



MEDIA LAW LETTER

Reporting Developments Through September 13, 2002

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JOIN US AT THE NAA/NAB/LDRC Conference September 25-27 SETH WAXMAN, former Solicitor General of the United States to speak on Thursday, Sept. 26th at the Dinner.

With great pleasure and excitement we are announcing that SETH WAXMAN, former Solicitor General of the United States from 1997- January 2001, will be the speaker for the Conference Dinner on Thursday, September 26th. We are asking that you all make a special effort to be there to hear him.

Ted Olson, current Solicitor General, on the Conference program for that night, has had a scheduling snafu. But Former SG Waxman, who argued the Government's side in *Bartnicki* and *ACLU v. Reno*, among other significant media relevant cases, will be the speaker at the Thursday night Dinner talking about the Supreme Court and the First Amendment, exciting and valuable matter that, of course, you will want to hear.

Mr. Waxman is known as a terrific speaker, and one of the most knowledgeable men in Washington on the Supreme Court.

Join us at the Conference! Join us for Seth Waxman!

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Sixth Circuit Strikes Down Secret Deportations Opens Door to Administrative Proceedings

By Herschel P. Fink

The Bush Administration received a stinging rebuke to its policy of broadly cloaking 9-11 legal proceedings in secrecy, when the Sixth Circuit U. S. Court of Appeals on August 26, 2002, struck down as basically undemocratic a directive of U. S. Attorney General John Ashcroft to hold hundreds of deportation proceedings in secret.

Ruling in *Detroit Free Press v John Ashcroft*, ___ F3d ___ (2002), WL 1972919, the Court in a unanimous opinion by Circuit Judge Damon Keith warned the government that “democracies die behind closed doors,” and held that the press is the deputized guardian of the public’s liberties.

While limited to secret deportation trials, quasi-judicial administrative proceedings, the Sixth Circuit broadly suggested that access to other categories of administrative proceedings, including executive and legislative, were within the ambit of *Richmond Newspapers v Virginia*, 448 US 555 (1980).

The case is the first appellate decision questioning the Administration’s secrecy tactics. A parallel case is awaiting decision in the Third Circuit, and the U. S. Supreme Court in that case stayed the effect of a New Jersey District Judge’s order which enjoined secret deportation proceedings nationally.

The Sixth Circuit case involved a Detroit district judge’s injunction against secret proceedings in a single deportation case. The government did not seek Supreme Court relief when the Sixth Circuit had earlier denied a stay.

The Sixth Circuit left the door open for closures of portions of proceedings when the government is able to demonstrate a narrowly tailored, particularized need for relief. The Ashcroft policy imposed secrecy on a broad category of “special interest” cases which the attorney general unilaterally declared were linked to the events of 9-11, without any particularized showing of need.

The suit was brought this spring by the Detroit Free

Press, Michigan’s largest daily newspaper, and joined by the ACLU, U. S. Representative John Conyers, The Detroit News and The Ann Arbor News. The deportation case involved an Ann Arbor Muslim, Rabih Haddad, who had overstayed his visitor’s visa by three years. The government has claimed Haddad was the head of an alleged charity which funneled money to a terrorist organization. The Free Press took no position on the merits of Haddad’s deportation, telling the Court that it simply sought to observe and report.

While first acknowledging the federal government’s “near-unrestrained ability to control our borders,” the Court noted that,

**“Democracies die
behind closed doors.”**

The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty. * * * Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them ‘special interest’ cases. The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors.”

Rejecting the Government’s argument that its plenary power over immigration gave it the right to operate in secret, the panel, also composed of Circuit Judge Martha Daughtrey and District Judge James Carr of Toledo, Ohio, reminded the Government that

“The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.”

The Court continued that,

“It would be ironic, indeed, to allow the Government’s assertion of plenary power to transform the First Amendment from the great instrument

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Sixth Circuit Strikes down Secret Deportations

(Continued from page 3)

of open democracy to a safe harbor from public scrutiny.”

The Court warned that,

“when government selectively chooses what information it allows the public to see, it can become a powerful tool for deception.”

The Court concluded that,

“a true democracy is one that operates on faith — faith that government officials are forthcoming and honest, faith that informed citizens will arrive at logical conclusions. * * * Today, we reflect our commitment to these democratic values by ensuring that our government is held accountable to the people and that First Amendment rights are not impermissibly compromised. Open proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy.”

The decision in *Detroit free Press* also signaled a readiness of the Sixth Circuit to apply the holding of *Richmond Newspapers* and the First Amendment to a broad range of other governmental information.

The Court dismissed the significance of *Houchins v KQED*, 438 US 1 (1978), which held that the news media had no greater right of access to a county jail than other persons. First, the Court held that, even if *Houchins* applied to administrative proceedings, it did not apply to administrative proceedings which exhibited substantial quasi-judicial characteristics.

More significantly, the Court in *Detroit Free Press* questioned the continued vitality of *Houchins*, “decided two years before *Richmond Newspapers*,” and a “plurality opinion of the Court,” stating that a majority of the *Richmond Newspapers* court neither accepted nor rejected “the conclusion that the First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by the government.”

The Court noted that “the *Richmond Newspapers* two-part ‘experience and logic’ test sufficiently addresses all of the *Houchins* Court’s concerns for the implications of a constitutionally mandated general right of access to government information,” concluding that, “it is clear that the Court has since moved away from its position in *Houchins* and recognizes that there is a limited constitutional right to some governmental information.” The Court further stated that, “we believe that there is a limited First Amendment right of access to certain aspects of the executive and legislative branches.”

Herschel P. Fink of Honigman Miller Schwartz and Cohn LLP, Detroit, Michigan, represented the Detroit Free Press before the District Court and Sixth Circuit.

The Court in Detroit Free Press questioned the continued vitality of Houchins.

The following were counsel in the case:

COUNSEL

ARGUED: Gregory C. Katsas, United States Department of Justice, Civil Division, Washington, D.C., for Appellants, Herschel P. Fink, Honigman Miller Schwartz & Cohn LLP, Detroit, Michigan, Lee Gelernt, American Civil Liberties Union Foundation, New York, New York, for Appellees. **ON BRIEF:** Gregory G. Katsas, Eric D. Miller, Sharon Swingle, Robert M. Loeb, United States Department of Justice, Civil Division, Washington, D.C., for Appellants, Herschel P. Fink, Brian D. Wassom, Honigman Miller Schwartz & Cohn LLP, Detroit, Michigan, Lee Gelernt, American Civil Liberties Union Foundation, New York, New York, Jonathan Rowe, Soble & Rowe, Ann Arbor, Michigan. Leonard M. Niehoff, Butzel Long, Ann Arbor, Michigan, Michael J. Steinberg, Kary L. Moss, American Civil Liberties Union Fund of Michigan, Detroit, Michigan, for Appellees.

Sixth Circuit Affirms Dismissal of School Shooting Case Against Movie, Video Game, and Internet Defendants

Noting First Amendment Concerns, Court Holds Defendants Owed No Duty

By Deanne E. Maynard

The Sixth Circuit affirmed the dismissal of a suit stemming from a 1997 school shooting in Paducah, Kentucky, in which plaintiffs alleged that various media defendants had caused the shooting. *James v. Meow Media, Inc.*, 300 F.3d 683, 2002 WL 1836520 (6th Cir. Aug. 13, 2002).

The district court dismissed the entire complaint, on state law grounds, for failure to state a claim. It also noted the serious First Amendment problems that would be presented by recognizing such claims. See *LDRC LibelLetter*, April 2000, at 43; see also *LDRC MediaLawLetter*, March 22, 2001, at 6 (discussing district court dismissal of virtually identical case related to Columbine shootings). Plaintiffs appealed the dismissal of the negligence and strict liability claims. The Sixth Circuit, in an unanimous opinion by Judge Danny Boggs, affirmed.

Plaintiffs, the parents of victims of the shooting, alleged that the teenage shooter, Michael Carneal, regularly watched movies, played video games, and viewed Internet sites produced by the defendants. According to the complaint, the content of these media “desensitized” Carneal to violence and “caused” him to shoot his classmates. The plaintiffs brought negligence and strict liability claims against all defendants and asserted RICO claims against the Internet defendants.

No Foreseeable Harm

The opinion holds that, as a matter of law, the defendants owed no duty of care to the plaintiffs because Carneal’s actions were not foreseeable. The Court recognized that “[t]he mere fact that the risk may have materialized does little to resolve the foreseeability ques-

tion.” Rather, in Kentucky (as elsewhere), whether a duty of care exists is, at bottom, a policy determination that is a question of law for the Court.

The Court then reasoned that “Carneal’s reaction to the games and movies at issue here, assuming that his violent actions were such a reaction, was simply too idiosyncratic to expect the defendants to have anticipated it. We find that it is simply too far a leap from shooting characters on a video screen (an activity undertaken by millions) to shooting people in a classroom (an activity undertaken by a handful, at most) for Carneal’s actions to have been reasonably foreseeable to the manufacturers of the media that Carneal played and viewed.”

The Court supported this conclusion in two ways. First, it noted that, except in extraor-

inary circumstances, there is no duty to protect against the intentional criminal actions of others. The Court found no exception to that general rule, because nothing close to special relationship existed between the plaintiffs and the defendants, and the defendants had no knowledge of Carneal, much less any knowledge of his idiosyncracies that put others at risk of his criminal actions. Second, although it did not directly reach the question whether the First Amendment independently barred the suit, the Court held that “grave constitutional concerns” counseled against finding foreseeability.

First Amendment Concerns

As an initial matter, the Court “had little difficulty” concluding that the First Amendment applied to the video game defendants. This was so because it was the very expressive content and communicative impact of the games that the plaintiffs sought to regulate:

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“We are loath to hold that ideas and images can constitute the tools for a criminal act . . . or even to attach tort liability to the dissemination of ideas.”

Sixth Circuit Affirms Dismissal of School Shooting Case

(Continued from page 5)

“[Plaintiffs] argue that the video game, somehow, communicated to Carneal a disregard for human life and an endorsement of violence that persuaded him to commit three murders.”

The Court then concluded that holding the defendants liable for the reaction of listeners and viewers to the content of their speech would present substantial First Amendment problems. The Court reasoned that “we are loath to hold that ideas and images can constitute the tools for a criminal act . . . , or even to attach tort liability to the dissemination of ideas.”

Not “Obscene”

The Court rejected the plaintiffs’ argument that, because the defendants’ speech was “excessively” violent, it was “obscene” speech entitled to less First Amendment protection. The Court refused to extend its obscenity jurisprudence – which it generally has applied only to sexual material – to violent speech.

Instead, the Court held that violent speech could be regulated only if it met the stringent test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) – that is, the speech had to be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” The Sixth Circuit concluded that the defendants’ movies and video games fell “well short of this threshold.”

Proximate Causation and Strict Liability

Finally, although the Court did not reach the question, it concluded that Carneal’s intentional criminal act also was likely a superseding cause that would defeat any claim that the defendants’ actions proximately harmed the plaintiffs, and thus would independently bar the negligence claims. Furthermore, the Sixth Circuit rejected plaintiffs’ strict liability claims as “deeply flawed,” refusing to apply products liability to ideas and images.

Deanne E. Maynard is a partner with Jenner & Block’s Washington, DC office, and represented most of the video game defendants in this matter.

Executive Director of Nonprofit is Public Figure

The former executive director of a community-based nonprofit organization responsible for distributing public and private funds for the improvement of a neighborhood in Minneapolis was held by a Minnesota appellate court to be a public figure in a recent non-media decision. *Metge v. Central Neighborhood Improvement Association* (Ct. of Appeals Minn. Aug. 20, 2002)

The court, in an opinion by Judge Hanson, found that the organization had been subject to extensive press coverage, including coverage of the executive director’s termination – the subject of the allegedly defamatory statements made by one of the organization’s Board members both before and after joining its Board of Directors. But the court was also impressed by the fact that the organization itself was “imbued with a public purpose,” that it received substantial public funds, that it received regular publicity, and that the executive director had access to media herself.

The court also engaged in a discussion of libel by implication and opinion that comes out in all respects for the defendant, over statements that were seemingly critical of her handling of the organization and its finances.

The case was the result of a suit brought by Jane L. Metge, against her former employer, the Central Neighborhood Improvement Association. Ms. Metge claimed wrongful termination, defamation, and tortious interference with a contract.

John A. Fabian, III, Nicholas G.B. May, Nichols Kaster & Anderson, PLLP, Minneapolis, Minnesota for Appellant.

Stephen O. Plunkett, Paul B. Kohls, Rider, Bennett, Egan & Arundel, LLP, Minneapolis, Minnesota for Respondent.

Planet Beach Franchising Corporation v. C3Ubit, Inc

By David Bralow

Placing newsgathering telephone calls into the State and posting an article on the Internet that allegedly injured a forum resident constituted sufficient contacts to support personal jurisdiction of an Internet-only publisher.

That was the ruling of Judge Sarah S. Vance of the Eastern District of Louisiana in *Planet Beach Franchising Corporation v. C3Ubit, Inc.*, 2002 WL 1870007 (E.D. La., August 12, 2002). The Louisiana court's ruling is one of the few to adopt such an expansive reading of the *Calder v. Jones*, 465 U.S. 783 (1984) effects test, but joining that recently propounded in *Young v. New Haven Advocate*, 184 F. Supp.2d 498 (W.D. Va. 2001). *Young* is currently on awaiting a decision on appeal.

Such an expansion of *Calder* creates a conflict with a majority of other Internet jurisdiction cases that hold that mere Internet publication and reputational injury in the forum are not sufficient to satisfy the due process standards for the exercise of jurisdiction.

To satisfy due process, "certain minimum contacts with [the forum] such that the maintenance of a suit will not offend 'traditional notions of fair play and substantial justice'" requires that the defendant "purposely directed his activities at residents of the forum" and the "litigation results from those alleged

injuries that arise out of or relate to those activities." *Burger King Corp. v. Rudzewics*, 471 U.S. 462 (1985).

The foreseeability that a defendant's actions may have some impact in the forum is not sufficient to confer personal jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

In libel cases, the Supreme Court required a factual demonstration that the publications at issue were "expressly aimed" at the state, were "intentionally directed" at the state resident, and were "calculated to cause injury" in that jurisdiction. *Calder*, 465 U.S. at 789-90.

In the *Planet Beach* case, the Louisiana plaintiff franchises tanning salons. A tanning salon Internet news site, TanToday.com, posted a story stating that Planet Beach was experiencing financial difficulties and that inexperienced people conducted the franchisee training programs.

The district court held that the *Calder* standard was met because defendant:

- 1) tried to obtain information about the plaintiff by calling the plaintiff's headquarters;
- 2) called a Planet Beach franchisee located in Louisiana; and
- 3) posted the allegedly defamatory story on the Internet website with an electronic version of the plaintiff's logo that was taken from the Planet Beach server located in Louisiana.

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To be published in November

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Planet Beach Franchising Corporation v. C3Ubit, Inc

(Continued from page 7)

“Based on their actions, defendants must reasonably anticipate being haled into court in Louisiana ‘to answer for the truth of the statements made in their article,”

the Court ruled.

The trial court relied heavily on the *Young* case, where a Virginia court held that hauling the Connecticut newspaper into a Virginia federal court did not offend due process because: the newspaper knew the subject of the story — a prison warden — was a Virginia resident and because the newspaper knew that the harm caused by the publication would be suffered in Virginia. 184 F. Supp.2d at 508.

The *Planet Beach* and *Young* holdings expand *Calder*. In that case, the Supreme Court premised jurisdiction on the fact that defendant National Inquirer’s and its writer *Calder*’s actions were expressly aimed at California and intentionally directed at a California resident, Shirley Jones. The Supreme Court was influenced by the fact that the National Inquirer sold 600,000 copies of the newspaper weekly in California. Not only was there significant circulation in the forum state, the Supreme Court observed:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California. 465 U.S. at 788-789.

Based on these contacts, the Supreme Court concluded:

Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner *Calder* edited an article that they knew would have a potentially dev-

astating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must “reasonably anticipate being haled into court there” to answer for the truth of the statements made in their article. *Id.* at 790.

In this regard, most courts find that the *Calder* effects test requires much more than mere telephone calls into the forum or injury in that forum. *Stover v. O’Connell Associates, Inc.*, 84 F.3d 132 (4th Cir.), cert. denied, 519 U.S. 983 (1996); *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865 (5th Cir. 2001). These courts use *Calder* as a factor for determining whether there is “purposeful availment” in the forum. Effects in the forum is not a substitute for the full inquiry focusing on the relations among the defendant, the forum and the litigation. *IMO Indus., Inc. v. Kiekert AG*, 155 F. 3d 254, 265 (3d Cir. 1998).

Furthermore, the *Young* and *Planet Beach* rulings are contrary to the substantial number of Courts and commentators who reject the idea that Internet publication and residence of the plaintiff are sufficient grounds for jurisdiction. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.2d 414 (9th Cir. 1997); *Am. Info. Corp. v. Am. Informetrics, Inc.*, 139 F. Supp. 2d 696 (D. Md. 2001); *Schnapp v. McBride*, 64 F. Supp. 2d 608 (E.D. La. 1998); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999).

Charles R. Penot, Jr., McGlinchey Stafford PLLC, New Orleans; Anderson L. Cao, Joel W. Mohrman, McGlinchey Stafford PLLC, Houston represented the plaintiff.

Rene A. Curry, Jr., Christopher C. Friend, Guy Christopher Curry, Edward C. Vocke, Curry & Friend APLC, New Orleans; John H. Prorok, Maiello, Brungo & Maiello LLP, Pittsburgh represented the defendants.

David Bralow is a Senior Counsel at Tribune Company, responsible for the company’s Southern newspapers.

The Planet Beach and Young holdings expand Calder.

Twenty Subscriptions and Two Video Sales Insufficient for Jurisdiction

Relying on a line of cases decided by the First Circuit Court of Appeals, the district court for the District of Puerto Rico dismissed an invasion of privacy claim against a Florida corporation for lack of personal jurisdiction. The plaintiffs attempted to establish jurisdiction based on the defendant's sale of two videotapes to Puerto Rico residents. The court, in a decision by Judge Casellas, held that despite the fact that the defendant's chief executive knew of the two sales, to establish specific jurisdiction, "it is required that 'a substantial number of copies [be] sold and distributed'" in Puerto Rico. *Rodriguez Salgado, et. al. v. Les Nouvelles Esthetiques*, 2002 WL 1900073 (D. Puerto Rico Aug. 16, 200).

