedure, stated that what lured her to Brown's office, at least in part, was the advertisement for his services she saw in the Yellow Pages. In her fraud claim against Dex Media, the plaintiff maintained, *inter alia*, that she was seeking a board certified doctor, that she relied in part on the misleading advertisement, and that she never would have consented to the surgery had she known the truth about Brown's credentials.

Since Dex Media knew that Dr. Brown wasn't board certified but nonetheless collaborated with him on the misleading ad, Knepper argued that Dex Media should be held liable for fraud. A jury, undoubtedly moved by the expert testimony of a plastic surgeon who described the plaintiff's injury as an "uncorrectable disaster" unlike any he had ever seen, returned a $1.58 million verdict for the plaintiff, which was reduced by the trial court by the amount of plaintiffs' previous settlement with the doctor.

Oregon Supreme Court Decision

On appeal, Dex Media argued that the trial court should have granted a directed verdict, a judgment notwithstanding the verdict, or a new trial because plaintiff failed to prove that the action taken by Dex Media was the proximate cause of her harm. Furthermore, defendant alleged that plaintiff had failed to present specific evidence to establish that the *particular* injury she incurred was a reasonably foreseeable consequence of the defendant's conduct.

The Oregon Supreme Court, however, was not persuaded. It said that the concept of proximate cause is synonymous with the notion of reasonable foreseeability and that in this case the plaintiff's injury might reasonably be expected to result from the misleading ad published by Dex Media.

The court wrote: "An advertisement that misrepresents a medical provider's qualifications self-evidently creates a risk that a consumer who seeks treatment from the provider in reliance on that misrepresentation will suffer an adverse result that would not have occurred if the provider's qualifications had been as represented."

The court held that there was no requirement that Dex Media foresee the particular adverse results caused to the patient by the surgery. It was enough that the publisher of the Yellow Pages had reason to believe that Knepper would act in reliance on the advertisement and that the resulting harm would likely ensue.

As a publisher, Dex also argued that it should be accorded additional protection for claims arising out of false or misleading advertisements. After all, it contended, if media companies were held liable for the publication of such advertisements, the result would be an unconstitutional chilling effect on the free flow of information. Thus, Dex pushed for a more stringent standard, arguing that liability should not attach unless the publication is "done maliciously or with intent to harm another or in reckless disregard of that possibility."

The Oregon Supreme Court rejected this reasoning. It noted that this was not the case of a newspaper unwittingly publishing a bogus advertisement. Here, the court concluded the fraud was directly perpetrated by a publication itself.

Dex Media was represented by Michael H. Simon, of Perkins Coie LLP, Portland. Plaintiff was represented by Kathryn H. Clarke, Portland.

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California Anti-SLAPP Statute Applies to Alleged Assault by Press Photographer

Plaintiff Can't Frustrate Statute by Pleading Illegal Conduct

In an interesting unpublished decision, a California appellate court granted a newspaper's motion to strike a complaint for assault, finding that a plaintiff cannot frustrate the purposes of the anti-SLAPP statute by simply pleading an illegal act. *Yan v. Sing Tao Newspapers San Francisco Ltd. et al.*, No. A120311, 2008 WL 4359534 (Cal. App. Sept. 25, 2008) (Swager, Marchiano, Margulies, JJ.) Instead, the court looked to the gravamen of the action to apply the statute and strike the claim.

Background

In April 2007, the plaintiff Demas Yan was in court in San Francisco to testify as a defense witness in a public corruption trial of a city official. Kristin Choy, a reporter and photographer for Sing Tao Newspapers, a California-based Chinese language newspaper company, was assigned to cover the criminal trial. She was in the courtroom for Yan's testimony and then followed him out of the courthouse. What happened during that time is disputed. Plaintiff alleged that Choy "accosted" him and refused to stop taking his picture when he asked her to stop, and that she tried to push his hand and briefcase away when he attempted to shield his face from the camera. In contrast, Choy stated that she introduced herself as a reporter and followed him out of the courthouse taking 10 photographs of him. After he shielded his face and told her to stop, she complied and walked away.

Plaintiff initially sued for invasion of privacy over the content of the news report about his trial testimony. After defendants sent a letter to Yan advising him of their intention to move to strike under Cal. Code 425.16, he filed an amended complaint alleging a cause of action for assault.

The trial court denied the defendants motion to strike, holding that "an alleged assault is not protected activity under the anti-SLAPP statute." The trial court apparently relied on the California Supreme Court's 2006 decision in *Flatley v. Mauro*, 39 Cal. 4th 299 (Cal. 2006), where the court held the statute inapplicable where the defendant's conduct is illegal as a matter of law.

Appellate Court Decision

The Court of Appeals ruled that in determining whether conduct is within the scope of the statute, a court's inquiry should not turn solely on the allegations of the complaint. Thus the trial court erred in finding that the anti-SLAPP statute categorically did not apply to a complaint for assault.

Instead, the actions must be evaluated in their entirety. Here Choy was acting in her capacity as a reporter by gathering information on a newsworthy event. Furthermore even if the plaintiff had alleged protected and unprotected activity by the reporter, the cause of action would still be subject to the anti-SLAPP statute "unless the protected conduct is merely incidental to the protected activity." "A plaintiff," the court stated, "cannot frustrate the purposes of the SLAPP statute through a pleading tactic or combining allegations of protected and non-protected activity under the label of one cause of action." *Yan* at *4.

> Here, the gravamen of respondent's action was based on appellants' First Amendment right to report on issues of public interest. Choy's protected conduct of reporting on respondent's testimony at the Fallay trial was not "merely incidental" to the conduct alleged to be an assault. Moreover, Choy's evident purpose in attempting to push aside respondent's hand and briefcase (assuming that she, in fact, did so) was to take photographs of him for her news story. Accordingly, the complaint alleges conduct that is protected by section 425.16. *Id.*

As to the merits of the complaint, the court concluded that plaintiff failed to show any probability of prevailing on the claim. His declaration that he was "apprehensive of harmful and offensive physical conduct" was otherwise unsupported by more specific factual allegations. Furthermore, he offered no evidence that Choy intended to cause harm.

Plaintiff acted pro se. Cedric C. Chao, Morrison & Foerster, San Francisco, represented Sing Tao Newspaper and Kristin Choy.

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New York Court Make Benefit Glorious *Borat* Movie

By Rachel F. Strom

The United States District Court for the Southern District of New York has again sided with Borat Sagdiyev, the fictional Kazakh reporter in *Borat – Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan*.

In *Psenicska v. Twentieth Century Fox Film Corporation, et al.*, Nos. 07 CIV 10972 (LAP), 08 CIV 01571 (LAP), 08 CV 1828 (LAP), 2008 WL 4185752 (S.D.N.Y. Sept. 3, 2008), Judge Loretta A. Preska of the Southern District of New York dismissed three more lawsuits brought by various participants in the *Borat* motion picture against Twentieth Century Fox Film Corporation, the distributor of *Borat,* Sacha Baron Cohen, the actor who plays and created the character Borat and a writer and producer of the film, and others involved in the production and distribution of the movie. In dismissing the three lawsuits, the Court held that the plaintiffs were all bound by the clear and unambiguous wording in releases that they had all signed. The court thus reaffirmed the principle that participants of a film may not maintain a lawsuit in the face of a clear and valid release.

Borat

Borat, a documentary-style film, tells the story of Borat, a fictional Kazakh TV personality dispatched to the United States by the Kazakhstan Ministry of Information to report on the American people. In the film, Borat travels across America with his friend and producer, Azamat Bagatov. During this transcontinental journey, Borat encounters a homophobic rodeo owner, kindly Jewish inn keepers, drunken fraternity boys and various other individuals. Mr. Cohen employs antics ranging from fish-out-of-water buffoonery, to eccentric and prejudicial commentary, to evoke reactions from the Americans Borat encounters.

In keeping with this theme, one of the plaintiffs Michael Psenicska – a high school math teacher and owner of a driving school in Maryland – is depicted in one scene attempting to teach Borat how to drive in preparation for Borat's cross-country trip. In the scene, Borat is constantly antagonizing the other drivers by shouting offensive remarks while he is dangerously flouting the rules of the road.

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

The Releases

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

The Proceedings

Plaintiff Martin originally brought suit against the producers of *Borat* on December 22, 2006 in the Jefferson Circuit Court in Alabama. But, on January 18, 2008, the Supreme Court of Alabama held that Martin was bound by the forum-selection clause of the release she signed, which stated that all claims must be brought in State and County

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New York Court Make Benefit Glorious *Borat* Movie

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of New York. *See Ex parte Cohen*, Case No. 1061288, 2008 WL 162598, at *1, *3 (Ala. Jan. 18, 2008).

While Martin's case was still pending in the Alabama court, apparently concerned that the Alabama courts might dismiss her case and that the New York statute of limitations would expire, Martin, on October 22, 2007, filed a summons with notice in the Supreme Court of the State of New York, County of New York. On February 22, 2008, the Defendants removed the action to the Southern District of New York. On March 28, 2008, after the Alabama court dismissed her claims, Martin filed a complaint in federal court.

Finally, in April 2008, Martin filed an amended complaint in the Southern District of New York alleging the she was fraudulently asked to appear in a "documentary" that about a "Foreign Reporter's travels and experiences in the United States," which would be shown on "Belarus Television." Martin was paid $350, signed a filming release, but she asked the court to rescind her release due the defendants' alleged fraudulent representations about the film. She also sought damages for fraudulent inducement, quasi contract/unjust enrichment and intentional infliction of emotional distress based on her appearance in *Borat.*

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

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

The defendants moved to dismiss the complaints in these three separate actions on the grounds that the plaintiffs' claims were barred by the releases they had signed. In the motions, the defendants argued that the releases contained specific waiver clauses, whereby the plaintiffs "acknowledge[d] that in entering into [the releases, plaintiffs were] not relying upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film."

Accordingly, the defendants argued that the plaintiffs' claims, which were all based on alleged misrepresentations about the nature of *Borat*, must be dismissed. In response, the plaintiffs argued that the defendants' alleged fraud voided the releases. Further, the plaintiffs argued that even if they were bound by the releases, the defendants' motion to dismiss should be denied because the description of *Bo-*

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rat as a "documentary-style film" in the release was ambiguous.

