MEDIA LAW RESOURCE CENTER

ANNUAL DINNER

WEDNESDAY, NOVEMBER 10TH, 2010

HONORING MLRC'S 30TH ANNIVERSARY

Looking Back, Looking Forward: The Changing Business of News

Jill Abramson
The New York Times

Michael Kinsley
Politico

Jonathan Klein
formerly with CNN/U. S.

Moderated by

Jonathan Alter
Newsweek

Cocktail Reception at 6:00 P.M.
Sponsored by AXIS PRO

Dinner at 7:30 P.M.

Grand Hyatt New York
Empire Ballroom, 109 East 42nd Street at Grand Central Station

RSVP by Monday, October 25, 2010

Business Attire

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER — WEDNESDAY, NOVEMBER 10TH, 2010

RSVP for Dinner by Monday, October 25, 2010

Reservations are not refundable for cancellations received after Friday, November 5, 2010.

Firm/Organization: _____

Contact Person: _____

Address: _____

_____

Phone: _____ Fax: _____

E-mail: _____

Please reserve:

___ Single seat(s) at $400 each

___ Table(s) for 10 at $4,000 each *

___ Table(s) for 11 at $4,400 each *

Amount Enclosed for Dinner Reservations: _____

Please make checks payable to:
Media Law Resource Center, Inc.
520 Eighth Avenue, North Tower—20th Floor
New York, NY 10018

In honor of the Media Law Resource Center's 30th Anniversary, the 2010 Dinner Program will include a special section of commemorative ads from members and friends of MLRC.

* Guests at the 2010 Annual Dinner purchasing one or more tables receive complimentary ad space.

Please see next page for Dinner Program ad details.

DINNER PROGRAM JOURNAL

Guests purchasing one or more tables at the 2010 Annual Dinner receive complimentary ad space commemorating MLRC's 30th Anniversary as follows:

One Table: Quarter Page
Two Tables: Half Page
Three or More Tables: Full Page

Additional space may be purchased at the following rates:

Please indicate your choice:

To increase from Quarter Page to Half Page: $250 ____
To increase from Quarter Page to Full Page: $750 ____
To increase from Half Page to Full Page: $500 ____

Members and Friends of MLRC who do not purchase a whole table, or are unable to attend the 2010 Dinner, are welcome to purchase ad space commemorating MLRC's 30th Anniversary at the following rates:

Please indicate your choice:

Quarter Page: $250 ____
Half Page: $500 ____
Full Page: $1000 ____

Amount Enclosed for Dinner Program Ad: _____

Sorry, but we will be unable to refund for any cancellation of journal ads.

Please e-mail your ad copy no later than Friday, October 15, 2010 to medialaw@medialaw.org for inclusion in bound program journal.

Ad specifications:

For technical questions regarding Program ads contact Jake Wunsch at jwunsch@medialaw.org

Dimensions:
Full page: 7.5″ x 9.5″
Half page: 7.5″ x 4.5″
Quarter page: 3.5″ x 4.5″

Accepted file formats: TIFF, JPEG, EPS
Color: Black and white only
Background: None **Bleeds:** None
Borders: None

Total Amount Enclosed for Dinner and Program Ad: _____

Please make checks payable to: Media Law Resource Center, Inc.
520 Eighth Avenue, North Tower—20th Floor, New York, NY 10018

Media Law Resource Center, Inc.
212-337-0200 fax: 212-337-9893 www.medialaw.org

For questions regarding Dinner reservations or Program Ads contact Debra Danis Seiden at dseiden@medialaw.org.

520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200

MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through October 25, 2010

MLRC

LIBEL & PRIVACY

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MLRC 2010 First Amendment Leadership Award for Extraordinary Contributions to Free Speech and Press: Robin Bierstedt, Time Inc.

On September 30, 2010, at the biennial NAA/NAB/MLRC Media Law Conference, MLRC was honored to present its First Amendment Leadership Award to Robin Bierstedt, who recently retired from Time Inc. where she was Vice President and Deputy General Counsel with primary responsibility for all legal matters relating to TIME Magazine, and the company's First Amendment interests. Robin was also Chair of the Media Law Resource Center from 2001 to 2002, a member of its Board of Directors, and was a Co-Chair of MLRC's New Legal Developments Committee.

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.

John Redpath, former General Counsel of Time Inc., presented the award. Here is a transcript of his remarks.

Bierstedt

John Redpath: I am very pleased and honored to be here at the meeting of the MLRC in Chantilly, VA. The MLRC has been a successful advocate and substantial resource for all who defend and protect the First Amendment. You could find no one more worthy of the MLRC FIRST AMENDMENT LEADERSHIP AWARD than Robin Bierstedt. You are, of course, lucky to get Robin to attend any event in person these days. She has spent the Spring, Summer and early Fall at the Bierstedt compound on Martha's Vineyard. It takes something special to get her to leave. Robin is an active tennis player who is phobic about the sun. As you can see from the absence of a tan, she must play tennis in a burka. I didn't know that Nike made burkas.

Robin has been a vigorous and articulate defender of the MLRC for many years. When I was at Time Inc. and the bill from the MLRC would arrive and I was under the pressure that all print organizations face, I would wander into Robin's office and seek relief from Time's obligation. No matter how forcefully I put my case for non-payment Robin was the staunchest advocate you could have had and the check eventually but always made its way into the mail.

We are not here, however, to honor Robin as a defender of the MLRC treasury or her academic record (already fulsomely covered in the program notes)-summa cum laude and Phi Beta Kappa with honors in English in from Barnard College or her graduation from Columbia Law School or her personal achievements: a marriage of 26 years and mother of two boys now 24 and 19-or her fecundity as an author-the list of articles, publications and speeches is too long to list. You are here to give Robin the MLRC First Amendment Leadership Award because of her passion and zeal for journalism, journalists and the First Amendment.

I wish I could quote some of Robin's comments about outside counsel, particularly outside counsel that expected to get paid for representing Time but good taste and discretion prevent me. I also wish I could have satisfied the persistent audio-visual attendant here at the hotel by showing some of the photos of Robin that I found in the Time Inc. private archive but once again discretion prevents me.

As a lawyer for Time Inc.-eventually Vice President and Deputy General Counsel-Robin was the senior lawyer who

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advised and counseled the journalists of Time and the other lawyers at Time who advised the other Time Inc. publications. Unlike many journalists who must consult their lawyers, they sought her advice and guidance because they found her a source of intelligent, informed advice coupled with sound judgment. As Rick Stengel, Managing Editor of Time magazine said "Robin was more hopeful and more optimistic" than any lawyer he had ever worked with. Michael Elliot, International Editor of Time described Robin as the person who "Gave us clarity and courage." I cannot imagine better recommendations from a client. And they are accurate and true. As another anonymous journalist at Time said, "Robin was the one who says yes."

Robin brought her skills to bear on even the most mundane of tasks. We've all seen claims brought against media companies which are meritless. Many of them are so unlikely that even the lawyer who argues them can't put much energy or enthusiasm behind them. Yet Robin crafted her responses to these tedious claims with flair and care. She is a better writer than most of her clients, for example- In response to yet another sailor who was sure that he was the subject of the famous Eisenstadt photo (published in LIFE magazine) of the sailor and nurse kissing in Times Square on VJ Day…..While she was rejecting the claim she noted, "Any swabbie worth his bell-bottoms kissed any girl within reach. No fewer than 10 sailors have managed to recall to the last detail how it happened and how they happened to be in Times Square."

Robin was, of course, responsible for many large and important cases while at Time. On her watch, Time was sued by many of the famous and powerful including two Prime Ministers (Papandreou of Greece and Hawke of Australia), an Israeli general (Ariel Sharon), the Church of Scientology and Indonesian politician (Suharto) and the spiritual leader of a militant Islamic organization. She also dealt with plaintiffs less powerful and less famous: a con artist, a stripper, a psychic, a belly dancer, a Brazilian prostitute and a Japanese serial rapist. Unfortunately, of course, truth, justice and the American way did not always prevail-Time had to settle or perhaps received less than favorable results but we all know that lawyers have to deal with the law and the facts as they find them and a victory for the client (no matter how deserving) is not always possible. Robin's role in all these and other Time matters was crucial. She was energetic, diligent and insightful. She calmed the clients. She managed outside counsel. And she provided the backbone and determination that are necessary for a public company to fight these profit draining battles.

Finally, Robin is a wonderful colleague-an adult, always good company, good humored, affable. By her manner and example she improved the morale of the Time Inc. law department. Quite an accomplishment, particularly in the last several years. So I am very pleased and honored to introduce Robin Bierstedt winner of the 2010 MLRC First Amendment Leadership Award.

MLRC 2010-11 UPCOMING EVENTS

MLRC Annual Dinner
November 10, 2010
Grand Hyatt, New York, NY
For more, click here

MLRC Forum
November 10, 2010
Grand Hyatt, New York, NY
For more, click here

DCS Annual Meeting
November 11, 2010
Proskauer Rose , New York, NY

California Chapter Luncheon Meeting
December 15, 2010
Southwestern Law School
Los Angeles, CA
For more, click here

MLRC/Southwestern Entertainment Law Conference
January 20, 2011
Los Angeles, CA

MLRC/Stanford Digital Media Conference
May 19-20, 2011
Palo Alto, CA

London Conference
September 19-20, 2011
(In-house counsel breakfast Sep 21st)
London, England

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Pennsylvania Jury Returns Verdict in Favor of The Pocono Record in Libel Cases over Investigative Series on Inflated Home Pricing

By Alia L. Smith

After a nine-day trial, it took a Monroe County, Pennsylvania jury just under two hours to unanimously conclude that The Pocono Record and its former reporter, Matt Birkbeck, had not libeled Raintree Homes, a real-estate developer, in a 2001 series investigating the reasons behind the foreclosure crisis in the Pocono Mountain region of Northeastern Pennsylvania. The jury found that the newspaper – which is owned and published by Dow Jones Local Media Group – accurately reported that Raintree sold homes at inflated prices based on inflated appraisals to buyers with marginal credit, thereby contributing to the high foreclosure rate. *Raintree Homes, Inc. v. The Pocono Record*, Nos. 3651 CIVIL 2001, 2358 CIVIL 2002 (Monroe Cty. C.C.P.).

The Articles

In April 2001, The Pocono Record published a series of articles by Birkbeck, entitled "A Price Too High," which examined why Monroe County's foreclosure rate had quadrupled from 1990 to 1999. Following many months of investigation, Birkbeck reported that one key cause was that some new home builders targeted poor-credit customers unfamiliar with the local market and sold them homes at prices far in excess of their fair market value. These inflated sales prices were supported by inflated appraisals. When buyers sought to sell or refinance, they learned that their homes – many of which had been purchased only a few years earlier – were worth only a fraction of what they had paid. Many were forced into bankruptcy and foreclosure.

The series – which won the 2001 national Investigative Reporters and Editors award for small newspapers – focused on the business practices of a few local companies, including the plaintiffs in this matter: Raintree Homes, its sister company Chapel Creek Mortgage Banker, and their owner, Gene Percudani. The articles explained that Raintree advertised heavily in the New York City market to prospective first-time home buyers with marginal credit. Chapel Creek secured mortgages for the buyers and routinely hired Dominick Stranieri to appraise the houses. As the articles reported, Stranieri faced civil charges accusing him of submitting inflated appraisals, and people who had purchased Raintree homes appraised by Stranieri discovered that soon after they bought their houses, independent appraisers valued them at substantially less than the purchase price.

Percudani declined to comment for the articles; instead, his lawyer denied using inflated appraisals, denied knowing of any deficiencies in Stranieri's appraisals, and stated that Raintree's prices were based on the fixed costs of construction.

After the original series of articles appeared, the newspaper continued to report on the controversy as it developed, informing readers, for example, that homeowners protested against Raintree and that various government officials were investigating real estate fraud in the region.

Plaintiffs' Complaint

Just a month after the series was published, Raintree, Chapel Creek and Percudani filed suit against Birkbeck and Dow Jones Local Media group (f/k/a Ottaway Newspapers), the owner and publisher of The Pocono Record, alleging that the articles were false and defamatory. Nearly a year later, the plaintiffs filed a second lawsuit, separately alleging defamation claims based on the original articles, and several subsequent reports, as they appeared on the newspaper's website.

Other Actions Against Plaintiffs, and the Stay of the Defamation Cases

Less than a year after plaintiffs filed suit, the Pennsylvania Attorney General filed a civil consumer fraud action against them, alleging, among other things, that plaintiffs and Stranieri conspired to sell homes at inflated prices and that plaintiffs failed to disclose key terms in their

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marketing program. *See Commonwealth v. Percudani*, 256 M.D. 2002 (Pa. Commw. Ct.). The defamation cases were stayed to allow the Attorney General's action to proceed. At that point, discovery had yet to begin in the defamation cases. Indeed, the newspaper had not even answered the complaints.

The Attorney General's action was resolved in 2007, when the parties entered into a consent decree in which Percudani agreed to pay $250,000, Raintree and Chapel Creek agreed to go out of business, and all of the plaintiffs were permanently enjoined from reentering the mortgage business in Pennsylvania. Plaintiffs also admitted violating consumer protection laws relating to provisions in their form contracts and disclosures in their Internet marketing. None of those admissions addressed the inflated prices of the plaintiffs' homes or the practices reported in the newspaper.

Also during the course of the stay, more than two hundred homebuyers filed suit against Percudani, Raintree, Chapel Creek, Stranieri, and others in federal court, claiming that they and other defendants committed unlawful and deceptive acts through their use of inflated appraisals and other business misconduct. *Lester v. Percudani*, No. 3:01-CV-1182 (M.D. Pa.); *Acre v. Chase Manhattan Mortgage Corp.*, No. 1:04-cv-832 (M.D. Pa.). That action eventually settled after the district court denied summary judgment in 2008.

In 2008, the stay of defamation cases was lifted.

Discovery and Motion for Summary Judgment

When the cases reopened, discovery began, although plaintiffs dragged their feet in producing documents in response to the newspaper's requests and disregarded two court orders to produce their documents. Along the way, plaintiffs admitted that, during the stay, Percudani destroyed or discarded "the vast majority" of the companies' documents, including their sales, construction, and mortgage files. After the defendants moved for sanctions, Percudani admitted at a hearing that he only retained documents that would be helpful to his case against the newspaper and discarded the rest..

On June 24, 2010, defendants moved for summary judgment in light of plaintiffs' admitted spoliation of evidence and on the grounds that (1) the articles were not materially false and (2) the plaintiffs were limited purpose public figures who could not prove actual malice. In late August, the Court granted in part and denied in part the motion. In its opinion and order, the Court declined to dismiss the cases on spoliation grounds, but held that it would instruct the jury at trial that it could draw an adverse inference against plaintiffs based on their destruction of evidence. The Court then dismissed Percudani's claims, ruling that the challenged statements were not "of and concerning" him and/or were not defamatory. The Court also held that the two corporate plaintiffs were limited purpose public figures based on their significant advertising. The opinion did not address defendants' arguments that the articles were substantially true and published without actual malice.

The Trial

Jury selection began on October 6, 2010, and the trial continued for nine days over three weeks. Prior to trial, the Court declined to rule on nearly all of the motions in limine. It did, however, deny defendants' motion for the jury to read the articles before opening statements and for the Court to provide a preliminary instruction on the elements of a defamation claim.

Plaintiff's case-in-chief relied largely on the testimony of Percudani, former employees of Raintree and Chapel Creek, Stranieri the appraiser, and a purported expert in home construction costs. The thrust of plaintiffs' presentation on the issue of falsity was that The Pocono Record singled out the Raintree plaintiffs, that Raintree's prices were in line with the prices charged by other builders, and that the price of its houses was driven by fixed construction costs. Percudani and Stranieri testified that they never made any arrangement to inflate appraisals to support the sales prices charged by Raintree. And, Percudani and plaintiffs' employees denied that Raintree marketed its homes to customers with poor credit.

Plaintiffs' theory of actual malice centered on a tale of revenge as told by one of plaintiffs' subcontractors. The subcontractor testified that Birkbeck angrily complained to him about burning that the contractor was doing on land owned by Percudani adjacent to Birkbeck's home. Their confrontation, which resulted in the contractor pleading guilty to disorderly conduct, occurred just one month before Birkbeck began reporting on the foreclosure series after another reporter, who had begun investigating the issue, left the newspaper. Plaintiffs contended that Birkbeck's reporting

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targeted Raintree in order to stop the development behind his home.

Plaintiffs also called a damages expert, who opined that plaintiffs' lost profits were approximately $27 million.

At the end of plaintiffs' case, defendants moved for a nonsuit on the grounds that plaintiffs had adduced insufficient evidence of falsity and actual malice. The Court denied the motion as to Raintree, but did dismiss the claims against Chapel Creek and plaintiffs' claims for punitive damages.

In cross-examining plaintiffs' witnesses, and in presenting their own case, defendants offered evidence to show that:

- Raintree's scheme of inflating prices had begun to unravel *before* the articles were published. For example, six months before the series was published, Chase Manhattan Mortgage Corporation – the bank that bought most of the loans from Chapel Creek – terminated its relationship with Chapel Creek because of faulty appraisals. Likewise, four months prior to the articles being published, Freddie Mac – which bought many of the loans from Chase – announced that it intended to put Percudani, Stranieri, and Chapel Creek on its exclusionary list, which effectively would bar them from the mortgage industry.

- Appraisal order forms sent from Chapel Creek to Stranieri explicitly stated that it "needed" a specific value, and Stranieri met that price, usually within a day of receiving the appraisal order form.

- Percudani, who professed at trial to know nothing of the foreclosure crisis facing homeowners in the neighborhoods where he built homes, had written to a Pennsylvania state agency before the articles were published to complain that local realtors and appraisers were to blame for the foreclosures and to complain that they were accusing him and other homebuilders of "ripping off" the public.

Defendants presented some of plaintiffs' advertisements, which were broadcast and published in New York media, and which touted Raintree's ability to get first-time home buyers into new homes "regardless of [their] present financial condition" and despite their concerns about "bad credit" or an inability to save for a down payment.