Taped Demo in Florida

The plaintiff, Yahaira Rodriguez Salgado, and her husband are residents of Puerto Rico. The defendant, Les Nouvelles Esthetiques ("LNE"), is a Florida corporation that publishes a monthly trade magazine for skin care professionals. In addition to publishing its magazine, LNE sponsors trade shows for skin care professionals.

During one trade show in Miami, the plaintiff participated in a demonstration of a new massage technique. The demonstration was videotaped and projected to the audience at the trade show. Later, LNE – without the permission of Rodriguez Salgado – began to advertise and sell the video through its monthly

magazine. LNE sold two tapes to Puerto Rico residents over a three-year period. The second sale was to Rodriguez Salgado's husband.

The plaintiff filed suit against LNE in the district court of the District of Puerto Rico. The plaintiff claimed LNE had violated her privacy rights as a result of the production, distribution and marketing of the video without her authorization.

LNE Challenges Jurisdiction

The defendants filed a motion to dismiss the complaint for lack of personal jurisdiction. Rodriguez Salgado and her husband, in their opposition to the motion to dismiss, conceded that general jurisdiction was not proper. However, they argued that the defendant's 20 magazine subscriptions in Puerto Rico and the two video sales were enough contacts with Puerto Rico to establish specific jurisdiction.

The court noted that Puerto Rico's long-arm statute was coextensive with the Constitution's due process limits and thus the court's decision focused solely on the federal constitutional analysis.

The court used a three-part test to determine if a finding of specific jurisdiction would comport with constitutional requirements.

The first prong of the court's test looked at the underlying

"Just as widespread circulation indicates deliberate action, thin distribution may indicate a lack of purposeful contact."

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INVITATION ARE OUT DCS BREAKFAST MEETING

**Friday
November 15, 2002**

7A.M-9A.M.

Contact us if you did not get an invitation.

Twenty Subscriptions and Two Video Sales Insufficient for Jurisdiction

(Continued from page 9)

ing claim and whether it directly arose out of, or related to, the defendant's activities within Puerto Rico. Taping and distribution at the trade show, seemingly done with the plaintiff's consent, did not arise out of any contact with Puerto Rico. No claim for damages from that would be entertained. Looking to the plaintiff's claims of damages caused by the distribution of the video in Puerto Rico, the court conceded that the claims were "somewhat related to the contacts that [LNE] had with the forum." However, the court believed that the connection was "rather tenuous."

The court noted an uneasiness in finding a causal connection between the defendant's activities and the alleged damages. Most significantly, the court noted that the videotaping was done in Florida. Thus, only one-half of the proximate causes for the damages plaintiff claimed actually happened in Puerto Rico. But, the court assumed "for the time being" that a partial causal connection would be enough to satisfy the "relatedness" prong for jurisdiction.

Nature and Quality of LNE's Contacts

Where the plaintiff ultimately failed to satisfy due process rights was the nature and quality of LNE's contacts with Puerto Rico.

Turning to First Circuit decisions on jurisdiction, the court found that the plaintiff could clearly not establish the requisite purposeful availment of Puerto Rico by the defendants.

Relying on *Noonan v. Winston Co.*, 135 F.3d 85 1st Cir. 1998), the court noted that "[j]ust as widespread circulation indicates deliberate action, thin distribution may indicate a lack of purposeful contact." The court also concluded that

Noonan stands for the proposition in *Keeton* [*v. Hustler*, 465 U.S. 770 (1984)] that for the establishment of specific jurisdiction in these types of

cases it is required that 'a substantial number of copies [be] regularly sold and distributed.

Turning to LNE's contacts with Puerto Rico, the court concluded that they were "infinitesimal."

Over a four-year period, LNE's video sales in Puerto Rico accounted for only \$50. In 1998, when the first video sale in Puerto Rico occurred, the one video sale accounted for 0.00129 percent of LNE's total revenues for that year. In 2000, when plaintiff's husband purchased the video, the sale accounted for 0.00123 percent of LNE's total revenue for that year.

However, the plaintiff also argued that LNE's 20 magazine subscriptions sold in Puerto Rico could also be considered – especially give the fact that LNE advertised the video in its magazine. The court did not agree.

The court held that

"the mere fact that LNE's magazine may have contained an advertisement for the sale of the subject videotape is insufficient to confer jurisdiction over LNE, since it did not specifically target Puerto Rico citizens, and resulted in only two (arguably one) sales."

The court recognized that unlike Noonan, the defendants here knew they were distributing their magazine and had sold two videos in the jurisdiction. But it held that the difference here was without ultimate significance. Absent substantial copies sold in the district, and with no evidence that the defendant had in any way specially targeted Puerto Rico with advertising or other business activities, the defendant would not be found to have purposefully availed itself of the jurisdiction

Jose A. Hernandez-Mayoral, of San Juan, represented the plaintiffs. Allen M. Levine and Daniel L. Wallach, of Becker & Poliakoff in Ft. Lauderdale, Fla., and Edna E. Perez-Roman, of O'Neill & Borges in San Juan, represented the defendants.

Plaintiff could clearly not establish the requisite purposeful availment of Puerto Rico by the defendants.

Texas Supreme Court Upholds Jury Finding of Actual Malice

Remands for Consideration of Damages

By Jim Hemphill

The Texas Supreme Court, apparently for the first time, has affirmed a libel verdict in favor of a public official over statements aired in a mass medium.

The lengthy opinion in *Bentley v. Bunton*, No. 00-0139, 2001 WL 1946127 (Tex. Aug. 29, 2002), addresses a number of issues, perhaps most notably involving actual malice, damages, and opinion. The decision was handed down by a fractured eight-member court – one justice did not participate – in which four justices joined the plurality written by J.A. Hecht in affirming in part and reversing in part, three justices concurred in part because they would have found fully in the defendants' favor, and the eighth justice concurring in part because he would have found fully in the plaintiff's favor.

Corruption Charges

The primary defendant, Joe Ed Bunton, hosted a local-access cable TV program carried in the small East Texas towns of Palestine and Elkhart. Bunton repeatedly referred to the plaintiff, Texas District Court Judge Bascom W. Bentley III, as "corrupt" during several episodes of the show. On some shows, Bunton had a co-host, Jackie Gates. At one point, when Bunton said that Bentley was the most corrupt public official in the county, Gates said "yeah," but otherwise voiced neither approval or disapproval of Bunton's comments.

Bentley sued, claiming that the programs caused him great mental distress and damage to his reputation. At trial, the jury found that both Bunton and Gates defamed Bentley and acted with actual malice. Among other damage elements, the jury awarded Bentley \$7 million for mental anguish, \$150,000 for damage to character and reputation, and \$1 million in punitive damages. The court of appeals affirmed the judgment against Bunton, but reversed the judgment against Gates. See *Bentley v. Bunton*, 1999 WL 967686, 1999 Tex. App. LEXIS 7947 (Tex. App. – Tyler 1999).

Texas Constitution's protection not broad

The Supreme Court addressed the question of whether the Texas Constitution's free speech provision provides greater protection against libel claims than the First Amendment. In the 1980s and early 1990s, several Supreme Court opinions appeared to so hold. However, the court's makeup has changed considerably, and in *Bentley* the court held that the state constitution actually provides less protection than the First Amendment – at least in the context of defamation claims – since it explicitly provides for redress in cases of damaged reputations.

"Corrupt" is not an opinion

The court also examined whether calling a judge "corrupt" could be objectively verifiable and thus fact, as opposed to opinion. Bunton, in the broadcasts, said it was his "opinion" that Bentley was corrupt, but then cited specific incidents in support of his purported opinion. Bunton also said that he had reviewed court files and other public documents, thereby (at least arguably) implying the existence of undisclosed defamatory facts. The court also noted that Bunton, at trial, cited eight instances proving that Bentley was corrupt and defended on the ground of truth; this, the court said, was evidence that even Bunton thought his statements were fact, not opinion.

Actual malice inquiry clarified

The Supreme Court also addressed the threshold question of how to conduct independent appellate review of an actual malice finding when a jury had clearly made credibility determinations – something an appellate court cannot do. The court essentially adopted a three-step approach.

First, "an independent review of evidence of actual malice should begin with a determination of what evidence the jury must have found incredible," such as the defen-

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The court held that the state constitution actually provides less protection than the First Amendment – at least in the context of defamation

Texas Supreme Court Upholds Jury Finding of Actual Malice

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dant's claim of lack of malice. Such evidence is to be ignored by the reviewing court.

Second, the court determines what facts are undisputed. Third, the court inquires whether the undisputed facts, together with evidence the jury could have believed, amount to clear and convincing evidence of actual malice.

"That does not mean, of course, that the plaintiff can prevail merely because the jury chooses not to believe the defendant," the court said. The jury's credibility determinations must be reasonable, and the plaintiff must adduce evidence of actual malice meeting the clear and convincing standard.

The court found significant Bunton's statement to a friend that although he "knew" Bentley was corrupt, "he really couldn't get anything on" him. This statement was made at the same time Bunton was calling the plaintiff "corrupt" on the air; at trial, Bunton did not deny making this statement. This, combined with other evidence including Bunton's ill will toward Bentley (such as Bunton's failure to return a phone call from Bentley to discuss the allegations, instead daring him to appear on the cable program), was sufficient evidence of constitutional malice, the court held.

Gates, however, was not shown to have acted with knowledge of falsity or reckless disregard, the court held. Gates testified that when he said "yeah" to Bunton's charge of corruption, he was merely acknowledging that this was *Bunton's* opinion; he did not mean to adopt it as his own. Gates testified that he did not, in fact, believe Bentley was corrupt. The court held that there was not sufficient evidence that Gates believed he was communicating his agreement with Bunton, and thus Gates did not know or recklessly disregard that he was communicating a falsehood.

First Amendment Requires Damage Reduction

Although it upheld Bunton's liability, the Supreme Court sent the case back to the court of appeals for retrial or reconsideration of the mental anguish damage award.

"We conclude that the First Amendment requires

appellate review of amounts awarded for non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not a disguised disapproval of the defendant."

Four Justices Voiced Some Disagreement

Three justices would have held that Bentley failed to prove actual malice by clear and convincing evidence, even as to Bunton. The evidence showed Bunton's objective unreasonableness, they said, but not subjective actual malice. One justice would have held Gates jointly and severally liable for all damages, and opined that the plurality's treatment of the mental anguish damages issue was faulty constitutional law, as well as being contrary to jurisdictional provisions of the state constitution that do not allow "factual sufficiency" review by the Texas Supreme Court.

It will take time to assess the impact of *Bentley v. Bunton* on Texas libel law. Areas of influence

may include how purported evidence of actual malice is analyzed in non-trial dispositions (such as summary judgment, where all reasonable inferences are made in favor of the nonmovant), what constitutes opinion, and (in the case of Gates's comments) the relevance of a speaker's intent regarding how he believes his statement will be interpreted (which may play a role in libel-by-impression cases). The plurality's 70-plus-page, 148-footnote opinion includes language that may cut both for and against libel defendants.

Bunton represented himself *pro se* in the appeal, while Gates was represented by Armando De Diego of Dallas and Ronald Dee Wren of Bedford, Tex. (now deceased).

Bentley was represented Michael Hatchell and Molly Hatchell of Hatchell PC in Tyler, Tex., George E. Chandler and Reich Chandler of the Chandler Law Offices in Lufkin, Tex., and Darrin Walker of Kingwood, Tex.

Jim Hemphill is a partner in Austin's George & Donaldson, L.L.P., which was not involved in Bentley v. Bunton.

It will take time to assess the impact of Bentley v. Bunton on Texas libel law.

**UPDATE: Illinois Appellate Court Upholds Dismissal of
Suit Against CBS Brought by Chicago Pol
Promo Sparks a Claim**

By Tom Curley

The First Judicial District of the Illinois Appellate Court has affirmed the dismissal of a lawsuit brought by a Chicago city official against a CBS television station and one of its investigative reporters. Significantly, the appellate panel Judge O'Brien held that a reporter's question posed to a government official as to whether that official was "cheating" the taxpayers could not be reasonably construed as an objective assertion of fact but, rather, was a non-actionable expression of the reporter's opinion.

The court's opinion in *Schivarelli v. CBS* (No. 1-01-3969, Ill. App. Ct. 1st Dist.) also contains several other helpful statements of Illinois law, including that:

- the unauthorized use of a plaintiff's likeness in a promotional announcement advertising a news broadcast is not actionable as commercial misappropriation; and
- the "of and concerning" requirement is a threshold issue to be decided by the court as a matter of law in the first instance in all defamation actions.

Promo on Investigative Reports

The lawsuit arose out of a 30-second promotional announcement broadcast in 1999 by CBS's Chicago station, WBBM-TV. The announcement promoted a body of investigative work by WBBM reporter Pamela Zekman by referencing stories Zekman had broken in recent years on a variety of subjects. One such story involved a Chicago Streets and Sanitation official, Peter Schivarelli, who allegedly collected a city paycheck for time he spent on purely personal matters, including traveling to Notre Dame football games and working at a hot dog stand he owned as a side business.

Zekman's investigative reports regarding Schivarelli's conduct while a government official initially were broadcast by WBBM in 1997. Schivarelli took no legal action at the time of these broadcasts and, in the wake of the public controversy caused by Zekman's revelations, Schivarelli announced that he would voluntarily leave his government job. However, when the station two years later broadcast the promotional announcement referencing the story on Schivarelli, he filed suit in Cook County Circuit Court on behalf of himself and his hot dog stand alleging claims for defamation, false light, misappropriation and commercial disparagement.

"I Never Cheated City"

Schivarelli's complaint against CBS, WBBM and Zekman related to a brief excerpt from one of the earlier investigative reports contained in the announcement: Reporter Zekman is shown standing next to Schivarelli in a parking lot and saying to him, "Let's sum this up for a second, the evidence seems to indicate that you're cheating the city." Schivarelli argued that he had never "cheated" his employer, the City of Chicago, and therefore the allegation was defamatory and invaded his privacy by casting him in a false light. Schivarelli also brought a cause of action for misappropriation alleging that his likeness had been used without his permission to promote Zekman's news reports.

The lawsuit also involved several causes of action asserted on behalf of a business owned by Schivarelli, a hot dog stand known as "Demon Dogs." Demon Dogs brought claims for commercial disparagement, defamation, and false light invasion of privacy arising out of the same promotional announcement.

The factual predicate for these claims depended upon a tortured construction of the promotional announcement which, in addition to showing the brief excerpt from Zekman's report on Schivarelli, also referenced an unrelated story reported by Zekman on unsanitary conditions at certain restaurants. Demon Dogs argued that that the segment of the announcement concerning unsanitary conditions in restaurants would be understood to imply that Demon Dogs served unsanitary food because the announcement also depicted Schivarelli, its owner, in a parking lot near the hot dog stand.

Motion to Dismiss Won

The defendants brought a series of motions to dismiss the complaint as originally filed and as subsequently amended. As reported in the November issue of the *MediaLawLetter*, the trial court dismissed the complaint in its entirety in a ruling from the bench, prompting the plaintiffs to appeal. The appellate court, in a ruling August 16, affirmed the trial court.

With respect to Schivarelli's defamation claim, defendants argued that any suggestion in the promotional announcement that he had been "cheating the city," taken in the context of the promotional announcement, did not include

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Illinois Appellate Court Upholds Dismissal of Defamation Suit Against CBS Brought by Chicago Pol

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specific information suggesting that the reference to “cheating” was intended to be a verifiable assertion of fact. In addition, the suggestion was preceded by the phrase “seems to indicate,” the type of expression of uncertainty that courts have deemed inconsistent with the assertion of objective fact. Finally, the statement was made directly to Schivarelli and, in that setting, was posed as a subjective interrogatory that invited a response.

The court agreed, emphasizing that the statement was not made in any specific factual context but was instead offered as a “broad” and “conclusory” expression of opinion. Zekman, the court observed,

“did not explain the evidence that she was referring to, nor did she state why she thought Mr. Schivarelli was cheating the city, how he was cheating the city, or even what she meant by the term ‘cheating.’”

Quoting a Texas appellate court case relied upon by the defendants, *El Paso Times, Inc. v. Kerr*, 706 S.W.2d 797, 798-99 (Tex. App. Ct. 1986), the Illinois Appellate Court further noted that the term “cheating” has

“no unique definition. ... It means different things to different people at different times and in different situations.”

Accordingly, the court concluded that an accusation of “cheating” without any factual mooring was simply not objectively verifiable as true or false and therefore could not properly state a claim for defamation. The court also dismissed Schivarelli’s claim for false light invasion of privacy holding that, by definition, no claim can be stated under this tort where the challenged statement is not capable of being proven false because it is an opinion containing no assertion of provable fact.

Misappropriation Fails

In addition to his defamation and false light claims, Schivarelli brought a cause of action for commercial misappropriation for the use of his likeness in the promotional announcement for Zekman’s reporting. In Illinois, the tort of misappropriation is codified in the Illinois Right of Publicity Act, 765 ILCS 1075/35(b). The statute expressly provides that the cause of action it codifies “does not apply to,” *inter*

alia, “use of an individual’s identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account” or to “promotional materials, advertisements, or commercial announcements for [such] a use.”

Schivarelli, however, argued that because the promotional announcement here was not intended to promote a particular newscast on a date certain, but instead was intended to promote the work of a reporter more generally, the statute was no bar to his claim. The court rejected Schivarelli’s argument, declining to read the statute, or its common law precursors, so narrowly.

Corporate Claims Dismissed

The appeals court also dismissed Demon Dogs’ defamation, false light and commercial disparagement claims holding that it was unreasonable as a matter of law to interpret the promotional announcement as being “of and concerning” Demon Dogs. In the trial court, Demon Dogs attempted to bolster its defamation claim by styling it as a *per quod* cause of action that depended on extrinsic facts to establish that the promotion referred to it. Thus, the hot dog stand insisted that it was entitled to present to the jury any extrinsic facts it could marshal to show that viewers understood the broadcast to refer to it, including witnesses who would allegedly testify that they understood the promotional announcement to refer to Demon Dogs.

The court, however, reiterated that whether a defamatory statement is reasonably “of and concerning” the plaintiff is a threshold decision for the court under Illinois law, regardless of whether the claim is for defamation *per se* or *per quod*. “An essential element of a defamation *per se* or a defamation *per quod* claim is that the challenged statement be ‘of and concerning the plaintiff.’” Comparing the complaint with the broadcast, the court determined that there simply was not any link between Demon Dogs and the food handling practices referred to in the promotional announcement.