The Decision and Order

In a Memorandum and Order dated September 3, 2008, Judge Loretta A. Preska granted defendants' motions to dismiss in their entirety in all three cases and held that the plaintiffs' claims were barred by the releases they had signed. In the Order, Judge Preska first rejected Plaintiff's argument that the term "documentary style" in the releases is ambiguous. The Court held that *Borat* is unambiguously a documentary-style film. The court stated:

There can be no reasonable debate … that *Borat* is a film "displaying the characteristics of a film that provides a factual record or report." The Movie comprises interviews with real people and depictions of real events that are intended to provide a "factual record or report" albeit of a fictional character's journey across America. … The fact that Borat is a fictional character, however, does nothing to diminish the fact that his fictional story is told in the *style* of a true one. Indeed, *Borat* owes such effectiveness as it may have to that very fact.

Next, the court held that the specific and clear waiver clauses in the releases barred plaintiffs' arguments that they signed the releases based on misrepresentations about the nature of film.

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

the specific and clear waiver clauses in the releases barred plaintiffs' arguments that they signed the releases based on misrepresentations about the nature of film.

The defendants were represented by Slade R. Metcalf, Katherine M. Bolger and Rachel F. Strom of Hogan & Hartson LLP, New York City. Plaintiff Michael Psenicska was represented by Peter M. Levine, New York City. Plaintiffs Cindy Streit, Sarah Moseley, Ben K. McKinnon, Michael M. Jared and Lynn S. Jared were represented by Adam Richards, New York City.

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Update: Newspaper Publisher's Defamation Suit Against Freelance Journalist Dismissed

Anti-SLAPP Motion Granted

By Judith F. Bonilla and Charles D. Tobin

After two years of litigation and an interlocutory appeal, a California trial court finally granted the anti-SLAPP motion and dismissed a libel lawsuit brought by a newspaper publisher against an *American Journalism Review* (*AJR*) freelancer. *Ampersand Publishing, LLC v. Paterno*, Case No. 06CC12861 (California Superior Court, Orange County) (J. Siegel).

The freelancer returns to court soon to press for recovery of attorney's fees.

The California Superior Court in Orange County, on September 24, granted freelance journalist Susan Paterno's anti-SLAPP (Strategic Lawsuit Against Public Participation) motion. Cal. Code Civ. Proc., § 425.16. The dismissal came three months after an appellate court agreed that statements in her article did not defame the *Santa Barbara News-Press*, which is owned by controversial billionaire publisher Wendy McCaw.

Paterno wrote a December 2006 *AJR* article, "Santa Barbara Smackdown," reporting on the waves of firing and resignations of dozens of the newspaper's journalists since McCaw bought the newspaper in 2000. Following argument in April 2007 on Paterno's anti-SLAPP motion, the trial judge held the newspaper plaintiff failed to demonstrate a probability of prevailing on 29 of the statements alleged to be defamatory, but had met its burden with regard to four statements. The trial court permitted the publisher to take discovery of actual malice.

The California Court of Appeal, in its published opinion, *Paterno v. Superior Court*, 163 Cal.App.4th 1342, 78 Cal.Rptr.3d 244 (2008) (Aronson, Rylaarsdam, Ikola, JJ.), in June 2008, found that the four statements could not support a cause of action by the publisher and therefore held that the trial court abused its discretion by permitting discovery.

After reviewing each of the statements, the appeals court found that Ampersand did not introduce sufficient evidence to establish a prima facie case of false or unprivileged statements of fact. The court chided the plaintiff for its "novel theory of liability," which, if adopted, would have held the statements defamatory simply because they did not present the *News-Press*' side of the story. It further commented about the "irony" of a newspaper publisher seeking the chill of First Amendment freedoms.

The trial court noted at the hearing, after the case returned there last month, that the appellate ruling left nothing to litigate other than the amount of Paterno's recoverable legal fees and dismissed the lawsuit. Paterno's fee petition remains pending.

Holland & Knight LLP represents freelance journalist Susan Paterno in this matter. Cappello & Noël LLP and Dreier Stein & Kahan LLP represent Ampersand Publishing, LLC.

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Cleveland Scene Wins Summary Judgment on Claims Over Investigative Article

Doctor Did Not Lose Public Figure Status Over Time

The *Cleveland Scene* newspaper won summary judgment on libel and privacy claims brought by a doctor who claimed he was harmed by an investigative news article that questioned his medical credentials and resume. *Patrick v. Cleveland Scene Publishing, et al.*, No. 05 CV 2791, 2008 WL 4616889 (N.D. Ohio Oct. 20, 2008) (Wells, J.).

The court found that the plaintiff failed to rebut the allegations in the article and thus failed to raise an issue of fact over falsity. The court also addressed plaintiff's status, stating in strong terms that public figure status does not fade over time as it relates to the original controversy.

At issue was an October 2004 cover story entitled "Playing Doctor." The article reported on investigations into plaintiff's credentials and alleged that he misrepresented his medical education and training in the 1970s. It also discussed his more recent job movement among various hospitals and current discrepancies about his age on his state medical licenses.

The plaintiff, Dr. Edward Patrick, had gained some public attention beginning in the 1970s through his association with Dr. Peter Heimlich. Plaintiff claimed to be a "co-inventor" of the anti-choking technique known as the "Heimlich Maneuver" and he had taken many public actions in the ensuing decades to promote it and himself for creating it.

Plaintiff claimed that at present he was "nothing more than a practicing doctor" and not a public figure. The court strongly disagreed, finding that he was a public figure for the pre-existing public controversy over the development of the Heimlich Maneuver and his self-proclaimed role in creating it. His public figure status for reporting on this controversy did not fade over time. Moreover, his public figure status was not limited to discussion of the anti-choking technique, but extended to discussion of his medical training and competence as they related to his public advocacy for the technique.

Kenneth A. Zirm and Reem Shalodi, Ulmer & Berne, Cleveland, OH, represented Cleveland Scene Publishing. Plaintiff was represented by N. Jeffrey Blankenship, Edward S. Monohan, Sr., Monohan & Blankenship, Florence, KY; and Randy J. Blankenship, Adkins Blankenship Massey & Steelman, Erlanger, KY.

Summary Judgment Affirmed for Detroit News

The Michigan Court of Appeals affirmed summary judgment for *The Detroit News* and its reporter, Doug Guthrie, in a libel, negligence, and invasion of privacy action brought by the owner of several topless dancing clubs. *Hamilton v. Detroit News, Inc.*, No. 278989, 2008 WL 3979477 (Mich. App. Aug. 28, 2008) (Cavanagh, Jansen, Kelly, JJ.). The court held that plaintiff was a public figure because of his notoriety as a major figure in the local adult entertainment industry and found no evidence of actual malice.

The article at issue reported on an armed robbery at plaintiff's house and further reported that a "racketeering case is pending in U.S. District Court alleging officers found cocaine, evidence of a gambling ring and $1.7 million cash at the club." The trial court granted defendants' motion for summary judgment, holding that the statements were not defamatory and that plaintiff was a limited-purpose public figure who failed to provide any evidence of actual malice.

On appeal, the plaintiff argued that he was not a limited purpose public figure, and that he therefore did not have to meet the high burden of proving actual malice. The Michigan Court of Appeals disagreed. First, the court swept aside plaintiff's argument that the trial court considered hearsay evidence in granting summary judgment. The documents submitted on the motion were permissible to prove that plaintiff was a public figure and/or that the article was privileged as a fair reports of public records. Since plaintiff had voluntarily injected himself into the controversy surrounding his adult entertainment establishments, and had been quoted on the subject in various news accounts for at least 10 years prior to the publication of the allegedly defamatory *Detroit News* article, the evidence showed he was sufficiently in the public eye to be classified as a limited-purpose public figure.

The Detroit News was represented by Leonard Niehoff of Butzel Long, Detroit. Plaintiff was represented by Michael L. Donaldson.

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Planned Parenthood Wins Motion to Dismiss under the New Illinois Anti-SLAPP Act

Speech Aimed to Procure Favorable Government Action Found Protected

By Leah R. Bruno and Meghan E. B. Norton

Interpreting its legislature's newly-enacted anti-SLAPP statute, an Illinois court recently dismissed the amended defamation complaint filed by Eric Scheidler and the Pro-Life Action League, against Planned Parenthood of Illinois, its CEO, Stephen Trombley and Gemini Office Development, LLC. *Scheidler et al. v. Trombley, et al.*, No. 07 LK 513 (Sept. 2, 2008, 16th Judicial Circuit, Kane County).

Plaintiffs alleged that a publication placed by Planned Parenthood in a local newspaper and a letter written to public officials by Planned Parenthood's Trombley, which included statements about the Pro-Life Action League and its leader Joe Scheidler, were false and made with actual malice. The court found that the statements were immune from liability under the anti-SLAPP statute, which protects speech in the interests of safeguarding and encouraging participation in government. *See* 735 ILCS 110/1 *et seq*. (2007).

Background

The lawsuit arose out of a heated community controversy over Planned Parenthood's new facility that was scheduled to open in Aurora, Illinois, in mid-September of 2007. When applying for city building permits, Planned Parenthood did not originally disclose its identity seeking building and zoning permits through a subsidiary. Passionate public debate ensued when abortion opponents learned that the building under construction would house a Planned Parenthood clinic. Over one hundred opponents testified at a City Council meeting at the end of August, arguing that Planned Parenthood should not be allowed to open because it deceived the city about its identity. At the same time, the City of Aurora also notified Planned Parenthood that its approval of the clinic's opening had been suspended pending a formal review of the permitting process.

In response to the protests and political action taken by Planned Parenthood's opponents, Mr. Trombley sent a letter to Aurora officials, including the Mayor and City Council on behalf of Planned Parenthood, explaining that they had been open and truthful throughout the permitting process and had only wanted to protect the privacy and safety of those working on the project. Mr. Trombley's letter included a statement that the Pro-Life Action League had a history of violence to support his explanation that Planned Parenthood had wanted to avoid disruptive and potentially violent protests that could delay the facility's opening and endanger the organizations' employees and clients. Mr. Trombley also invited the officials to contact him if they had any questions or to learn more.