In addition, defendants presented the testimony of Francisca Moya and Sheryl Duff – two of the homeowners featured in the articles – who testified about their unfortunate experiences with Percudani's companies. They described seeing the advertisements and the high-pressure sales pitches they encountered. And each explained that they were dumbfounded to learn that their homes were worth about $50,000 less than they had paid for them, in Moya's case, only ten months after she purchased the house. Both women talked movingly about how they lost their homes – one in foreclosure and the other simply gave her house keys to the bank.

Defendants also highlighted several significant events that happened after the articles were published that evidenced the accuracy of Birkbeck's reporting. For example, Chase offered to reduce the principal on loans used to buy Raintree homes to reflect their actual fair market value, an unprecedented move at the time; Freddie Mac formally placed Percudani, Chapel Creek and Stranieri on its exclusionary list; Stranieri surrendered his appraisers license; Percudani and his companies admitted violating Pennsylvania law in connection with the Attorney General's suit; and the Pennsylvania Banking Department released a study confirming the high foreclosure rates and Raintree's role in them.

In addition, Birkbeck and two of the newspaper's editors testified at length about the substantial investigation and reporting that went into the original series. Birkbeck explained how he interviewed realtors, appraisers, builders, bankers, state officials, homeowners, Chase, Freddie Mac, and others – and, through these interviews, learned about Percudani and Stranieri, and discovered that independent appraisals consistently showed that Stranieri's appraisals inflated the value of Raintree's homes. Birkbeck also testified about reviewing government foreclosure records and finding the link between those foreclosures and Raintree and other builders.

Some of Birkbeck's sources also testified, including Duff, Moya, appraisers, and a former state representative who – long before the articles were published – made home foreclosures a central platform of his campaign.

Jury Instructions, Deliberation and Verdict

The Court did not hold a formal charging conference and

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developed its own verdict form, which asked three questions:

- Has the Plaintiff proven by a preponderance of the evidence that the articles written by Matt Birkbeck and published by the Pocono Record were defamatory with respect to Raintree Homes, Inc.?
- Has the Plaintiff proven by clear and convincing evidence that the Defendants acted with actual malice in writing and publishing the articles pertaining to the Plaintiff?
- State the amount of damages sustained by Plaintiff as a result of Defendants' actions.

Defendants objected to the verdict form.

The Court's jury instructions were very short. It explained that the word "defamatory" on the verdict form encompassed defamatory meaning and falsity. The instructions defined "actual malice" to mean knowledge of falsity or reckless disregard for the truth, but offered no additional explanation, despite defendants' objection to the use of the term "actual malice" (which does not even appear in the standard Pennsylvania jury instructions) and their request to explain that actual malice requires a subjective awareness of probable falsity.

The Court gave an adverse inference instruction, advising the jury that they may assume that the evidence Percudani destroyed would be helpful to the defendants and harmful to the plaintiffs.

The jury deliberated for approximately two hours before returning its verdict in favor of The Pocono Record and Birkbeck. On the verdict sheet, the jury answered the first question "no," indicating that Raintree had not proven by a preponderance of the evidence that the articles were "defamatory." Given that answer, the jury did not proceed to the remaining questions.

Raintree has not indicated whether it plans to appeal.

Defendants The Pocono Record and Matt Birkbeck were represented by Gail Gove of Dow Jones & Company and Gayle Sproul and Michael Berry of the Philadelphia office of Levine, Sullivan, Koch & Schulz, LLP and Alia Smith of the firm's Washington, D.C. office. Plaintiff Raintree Homes was represented by Marshall Anders of Anders & Masington, LLC in Stroudsburg, PA.

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Baltimore Federal Court Jury Awards 350K in Case of Misidentification

Newspaper Wrongly Identified Private Plaintiff as Federal Fugitive With Same Name

In a recent Maryland libel trial, a jury awarded $350,000 to a Florida restauranteur for a series of articles published online and in print in the Baltimore City Paper which misidentified him as a federal fugitive of the same name. *Kafouros v. CEGW, Inc. et al*, No. 09-1542 (D. Md. Jury verdict Sept 23, 2010) (Motz, J.).

Background

The articles, published in 2008 in the Baltimore City Paper, and authored by senior staff writer Van Smith, reported that plaintiff, Ioannis Kafouros was in fact Ioannis "Crazy John" Kafouros, a Baltimore nightclub owner who was convicted of trafficking in stolen goods and who fled the state before he was sentenced in absentia in 1999.

The reporter, a 20-year veteran at the paper, became interested in the whereabouts of "Crazy John" after federal agents raided a property still listed in the fugitive's name. The reporter Googled the name "Ioannis Kafouros" and found an Ioannis Kafouros in Miami, the owner of Mykonos Restaurant. On August 21st, 2008, Smith telephoned the restaurant, attempting to contact Mr. Kafouros. Instead, he reached plaintiff's son, Alexis Kafouros, who took a message for his father. During this five-minute conversation, the reporter claimed that the son confirmed that his father was the fugitive "Crazy John" Kafouros.

Based solely on the Google search and the conversation, Smith wrote the first article, which was published online, on the Baltimore City Paper website, on August 22nd, 2008. This article was headlined: "Where is Crazy John Kafouros?" The reporter explained that he called the Maryland U.S. Attorney's office about the location of "Crazy John," but the office spokeswomen could not comment on current efforts to locate him. It then described plaintiff's "possible connection" to the fugitive based on the Google search and confirmation from the son. The article came to a stronger conclusion stating:

> Thus, Crazy John the federal fugitive appears to be living quite openly in Miami, running an award-winning restaurant, and not the least bit concerned he could be sent straight to federal prison if authorities find him. That may change now, given the renewed publicity the Tilman raids have brought him – and given the ease with which his whereabouts were found by City Paper.

Plaintiff sent a letter complaining about the article to defendants on September 16, 2008. The defendants, on September 24, 2008, published an article that stated that the plaintiff "appears not to be federal fugitive 'Crazy John' Kafouros" and that "a formal determination is to be announced by the U.S. Marshal Service."

In October 2008, the defendants again published the statements that plaintiff's son Alexis had said that his father was the same Ioannis Kafouros from Baltimore, and that his mother, Diane Kafouros, lived in Baltimore. The article also suggested that plaintiff owned property in Maryland that had been raided by federal agents.

Libel Complaint

Plaintiff filed suit on March 17, 2009, in Miami-Dade County Court, against the newspaper and the reporter for defamation. Plaintiff claimed that the articles made several false allegations: first, he was not "Crazy John" Kafouros; second, his son, Alexis, had never stated nor implied that his father was the "Crazy John" from Baltimore; third, his son Alexis had clearly told the reporter that his mother's name was Maria Kafouros, and not Diane; fourth, he was not under any investigation by the U.S. Marshal Service; and lastly, he had never owned property subject to any raid by federal agents.

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Defendants removed the case to the United States District Court for the Southern District of Florida on April 24, 2009. The case was transferred to the United States District Court for the District of Maryland on June 9th, 2009.

Libel Trial

Defendants did not move for summary judgment before trial and did not challenge plaintiff's assertion that he was a private figure. Jury voir dire was conducted by Judge Motz and focused on any connections to the parties and conflicts about jury service rather than attitudes towards the press.

The case was tried before an eight person jury over four days. Plaintiff's theme was that the newspaper was negligent and reckless in publishing the story, stressing that the reporter failed to ask more questions of Alex, that he didn't call plaintiff back, he did not do any further fact-checking, and he did not realize that the two Ioannis Kafouroses had different middle initials. The defendants "wanted to have found 'Crazy John Kafouros, the federal fugitive," plaintiff's counsel told the jury. "Van Smith heard what he wanted to hear and did nothing to confirm or deny it."

No expert witnesses were used. Plaintiff, his son, wife and cousin testified as to falsity and damages.

The newspaper called as witnesses the reporter, editor and publisher. Defense counsel acknowledged that the identification of plaintiff as a fugitive was a "mistake," but emphasized that it was a result of a simple misunderstanding, not "evil." Defense arguments focused on the honest nature of the newspaper's mistake, and on corrections it ran in the following weeks.

The reporter testified that plaintiff's son had in fact confirmed his father was a fugitive over the phone, stating at trial "I thought it was extremely odd, but Alex had said what he had said."

The parties also clashed over whether plaintiff suffered damages. According to plaintiff's counsel, the articles caused Mr. Kafouros to live in fear, and beef up security for himself and his family because "Crazy John" Kafouros was a fugitive who possibly owed money to more unsavory people. As plaintiff's counsel said, "You don't know who might be looking to collect that money from 'Crazy John" Kafouros."

The defense countered that plaintiff's restaurant was still doing well, even in the poor economy; and that the Baltimore City Paper had few readers in Florida. If anyone was after 'Crazy John', defense counsel argued, the plaintiff would have already heard about it. He also appealed to the jury on the point that the plaintiffs were comfortably well off, and did not need the $1 million in damages they were asking for.

After two and a half hours' of deliberation, the eight-member jury found that the paper was negligent in publishing the articles about plaintiff, but found no evidence of actual malice to support an award of punitive damages. The jury awarded the plaintiff $350,000 in compensatory damages. This month the newspaper paid the judgment.

Plaintiff was represented by Joel S. Magolnick, of Marko Magolnick and Leyton PA in Miami, Fla., and Joshua R. Treem, of Schulman Treem Kaminkow and Gilden PA in Baltimore, Md. The Baltimore City Paper was represented by Peter F. Axelrad and Michael S. Steadman Jr., of Council, Baradel, Kosmerl & Nolan P.A. in Annapolis, Md., and John Timothy Hinton, Jr, of Haggerty McDonnell O'Brien and Hinton LLP, in Scranton, Pa.

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California Newspaper Publisher Loses Private Figure Libel Trial

Jury Awards Plaintiff $332,500

After a six week trial, a California state court jury this month awarded $332,500 in damages to a private figure plaintiff in a libel case against the owner and publisher of a group of community newspapers. *Bohl vs. Hesperia Resorter, et al*., SCVSS 68052 (San Bernardino Sup. Ct. verdict rendered Oct. 4, 2010) (Gafkowski, J.). The jury found that the publisher acted negligently, but found no actual malice to award punitive damages.

In an unpublished pretrial ruling issued in August, the trial court held that plaintiff was a private figure even though she was a state contractor and married to a public official at the relevant time. The court held that plaintiff had not thrust herself into the public spotlight because of her relationship with a public official.

Background

The defendant Raymond Pryke is the owner and publisher of several community newspapers in Southern California, including the *Hesperia Resorter,* the *Apple Valley News* and the *Adelanto Bulletin.* In 1999 and 2000, the newspapers published two articles about plaintiff Nancy Bohl, the owner of a company called The Counseling Team which provides counseling services to first responders. Under a state contract, The Counseling Team provided services to San Bernadino law enforcement officers. In 1999, Bohl was dating then San Bernadino County Sheriff Gary Penrod, and in 2000 the couple married.

The articles, headlined "Sleeping with Penrod Pays Off" and "Sheriff Penrod Spies on Deputies," alleged that plaintiff obtained the contract with the state because of her relationship with Penrod, that the company over-billed the county, and that it disclosed confidential patient information to Sheriff Penrod and other law enforcement officials.

Bohl sued for libel in September 2000. The trial court granted a default judgment against the defendants as a sanction for the publisher's refusal to answer interrogatories about the sources for the articles. In 2005, after conducting a damages hearing, Superior Court Judge Christopher J. Warner awarded plaintiff $2 million in compensatory damages and $1 million in punitive damages. *See MLRC MediaLawLetter* Oct. 2005 at 19.

In 2007, a California appellate court reversed the judgment, holding that under the circumstances a default judgment as a discovery sanction was an abuse of discretion where the publisher was asserting his rights under the California shield law. *See Bohl v. Pryke*, No. E039392, 2007 WL 1301006 (Cal. App. 4 Dist. May 4, 2007) (Hollenhorst, McKinster, King, JJ.). *See MLRC MediaLawLetter* May 2007 at 20.

On remand in 2008, the trial court awarded the plaintiff $29,180 in sanctions for abuse of discovery. That award was affirmed by the appellate court in April 2009.

In August 2010, Superior Court Judge Frank Gafkowski Jr. held that plaintiff was not a public figure because of her relationship with Sheriff Penrod and had not injected herself into any public controversy.

The Libel Trial

Jury selection began in late August 2010 under standard voir dire procedures. No jury questionnaires were used. Defendant did conduct confidential jury focus surveys. A 12 person jury of 8 women and 4 men was seated.

Plaintiff's theme at trial was that the publisher and reporter acted negligently in publishing the articles because they did not verify information from their anonymous sources and published false information. Plaintiff presented numerous witnesses who testified about her company's professionalism and confidentiality in counseling law enforcement individuals.

Defendant argued that the articles were true and that the sources were credible and reliable. The defendant also showed that other daily newspapers reported on Bohl and similar allegations. Moreover, defendant argued that Bohl and her company had not suffered any actual damages.

No expert witnesses were used by either side.

After three and one half days of deliberations, the jury returned a verdict for plaintiff. The jury found that the articles were false and published negligently, but found no clear and convincing evidence of actual malice to support punitive damages.

Plaintiff was represented by John Rowell, Cheong, Denove, Rowell & Bennett, Los Angeles, CA. Defendant was represented at trial by Frank J. Lizarraga, Jr. and Brent L. Valdez, Covington & Crowe, Ontario, CA.

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Jury Rejects Mayor's Libel Claim Against Thorn-in-the-Side Newspaper

Newspaper Wins Big Damages for Seizure of Newspapers

The former editor of the Westchester Guardian and 16 other newspaper employees won a total of $8 million in damages against Mayor Philip Amicone, Yonkers, NY, over claims that city officials seized newspapers, newsracks and threatened distributors with arrest in retaliation for the newspaper's criticism of the Mayor. Claims from the newspaper plaintiffs were consolidated and tried together with the Mayor's libel counterclaim against the newspaper. *Blassberg v. Amicone*, No. 08-1506 (S.D.N.Y. jury verdict Oct. 13, 2010) (Seibel, J.). The jury rejected the Mayor's libel claim over an article stating he had visited a strip club. This article focuses on the libel counterclaim.

Background

The Westchester Guardian is a free weekly newspaper owned by strip club owner, Sam Zherka. The New York Times once described the owner as "not your grandparent's idea of a newspaper publisher"; and the newspaper as one that "often shoots first and asks questions later, running front-page headlines that accuse city officials of corruption and ineptitude and the police of brutality without necessarily dotting the i's on the evidence." The paper is a harsh critic of local politicians, once publishing on its cover a photograph of Mayor Amicone and a neighboring politician with the headline "Dumb and Dumber."

At issue on the libel claim was a November 1, 2007 story entitled "It's Still a Tale of Two Cities . . . Seriously in Need of Change." As part of its critique, the article alleged that Mayor Amicone was a "huge hypocrite. Pretending to be holier than thou, he actually frequents strip clubs; even had a 'lap dance' from a girl by the name of Sassy." Richard Blassberg, who was editor at the time, later said the source for the article was the paper's owner Sam Zherka.

Amicone sued Zherka, then editor Richard Blassberg, and the newspaper for libel as a counterclaim to the newspaper's First Amendment retaliation claims against the Mayor. No pretrial motions for summary judgment on the libel claim appear to have been made.

Libel Trial

The trial began on October 4 before an eight person jury. Judge Cathy Seibel of the Southern District of New York presided. The libel claim was something of side-show to the First Amendment retaliation claims. According to news reports, testimony on the libel claim focused on the truth or falsity of the article. Zherka testified that Amicone was in his VIP strip club in Manhattan a few weeks after they met at a dinner earlier in the year, where, according to Zherka, the mayor gave Zherka an integrity award. The mayor testified that he had never been in Zherka's strip club, or any strip club – and that he had never given Zherka any award or offered public words of praise. Zherka testified that he had not personally seen Amicone in the club, but had been told by two employees that Amicone had been in the club. He also testified that he had unsuccessfully searched for over three years for the dancer named "Sassy."

The Mayor and city lawyers said they would move to set aside the judgment.

Plaintiffs were represented by Jonathan Lovett and Amy L. Bellantoni of Lovett & Bellantoni, LLP, Hawthorne, NY. Defendants were represented by Kevin J. Plunkett and Brian T. Belowich of Delbello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, NY.

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Three Appellate Courts Interpret Illinois's Anti-SLAPP Statute

By Steve Mandell, Steve Baron, and Shari Albrecht

The Citizen Participation Act (CPA), 735 ILCS 110/1 *et seq.*, Illinois's anti-SLAPP statute, was enacted in 2007; however, before September 30, 2010, no Illinois appellate court had issued a ruling addressing its scope. In the past month, two appellate courts and the Supreme Court of Illinois have issued opinions that largely confirm the broad interpretation of the Act that defendants have advocated since its enactment.

The CPA

The CPA provides immunity for a wide range of activities: "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government . . . , regardless of intent or purpose . . . ." 735 ILCS 110/15. The statute broadly defines "government" to include not only a "branch, department, agency, [or] employee" of a government but also "the electorate." 735 ILCS 110/10. The CPA does not impose any requirement that the protected activity have some connection to the public interest, nor does it provide for any analysis of the merit of a plaintiff's claim.

The only exception to the immunity is for acts "not genuinely aimed at procuring favorable government action, result, or outcome" – language that traces back to U.S. Supreme Court cases applying the *Noerr-Pennington* doctrine. 735 ILCS 110/15. When a defendant files a motion under the Act, the court must apply a burden-shifting procedure that requires the plaintiff to establish, by clear and convincing evidence, that the statute's immunity does not apply. 735 ILCS 110/20(c). A prevailing defendant is entitled to "reasonable attorney's fees and costs incurred in connection with the motion." 735 ILCS 110/25.

The Cases

The first of this trio of decisions was the First District Appellate Court's ruling in the case *Shoreline Towers Condominium Association v. Gassman* (Nos. 1-08-2438 and 1-09-2180, Sept. 30, 2010). That case sprang from a dispute between a condominium association and a resident. After the association interpreted one of its rules as preventing the resident, Gassman, from displaying a mezuzah outside her apartment door, Gassman took action: she filed discrimination claims with numerous state and local agencies and filed a federal lawsuit. Chicago later changed its municipal code to forbid such rules, and Illinois law similarly changed.