Defendants were represented by CBS in-house counsel Susanna M. Lowy and Anthony M. Bongiorno and Lee Levine, Jay Ward Brown and Tom Curley of Levine Sullivan & Koch, L.L.P. of Washington, D.C. and Michael J. Hayes and Myriam Pierre Warren of Gardner, Carton & Douglas of Chicago. Alan J. Mandel of Alan J. Mandel, Ltd. of Chicago represented the plaintiffs.

Summary Judgment Granted for Oprah Winfrey

Portrayal of Plaintiffs as Victims of Spousal Abuse Was Not Injurious to Reputation

By Nancy Hamilton

In a case that proves the old adage “no good deed goes unpunished,” two women, graduates of a charity that received \$50,000 from Oprah Winfrey’s Angel Network Foundation for offering computer training to women who were victims of abuse, sued Oprah Winfrey (“Winfrey”) and Harpo Entertainment Group (“Harpo”) for defamation and intentional infliction of emotional distress. Also proving, perhaps, that Oprah has an angel of her own, federal district Judge Nathaniel M. Gorton granted summary judgment for the defendants and did not allow any discovery.

Libel Complaint Was Fake

The claims arose out of interviews with the plaintiffs and other participants in the charity’s program, Yellow Brick Road (“YBR”), videotaped in Massachusetts and subsequently aired on the Oprah Winfrey Show (the “Show”). In their Complaint, filed in federal district court in Worcester, Massachusetts, the plaintiffs claimed that they were “shocked” by the manner in which the Show aired their interviews and portrayed them as victims of domestic abuse.

The plaintiffs alleged that they had not been the victims of spousal abuse or battering, had not sought refuge in a battered women’s shelter or sought counseling for abuse. Video clips of the plaintiffs were shown but the plaintiffs were not mentioned by name nor were any portions of their interviews aired. Rather, plaintiffs were shown briefly in a segment that generally described the YBR program and the goals of its founder Jodi Beldotti.

Shortly after filing a motion to dismiss Winfrey and Harpo filed a Motion for Sanctions together with supporting evidence against the plaintiffs and their counsel alleging that they either (1) knowingly filed false statements in their Complaint or (2) failed to conduct a reasonable pre-filing investigation into the plaintiffs’ past marital history

prior to filing the lawsuit. Winfrey and Harpo also argued that the plaintiffs and their counsel filed the lawsuit to harass the defendants and to gain personal notoriety and attract national media attention.

As it turned out the plaintiffs had both sued their husbands on the basis of spousal abuse. The court subsequently orally reprimanded the plaintiffs’ attorney in open court and gave defendants leave to file a renewed motion to dismiss, which was subsequently converted to a motion for summary judgment.

In support of the motions, Harpo and Winfrey contended that the plaintiffs’ past marital histories, divorce complaints and own prior sworn statements in support of

restraining orders against their husbands revealed that they were, in fact, victims of spousal abuse and; thus, the Complaint lacked any factual support. Additionally, an affidavit submitted by Beldotti, the founder of YBR, stated that (1) the plaintiffs

were former students and graduates of YBR, (2) each candidate is interviewed by Beldotti to determine whether they meet YBR’s admission criteria and (3) had the plaintiffs indicated that they had never suffered domestic abuse, they would not have been admitted to the YBR program.

Not Defamatory

In its opinion, the district court first addressed the First Amendment implications of the defamation claim and held the subject matter of the Show, in spotlighting YBR to draw attention to the nexus between domestic violence and economic dependence, is a matter of public concern for which the public has a compelling interest in the free flow of information. As a result, the plaintiffs bore the burden of proving the falsity of the alleged defamatory statements. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); *Riley v. Harr*, - F.3d - 2002 WL 1246288, *3 (1st. Cir.)

While the plaintiffs may have suffered some chagrin, discomfort and embarrassment, the only basis for a defamation claim is damage to one’s reputation.

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Summary Judgment Granted for Oprah Winfrey

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But, the court noted that the threshold question, whether the contested statement is reasonably susceptible of defamatory meaning, must be examined “in its totality in the context in which it was uttered or published.” *Foley v. Lowell Sun Pub. Co.*, 404 Mass. 9, 11 (1989). After examining the Show’s presentation of the plaintiffs as survivors of domestic abuse who benefited from the YBR program, the Court noted that the tenor of the Show, viewed as a whole, was laudatory and portrayed the women as “courageous [and] worthy of emulation.” Moreover, the court held that in today’s age,

it does not besmirch a woman’s reputation to suggest that she is a victim of domestic abuse. It bears emphasis that defamation actions have their roots in community standards rather than in the views of isolated individuals. The mere fact that, because of the segment, a few people could view the plaintiffs unfavorably is not sufficient to support a claim for defamation.

See, e.g., 1 *Sack on Defamation*, § 2.4.1 at 2-9 (3d. ed 1999). Here, plaintiffs failed to show how their reputations were defamed by the Show’s representation of them as survivors of abusive relationships.

Substantial Truth

The Court also held the defamation claim failed because the facts set forth in the Show were substantially true. Both plaintiffs had previously sought divorce on the grounds of cruel and abusive treatment. In affidavits, however, the plaintiffs contended that, despite their representations in their respective divorce proceedings, which, they claim, were done because their lawyers at the time advised them to do so, they were never victims of domestic abuse.

Nevertheless, the court determined “the record belies the plaintiffs’ story” in light of Beldotti’s affidavit which stated that she would not have allowed the plaintiffs to enroll in her program unless they had represented them-

selves to be battered women or victims of abuse. The plaintiffs offered no other plausible explanation for their participation in such a program. Viewing the complete record, the court held the plaintiffs had not shown that the contested statements and inferences were false.

Regarding the intentional infliction of emotional distress claims, the court noted “against the background of the First Amendment, courts consider claims for intentional infliction of emotional distress with particular wariness in the media context.” *Brown v. Hearst Corp.* 54 F.3d 21, 26-27 (1st Cir. 1995). In view of the finding that the plaintiffs had not established that the Show had defamed them, the defendants’ substantially accurate portrayal of them did not amount to extreme and outrageous conduct.

Thus, summary judgment was granted for Winfrey and Harpo without discovery and they are free to do good deeds for another day. The plaintiffs have not appealed.

Plaintiff was represented by Christopher Uhl, Worcester,

Massachusetts.

Nancy Hamilton of Jackson Walker L.L.P., together with her partner, Chip Babcock and local Worcester counsel Paul O’Connor represented Oprah and Harpo Productions, Inc.

“The mere fact that, because of the segment, a few people could view the plaintiffs unfavorably is not sufficient to support a claim for defamation.”

***Any developments you think other
LDRC members should know about?***

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Georgia District Court Denies Dueling Motions in Burke Ramsey Defamation Action

By Cameron Stracher

In an August 28th decision, the U.S. District Court for the Northern District of Georgia, Judge Clarence Cooper, denied Court TV's motion to dismiss a lawsuit brought on behalf of JonBenet Ramsey's brother Burke. On the same day, the court also denied Burke Ramsey's motion for summary judgment on the issue of falsity, ruling that it was premature in the absence of full discovery to decide whether the plaintiff had in fact been a "suspect" in his sister's murder.

The case, *Ramsey v. Courtroom Television Network LLC*, No. 1:01-CV-1561 CC (N.D. Ga.), arose from a 1999 Court TV telecast entitled "*Who Killed JonBenet Ramsey: Prime Suspects*" and a related press release posted on Court TV's internet website, which alerted viewers to the program.

Notably, the dueling motions by Court TV and Burke Ramsey presented an issue of first impression concerning the choice of law rule that Georgia, as the forum state, would apply in a multi-state defamation action arising from a national telecast. The court held that, in this particular context, Georgia would follow the more flexible Restatement (Second) of Conflict of Laws "most significant relationship" test to decide which jurisdiction's law to apply, instead of Georgia's traditional *lex loci delicti* rule, or the "law of the place of the wrong." Applying the Restatement test, the court concluded that Georgia substantive law should govern the action, rather than that of New York.

Raises Then Denies Burke's Role

Burke Ramsey, in a complaint filed on his behalf by his parents as his "next friends," claimed that he was defamed by both the press release and the telecast. The complaint contended that the telecast and press release communicated to viewers and readers that "Burke Ramsey was a prime suspect in connection with the murder of his sister" and that "evidence existed to justify placing Plaintiff Burke Ramsey on trial as a prime suspect in connection with the murder."

Choice of Law at Issue

In its motion to dismiss, Court TV argued that the average viewer, considering the telecast and press release as a whole and in context, could not reasonably ascribe such a meaning to them as a matter of law. Specifically, while the telecast did recount that Burke Ramsey was one of three people (along with his parents) known to be in the Ramsey home at the time of the murder, and that his "Swiss Army" knife was purportedly found near the body, it also detailed the evidence suggesting that the plaintiff had no involvement in the killing.

In addition, the telecast observed on four separate occasions that Burke Ramsey had been officially cleared by the Boulder district attorney's office. Finally, one expert panelist who appeared on the telecast called the possibility of the plaintiff being the murderer "ridiculous" and none of the panel of experts assembled by Court TV thought that the plaintiff was responsible for his sister's murder.

Court TV also argued that, to the extent the telecast and the press release were capable of the defamatory meaning urged by the plaintiff, an assertion that evidence existed justifying Burke Ramsey's criminal prosecution constituted a non-actionable expression of opinion based upon facts that were fully disclosed to Court TV's audience.

Court Allows Defamatory Meaning

The court's ruling on the motion to dismiss only briefly touched upon the parties' arguments. The court simply observed that it "must accept the allegations in Plaintiff's Complaint as true. As such, the court concludes that the telecast and press release are reasonably capable of a defamatory meaning."

The court also noted, without elaboration, that it found "distinguishable" one of the many authorities cited by Court TV, *Mead v. True Citizen, Inc.*, 203 Ga. App. 361, 417 S.E.2d 16 (1992), an opinion authored by the trial judge here when he served as a state appellate court justice. In that case, a newspaper article incorrectly stated that the plaintiff "remain[ed] in [police] custody pending completion" of a criminal investigation when, in fact, the plaintiff had never been taken into custody and plaintiff's only involvement was

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Georgia District Court Denies Dueling Motions in Burke Ramsey Defamation Action

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that she reported the crime to police. The Georgia Court of Appeals held that the challenged newspaper article there was not capable of a defamatory meaning because, taken in context, it could not reasonably be interpreted to accuse the plaintiff of the crime in question.

Plaintiff Seeks Summary Judgment on Falsity

In an interesting procedural twist, Burke Ramsey had moved for summary judgment on the issue of falsity shortly before Court TV filed its motion to dismiss. The summary judgment motion was filed before any substantive discovery had taken place. The principal factual foundation for the motion was an affidavit from Boulder District Attorney Alexander M. Hunter, who has investigated JonBenet Ramsey's murder. In Hunter's affidavit, he stated that "no evidence has ever been developed in the investigation to justify elevating Burke Ramsey's status from that of witness to suspect."

Based primarily upon this statement, the plaintiff argued that he had already met his burden of proving falsity. In a brief order, the court concluded that a decision on the question of falsity was "premature and should not be ruled upon until full discovery has been completed in this case."

Choice of Law in Multi-state Defamation Action

Underlying the decisions on both Court TV's motion to dismiss and Burke Ramsey's motion for summary judgment was the threshold question of which jurisdiction's substantive law to apply - Georgia or New York. The plaintiff argued that Georgia, as the forum state, would apply its traditional choice of law rule of *lex loci delicti* and, consequently, would apply Georgia law because the plaintiff's alleged injury to his reputation occurred in Georgia, where he currently resides.

Court TV argued that the *lex loci delicti* rule is of little utility in a multi-state defamation action in which the plaintiff claims an injury based upon a national telecast and therefore Georgia would apply the Restatement (Second) of Conflict of Laws "most significant relationship" test, a more flexible analysis that generally examines which jurisdiction has the greater connection to the parties and claims in any given case. Applying this totality of the facts and

circumstances analysis, Court TV argued that New York has the most significant relationship to the case, as all of the allegedly injurious conduct took place in New York, where Court TV and its employees are based. Furthermore, because the plaintiff lived in Colorado, not Georgia, at the time of the murder and its aftermath, Court TV argued that the forum state's relationship to this case was relatively weak, even if the plaintiff did reside in Georgia at the time of the telecast.

Ultimately, Court TV won the battle but lost the war on the choice of law question. Observing that it had no Georgia or 11th Circuit cases to guide it, the court concluded that Georgia as the forum state would indeed follow the most significant relationship test and not the *lex loci delicti* test. Specifically, the court embraced the analysis of the leading case of *Davis v. Costa-Gravas*, 580 F. Supp. 1082 (S.D.N.Y. 1984), to determine the law to be applied in "the context of an allegedly defamatory publication distributed simultaneously across the nation."

Applying this analysis to the facts, however, the court accepted the plaintiff's alternative argument that, even if the Restatement test applied, Georgia still has a more significant relationship with the action than New York because of the plaintiff's current domicile. The court wrote that while

"New York is the state where the defendant did his act or acts of communication, such as assembling, printing and distributing the press release and telecast and is also the state of the defendant's domicile, incorporation or organization and principal place of business, the court finds that the state with the most significant relationship is Georgia."

The case now proceeds to the discovery stage, which the court has ordered must be completed by January 3, 2003.

Plaintiff Burke Ramsey is represented by L. Lin Wood, Brandon Hornsby and Mahaley C. Paulk of L. Lin Wood, P.C. of Atlanta. Defendant Court TV is represented by its General Counsel Douglas P. Jacobs of New York, Lee Levine, Cameron Stracher and Amy Ledoux of Levine Sullivan & Koch, L.L.P. of Washington, D.C., and by John J. Dalton of Troutman Sanders, L.L.P. of Atlanta.

D.C. District Court Grants Defense Summary Judgment in Pioneer Aviator's Libel Suit

By Michael Kovaka

In a decision handed down in mid-August, The United States District Court for the District of Columbia, Judge Lamberth, granted a defense motion for summary judgment in a libel and invasion of privacy case brought by one of the country's first female fighter pilots. *Lohrenz v. Donnelly*, ___ F. Supp. 2d ___, 2002 WL 1885042 (August 16, 2002).

The case centered on claims that Carey Lohrenz, one of the first two women assigned to pilot the Navy F-14 Tomcat fighter jet, was unqualified and should have failed out of the fighter training program, but instead was given preferential treatment over male candidates due to political pressure. The defendants in the case were the Center for Military Readiness ("CMR"), a public policy organization concerned with military personnel issues, and its president, Elaine Donnelly.

The court, in a decision by Judge Lamberth, based its summary judgment ruling on conclusions that Lohrenz was a limited-purpose public figure under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and that she had failed to meet her burden of raising a triable inference of actual malice.

Debate Over Women Pilots

Lohrenz came under the scrutiny of CMR in late 1994, when the Navy's other female F-14 pilot, Kara Hultgreen, was killed while landing her jet on the aircraft carrier U.S.S. Abraham Lincoln. Hultgreen's death added fuel to an ongoing debate over the wisdom of the military's decision to allow women in combat.

Soon after Hultgreen's fatal accident, CMR president Donnelly spoke on the telephone with and received a letter from Navy Lieutenant, Patrick "Pippen" Burns. Lt. Burns told Donnelly that neither Lohrenz nor Hultgreen was a qualified fighter pilot and that both had been promoted because of political pressure. Lt. Burns later sent Donnelly portions of confidential Navy files pertaining to Lohrenz,

including her Navy training records.

Based primarily on this information, Donnelly concluded that Lohrenz and Hultgreen both had become aircraft carrier-qualified F-14 pilots only because they were women and that they both should have failed out of the Navy's F-14 program. Donnelly subsequently had discussions on the subject with several high-ranking Navy officials, including two admirals. Donnelly shared her conclusions with each of these officials and showed them portions of the confidential records upon which she had based her conclusions.

All of the Navy officials discussed Donnelly's research and conclusions with her and all told her they believed her conclusions were wrong. Eventually, the Navy prepared a

report responding to Donnelly's allegations. That report confirmed many of the facts then known to Donnelly, but reached a contrary conclusion. According to the Navy report, both Lohrenz and Hultgreen had been promoted according to normal Navy standards.

The court's decision thus takes the common-sense position that a person need not voluntarily seek the status of a public figure in order to be deemed a voluntary limited-purpose public figure.

Report on "Double Standards"

Nonetheless, Donnelly proceeded to prepare a Special Report for CMR entitled "Double Standards in Naval Aviation" (the "Donnelly Report"). The Donnelly Report included excerpts from Lohrenz's training records and comments from male aviators who criticized both Lohrenz and Hultgreen. The Report broadly concluded that female aviators were promoted on lower standards than their male counterparts. More specifically, the Report stated that Lohrenz was one pilot who had received special treatment that allowed her to advance.

CMR published the Donnelly Report and copies were circulated throughout the naval aviation community, were made available to the general public, and were disseminated to local and national media. Donnelly also gave a speech at the Army-Navy Club in Washington D.C during which she repeated her conclusions regarding Lohrenz.

Lohrenz claimed that her performance declined follow-

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Aviator's Libel Suit

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ing publication of the Donnelly Report and that her commanders became overly critical as a result of the report's publication. Lohrenz eventually was removed from flight status. Lohrenz in turned sued Donnelly and CMR, alleging libel, slander and false light invasion of privacy.

Public Figure Analysis

In seeking summary judgment, the defendants argued that Lohrenz was a limited-purpose public figure and therefore was required to prove actual malice. The court analyzed the issue under the three-part test set forth by the D.C. Circuit in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (1980). Under that test, a court deciding whether a libel plaintiff qualifies as a limited-purpose public figure must (1) identify a public controversy for which the plaintiff is alleged to be a public figure; (2) examine the extent and nature of the plaintiff's participation in the controversy; and (3) determine whether the statements alleged to be defamatory were germane to the plaintiff's participation in the controversy.

Under the first prong of that test, the court readily concluded that a public controversy had existed regarding the role of women in the military, whether women should be allowed in combat, and whether women received military promotions under more lax standards than men.