During this same time, Planned Parenthood also published a notice in the local newspaper, the *Aurora Beacon News*, requesting that the Aurora citizens voice their support for Planned Parenthood by contacting their aldermen. The notice also mentioned the threats of violence that Planned Parenthood potentially faced, and in doing so, again cited to the Pro-Life Action League's "well documented history of advocating violence."

Shortly thereafter, the Pro-Life Action League, its Communications Director, Eric Scheidler, and numerous individuals loosely connected to the Pro-Life Action League (who subsequently voluntarily dismissed their claims), filed a lawsuit in Kane County, Illinois. The Amended Complaint alleged that Steve Trombley, Planned Parenthood of Illinois and Gemini Office Development committed libel *per se* by imputing criminal violence to them.

The Citizen Participation Act

On August 28, 2007, Illinois joined a growing number of states by enacting specific legislation aimed at protecting individuals who speak out on matters of public concern. The statute, which is titled the Citizen Participation Act, includes lengthy policy language in the body of the Act itself. Highlighting that "[t]he threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights," the Act attempts to "strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government." Emphasizing a liberal construction, the statute immunizes "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government . . . regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome."

From a pragmatic standpoint, the law has several notable provi-

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Planned Parenthood Wins Motion to Dismiss under the New Illinois Anti-SLAPP Act

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sions. First, it provides that a hearing and decision on a motion under the Act must occur within 90 days after filing. The Act also provides for an expedited appeal from a trial court order that denies an anti-SLAPP motion. Finally, a moving party who prevails under the Act receives all reasonable attorneys' fees and costs incurred in connection with the dispositive motion. The statute is not itself a procedural vehicle, but simply provides a new grounds for bringing a dispositive motion and special considerations which must taken into account when such a motion is before the Court.

The Court's Analysis

Before ruling on whether Planned Parenthood's statements were protected by the new statute, the court addressed a number of threshold issues involving the parameters and constitutionality of the anti-SLAPP Act.

The court initially addressed a potential ambiguity under the statute stemming from the Act's provision that immunity shall be granted, "regardless of intent or purpose," contrasted with its requirement that the acts be taken with a "genuine aim." The court noted that if a malice or intent inquiry were proper, immunity for tortious conduct would possibly be limited based on intent. The court resolved the statute's potential ambiguity by looking to the *Noerr-Pennington* doctrine of immunity, which the act intended to adopt as revealed by the act's legislative history. In light of the act's reliance on *Noerr*, the court resolved that the appropriate test under the Act was "first and foremost an objective test" and did not provide for a subjective inquiry unless the objective test failed. As a result, the court found that the Act provided absolute immunity and did not exclude tortious acts from its protection.

Resolving the malice inquiry issue, the court next turned to an analysis of the statute's constitutionality. The court found that the Pro-Life Action League's arguments about constitutionality and Due Process were without merit because absolute privileges have long been upheld. The court highlighted Illinois' history of recognizing the conflict between the competing interests of individual reputations and a free and full discourse involving the process of government, but of nonetheless upholding immunity protections. Issuing a caveat that it was not within the court's discretion to determine public policy set forth by the legislature, the court ruled that the statute was constitutional.

The court next disposed of certain procedural arguments raised by plaintiffs. The court confirmed that the defendants' motion to dismiss was an appropriate procedure by which to file their claim under the anti-SLAPP Act, and also noted that a full evidentiary hearing with witnesses was not mandated under the statute. The court also reiterated the evidentiary standard provided in the statute, which requires that plaintiffs come forward with clear and convincing evidence once an anti-SLAPP motion has been filed.

Turning to the merits, the court found that "an objective review" of Mr. Trombley and Planned Parenthood's letter to Aurora officials revealed its intent to effect the opening of its health center in Aurora. The court found that in doing so, Planned Parenthood "sought to procure favorable government action, result, or outcome, that is, the continued cooperation of the City of Aurora in the permitting process and the opening of the health center in Aurora." The court pointed out that the Pro-Life Action League's own evidence confirmed that a genuine dispute existed and Planned Parenthood had petitioned the individuals who had the authority to approve the permitting process. Finally, the court held that the act's immunity provisions applied equally to Planned Parenthood's public notice in the *Aurora Beacon News*. The court concluded by holding that the anti-SLAPP act's provisions relating to discovery and hearing procedures were not an unconstitutional violation of separation of powers based upon prior Illinois Supreme Court authority.

Conclusion

As one of the first Illinois state court opinions to address the new anti-SLAPP Act, this decision may prove significant as courts continue to interpret the parameters of the protection provided by the statute without yet having guidance from either the appellate courts or the Illinois Supreme Court. Pursuant to the Act's mandate, Defendants' petition for attorneys' fees and costs is currently pending before the court. The court has also permitted the plaintiffs to file a Fourth Amended Complaint based on several newly-identified publications arising out of the same dispute, to which Planned Parenthood has responded with another anti-SLAPP motion to dismiss. The result of this subsequent anti-SLAPP motion will be determined in the months to come.

Leah R. Bruno is a partner and Meghan E. B. Norton is an associate with the media defense team at Sonnenschein, Nath & Rosenthal LLP in Chicago. They represented the defendants in this matter. Plaintiffs' counselare Thomas Brejcha, Peter Breen, and Jason Craddock of the Thomas MoreLaw Society in Chicago, IL.

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Condo Developer Cannot Sue for Defamation Based on Alleged Mistaken Identity

By Damon Dunn

A "mistaken identity" claim for defamation *per se* against a newspaper and its source was dismissed with prejudice by the Illinois Circuit Court in *Wright Development Group, LLC v. Walsh, et al.*, No. 07 L 010487. The plaintiff, a limited liability company that developed condominiums, sued Pioneer Newspapers and a condominium association president (Walsh) who was the source for a news report describing a public meeting held at a local alderman's office. Pioneer had reported the residents' complaints about local condominium developers under the head line "Condo boom creates glut of horror stories" and discussed their fraud complaint against "Wright Development Group."

Plaintiff alleged that it had not developed the condominiums, nor had it been sued by the association. Instead, the association had sued two individuals named Andrew and James Wright, along with two limited liability companies named Wright Management, LLC and Sixty Thirty, LLC. Plaintiff claimed that the newspaper was negligent because its reporter did not review court files to confirm the actual parties to the fraud suit.

Illinois Anti-SLAPP Act and Reporters Privilege

The defendants filed motions to dismiss but, while the motions were pending, Walsh filed a separate motion to dismiss under the Illinois Citizens Participation Act, a recently enacted anti-SLAPP statute. The Act (1) immunizes citizens from civil actions that are based on acts made in furtherance of a citizen's free speech rights or right to petition government, and (2) establishes an expedited process to dismiss SLAPPs. See 735 ILCS 110/15-20. The Act stays other pending proceedings and discovery, absent good cause, and requires the court to rule on the motion within 90 days.

The trial court found good cause to allow discovery under the Act and the plaintiff sought to depose the reporter. The newspaper opposed this discovery under the Illinois Reporters Privilege Act, arguing that the privilege barred discovery of the reporter if other attendees of the meeting were available for depositions. The court agreed, noting that the Citizens Participation Act motion had delayed ruling on the newspaper's own motion to dismiss and stayed discovery of the reporter.

Preliminary depositions confirmed that the reporter transcribed Walsh's comments regarding the association's fraud lawsuit against the developers correctly but also that Walsh had not actually identified the developers as "Wright Development Group" until the reporter approached Walsh for follow up questions. Although all of the attendees were still "mingling" in the room when Walsh identified the developers to the reporter, the court ruled that Walsh was not immunized under the Citizen Participation Act because he had not stated this detail to the meeting at large

The Act provides for an immediate appeal if the motion to dismiss is denied but the court declined to certify Walsh's motion for interlocutory appeal on the question of whether Walsh's comments were "in furtherance" of his right to petition. Since the Illinois Supreme Court had not yet modified its rules to allow an interlocutory appeal of right under the Act, Walsh filed for an emergency writ from the Illinois Supreme Court to stay the trial court proceedings, allow an appeal or, in the alternative for modification of the rules of appellate procedure to allow an immediate interlocutory appeal of right under the Act. The court denied the requested stay.

Ruling on Motion to Dismiss

While proceedings were still before the Illinois Supreme Court, the trial court set the previously filed motions to dismiss the complaint for hearing. Pioneer's motion to dismiss argued that the newspaper was not negligent because it was under no duty to review court filings to fact check statements at a public meeting. Pioneer also argued that the article was substantially true and subject to an "innocent construction" which did not refer to the plaintiff. Pioneer pointed out that the condominium association actually had sued a group of developers either named "Wright" or linked to the Wrights and, consistent with this construction, the newspaper referred to "developers" in the plural rather than single form. Moreover, the article did not include an "LLC" designation to signify it was referring to a limited liability company.

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Condo Developer Cannot Sue for Defamation Based on Alleged Mistaken Identity

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Plaintiff countered that none of the defendants were named "Wright Development Group" and that the use of capital letters would cause people to reasonably interpret the article as referring to the Plaintiff even if the LLC designation was omitted.

Judge Thomas P. Quinn of the Cook County Circuit Court issued a written opinion on September 28, 2008. The court dismissed the case with prejudice under the Illinois innocent construction rule, which requires the court adopt an innocent construction if it is reasonable. The court concluded that the article could be reasonably interpreted to refer to the Wrights and their companies rather than to the plaintiff.

The court explained that "there were at least three defendants in the [underlying fraud] lawsuit with the name Wright." The court also observed that the newspaper had not referenced "Wright Development Group, LLC." The court explained that:

> "Plaintiff cannot have it both ways. It cannot argue, on the one hand, that 'Wright Development Group' is obviously not a reference to the three 'Wright' defendants in the lawsuit because the names are not exactly the same but that the article is obviously a reference to it even though its name is not exactly the same as the one in the article."

Accordingly, the court dismissed the entire case with prejudice.

After the trial court's dismissal, the Illinois Supreme Court denied Walsh's motion for a supervisory writ without explanation. Soon after, Walsh filed an appeal of the interlocutory orders under the final judgment rule. It is doubtful, however, that Walsh's appeal will resolve the apparent disconnect between the Citizen Participation Act and the rules governing appellate jurisdiction.