The condo association and its president then filed a state-court lawsuit against Gassman, alleging defamation and related torts. The alleged defamation included not only Gassman's public statements regarding the association's rule (including statements to a local Jewish newspaper) but also personal insults toward the association's president. The Circuit Court of Cook County granted the association's motion to dismiss under the CPA but denied the motion as to the president's claims. The appeal concerned only the dismissal of the claims against the association and not the denial of the president's motion. The appellate court affirmed.

The second opinion came from the Second District Appellate Court in *Sandholm v. Kuecker* (No. 2-09-1015, October 18, 2010). The underlying dispute in that case was an effort by community members and parents to pressure a school board to dismiss a high school basketball coach. After the school board failed to act on formal complaints, the community members formed a committee and continued to make public statements calling for the coach's removal, including postings on websites that covered local news and sports, statements on a local radio show, and statements to reporters from local newspapers.

The plaintiff was eventually removed from his post as the school's basketball coach, although he remained athletic director. The former coach filed a 25-count complaint in the Circuit Court of Lee County (in north central Illinois). The circuit court dismissed the complaint in its entirety pursuant to

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the CPA, and the appellate court affirmed, in a 49-page opinion.

The third opinion was the Supreme Court of Illinois's ruling in *Wright Development Group v. Walsh* (No. 109463, Oct. 21, 2010). Of these three cases, *Walsh* is the most classic "SLAPP." John Walsh, the president of a condo board association on Chicago's north side, attended a meeting at an alderman's office relating to condo development issues; Walsh's association was already engaged in a lawsuit against its developers. After the meeting, the alderman hosted a "mingling session" at which Walsh discussed his concerns with local newspaper reporters.

The developers filed suit against Walsh and the newspapers that reported his statements. (The claims against the newspapers were stayed pending bankruptcy and were not the subject of the appeal.) The Circuit Court of Cook County denied Walsh's CPA motion on the ground that his statements to reporters were not made in the context of a government proceeding, but the court granted a separate motion to dismiss that was based on pleading deficiencies. Walsh appealed, and the First District Appellate Court denied the appeal as moot, reasoning that Walsh had obtained the relief he sought when the complaint was dismissed, albeit on grounds that did not entitle him to a fee award.

Walsh appealed that ruling to the Illinois Supreme Court, which reversed the appellate court on the mootness issue, held that Walsh's CPA motion should be granted, and remanded the case for award of attorney fees.

The Holdings

The CPA is broad. This trio of rulings confirms the broad scope of the CPA. The *Sandholm* opinion in particular emphasizes this fact, stating that the CPA is broader than other states' anti-SLAPP statutes and broader than the sort of anti-SLAPP legislation initially conceived by professors George Pring and Penelope Canan, who coined the term "SLAPP." The CPA is not limited to protection of the right to petition and is not limited to protection of speech on matters of public concern.

The *Sandholm* court also emphasized that the CPA's immunity can apply regardless of the merits of the plaintiff's claim; the court stated that the CPA provides some defendants with "the right to commit libel with impunity" and provides "a qualified privilege to speak even with actual malice."

The CPA is not unconstitutional. The *Sandholm* court specifically rejected an argument that the CPA was unconstitutional; the *Walsh* court held that such an argument had been waived because it was not raised before the trial court. The plaintiff in *Sandholm* had argued that the CPA was unconstitutional under the Illinois constitution because it deprived him of the right to protect his reputation; the court rejected that argument with little discussion and analogized the CPA to other statutory immunities, such as governmental tort immunities. The *Sandholm* court also rejected the plaintiff's equal protection argument, which was premised on the assertion that the CPA is specifically and improperly aimed at public employees.

The CPA's protection is not limited to statements in governmental proceedings. Each of these three cases involved an underlying activity other than direct statements to government or statements within a government proceeding; in each case, the court held that the CPA should not be strictly limited to such situations. Each of the courts pointed to the CPA's own broad language in support of this conclusion.

As the *Walsh* court noted, the CPA's definition of "government" includes the electorate; the court noted that the effect of Walsh's statements would extend, at a minimum, to the residents of his building, "and also potentially affect citizens of the same ward and city." The *Walsh* court stated that nothing in the CPA "suggests a requirement of direct appeal to a government official."

The *Sandholm* court further noted that statements in governmental proceedings are already protected by various privileges, including the *Noerr-Pennington* doctrine, so a similar, narrow interpretation of the CPA would make the statute meaningless. The *Sandholm* court described statements posted to websites and other public statements made outside the context of government proceedings as "part of the process of influencing the government to make a decision in the petitioner's favor," and explicitly held that the CPA applies to media defendants that "participated in this process by providing a forum for defendants to speak about their position."

The "sham" exception is not primarily a subjective

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inquiry. Each of the three rulings approaches the CPA's sole exception in a slightly different way. *Sandholm* is the most explicit about the type of analysis that the court performs to determine whether an activity is "genuinely aimed at procuring favorable government outcome."

Tracing this language back to Supreme Court cases that explain the *Noerr-Pennington* doctrine, the *Sandholm* court explained the test as follows: "Applying the doctrine and its sham exception to the facts of this case requires the court to first consider whether objective persons could have reasonably expected to procure a favorable government outcome (plaintiff's removal) through a public campaign like defendants' campaign against plaintiff. If the answer to that question is 'yes,' the court did not consider the subjective intent of defendants' conduct. If the answer is 'no,' the court would consider whether defendants' subjective intent was not to achieve a government outcome that may interfere with plaintiff but rather to interfere with plaintiff by using the governmental process itself."

To determine whether the objective portion of the test was satisfied, the *Sandholm* court looked to the actual effects of the defendants' activities and pointed to the fact that the publicity campaign had reached the result that the defendants sought. Similarly, the *Shoreline Towers* court looked to changes in state and local law in support of its conclusion that the CPA's exception should not apply. The *Walsh* court did not lay out this analysis in any detail; the court simply stated that the plaintiff had been unable to prove that the defendant was being untruthful concerning the motivations for his statements, and that further analysis of the plaintiff's argument was unnecessary in light of that determination.

CPA applies to media defendants and to statements to the media. Each of the cases involves a media defendant, a statement to the media, or both. In *Sandholm*, a radio station and its general manager were defendants and movants under the CPA; the plaintiff's claims against the individual defendants were also based in part on statements newspaper reporters and postings on local news and sports websites. In *Shoreline Towers*, the plaintiff's claims were based in part on the defendant's statements to a local newspaper. In *Walsh*, the plaintiff's claims were based on statements to newspaper reporters. In each case, the courts applied the CPA without regard to the involvement of media defendants or the means by which the statements were published.

Fee recovery is limited to those incurred "in connection with the motion." This issue arose in *Sandholm*. In that case, the defendants cross-appealed, arguing that the trial court erred in limiting fee recovery to those fees that were specifically itemized as being related to the briefing of the CPA arguments. Four different law firms represented the defendants, and their initial request for fees ranged from $11,000 to $212,000. The trial court ruled that the parties were limited to an hourly rate of $200, which the court determined was the prevailing rate in the rural area where the suit was brought. The court also ruled that the fees should not include charges for assistants, librarians, and Westlaw research, travel time, and time spent briefing issues other than the CPA motion. Defendants' revised fee petitions sought between $1,500 and $32,000.

These three recent opinions have created a fairly uniform body of case law that takes a broad view of the CPA and confirms that the statute provides a potent device for early dismissal of defamation and related claims.

The appellate court, applying an abuse of discretion standard, affirmed the trial court's ruling. The court was unsympathetic to the defendants' argument concerning the impossibility of splitting up time between the CPA motion and other defenses. The court stated that it was the defendants' burden to present a fee petition limited to fees incurred "in connection with the [CPA] motion," as the statute requires.

The *Shoreline Towers* opinion also addresses attorney fees. In that case, the court limited the defendants to hourly rates between $235 and $350, concluding that the case did not merit the same hourly rate as "complex commercial litigation." Although the attorneys had initially requested a fee award of approximately $52,000, the trial court awarded (and the appellate court affirmed) $36,840.

Other procedural rulings. These cases also addressed

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procedural issues that are unique to Illinois practice and which this article will not analyze in any depth. The *Shoreline Towers* opinion addresses the CPA's retroactivity. *Walsh* addressed appellate jurisdiction; although the CPA provides for interlocutory appeal of denial of a motion to dismiss, the court rules do not provide for such a procedure. Each of the opinions deals to some extent with the question of how a motion to dismiss under the CPA, which provides for burden-shifting, relates to other standards for motions to dismiss found in the Illinois Code of Civil Procedure. Justice Freeman filed a concurrence to the *Walsh* opinion that, while not binding, will likely influence future analysis of that issue.

Conclusion

These three recent opinions have created a fairly uniform body of case law that takes a broad view of the CPA and confirms that the statute provides a potent device for early dismissal of defamation and related claims.

Mr. Mandell, Mr. Baron, and Ms. Albrecht are with Mandell Menkes LLC in Chicago.

In the Shoreline Towers case, the plaintiffs were represented by David C. Hartwell and Joonho Yu of Penland & Hartwell, LLC, Chicago, and the defendant was represented by William I. Goldberg of Seyfarth Shaw, LLP, Chicago.

In the Walsh case, the plaintiff was represented by David P. Goodman and Joseph L. Cohen of Shaw Gussis Fishman Glantz Wolfson & Towbin LLC of Chicago. Terrence J. Sheahan and Michael Franz of Freeborn & Peters, Chicago, represented defendant Walsh, and Damon E. Dunn and Michelle L. Wolf-Boze of Funkhouser Vegosen Liebman & Dunn Ltd., Chicago, represented the Sun-Times Media Group.

In the Sandholm case, the plaintiff was represented by Stephen T. Fieweger of Katz, Huntoon & Fieweger, P.C., of Moline, Illinois. Defendants NRG Media and Al Knickrehm were represented by Michael R. Lieber and Jacob P. Hildner of McGuireWoods LLP in Chicago. The individual defendants were represented by Linda A. Giesen of Dixon & Giesen Law Offices, Dixon, Illinois; James W. Mertes, Pignatelli & Mertes, P.C., Rock Falls, Illinois; and Jeffrey Zucchi, Clark Justen & Zucchi, Ltd., Rockford, Illinois.

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New York's Highest Court Extends Its Defendant-Friendly Approach to Non-Media Republication Liability for Defamation Damages

By Henry R. Kaufman and Michael K. Cantwell

The New York Court of Appeals, long-known as a media and defendant-friendly venue in defamation cases, addressed the liability of a non-media originator of a defamation for damages from its later republication by the media. *Geraci v. Probst*, (N.Y. Oct. 14, 2010).

In a 6-1 opinion, written by Chief Judge Lippman, the Court affirmed New York's century-old common law approach to republication liability in holding that a defamation defendant will not be held responsible for a subsequent republication by others years later without his knowledge or participation.

In a 6-1 opinion, the Court affirmed New York's century-old common law approach to republication liability in holding that a defamation defendant will not be held responsible for a subsequent republication by others years later without his knowledge or participation.

Background

Plaintiff Ronald Geraci and defendant Thomas Probst were former partners engaged in selling fire trucks to fire districts on Long Island. Geraci was also a commissioner of the Syosset Fire District. But Geraci claimed that he had never profited from sales to the District. In March 2002, after their business relationship soured, Probst wrote a letter to the Board of Fire Commissioners in which he challenged Geraci's statement, claiming that "[t]o be charitable, it was 'inaccurate.'" It was undisputed Probst's accusation was false.

In March 2003 the plaintiff commenced a defamation suit against Probst individually and d/b/a Hendrickson Truck Center, Hendrickson Enterprises, Inc., Hendrickson Transport, Inc., and Hendrickson Truck Parts, Inc. During the trial, the plaintiff sought to introduce portions of an article that had appeared in *Newsday* in November 2005, more than three years after the defendant's letter had been written, and more than two and a half years after the action had been commenced. The *Newsday* article repeated the accusation made by defendant and included a large color photograph of the plaintiff. Probst had not contacted *Newsday*, nor had *Newsday* attempted to contact Probst.

Over the defendants' objections the trial court admitted the article into evidence. The jury thereafter awarded plaintiff $2,950,000 in damages, including $500,000 in punitive damages. The court then granted defendants' motion to set aside the verdict and ordered a new trial unless plaintiff agreed to a remittitur to $800,000, including $50,000 in punitive damages. Plaintiff agreed, and both parties appealed.

The Appellate Division dismissed plaintiff's cross-appeal from the remittitur for lack of aggrievement but affirmed the judgment, holding that defendants' claim that the court had erred by allowing evidence of republication was not preserved for review. The Appellate Division also rejected defendants' argument that the trial court had erred by instructing the jury that Probst's statement was defamatory per se.

Court of Appeals Decision

After holding that the issue of republication had been squarely placed before the trial court, and thus preserved for appellate review, the Court of Appeals restated and reaffirmed its longstanding standard for republication liability:

> "It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control and who thereby make themselves liable to the

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> person injured, and that such repetition cannot be considered in law a necessary and probable consequence of the original slander or libel" (Schoepflin v Coffey, 162 NY 12, 17 [1900]).

The rationale for the rule, the Court went on, was that the party repeating the defamation should be responsible for the resulting damages. Admitting evidence of republication creates a risk that:

> the jury may "charge against defendant a separate, distinct libel (not pleaded in [the] complaint) by someone else, contrary to the rule that '[t]he original publisher of a libel is not responsible for its subsequent publication by others'" (Macy v New York World-Tel. Corp., 2 NY2d 416, 422 [1957]).

Under this standard, the Court held that admission of the *Newsday* article was error. The plaintiff had failed to demonstrate any connection between Probst and the subsequent article – there was no evidence Probst had contacted, or been contacted by, anyone at *Newsday*, nor was there any evidence that Probst had any control over whether *Newsday* published the article. In the absence of a showing that Probst "approved or participated in some other manner" with *Newsday*, there was no basis for allowing the jury to consider the article as a measure of plaintiff's damages.

The Court then rejected plaintiff's claim that the article should have been admitted because the republication was reasonably foreseeable, a standard set forth in the Restatement (Second) of Torts § 576(c) (liability for republication that "was reasonably to be expected") and left open by dicta in *Karaduman v. Newsday*, 51 N.Y.2d 531, 540 (1980) (potential liability for republication "had plaintiff been able to demonstrate that they participated in the original publication with knowledge or a reasonable expectation that republication was likely").

First, even if the Court adopted the Restatement standard, it is far more limited than the plaintiff and the dissenting judge (see below) claimed. The two examples of foreseeable republication given in the comments to § 576(c) are (1) "'[i]f the defamation is repeated by a person to whom it is published' if the originator of the statement 'had reason to expect that it would be so repeated'"; and (2) where the originator "widely disseminated the defamation and thus intimated to those who heard it that he [or she] is not unwilling to have it know to a large number of people." Neither circumstance was present in the case – Probst never spoke with anyone at Newsday and he did not "widely disseminate" his allegations concerning plaintiff.

Second, the Court reiterated and reaffirmed that had not endorsed a broad foreseeability standard in *Karaduman*. This was evident, Judge Lippman noted, from its decision in *Rinaldi v. Viking Penguin*, 52 N.Y.2d 422 (1981). Although the defendant authors' contract in that latter case addressed their rights if a paperback edition were later published, the authors had no liability for the paperback because the facts of that case demonstrated that they "'had no knowledge of and played no role in' the republication."

Dissent

In a lone dissent in *Geraci*, Judge Robert Smith argued that the republication standard was created in a pre-*Times v. Sullivan* world, where the republisher would itself be strictly liable, and should be reconsidered in light of the fact that "plaintiff here never had a realistic hope of recovering from Newsday." (Dissent, slip op. at 2.)

Smith would therefore have modified the rule in order to accord plaintiff some degree of potential compensation for the damage caused by the later publication where the republisher could not itself be subject to liability under modern constitutional principles.

Discussion

Although *Geraci* was a ruling limited to the issue of a non-media defendant's liability for a media defendant's subsequent republication, and thus arguably has no direct or immediate impact on the issue of media liability, the case is of interest and potential future significance to the media in at least two respects. First, the Court majority reaffirmed its narrow view of the scope of "foreseeability" even for

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purposes of certain media-related publications. Although it did not resolve all issues left open in *Karaduman* and *Rinaldi*, the Court's narrow approach to foreseeability should militate in the direction of liability-limiting results in future cases. This might perhaps include future applications of the narrow rule to modern paradigms more central to media liability such as republications of media content on the Internet, including by news aggregators or other unrelated or unauthorized third-party republishers.

Second, and perhaps even more significantly, the Court extended its consistent record of narrowing potential liability and damages in defamation actions in reliance on a broad reading *both* of common law protections and defenses *in addition to* the Court of Appeals' traditionally expansive reading of constitutional protections – state and federal. A similar expansiveness on the federal level has on occasion been reigned in as inappropriate "double counting." *See*, *e.g.*, *Calder v. Jones*, 465 U.S. 783 (1984) (holding that to include First Amendment concerns in a jurisdictional analysis would be "double counting" in light of the existing constitutional limitations in the substantive law governing defamation suits) (*citing Herbert v. Lando*, 441 U.S. 153 (1979) (no First Amendment privilege bars inquiry into editorial process); *Hutchinson v. Proxmire*, 443 U.S. 111 (implying that no special rules apply for summary judgment)).

But if *Geraci* is the latest case emanating from the New York Court of Appeals that utilizes common law protections to limit libel claims, even as constitutional protections provide additional constraints, any such asserted double counting has not been recognized as inappropriate by the New York Court of Appeals.

Indeed, what *Geraci* now shows is that, in the face of at least a nascent critique along such theoretical lines by Judge Smith, a dissenting view proposing to protect the libel plaintiff's interests or to reign in the broadest pro-defendant emanations of *Times* v. *Sullivan* cannot yet command even a second vote on the current seven-judge New York Court of Appeals.

Henry R. Kaufman and Michael K. Cantwell, practice media, publishing and IP law with Henry R. Kaufman, P.C. in New York City. Plaintiff in the case was represented by Michael T. Hopkins. Defendant was represented by Evan H. Krinick.

MLRC Media Law Resource Center

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London Conference
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(In-house counsel breakfast Sep 21st)
London, England

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South Dakota Court Denies Summary Judgment to Newspaper Over Parody Letter

Fake Apology Letter Could Have Been Understood As Real

In an interesting libel decision, a South Dakota trial court held that a jury should decide whether a fake apology letter, intended as a parody of a public figure, was published with actual malice. *Scott v. Beck and The Argus Leader*, No. 07-3426 (S.D. Cir. Ct. Sept. 17, 2010) (Zell, J.). The court found that the failure to label the letter as a parody, running it under the subheading "news item," as well as the mainstream nature of the paper, was evidence that the publisher entertained serious doubts that readers would understand its fake letter as parody.