Turning to the second prong of the test, the court reviewed evidence of statements Lohrenz had made in the media due to her role as a pioneer of female naval aviation. The evidence showed that Lohrenz had repeatedly made statements in the local and national print and broadcast media, both before and after the death of Lt. Hultgreen. In those statements, Lohrenz had supported the role of women as naval combat aviators and denied that female aviators received preferential treatment in the military.

Did Not Seek Publicity

Lohrenz argued that her involvement in the controversy was insufficient to make her a public figure because she had not sought out the media spotlight and had only made her public statements in response to media inquiries. Pointing to the Supreme Court's ruling in *Gertz*, Lohrenz argued that she did not meet the limited-purpose public figure test be-

cause she had not "thrust" herself into the controversy. Rather, her role in the controversy was attributable to the media's decision to focus on her and her status as a Navy aviation pioneer.

Although the defendants conceded that Lohrenz did not actively seek out the attention of the media, the court did not find this fact determinative of her public figure status. The court first emphasized that *Gertz*'s limited-purpose public figure doctrine does not require that the plaintiff have a subjective desire to become prominent in a public debate. Pointing to the D.C. Circuit's ruling in *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (1985), the court noted that a libel plaintiff may become a public figure unwillingly, without voluntarily seeking to place herself in the public spotlight.

Voluntary Acts to Voluntary Status

Unlike *Dameron*, however, the court's opinion does not specifically hold Lohrenz to be an *involuntary* public figure — a designation first recognized by the Supreme Court in *Gertz*. Instead, the court emphasized that Lohrenz had voluntarily made the decision to speak to the media while being "well-aware that her position as one of the first female F-14 pilots would attract public attention."

The court's decision thus takes the common-sense position that a person need not voluntarily seek the status of a public figure in order to be deemed a voluntary limited-purpose public figure. Rather, as the *Waldbaum* decision holds, it is sufficient that an individual has voluntarily embarked upon a course of conduct that could reasonably be expected to have a significant impact on a public controversy.

After concluding that the both the first and second prongs of the *Waldbaum* test had been satisfied, the court had no trouble concluding that the statements published by Connelly and the CMR were germane to the public controversy at issue. As the court noted, "defendants allegedly defamed plaintiff Lohrenz by asserting that she was an unqualified pilot and had been promoted because she was a woman, and plaintiff's participation in the controversy included statements that she was as well-trained as male pilots and had been promoted under the same standards applied to the male pilots."

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Aviator's Libel Suit

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No Issue on Failure to Corroborate

Having found Lohrenz a limited-purpose public figure, the court next considered whether she had presented evidence sufficient to raise a triable issue of actual malice. In attempting to shoulder this burden, Lohrenz relied primarily on two theories. First, pointing to the Supreme Court's ruling in *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657 (1989), Lohrenz argued that actual malice could be inferred from Donnelly's decision to rely on statements by Lt. Burns without investigating his background to ascertain his credibility and without determining whether he ever had interactions with Lohrenz that would have permitted him to comment competently on her qualifications.

The court, relied on *Connaughton* and *St. Amant v. Thompson*, 390 U.S. 727 (1968), in concluding that Donnelly's reliance on Lt. Burns did not raise a triable issue of actual malice. First, *St. Amant* makes clear that even if the defendants' conduct had amounted to an extreme departure from journalistic standards, that alone would be insufficient to show actual malice.

Second, the failure to pursue corroborating sources for Lt. Burns' statements also did not give rise to an inference of actual malice. Like many libel plaintiffs before her, Lohrenz claimed that *Connaughton* stands for the proposition that actual malice may be inferred whenever a publisher has relied on an obviously questionable source without seeking independent corroboration of that source's statements. The court rejected this interpretation of *Connaughton*.

Focusing both on the unique and striking facts of *Connaughton*, and the specific language of the Supreme Court's holding, the court concluded that the failure to pursue corroborating sources evidences actual malice only when it constitutes a "conscious avoidance of the truth." The court found that Lohrenz had failed to present evidence either that the Donnelly had ever doubted Lt. Burns' veracity or that she believed seeking corroboration was likely to demonstrate any falsity in Lt. Burn's statements.

Rejecting Official Navy Views

The court also rejected Lohrenz's argument that actual malice was shown by defendants' decision to publish the Donnelly statements in the face of repeated statements by

Naval officials stating their disagreement with those conclusions. The court noted that the Navy officials had not disputed the accuracy of the facts set forth in the Donnelly Report, but had disagreed only with the report's conclusions based on those facts. The court refused to find actual malice based solely on this interpretive disagreement.

"[I]t appears that there was an historical record that is probably common to issues of great public interest and debate, facts that are open to vastly different interpretations, all of which are protected by the First Amendment. No actual malice may be inferred from these disputes between defendants and Navy officials."

Finally, the court rejected Lohrenz's claim that actual malice could be found in Donnelly's "selective editing" and presentation of her training records. Pointing to the D.C. Circuit's ruling in *McFarlane v. Esquire Magazine, Inc.*, 74 F.3d 1296 (1996), the court stated that "[i]t is generally accepted that media defendants are not compelled to publish the entirety of their sources and may edit or abridge their sources as they see fit."

The inability of Lohrenz to raise a triable issue of actual malice also doomed her claim for false light invasion of privacy. Relying on the Supreme Court's decision in *Time Inc. v. Hill*, 385 U.S. 374 (1967), the court recognized that the actual malice rule also applies to invasion of privacy suits brought by public figures.

Carey Lohrenz represented by Susan Graham Barnes; Pamela Nagle Huttin, Rodney A. Smolla, McCarthy, Lebit, Crystal & Haiman, Cleveland, Ohio.

Elaine Donnelly represented by Frank Myers Northam, Webster, Chamberlain & Bean, Washington, D.C.; Kent Masterson Brown, Lexington.

The Copley Press, Inc. & San Diego Tribune represented by Sharon Cummings Giles, Robins, Kaplan, Miller & Ciresi, Washington, D.C.

News World Comm. Inc. represented by Allen Vern Faber, James Aston, Jr., Akin, Gump, Strauss, Hauer & Feld, Washington, D.C.

John Does represented by Frank Myers Northam, Kent Masterson Brown, Lexington.

Michael Kovaka is with Dow Lohnes & Albertson in Washington, D.C.

French Language Laws Apply to On-Line Sites

According to Quebec courts – most recently in *Procureur General du Quebec v. Reid*, 760-61-026203-019, C.Q., 23/05/02, Judge R.P. Boyer, the French language laws in the Canadian province apply to on-line sites. (Charte de la langue française (L.R.Q., c.C-11)). For those of you who do any business in Quebec, this may be of some interest, and Marc-Andre Blanchard has done a brief outline of the requirements:

- 1) If the company has less than 50 employees in Quebec and has an establishment in Quebec, its Internet site must be in French if it is used to offer products and services in Quebec, namely, through e-commerce. Consequently, if the company proposes products or services destined only to territories other than Quebec, then the website does not have to be in French.
- 2) For a company with less than 50 employees in Quebec and having an establishment in Quebec, the intranet site must be in French if the content of the intranet can be considered as written communication between the employer and the staff.
- 3) For companies having more than 50 employees in Quebec and having their head office in Quebec, the website must be in French. In the case of a multinational enterprise or in the case of a national enterprise having a division in Quebec, only the part of the website related to the operations of the Quebec division must be in French.
- 4) In the case of a company having more than 50 employees in Quebec and having its head office in Quebec, the intranet must be in French. However, in the case of a multinational or a national company having a Quebec division, only the part of the intranet concerning the employees in Quebec and what is necessary and useful for the fulfilment of their duties must be in French.
- 5) In the case of a company having more than 50 employees in Quebec, the extranet concerning the relationship between the company and its Quebec suppliers or its Quebec clients must be in French.

Companies with more than 50 employees on the territory

of Quebec for a period of more than 6 months, must register at the “Office de la langue française” and go through a process to ensure that the use of French is generalized at all levels of the enterprise, including the use of French in information technology.

*Marc-Andre Blanchard is with **GOWLING LAFLEUR HENDERSON LLP** in Montreal, Quebec.*

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France's Foreign Head of State Insult Law Violates European Convention

ECHR Reverses Conviction of Le Monde for Criticizing King of Morocco

By Julie Herzog

In a recent decision, the European Court of Human Rights (ECHR) ruled unanimously that France violated Article 10 of the European Convention on Human Rights by imposing a criminal fine on the publisher and reporter from *Le Monde* for publishing allegedly offensive statements about the King of Morocco in an article on drug production and trafficking in Morocco. *Colombani & Others v. France*, No. 51279/99 (June 25, 2002) (available at www.echr.coe.int). *Le Monde's* publisher Jean-Marie Colombani, and the author of the article, Eric Incyan, were convicted under Section 36 of the Law of July 29, 1881 that prohibits offending or insulting a foreign head of state. The law provides for monetary fines and punishment of up to one year in prison. The defendants were ordered to pay a fine of 5,000 Francs; 1 Franc in damages to the King and 10,000 Francs in costs.

Reversing, the ECHR held that the French law violated the right of freedom of expression protected by Article 10 of the European Convention. It also held significantly that journalists cannot be held liable for relying on official reports when reporting information of legitimate interest to the public. The ECHR panel was comprised of Judges András Baka (Hungary), Jean-Paul Costa (France), Gaukur Jörundsson (Iceland), Karel Jungwiert (Czech Republic), Volodymyr Butkevych (Ukraine), Wilhelmina Thomassen (Netherlands), and Mindia Ugrehelidze (Republic of Georgia).

Le Monde Article On Moroccan Drug Trade

The article at issue appeared in *Le Monde* on November 3, 1995. It revealed the content of a confidential report on drug production and traffic in Morocco assembled by the Geopolitical Drugs Observatory (OGD), a non-governmental organization of analysts, scholars and journalists that monitors and reports on drug trafficking. (See www.geodrugs.net.) The report was prepared at the re-

quest of the European Commission following Morocco's application for membership in the European Union.

Le Monde's front page article was headlined "Morocco, the World's Leading Hashish Exporter" and sub-titled "A Confidential Report Casts Doubt on King Hassan II's Entourage." A lengthier article appeared on an inside page under the title "A Confidential Report Casts Doubt on Moroccan Authorities in Hashish Traffic." According to the articles, the report exposed Morocco as the "world's leading hashish exporter" and emphasized the "direct responsibility of the Moroccan authorities" in the drug traffic in the country, contrary to the highly publicized war against drugs announced by Moroccan authorities in 1992.

Following publication, the King of Morocco formally requested that the French Minister for Foreign Affairs prosecute *Le Monde*. Colombani and Incyan were then charged with insulting a foreign head of state. They were acquitted by the Paris Criminal Court on July 5, 1996, which held that the journalist had

acted in good faith, pursued a legitimate aim and cited a report whose reliability was undisputed.

On appeal by the King and the prosecutor, the Court of Appeal, in a decision affirmed by the Cour de Cassation (France's Highest Court), held that the journalists were liable for drawing the public's attention to the responsibility of the King's royal entourage, and that by making such serious implications of tolerance on the part of the King, without independently investigating the underlying report's accuracy, they manifested a malicious intent and a lack of good faith.

Insulting a Foreign Head Of State

Section 36 of the Law of July 29, 1881 prohibits offensive statements about a foreign head of state to protect him or her from attacks against honor and dignity. The most distinctive feature of this law is that truth is not a defense. Once it is established that the statement about the foreign head of state has been made with malice, the defendant

The Court ruled that the "interference" with the freedom of the press was disproportionate with the interest at stake.

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France's Foreign Head of State Insult Law Violates European Convention

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cannot avoid liability by showing the truth of his assertions.

It is important to note that in French law, malice is defined as a harmful intent and, unlike actual malice in American law, truth has no bearing on the meaning of the term. In this context, it is irrelevant that the statements were completely true so long as an intent to harm the King of Morocco's reputation can be established – which was satisfied here on the ground that the statements focused attention on the King's tolerance of the situation.

The French Court of Appeal concluded that the law did not unduly restrict freedom of expression because the government had to prove a harmful intent on the part of defendants, thus it only prohibited the “abusive use of the freedom of expression.”

Law Violates Article 10

The ECHR ruled, however, that Section 36 of the Law of July 29, 1881 violates Article 10 of the European Convention. Article 10 allows limited restrictions on the freedom of speech when they are prescribed by law, and “necessary in a democratic society ... for the protection of the rights and freedoms of others.”

National authorities must convincingly establish that a “pressing social need” is at stake that justifies an “interference” with the freedom of expression. Although national courts should be accorded a certain “margin of appreciation” in order to assess what is of vital interest to the society, the ECHR's role is to insure that the justification given is “relevant and sufficient” as well as “proportionate” to the interest at stake.

The ECHR acknowledged that protecting reputation is a legitimate aim, however, this interest must be balanced with the need for a democratic society to maintain a free press. In its decision, the Court ruled that the “interference” with the freedom of the press was disproportionate with the interest at stake, and held that section 36 of the law of July 29, 1881 is incompatible with Article 10 in view of 1) the newsworthiness of the statements and 2) the overprotection for a head of state.

Newspaper Report Was Newsworthy and Protection to Head of State Unnecessary

The Court emphasized the “legitimate interest” of the French public to be informed of the content of a report about drug production and traffic in a country that applied for membership in the EU and maintains a close relationship with France. Moreover, in the Court's view, the offense of insulting foreign heads of state immunizes them against any criticism from the press, regardless of its accuracy and newsworthiness. The French law is all the more pernicious since, unlike defamation law, truth is not a defense.

The insult law, the Court found, confers a favored status on heads of state that is derogatory to general defamation law and inconsistent with modern political practice. Al-

though maintaining friendly relationships with foreign states is an understandable government interest, this insult law “goes beyond what is necessary to achieve such an objective.”

Moreover, the Court noted that public figures, like heads of state, should be more tolerant of criticism than other individuals, and are of necessity more exposed to public — and press — scrutiny.

The Court further observed that in spite of the ruling by the French High Court the recent trend among the lower French Court was to deny recovery under the law to a head of state on the ground that this provision violates Article 10. The leading lower Court ruling on the subject was issued by the *Tribunal de Grande Instance* (France's Trial Court) on April 25, 2002. African Presidents Omar Bongo of Gabon, Idriss Deby of Chad, and Den Nguesso of Congo (Brazzaville) sued writer Francois-Xavier Verschaves for accusing them of crimes from electoral fraud and weapons trafficking to mass murder in a book called “Black Silence-- Who Will Stop France-Africa?” The author and the editor of the book, Laurent Beccaria, were prosecuted for offending a foreign head of state. The Court dismissed the claim, holding that the law was incompatible with the European Convention of Human Rights which takes precedence over national law pursuant to Article 55 of the French Constitu-

Journalists cannot be held liable for relying on official reports when reporting information of legitimate interest to the public.

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tion. Among the reasons cited by the Court in its ruling were the absence of the defense of truth and the lack of necessity of such a restriction on free speech in a democratic society.

Press Can Rely on Official Reports

The ECHR also ruled that in reporting on newsworthy subjects that are of legitimate interest to the public, journalists should be entitled to rely on official reports without conducting their own investigation. Contrary to the French Court's finding, the Court held that the report compiled by the OGD – which was uncontested by the European Commission – was a reliable source for the press. To rule otherwise, the Court reasoned, would undermine the role of the press as a public watchdog. Accordingly, the ECHR

also overruled the decision of the French Court of Appeal and Cour de Cassation and held that *Le Monde* republished portions of the OGD report in good faith and in compliance with the duties of journalists.

Conclusion

France is now under an obligation to modify its law to comply with the Court's decision, an obligation which will be monitored by the European Cabinet.

Julie Herzog is a French lawyer associated with Miller & Korzenik in New York.

The Petitioners were represented by A. Lyon-Caen. The French Government was represented by R. Abraham, Director of Judicial Affairs at the Ministry of Foreign Affairs.

Photo Journalist Gives Up Rights to 9/11 Pictures In Plea Agreement

By Jeremy Feigelson and Michael Schaper

Stephen Ferry, a freelance photographer, gave up his copyright and right of attribution in photographs he took of Ground Zero on September 11 and 13, 2001, as part of a plea agreement entered in May 2002 with the New York County District Attorney's office.

Mr. Ferry was on assignment for *Time* magazine on September 11 when he was arrested at the World Trade Center site on various charges, including criminal possession of a forged instrument, criminal impersonation, obstruction of governmental administration, and obstructing firefighting operations. At the time of his arrest, the police seized Mr. Ferry's cameras and 28 rolls of film. A grand jury in New York County returned an indictment against Mr. Ferry in October 2001.

The arrest was based upon allegations that Mr. Ferry improperly used protective Fire Department gear while taking pictures of the World Trade Center site. It was also alleged that upon his arrest he showed police an altered drivers' license (the allegedly forged instrument). Mr. Ferry contended that he put on unused fire gear to protect himself

while helping firefighters at the site, and that he altered his driver's license because he needed a form of photo identification while working overseas and his license had recently expired. Mr. Ferry maintained that he had returned from overseas on September 10 and had not yet renewed the license.

The District Attorney's office denied repeated requests by Mr. Ferry and his attorneys for the return of Mr. Ferry's film. After the District Attorney's office had the film developed, it refused to provide Mr. Ferry with copies. It was not until December 2001 that Mr.

Ferry and his counsel were allowed to even view the photographs at the District Attorney's office.

The District Attorney's office stated that it would not return the film or copies of the film because it was concerned that Mr. Ferry would profit from their publication. When Mr. Ferry suggested that he would donate any proceeds he received to a 9/11 charity and offered to allow the photographs to be published without attribution, the District Attorney's office still refused to return the photos, claiming

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The District Attorney's office denied repeated requests by Mr. Ferry and his attorneys for the return of Mr. Ferry's film.

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that their publication would enhance Mr. Ferry's career.

Asserting that the refusal to return the photographs violated his First Amendment rights to display and publish them, Mr. Ferry filed a motion for the return of the film in New York Supreme Court on December 17, 2001. The motion was denied on February 13, 2002. *People v. Ferry*, No. 6373-01 (N.Y. Sup. Ct. Feb. 13, 2002).

Prior Restraint Argued

The only question raised in Mr. Ferry's motion was whether the refusal to return the photographs was an unconstitutional prior restraint. Mr. Ferry's motion, citing *CBS Inc. v. Davis*, 510 U.S. 1315 (Blackmun, Circuit Justice 1994), *Heller v. New York*, 413 U.S. 483 (1973), and *New York Times v. United States*, 403 U.S. 713 (1971), stated the well-known propositions that there is a heavy presumption against the constitutionality of prior restraints, and that prior restraints are only upheld in exceptional cases.