Damon E. Dunn and Orley J. Moskovits of Funkhouser Vegosen Liebman & Dunn Ltd. in Chicago, Illinois, represented Pioneer Newspapers, Inc. Wright Development Group LLC is represented by David B. Goodman and Joseph L. Cohen of Shaw Gussis Fishman Glantz. John Walsh is represented by Terrence J. Sheahan of Freeborn & Peters LLP

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Ohio Federal Court Finds No Jurisdiction Over California-based Gossip Blog

Website Did Not Target Ohio

A federal district court in Ohio has dismissed a libel suit against the operator of the perezhilton.com gossip blog for lack of personal jurisdiction, holding that the site was not directed at Ohio. *Wargo v. Lavandeira*, No. 1:08 CV 02035, 2008 WL 4533673 (N.D.Ohio Oct. 3, 2008) (Wells, J.).

Background

Perez Hilton is the pseudonym of Mario Lavandeira, who runs one of the web's most popular celebrity gossip blogs. In December 2007, Diane Wargo, an Ohio nurse, sent an offensive e-mail to the blog from her workplace, stating: Perez you are a FAT GAY PIG! Angelina is a ugly whore! You love her because she is a fag lover! Her brother is a gay little jerk just like your fat ugly ass! MANGELINA is a digusting gross skank!" According to her complaint, her e-mail was a response to "harassing emails directed at her by Lavandeira" and was written "in the manner and language typical of perezhilton.com."

Lavandeira posted Wargo's e-mail as an "Email of the Day," and identified her by her full name and e-mail address (which identified her employer). Wargo claimed she received hundreds of threatening e-mails, several threatening phone calls and was fired from her job.

In July 2008, Wargo sued Lavandeira and "John Doe" defendants in state court in Ohio for a variety of claims, including breach of contract, fraud, defamation, invasion of privacy, tortious interference and intentional infliction of emotional distress. Wargo alleged that the disclosure of her name and e-mail address (rather than just her screen name) violated the blog's conditions of use. She also alleged that numerous comments posted to the blog about her e-mail defamed her. The case was removed to federal court in August 2008 and Lavandeira moved to dismiss for lack of personal jurisdiction, or alternatively, for transfer to Los Angeles where he lives and works.

District Court Decision

Reviewing Ohio's long-arm statute, O.R.C. 2307.382, District Court Judge Lesley Wells held that none of its provisions provided for jurisdiction over Lavandeira since he did not transact business in the state or sell goods in the state and the alleged wrongs were drawn solely from the content of a website that was not connected to Ohio.

The court rejected the novel claim that jurisdiction could be based on Lavandeira's alleged breach of an implied warranty not to publish her identity. Section (A)(5) of the long-arm statute provides for jurisdiction over breach of warranty claims, but requires the actual sale of goods, and thus was not applicable.

The court also noted a lack of jurisdiction under the Supreme Court's "minimum contacts" test.

> In this instance, the Court cannot exercise general jurisdiction over the Defendants because neither Mr. Lavandeira nor PerezHilton.com maintains any presence-physical, corporate, financial, or otherwise-in the state of Ohio that could be regarded, in the least, as "substantial," "continuous and systematic". Decisions in this Circuit have clearly indicated that the mere operation of an internet website, to which Ohio residents gain unfettered access, does not, without more, establish general jurisdiction. *Wargo* at *5 (citations omitted).

Finally, Judge Wells concluded that "while the content of the internet publication on PerezHilton.com was about an Ohio resident, that publication did not concern that resident's Ohio activities, the website itself was not directed at Ohio over any other state, and the Defendants' conduct did not occur in Ohio."

Lavandeira was represented by Bryan J. Freedman and Gerald L. Greengard of Freedman & Taitelman, LLP in Los Angeles and Darrell A. Clay and Michael T. McMenamin of Walter & Haverfield in Cleveland. Wargo was represented by Brian D. Spitz and John M. Heffernan of the Spitz Law Firm in Cleveland.

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Ninth Circuit Rejects Personal Jurisdiction in Contract Claim Over eBay Sale

Single Sale Is Not Purposeful Availment

The Ninth Circuit recently ruled that the sale of an item via the Internet auction website eBay is insufficient by itself to support personal jurisdiction over a nonresident defendant. *Boschetto v. Hansing*, No. 06-16595 (9th Cir. Aug. 20, 2008) (Fletcher, Rymer, Duffy, JJ.).

The appeal presented an issue "surprisingly unanswered by the circuit courts. Does the sale of an item via the eBay Internet auction site provide sufficient 'minimum contacts' to support personal jurisdiction over a nonresident defendant in the buyer's forum state?" The Ninth Circuit's answered no, finding that a single sale over eBay does not constitute purposeful availment.

Background

California plaintiff Paul Boschetto bid on an eBay auction for, and – on Aug. 8, 2005 – won as high bidder, a Ford Galaxie sold by Wisconsin defendant Jeffrey Hansing. Upon completing the transaction and receiving the vehicle, Boschetto sued Hansing and other Wisconsin auto dealers alleging the vehicle's condition did not meet the description in the eBay listing. The California district court granted defendants' motion to dismiss for lack of personal jurisdiction.

The district court held that the lone jurisdictionally relevant contact with California was the sale of the car on eBay and this was insufficient to establish personal jurisdiction. The eBay auction was a "virtual forum for the exchange of goods" and "the eBay seller does not purposefully avail himself of the privilege of doing business in a forum state absent some additional conduct directed at the forum state."

Decision

On appeal, the Ninth Circuit agreed. The appellate court utilized a three-part test to determine whether it could exercise jurisdiction over a nonresident defendant. (1) The nonresident must purposely direct his activities toward the forum state or purposely avail himself of the forum's benefits and privileges; (2) the claim must arise out of forum-related activities; and (3) exercise of jurisdiction must be reasonable. *Lake v. Lake*, 814 F.2d 1416, 1421 (9th Cir. 1987).

Because the defendant has not used eBay to "conduct regular sales in California (or anywhere else)," the limited nature of the transaction would not satisfy the first element of the test. Thus, the car sale on eBay was insufficient as a basis to support personal jurisdiction over a nonresident defendant.

Plaintiff argued that the fact that the sale was consummated via eBay was jurisdictionally significant because eBay listings can be viewed by anyone in California with Internet access – and eBay's site is highly interactive. The nature of eBay's website, however, was not relevant to the jurisdictional analysis because "the issue is not whether the court has personal jurisdiction over the intermediary eBay but whether it has personal jurisdiction over an individual who conducted business over eBay."

Here plaintiff did not allege that any of the defendants used eBay as a platform for other Internet sales. Thus the online aspect of the case was "a distraction from the core issue: This was a one-time contract that otherwise created no substantial connection to California."

Judge Clymer wrote a separate concurrence to underscore her disagreement with plaintiff's arguments for jurisdiction. "I believe that a defendant does not establish minimum contacts nationwide by listing an item for sale on eBay; rather, he must do "something more," such as individually targeting residents of a particular state, to be haled into another jurisdiction."

Plaintiff Paul Boschetto was represented by Kenneth D. Simoncini of Simoncini & Associates in San Jose, Calif. Defendant Jeffrey Hansing was represented by Robert G. Krohn of Roeth Krohn Pope LLP in Edgerton, Wash. Defendant Frank-Boucher Chrysler Dodge-Jeep, Gordie Boucher Ford and Boucher Automotive Group were represented by Timothy C. Davis of the Davis Law Firm in San Francisco, Calif.

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Ohio Appeals Court Reverses Criminal Harassment Conviction Over MySpace Posting

State Failed to Prove Intent to Harass

An Ohio teenager, convicted of telecommunications harassment for a MySpace posting about a former friend, was cleared of criminal wrongdoing on appeal. *State v. Ellison*, No. C-0708752008 WL 4531860 (Ohio App. Oct. 10, 2008) (Cunningham, Hildebrant, Painter, JJ.).

In dismissing the criminal charge for lack of evidence, the court did not have to reach the defendant's freedom of speech challenge. That, however, did not prevent one judge from issuing a short concurrence opining on the First Amendment implications of the case. "It is a scary thought that someone could go to jail for posting a comment on the Internet," Judge Painter wrote. "If so, we could not build jails fast enough."

Background

The defendant, Ripley Ellison, and Savannah Gerhard were childhood friends, but their relationship soured after Ellison's younger brother accused Gerhard of molesting him. The Hamilton County Department of Job and Family Services investigated the claim but found insufficient evidence to substantiate the charge. Nonetheless, during the summer of 2007, Ellison posted on her public MySpace page a picture of Gerhard captioned: "Molested a little boy."

Ellison also proclaimed in her profile that she hated Gerhard, but never directly told her former friend about the posting. It was only after hearing about it from others that Gerhard saw the posting and complained to authorities at her school. Even though Ellison removed the comments from her MySpace page at the request of the school, she was still charged with telecommunications harassment and convicted in a bench trial.

Telecommunications Harassment

Ohio's Telecommunications Harassment statute states: "No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person." R.C. 2917.21(B).

Although the defendant argued that she did not make a "telecommunication" because she never directly contacted Gerhard, the court noted that such direct contact is not required to establish a telecommunication under the statute. Still, precisely because she never directly communicated her comments to Gerhard, Ellison also argued that she could not possibly have had the intent to harass her former friend when she made the telecommunication. On that point, the court agreed, holding that the defendant was not guilty of harassment because the state did not meet its burden of proving her *specific purpose* to harass, the requisite *mens rea* under the statute.

Since harassment itself was not specifically defined in the statute, the court cited the Black's Law Dictionary definition of the word and wrote: "For conduct to rise to the level of criminal harassment under this section of the statute, the accused must have intended to alarm or to cause substantial emotional distress to the recipient, not just to annoy her." "The legislature has created this substantial burden to limit the statute's scope to criminal conduct, not the expression of offensive speech." Falling far short of that standard, Ellison should not have been convicted of a criminal offense.

Posting an annoying – but nonthreatening – comment on a website is not a crime under this statute

The court declined to address Ellison's First Amendment defence stating that it did not have to reach the issue since the evidence in the case was insufficient to sustain a conviction. Despite its reluctance to delve into free speech battles in the social networking world, one judge strongly suggested how this case would have come out on First Amendment grounds.