Background

The plaintiff, Dan Scott, was at relevant time president of the Sioux Falls Development Foundation. The lawsuit grew out of a speech he gave in June 2007 at a Chamber of Commerce breakfast attended by state legislators and community leaders, including the president and publisher of the Argus Leader. In a pro-development speech, Scott remarked that the mission of the Argus Leader was "to comfort the afflicted and afflict the comfortable." He closed his remarks by saying "if you can't bring yourself to catch the excitement, then at least stay out of the way, because there is a bunch of us here who have a city to build."

The speech created a kerfluffle with state leaders and the newspaper. The paper published an article describing the speech as "arrogant" and the Development Foundation's executive committee asked Scott to write a letter to state legislators explaining the remarks. The newspaper's ensuing coverage and its attempt at parody led to the lawsuit.

The newspaper published an article entitled "Divisively Arrogant: Dan Scott's Apology." Under the headline, the subhead read: "news item." The article reported that Scott was asked to write a letter of apology to lawmakers for his breakfast speech; that a copy of the letter could be found on the paper's website or, it went on to state, "you can read a reasonable facsimile right here." The intended parody read as follows:

To: South Dakota Legislators
From: Dan Scott, Sioux Falls Development Foundation

You may have read an article in the Argus Leader blatantly misquoting my remarks at a recent Chamber of Commerce breakfast for out-of-state lawmakers.

You know how that newspaper is, so you won't be surprised to learn that when I said, "Stay out of the way, will you? We've got a city to build," I was, uh, let's see, I was really talking about legislators in NORTH Dakota. Yeah, that's it! North Dakota. That was obvious to everybody, and even though I am not admitting I said anything like that, leave it to the Argus Leader to put a negative spin on it.

Well, after the Argus Leader misquoted me saying what I'm not admitting I actually said, the whole thing blew up. Now my job is on the line. A few hicks from small towns with zero hope of ever having a strip mall or a river walk complained about what I said - even though I didn't say it - and now the money boys in town are squeezing me hard. They told me I had to apologize to you, which I'm not officially doing in this letter, because I did nothing to apologize for, even though I'm hoping people are dumb enough to think I'm apologizing, which I'm not.

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Here in the golden city of Sioux Falls, we're pretty darn proud of our success. Let's be honest: We have more money, better jobs and nicer houses than other towns. Even the governor, who lives in one of those towns, has called us the "economic engine" of the state. As I like to say, an engine doesn't get very far without other important stuff - like, oh, the glove box or cup holders. If we didn't think the small towns of South Dakota were important, we wouldn't have launched our campaign to persuade young people to leave them and move to Sioux Falls so they can get better jobs, more money and nicer houses.

Here in the shining city of Sioux Falls, we've been bellyaching privately for a long time that the state Legislature is dominated by people like you from small towns who don't care a whit about our little slice of paradise.

We finally got some of our guys into leadership positions in the Legislature, and so we think we've got a decent chance to take over. Our motto is: "What's good for Sioux Falls is good for South Dakota." If political muscle doesn't work and you still vote against bills that give us a blank check to do anything we want, we may secede and move to Iowa.

Oh, I'm just kidding on that one.

In conclusion, I feel certain we are all on the same page when it comes to making this state a better place for our children and grandchildren - as long as you speak reverently of Sioux Falls and enthusiastically support everything we want. Because all of us are public servants selflessly devoted to the common good, we are bound to encounter an occasional disappointment along the way, such as being misquoted and taken entirely out of context when I was clearly talking trash about North Dakota lawmakers, not you. If I manage to keep my job, I intend to work even harder in the future to brag about our good fortune to live, work and play in a city like Sioux Falls.

Too bad you don't.

In August 2007, Scott sued the newspaper and publisher for libel and false light. A motion to dismiss the complaint was denied in 2008 and the State Supreme Court refused to hear an appeal from the denial to dismiss.

Summary Judgment Denied

On the newspaper's motion for summary judgment, the court identified the key issue as whether the newspaper knew or recklessly disregarded the idea that readers would believe the phony letter was Scott's actual letter. The court found sufficient evidence of actual malice to defeat summary judgment based on the following. 1) In a prepublication email, the publisher asked whether the article was "too mean" and "inside baseball" for readers. 2) The article had the subhead "news item" instead of "opinion," "satire" or "humor." 3) The fake letter included a "to" and "from" line and photograph of the plaintiff. 4) It appeared in the "Voices" section of the newspaper where readers expected news stories. 5) The newspaper was a mainstream publication, as opposed to an alternative or fringe newspaper. 6) A weblink to the real apology letter did not appear on the newspaper's website until the day after publication.

For many of these same reasons, the court rejected the defendants' argument that the fake letter contained no false assertions of fact. Notably the court did not engage in any analysis of the tone and content of the parody letter, which contained numerous sentences that would appear to alert readers that it was a parody.

Finally, the court allowed plaintiff to take discovery on the issue of punitive damages. South Dakota discovery law requires evidence that a defendant engaged in willful, wanton or malicious conduct before such discovery is allowed. The court largely accepted plaintiff's argument that the defendants retaliated against him because of his comment about the newspaper in his speech.

Plaintiff is represented by William J. Janklow, Janklow Trial Lawyers, Sioux Falls, SD. Defendants are represented by Steven W. Sanford, Cadwell, Sanford, Deibert & Garry, LLP, Sioux Falls, SD.

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Court Dismisses Libel Claim Over Erroneous Newspaper Headline

Headline Should Not Be Read In Isolation

By Justin E. Klein

On September 29, 2010, Judge Kenneth M. Karas of the United States District Court for the Southern District of New York issued an Opinion and Order granting Gannett Satellite Information Network's ("Gannett") motion to dismiss amended complaints brought by James Morrone and Steven Triano that asserted claims for defamation and intentional and negligent infliction of emotional distress. *Triano v. Gannett Satellite Information Network*, No. 09-CV-2497; *Marrone v. Gannett Satellite Information Network*, No. 09-CV-2533.

Facts

As detailed in the Court's Opinion and Order, the Court accepted the following allegations from the amended complaint as true (internal citations omitted):

> On November 19, 2007, Plaintiffs, who are friends, were hunting together in Harpersfield, New York. Morrone was tracking a deer that had been wounded by another hunter when Triano was 'accidentally wounded' by being shot in the lower left part of the knee. When Morrone realized that Triano had been shot, he immediately called 911. According to the Amended Complaints, Triano is currently recovering from his injury. On November 23, 2007, Gannett's subsidiary, The Journal News, and its online entity, www.lohud.com, published an online article about this incident with the headline 'Purchase Man Charged with Felony in Hunting Death.' Plaintiffs only allege that the statement in the headline that a 'Hunting Death' occurred is false; no other statement in the article is alleged to be false, let alone defamatory. A printed version of the article appeared in the November 23, 2007, issue of the Journal News, and contained an accurate headline: 'Purchase Man, 44, charged in upstate hunting accident.'

The body of the November 23, article published online provided as follows:

> A 44-year-old Purchase man is accused of shooting his hunting partner Monday in the upstate town of Harpersfield, police said. James J. Morrone was charged with first-degree reckless endangerment, a felony; prohibited use of a weapon, a misdemeanor; and hunting without a license, a violation, according to state police at Margaretville. Steven Triano, 41, of West Harrison was hunting with Morrone in Harpersfield – about 65 miles southwest of Albany – when Morrone shot at a deer and hit Triano in the left leg, state police said. Both men were reported to be wearing camouflage rather than red or orange, state police said. Because deer can't tell red or orange from green and brown, the state Department of Environmental Conservation encourages all hunters to wear the vivid colors as a safety measure against accidental shootings. Triano was taken to A.O. Fox Memorial Hospital in Oneonta and later transferred to Westchester Medical Center in Valhalla, police said. His condition was not available last night. Attempts to reach Morrone and Triano were not immediately successful last night.

Legal Analysis

At the outset, the court conducted a choice of law analysis –

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largely due to the fact that plaintiffs' complaints were initially filed in federal court in New Jersey and transferred to New York – and concluded that New York law applies because no party disputed that New York law applied and because "New York is both the state where the effect of the alleged injury was felt, and the state with the most significant relationship to the injury as the Plaintiffs are New York residents, and Gannett's economic (and allegedly tortious) activity was targeted at New York."

Having concluded that New York law applied, first, the court held that, to the extent plaintiffs were asserting a false light invasion of privacy claim – it was unclear from their allegations, their claims were dismissed because no such action exists under New York law.

Second, the court held that plaintiffs could not maintain a defamation claim based on the headline alone because the headline, "Purchase Man Charged with Felony in Hunting Death," mentioned neither plaintiff and so plaintiffs could not satisfy the first element of a defamation claim, i.e., a written defamatory statement of fact *concerning the plaintiff*.

Third, the court turned its analysis to the headline in the broader context of the entire article.

The court concluded that in context, "a reasonable person, having read the headline and the article, would not conclude that Triano had been killed." The court recognized that "a reasonable person would not have concluded that Gannett was attempting to contact Triano after Triano's death; nor would a reasonable person have concluded, when Gannett stated that Triano's 'condition was not available last night,' that Gannett was referring to the condition of Triano's corpse."

Stated differently, the court held that "even if the headline was literally false, the full context of the article contradicted the headline and was substantially true such that the reasonable reader likely would conclude that the headline was inaccurate, and not that Morrone shot and killed Triano."

Fourth, as to Triano only, the court recognized that he could not maintain his claim because the law in New York is that a premature report of death is not defamatory.

Next, the court turned to the plaintiffs' emotional distress claims, recognizing that "'[t]t is nearly impossible in New York for a plaintiff to state a viable claim for intentional infliction of emotional distress," and holding that, "[a]t most, what Plaintiffs have alleged is that Gannett made a mistake [] [t]here is no plausible claim that this mistake was outrageous or atrocious."

Finally, the court recognized that "a claim for negligent infliction of emotional distress requires, in this case, allegations of a duty Gannett owed to Plaintiffs, and a breach causing Plaintiffs to fear for their safety or to be unreasonably endangered" and held that "Defendants owed no such duty to Plaintiffs."

Accordingly, the court granted Gannett's motions to dismiss plaintiffs' amended complaints and requested that the Clerk close both cases.

Mark A. Fowler, Glenn Edwards, and Justin E. Klein, of Satterlee Stephens Burke and Burke LLP in New York City represented Gannett Satellite Information Network. Vartan Asatrian in Harrison, New Jersey represented plaintiffs.

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California Court of Appeal Affirms Anti-SLAPP Dismissal of Public Official's Defamation Case Against Hearst's *San Francisco Chronicle*

Fair and True Report of Public Proceedings

By Jonathan R. Donnellan and Kristina E. Findikyan

The California Court of Appeal resoundingly affirmed a lower court ruling striking a defamation complaint by an Oakland, California City Councilwoman against the *San Francisco Chronicle* and one of its columnists, which arose out of an opinion column that referred to official investigations into the public official's alleged receipt of illegal kickbacks. *Brooks v. San Francisco Chronicle, et al.*, No. A125046, 2010 WL 3594489 (Cal. Ct. App. Sept. 16, 2010) (unpublished).

The opinion expanded the application of the "fair and true report" privilege under California law, extending protection to a statement not contained in official investigatory documents but one which was related to official investigations and made by a confidential source.

The Opinion Column

In 2005 and 2006, two public bodies, the Alameda County District Attorney's Office and the City of Oakland Public Ethics Commission, began investigations into allegations that Oakland City Councilwoman Desley Brooks had employed her boyfriend's daughter as a staff aide (while the young woman was simultaneously employed as a fulltime student on the opposite coast at Syracuse University) and that Brooks had received illegal kickbacks in connection with the hiring. The *San Francisco Chronicle* covered the story. The Ethics Commission later in 2006 issued a public report providing that the kickback allegations were "still under investigation" by the D.A.'s Office and that Office couldn't tell when the investigation would be completed. Because of the limited scope of its authority, the Ethics Commission dismissed the allegations on the grounds it lacked jurisdiction and because referral to the District Attorney's office "would be redundant since the District Attorney is already conducting an investigation." By 2008, the District Attorney's Office had not filed any charges against Desley Brooks relating to the kickback allegations.

In June, 2008, the *Chronicle* published a column by Chip Johnson, an award-winning columnist who covered the City of Oakland, entitled "Time to probe corruption in Oakland City Hall." The Column severely criticized a different public official, the Oakland City Administrator, who had been asked to step down by the mayor after a police report showed she had bullied and threatened officers who arrested her nephew. The Column went on to raise a series of questions about the Oakland administration. In a single sentence, Johnson recounted the kickback allegations against Desley Brooks, stating that:

> "Two years ago, nothing was done when allegations of illegal kickbacks were raised against District Six Councilwoman Desley Brooks, another of [the City Administrator's] allies, after police investigators linked bank deposits made by the mother of one of Brooks' employees to several personal checks for $1,200 written to Brooks (exactly half the employee's paycheck)."

The clause concerning the "bank deposits" was not contained in the public official investigatory documentation, was attributed to unnamed police sources, and became the focus of Brooks' claim against the *Chronicle*.

Procedural History

Shortly after publication of the 2008 Column, Desley Brooks filed a complaint for defamation against the *San Francisco Chronicle* and its columnist (collectively, "the *Chronicle*"). The *Chronicle* thereafter filed a motion to strike

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the complaint pursuant to California's anti-SLAPP statute, Code of Civil Procedure § 425.16, arguing that the lawsuit arose from the *Chronicle*'s protected speech activity and that Brooks could not meet her burden of establishing falsity (the challenged statement in the Column was substantially true), the statement was a fair and true report of public proceedings, was also protected opinion, and that Brooks could not establish that the *Chronicle* had acted with actual malice.

After the *Chronicle* filed its anti-SLAPP motion, Brooks moved to take the columnist's deposition to determine the identity of his confidential source, and also moved to amend the complaint to more particularly allege that the "bank deposits" clause of the challenged sentence defamed her. Judge Jon Tigar of the Alameda Superior Court denied Brooks' motion for discovery, finding that under *Paterno v. Superior Court*, 163 Cal.App.4th 1342 (2008), and *Garment Workers Center v. Superior Court,* 117 Cal.App.4th 1156 (2004), Brooks had to first make a prima facie demonstration that the challenged statement was "provably false" before proceeding to actual malice discovery. The trial court allowed the plaintiff to amend her complaint to allege the verbatim challenged statement at issue, including the "bank deposits" clause of the Column's challenged statement about which Brooks complained.

The parties thereafter finalized the briefing on the anti-SLAPP motion. In Opposition to the *Chronicle*'s anti-SLAPP motion, Brooks submitted, among other things, a Declaration stating that: (1) she had conducted a search of her bank records and she did not know of any employee, nor any person on behalf of an employee, who had ever deposited $1,200 or any amount of funds into her bank account; and (2) the mother of the staff aide at issue had died before Brooks was elected to the City Council.

The trial court issued a tentative ruling denying the *Chronicle*'s anti-SLAPP motion, stating its belief that Brooks had made a prima facie showing that the challenged statement contained "provably false facts" and that Brooks would therefore be entitled to discovery on actual malice (or, stated otherwise, entitled to a deposition of the columnist to attempt to discover the identity of his confidential source). At oral argument on the motion to strike, the *Chronicle* withdrew actual malice as one of the grounds on which it would rely for dismissal.

On April 1, 2009, the trial court rejected its tentative ruling and issued a detailed order granting the *Chronicle*'s anti-SLAPP motion on the grounds that Brooks had not met her burden of demonstrating that the Column was provably false, and that the statement in the Column was a fair and true report in a public journal concerning a public official proceeding pursuant to California Civil Code § 47(d). First, the trial court noted the undisputed existence of the District Attorney and Ethics Commission investigations into the allegations of the kickbacks, and then determined under the substantial truth doctrine that the inclusion of the phrase regarding the bank deposits did not change the "sting" of the concededly truthful parts of the Column. Detailing a host of California authorities, the trial court held they compelled the conclusion that the Column was substantially true "because its main parts were all true."

The opinion expanded the application of the "fair and true report" privilege under California law, extending protection to a statement not contained in official investigatory documents but one which was related to official investigations and made by a confidential source.

> "Councilwoman Brooks had, in fact, been investigated; the investigation involved allegations of kickbacks from an employee . . . and public officials took no action. The only potentially untrue portion is [the columnist's] use of the phrase 'police investigators' and his reference to a specific amount of money in Councilwoman Brooks' account. An ordinary reader, learning that Councilwoman Brooks was being officially investigated for kickbacks in connection with the employment of a staff member, would have the same opinion of Councilwoman Brooks whether or not the challenged phrases were part of [the] . . . column." (citation omitted)

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The trial court went on to find the Column was also entitled to protection as a fair and true report of the District Attorney's Office and the Ethics Commission investigations, which qualified as public official proceedings under California Civil Code 47(d)(1).

The Court of Appeals Affirms

Brooks appealed the trial court's ruling to the First Appellate District of the California Court of Appeal, which unanimously affirmed the trial court's ruling on the grounds that the Column was absolutely privileged as a fair and true report under Civil Code 47(d)(1).

Brooks did not dispute and the appellate court agreed that the complaint fell squarely within the scope of the anti-SLAPP statute "because it targets the Chronicle's free speech rights in connection with an issue under consideration or review by the Ethics Commission and the District Attorney . . ., and also because it targets the Chronicle's free speech rights in connection with an issue of public interest." (citations omitted). The burden then shifted to Brooks to establish a probability of success on the merits of her defamation claim.