Mr. Ferry further argued that the court should exercise a heightened level of scrutiny because he, as a member of the press, was improperly singled out for enforcement of criminal statutes, which are laws of general applicability.

No First Amendment Issue

The Court dispensed with Mr. Ferry's First Amendment argument in three paragraphs. Justice Scherer first distinguished *Heller*, the only criminal case cited in Mr. Ferry's motion, noting that the pornographic film held by police there and ordered returned while the case was pending was the *subject* of the criminal charges and seized solely because of its content, while Mr. Ferry's film was merely

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Strategies for Seized Photographs

What follows are some brief thoughts about strategies that can be employed when trying to recover seized photographs.

Informal request. Call the District Attorney's Office shortly after the photographer is arrested and request the return of the film or copies of the film. Some prosecutors will return the film or, if the original is needed for evidence, copies of the film. If a prosecutor is reluctant, counsel can contend (as Ferry's did) that prohibiting publication of the photographs is effectively a prior restraint in violation of the First Amendment, and that both the state's evidentiary needs and the public interest in dissemination of the images can be accommodated by releasing copies of the film.

Suppression motion. If the district attorney refuses and the facts warrant, the photo journalist might bring a motion challenging the lawfulness of the search and seizure of the film. Under New York law— which is more restrictive than federal law in this regard — a closed container may be searched incident to arrest only if an officer has a reasonable belief that the suspect may gain access to a weapon or destroy evidence. *People v. Montgomery*, 489 N.Y.S. 2d 975, 978 (N.Y. Crim. Ct. 1985). If the court deems the search illegal, presumably it will also order the film returned. In the circumstances of the Ferry case, the search of Ferry's camera bag arguably could not be justified as related to the charges against him.

Search Warrant. Request to see a copy of a New York warrant issued to allow the district attorney to develop the film, because the warrant may instruct the district attorney's office to return negatives to the defendant. The district attorney will likely need to obtain a warrant to later "search" or develop the film. See *People v. Allen*, 675 N.Y.S. 2d 482 (1998). In Mr. Ferry's case, Judge Walsh of the New York Criminal Court issued a warrant in October 2001 allowing the district attorney's office to develop the film. The warrant also instructed the district attorney's office to return the negatives to Mr. Ferry without delay. Despite repeated requests, the district attorney's office only gave the warrant to Mr. Ferry's attorneys in April 2002 as part of the pre-trial materials turned over to the defendant. The district attorney's office claimed that the judge's instruction to return any nega-

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“arrest evidence.”

Judge Scherer further held that the First Amendment was not implicated because the standards governing the disclosure of evidence set forth in New York Criminal Procedure Law § 240.20 were met by allowing Mr. Ferry and his attorneys to view the photographs. Under New York procedure, Mr. Ferry had no right of interlocutory appeal from Justice Scherer’s ruling.

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tives did not apply because Mr. Ferry’s camera produced slides, which are technically different from negatives. The plea agreement was entered before a court was asked to consider arguments relating to Mr. Ferry’s right to the film under the warrant.

Formal discovery. If a suppression motion is inappropriate or fails, the photojournalist might demand a copy of the film during discovery. A New York defendant is entitled to access to any confiscated property, including photographs, that the prosecutor intends to enter into evidence at trial. N.Y. Crim. Proc. § 240.20. Though some judges may feel that allowing the defendant to view the photographs is enough, some might order the release of copies of the film.

Petition. The next procedural option, the one used in Mr. Ferry’s case, is to petition the criminal court judge to order the return of copies of the film. In addition to the First Amendment arguments against prior restraints made in Mr. Ferry’s case, it could be noted that the narrow categories for which courts have suggested that prior restraints may be constitutional – threats to national security, obscenity, and incitement – all involve speech that is intrinsically harmful, whereas photographs taken while committing minor criminal offenses are not intrinsically harmful.

Collateral attack. If the petition is rejected, a photographer could try to collaterally attack the trial judge’s rejection of the petition by initiating an Article 78 proceeding in the Appellate Division. See N.Y. C.P.L.R. §7801 (2001). Petitioners usually must meet a high threshold, however – including a showing that the trial judge exceeded his or her authority – to succeed in such proceedings. See *Mollen v. Mathews*, 710 N.Y.S. 2d 399 (N.Y. App. Div. 2000).

Post-trial recovery. Finally, a photographer can attempt to recover photographs at the conclusion of the criminal action. At that point, the burden is on the police property clerk to bring a forfeiture action to retain the film. See, e.g., N.Y.C. Rules Tit. 38-A, § 12-36 (2002). Prosecutors bring forfeiture actions almost exclusively to retain stolen property, property used in the commission of a crime, money illegally obtained through gambling or drug sales, and contraband (illegal drugs or guns), not to retain material that was lawfully obtained (such as film purchased at a store) and not used in the commission of a crime.

In May 2002 Mr. Ferry pled guilty to one count of criminal possession of a forged instrument. Though his plea agreement did not include jail time, it specified that Mr. Ferry would give up his copyright and rights of attribution in the photographs. He will also be on probation for five years and must perform 1200 hours of community service. The plea agreement also required the photographs to be put in the public domain and housed at the Library of Congress.

People v. Ferry is perhaps best understood as an aberrational case that reflected the charged feelings in New York

City about 9/11. Robert Morgenthau, the New York County District Attorney, has no history of prosecuting the press, nor do his fellow district attorneys in the city. While other photographers are unlikely to face similar situations, we have included practical advice on what to do in the event a comparable case arises. (see sidebar)

In *People v. Ferry*, the District Attorney’s office was represented by Assistant District Attorney William Beesch. Mr. Ferry was first represented by Paul A. Shneyer of Paul Shneyer, P.C. in New York, and later represented by Jack T. Litman and Todd B. Terry of Litman, Asche, and Gioiella, LLP in New York.

Jeremy Feigelson is a partner at Debevoise & Plimpton in New York. Michael Schaper is an associate at Debevoise.

Kansas Magistrate Orders Testimony, But Reporter Not Called

A Kansas federal magistrate ruled in early August that while a *Kansas City Star* reporter could not avoid testifying regarding quotations published in an interview with a store owner accused of trademark infringement, the magistrate did state that the reporter should testify at the conclusion of other evidence, to allow the judge to determine the relevance of his testimony on a question-by-question basis. *U.S. v. Foote*, Crim. No. 00-20091, 2002 WL 1822407 (D. Kan. order Aug. 8, 2002).

In the end, the reporter was not required to testify, and the store owner was convicted.

In December 1998, the *Star* published two articles by reporter Richard Espinoza on the seizure of Jerome D. Foote's allegedly counterfeit merchandise and on the problem of counterfeit merchandise generally. Both articles contained quotations from Foote, from interviews with the reporter.

The government sought to introduce the published quotes as evidence, and sought to compel Espinoza to testify that Foote actually made the statements. Espinoza sought to quash the subpoena, citing the newsperson's privilege.

Magistrate David J. Wax, who the parties agreed could rule on the issue, held that the prosecution had made a sufficient showing regarding the relevancy, need and nature of Espinoza's testimony to defeat the motion to quash. But since Wax did not know what information the government would seek from Espinoza, he ordered that the reporter be presented at the end of the prosecution's case, so the judge could apply a balancing test on any particular question.

Wax also noted that Espinoza's citation of Justice Department regulations regarding subpoenaing of reporters, 28 CFR 50.10, was inappropriate, citing the holding in *U.S. v. Caceres*, 440 U.S. 741 (1979), that otherwise admissible evidence need not be excluded because it was obtained in violation of an internally-enforced departmental policy.

After a six-day trial, Foote was convicted on Aug. 14 on 15 counts of trafficking in counterfeit trademark merchandise, one count of conspiracy to traffic in counterfeit trademark merchandise, and six counts of money laundering.

Espinoza was represented by Michael Abrams of Lathrop & Gage, L.C. in Kansas City, Mo.

Watch the B Roll!

The libel plaintiff argued that the station's multiple layers of review for its news piece, a process which managed to miss the mention of the plaintiff- car dealership on a license plate in the video, was reckless and constituted actual malice. To its credit, and the fortune of the station and the state of the law, the district court in the Eastern District of Virginia disagreed. *Heishman, Inv. v. Fox Television Stations, Inc.* (E.D. Va., Aug. 20, 2002). The court, Judge Ellis, rejected the plaintiff's view that had the station employed a review system of only one or two people, its failure to find the reference to plaintiff would have been negligent, but missing the reference in a review system with as many as five or more reviewers certainly was reckless tantamount to actual malice.

According to the decision, the story about flood damaged cars being sold without full disclosure to unsuspecting buyers managed to get through a reporter, assistant news director, V.P. and News Director, and members of the Fox legal staff without anyone noticing that some B roll contained a license plate that had the dealership name on it. The dealership, by everyone's apparent admission, had nothing to do with the story and the car in the video was not flood damaged. In fact, it belonged to a station cameraman who set up the shot of washing the car to serve as B roll.

The lesson here is an old and venerated one: watch out for the B roll.

Plaintiffs represented by Robert J. Cunningham, Whitestone, Brent, Young and Merrill, Fairfax, Virginia.

Defendants represented by Dane Hal Butswinkas, Williams & Connolly, Washington, D.C.

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Konop v. Hawaiian Airlines: Unauthorized Access To Web Sites Is Not “Wiretapping”

Ninth Circuit Reverses Itself On The Issue of “Interception” Under The Wiretap Act

By Nicole Wong

An employer does not violate the federal Wiretap Act by accessing its employee’s password-protected website without authorization, according to a recent ruling of the Ninth Circuit. In *Konop v. Hawaiian Airlines, Inc.*, 02 C.D.O.S. 7727 (9th Cir., Aug. 23, 2002), the three-judge panel held that the Wiretap Act, 18 U.S.C. §§ 2510 *et seq.*, only applies to the interception of an electronic communication that is contemporaneous with the transmission of that communication, not while it is in electronic storage.

As the Court observed, in an opinion by Judge Boochever, the content of a website consists of electronic information stored by a hosting service computer or “server.” When a person accesses the site, technically that person’s computer “requests” to receive an electronic copy of one of the web pages stored on the server. The requesting computer then downloads the web page to be viewed on the user’s computer screen. Because the user is simply accessing information that is already stored on the server -- and is not in transmission — the Court held there is no “interception” for purposes of the Wiretap Act.

Employer Accesses Employee Site

In *Konop*, plaintiff Robert Konop maintained a website where he posted messages critical of his employer, Hawai-

ian Airlines, and invited select employees to access the password-protected site. A vice president of Hawaiian Airlines learned of the site and asked two other employees if he could use their names to gain a password and access the site. They agreed. Upon discovering the intrusion, Konop brought suit against Hawaiian Airlines under the Wiretap Act, the Stored Communications Act, the Railway Labor Act and several state tort claims.

The district court granted summary judgment against Konop on all claims, except for his retaliation claim under the Railway Labor Act. Konop also lost the retaliation claim after a short bench trial. He appealed the district court’s judgment on all claims, except for those brought under state tort law.

On August 23, 2002, the Ninth Circuit, in a 2-1 decision, affirmed the district court’s judgment with respect to the Wiretap Act and retaliation claims; reversed the judgment on plaintiff’s Stored Communication Act claims and several additional claims under the Railway Labor Act; and remanded the case for further proceedings.

Prosecutors Sought Reconsideration Of Earlier Decision

By this holding, the panel reversed its earlier decision regarding the Wiretap Act, which was originally filed in January 2001. *Konop v. Hawaiian Airlines, Inc.*, 236 F.3d

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Konop v. Hawaiian Airlines

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1035 (2001). In its first decision, the Court held that the Wiretap Act's definition of "intercept" does not expressly contain or suggest that the acquisition of a communication must be contemporaneous with its transmission. Thus, it reasoned, website content stored on a server could be "intercepted" when a user simply downloads and views a page without authorization.

Shortly after the first decision was issued, the U.S. Department of Justice and the California District Attorneys Association filed briefs with the Court, warning that a decision which equated accessing a website or any other stored electronic files (such as email) with wiretapping would substantially impair criminal investigations.

The Wiretap Act generally requires that government investigators obtain a wiretap order before intercepting communications. 18 U.S.C. § 2518. The Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, on the other hand, specifically governs electronic communications held in electronic storage and requires less burdensome and restrictive procedures for disclosure of such communications. *See* 18 U.S.C. § 2703.

Thus, the prosecutors argued that the Ninth Circuit's definition of the term "intercept" could be read to require a wiretap order for accessing stored electronic communications, such as monitoring websites. Requiring such an order "would occasion a seismic shift in current law enforcement practice, substantially impairing the ability of federal (and state) investigators and prosecutors to pursue and prosecute Internet crime of every kind."

In August 2001, the panel withdrew its opinion, over the objection of Judge Stephen Reinhardt.

Unauthorized Access To Web Sites Not An Interception

After reconsidering its previous decision, the panel, with Judge Reinhardt dissenting, held in its latest opinion that the Wiretap Act applies narrowly to the contemporaneous interception of electronic communications. Following the reasoning of the Fifth Circuit in *Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457 (5th Cir. 1994), the Ninth Circuit held that the statutory structure of

the Wiretap and Stored Communications Act indicated that wire and electronic communications should be treated differently because a "wire communication" was defined to include storage of the communication, while "electronic communication" was not. Therefore, the term "intercept" might apply to wire communications in storage, but would not apply to electronic communications in storage, which are instead governed by the Stored Communications Act.

The majority took particular note that Congress amended the requirements for government interception of wire communications in the recently enacted USA PATRIOT Act by eliminating "storage" from the definition of a wire communication.

"By eliminating storage from the definition of wire communication, Congress essentially reinstated the [pre-1986] definition of 'intercept' — acquisition contemporaneous with transmission — with respect to wire communications."

Acknowledging the prosecutors' concerns, the majority wrote

"if Konop's position were correct and acquisition of a stored electronic communication were an interception under the Wiretap Act, the government would have to comply with the more burdensome, more restrictive procedures of the Wiretap Act to do exactly what Congress apparently authorized it to do under the less burdensome procedures of the [Stored Communications Act]. Congress could not have intended this result."

The Court also held that Konop's claims under the Stored Communications Act can proceed since there is at least an issue of fact as to whether Hawaiian Airlines accessed the site with the consent of a "user."

Plaintiff Konop represented himself, *pro se*. Hawaiian Airlines was represented by Marianne Shipp of Gibson, Dunn & Crutcher.

Nicole Wong is a partner with the law firm of Perkins Coie, LLP, in San Francisco.

Therefore, the term "intercept" might apply to wire communications in storage

California Supreme Court Holds Firm on Anti-SLAPP Statute

New Amendments Limit Statute for Non-Media Businesses

By Karl Olson

California's pioneering, broadly-worded anti-SLAPP statute remains intact after three non-media cases decided late last month by the California Supreme Court in which the Court was asked to limit the law's reach. Meanwhile, amendments to the statute now on Governor Gray Davis' desk – which are designed to curb the use of the statute by business against consumer lawsuits – would exempt the media and preserve the statute as a potent weapon against libel suits.

The unusual confluence of events in the last week of August – three major California Supreme Court decisions on August 29, 2002, and a major overhaul of the anti-SLAPP law in the Legislature August 31 – was prompted by a frenzy of activity

in the courts and, subsequently, the Legislature in the last year. The statute (targeting so-called Strategic Lawsuits Against Public Participation, or SLAPPs)

has been on the books for 10 years now. In the past few years it has been used routinely in almost every variety of commercial case as a potent litigation weapon because it is triggered by causes of action arising from statements in, or with a relation to, judicial proceedings.

It was against that backdrop that, in the very different milieus of the state Supreme Court and the state Legislature, two branches of government dealt with how to preserve the statute's core use in cases involving the exercise of free speech and petition rights while at the same time putting some limits on its use in cases far removed from the quintessential SLAPP.

Supreme Court's Trio of Cases: Following Plain Language, With Limits

The Supreme Court spoke first, with three decisions on August 29, all written by J. Werdegar, arising from three very different factual circumstances, only one of which resembled a typical SLAPP suit. None of the cases involved the media, but the California Newspaper Publishers Association and member newspapers

weighed in with amicus briefs in all three cases, and were rewarded when their core position in all three cases was adopted by the Court.

The three cases all involved the core issue of whether someone making an anti-SLAPP motion – which aims at the early dismissal of a case and which can involve an award of attorney's fees to the party making the motion – must first show that the plaintiff had an "intent to chill" the exercise of free speech. A secondary issue was whether the party making an anti-SLAPP motion must show that the plaintiff's action had a "chilling effect" on speech or petition rights.

The Supreme Court had little difficulty rejecting both requirements. First, the Court – which consistently says it sees its role as following the plain language of laws – followed the plain language of the anti-SLAPP statute, as it had when it first grappled with the statute in 1999.

The Court unanimously observed that the anti-SLAPP law "nowhere states that, in order to prevail on an anti-SLAPP motion, a defendant must demonstrate that the plaintiff brought the cause of action complained of with the intent of chilling the defendant's exercise of speech or petition rights." Nothing in the statute requires the court to figure out the plaintiff's subjective motivations before determining whether the statute applies, the Court found. Lawsuits can chill speech even if they aren't intended to do so, the court observed, adopting the news media's position.

The Court's rejection of an "intent to chill" requirement came in three cases with very different factual circumstances, and had three different results in those cases.

Equilon: Wrong Message, Wrong Messenger

In *Equilon v. Consumer Cause*, 2002 WL 1980437, an organization called Consumer Cause had served Equilon, which operates Shell and Texaco gas stations, with notice to sue under Proposition 65, a California law regulating cancer-causing substances. Before Consumer Cause had

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filed a lawsuit, however, Equilon filed its own “declaratory relief” action. Consumer Cause filed an anti-SLAPP motion, claiming Equilon’s action arose from Consumer Cause’s petition rights. Both the trial court and Court of Appeal agreed, dismissing Equilon’s lawsuit and awarding attorney’s fees against it.

Equilon obtained review in the Supreme Court, arguing that the statute had become a monster and that the award of attorney’s fees against Equilon was unconstitutional unless a court found that it acted with the intent to chill free speech. Some lower courts had adopted just such an “intent to chill” requirement.