"Posting an annoying – but nonthreatening – comment on a website is not a crime under this statute," wrote Judge Painter in a short concurrence. "It might well be a civil wrong, but it is not jailable. The First Amendment would not allow punishment for making a nonthreatening comment on the Internet, just as it would not for writing a newspaper article, posting a sign, or speaking on the radio."

Michael W. Welsh represented the defendant. Joseph T. Deters and Ronald Springman, Jr. represented the State.

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Canadian Human Rights Tribunal Dismisses Complaints Against *Maclean's* Magazine

Magazine Accused of Insulting Muslims

By Roger D. McConchie

On October 10, after deliberating four months, the British Columbia Human Rights Tribunal dismissed complaints brought by the Canadian Islamic Congress against *Maclean's*, a national news magazine, alleging that a cover story by Mark Steyn entitled "The Future Belongs to Islam" had exposed Muslims to hatred and contempt because of their religion, in violation of s. 7(1)(b) of the BC Human Rights Code. The Steyn article had been excerpted by *Maclean's* from Steyn's international bestselling book, "*America Alone*."

The Vancouver hearing of the Canadian Islamic Congress complaints in June marked the first time in the history of British Columbia that a national news media organization was compelled to appear before a government-appointed administrative tribunal to defend "hate speech" allegations.

Background

Maclean's also had the distinction of being the first publication to be targeted by a hate speech complaint which sought a Tribunal order that a national publication print a cover story of equivalent length and prominence in order to offset the alleged harm caused by the so-called hate speech.

There were other unusual aspects to the Tribunal hearings which took place under high security in the Provincial Courthouse in downtown Vancouver. The evidence supporting the complaints by the Islamic Congress (instigated and managed from beginning to end by three Ontario Muslim law students) included testimony about the allegedly injurious effects of the article in Ontario, and evidence about blogs and postings on blogs in Belgium, California, Texas, Ontario and Alberta.

The Tribunal, which normally occupies its times adjudicating landlord-tenant disputes, labor disputes, and complaints of sexual harassment in the work-place, was unmoved by *Maclean's* submissions that evidence of activities and events beyond its territorial jurisdiction were inadmissible.

Another unusual facet of the hearings involved live-blogging by spectators from the well of the court. A number of bloggers sitting in the public gallery tapping away at lap-top computers exposed the minute-by-minute workings of the Tribunal on the Internet in a way no ordinary news report could. This immediate, online reporting created significant reverberations in the blogosphere: the volume, reach and intensity of the Internet commentary about this Canadian legal proceeding was probably unprecedented.

The Canadian Islamic Congress ("CIC") argued at the conclusion of the hearing that the main message of the Steyn article was that "Muslims in the West are engaged in an underground conspiracy to take over the world by virtue of the authority of their religion." In the same vein, the CIC submitted that the article promoted "an image of Western Muslims as unwilling or unable to integrate into Western society, therefore creating a sense of Muslims as a population which does not belong" and "a view of Islam as having a global, uniform population that was unable to form an identity outside of its religious affiliation."

Faisal Joseph, the Ontario lawyer who represented the Islamic Congress at the hearing, alleged in his closing submission to the Tribunal on June 6 that the *Maclean's* article expressed hatred and contempt in a "polished tone" and with "great sophistication" and constituted "venom clothed in the language of reason."

The Steyn article began: "The Muslim world has youth, numbers and global ambitions. The West is growing old and enfeebled, and more and more lacks the will to rebuff those who would supplant it. It's the end of the world as we've known it."

Witnesses called by the Canadian Islamic Congress testified they were upset by passages such as the following: "Time for the obligatory "of courses": *of course*, not all Muslims are terrorists – though enough are hot for jihad to provide an impressive support network of mosques from Vienna to Stockholm to Toronto to Seattle. *Of course,* not all Muslims support terrorists – though enough of them share their basic objectives (the wish to live under Islamic law in Europe and North America) to function unwittingly

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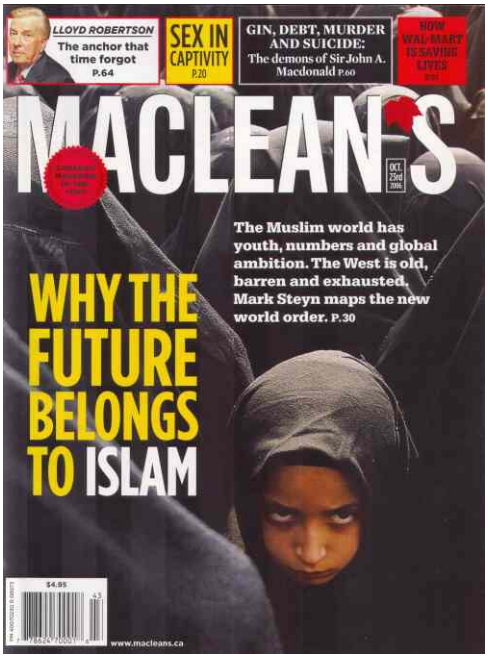
or otherwise as the 'good cop' end of an Islamic good cop/bad cop routine. But, at the very minimum, this fast-moving demographic transformation provides a huge comfort zone for the jihad to move around in."

The Magazine's Defense

Maclean's took a narrowly-focussed approach to the conduct of its defense.

When the five day hearing began in Vancouver on June 2, *Maclean's* informed the Tribunal in its opening statement that the magazine would not attempt to defend the content of its article on journalistic grounds.

Maclean's stated that it did not accept that the Tribunal or any similar tribunal at the federal level or in other Canadian provinces was entitled to monitor, inquire into, or assess its editorial decision about what should or should not be published.



Accordingly, *Maclean's* called no evidence from its editorial staff or from the author, Mark Steyn, to explain how the article was written, why certain graphics were chosen, or the editorial decisions taken in arriving at the article's final content, layout and positioning in the magazine's October 23, 2006 issue.

The Canadian Charter of Rights and Freedoms guarantees "freedom of expression, including freedom of the press and other media of communication" subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Although *Maclean's* took the position that s. 7(1)(b) of the BC *Human Rights Code* and the proceedings before the Human Rights Tribunal constituted an illegal infringement of *Maclean's* free speech rights, it was not entitled to mount a constitutional challenge to the legislation before the Tribunal. The BC *Administrative Tribunals Act* specifically deprived the Tribunal of any jurisdiction over Constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

In this connection, it should be noted that the Human Rights Tribunal members are appointees of the Provincial Cabinet, who do not enjoy the constitutional independence and tenure prescribed for superior court judges by the Constitution Act (formerly the British North America Act). The BC *Human Rights Code* specifically provides that the ordinary rules of evidence observed by a court do not apply. Further, because the Tribunal is administrative in nature, its decisions have no precedential value. They are not even binding on the Tribunal itself.

Maclean's noted in its opening submission to the Tribunal that s. 7(1) of the *Human Rights Code* imposes a form of strict liability on the target of a hate speech complaint. Under s. 7(1)(b), innocent intent, truth, fair comment on true facts, publication in the public interest and for the public benefit, and responsible journalism (recognized defenses in defamation litigation) are not available. It is worth noting that although the federal *Criminal Code*, which applies uniformly across Canada, contains offences of advocating genocide, public incitement of hatred, and willful promotion of hatred, a guilty mind (*mens rea*) is a prerequisite to liability under the Criminal Code. Further, truth is a defense to a criminal charge of willful promotion of hatred, as is fair comment, publication in the public interest, and opinion expressed in good faith on a religious subject.

In its closing submission on June 6, *Maclean's* argued (successfully as it turned out) that the expression "*hatred and contempt*" in s. 7(1)(b) of the Human Rights Code must be restrictively interpreted to apply only to "*extreme ill-will and an emotion which allows for no redeeming qualities in the person at who it is directed*." On the basis of prior authorities, "*contempt*" must be limited to "unusually strong and deep-felt emotions of detestation, calumny and vilification."

In the context of those restricted means, the test for determining whether a given publication violates s. 7(1)(b) of the Code must be objective: whether, when considered objectively by a reasonable person aware of the relevant context and circumstances, the expression in question would be

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understood as exposing or tending to expose the member of the target group to hatred or contempt.

The Tribunal's Decision

Although the Tribunal's Reasons for Decision spans 37 pages, the core reasoning underpinning its dismissal of the complaints appears to be expressed on one relatively short paragraph:

> "The article expresses strong, polemical, and, at times, glib opinions about Muslims, as well as world demographics and democracies. It contains few scholarly trappings, at least in the form presented in the magazine. It is inaccurate in some respects and we accept that it was hurtful and distasteful ...However, read in its context**,** the Article is essentially an expression of opinion on political issues which, in light of recent historical events involving extremist Muslims and the problems facing the vast majority of the Muslim community that does not support extremism, are legitimate subjects for public discussion."

The CIC has 60 days to commence legal proceedings for a judicial review of this decision in the Supreme Court of British Columbia. This scenario appears unlikely. The CIC did not seek a judicial review of the decision of the federal Canadian Human Rights Commission earlier this year to reject a virtually identical complaint it filed against *Maclean's* over the electronic version of the Steyn article which was posted on the magazine's website. Nor did the Canadian Islamic Congress seek judicial relief concerning a decision by the Ontario Human Rights Commission earlier this year rejecting that complaint because the Ontario statute does not contain a "hate speech" prohibition.

Although *Maclean'*s was exonerated by the BC Tribunal, that may be small comfort for free speech proponents.

It is reasonable to expect that other national media organizations will eventually face future prosecutions under s. 7(1)(b) of the BC ***Human Rights Code***. In fact, the Tribunal told future complainants how to improve their evidence in future cases. In its Reasons, the Tribunal implied that that the Canadian Islamic Congress might have succeeded if it had called an expert witness qualified to identify a writer's use of words and their intended meaning or effect on the recipient of a communication, as well as a sociologist who could explain the nature of Islamaphobia and how the themes and stereotypes in the article might increase its prevalence.

In short, the Tribunal seems to be saying that the secret to success is for the complainant to present a complete line-up of experts to explain why published expression is hateful and contemptuous of people on the grounds of religion, race, colour, ancestry, place of origin, marital status, family status, physical or mental disability, sex, sexual orientation or age (all prohibited grounds in s. 7(1)(b)).