The Court of Appeal agreed with the lower court that Brooks had not met her burden on the grounds of the fair and true report privilege. Noting that the term "public official proceeding" has been given an expansive interpretation by the courts, the Court first found that the investigations of malfeasance conducted by the Ethics Commission and District Attorney's Office qualified for protection under Civil Code § 47(d). The Court rejected Brooks' argument that the privilege is limited to information that can be found in written documents, noting that "California law has long held that members of the media may report on theories and representations made by government officials, even if those representations are made orally, in an extrajudicial context, rather than in official documentation." (citations omitted)

The Court then rejected Brooks' primary argument on appeal, that the Column was not a "fair and true report" because the challenged statement was "an outright lie or falsehood." The Court noted that the test for determining whether a publication qualified as a "fair and true report" was to measure the publication's "'natural and probable effect . . . on the mind of the average reader,'" and that the media's responsibility rested in ensuring that "'the "gist or sting" of the report – its very substance – is accurately conveyed.'" (citations omitted)

Relying on a long line of California precedents, the Court found that the Column met the test:

> "[T]here is no question that [the] column was a fair and true report describing the official proceedings involving Brooks, because the "'gist or sting'" of the challenged statement was true and consistent with the known facts. The challenged statement basically reported that Brooks was investigated for receiving illegal kickbacks, that the investigation focused on Brooks's financial dealings with a former employee, and that 'nothing was done' as a result of the investigation. All of these statements are fully supported by the documents appearing of record in this proceeding. Consequently, even assuming arguendo that the Chronicle inaccurately conveyed the exact details of the mechanics of the alleged kickback scheme, the challenged sentence accurately captured the 'gist or sting' of the allegations leveled against Brooks and any "'inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently . . . .'"'" (internal citations omitted)

The Court therefore affirmed, holding that the *Chronicle* was absolutely shielded from liability by the fair and true report privilege and that Brooks was unable to show a probability of success on her defamation claim.

Hearst was represented by in-house counsel Jonathan R. Donnellan and Kristina E. Findikyan, with Karl Olson then of Levy Ram & Olson and Tom Burke of Davis Wright Tremaine LLP contributing to the briefs. Plaintiff was represented in the trial court by Wayne Johnson of Oakland, California and by Howard Moore, Jr. of Moore & Moore of Berkeley, California on appeal.

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Documentary Producer Wins Anti-SLAPP Dismissal on Appeal

Dance Documentary Matter of Public Concern

A California appellate court granted on appeal an anti-SLAPP motion to dismiss interference with contract claims against a documentary film producer. *Krown Towers v. David La Chapelle Studio, Inc.,* No. B217526, 2010 LEXIS 6238 (Cal. App. August 6, 2010) (Kriegler, Turner, Kumar, JJ.). The trial court had denied the motion to dismiss, holding that the speech aspect of the documentary was incidental to the contract claims. The appellate court reversed, holding that the case arose from speech on a matter of public interest and that plaintiff failed to state any claims.

Background

At issue in the case was use of dance competition footage in the 2005 documentary Rize. The film depicts the unique dance subcultures of Los Angeles of "clowning" and "krumping." The documentary was produced by photographer David La Chapelle and his company David La Chapelle Studio, Inc. A significant portion of the documentary consisted of footage of a competition held in Los Angeles. La Chapelle filmed the event and used the footage pursuant to a contract with Thomas Johnson, one of the producers of the competition.

In 2008, plaintiff Krown Towers sued La Chapelle alleging it had a 25% interest in the rights to the dance competition and that La Chapelle tortiously interfered with that interest and with plaintiff's prospective economic interest in the competition by contracting with Thomas to use the footage in the documentary.

Appellate Court Decision

On appeal, the court held that the dance competition was an issue of public interest, noting that it was held in a large public forum – and that the documentary won a prestigious award and was distributed nationally. The court rejected plaintiff's claim that filming the competition was unprotected commercial speech. Similarly, the filming of the competition and the use of the footage in the documentary was an exercise of free speech in connection with a public issue.

On the merits, the court held that plaintiff failed to state any cause of action. In California, the tort of intentional interference with contractual relations requires that the plaintiff plead intentional acts designed to disrupt the contract. Here, the court found, the plaintiff had only alleged that defendant filmed with knowledge of a preexisting rights contract, but did not allege any acts to induce a breach. Also, the tort of intentional interference with prospective economic advantage tort requires that plaintiff allege independent wrongful acts by the defendant. In California, this means that "the defendant knew that the interference is certain or substantially certain to occur as a result of his action." Plaintiff failed to allege facts to support the claim.

Finally, based on the facts adduced on the motion, the court found that plaintiff could not amend the complaint to state a cause of action.

Plaintiff Krown Towers was represented by Loyst P. Fletcher of the Law Offices of Loyst P. Fletcher, in Beverly Hills, California. Defendant David La Chapelle Studio was represented by Deborah Drooz of Brownstein, Hyatt, Farber & Schreck, in Los Angeles, CA.

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California Court of Appeal Grants Anti-SLAPP Protection to Medical Data Publisher

Hearst Wins Dismissal in Wrongful Death Case

By Jonathan R. Donnellan and Kristina E. Findikyan

In a matter of first impression and one of the first decisions of its kind nationwide, the California Court of Appeal granted the anti-SLAPP motion of Hearst Corporation's First DataBank, a specialty publisher of medical information, in a wrongful death lawsuit directed solely at First DataBank's publication about prescription drugs.

The Court ruled that plaintiffs, the relatives of a patient who had killed himself allegedly after ingesting the prescription drug Paxil, failed to demonstrate that First DataBank owed them a duty and therefore they could not meet their anti-SLAPP burden of establishing a probability of success on the merits of their negligence and breach of contract claims. The Court of Appeal reversed the trial court's ruling against First DataBank and remanded for the lower court to enter an order granting First DataBank's motion to strike the complaint. *Rivera v. First DataBank, Inc.*, 187 Cal.App.4th 709, 115 Cal.Rptr.3d 1 (Cal. App. July 23, 2010).

The Court ruled that plaintiffs failed to demonstrate that First DataBank owed them a duty and therefore they could not meet their anti-SLAPP burden of establishing a probability of success on the merits of their negligence and breach of contract claims.

First DataBank's Publication and the Lawsuit

First DataBank is an independent publisher of medication databases used by a wide range of users including pharmacies, hospitals, and the general public. As one part of its broad publishing interests, First DataBank publishes for the general public information on prescription drugs approved for sale by the FDA. These "Patient Education Monographs" are provided by First DataBank to its various subscribers, and are in turn distributed by some of those subscribers to others, including the general public and consumers of prescription drugs. For example, a pharmacy customer of First DataBank might staple the First DataBank Monograph to the bag containing the drug when the patient fills and picks up their prescription drug from the pharmacy.

The Monographs are thus used as a reference by many patients to supplement the advice they receive from their doctors about a specific drug they have been prescribed. Each Monograph contains clearly labeled sections on Warnings, Side Effects, Precautions and more, summarizing important information about specific drugs developed by manufacturers and approved by the FDA and synthesizing that information into a concise document written in everyday language a consumer would understand.

According to the complaint, Mr. Rivera committed suicide after ingesting Paxil, a prescription he filled at a Costco pharmacy. Plaintiffs alleged that Costco provided First DataBank's Paxil Monograph to Mr. Rivera and that First DataBank was negligent in its publication and breached an alleged contract with Costco because First DataBank did not adhere to, or disregarded, the FDA's suicide warnings for Paxil and the FDA releases emphasizing suicide risk.

First DataBank filed an anti-SLAPP motion to strike the complaint pursuant to California Code of Civil Procedure § 425.16. In its motion, First DataBank argued that its Monograph is protected speech and that Plaintiffs could not meet their anti-SLAPP burden because, among other things, First DataBank's speech was truthful and accurate and therefore protected against liability for negligence and breach of contract. Furthermore, First DataBank argued that the causes of action failed as a matter of law because First DataBank owed no duty to the plaintiffs and did in fact include the FDA warning about risk of suicide for all patients numerous times in its Monograph.

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Trial Court's Ruling Against First DataBank

Judge Kirk H. Nakamura of the Orange County California Superior Court denied First DataBank's anti-SLAPP motion. The trial court ruled that "the gravamen of the causes of action against [First DataBank] is for wrongful death" and therefore First DataBank had not established its initial burden on an anti-SLAPP motion that its publication arose out of "free speech in connection with a public issue." The trial court also held that First DataBank's motion was barred by the so-called "commercial speech" exception to the anti-SLAPP statute, Code of Civil Procedure § 425.17(c).

Court of Appeals Reverses

First DataBank appealed the trial court's ruling to the Fourth District of the California Court of Appeal. In a July 23, 2010 published decision, the Court unanimously reversed.

First, the Court held that First DataBank had met its initial burden of establishing that the anti-SLAPP statute applied. Because First DataBank was being sued exclusively over the contents of its Paxil Monograph, the complaint arose from First DataBank's exercise of free speech.

"'[W]e do not evaluate the first prong of the anti-SLAPP test solely through the lens of a plaintiff's cause of action'" (citations omitted), rather, the inquiry is focused on "'the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning.'" (emphasis in original; citations omitted) The Court also found that the contents of the Monograph fell within the statute because treatment for depression is a matter of public interest.

The Court rejected the trial court's ruling that § 425.17(c) barred First DataBank's anti-SLAPP motion. Plaintiffs' interpretation of the so-called commercial speech exception to the anti-SLAPP statute – that any statement by anyone made while delivering any person's goods would fall into the exception – had already been considered and "unequivocally rejected" by the California Supreme Court's recent ruling in *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal.4th 12 (2010). The Court found, among other things, that First DataBank's Monograph discussed Paxil, the product of a drug manufacturer, not First DataBank.

Since First DataBank had met its initial burden of establishing that the anti-SLAPP statute applied, the burden shifted to Plaintiffs to establish a probability of success on the merits of their negligence and breach of contract claims, a burden the Court of Appeal found the Plaintiffs did not meet. Significantly, the Court held that the Plaintiffs failed to demonstrate that First DataBank owed them any duty, which disposed of both the negligence and breach of contract claims against the publisher.

"[First DataBank] is neither the manufacturer of Paxil . . . nor the pharmacy dispensing it. Plaintiffs did not show [First DataBank] was obligated to provide any information to them at all. Rather, as supported by [First DataBank's] evidence, the [M]onograph was not required and was intended to be a supplement . . . ." (citations omitted). The Court went on to find that the FDA suicide warnings of which Plaintiffs complained only applied to adolescents and children – not to Mr. Rivera who was fifty (50) years old – and in any event, First DataBank's Monograph contained suicide warnings applicable to all patients (even adults) in several places.

In addition, the Court rejected Plaintiffs' argument that the suicide warnings were buried in fine print, noting that there was no duty on First DataBank to alter the style, format or contents of its Monograph, and Plaintiffs had not presented any evidence that the Monograph contained any information that was false.

Hearst was represented by in-house counsel Jonathan R. Donnellan and Kristina E. Findikyan, with Tom Burke and Rochelle Wilcox of Davis Wright Tremaine LLP contributing to the briefs. Plaintiffs were represented by Don Farber of San Rafael, California.

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Seventh Circuit Affirms Dismissal of Complaint Over Yahoo! Search Results

Typing one's name into a search engine can pull up results ranging from past accomplishments to embarrassing episodes to complete nonsense. Most would ignore the ultimate category as a byproduct of inconsequential Internet spam, but one woman decided to sue the search engine alleging it had culpability in the matter. The Seventh Circuit, however, held that plaintiff failed to state a claim for relief. *Stayart v. Yahoo! Inc.*, No. 09-3379 (7th Cir. September 30, 2010).

Background

When Beverly "Bev" Stayart entered her name into the Yahoo! search box, search results found spam websites and pornographic sites that had used her name. Interested in pursuing the matter further, she conducted numerous other searches that led her to sites that used her name in various unsavory ways, including in connection with pornographic videos. Unnerved by what she saw, Stayart asked Yahoo! to remove all such content. The search engine informed her that its role was not to censor the Internet, so she filed suit on a Lanham Act false endorsement claim (along with state law privacy claims that were denied supplemental jurisdiction).

Unsurprisingly to anyone reading this who has never heard of Bev Stayart (i.e. anyone reading this), the district court found that she lacked standing to bring a Lanham Act claim. First, Stayart had no commercial interest in her name. Her occasional online writing and modest professional accomplishments evinced a mere emotional interest and were not indicative of an attempt to commercialize the name. Second, there was no likelihood of consumer confusion. The court indicated that anyone who encountered these links would know that she did not endorse them.

Finally, the district court engaged in a fairly muddled Section 230 analysis in which it appeared to recognize Yahoo!'s 230 immunity but did not clearly address the often thorny issue of whether the claim at issue was the type of intellectual property claim typically outside of 230's shield.

Seventh Circuit Decision

In a much more succinct opinion, the Seventh Circuit affirmed that plaintiff had failed to state a claim for relief. The Court of Appeal focused on Stayart's lack of commercial interest in her name and found the lack of standing sufficient to dismiss her Lanham Act claim. The opinion noted that her humanitarian works and self-described scholarly online posts, among other minor activities, created no commerciality, regardless of altruistic motives.

Search Engine Lawsuits

Although her claim against Yahoo! failed, Beverly Stayart has sued Google over similar objections to the results of searches. In the Google action she attempts to circumvent Section 230 by alleging that Google is the "information content provider and/or information content developer." *See* Complaint at 4, *Stayart v. Google, Inc.*, 2:10-cv-00336-LA (E.D. Wis. April 20, 2010).

Stayart is also not the first person to sue a search engine over search results. A few years ago, an accountant sued Google because a search for his name and profession resulted in a page that contained his name followed by ellipses and then the description of serious professional wrongdoing, which appeared further down the actual page in connection with another person. Displeased with this outcome, the accountant sued Google for libel, products liability, and unfair business practices. This strategy turned out particularly poorly for the plaintiff. The trial court granted an anti-SLAPP motion to dismiss, holding that search results do not necessarily convey a defamatory meaning and are protected by Section 230 and awarded $23,000 in attorneys' fees. The appellate court affirmed. *Maughan v. Google Technology, Inc.*, 49 Cal.Rptr.3d 861 (Cal. App. 2006).

Similarly, a political candidate had the bad fortune to be on the next line down from a communist political organizer on an online candidates list. A search for the candidate's name, Bill Murawski, on search engines such as Ask.com, one of several defendants in the lawsuit, yielded the result: "Communist Political Organizer Bill Murawski." The court found the website operator not liable for defamation and the search engine protected by Section 230. *Murawski v. Pataki*, 514 F.Supp.2d 577(S.D.N.Y. 2007).

On a variation on this theme, one plaintiff sued for defamation and related claims when its name was not being returned in search results. *Kinderstart v. Google,* No. C 06-2057 (N.D. Cal. March 3, 2007). On the defamation claim, the court notably found that Google's web rankings are not statements of fact.

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NY Times Wins Access to Names of Persons Licensed to Trade in Sanctioned Nations

By David McCraw

A federal district court has granted The New York Times summary judgment in a Freedom of Information Act suit seeking the identities of individuals who have been licensed by the Treasury Department to conduct business in or with sanctioned nations like Iran and North Korea. *New York Times Company v. U.S. Dept. Treasury*, 09 Civ. 10437 (S.D.N.Y. Oct. 13, 2010) (Maas, M.J.).

Through an earlier suit, The Times had won access to the names of corporations that had been given licenses by Treasury, but Treasury continued to resist identifying individual licensees, claiming that disclosure would constitute an unwarranted invasion of privacy.

However, Magistrate Judge Frank Maas of the Southern District of New York ruled on October 13, 2010 that Treasury had shown only speculative evidence of harm from disclosure and The Times had demonstrated a public interest in the names. The Times has argued in both FOIA cases that the public has a right to know who is getting licenses to do business in sanctioned nations in order to monitor whether Treasury is showing favoritism to certain applicants or issuing the licenses without due regard for American foreign policy concerns.

"If everyone on the list were a widely known public figure with connections to the administration, that would suggest something powerfully important about the licensing process; if no one on the list were known to the general public, that would suggest something else."

The Times was assisted throughout the litigation by the Media Freedom and Information Access Practicum, a Yale Law School clinic. Since 2009, The Times has partnered with the clinic on its FOIA cases, and the Yale students played a major role in drafting the successful summary judgment brief.

The decision by Judge Maas – who was designated by the parties to decide all issues – was the latest milestone in a long-running legal battle between The Times and Treasury's Office of Foreign Assets Control ("OFAC") over access to information. In passing trade sanctions preventing U.S. citizens and companies from doing business with certain outlaw nations, Congress designated OFAC to grant exceptions to the boycotts and to license companies and individuals to engage in specific transactions in the sanctioned countries, either with private entities or the foreign government. Despite its sensitive role in U.S. foreign relations, OFAC has rarely been transparent about its operations.

In 2008, The Times filed its first FOIA suit against Treasury seeking access to files maintained on the licensees. Treasury and The Times ultimately settled that suit with the disclosure of a database of all the corporate licensees and hundreds of pages of records documenting successful license applications as well as payment by the Government of The Times's attorneys' fees. But OFAC declined to provide similar information for individuals, prompting The Times's follow-up suit in 2009.

Under the privacy exemption in FOIA, an agency must first establish whether the privacy interest in the data at issue is significant or *de minimis*. If it is significant, then the court is required to consider whether the public interest will be served by disclosure and balance the competing interests.

In deciding both parts of the test, Judge Maas made rulings that at first blush seemed to signal that Treasury would prevail. He rejected The Times's argument that there was no privacy interest in the names of licensees who were engaged in legal commercial activities, finding that a more than *de minimis* privacy interest had been established by Treasury. He also adopted a narrow construction of the public interest test, finding that the "only recognizable type of public interest is ... providing transparency and accountability for agency action."

Despite those rulings, he found Treasury's case wanting. In trying to establish harm from disclosure, Treasury's only proof was a declaration from a Treasury FOIA officer, who said stigmatization "could" occur to licensees. Judge Maas

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noted that Treasury offered no proof that any of the corporate licensees disclosed as a result of The Times's first suit had been harmed in any way. And while he accepted that licensees might be subjected to unwanted contact because of their association with sanctioned nations, he said the "mere fact that someone might seek to interview a licensee does not mean … that the individual would be subject to opprobrium or harassment."

As for the public interest, Treasury strenuously argued that no light would be shed on agency action by disclosure of the names alone and that The Times wanted to use the names as a lead to obtain information on U.S. business ties to sanctioned nations. Some cases have held that such a "derivative use" is not a proper public purpose for granting access in a FOIA privacy case.