Equilon confronted two insurmountable problems, however: the message and the messenger. The message – someone making an anti-SLAPP motion should have to show that the plaintiff intended to chill free speech – is a message the Legislature didn’t send when it passed the law in 1992, and with reason. An “intent to chill” requirement would enmesh trial courts in thorny determinations of a litigant’s state of mind while determining whether the anti-SLAPP statute applied. That would delay litigation and make early dismissal of lawsuits – a prime goal of the statute – difficult.

Equilon was also the wrong messenger for the argument that an award of attorney’s fees against SLAPP filers was unconstitutional. Equilon, the operator of dozens of Shell and Texaco stations, was hardly the poster boy of someone who couldn’t afford to pay its adversary’s attorney’s fees.

Cotati: This Isn’t a SLAPP

The Supreme Court did look for ways to cabin the use of the anti-SLAPP statute in a case called *City of Cotati v. Cashman*, 2002 WL 1997921. The City of Cotati had passed a law regulating rents charged by mobile home owners. The mobile home owners filed a constitutional challenge to the rent control ordinance in federal court. Cotati then filed its own state court declaratory relief action. The mobile home park owners then filed an anti-

SLAPP motion in the state court case and the motion was granted.

The Supreme Court found there was no “intent to chill” requirement. The Court also made short shrift of the argument that an anti-SLAPP motion must demonstrate that the plaintiff’s action would have a “chilling effect,” reasoning, “judicial imposition of a chilling-effect proof requirement would contradict the anti-SLAPP statute’s plain language, undermine the Legislature’s expressed intentions, and create anomalies. The statute contains no such requirement.” Again, the Court handed the media a victory.

The Court, however, did limit the statute’s reach somewhat by strictly interpreting the requirement that a person making an anti-SLAPP motion show the plaintiff’s action *arises from* speech or petitioning activity.

Cotati’s action “arose” not from the park owners’ federal court lawsuit, but from the controversy over rent control, the court reasoned.

Therefore, the anti-SLAPP statute didn’t apply. Any other result, the court concluded, would mean that any cross-action would be subject to the anti-SLAPP statute, an “absurd result” in the Court’s view.

The Court’s ruling in the *Cotati* case was unanimous. In a third case, however, *Navellier v. Sletten*, 2002 WL 1997905, the Court was sharply split, 4-3, with the majority finding that the statute applied and a vociferous three-justice minority arguing that it didn’t. On the merits in *Navellier*, the court adopted its reasoning in Equilon that there was no intent to chill requirement in the statute. Contrary to what it eventually decided in *Cotati*, the majority found that the lawsuit did “arise from” petition activity and thus that the statute applied (which is what newspapers argued in their amicus brief). The Court did not reach a determination on whether the plaintiff had a probability of prevailing, remanding that issue back to the appellate court (again, in accordance with what newspapers had urged the court to do). Justice Janice Brown, in a dissent in *Navellier*, argued,

Must first show that the plaintiff had an “intent to chill” the exercise of free speech.

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“Under the majority’s rule, suits are presumptively SLAPPs until the plaintiff affirmatively makes a requisite showing. This will deter parties with novel claims, burden parties with meritorious ones, and prevent courts from hearing legal theories that warrant consideration. Frivolous filers will gain a new bargaining chip for settlement; a threatened motion to strike, even if unsuccessful, will cost meritorious litigants time and money.”

The *Cotati* ruling should not have a measurable effect on media use of the statute. A libel claim against a newspaper clearly “arises from” the allegedly libelous publication. *Cotati*’s “arising from” language shouldn’t help libel plaintiffs, even if it does limit the use of the statute in garden-variety counterclaims and cross-claims to prevent what the Court called “absurd” results.

Legislature Seeks to Limit Business Use of SLAPP Law

While the Supreme Court was grappling with the three cases involving the anti-SLAPP statute, California’s Legislature was working on changing the statute to limit its use by business and commercial speakers against consumer lawsuits and class actions. The bill which cleared the Legislature in the waning hours of its session on August 31 had its genesis in the increasing use of the statute by big business in the past few years.

As far back as 1994, media companies had used the statute with great frequency and little objection. After all, the statute protects free speech, and that’s the business in which newspapers, magazines and television stations are engaged. While the media may not have been the poster children of the statute when it passed in 1992, their use of the statute to combat defamation suits was certainly consistent with its core purpose to protect free speech.

The last two years, however, have seen widespread use of the statute by non-media companies against consumer lawsuits. The Consumer Attorneys of California turned to the Legislature this year, arguing that big business was perverting the statute by using it against consumers, exactly the opposite of what the framers of the

law had in mind. The CAOC-sponsored bill, however, specifically exempted the media and the media supported the bill, Senate Bill 789.

SB 789 would curb use of the statute in class actions or “private attorney general” actions, as well as cases involving strictly commercial speech. The new limitations would not apply to the news media and motion picture industry, which could continue to use the statute. The heaviest opposition to the bill came from the insurance industry, which has made extensive use of the anti-SLAPP statute against lawsuits brought by their policyholders.

Governor Gray Davis has until September 30 to act on the bill. His signature would go a long way to preserving the statute’s original use on behalf of free speech and petition rights by those challenged with intimidation lawsuits, and not as a weapon to be used routinely in consumer lawsuits and garden-variety commercial cases.

Karl Olson is a partner at Levy, Ram & Olson in San Francisco. He wrote the amicus brief for California newspapers in the three Supreme Court cases discussed in the article. The opinions expressed in this article are his own.

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California Supreme Court Denies Review of Gag Orders

By Roger R. Myers and Rachel E. Matteo-Boehm

Only three years ago, the California Supreme Court appeared to strengthen the public's right to remain fully informed about judicial proceedings in this state. But the promise of *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999), remains unfulfilled. While recognizing that *NBC Subsidiary* and the court rules enacted to enforce its mandate severely restrict their ability to exclude the public and the press from courtroom proceedings and to seal records, trial courts in California – or, at least, in the northern part of the state – are utilizing other tools in an effort to limit the amount of information available to the public about noteworthy criminal cases.

Gag & Sealing Orders Routine

Since *NBC Subsidiary* was decided, state courts have imposed gag orders or other significant restraints on information in virtually every high-profile criminal case tried in the San Francisco Bay Area. These gag orders – prior restraints not on the media directly, but on the

trial participants, law enforcement, court personnel and others – are often being imposed based on outdated authority and under a less rigorous standard than the compelling interest test that must be met for closing hearings and sealing records. Often, these orders also have provisions that have the effect of sealing various records in the case.

In addition, defense counsel are seeking – and trial courts are granting – orders “temporarily” denying access to important records in the case (such as grand jury transcripts, search and arrest warrant records, and the like) for months on end (i.e., until the news value of the documents has substantially diminished), purportedly to give defense counsel time to review the documents and prepare motions to “permanently” seal the records through trial (and perhaps beyond).

Unfortunately, the California Supreme Court recently declined petitions by several media organizations

seeking review of such orders in two murder cases, both arising out of the deaths of young children. As a result, these types of restriction on access are likely to continue until either the Court of Appeal or Supreme Court intervenes.

Trial Courts Rely on Sheppard v. Maxwell

The first case before the state Supreme Court arose out of San Francisco, where Patrick Goodman was charged with first degree murder in the death of Elijah Sanderson, a three-year-old boy who died from what the city's medical examiner called the worst case of child abuse he had ever seen. As the jury was being impaneled, the *San Francisco Chronicle* published an article about the upcoming trial – the first article about the case in 16 months.

Based on that single article, the trial court without notice or a hearing granted a defense request for a sweeping gag order that precluded the parties, attorneys, judicial employees, law enforcement officers and others from saying virtually anything about the case outside the courtroom. The order was interpreted by those

subject to it not only to prevent them from speaking with the *Chronicle's* reporter about the case, but also from providing the reporter with copies of documents in the case, including photographs of Elijah.

When the *Chronicle* learned of the order, the newspaper moved to lift or modify it. The court denied the motion – and agreed that it also sealed records by precluding release of any “evidentiary photographs of Elijah” – on the ground that the Supreme Court, in the unique 1966 case of *Sheppard v. Maxwell* had imposed a “duty” on trial courts to issue such orders in any case that attracted publicity (including, apparently, a case that had attracted a single newspaper article in the 16 months leading up to trial).

The second case arose out of Marin County, where Winnfred Wright and four female companions are

State courts have imposed gag orders or other significant restraints on information in virtually every high-profile criminal case tried in the San Francisco Bay Area.

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charged with second degree murder, manslaughter, child endangerment and abuse after a 19-month-old boy died in their care and authorities then found that the 12 other children in their “Family” suffered from malnutrition and, in some cases, rickets. Not surprisingly, the case attracted considerable publicity during the first month or so after the young boy’s death.

The parties sought both a broad gag order similar to the one imposed in the *Goodman* case and a “temporary” seal on the grand jury transcript and other records until the defendants filed motions (four months later) to dismiss the indictment and to seal those records (and more) through trial.

The *Chronicle* — joined at various points by the Associated Press, *Los Angeles Times* and *Marin Independent Journal* — intervened to oppose the motions. Although the parties presented no evidence other than copies of articles — *i.e.*, no evidence on the extent of publicity, the circulation and ratings of media covering the case (in Marin County or any county to which venue might be transferred), or its effect on prospective jurors — the trial court granted the gag and “temporary” sealing orders, again largely on the basis of *Sheppard v. Maxwell*.

Courts Relying on Old Authority

In litigating these and previous gag orders imposed in the Bay Area, it had become apparent that trial courts were relying on *Sheppard v. Maxwell* and its progeny precisely because the First District Court of Appeal — which covers San Francisco, Marin County and other parts of the Bay Area — and the state Supreme Court had not addressed the issue since shortly after *Sheppard* was decided. The First District had not addressed a gag order in a criminal case in 33 years, since *Hamilton v. Municipal Court*, 270 Cal. App. 2d 797 (1969), a decision arising out of the prosecution of anti-Vietnam war protesters at UC-Berkeley that was clearly influenced by the protests then raging. The California Supreme Court had not addressed the issue in nearly 25 years, since it had suggested that gag and closure orders could be imposed, at least in juvenile cases, under a reasonable likelihood of prejudice test. *Brian W. v. Superior Court*, 20 Cal. 3d 618 (1978).

Noting that these cases were decided before the Supreme Court in 1980 recognized that the importance of access to information about criminal cases required a First Amendment right protecting that access, the AP, *Chronicle* and *Independent Journal* filed a consolidated petition for writ of mandate in the First District Court of Appeal seeking review and reversal of the gag orders imposed in the *Goodman* and *Wright* cases. The media’s petition described the tension between the pre-1980 authority — with its presumption against access to information whenever a court thought a reasonable likelihood of prejudice might result — and the post-1980 authority, which rejected the reasonable likelihood of prejudice standard and shifted the presumption in favor of access.

If closure and sealing orders may not be imposed except where essential to prevent a substantial probability of prejudice to fair trial rights, it would seem to make little sense that gag orders, which as prior restraints on speech are disfavored and presumptively unconstitutional, could be imposed on less rigorous showing. The media also noted how one appellate panel in the state — the Second District Court of Appeal in Los Angeles — had reduced the number of gag orders being imposed in that district when it ruled that gag orders, as prior restraints, could not be imposed except under the clear and present danger test applicable to prior restraints in other contexts. *Hurvitz v. Hoeflin*, 84 Cal. App. 4th 1232 (2000).

The Court of Appeal’s initial response was encouraging. Almost immediately after receiving the media’s petition, the Court of Appeal severed the two matters into separate writ proceedings and ordered parties to file oppositions to the petition. In the *Goodman* case in San Francisco, which had by then concluded with the murder conviction of the defendant, the defense attorney submitted a one-paragraph letter informing the court that the conclusion of the case had prompted the court to lift the gag order, and thus the petition should be dismissed as moot.

In the *Wright* case in Marin, defendants filed briefs arguing that lifting the gag order (and unsealing the “temporarily” sealed documents) would endanger their ability to obtain a fair trial in that county. The Guardians ad Litem for the child victims in that case also filed a brief, claiming, among other things, that the sealing and gag or-

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California Court Denies Review of Gag Orders

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ders in that case were necessary to prevent the minors from being exposed to publicity about the proceedings against their parents/guardians that the minors might find disturbing.

Ultimately, however, the appellate court denied both petitions. In the *Goodman* case, the Court of Appeal denied the media's petition as moot notwithstanding the recognized exception, applied in many prior closure and gag order cases, for issues capable of repetition yet evading review.

In the *Wright* case, the Court of Appeal "decline[d] to set aside" the gag and temporary sealing orders because the trial court, in its comments during oral argument, had articulated the proper standard (even if it had not required the parties to present evidence meeting that standard). The Court of Appeal thus ordered the trial court to append copies of the transcript of its comments to its gag and sealing orders, thus satisfying, in the appellate court's view, the requirement that sealing and gag orders be supported by written findings.

Supreme Court Declines Review, Leaving Uncertainty And A Split In Authority

In light of the Court of Appeal's refusal to clarify, in either case, the standards that must be met for imposing gag orders on trial participants, the media filed petitions for review in each case with the California Supreme Court. The media pointed out that the Court had not addressed gag orders since the 1978 *Brian W.* case, in which, in a footnote, the Court had "assume[d]," without deciding, "that the 'reasonable likelihood' test, more favorable to [the defendant] than the 'clear and present danger' standard, is proper for determining the appropriateness of imposing a gag order on those present at a hearing." 20 Cal. 3d at 624 n.7. As it had done in below, the media also observed that review was necessary to provide lower courts with clear guidance as to standards that must be met before such gag orders may be imposed, especially in light of the proliferation of such orders since *NBC Subsidiary*.

Regrettably, the Supreme Court on August 21 denied review. Only one of the Court's seven justices, Justice Ming Chin, favored review of either case, three short of the votes necessary for review to be granted.

Reading Denial Of Review As Approval, Trial Court Seals Records

The failure of the Court of Appeal or the Supreme Court to intervene may have been interpreted by the Marin County Superior Court as a green light to further restrict the public's right of access. In June, the *Wright* defendants had moved to permanently seal the grand jury transcript and a host of other previously sealed documents, and also moved to seal all documents filed in connection with motions to suppress and challenges to the indictment. The hearing on those motions was held August 27, exactly one week after the Supreme Court issued its orders summarily denying review of the gag order. On September 3, the Marin County court issued an order sealing all of the documents at issue in their entirety, including all five volumes of the grand jury transcript.

The trial court based its latest order, in large part, on its belief that any right of access to the records is not constitutional, but rather based on the common law, and that the ability to access articles on the Internet had changed the sealing analysis by allowing the court to presume that potential jurors are reading the coverage (thereby, in the court's view, mooted the need for defendants to show that the coverage was widely circulated in, and prejudicing, a large percentage of the jury pool). The media believe this ruling requires appellate intervention. But even if the Court of Appeal agrees to review the sealing order the standard for imposing prior restraints in the form of gag orders will remain unresolved.

Mr. Myers and Ms. Matteo-Boehm, who are with Steinhart & Falconer LLP in San Francisco, CA, represented the Associated Press, The Hearst Corporation dba San Francisco Chronicle, the Marin Independent Journal, and the Los Angeles Times (with Karlene Goller) in this matter.

Counsel for Winnfred Wright: Jack Rauch, San Rafael, California. Attorney for the People: Mary Stearns, San Rafael, California. In Goodman case: Stephen L. Rosen, Office of the Public Defender, San Francisco.

Pentagon Limits Credentials for Reporters

By Kevin M. Goldberg

The Pentagon has taken a hard line with regard to building access passes in the wake of September 11, which has led to an outcry of protest from reporters and publications that cover the Department of Defense on a semi-regular basis.

The controversy surrounds the issuance and renewal of Pentagon building passes, which allow a holder to move about the building without an escort (there are a maximum of two escorts available at any given time). Building passes affect not only reporters but anyone who enters the Pentagon for any type of business if the individual is not engaged in daily employment in the building.

Those without the pass not only have to stay with their escort, but must enter the building at a designated entrance. This entrance is not the most convenient for reporters who travel to the Pentagon via the Metrorail subway system, as it is halfway around the building

from the Pentagon subway station. Further, waiting for an escort is an impediment to coverage of breaking news events.

The Pentagon's Office of Public Affairs ("OPA") began notifying all persons holding building passes that their passes would not be renewed – and perhaps might be affirmatively

cancelled – if they did not enter the building at least twice per week. This notification occurred after the OPA decided that it would strictly apply a pre-existing policy found in OSD Administrative Instruction 30,

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The issuance of Pentagon building passes will be limited to those members of the media who either work full time within the Pentagon or visit at least two times a week.

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Pentagon Limits Credentials for Reporters

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which states:

The sensitive nature of the daily activities conducted at the Pentagon requires restrictive measures regarding access to the Pentagon. The issuance of Pentagon building passes will be limited to those members of the media who either work full time within the Pentagon or visit at least two times a week. Members of the press will be treated in the same manner as other non-DoD personnel who are provided access to the Pentagon.

Of course, this requirement is particularly onerous for those in the news industry. Many smaller publications use one or two person bureaus to cover the entire federal government, meaning they will have no presence at the Pentagon on a regular basis. Others, even if they have a reporter at all times at the Department of Defense, will rotate staff through various locations, so that any given reporter or photographer may not enter the Pentagon for several months at a time, only to return and find that he or she has no building access pass.

The OPA did provide one instance in which reporters can maintain their access to the building in the event that they were infrequent visitors: by proving that they write regularly on defense issues and/or the Pentagon. The OPA has been performing Lexis/Nexis searches to confirm that certain reporters do, in fact, write articles on issues concerning the Pentagon and Department of Defense.

Assistant Secretary of Defense Victoria Clarke explained this Lexis/Nexis search as a benefit to reporters which allows, in instances where a reporter falls short of the two-visits-per-week minimum, a reporter's building pass to be renewed if "[the reporter's] portfolio clearly demonstrates that allowing access to the building is in the best interest of the Department". Of course, this "assistance" has provided more consternation for the First Amendment community than comfort, as it smacks of content review; even requiring a reporter to write on defense-related issues on a regular or semi-regular (yet undefined) basis seems to compel speech.

The Pentagon does not see this as a "credentialing"

issue, but as an access issue. The Public Affairs Office claims that access is being tightened for anyone who enters the building. These new restrictions will not prevent the press from entering the building, contacting and visiting with staffers, or attending press conferences. It will however, restrict the number of people who can do so without escorts, thereby requiring any "uncredentialed" reporters to plan their visits in advance.