Conclusion

Maclean's has publicly stated that it is continuing to investigate its legal options despite the dismissal of the Canadian Islamic Congress complaints by the BC Human Rights Tribunal. One obvious question is whether, despite the dismissal, the Courts would hear a Charter challenge to the validity of the speech restrictions contained in s. 7(1)(b) of the BC *Human Rights Code*. One thing is clear: the threat posed to the national news media in Canada by the hate speech provisions in the BC statute will remain alive indefinitely until those provisions are struck down by the courts.

It is reasonable to expect that other national media organizations will eventually face future prosecutions under s. 7(1)(b) of the BC

Roger D. McConchie, of the McConchie Law Corporation, Vancouver, Canada, represented Maclean's Magazine in this matter together with Julian Porter, Toronto, Canada.

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SDNY Judge Permits Courtroom View Network To Live-Record

*E*Trade Financial Corporation v. Deutsche Bank* Trial

By Dean Kawamoto

On October 14, 2008, Judge Robert Sweet of the Southern District of New York granted Courtroom View Network's ("CVN's) application to live-record the trial in *E*Trade Financial Corporation v. Deutsche Bank AG*, No. 05-cv-902-RSW (S.D.N.Y.) for access over the internet.

The ruling authorized the first live recording of a trial in a federal court since the federal pilot program in the early 1990s. Pursuant to the decision, gavel–to-gavel coverage of a federal trial was made available over the Internet for the first time in history. Judge Sweet's decision is noteworthy in applying classic constitutional values of access to modern technology. The decision is also instructive in correctly calibrating the burden of persuasion to public values of access.

Courtroom View Network

The media-applicant in this case was Courtroom View Network ("CVN"), an Internet-based news-gathering entity that covers a broad range of trials and other judicial proceedings, including some of the most prominent civil litigation in the United States. To date, CVN has covered over 200 courtroom proceedings, including many trials in state court. CVN's coverage uses the internet to provide interested viewers a direct view into the courtroom through gavel-to-gavel coverage of a proceeding. Most of CVN's viewers are members of the legal or business communi-ties, which use CVN's coverage to follow cases for professional and educational reasons.

Case Background

The underlying litigation involved a contract dispute between E*Trade and Deutsche Bank AG over Deutsche Bank's sale of a corporation and its subsidiary, and the tax and accounting treatment of the subsidiary's deferred tax asset. CVN applied to cover the trial pursuant to Southern and Eastern District Local Rule 1.8, which permits a media organization, like CVN, to bring into the court-room a "camera, transmitter, receiver, portable telephone or recording device" upon "written permission of a judge of that court." After reviewing letter briefs submitted by both parties, and hearing oral argument on the application, Judge Sweet issued a 16-page written decision granting CVN's application. Trial commenced on October 14, 2008.

Constitutional Underpinnings

Judge Sweet's decision begins by emphasizing the "constitutional framework" that should inform the exercise of a court's discretion under Rule 1.8. *See E*Trade Financial Corporation v. Deutsche Bank AG*, 2008 WL 4579956, at *2 (S.D.N.Y., Oct. 14, 2008) (Sweet, J.).

In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), the Supreme Court held that the First Amendment guarantees the right of the public and press to attend criminal trials, and emphasized the important public interests furthered by open proceedings, including providing an assurance that proceedings are conducted fairly, increasing public confidence in the administration of justice, and educating the public and increasing respect for the law. *E*Trade*, 2008 WL 4579956 at *2, *citing Richmond Newspapers*, 448 U.S. at 569-572.

Subsequent decisions, such as the Second Circuit's opinion in *Westmoreland v. Columbia Broadcasting System, Inc.,* 752 F.2d 16, 23 (2d. Cir. 1984), have confirmed that the constitutional right of public access extends to civil trials as well as criminal trials.

While Judge Sweet acknowledged that there is no constitutional right to broadcast proceedings, "[t]he inquiry into whether permission should be granted [to cover proceedings] in a given case must begin with *Richmond Newspapers'* 'presumption of openness.'" *E*Trade*, 2008 WL 4579956, at *4. In this regard, "[d]ue process concerns may ultimate counsel against such access," but "there does not seem to be a reason to treat the question of cameras in the courtroom as different in kind from the long history of 'conflicts between publicity and a defendant's right to a fair trial. . .'" *Id.*

In other words, the decision of whether to allow cameras into a courtroom should be no different than the question of whether to permit press coverage in general — denial of a media application implicates the same constitutional values as when a party seeks to exclude the press and the public, and the burden on a party opposing such an application should reflect

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this constitutional norm of open proceedings.

The Defendant's Burden

In light of the constitutional values implicated by CVN's request, Judge Sweet concluded that none of defendant's objections "raise[d] concerns of sufficient seriousness" to justify denying CVN's application. *E*Trade*, 2008 WL 4579956 at *4. Defendant raised five arguments in opposing CVN's application; the same five raised by virtually every party seeking to bar cameras from a courtroom: (1) cameras may intimidate or infringe upon the privacy interests of witnesses; (2) the parties do not consent; (3) confidential information may be disclosed at trial; (4) the trial involves a private dispute of limited interest to the public; and (5) a private venture (here, CVN), should not profit from the broadcast of court proceedings. *Id.* at *5.

The court rejected all of these concerns. With respect to the privacy interests of witnesses, given that the case involved a contract dispute, not only had the defendant failed to identify any "sensitive issues" that would raise privacy concerns, but it would be "difficult to imagine such issues arising in the context of [the] lawsuit." *Id.* at *5. In the event that such sensitive issues arose, the court reserved the authority to order the camera turned off. With respect to party consent, the critical issue was not whether a party consented, but "whether the objecting party has shown any prejudice," resulting from the presence of a camera.

Confidential information was not an issue because CVN agreed to only publish exhibits that were introduced into evidence at trial and made part of the public record, and parties could also file exhibits under seal. The court also rejected the "public interest" argument on the grounds that it was not for the court to decide "what is or is not of interest to the public." Finally, the defendant failed to explain why a private venture could not make a profit from broadcasting court proceedings, given that reporting on court proceedings in the newspaper and network television was both permitted and lucrative.

One can infer that underlying Judge Sweet's decision is the proposition that objections must raise substantial concerns of actual prejudice, and not merely speculative assertions as to the hypothetical impact of cameras on proceedings. *Cf Chandler v. Florida,* 449 U.S. 560, 582 (1981) (holding that the mere presence of a camera in a criminal trial did not deny defendants' constitutional rights; the Court acknowledged the inherent "risk" of psychological prejudice, but unambiguously rejected the proposition that such prejudice is unprovable and justifies barring cameras). General allegations regarding the negative impact of cameras on witnesses or parties are unsupported by the numerous studies conducted on cameras in the courts. *See Id.* at *4 & fn. 1 (citing studies and sources). Crediting unsupported allegations would confer an unwarranted veto over media applications on the parties in conflict with the constitutional norm of public access to judicial proceedings.

Technological Innovation

Judge Sweet's opinion also recognizes the importance of technological innovation, and that CVN's webcasting is "free of a number of the problems that courts have identified with regard to television broadcasts." *E*Trade*, 2008 WL 4579956 at *6. Many of the early decisions rejecting a constitutional right to broadcast proceedings are based, in part, upon the then-existing technological limitations of mass communication technology. *Id.* at *6. Indeed, Justice Clark's, decision in *Estes v. Texas*, 381 U.S. 532, which held that there was no constitutional right to broadcast court proceedings, also stated that "[w]hen 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." (*E*Trade*, 2008 WL 4579956 at *2, *citing Estes,* 381 U.S. at 540.)

Judge Sweet's decision contrasted CVN's coverage with the concerns identified in *Estes*, emphasizing that CVN was (a) seeking to cover a bench trial, not a jury trial; (b) that the case was not a high-profile one and would not be broadcast to a general audience; (c) that any additional burden on the Court would be minimal; and (d) that CVN's coverage would be gavel-to-gavel, thereby "ameliorating concerns with regard to sensationalized or selective coverage." *Id.* at *6. Judge Sweet's decision thus signals the entrance of federal trials and courts—as well as jurisprudence on public access to federal proceedings—into the on-line information age.

Dean Kawamoto is an associate at Boies, Schiller & Flexner LLP. His firm represented Courtroom View Network in this matter.

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A Decision Worth 21,000 Words

Photographs Depicting *Abuse of Detainees by American Soldiers Not Exempt Under FOIA*

By Jason P. Criss

On September 22, the United States Court of Appeals for the Second Circuit issued its decision in *American Civil Liberties Union v. Department of Defense*, No. 06-3140-cv, 2008 WL 4287823 (2d Cir. Sept. 22, 2008). The Second Circuit held that 21 photographs depicting abusive treatment of detainees by United States soldiers in Iraq and Afghanistan had to be disclosed pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

In doing so, the Second Circuit rejected the Government's argument that the FOIA exemption 7(F), which authorizes withholding of records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to endanger the life or physical safety of any individual," *id.* § 552(b)(7)(F), applies to these photographs. *Id.* at *4.

The Second Circuit also held that the redactions to the photographs ordered by the district court rendered inapplicable the FOIA exemptions for material that would harm personal privacy interests, *id.* §§ 552(b)(6) and 552(b)(7)(C) (exemptions 6 and 7(F)). *Id.* at *21.

Background

The appeal arose from a FOIA request made by the ACLU and the other plaintiffs on October 7, 2003 for records relating the treatment and death of prisoners held in United States custody abroad, and the practice of "rendering" prisoners to countries known to employ torture. The Government did not respond to the plaintiffs' FOIA request, and on June 2, 2004, the plaintiffs filed suit in the Southern District of New York. On August 16, 2004, the plaintiffs provided the Government with a list of records potentially responsive to the FOIA request.

The list included 87 photographs and other images of detainees at detention facilitates in Iraq and Afghanistan, including Abu Ghraib prison (the "Abu Ghraib photographs"). In the parties' cross-motions for partial summary judgment, the Government initially only invoked FOIA's personal privacy exemptions (exemptions 6 and 7(C)) as its basis for withholding the Abu Ghraib photographs. The plaintiffs argued that these exemptions did not apply, because redactions could prevent any unwarranted invasions of privacy. *Id.* at *1.

Two months after oral argument on the cross-motions, the Government argued, for the first time, that exemption 7(F) also applied to the photographs. The Government argued that this exemption applied because release of the Abu Ghraib photographs could reasonably be expected to endanger the life or physical safety of United States troops, other Coalition forces, and civilians in Iraq and Afghanistan. The Government did not identify any specific individuals who would be put at risk by the disclosure of the photographs. *Id.* at *2.