Judge Maas found, however, that the request was not based on a "derivative use" theory because the names themselves shed light on governmental decision-making. He approvingly quoted from The Times brief: "If everyone on the list were a widely known public figure with connections to the administration, that would suggest something powerfully important about the licensing process; if no one on the list were known to the general public, that would suggest something else."

The Court distinguished between derivative use and analysis of information by a reporter. "Here, the Times does not base its public interest argument on its proposed use of the names to find other newsworthy information. Rather, the Times intends to use outside information to make sense of the list of names provided by Treasury. This is no more derivative than the use of mapping software to make sense of the addresses of individuals who received emergency benefits from the government."

Treasury also argued that it makes its licensing decisions according to set standards and without regard to who the applicant is, but the Court said The Times had the right to explore whether that was in fact so and it could do so only by getting the names.

Treasury has not said whether it will appeal the decision to the Second Circuit.

The Times was represented by its in-house lawyers Jacob Goldstein and David McCraw, assisted by students Jennifer Jones, Margot Kaminski, Jerermy Kutner, and Stephen Gikow of Yale Law School. Treasury was represented by AUSA Joseph Cordaro.

Kentucky Newspapers Win Access To Child Services Documents

Court Rejects HIPPA and Privacy Objections

By Jon L. Fleischaker and Jeremy S. Rogers

A Kentucky court has held that Kentucky's Cabinet for Health & Family Services must publicly disclose records relating to children who are killed or seriously injured (under the Cabinet's supervision). *Lexington Herald-Leader, The Courier Journal v. Kentucky,* No. 09-1742 (Ky. Cir. Sept. 29, 2010) (Shepherd, J.). In a challenge brought by the Courier-Journal (Louisville) and the Herald-Leader (Lexington), the Franklin Circuit Court held that the Cabinet's policy of nondisclosure violates the state's Open Records Act. The court also awarded costs and attorneys' fees to the two newspapers, finding that the Cabinet willfully violated the law.

The court's reasoning could also apply in other states because it was based in part on provisions of the Child Abuse Prevention and Treatment Act (CAPTA). CAPTA is a federal law that, among other things, requires states that receive federal funding for child protective services programs to publicly disclose information relating to children under the Cabinet's supervision who are killed or seriously injured as a result of abuse or neglect. In Kentucky, the Cabinet administers the state's child protective services programs, and it has had a longstanding policy to withhold all information relating to cases where children are killed or seriously injured.

In a strongly worded May 3, 2010 opinion and order, Franklin Circuit Judge Philip J. Shepherd ruled that the

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Cabinet's policy violated Kentucky's Open Records Act and violated provisions of CAPTA. In a subsequent order entered on September 29, 2010, the court found that the Cabinet willfully violated the law and awarded attorneys' fees and costs to both newspapers. The Cabinet has asked the court to reconsider its award of fees.

Case of Kayden Branham's Death

Reporters for the Courier-Journal and Herald-Leader submitted open records requests to the Cabinet for its records relating to the case of Kayden Branham. Kayden Branham was a 20-month-old boy who died in May 2009 while under the Cabinet's supervision.

Kayden's mother, herself only 14 years old, was also under the Cabinet's supervision. Social workers from the Cabinet had placed the two children in the Monticello, Kentucky home of one of their relatives. However, on the night of May 30, 2009, Kayden and his mother were no longer staying at their relative's home. They were with Kayden's 19-year-old father at a mobile home that was being used as a methamphetamine lab. On a table was a coffee cup filled with a toxic drain cleaner that is also used in making meth. Kayden drank it. He suffered burns and internal injuries, and died at the hospital within approximately one hour. Kayden's father was charged with murder.

In the wake of the tragedy, it was unclear what, if any, actions were taken by the Cabinet to monitor the children's placement, whether the Cabinet was aware that the two were no longer staying at their relative's home, and whether the Cabinet was aware that the mobile home where the two children were staying was being used as a meth lab.

Reporters for both newspaper submitted open records requests to the Cabinet, asking for records relating to both Kayden and his mother. The Cabinet denied the requests, claiming that all responsive records were exempt from disclosure under various state and federal laws, including the Health Insurance Accountability and Portability Act ("HIPAA").

Cabinet's Legal Claims

Kentucky's Open Records Act is codified at KRS 61.870 through KRS 61.884. The Act requires all state and local public agencies in Kentucky to disclose records upon request unless the record is subject to one of several specifically enumerated exceptions. The Cabinet invoked the Open Records Act exception for records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, KRS 61.878(1)(a), and the exception for records made confidential by state or federal law, KRS 61.878(1)(k) and (l).

HIPAA is the federal law that the Cabinet invoked. The Cabinet claimed that its child protective services are tantamount to the provision of medical care. The Cabinet claimed that it is a health care provider under HIPAA and that its child protection records, including records concerning Kayden's death, are protected health information.

The Cabinet also claimed that the records are exempt from disclosure under two Kentucky statutes, KRS 194A.060 and KRS 620.050. The first statute, KRS 194A.060, authorizes the Cabinet's secretary to "develop and promulgate administrative regulations that protect the confidential nature of all records and reports of the cabinet that directly or indirectly identify a client or patient or former client or patient of the cabinet." Although the Cabinet's secretary had not promulgated any such regulations, the Cabinet claimed that the statute stands for the general proposition that the Cabinet's records should be treated confidentially.

The second Kentucky statute, KRS 620.050, is based on the CAPTA requirements, and it contains two relevant provisions. Section 5 provides generally that the Cabinet's records relating to suspected child abuse, neglect, or dependency are confidential and can only be disclosed to limited classes of people such as the child's parents, medical providers, law enforcement officials and Cabinet employees. The other provision of the statute, Section 12(a), provides an exception that "[i]nformation may be publicly disclosed by the cabinet in a case where child abuse or neglect has resulted in a child fatality or near fatality." The Cabinet claimed that the use of the word "may" in Section 12(a) gave the Cabinet the sole discretion to determine whether or not to disclose records relating to child fatalities and serious injuries.

Kentucky AG's Decision

The Herald-Leader appealed the Cabinet's denial to Kentucky's Attorney General, an appeal process which is permitted, but not required, under Kentucky's Open Records

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Act. On September 11, 2009, the Attorney General issued open records decision 09-ORD-149. The Attorney General agreed with the Cabinet that KRS 194A.060 provided "a general confidentiality statute" and that the provision in KRS 620.050(12)(a) that child fatality information "may" be publicly disclosed provided the Cabinet with discretion and did not require the Cabinet to disclose child fatality information. The Attorney General did not reach the HIPAA question.

The Herald-Leader appealed the Attorney General's decision to the Franklin Circuit Court, the trial court in Kentucky's capital, Frankfort, where the Cabinet's central office is located. The Courier-Journal joined in the lawsuit.

Court's Decision

In a strongly worded May 3, 2010 opinion and order, the court overturned the Attorney General's decision. The court rejected each of the Cabinet's arguments, holding that "the Cabinet's arguments appear to be based more on the culture of the agency, which seeks to avoid public scrutiny, than on any statutory prohibition."

The Cabinet claimed that it is a health care provider under HIPAA and that its child protection records, including records concerning Kayden's death, are protected health information.

The court held that the Attorney General's determination that the two Kentucky statutes allow the Cabinet to withhold the records was "clearly erroneous and completely contrary to the plain, explicit language of those statutes." The court reasoned that the word "may" in the statute did not give the Cabinet discretion to provide or withhold the records, because Kentucky's Open Records Act is mandatory. Kentucky's Open Records Act requires that "public records shall be open for inspection." KRS 61.872(1). The court put it succinctly: "When public disclosure is *permitted* under the Cabinet's enabling legislation, it is *required* under the Open Records Act."

The Court also relied heavily upon the corresponding federal CAPTA provision, 42 U.S.C. § 5106a (b)(2)(A)(x). That statute requires that a state's laws generally preserve the confidentiality of child protection services records. *See* 42 U.S.C. § 5106a(b)(2)(A)(viii). However, it also contains a specific provision requiring that a participating state have in place assurances that "the State has in effect and is enforcing a State law … relating to child abuse and neglect that includes … provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality." 42 U.S.C. § 5106a(b)(2)(A)(x) (emphasis added). Referring to the Cabinet's across-the-board policy of nondisclosure, the court held that "[i]t would be completely disingenuous, and contrary to law, for this Court to judicially sanction a policy of the Cabinet which effectively undermines, indeed nullifies, this provision of federal law."

The court quickly dispensed with the Cabinet's HIPAA claim, finding that the "Cabinet is not a health care provider within the scope of HIPAA in the context of this case, nor is the information that is sought protected health care information."

The court also forcefully rejected the Cabinet's privacy claim, holding that "there is the strongest possible legitimate public interest in the information requested, concerning the state's discharge of its statutory duties to dependent and neglected children, which outweighs any privacy interests of any party or other person." The court went on to say "[w]hile it should go without saying, it perhaps must be spelled out in the context of this case: it is not unwarranted for the public, and the press, to want to know what happened when a 20 month old child in the care and legal custody of the Commonwealth of Kentucky winds up dead after drinking toxic substances in a meth lab."

The court wrote that "[a] foster care system that operates in secret, without public scrutiny or accountability, even in this extreme case where a child in foster care has lost his life, is a system that is operating outside the scope of the legislative mandate for public accountability … [t]his reflects a systemic failure that will inevitably lead to covering up, rather than fixing, the problems in the state foster care system, to the detriment of children who are dependent on the state for their protection and welfare."

Attorney Fee Award

The court's opinion and order was not a final and appealable judgment because it reserved ruling on the

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newspapers' request for an award of attorneys' fees, costs, and statutory penalties. Kentucky's Open Records Act provides that a court may award costs and attorneys' fees to a party who prevails against a public agency where there is a finding that records were willfully withheld in violation of the Act. *See* KRS 61.882(5). The law also allows a court to award a discretionary penalty of up to $25 for each day a record is withheld.

On September 29, 2010, the court entered a judgment awarding attorneys' fees and costs to both newspapers, finding that the Cabinet's blanket policy of nondisclosure was a willful violation of the Open Records Act. The court held that the law authorizing an award of costs and fees "reflects the importance of public involvement in the proper functioning of a democratic government," and that this "concern applies with special force to the facts of this case, where the government has presided over a foster care system in which an innocent ward of the state lost his life because of criminal conduct and neglect." According to the court, "an agency cannot be in good faith compliance with the Kentucky Open Records Act when its actions prevent disclosure of a class of cases where a clearly governing statute, in this case KRS 620.050(12)(a), allows for disclosure."

However, the court declined to award a statutory penalty because the Cabinet had relied in part upon a Kentucky Attorney General decision supporting its position. The Cabinet has moved the court to reconsider its attorney fee award, and the Cabinet has not yet disclosed the requested records. It is unknown whether the Cabinet will appeal the court's decision.

Jon L. Fleischaker and Jeremy S. Rogers of Dinsmore & Shohl LLP in Lexington, KY, represented the Courier Journal in this matter.

State University Research Foundation Subject to Freedom of Information Law

Research Foundation Collaterally Estopped from Arguing Not Subject to FOIL

By Eva Saketkoo

In a decision issued last month, the New York Supreme Court in Albany County granted a Freedom of Information Law ("FOIL") petition filed by the Albany *Times Union* (a Hearst newspaper) and its reporter (collectively, "Times Union") and ordered the Research Foundation of the State University of New York ("Research Foundation") to produce the requested records relating to its employment of Susan Bruno, the daughter of former state Senate Majority Leader Joseph Bruno. *The Hearst Corp., et al., v. The Research Found. of State Univ. of New York*, Index. No. 6107-09 (September 17, 2010) (Connolly, J.) ("Slip Opinion"). The court also awarded the Times Union its attorneys' fees and costs.

Background

The Research Foundation had denied the Times Union's FOIL request and opposed the Petition claiming that it is an educational corporation chartered by the New York State Board of Regents and not an agency subject to FOIL. It maintained its position even though the Research Foundation had litigated the exact same issue three years earlier (in the same court) and lost. *Siani v. Research Foundation of the State University of New York*, Index No. 6976-06 (Sup. Ct., Albany Cty Mar. 26, 2007). The *Siani* court rejected the Research Foundation's argument and held that under established precedent it was clearly an agency subject to FOIL:

> Given the functional relationship between the Research Foundation and the State University [SUNY], the importance of the role played by the Research Foundation in the educational efforts of the State University and the power it has with respect to sponsored programs of the State

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> University, the Research Foundation exercises a governmental function and is therefore subject to the provisions of the Freedom of Information Law.

Id. at 5. (The court cited, *inter alia*, *Perez v. City University*, 5 N.Y.3d 522, 528, 529 (2005) (citing *Matter of Smith v. City Univ. of N.Y.*, 92 N.Y.2d 707, 713 (1999)) (holding that since the Hostos Community College Senate and its Executive Committee both exercise a "quintessentially governmental function," they are each subject to and required to disclose information under FOIL)).

Among the factual evidence cited in support of its ruling, the court noted that the Research Foundation was created by the New York State Board of Regents for the sole purpose of "developing and increasing facilities of the State University of New York by making and encouraging gifts, grants and donations of real and personal property, to receive, hold and administer gifts and grants and to finance studies and research of benefit to and in keeping with the educational purposes and objectives of the State University." *Id.* at 4.

It also noted that as "the fiscal administrator of the majority of the State University's sponsored programs, the activity of the Research Foundation is included in the financial statements of the State University" and that the Research Foundation is included within the definition of a "state agency" in New York State Finance Law §53-a. *Id.* at 5.

Respondent did not appeal the *Siani* decision.

The Court's Decision

In support of its Petition seeking disclosure of the Bruno documents, the Times Union argued both that the prior ruling of the court in *Siani* was binding and had preclusive effect on the Research Foundation and that the Research Foundation was an "agency" subject to FOIL under established precedent even absent the *Siani* decision.

The Court did not reach the latter argument but instead granted the Petition on the grounds that the Research Foundation was collaterally estopped from relitigating the issue of whether it was an agency subject to FOIL. It held that since the "pending issue was previously raised, material to, and necessarily decided in [the *Siani* litigation] [and] the party to be estopped [the Research Foundation] had a full and fair opportunity to litigate the issue, then fairness and efficiency dictate that [the Research Foundation] should not be permitted to try the issue again." Slip Opinion at 2. The Court also held that since the Research Foundation did not have a reasonable basis for denying the FOIL request, the Times Union was entitled to an award of its attorneys' fees and costs under FOIL.

The Research Foundation has appealed the court's decision to the Third Department Appellate Division.

Petitioners were represented by Hearst in-house counsel Jonathan Donnellan and Eva Saketkoo. Respondent SUNY Research Foundation was represented by James Potter of Hinman Straub P.C.

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ECHR: Conviction of Finnish Newspaper for Publishing Information About Extra-Marital Affair Violated Article 10

In a decision issued on October 12, 2010, The European Court of Human Rights (ECHR) held that Finland's criminal convictions of a newspaper, its editor-in-chief and a journalist, for publishing information about the private life of the chief communications officer of a presidential candidate during the 2000 election campaign, violated Article 10. *Saaristo v. Finland*, App. No. 184/06 (12 Oct. 2010).

The Court's ruling illuminated its approach to balancing the Article 8 right to privacy and the Article 10 right to freedom of expression, when the private lives of those in politics are involved. The Court reaffirmed the significance of the publication of information about matters in the public interest and introduced flexibility into the meaning of public figure beyond just elected politicians and civil servants.

Background

In 2000, during a presidential election campaign, the Finnish tabloid newspaper Ilta-Sanomat Oy published an article with photographs entitled *"The ex-husband of [R.U.] and the person in charge of communications for the Aho campaign have found each other."* The Court's decision refers to the parties only by initial, by provides some background information about the public status of each of the participants. The ex-husband was a director of Finnpro, a company promoting Finnish exports. His former wife R.U. was a television reporter. The new women O.T. was the communications director for presidential candidate Esko Aho. O.T. complained to the Finnish police and the public prosecutor brought criminal charges against the newspaper, the editor and the journalist under Chapter 27, section 3(a) of the Finnish Penal code.

On February 1st, 2002, the media defendants were convicted for having violated O.T.'s private life and ordered to pay a fine of approximately 1,000 Euros, and costs of 11,500 Euros. The Finnish district court found that despite O.T.'s position in the presidential campaign, she was not a public figure and that her consent should have been obtained before publication of applicants' story about her relationship. Regardless of the accuracy of the information published, the district court held that the applicants' article was not necessary for examining any matter of interest to society.

On appeal, the media defendants argued that O.T. was a public figure, particularly because one of the main issues in the presidential campaign had been family values. In addition, the defendants argued that the affair had been public and a news report about it could not be considered private. The Court of Appeal rejected these arguments and dismissed the appeal. The Supreme Court affirmed the Court of Appeal's judgment and held that the article focused on a personal intimate relationship rather than anything of political importance, and therefore its publication had not justified violating O.T's. privacy.

ECHR Complaint

On December 28, 2005, the applicants complained that their criminal convictions by the government of Finland had violated their Article 10 right to freedom of expression. The applicants argued that the right of freedom of expression was critically important in matters of political discussion and that their article was mainly political and factually correct. The applicants argued that there had been no compelling reasons to interfere with their freedom of expression and as such, the interference had been a violation of Article 10.

ECHR (Fourth Section) Decision

The Court found that there had been a violation of Article 10. The Court emphasized the significance of the right of freedom of expression and the essential role a free press plays in the functioning of a democratic society. The press must be able to impart information on all matters of public interest, subject to its obligations and responsibilities to respect the reputation and privacy rights of others. The Court noted that the limits of scrutiny for a politician are wider than for a private individual since politicians "inevitably and knowingly lay themselves open to close scrutiny of their words and

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deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance."

Though the limits of public scrutiny are not as broad for civil servants as for politicians, civil servants must also expect and tolerate some criticism. When a person's private life and reputation is implicated in the disclosure of information in the public interest, then the articles or photographs containing that information must contribute to public debate to warrant publication.

In this case, O.T. was not a politician or a civil servant but she could not be considered an entirely private person either, as she was publicly visible in the media as the communications officer for a presidential candidate and invited public interest. Thus, some limitation on the scope of her protected private life was to be expected. Appellants' article was published during the election campaign and the information disclosed in the article was factually correct and presented in an objective manner.