This is likely to result in diminished relations between reporters and Pentagon staff, leaving reporters unable to obtain much of the information to which they were formerly privy. Yet, the Pentagon does not believe it is singling out the press for special treatment; in fact, the OPA believes it is being more liberal in its granting of passes to the press than other applicants.

Two organizations have written letters of protest to the Pentagon. The Regional Reporters Association, via its President, Marc Heller of the Watertown (NY) Daily News, sent a letter to Victoria Clarke. Mr. Heller was one of the first reporters to be notified that his building pass was going to be canceled for lack of presence at the Pentagon and brought this issue to light amongst many in Washington. The National Press Club, in addition to contacting Ms. Clarke, sent a letter director to Secretary of Defense Donald Rumsfeld. Neither organization's efforts appear to have had much success, as no change in policy has been announced.

Kevin M. Goldberg is an Associate at Cohn and Marks LLP in Washington, DC. He is legal counsel to the Regional Reporters Association.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

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One Year Later, Access Issues Dominate

As we marked the first anniversary of the terrorist attacks with ceremonies, vigils and marathon media coverage, the courts continued to deal with the fallout of the events of Sept. 11, 2001, particularly in regards to access to information and government actions.

The decision of the Federal Court of Appeals for the Sixth Circuit upholding a district court's grant of preliminary injunction barring the government from closing immigration hearings could not be closed to the press or public. *Detroit Free Press v. Ashcroft*, Civil No. 02-1437, 2002 WL 1972919 (6th Cir. Aug. 26, 2002) is reported at p.3 of this *MediaLawLetter*.

Appeals Proceed

On Sept. 17, the 3rd Circuit is scheduled to hear arguments in a case posing the same basic access issues to the one decided by the Sixth Circuit, in which a federal judge in New Jersey issued a preliminary injunction against the closure policy in the Creppy memo not in one, but all cases. The injunction was stayed by the U.S. Supreme Court in June. *See North Jersey Media v. Attorney General*, No. 02-2524 (3rd Cir. argument scheduled for Sept. 17) (appeal of 205 F.Supp.2d 288, 30 Media L. Rep. 1865 (D.N.J. May 28, 2002), stayed by No. 01-A-991 (U.S. June 28, 2002)); *see also LDRC MediaLawLetter*, July 2002, at 36.

Meanwhile, the Court of Appeals for the District of Columbia Circuit granted an expedited appeal of a ruling by District Judge Gladys Kessler ordering the government to release the names of those detained since Sept. 11, as well as the identities of their attorneys. *See Center for Nat'l Security Studies v. Dept. of Justice*, No. 02-5254 (D.C. Cir. filed Aug. 13, 2002); *see also LDRC MediaLawLetter*, Aug. 2002, at 55. Kessler stayed her decision pending the appeal, which is scheduled to be argued on Nov. 18.

Secret Courts Emerge From Shadows

A decision in May by the highly secretive court established in 1978 to approve government requests for surveillance in foreign intelligence investigations has set a number of precedents – it is the first decision by the court rejecting a government request,² and it is the first decision by the court that has been made public. And the government's appeal of the decision will lead to the first-ever session of the court

established to hear such appeals.

The case, *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, No. 02-429, 2002 WL 1949263 (F.I.S.Ct. May 17, 2002), available at www.washingtonpost.com/wp-srv/onpolitics/transcripts/fisa_opinion.pdf, concerns the government's ability to use evidence gathered in intelligence investigations in non-intelligence prosecutions.

The Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811, 1821-1829, 1861-1862), imposes lower due process standards on government espionage and intelligence investigations, and creates the Foreign Intelligence Surveillance Court to review government requests for surveillance orders in such investigations. A 1995 Executive Order extended the Act's provisions to include physical searches, and allowed the use of evidence obtained under FISA in non-criminal espionage investigations, as long as the espionage investigation was the "primary purpose" of surveillance under the FISA order. *See Exec. Order No. 12,949*, 60 Fed. Reg. 8169 (1995) and 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B). *See also LDRC LibelLetter*, Oct. 2001, at 56.

This last provision was changed by the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), passed in reaction to the Sept. 11 attacks. Under §218 of the Act, foreign intelligence gathering need be only a "significant" purpose of any FISA surveillance. *See LDRC LibelLetter*, Dec. 2001, at 49.

In March, citing the USA Patriot Act provision, Attorney General John Ashcroft issued a policy memo stating that law enforcement and intelligence officials were now allowed to share information, including information stemming from FISA surveillance. The memorandum is available online at fas.org/irp/agency/doj/fisa/ag030602.html. The Justice Department then filed these new procedures with the Foreign Intelligence Surveillance Court, for use in all past, present, and future cases.

But while the court has historically been extremely deferential to government requests – since its creation the court has granted about 13,000 surveillance applica-

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One Year Later, Access Issues Dominate

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tions, and officially rejected none – the court unanimously rejected the new protocols in a May 17 ruling written by then-Presiding Judge Royce C. Lamberth. Like all decisions of the Foreign Intelligence Surveillance Court, the decision was secret. But in response to a request from the Senate Judiciary Committee, the court decided in August to release the decision publicly – the first published decision in the court’s history.³ The court’s new presiding judge, Colleen Kollar-Kotelly,⁴ also announced in a letter to the committee that “should the FISA Court issue any unclassified opinions or orders in the future, it would be our intention, as a Court, to release them and publish them.”

While the court acknowledged that it had allowed limited sharing of information from FISA surveillance between intelligence and law enforcement officials in the past, it ruled that the new procedures outlined in Ashcroft’s memo “eliminate the bright line” between the two types of investigations required by FISA, and allow criminal prosecutors to direct FISA surveillance in cases with overlapping intelligence and criminal investigations or interests.

If direction of counterintelligence cases involving the use of highly intrusive FISA surveillances and searches by criminal prosecutors is necessary to obtain and produce foreign intelligence information, it is yet to be explained to the Court.

2002 WL 1949263, at *13.

The court also noted that even under the old policy, there were problems with sharing of FISA information, and other erroneous statements, in more than 80 FISA applications filed with the court in the late 1990s. After the government informed the court of these problems in September 2000, the court barred an individual FBI agent from testifying as a FISA affiant, but decided to wait for the results of the Justice Department’s internal ethics investigation before taking further action. According to the *New York Times*, that investigation is still pending.

The court then ordered that the language of Ashcroft’s policy memo be rewritten to ensure that law enforcement officials do not direct or control the use of FISA procedures to enhance criminal prosecutions.

The government has appealed to the Foreign Intelligence Surveillance Court of Review, the appeals court established by the FISA legislation to hear government appeals of surveillance denials by the Foreign Intelligence Surveillance Court. (The redacted brief is available at fas.org/irp/agency/doj/fisa/082102appeal.html.) The government’s brief argues that the Foreign Intelligence Surveillance Court’s rulings “rest on a fundamental misapplication of FISA and the USA Patriot Act.”

It is unclear when the Foreign Intelligence Surveillance Court of Review will hear the case – the proceeding will be held in secret – but it will be the first time that the court, which is made up of three senior judges, will ever hold official proceedings. There are also procedural questions: under the statute, only the government may present its case.

Court Withholds Defendants’ Briefs

In late August, the judge presiding over the prosecution of alleged terrorist conspirator Zacarias Moussaoui ordered that virtually all of his *pro se* pleadings — which have included both cogent legal arguments and rambling diatribes against the government, prosecution and defense lawyers, and others — will no longer be made public.

In granting the government’s motion to seal the documents, U.S. District Judge Leonie Brinkema cited the “irrelevant, inflammatory and insulting” language in the filings. She also cited the government’s stated concern that the documents may include coded messages to terrorists.

Although the order is limited to papers “containing threats, racial slurs, calls to action, or other irrelevant and inappropriate language,” virtually all of Moussaoui’s pleadings have contained such material.

Senators Comply With Probe

While members of the House and Senate intelligence committees objected to requests that they submit to lie detector tests as part of an investigation into leaks of committee material, *see LDRC MediaLawLetter*, Aug. 2002, at 57, most members of the Senate panel agreed to

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One Year Later, Access Issues Dominate

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provide details of their contacts with reporters to the FBI, according to the Associated Press. The news service reported that 13 of the 17 committee members said they were complying with the request for telephone logs, memorandums, visitor sign-in sheets, calendars, appointment books and e-mail messages for June 18 and 19, 2002. The AP was unable to reach the other senators.

On June 19, CNN reported that the government had intercepted Arabic messages on Sept. 10 that, in retrospect, may have provided advance notice of the Sept. 11 terrorist attacks. Information regarding the messages was provided to the Congressional intelligence committees on June 18, but was not released publicly until the CNN report.

The FBI investigation was requested by the chairs of the committees.

In December, Congress ordered Attorney General John Ashcroft to investigate the "problem" of leaks of government information. Although the report was due to be completed by May 1, it has yet to be released. See *LDRC MediaLawLetter*, Aug. 2002, at 58.

Other Developments

Tape Disclosure Motion Premature: On Aug. 19, Gannett filed a motion requesting that any cockpit voice recordings and transcripts used by the prosecution in the trial of alleged terrorist conspirator Zacarias Moussaoui be released to the public and media. U.S. District Judge Leonie Brinkema ruled that the motion was premature, since she had not yet decided whether to allow the government to use the tapes. *U.S. v. Moussaoui*, Crim. No. 01-455-A (order Aug. 20, 2002), available at notable-cases.vaed.uscourts.gov/1:01-cr-00455/docs/67163/0.pdf.

New Jersey Reopens Records: New Jersey Governor James E. McGreevy signed a new executive order on Aug. 13 that rescinded most of the restrictions on public records access that he had imposed in an order in July. Exec. Order 26 (Aug. 13, 2002), available at www.state.nj.us/grc/eom26.shtml. The new order, which was the result of negotiations with media organizations and advocacy groups, reduced the 483 exemptions in the prior order to 75. The new restrictions

Ujaama Motions Denied: On Aug. 23, U.S. District Judge Gerald Bruce Lee of the Eastern District of Virginia denied motions by *The Denver Post*, the *Rocky Mountain News*, and the *Seattle Times* seeking release of a redacted transcripts in detention proceedings regarding James Ujaama, and a bifurcated proceeding in which the purely legal arguments concerning whether a U.S. citizen may be held as a "material witness" to a grand jury proceeding would be conducted in open court. Lee also initially ordered that the hearing on the newspapers' motions to open the proceedings would itself be closed, but reversed himself when the newspapers (joined by the Washington Post, New York Times and Reporters Committee for Freedom of the Press) objected. See *U.S. v. Ujaama*, Civil No. 02-MC-36 (order Aug. 23, 2002); see also *LDRC MediaLawLetter*, Aug. 2002, at 57. Ujaama, who has been detained since July as a material witness, was indicted Aug. 28 by a Seattle grand jury for allegedly conspiring to support terrorism.

¹ Motions to dismiss are pending in a suit filed by the foundation against various media defendants over reporting of the government's charges. See *Global Relief v. New York Times*, Civil No. 01-8821 (N.D. Ill. filed Nov. 15, 2001). See *LDRC LibelLetter*, Dec. 2001, at 52.

² In 1997, the government withdrew a surveillance request that the court found to be deficient.

³ In the early 1980's, Presiding Judge George Hart issued a brief unclassified memorandum opinion affirming that the FISA Court had no jurisdiction to issue warrants for physical searches, which was later changed by executive order.

⁴ The USA Patriot Act reorganized the court, increasing it from seven to 11 judges. § 208, USA Patriot Act, codified at 50 U.S.C. §1803(a).

LDRC ANNUAL DINNER

November 13, 2002

*In the Trenches: War Reporting & the
First Amendment*

Ted Koppel Moderating

Polls Indicate Public at Odds with First Amendment, News Media, and Itself

One year after September 11, public perceptions of the news media and First Amendment freedoms appear to be mixed. Recent and independent polls conducted by the Pew Research Center for the People and the Press, and the First Amendment Center of the Freedom Forum, indicate that a larger percentage of the public sees the First Amendment as going too far in the liberties it guarantees. In return for a safer society, some, perhaps many of the public, appears willing to sacrifice certain First Amendment freedoms. Yet, data suggests continued and solid support for maintaining liberties enjoyed by individuals, and the media.

Free Speech Still Matters

Nearly half of those in the First Amendment Center's poll believe that the First Amendment goes too far in guaranteeing personal liberties. This response is the highest since the survey has been conducted and a ten percentage point increase from the previous year.

But that is the response to the global question about the First Amendment and all of the rights it protects. When one breaks down the First Amendment into its constituent parts then the public's views are not easily pigeonholed. In fact, 68% consider the "right to be informed by a free press" an essential right, an eight percentage point increase from 1997, and 26% more think it is an "important" right. While somewhat less than the support for other aspects of the First Amendment, such as speech, this is a very solid majority.

And while 33% say the press has "too much freedom" today, that is actually less than the percentage that felt that way in 2000 and 2001 polls, while those who think that the amount of freedom is "just right," is the highest in the four years reported by the Freedom Forum, coming in at 51% with another 13% believing there is too little press freedom. That is 64% who believe in freedom of press to the degree that they find the level of freedom either satisfactory or too little at this juncture.

That is 64% who believe in freedom of press to the degree that they find the level of freedom either satisfactory or too little at this juncture.

All of these numbers suggest a relatively wide support for freedom of the press.

Evidencing either the conflict Americans may feel about press freedom or the limited value one should place on individual poll results, at a later point in the questionnaire, 42% of those polled seem to be saying that the "media has too much freedom to publish whatever it wants," as contrasted with 32% who find that there is too much government censorship.

Interestingly, those polled were concerned about the government making too little information available to the press and public. 48% of those polled felt Americans had too little access to government records, while 38% thought it "just right" and only 8% thought it too little. 40%,

thought there was too little access to information about the federal government's war on terrorism, although the "just right" percentage remained at 38% and the "too much" rose to 16%.

The public evidences some concern about criticizing the military, with only 33% strongly agreeing that newspapers should be allowed to freely criticize the U.S. military about its strategy and performance, with an additional 24% "mildly" agreeing. But 18% mildly, and 24% strongly, disagree with that proposition – a pretty large number of people thinking that the press should be limited, perhaps, in what it can say about the military.

Free Speech Highly Valued

Americans have no reservations about the value of the freedom of speech. Three-quarters of those polled in the First Amendment Center's survey believe that the right to speak freely is an essential right. Even the right to express unpopular opinions finds tremendous support among the public(94%).

On the other hand, specific kinds of offensive speech enjoy less support. Only 57% (29% strongly, 28% mildly) believe one has the right to engage in speech which is of-

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Polls

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fensive to religious groups, with only 34% (14% strongly, 20% mildly) supporting the right to convey speech offensive to racial groups.

Public Wants More Access to Government Records (But Keep Everyone Away From My Information)

The public is also committed to maintaining, and even expanding the right to access government records - as long as those records are not about them. According to the First Amendment Center's poll, 48% of Americans think they do not have enough access to government records while only 38% believe the public has the right amount. Health inspections of restaurants (96%), names of registered sex offenders (94%), transcripts of city council meetings (93%), and police reports of crimes (88%) are among the specific types of records the public desires the greatest access.

This strong support for more access to government records fades however when the issue becomes access to an individual's personal information. 81% believe the "right to privacy" is an essential right with 60% stating the government has too much access to a person's private information.

Certain records receiving the lowest support for access include: employment records of local school officials (73%) and local real estate records (72%). Support for access to government records also declines when the records concern the war on terrorism, then only 40% believe the public has too little access. Nearly two-thirds of respondents in a poll conducted by the Pew Internet and American Life Project said that they support the government removing sensitive material off government web sites, even if it deprives the public of that information.

Post- 9/11 Bump in Media Approval Evaporates

The news media should also take notice that the polls point out that the public believes the media does not use the freedom it has appropriately, and are too critical of the military. However, data also suggests that the public approves of the manner in which the media has covered the war on terrorism, and the media's role in watching over the

government.

Last fall, with the events of September 11 still fresh, the media enjoyed a period of popularity and approval in the eyes of the general public. However, the Pew Center poll indicates that this upswing was only a brief respite in the public's long-standing suspicion and even antagonism towards the news media. Not even one year ago 69% of those polled believed that members of the news media "stand up for America". Today that number is only 49%, with 35% claiming the media's coverage is too critical of the United States.

Last September, 73% considered the media "highly professional" whereas only 49% think that today. More people now also believe the media:

- care less about the people they report on (Now: 47%; 11/01: 30%);
- are politically biased (Now: 59%; 11/01: 47%);
- and try to cover up their own mistakes (Now: 67%; 11/01: 52%);
- while *less* people now think the media "usually get facts straight" (Now: 35%; 11/01: 46%).

Finally, only 39% also consider the media "moral", a 14 percentage point decrease from last year.

Split on Terrorism Coverage

As for the media's coverage of the war on terrorism, the public remains split. Nearly three-quarters (71%) of those who have followed the war on terrorism in the news consider the coverage to be either "excellent" or "good". However, there remains concern about the media criticizing the military. 42% (24% strongly, 18% mildly) of respondents in the First Amendment Center's poll said that newspapers should not be allowed to freely criticize the military.

There has also been a change in the perception of the effects of the media's coverage in the real world. In a noticeable change from the Gulf War, today it is a near even split among those in the Pew Research Center's poll who believe media criticisms help keep the nation prepared (49%) and those who see criticism weakening national defense (50%). Ten years ago, the public overwhelmingly viewed media criticism as beneficial (59%) as opposed to

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Polls

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interfering with national defense (28%).

Despite this backward slide, the situation is not entirely bleak. The public still thinks the news media fulfill a valuable role in society as more than half of those polled (59%) believe the media's role as a watchdog of government discourages politicians from acting improperly.

Which Media Are Most Credible?

Another promising sign is that even with their criticisms, the credibility of individual media outlets and personalities have remained relatively constant over the past two years. According to the Pew Center poll, CNN continues to remain the most credible source of television news (37% believe all or most) with *The Wall Street Journal* being the most credible member of the print media (33% believe all or most).

The Big Three networks each have roughly the same level of credibility (CBS: 26%, NBC: 25%, ABC: 24%). Among television news personalities, the network evening newscast anchors (Brokaw, Rather, Jennings) are still considered the most credible while cable personalities (Brian Williams, Larry King, Brit Hume, Aaron Brown, Geraldo Rivera) are generally considered less credible.