On September 29, 2005, the district court issued its order on the cross-motions for partial summary judgment, and it ordered the release of the Abu Ghraib photographs. The district court determined that redactions of all identifying characteristics of the individuals depicted in the photographs would prevent an invasion of privacy interests. It also rejected the Government's exemption 7(F) argument, on the ground that "the core values that Exemption 7(F) was designed to protect are not implicated by the photographs, but . . . the core values of FOIA are very much implicated." *Id.* (quoting *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 578 (S.D.N.Y. 2005)) (internal quotation marks omitted).

The Government appealed the district court's decision, but while the appeal was pending, many of the Abu Ghraib photographs were published by a third party. The Government then withdrew its appeal. In response, the plaintiffs sought clarification to determine if there were other detainee abuse images being withheld. In response, the Government confirmed that an additional 29 images were being withheld based on these same FOIA exemptions. In orders dated June 9, 2006 and June 21, 2006, the district court ordered the release of 21 of the 29 photographs, 20 of them in redacted form. In doing so, the district court adopted its prior reasoning rejecting the interpretations of the FOIA exemptions advanced by the Government. The Government then appealed that decision to the Second Circuit. *Id.* at *2-3.

Second Circuit Decision

The Government's exemption 7(F) argument was the focus of Second Circuit appeal. The Second Circuit rejected the Gov-

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ernment's interpretation of the exemption as inconsistent with FOIA's language and structure, the chronology of amendments to FOIA, and the requirement that FOIA exemptions be narrowly construed. The Second Circuit concluded that the statute's use of the term "any individual" supported the interpretation that exemption 7(F) exempts documents that could endanger identified individuals, not mere "diffuse threats." *Id.* at *5-6.

The Second Circuit also noted that FOIA contains a separate national security exemption, which was not cited by the Government as basis to withhold these photographs, and it concluded that it would be anomalous to interpret exemption 7(F) in a manner that covered general threats to American military forces, which is a national safety matter. *Id.* at *9-10. Finally, the Second Circuit noted that the legislative history of this exemption showed that it was designed to address criminals using FOIA to target specific individuals in furtherance of the criminals' illegal activities. *Id.* at *11, *15.

Accordingly, the Second Circuit held that "in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to identify that individual." *Id.* at *8. The Second Circuit did not "shape the precise contours of the exemption" in its opinion, because it determined that "it is not a close question whether the government has identified any relevant individual with reasonable specificity." *Id.* The Second Circuit further stated that "it is plainly insufficient to claim that releasing documents could reasonably be expected to endanger some unspecified member of a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan." *Id.*

The Second Circuit also agreed with the district court that FOIA exemptions 6 and 7(C) did not justify the withholding of these photographs. FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt," and "courts have found redacting of identifying information adequate to prevent infringement of the significant interests that FOIA's privacy exemptions were designed to protect." *Id.* at *20 (quoting 5 U.S.C. § 552(b)). The Second Circuit noted that the district court reviewed the 29 withheld photographs, determined which ones should be released, and the extent of the redactions needed to shield the identities of the individuals depicted in them. The Second Circuit undertook its own review of the photographs and determined that the redactions ordered by the district court were sufficient. *Id.* at *20.

The Second Circuit also rejected the Government's argument that it should interpret exemptions 6 and 7(C) to permit the withholding of these photographs because the Geneva Conventions prohibit subjecting prisoners to "insults and public curiosity."

The Second Circuit noted that a reasonable Executive Branch interpretation of a treaty is due deference, provided that the interpretation has been consistently adhered to. *Id.* at *22. But the Second Circuit found that the interpretation of the Geneva Conventions advanced by the Government was inconsistent with its prior interpretations: "Prior to this litigation, the United States has not consistently considered dissemination of photographic documentation of detainee mistreatment to violate the public curiosity provisions of the Geneva Conventions, at least not when the detainee is unidentifiable and the dissemination is not itself intended to humiliate." *Id.* at *23.

The Second Circuit held that the Geneva Conventions did not bar the disclosure of these photographs, because they had been redacted to conceal the detainees' identities and the purpose of the dissemination was to document detainee abuse, not to humiliate the detainees. *Id.* The Second Circuit went further and noted that releasing the photographs actually would further the purposes of the Geneva Conventions, by increasing public awareness of the events depicted in them. *Id.*

The Second Circuit noted that "while this [appeal] is one of the first cases to examine whether exemption 7(F) can be conscripted into an service as an ersatz classification system, it is unlikely to be the last." *Id.* at *8. This decision should provide other parties making FOIA requests with a number of powerful arguments to challenge overbroad interpretations of these exemptions.

Jason P. Criss is Special Counsel to Covington & Burling LLP in New York, which represented a group of professors of law of armed conflict as amici curiae *in this appeal.*

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ETHICS CORNER

Ethical Implications of Attorneys Advertising Their Listing in "Super Lawyers" or "Best Lawyers in America"

By Merrit M. Jones and Andrew I. Dilworth

Is it ethical for attorneys to advertise their inclusion in "Super Lawyers" or "Best Lawyers in America"? Do such ads make misleading and unsubstantiated comparisons, or do they merely make implied comparisons based on substantiated facts? Do rules regulating such ads violate the right of lawyers to commercial speech protected by the First Amendment?

Although all but three states have adopted the American Bar Association's Model Rules of Professional Conduct ("Model Rules") in some form or another, including Rule 7.1 pertaining to attorney advertising, ethics opinions vary in their views as to whether to allow attorney ads and websites to publicize an attorney's listing in "Super Lawyers" or "Best Lawyers in America." Most recent opinions permit such ads, albeit with some restrictions.

Notably, however, a 2006 opinion by the New Jersey Supreme Court's Advisory Committee on Attorney Advertising not only prohibits such ads, it prohibits attorneys even from participating in the nomination and evaluation process. Soon after the opinion's publication, the New Jersey Supreme Court stayed its application. At the Court's request, a special master recently issued a 304-page report that sets forth the issues, available at http://pdfserver.amlaw.com/nj/SuperLawyers%20Master%20Report.pdf. A final decision by the New Jersey Supreme Court is still pending.

ABA Model Rule 7.1

Throughout much of the last century, bar organizations prohibited attorney advertising. In 1977, however, the United States Supreme Court held that attorney advertising is commercial speech protected by the First Amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350, 383, 97 S. Ct. 2691, 2709, 53 L. Ed. 2d 810, 835 (1977). Commercial speech may be regulated by the states to advance a legitimate governmental interest as long as that regulation is not more extensive than is necessary to serve that interest. *Central Hudson Gas & Electric Corp v. Public Service Commission of New York*, 447 U.S. 557, 566, 200 S. Ct. 2343, 2351, 65 L. Ed. 2d 341, 351 (1980).

Although the *Bates* Court held that "false, deceptive, or misleading" advertising could be restrained, it favored more disclosure over greater restraint, in the hope that a sufficiently informed public will put advertising in its proper perspective. *Bates*, 433 U.S. at 383-84, 97 S. Ct. at 2709, 53 L. Ed. 2d at 835-36.

Subsequent U.S. Supreme Court decisions concerning attorney advertising have applied the same reasoning. For example, in *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109-11 (1990), the Court struck down an outright ban on advertising an attorney's specialization, stating that a certification "is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work."

The ABA Model Rules were amended in 2002. Prior to amendment, Rule 7.1 concerning lawyer advertising prohibited making "a false or misleading communication about the lawyer or the lawyer's services." It specifically defined a false or misleading communication as one that:

> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) is likely to create an unjustified expectation about results the lawyer can achieve, … or
>
> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

The Eleventh Circuit in considering a Florida rule similar to Model Rule 7.1 held that a lawyer's truthful advertisement of his Martindale Hubbell rating was not misleading or an

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unsubstantiated comparison in violation of the rule. *Mason v. The Florida Bar*, 208 F.3d 952, 956-59 (11th Cir. 2000).

Amended Model Rule 7.1 appears to provide even greater flexibility in advertising a lawyer's inclusion in rating and ranking publications. It still prohibits making a "false or misleading communication about the lawyer or the lawyer's services," which it defines as one that "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Additional guidance concerning what constitutes a false or misleading communication, however, has been moved to the Comments section.

Comment 2 clarifies that a truthful statement may be misleading where "there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation." Comment 3 explains that a truthful advertisement of the lawyer's achievements may be misleading "if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case."

Most importantly, Comment 3 provides that an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers "***may be*** misleading ***if*** presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." (Emphasis added). Interestingly, the amended rule does not facially prohibit unsubstantiated comparisons, but provides that they may be misleading if they suggest a substantiated basis. Comment 3 further states that "[t]he inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client."

Thus, Model Rule 7.1 appears to permit a comparison of lawyers' services, so long as it is not an "unsubstantiated" comparison that implies it can be substantiated, and provides that an "appropriate disclaimer or qualifying language" might save the advertisement from being misleading.

The ABA Model Rules have been adopted, in some form, in every state except California, Maine and New York, as well as in the District of Columbia and Virgin Islands. *See* the ABA's website, www.abanet.org/cpr/mrpc/chron_states.html. A number of jurisdictions have considered whether it is ethical to advertise a lawyer's inclusion in "Super Lawyers" and "Best Lawyers in America." Although all states require that attorney advertising be truthful and that it not be deceptive or misleading, the views of each state as to what constitutes deceptive or misleading advertising differ. Following is a summary of the various approaches by some, but not all, states that have directly confronted this issue, in an effort to demonstrate how those states have balanced the rights and benefits of commercial speech with the obligation to protect consumers from false and misleading attorney advertising.

"Best Lawyer" Advertising

Arizona has considered the issue twice – both before and after amendment of the Arizona Rules of Professional Conduct ("ER"). Prior to amendment in 2003, ER 7.1 concerning lawyer advertising tracked the old Model Rule 7.1 in prohibiting comparison of lawyer services, "unless the comparison can be factually substantiated." The Committee of the Rules of Professional Conduct thus concluded that advertising a lawyer's inclusion in "The Best Lawyers in America" necessarily attempted to convey that the lawyer's services were superior, and was unethical because the superiority of legal services could not be substantiated. *See* Ariz. Ethics Op. 91-08.