More importantly, the information about O.T's private life had a direct bearing on the issue of family values in the presidential election campaign, which was a clear matter of public interest. The Court emphasized that unlike in the *Von Hannover* case, the article here contributed to a matter of public interest, *"in the form of political background information*." The Court concluded that the Finnish Courts did not have sufficient reason to show that the interference with appellants' freedom of expression was necessary in a democratic society.

Furthermore, the Court found that the criminal convictions and amount of fines imposed upon the appellants were disproportionately harsh sanctions for defamatory or insulting statements made in the context of public debate. It noted that criminal penalties could not be ruled out altogether as a sanction for defamation but that "the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 only in exceptional circumstances, notably where other fundamental rights have been impaired as, for example, in the case of hate speech or incitement to violence." Here, the severity of the sanctions on the appellants had been unwarranted.

The press applicants were represented by Mr Petteri Sotamaa in Helsinki. The Finnish Government was represented by Mr Arto Kosonen of the Ministry for Foreign Affairs.

MLRC Media Law Resource Center

2010-11 UPCOMING EVENTS

MLRC Annual Dinner
November 10, 2010
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DCS Annual Meeting
November 11, 2010
Proskauer Rose Conference Center
New York, NY

California Chapter Luncheon Meeting
December 15, 2010
Southwestern Law School
Los Angeles, CA
For more, click here

MLRC/Southwestern Entertainment Law Conference
January 20, 2011
Los Angeles, CA

MLRC/Stanford Digital Media Conference
May 19-20, 2011
Palo Alto, CA

London Conference
September 19-20, 2011
(In-house counsel breakfast Sep 21st)
London, England

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Supreme Court Roundtable 2010: The Roberts Court and the First Amedment

Floyd Abrams, Professor Joel Gora, Paul Smith

Earlier this month, the MLRC Bulletin published this Supreme Court Roundtable on the Court's notable decisions of the past year and the Court's First Amendment docket for the new Term.

1. Competing Views of the First Amendment – Citizens United v. FEC

MLRC: *Does the Citizens United case pose an irreconcilable clash between competing views of the First Amendment? (e.g., liberty vs. equality; principled vs. consequentialist views of the First Amendment)*

Paul Smith: While those tensions are certainly reflected in the decision, I don't really think it's fair to view the five-vote conservative majority that carried the day as more "principled" than the dissenting four Justices or as Justices who interpret the First Amendment to achieve equality rather than liberty. The case dealt with a particular problem — how the First Amendment applies to corporations when they are participating directly in campaigns for federal office. The Justices had to decide how much deference to accord Congress when it decided that a particular form of corporate participation in elections — direct advocacy during the final weeks of a campaign using general treasury funds rather than PAC funds — would distort the marketplace of ideas and/or create too much risk of corruption.

Floyd Abrams: First Amendment rulings routinely arise out of clashes between free speech claims and other social interests — i.e., personal reputation, privacy, national security or the like. What's most troubling to me about much of the criticism of *Citizens United* is not that many observers view the need for "reform" in this area as so important that the First Amendment must fall before it. I strongly disagree with that approach but, as I've said, it's commonplace in First Amendment cases for competing interests to be assessed. What's more troublesome still to me is the position of many critics of *Citizens United* that the true competing interest is the preservation of "American democracy" or the like. To say that speech, let along speech about who to vote for, should be suppressed in the name of democracy seems to me to be especially dangerous.

Professor Joel Gora: On the day that *Citizens United* was decided, I found myself saying, in a New York Times blog column, that it was "a great day for the First Amendment." What made it great was that the Court was willing to use broad strokes to strike down a law which restricted speech in broad terms. Under the challenged law, all corporations and all labor unions were banned, under threat of criminal sanctions, from using their funds to speak out about government and politics in any way that even mentioned a politician or an incumbent officeholder running for election. What could be more quintessentially at the core of the First Amendment than such speech and what more important role could the Court play than striking down a law which restrained such speech. The First Amendment has always been based on the idea that the more speech we have, the better off we are, as individuals and as a people. The *Citizens United* case eloquently reaffirmed and reinforced that overarching principle. So, the clash between liberty and equality is a false clash. Protecting the right of everyone and every entity to speak – liberty – will enhance the ability of everyone to participate more fully in the political process – equality. On the other hand, seeking to restrict liberty to achieve equality is a fool's errand: it will neither protect liberty nor achieve equality. In squarely recognizing that critical connection, the Court's opinion was a historic and heroic affirmation of the central meaning of the First Amendment. All individuals and groups are equally entitled to exercise their freedom of speech. Now, that is the proper way to level the playing field.

MLRC: *Is Justice Kennedy correct that the First*

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Amendment does not permit Congress to make categorical distinctions based on the corporate identity of the speaker?

Paul Smith: I think Justice Stevens is persuasive in arguing in dissent that the long tradition of treating corporations differently for purposes of their participation in campaigns is neither surprising nor particularly in tension with the rest of First Amendment jurisprudence. As he points out, there are all sorts of categorical distinctions drawn in the regulation of speech consistent with the First Amendment. His examples were students, prisoners, members of the Armed Forces, foreigners seeking to participate in American political campaigns, and government employees. All are treated differently as a categories of speakers by the law.

Floyd Abrams: Generally, yes. Of course cases treat students differently when they speak in (but not out of) school, prisoners, when their speech threatens order in the prisons where they're incarcerated, etc. There are exceptions to any generalization but that does not mean that the generalization is incorrect in its articulation of the principle. Even the First Amendment's "no law" language has been held to be non-absolute, but the core precepts of that Amendment have still generally been judicially vindicated. To say that corporations, as a group, may be categorically prevented from speaking out on the sort of matters at issue in *Citizens United* would be at odds with the core of the First Amendment.

Professor Joel Gora: Our incredibly complex system of campaign finance rules and regulations — about who can speak and what can be said and when it can be said — presided over by the government bureaucrats at the Federal Election Commission, and backed up by criminal and civil penalties, has created, in effect, a de facto system of prior restraint which causes a chilling effect on political speech all over the country. The chilling effect on speech that system caused, with people and organizations fearful that their ad in the newspaper criticizing the President of the United States might somehow be deemed illegal, was anathema to First Amendment values. Now the Court has swept all of those restraints away and allowed any group taking any form to speak out on the core political issues of the day on behalf of its members, contributors, shareholders, employees and the like. The Court dismantled the First Amendment "caste system" whereby whether someone or some group could speak depended on who or what they were. Before the decision, the right to speak depended on who was doing the speaking: business corporations, no, unless they were media corporations; non-profit corporations maybe, depending on where they got their funding; labor unions no. At the state level there was also a crazy-quilt system, with half the states allowing corporations and unions to speak out about politics and the other half not. The Court has swept those distinctions all aside: the right to speak cannot depend on the identity of the speaker. Under the First Amendment, there can be no second-class speech or second-class speakers.

I tend to think that the exemption for media corporations in the law would have been constitutionally required even if the law had been upheld as applied to other corporations. But I recognize that drawing such a line is becoming increasingly difficult in a time when anyone can have a website.

- Paul Smith on *Citizens United*

MLRC: *What are the consequences of allowing such distinctions? Would media corporations be exempt from regulation only by the grace of Congress?*

Paul Smith: Obviously courts need to be vigilant when lawmakers disparately regulate speech rights by categories of speakers. There has to be a strong, content-neutral justification and the law cannot be a covert way of favoring some viewpoints over others. The fact that some categorical distinctions may be permissible does not mean that all are. Clearly, if *Citizens United* had come out the other way, media corporations (and all other corporations) would still have enjoyed constitutional protection from nearly all other forms of government censorship. The hard question is whether it would have been permissible to apply the ban on electioneering communications paid for with general treasury funds on the eve of elections to media corporations. I tend to think that the exemption for media corporations in the law would have been constitutionally required even if the law had been upheld as applied to other corporations. But I recognize

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that drawing such a line is becoming increasingly difficult in a time when anyone can have a website.

Floyd Abrams: Who knows? Certainly there is a risk of that result. Just as important, if the Court were to say that Time Warner could prepare, distribute and show on television its own version of "Hillary; The Movie" but that Citizens United would act criminally if it did so, it would have acted in a wholly unprincipled — not to say unconstitutional — manner.

Professor Joel Gora: In this regard, the Court explicitly and emphatically reaffirmed the First Amendment protections of the institutional press. In fact, the Court said that if the government could, indeed, restrict the First Amendment rights of corporations, that would include the power to limit media corporations as well – a clearly unacceptable and unprecedented result. By recognizing full First Amendment rights of corporations, including media corporations, the Court avoided that outcome. Nonetheless, most of the press, however, has not expressed appreciation for the protection the Court reaffirmed for them, and many have excoriated the Court for handing down that decision. The Court's ruling reconnected with the classic First Amendment tradition established by the great 20th century Justices like Holmes, Brandeis, Black, Douglas and Warren who understood that the protection of free speech went hand in glove with the enhancement of democracy. The latter three Justices, among the most liberal ever to serve on the Court, could not have been plainer in their commitment to a uniform and universal view of free speech as the indispensable precondition for democracy. In a 1957 opinion on the rights of labor unions to speak out about politics they said: "Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesman. The people determine through their votes the destiny of the nation. It is therefore important – vitally important – that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." Deeming a particular group "too powerful" to be allowed to speak was not a "justificatio[n[for withholding First Amendment rights from any group – labor or corporate."

MLRC: *Does Citizens United provide a basis to overrule FCC v. Pacifica Foundation and the scarcity rationale for regulating broadcast radio and television?*

Paul Smith: I suppose it does if you take seriously the notion that the law can't draw categorical distinctions among speakers. But in my view, the reasons why it is constitutionally questionable to continue to single out broadcasters for greater regulation have more to do with the fact that the scarcity rationale is no longer persuasive, given the diversification of electronic media.

Floyd Abrams: Probably not. I don't believe Justice Kennedy and the majority of the Court meant to do so by anything in the opinion although there are other routes to that result.

Professor Joel Gora: As to the impact of *Citizens United* on the *Pacifica* scarcity rationale for regulating offensive broadcast speech, I think the real undermining of that rationale happened well before Citizens United, with the arrival first of cable and then of the Internet, not to mention the technologies on the horizon that would permit multiple uses of individual broadcast channels. Its critics can try to blame *Citizens United* for many baleful things, but making television safe for "Seven Dirty Words" is not one of them.

2. Anonymity in the Political Process; Anonymity Online

Doe v. Reed

MLRC: ***Do political petition signers have a right to shield their identity under the First Amendment?***

Paul Smith: I'm with Justice Scalia on this one. Signing a petition seeking to put an initiative on the ballot is a form of expression but it is also a public act, playing a role in the eventual passage of legislation. We choose, for lots of good reasons, to have a secret ballot on election day, but I don't see that as analogous. Especially given the clear need for public scrutiny of petitions to assure there has not been fraud and abuse, I would say that a person signing a petition to put an issue on the ballot should know this will not be an anonymous action. Of course, people should be protected from tortious and criminal retribution. But that does not mean they should be protected from criticism in the marketplace of ideas.

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Floyd Abrams: No. I agree with Paul Smith that Justice Scalia was correct on this issue.

Professor Gora: The undisclosed First Amendment story of this past Supreme Court Term, I am saddened to report, is that the Court, save for the stalwart Justice Thomas, has thrown associational privacy and political anonymity under the bus. There was a time in the midst of the liberal Warren Court when the First Amendment was interpreted as giving extremely strong protection to the right to associate with controversial groups without unnecessary government surveillance and disclosure – a right established in a number of cases involving the NAACP trying to protect its members against the harassment that would follow if their association were disclosed – as well as the right to hand out political literature without putting your name on it, just like the Framers did who authored the Federalist Papers anonymously.

But the current Court is much less sensitive to those protections and much more enamored of disclosure as either the government's right to impose or a less drastic alternative to limits on speech. So, you understandably may not have noticed in the din of disapproval that has accompanied the *Citizens United* case, that the Court did, in fact, uphold relatively intrusive disclaimer and disclosure of the messages and sponsors of the speech that it just freed from prohibition. And the disclosures upheld went well beyond what groups like the ACLU thought were justified. The Court's 1976 landmark campaign finance decision in *Buckley v. Valeo* clearly held that the only independent speech that could be subject to ANY forms of registration or disclosure was that which Expressly Advocated the election or defeat of a federal candidate. Too narrow, said 8 of the 9 Justices in *Citizens United,* any person or group that even mentions a politician in an election season broadcast advertisement, regardless of the context or thrust of the ad, is subject to the statute's disclosure regime. Indeed, Justice Kennedy was quite explicit that one of the reasons why it would not be dangerous to democracy to let corporations and unions have full speech rights concerning candidates and politics was that, for the first time, there would be disclosure as well: "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today….The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." Gone was any significant appreciation of the chilling effect that disclosure can have, even apart from those groups that can show specific threats of harassment of their members and supporters.

That same embrace of disclosure and transparency also led to the result in *Doe v. Reed*, where the widespread public disclosure of the identities — names and addresses — of people who signed petitions to put what was perceived to be an anti-gay referendum on the ballot was approved by the Court, with only Justice Thomas dissenting in favor of political privacy, though Justice Alito did suggest that a door should be kept open for as-applied harassment challenges. But the overwhelming majority of the Court supported public disclosure and denigrated the privacy concerns. While there were a number of arguably sound legal grounds for the result – signing the petition is a public act; many referenda are not particularly controversial and don't require protection of privacy; electoral fraud needs to be discouraged – what was arguably really going on was a campaign to expose and intimidate people who politically opposed same sex marriage. Though not extremely widespread, there had been enough incidents in different parts of the country to raise a concern about the effects of disclosure, but the majority brushed it aside. Well, at least we still have the secret ballot.

MLRC: *Will the Court's decision in Doe v. Reed impact the First Amendment right of anonymity in other contexts such as defamation claims over speech on the Internet?*

Paul Smith: The petition context is pretty distinct. I don't see the decision as having a significant impact on the right to speak anonymously in other contexts.

Floyd Abrams: Not directly although I think the general "right" to anonymity on the internet is likely to face rough sledding in the context of libel or other recognized claims.

Professor Joel Gora: The implications for privacy on the internet, to my mind, are troubling. In *Citizens United* the Court extolled the virtues of the internet in facilitating disclosure about who is supporting what political messages,

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and in *Doe v. Reed* the Court minimized the threat of viral internet assaults on individuals for their support of certain political positions. In that legal milieu, proponents of internet privacy may have an uphill piece of business.

3. Categorical Exceptions To The First Amendment – U.S. v. Stevens

MLRC: *In U.S. v. Stevens, the government argued that "Whether a given category of speech enjoys First Amendment protection depends upon a balancing of the value of the speech against its societal costs." The Court rejected this argument, with Chief Justice Roberts describing it as "startling and dangerous." Is this the most important takeaway point from the decision?*

Paul Smith: The government's argument for a new exception to strict scrutiny, based on a balancing of the value of speech against its social costs, was a remarkably anti-First Amendment position that the Court rightly rejected. Indeed, the Solicitor General's office seemed to have backed away by the time the Government filed its reply brief and at oral argument. It was obviously important for the Court reject such an approach emphatically. But I thought it was also important that the Court took seriously its duty of determining the full potential breadth of the statute and applying strict scrutiny to assess the statute in its full breadth, rather than papering over that problem in order to find a way to uphold a law aimed at an odious form of expression (so-called "crush videos").

Floyd Abrams: Yes. In fact, the *Stevens* opinion should (and I think ultimately will) be celebrated as a memorable one precisely because of that part of the Court's analysis.

Professor Joel Gora: Yes, as with *Citizens United*, in *Stevens*, the Court was also striving to put the First Amendment first, and not have it balanced against other competing interests in an ad hoc and subjective way. In both cases there was a clear impatience with paternalistic "government knows best" justifications for limiting speech either by lumping it into "unprotected" categories or buckets or attempting to balance speech away in an ad hoc fashion. In this respect, the two decisions are reminiscent of the approach taken by Justices Black and Douglas in an earlier era, railing against "balancing away" First Amendment rights on the altar of various assorted government interests. What is surprising is that the more liberal Justices would have joined the Stevens opinion, given that they tend to eschew the more "absolute" approach and opt for a supposedly more modest case-by-case approach. Perhaps this can be explained by the fact that the decision was essentially an overbreadth ruling, based on the determination that most of the Act's applications were invalid, but inviting Congress to redraft the statute in a way that focused more on the purported concerns with horrible, sexually-fetished animal cruelty, rather than videos of hunters stalking deer.

4. Content-based Restrictions on Speech and the First Amendment – Holder v. Humanitarian Law Project

MLRC: *In Holder, the Supreme Court rejected a First Amendment challenge to a federal statute barring "material support" to designated foreign terrorist groups, including "coordinated" speech and advocacy on behalf of such groups. Is the Court's decision important to free speech issues outside of the war on terror?*

Paul Smith: *Holder* is interesting because the Court seemed to acknowledge that it was dealing with the kind of content-based restriction on speech that warrants strict scrutiny but it was willing to uphold the law, giving great deference to Congress. That's very rare. My sense is that it will not lead to a general loosening of First Amendment standards but will instead be cabined to the terrorism context.

Floyd Abrams: I think the *Holder* case was a very difficult and close one — far more so than *Citizens United*. That said, I think the impact of the case on other areas will be minimal.

Professor Joel Gora: That's hard to tell. Of course, some analysts have pointed out a real tension between the *Holder* case, which upheld a statute restricting "material support" for protected speech, and *Citizens United* which struck down a statute restricting "material support" so to speak for political speech by corporations and unions. I tell my students, only half jokingly, that the moral of the story is (1) that the conservatives will protect speech for corporations, but not for terrorists, (2) the liberals will protect speech for terrorists, but not for corporations and (3) Justice Stevens will protect speech for nobody, since he was the only Justice to reject the

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First Amendment claims in *both* cases. I then tell my students that maybe Al Qaeda should incorporate and gain protection in the Supreme Court by a vote of 8-1. Of course, the cases are more "nuanced" than that, but I am a bit appalled by the self-contradictory inconsistencies in approaches, especially, inter alia, on the question of "deference" to Congress and the President. The liberals give Congress the benefit of the doubt on regulating campaign speech, but not regulating terrorists, and the conservatives do vice versa. Were I the Tenth Justice, I would say that deference is no more appropriate – and just as pernicious – in the Pentagon Papers case as in *Buckley v. Valeo*, in *Holder* as in *Citizens United*. The one constant is the government's self-interest in protecting themselves or their secrets, and the courts should be willing to call them on it. I haven't the slightest doubt that Justices Black and Douglas would have easily invalidated both statutes. Instead, you have the specter of Justice Breyer dissenting in *Holder* saying the activities at issue "involve the communication and advocacy of political ideas and means of achieving political ends" and continuing, that "this speech and association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection." If that doesn't also describe *Citizens United*, in which he rejected the First Amendment claim, I don't know what does. My hope is, however, that *Holder* will be distinguished in the future as a national security case, without a spillover effect on First Amendment claims and issues more generally. But, in all honesty, there is an underlying tension between the two cases that may erupt in the future.