Those polled gave local television lower credibility ratings than in the 2000 and 1998 polls, 27% versus 33% and 34% in the prior years. That puts local television about on par with the networks.

As in past years, local newspapers have a modestly lower credibility rating than the local broadcasters, with 21% indicating they believe all or most of what they read in their local newspaper, down from 25% in May 2000.

Polls cited above can be accessed at the following web sites:

Pew Research Center for the People & the Press:
<http://www.people-press.org/reports/display/php3?ReportID=159>

First Amendment Center of The Freedom Forum:
<http://www.freedomforum.org/templates/document.asp?documentID=16840>

Pew Internet & American Life Project:
<http://www.pewinternet.org/reports/toc.asp?Report=69>

Bush Administration Asserts Privilege For Pardon Papers

While President Bush criticized some of the 177 pardons and commutations that President Clinton issued in the waning hours of his presidency – especially the pardon of fugitive financier Marc Rich – his administration is now trying to block a lawsuit seeking documents related to the pardons.

In its motion to dismiss *Judicial Watch, Inc. v. Dept. of Justice*, Civil No. 01-639 (D.D.C. filed March 23, 2001), filed Aug. 12, the Bush Administration argues that releasing papers relating to the pardons – including papers, such as court documents, which the president did not see when making his decisions – would, a White House spokesman told reporters, “have a chilling effect on the deliberative process.”

The motion does not invoke executive privilege, which must be done personally by the president. *See U.S. v. Burr*, 25 F.Cas. 55 (C.C.Va. 1807). But the administration's brief, submitted by Assistant Attorney General Robert D. McCallum, Jr., states that “the documents generated in the process of developing and providing advice to [the president] are squarely subject to” the “presidential communications privilege” recognized – but not entirely defined – in *U.S. v. Nixon*, 418 U.S. 683, 705 (1974), and are thus exempt from disclosure under the federal Freedom of Information Law.

According to the brief, this privilege covers papers “authored or solicited or received by [Justice] Department officials in the course of preparing and providing information to assist the president in the exercise of his constitutional pardon power.”

The lawsuit seeking the documents was brought by Judicial Watch, which describes itself as an “ethical and legal ‘watchdog’ over our government, legal, and judicial systems to promote a return to ethics and morality in our nation's public life.” The organization has filed numerous suits against recent administrations of both parties. *See, e.g., LDRC LibelLetter*, Dec. 2000, at 30.

Judicial Watch was due to reply to the government's motion in mid-September.

Zero Damages Award in Copyright Infringement Suit

By Marc E. Ackerman and Brendan G. Woodard

Baltimore Ravens, Inc. (“Ravens”) and National Football League Properties, Inc. (“NFLP”) successfully defended against a claim for damages in a recent copyright infringement action over the Ravens’ “Flying B Logo” in the United States District Court for the District of Maryland. Although the plaintiff, Frederick E. Bouchat, prevailed in the liability phase of the case, after a trial on damages, on July 24, 2002, a twelve-person jury returned a unanimous verdict in favor of NFLP and the Ravens, determining that Mr. Bouchat, who had sought to recover millions of dollars, was not entitled to any money damages. The jury concluded that NFLP and the Ravens had proven that all revenue generated from the sale of products bearing the so-called “Flying B Logo” – the only revenue susceptible to recovery in the action – was attributable completely to factors other than the artwork of the Flying B Logo.

Liability Issues

In May 1997, Mr. Bouchat filed a copyright infringement suit against the Ravens and NFLP. Bouchat alleged that the Ravens and NFLP had used three drawings that he created as logos for the Baltimore Ravens professional football team, including the logo that was adopted as the team’s primary trademark for the 1996 through 1998 football seasons – the Flying B Logo. The case was bifurcated into a liability phase and a damages phase, with the liability phase proceeding to trial in the fall of 1998.

A five-week trial on liability was held before the Honorable Marvin J. Garbis, and the jury returned a verdict finding that the Ravens and NFLP did not infringe two of the drawings, but that there was an infringement of the Flying B Logo drawing. Both sides agreed that there was no evidence that any infringement was willful. Following an appeal by the Ravens and NFLP, the jury verdict was affirmed by a divided panel of the Fourth Circuit Court of Appeals, and a petition for a rehearing *en banc* was subsequently denied. After the petition for *certiorari* was denied by the Supreme Court, the case proceeded to a trial on damages.

Limiting Damages Issues

In the damages phase of the litigation, Plaintiff sought to recover the Ravens’ and NFLP’s “profits attributable to the infringement,” claiming that all of NFLP’s and the Ravens’ revenue was presumed to be attributable to the infringement. NFLP and the Ravens moved for partial summary judgment to exclude streams of revenue that were generated without regard to the use of the Flying B Logo. These revenue streams included revenue generated from Ravens ticket sales, broadcasting, sponsorships, and general business activities. The Court agreed, finding that, as a matter of law, NFLP and the Ravens were entitled to summary judgment as to all claims for profits other than those relating to the sale of licensed merchandise.

After discovery was complete, NFLP and the Ravens successfully moved to exclude revenue generated from the sale of game programs, trading cards, and video games from Plaintiff’s potential pool of recovery because revenue from the sale of these products was not generated because of the artwork of the Flying B Logo. Following the pretrial motions, Mr. Bouchat’s potential pool of recovery was limited to revenue generated from the sale of NFL-licensed Ravens merchandise and “souvenir” cups sold in the stadium at Ravens home football games. Plaintiff’s potential award was set at approximately \$2.5 million, so the only task remaining for the jury was to allocate what percentage, if any, of that revenue was attributable to the artwork of the Flying B Logo.

Damages Trial

The damages phase of the trial, which began on July 17, 2002, was again held before the Honorable Marvin J. Garbis. During opening statements, Plaintiff contended that, as the originator of the Flying B Logo, Mr. Bouchat was entitled to a reasonable percentage of the revenue generated from the sale of Ravens merchandise bearing the Flying B Logo. NFLP and the Ravens told the jury that fans buy NFL-licensed merchandise in order to associate themselves

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Zero Damages Award in Copyright Infringement Suit

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with their favorite teams, and that on-field success, rather than artwork, is what drives sales of NFL-licensed merchandise.

At trial, senior executives from NFLP's consumer products department testified that in their experience, NFLP's licensees are not concerned with the artwork of any particular logo when entering into contracts with NFLP. Similarly, two of NFLP's licensees testified that when negotiating license agreements, they do not concern themselves with the artwork or appearance of any particular NFL team logo. The Baltimore Ravens President and Chief Operating Officer, David O. Modell, and a representative from Fine Host Corporation, the exclusive concessionaire at Ravens stadium, also testified in the same regard.

Dr. Yoram Wind, the Lauder Professor at the Wharton School, and a widely-recognized expert in the fields of marketing, marketing research, and consumer behavior, also testified on behalf of NFLP and the Ravens. Dr. Wind testified that he was retained to conduct an experiment to determine the extent to which the Flying B Logo impacted sales of Ravens merchandise. To this end, Dr. Wind designed a consumer survey involving more than 1,000 consumers who were shown products bearing Ravens logos, including the Flying B Logo. Based on the results of the survey, Dr. Wind concluded that the artwork of the Flying B Logo had no impact on sales of Ravens merchandise.

The only witness to testify for Plaintiff at trial was Dr. Roland Rust, a marketing professor at the University of Maryland. Dr. Rust's testimony was limited to a critique of the survey conducted by Dr. Wind.

Plaintiff argued that Mr. Bouchat was entitled to between fifty and ninety percent of the revenue generated from the sale of Ravens licensed merchandise, claiming that Defendants did not satisfy their burden of proof to show that profits from sales of Ravens merchandise were attributable to factors other than the artwork of the Flying B Logo. Defendants countered that Plaintiff was not entitled to recover any of Defendants' profits from the sale of products bearing the Flying B Logo, because separate and apart from its function as the trademark or identifying symbol of the team, the mere

artwork of the Flying B Logo alone did not cause consumers to purchase such merchandise. Plaintiff did not seek actual damages.

The case was submitted to the jury for consideration on July 23, 2002, and on July 24, after a day of deliberations, the jury returned a verdict in favor of the Ravens and NFLP. The jury concluded that NFLP and the Ravens had proven by a preponderance of the evidence that income derived from the sale of products bearing the Flying B Logo was attributable completely to factors other than the artwork of the Flying B Logo.

Defendants National Football League Properties, Inc. and Baltimore Ravens, Inc. were represented by Robert L. Raskopf and Marc E. Ackerman of White & Case LLP in New York, and George Beall of Hogan & Hartson, L.L.P. in Baltimore.

Plaintiff was represented by Howard J. Schulman of Schulman & Kaufman, LLC in Baltimore.

To be published in November

LDRC 50-STATE SURVEY 2002-03: MEDIA LIBEL LAW

***With updated reports on libel law in the
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ETHICS CORNER: Practicing Media Law in an Interconnected World

Recent MJP Recommendations Offer Hope for “Unauthorized” In-house Practitioners

By **Bruce E. H. Johnson**

The growth of many media companies into multi-state and even multinational corporations, coupled with improved telecommunications technologies that facilitate lawyer-client communications, has made the multi-jurisdictional practice of media law both necessary and convenient. As Professor Carol Needham of St. Louis University Law School has noted: “Multijurisdictional practice has become the norm rather than the exception.”

But such necessity and convenience are at odds with traditional state-by-state rules governing the practice of law in the United States. For many years, however, lawyers and bar associations ignored the potential clash. In-house lawyers, in particular, lived in a “don’t ask, don’t tell” netherworld, which allowed them to provide efficient services to their corporate clients even when the client’s business (and its legal problems) strayed across state lines.

This undeclared truce came to a sudden end in 1998, when the California Supreme Court issued its decision in *Birbrower, Montalbano, Condon & Frank v. Superior Court*, ruling that giving advice on California law to a California company could constitute the practice of law in California. The *Birbrower* court stated that the practice of law “in California” occurs when a lawyer engages in “sufficient activities in the state or create[s] a continuing relationship with the California client that include[s] legal duties and obligations.”

Could an in-house lawyer for a newspaper chain in, say, New York, be confident that he or she was not violating the law by vetting an article for one of the client’s California newspapers? *Birbrower* provided no comfort, with the court suggesting that “our definition [of authorized practice] does not necessarily depend on or require the unlicensed lawyer’s physical presence in the state For example, one may practice law in the state in violation of [the state statute] although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern

technological means.”

In other words, taking *Birbrower* at its word, the New York lawyer participating in a conference call with the company’s Los Angeles editors or managers about an employment dispute, or involving prepublication review, may be illegally practicing law “in California.”

American ethics practitioners were shocked by the *Birbrower* opinion, which seemingly ignored modern practice demands and client needs. But California was not alone in restating a very restrictive, and even protectionist, approach to the practice of law in the United States, despite the demands of technology and client efficiency. (Ironically, since a 1998 European Union directive, it is now easier and simpler for European lawyers to practice across international borders than it is for US lawyers to practice across state lines.) Consider the following scenarios:

- If an in-house lawyer for a Chicago-based media company, who is an employment law specialist licensed in Illinois, visits the company’s Ohio newspaper and provides employment advice to its managers, accompanied by outside counsel from an Ohio law firm, a 2000 decision by the Ohio Supreme Court suggests that the Ohio lawyers could be guilty of assisting in the unauthorized practice of law in Ohio.
- If the client is a Colorado company and its lawyer, then residing in Colorado, is a member only of the Wisconsin bar, can the lawyer legally assist the company in federal court litigation, assuming he or she retains Colorado-admitted counsel and is admitted *pro hac vice*? In 2001, the Colorado Supreme Court said no, denying the lawyer any of the fees earned, even though the client was fully informed of the lawyer’s bar status.
- If a retraction demand is sent to a Connecticut newspaper, can the newspaper chain’s in-house lawyer, admitted only in New York, come to Hartford to provide advice or negotiate with the claimant? An opinion from the Connecticut Committee on the Unauthorized Practice of Law, from the sum-

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Practicing Media Law in an Interconnected World

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mer of 2002, has ruled that such activities would be illegal. The opinion did not deal with such advice because given by phone/fax/email.

- If the retraction demand is sent to the company's Virginia newspaper, however, the lawyer is free to travel to Richmond, because Virginia excludes in-house practitioners from its regulations defining "unauthorized practice" of law.
- What if an in-house lawyer licensed in New York travels to Detroit to attend a meeting at one of the broadcast stations owned by the corporations and advise on environmental compliance issues and, while there, also returns telephone calls and sends emails, would such actions constitute the unauthorized practice of law? No, but only because Michigan has specifically exempted such occasional practice from the unauthorized practice of law rules.

Given the shock of *Birbrower*, coupled with an increasing recognition by ethics practitioners that such restrictive rules made little sense in an interconnected world, the American Bar Association began a detailed review and update of current rules relating to unauthorized practice of law by practitioners who are licensed in another state.

On August 12, 2002, the American Bar Association House of Delegates approved the final report and recommendations of the ABA Commission on Multijurisdictional Practice (MJP Commission) at the ABA annual meeting in Washington, D.C. The principal recommendations that the House approved would enable lawyers more freely to provide legal services in states where they are not admitted. In effect, if the proposals are implemented, a bar license would be treated much the same as a driver's license today. The House also approved changes in model state procedures on reciprocal discipline, on *pro hac vice* admission, on permanent admission by motion of lawyers admitted in other states, and on recognition of the role of lawyers admitted in non-U.S. jurisdictions. None of these new provisions of the Model Rules, however, will become effective until adopted by individual states.

Among the MJP Commission's proposals that were approved by the ABA are:

- (1) an amendment to ABA Model Rule 5.5 so that in non-litigation matters it is not unauthorized practice for lawyers to render legal services "on a temporary basis" across state lines if such services "arise out of or are reasonably related to" the lawyer's practice in the jurisdiction where he or she is admitted;
- (2) an amendment to ABA Model Rule 8.5, making a lawyer subject to discipline in a state where the lawyer renders or offers to render legal services, even if the lawyer is not admitted there;
- (3) a new ABA Model Rule 5.5(b) that prohibits a lawyer from establishing an office or other continuous presence, or otherwise holding out to the public that the lawyer is admitted to practice, in a jurisdiction where the lawyer is not admitted, except when authorized by law or rule;
- (4) additional modifications to ABA Model Rule 5.5 also permits temporary out-of-state practice when a lawyer (a) works as co-counsel with a lawyer admitted to practice law in the jurisdiction who actively participates in the matter; (b) does work ancillary to pending or prospective litigation or agency proceedings in which the lawyer has been admitted *pro hac vice*, or reasonably expects to be; or (c) represents clients in, or ancillary to, alternative dispute resolution if the services are related to the lawyer's practice where admitted and if the host state does not require *pro hac vice* admission for such representations; and
- (5) a new Model Rule 5.5(d) that permits work by a lawyer licensed in another state for an organizational employer-client or its affiliates.

With the ABA's decision to push forward on MJP reforms, the battle now turns to the individual jurisdictions, where the proposed rule changes will be considered by the bars of 50 states and the District of Columbia. In the meantime, the risks of lawyers falling into unauthorized practice traps will remain.

Mr. Johnson is a partner in the Seattle office of Davis Wright Tremaine LLP, and also serves on the DCS executive committee. He is a member of the DCS Ethics Committee.

Bulletin Examines Complaints Filed Against News Media

LDRC's 2001 Complaint Study, which was released in August along with a report on the U.S. Supreme Court's 2001 term, examines complaints filed in 2001 against the media for, or directly related to, editorial content.

Continuing on studies conducted in the 1990s, the 2001 Complaint Study examines in detail the types of cases filed in 2001 against media defendants, broken down by media type, plaintiff type, jurisdiction and type of claim(s). The study also compares the year's results to results from LDRC complaint studies in the 1990s.

The most common plaintiffs in 2001 media cases were business people and corporations, followed by artist/entertainers, inmates, and candidates for electoral offices. Of the various plaintiff categories, only corporations filed, percentage wise, significantly fewer suits than in prior surveys.

Business people and corporations were the most frequent type of plaintiffs against virtually every type of media defendant. The exceptions were defendants involved in media production, for which writers and authors were a large group of plaintiffs, and magazines, against whom photographers were frequent plaintiffs. In the relatively small number of cases against book publishers (17 cases), the most frequent plaintiffs were authors and plaintiffs who represented them as relatives of aggrieved parties.

Newspapers were the most frequent defendants, followed by reporters and correspondents. Television stations were named in fewer than half as many lawsuits as newspaper defendants. As in prior surveys, media in the smaller-sized markets – ranked below 50th by Arbitron – were sued most often, and were named in 42 percent of the lawsuits. They were followed by media in the top 20 markets, which were defendants in one-third of the complaints.

Amongst newspaper defendants, daily newspapers were named in 84.8 percent of cases, and by market size the newspapers sued most frequently were in those in markets ranked below 50th by Arbitron. For television stations, however, the markets with the largest share of cases were those ranked between 21st and 50th. In radio, defendants from the top 20 markets predominated (47.8 percent of cases).

General and investigative reporting were the most frequent activities leading to a lawsuit, forming the basis for two-thirds of complaints, followed by advertising and pro-

motion (9.1 percent). Claims based on newsgathering – the way in the media went about reporting stories – was the basis for only 2.1 percent of the 2001 cases.

Libel was by far the most frequent individual claim made against media defendants, made in 71.7 percent of complaints. It was the only claim made in 42.4 percent of cases.

Libel was followed by invasion of privacy claims, which were made in 29.2 percent of complaints; of the privacy torts, false light was the most common, made in 18.1 percent of complaints. Emotional distress claims were the third most common claims, made in 22.5 percent of complaints.

Almost three-quarters of the suits were filed in state court, with California (7.1 percent of suits), New York (4.7 percent), Pennsylvania (3.5 percent) and Texas (also 3.5 percent) in the lead. Of the federal courts, the Second (4.7 percent) and Ninth (4.3 percent) circuits saw the most suits.

LDRC BULLETIN 2002: No. 3, which contains both the 2001 Complaint Study and LDRC's Supreme Court Report, was mailed in August to media and law firm members that pay dues above \$1,000. Additional copies are available for \$35 each by contacting LDRC, 80 Eighth Avenue, Suite 200, New York, NY 10011, phone (212) 337-0200. Order forms are also available on our web site, www.ldrc.com.

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DCS BREAKFAST MEETING

Friday, November 15, 2002

7A.M-9A.M.