In 2003, ER 7.1 was amended to track the new Model Rule 7.1, and the prohibition against unsubstantiated comparative statements was moved from the body of the rule to the comment section. When the Committee revisited the issue in 2005, it concluded that "it is not unethical for a lawyer to advertise the lawyer's listing in *The Best Lawyers in America*, as long as the advertised representation is truthful and includes the year in which and the specialty for which the lawyer was listed in the publication." *See* Ariz. Ethics Op. 91-08, July 2005. The Committee went on to state that "the factual statement that a lawyer is listed in *The Best Lawyers in America* is an implied comparison with a subjective basis that can be verified."

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Michigan Rule of Professional Conduct ("MRPC") 7.1 tracks the old Model Rule 7.1 in prohibiting a comparison of lawyer services, "unless the comparison can be factually substantiated." The Michigan State Bar's Committee on Professional & Judicial Ethics has issued an opinion that "[a] lawyer who is listed as a "Super Lawyer" . . . may refer to such listing in advertising . . ." *See* Mich. Comm. on Prof'l & Jud. Ethics, Informal op. RI-341. The Committee listed the following important factors, among others, in determining whether to allow such advertising: (1) that the publication considered a lawyer's qualifications, (2) it measured lawyers by "a selection system uniformly applied," (3) "[t]he rating or certification is not issued for a price," (4) the publication "provides a basis on which a consumer can reasonably determine how much value to place in the listing or certification," and (5) "[t]he basis of selection should be verifiable" (i.e., if peer review is claimed it should be verifiable that it was conducted).

Connecticut's Statewide Grievance Committee has issued a series of advisory opinions on this issue. Advisory Opinion #07-00188-A (October 4, 2007) finds advertising one's inclusion in a list of "Super Lawyers" to be "potentially misleading because it connotes a superior quality," and "requires an appropriate explanation and disclaimer in order to avoid confusing consumers and creating unjustified expectations." The opinion goes on to describe a proposed ad and appropriate disclaimer concerning the selection process.

In Advisory Opinion #07-01008-A (November 16, 2007), the Committee considered an advertisement stating "Congratulations to Our Four Attorneys in Super Lawyers!" Underneath, in small type size, was the sentence, "We are proud to announce that four of our lawyers are among those chosen by their peers to be recognized in Connecticut Super Lawyers." The Committee required that the proposed ad comply with earlier disclaimer requirements and also "list the actual calendar year and practice area for which the four attorneys were selected."

Delaware's Professional Conduct Rule 7.1 is identical to amended Model Rule 7.1. In Opinion 2008-02, issued last February, the Delaware Committee on Professional Ethics considered whether its is permissible to include on a lawyer's website or in an email solicitation or newsletter that the lawyer has been designated a "Super Lawyer" or "Best Lawyer" in a particular practice area. The Committee concluded that it is permissible, as long as the lawyer states the year and particular specialty or practice area of the designation. In doing so, the Committee found the publication's research into the background and experience of candidates to be an "essential factor," because it reduces the likelihood that the designation would be misleading.

Additionally, ethics opinions from Virginia, Iowa, North Carolina, Tennessee, and Pennsylvania all permit such advertisements in one form or another, though space limitations do not permit their detailed discussion here.

New Jersey Opinion

Why, then, did the New Jersey Supreme Court's Advisory Committee on Attorney Advertising reach such a sharply different conclusion? In New Jersey, Rule of Professional Conduct ("RPC") 7.1 is somewhat more restrictive than ABA Model Rule 7.1, because it specifically defines a false or misleading communication to be one that "is likely to create an unjustified expectation about the results the lawyer can achieve" (RPC 7.1(a)(2)) or "compares the lawyer's services with other lawyers' services." (RPC 7.1(a)(3)). There is no provision that permits a "substantiated" comparison of lawyers' services, or contemplates that a disclaimer might save an advertisement from being misleading.

[t]hese self-aggrandizing titles have the potential to lead an unwary consumer to believe that the lawyers so described are by virtue of this manufactured title, superior to their colleagues who practice in the same areas of law.

Thus, in Opinion 39, the Committee on Attorney Advertising states that "[u]se of superlative designations by

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lawyers is inherently comparative." It further states that "[t]hese self-aggrandizing titles have the potential to lead an unwary consumer to believe that the lawyers so described are by virtue of this manufactured title, superior to their colleagues who practice in the same areas of law." It concludes that "[t]his simplistic use of a media-generated sound bite title clearly has the capacity to materially mislead the public."

The Committee did not stop there. Since the entire insert to the *New Jersey Monthly* "Super Lawyers" publication, including biographical sketches and even the listing of attorneys, is marked by the magazine as an advertisement, and also because of the proximity of attorney advertisements to magazine text on individual lawyers, the Opinion prohibits attorneys from placing ads in either the "Super Lawyers" magazine insert or stand-alone version, even when such advertisements do not include the words "Super Lawyer." "It is inevitable that a member of the public, reading an article about a certain attorney who has been designated by the magazine as a 'Super Lawyer,' will note a nearby advertisement congratulating that lawyer (though not using the prohibited words 'Super Lawyer'), and will attribute the marketing designation to the subject of the advertisement."

The Opinion requires that, to the extent that biographic sketches or other articles are paid for or written in whole or in part by the subject attorneys, they must bear the word "advertisement" in large print at the top.

Finally, the Opinion states, without further discussion, that participation in a survey "where an attorney knows or reasonably should know that the survey would lead to a descriptive label that is inherently comparative such as 'Super Lawyer' or 'Best Lawyer,' is inappropriate."

Four weeks after Opinion 39 was issued, it was stayed by the New Jersey Supreme Court at the request of "Super Lawyers" Magazine's management and the State Bar Association. On June 30, 2008, at the Supreme Court's request, retired Judged Robert A. Fall acting as special master issued a 304-page report that provides a comprehensive history of attorney advertising, Supreme Court decisions regarding attorney advertising as constitutionally protected commercial speech, and a survey of current practices in various jurisdictions, before turning to New Jersey's rules and Opinion 39.

The report does not take a particular position, but lays out the issues in great depth. In contrasting New Jersey's rules and ethics opinion with those of other jurisdictions that allow such attorney advertising, the report states, at page 295: "Those states have an underlying attorney-advertising regulatory scheme that differs from that in New Jersey; they generally prohibit comparative attorney advertising, but only if it cannot be verified, while New Jersey prohibits comparative attorney advertising per se." The report later hints that such a rule may not withstand constitutional scrutiny, stating at page 301: "Whether the Court finds a valid constitutional basis for such an absolute rule in the context of this record, is a policy decision to be arrived at through application of the balancing test so often cited in this Report."

The report looks to the manner in which other states have balanced the right of constitutionally protected commercial speech with the interest in protecting the public from deceptive or misleading attorney ads, particularly in light of the preference under *Bates* for more disclosure over greater regulation. It notes at page 295 that those states that allow comparative and quality-of-service lawyer advertising usually do so by "construing such advertising to be an implied comparison with the services of lawyers not contained on the listings, but finding there is either a subjective or objective basis for that comparison that can be verified by a disclosure and analysis of the underlying peer-review rating methodology," and often requiring an additional disclaimer "designed to place these peer-review attorney rating lists in proper perspective for the consumer."

The report later hints that New Jersey might do the same, stating at page 301: "There is a basis to interpret that RPC 7.1(a)(3) as not being intended to prohibit implied comparisons on a per se basis." Earlier, the report states at page 296: "Perhaps a distinction could be made between 'direct' or 'explicit' comparative advertising, which should be prohibited whether or not the comparison could be verified, and 'implied' comparative advertising, which could be permitted if the basis for same can be verified through adequate and accurate disclosure . . ." The problem, the report plainly states, is that the New Jersey rule "makes no such distinction."

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Moreover, the report acknowledges that implied comparisons can still be misleading. It looks to the standards and disclaimers required in advertising opinions of other states, including the following, to provide guidance in case the New Jersey Supreme Court elects to modify or interpret the rules in a manner that would permit such attorney advertising:

1. The advertised representation must be true;
2. The advertisement must state the year of inclusion in the listing as well as the specialty for which the lawyer was listed;
3. The basis for the implied comparison must be verifiable by accurate and adequate disclosure . . . of the rating or certifying methodology utilized . . . that provides a basis upon which a consumer can reasonably determine how much value to place in the listing or certification . . .
4. The rating or certifying methodology must have included inquiry into the lawyer's qualifications and considered those qualifications in selecting the lawyer for inclusion;
5. The rating or certification cannot have been issued for a price or fee, nor can it have been conditioned on the purchase of a product, and the evaluation process must be completed prior to the solicitation of any advertising, . . .
6. . . . [T]he advertising must state and emphasize only one's ***inclusion*** in the Super Lawyers or The Best Lawyers in America list, and ***must not*** describe the attorney as being a "Super Lawyer" or the "Best Lawyer;"

* * *

9. The advertising must be done in a manner that does not impute the credentials bestowed upon individual attorneys to the entire firm;

* * *

12. The advertisement must include a disclaimer making it clear that . . . the rating of an attorney by any other organization based on a peer-review ranking is not a designation or recognized certification by the Supreme Court of New Jersey or the American Bar Association.

The report does not address in detail Opinion 39's ban on lawyers placing ads in "Super Lawyers" magazine or responding to its surveys. Even a strict construction of RPC 7.1(a)(3) does not appear to support such an outright ban. It certainly seems more extensive than necessary to serve the government's interest in protecting consumers from false and misleading attorney advertising.

Conclusion

As the report appears to indicate, without taking a particular position, New Jersey and other states confronting this issue would be wise to find a compromise that allows lawyers to advertise their inclusion in "Super Lawyers" and "Best Lawyers in America" but requires appropriate standards and disclaimers to ensure, to the greatest extent possible, that the public is informed rather than misled. This could be done by modifying New Jersey's rule, or interpreting its ban on comparative advertising to prohibit direct comparisons but allow, with appropriate disclaimers, implied comparisons that have a substantiated or verifiable basis. Otherwise, New Jersey and any other states that enact a similar ban may find their rules struck down as overbroad and unconstitutional abridgement of commercial speech protected by the First Amendment.

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