There is a good deal of worried speculation in the First Amendment community about why the Court took this case since lower courts had been virtually unanimous in striking down statutes like California's.

- Professor Joel Gora on *Schwarzenegger*

5. Regulating the Sale of Video Games to Minors – Schwarzenegger v. Entertainment Merchants Association, et al.

MLRC: *In light of U.S. v. Stevens, and the unanimity among lower courts in striking down laws restricting sales of video games to minors, why did the Supreme Court agree to hear this case?*

Paul Smith: My own view on that is that the Court saw that nine different state or local laws had been struck down by federal courts and decided it was time for it to make sure this degree of friction between state policymakers and federal judges was appropriate. They had not been asked to grant review since the very first case a decade ago. I don't believe they granted review with a firm conviction that the Ninth Circuit's decision needed to be reversed — though I guess I can always be proved wrong!

Floyd Abrams: Lots of state laws, lots of support for them by state Attorneys General, lots of rulings offering somewhat different justifications for striking those laws down. It's always conceivable that the Court will reverse a ruling it's agreed to review but it's unlikely in light of *Stevens*.

Professor Joel Gora: There is a good deal of worried speculation in the First Amendment community about why the Court took this case since lower courts had been virtually unanimous in striking down statutes like California's. And, like *Stevens*, it does require consideration of whether a category of speech should be deemed as so consistently of little value in comparison to the harms that it supposedly generates as to justify putting it in the non-speech category.

MLRC: *Would a decision in favor of California reopen the question of regulating the Internet to protect children?*

Paul Smith: Not necessarily, if the Court were convinced that sale of video games to minors can be regulated without affecting adults' access to protected expression (although we will argue there will be such an effect). Ironically, distribution of video games is now shifting to the Internet where age restrictions will raise the same problems litigated in *Reno v. ACLU* and the COPA line of cases.

Floyd Abrams: Probably not. The same problems of vagueness, overbreath and the like that led to the Court's rulings would still exist.

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Professor Joel Gora: The Court has generally refused to do so since *New York v. Ferber* upheld a ban on "child pornography" in considerable degree to protect the harm of exploiting young people to produce such content. So, that case was explainable as a child abuse case as much as a free speech ruling. Here the relationship between speech and harm is less direct and more attenuated. It implicates the classic debate about how much of a link between speech and harmful conduct resulting from the speech has to be shown before the speech can be punished. But cutting in the opposite direction is that, at least where sexual content is concerned, "obscenity for minors" has been a recognized category of "non-speech" or lesser protected speech for 45 years. The Court has generally resisted the blandishments of the save the children crowd to try to justify broad prohibition of sexual content on the internet, but has not denied government the right to engage in more focused regulation. Here the harm is the long-term instigation of violence, not sexual behavior, and the Court may feel that speech which assertedly stimulates violence by youth is more of a valid governmental concern. A decision upholding the statute would undermine First Amendment rights across the board and allow a variety of proscriptions of speech where the speech/harm nexus is not all that clear. I hope there are not five votes to uphold this statute, but a weird, strange bedfellows coalition on the Court might produce such a majority.

6. Hustler v. Falwell and Private Figures – Snyder v. Phelps

MLRC: *Will the Court limit Hustler v. Falwell to claims involving public figures?*

Paul Smith: I'm afraid I'm not confident in my ability to predict what the Court will do with this case. The First Amendment claims seem strong but the speaker and the speech at issue are so unattractive.

Floyd Abrams: There's a real chance of that but not, I think, in the *Snyder* case.

Professor Joel Gora: Many civil libertarians and many media lawyers are worried, and rightly so, about the Court's grant of certiorari in this case. One of the greatest adages in First Amendment lore is the famous line by Justice Oliver Wendell Homes: "… if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate." That principle is what has animated our constitutional tolerance for flag burning, hate speech, the Nazis marching in Skokie and other things that most of us would find intolerable and unacceptable, but which we must tolerate and accept because we all have different ideas of what ideas should not be free. Does this case, with its intolerable speech, endanger that principle?

MLRC: *Is the amicus brief filed by 48 state attorneys generals on behalf of plaintiffs correct in arguing that the question of public concern should not be based on the topic of the speech, but on plaintiff's connection to the speech at issue?*

Paul Smith: That's a pretty scary proposition. It seems to open up lots of potential for making core political speech into an actionable tort.

Floyd Abrams: I hope not. That would be a substantial setback for First Amendment interests.

Professor Joel Gora: There are three threat points for freedom of speech and press in this case. First, that the Court might find that some speech is so "outrageous" that it can, indeed, be civilly punished through damages for the intentional infliction of emotional distress – which was once called "the tort of outrage." I always viewed the *Falwell* case as the Court's saying, unanimously, that the concept is too subjective and open-ended and treacherous ever to be defined with sufficient precision to satisfy First Amendment concerns. I hope the Court wills stick to those guns.

Second is the "public/private" distinction. The Reverend Jerry Falwell was a quintessential public figure, about whom harsh commentary was fair game. The law of defamation draws a distinction between the greater leeway given to attack public figures or officials without fear of libel suit and the lesser leeway afforded when the subject of the story is a private person who did not seek limelight or power. That is a very strong argument here and could conceivably prompt the Court to declare that the Falwell protections do not apply where the target of the vicious speech is a private

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person. The problem is that this dividing line is not all that clear and at the margin between the two there will be an awful lot of chilling effect.

MLRC: *What are the First Amendment consequences of a ruling in favor of plaintiffs?*

Paul Smith: It depends on how it's written. It might be pretty limited (though still scary as just noted). Or it might open up new avenues for cutting back on First Amendment rights. Hard to say.

Floyd Abrams: Hard to tell. The Court could analogize the protection of funerals to the "home is a castle" approach it's taken previously but even so it would open doors to regulation just about all had thought closed.

Professor Joel Gora: The Court might carve out an exception for the location of the protest, funerals, or maybe even military funerals, on the ground that such regulation of the "time, place or manner" of speech is more permissible. Indeed, an amicus brief has been filed by 40 Senators, headed by Senators Harry Reid and Mitch McConnell, who have probably not agreed on anything else in the last six months, urging the Court to punish the speakers for invading the sanctity of a military funeral and pointing to a federal statute that protects such hallowed situations. The Court has upheld speech restrictions within the areas surrounding the entrances to hospital facilities, for example, But so much of the impetus to penalize the speech in this case is the hatefulness of the ideas, not just the seclusion of the location, and the Court normally does not allow time, place or manner rules to vary with the content of the speech at issue. Hopefully a majority of the Court will find that these three grounds are sufficiently troubling from a First Amendment perspective and protect the speech in question, however intolerable we may feel it to be.

The Court could analogize the protection of funerals to the "home is a castle" approach it's taken previously but even so it would open doors to regulation just about all had thought closed.

- Floyd Abrams on *Snyder*

7. The First Amendment Legacy of Justice Stevens

MLRC: *From majority opinions in FCC v. Pacifica, Reno v. ACLU, Bartnicki v. Vopper, to dissents in Citizens United and Texas v. Johnson, Justice Stevens has participated in some of the most important First Amendment cases of our era. What is his First Amendment legacy?*

Paul Smith: With regard to "adult" material, I think he moved over time, becoming a more stalwart protector of the First Amendment than when he started out. He began as a proponent of the view that sexually explicit material (*Young. v American Mini Theatres*) and dirty words (*Pacifica*), while not unprotected, constitute low-value speech subject to greater regulation. The tenor is much different by the time of his dissents in *Ashcroft v. American Library Ass'n* and *Ashcroft v ACLU*.

Floyd Abrams: Justice Stevens was hardly a rigorous protector of the First Amendment. While his First Amendment protective ruling in *Bartnicki* and his dissents in *Ashcroft* v. *ACLU* and *Ashcroft* v. *American Library Ass'n* are important, they seem to me to be greatly outweighed by his far from protective rulings in cases ranging from *Hill* v. *Colorado* to *Pacifica* and *American Mini-Theatres*, his dissents in *Eichman*, *Johnson* — and, not least, his dissent in *Citizens United* itself.

Professor Joel Gora: In my view, Justice Stevens' First Amendment legacy is a decidedly mixed one. I give him a great deal of credit for writing important opinions protecting free speech in cases like *Reno v. ACLU*, which was a bit of a magna carta for protecting speech on the internet, and *McIntyre v. Ohio Elections Commission*, which was a surprisingly strong recognition of the right of political anonymity and struck down a law which required people to put their names on election literature – a ruling which has been seriously undercut by some of the more recent pro-disclosure decisions. He seemed to have the romantic notion that the First Amendment primarily was designed to protect "the soapbox orator and the lonely pamphleteer." While that was once a noble and necessary vision of the First Amendment, in the modern age, people have to join together with others to make their voices heard and, certainly in the

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campaign finance area, he resisted that vociferously. Not only did he write the harsh dissent in *Citizens United* accusing the Court of selling out democracy to corporate interests, but he had long considered the regulation of campaign funding as the regulation of money and property, not of speech, and subject to much greater government controls accordingly. Justice Stevens rarely met a campaign finance limitation that he didn't like. It is ironic that he succeeded Justice William O. Douglas, who was the Court's greatest free speech champion – for people and the institutions they comprise – and who was thought to have been preparing an opinion in the *Buckley* case striking down all restrictions on campaign funding, before he was forced by illness to retire from the Court.

Lastly, Justice Stevens authored two of the most questionable rulings on controlling the content of speech. One was the *Pacifica* plurality opinion which upheld penalizing, as offensive, the broadcasting of George Carlin's brilliant and satirical monologue called "Seven Dirty Words." The other was a similar decision, perhaps his initial First Amendment opinion on the Court, upholding zoning restrictions on sexually-oriented movies and bookstores because the material was of lesser value than the Federalist Papers. Or, as Justice Stevens memorably put it: "…few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice." That few, however, included Justices like Black and Douglas who did not think there should be second class speech under the First Amendment.

8. Supreme Court Justice Elena Kagan and the First Amendment

MLRC: *Do Elena Kagan's academic writings reveal a discernable First Amendment philosophy*? *See, e.g.,* "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," 63 Chicago L. Rev. 413-517 (Spring, 1996).

Paul Smith: I think I'll let others comment on the new Justice!

Floyd Abrams: The questioner obviously doesn't argue before the Supreme Court. Let's wait and see.

Professor Joel Gora: I think it is difficult on the basis of her academic writings to make such an assessment. She had a reputation as Harvard Law School's Dean of reaching out and listening to people from all points on the political spectrum, and one would hope that if she brings that same open minded quality to her responsibilities as a Justice she may occasionally surprise us with the reasoning and outcomes she supports.

9. Future of the First Amendment: Global Influences and the New Media Marketplace

MLRC: *There has been considerable debate about the role of foreign law in the Supreme Court's constitutional decision making process. Will the balancing tests applied by the European Court of Human Rights, and national courts in Europe, in areas such as libel, privacy and "hate speech," have influence on any Justice's First Amendment jurisprudence?*

Paul Smith: I don't see foreign law affecting the Court's First Amendment jurisprudence. The First Amendment is such a uniquely American constitutional provision that it is somewhat insulated from the kinds of influence that is exerted by foreign law in the application of other constitutional provisions like the Eighth Amendment and the liberty clause of the Fourteenth Amendment.

Floyd Abrams: No, but I wish the court would read and learn from the rulings abroad protecting confidential sources.

Professor Joel Gora: I hope not. I think American "exceptionalism" on strong protection for First Amendment freedoms is to be cherished. We are definitely outliers where protecting provocative speech is concerned, and, to my mind, that is all to the good. The slippery slope to greater government control of speech should be resisted as much as possible. Some of the current Justices seem all too willing, like their European counterparts, to "balance" free speech against the needs and concerns of society. Happily the current majority of our Supreme Court is generally quite impatient, if not hostile, to that perspective, and therefore, quite supportive of strong and categorical protections of First Amendment rights.

MLRC: *Will the economic challenges faced by traditional media directly or indirectly influence the Supreme Court's First Amendment jurisprudence?*

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Paul Smith: I don't see that happening in particular. Of course, the emergence of web-based outlets of various stripes likely will affect the Court's jurisprudence in the sense that it makes it even tougher to think of the "press" as a separate entity and the press clause of the First Amendment as providing special protection to that entity.

Floyd Abrams: No, but the "every person is a publisher" reality of the Internet may well result in less First Amendment protection for the press than might otherwise have been the case.

Professor Joel Gora: Probably not, though those challenges will clearly have an impact on the traditional media themselves, and the Court might ultimately be influenced by the real-life blurring of lines between who is considered part of the traditional media and who is not. Hopefully, from my perspective, the effect will be more First Amendment protection across the board, as was evident in the Citizens United case.

MLRC: *Is the Court's traditional prior restraint jurisprudence sustainable in the world of Wikileaks?*

Paul Smith: That is an interesting question. It does seem that there might be a move to relax the doctrine. It is one thing to shield the New York Times from an injunction when it decides to print some classified information. It is quite another if there is less of an assurance that professional journalists have weighed the question and determined that the information is both newsworthy and not unduly threatening of the public interest.

Floyd Abrams: If Wikileaks had published the Pentagon Papers, don't ask what the result would have been! Let's hope that a few years pass before the next prior restraint case reaches the Court.

Professor Joel Gora: I think the Court majority has put a good deal of emphasis on the internet as the First Amendment facilitator for the future, as a 21st century poor person's printing press or soapbox, as the way to enhance disclosure in campaign financing as a less drastic alternative to prohibitions and restrictions. Of course those very qualities make it extremely difficult to restrict the dissemination of classified or confidential information as well. But people once feared the printing press as the devil's tool, yet that worked out pretty well. Hopefully, the internet will work out well also for First Amendment values.

I don't see foreign law affecting the Court's First Amendment jurisprudence.

- Paul Smith

About the participants:

Floyd Abrams is a partner at Cahill Gordon & Reindel LLP in New York City. He has a national trial and appellate practice and extensive experience in high-visibility matters, often involving First Amendment, intellectual property, insurance, public policy and regulatory issues. He has argued frequently in the Supreme Court in cases raising issues as diverse as the scope of the First Amendment, the interpretation of ERISA, the nature of broadcast regulation, the impact of copyright law and the continuing viability of the Miranda rule. Most recently, Floyd prevailed in his argument before the Supreme Court on behalf of Senator Mitch McConnell as *amicus curiae*, defending the rights of corporations and unions to speak publicly about politics and elections in *Citizens United v. Federal Election Commission*. Floyd's clients have also included The McGraw-Hill Companies, *The New York Times* in the Pentagon Papers case and others, ABC, NBC, CBS, CNN, Time Magazine, Business Week, The Nation, Reader's Digest, Hearst, AIG, and others in trials, appeals and investigations.

Joel Gora is a professor at Brooklyn Law School and a nationally known expert in the area of campaign finance law. He has been a member of the faculty since 1978, teaching constitutional law, civil procedure and a number of other related courses. He also formerly served as Associate Dean for Academic Affairs from 1993-1997 and again from 2002 through 2006. He is the author of a number of books and articles dealing with First Amendment and other constitutional law issues. His most recent book is *Better Parties, Better Government*, which he co-authored with financial market expert Peter J. Wallison. Professor Gora continues to be active in working on campaign finance policy

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issues, including filing briefs in the Supreme Court of the United States, advising various organizations and publishing articles in the news media. Following law school, he served for two years as the pro se law clerk for the U.S. Court of Appeals for the Second Circuit. He also was a full-time lawyer for the ACLU, first as national staff counsel, then acting legal director and associate legal director. During his ACLU career, he worked on dozens of U.S. Supreme Court cases, including many landmark rulings. Chief among them was the case of *Buckley v. Valeo*, the Court's historic 1976 decision on the relationship between campaign finance restrictions and First Amendment rights. He has worked, on behalf of the ACLU, on almost every one of the important campaign finance cases to come before the high court.

Paul M. Smith is a partner at Jenner & Block LLP in Washington, D.C. He is Chair of the Appellate and Supreme Court Practice and a Co-Chair of the Creative Content, Media and First Amendment, and Election Law and Redistricting Practices. Mr. Smith has had an active Supreme Court practice for two decades, including oral arguments in thirteen Supreme Court cases. These arguments have included *Crawford v. Marion County Election Board (2008),* the Indiana Voter ID case; *LULAC v. Perry* (2006), and *Vieth v. Jubelirer (2003),* two congressional redistricting cases; *Lawrence v. Texas (2003)*, involving the constitutionality of the Texas sodomy statute; *United States v. American Library Ass'n* (2003), involving a First Amendment challenge to the Children's Internet Protection Act and *Mathias v. WorldCom* (2001), dealing with the Eleventh Amendment immunity of state commissions. His first argument was in *Celotex Corp. v. Catrett* in 1986. Mr. Smith also worked extensively on several other First Amendment cases in the Supreme Court, involving issues ranging from commercial speech to defamation to "adult" speech on the Internet. Mr. Smith also represents various clients in trial and appellate cases involving commercial and telecommunications issues, the First Amendment, intellectual property, antitrust, and redistricting and voting rights, among other areas. His recent trial work has included several cases involving congressional redistricting as well as challenges to state video game restrictions under the First Amendment. In November, he will argue for the respondents in *Schwarzenegger v. Entertainment Merchants Association* before the Supreme Court.

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MLRC/Stanford Digital Media Conference
May 19-20, 2011
Palo Alto, CA

London Conference
September 19-20, 2011
(In-house counsel breakfast Sep 21st)
London, England

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