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MEDIALAWLETTER

Reporting Developments Through September 27, 2004

Finally: Texas Supreme Court Rejects Public Officials' Libel Claim Over Political Satire

By Jim Hemphill

After five years of litigation that received considerable national attention in media and legal circles – and rulings against the press from the trial and intermediate appellate courts – the Texas Supreme Court has rendered judgment for the *Dallas Observer*, its parent corporation, and three of its journalists in a libel case over a political satire criticizing the actions of two elected officials. *New Times, Inc. v. Isaacks*, 2004 WL 1966014 (Tex. Sept. 3, 2004).

The unanimous decision, written by Justice Wallace Jefferson (who shortly thereafter was elevated to chief justice by the governor), held that a reasonable reader, as a matter of law, would not believe that the fictional satire was an account of actual fact, and further held that the defendants disproved actual malice.

Background

The case arose out of a satirical article lampooning various public officials' actions in the case of Christopher Beamon, a 13-year-old boy who was jailed for writing a Halloween essay about a school shooting.

The jailing was widely considered an overreaction in the post-Columbine environment. The satire in the *Observer* – an alternative weekly in the New Times chain – recounted the purported jailing of a six-year-old girl for writing a book report on the children's classic *Where the Wild Things Are* and included fictional, outrageous quotes from those involved in the real jailing of Beamon.

For example, Judge Darlene Whitten – who sentenced Beamon to 10 days in juvenile detention – was "quoted" in the satire as saying "Any implication of violence in a school situation, even if it was just contained in a first-grader's book report, is reason enough for panic and overreaction." The satire had Judge Whitten scolding the fictional six-year-old nonsensically from the bench: "It's time for you to grow up, young lady, and it's time for us to stop treating kids like children."

The satire also "quoted" District Attorney Bruce Isaacks – whose office handled the charges against Beamon (which were eventually dropped) – as saying "We've considered having her certified to stand trial as an adult, but even in Texas there are some limits."

Whitten and Isaacks weren't the only targets of the satire. Among the others was then-Texas Governor George W. Bush, who purportedly asserted that *Where the Wild Things Are* "clearly has deviant, violent, sexual overtones" and stated that he was "appalled that such material could find its way into the hands of a Texas schoolchild." And the superintendent of the small school that Beamon attended was "quoted" as stating, "Frankly, these kids scare the crap out of me."

The satire ended with a purported quote from the fictional six-year-old, who supposedly said: "Like, I'm sure ... It's bad enough people think like Salinger and Twain are dangerous, but Sendak? Give me a break, for Christ's sake. Excuse my French."

The judge and the district attorney were unamused and demanded a retraction. In response, the *Observer* published an irreverent column – using terms such as "clueless" and "cerebrally challenged" – pointing out that the article was a fictional satire.

In response, Whitten and Isaacks sued the *Observer*; New Times, its parent company; Rose Farley, the satire's author; Patrick Williams, the newspaper's managing editor and primary editor of the satire; and Julie Lyons, the editor in chief. The plaintiffs were represented by Mike Whitten, who is Judge Whitten's husband.

The Lower Courts' Decisions

The defendants moved for summary judgment on two grounds: that the satire could not reasonably be read as stating actual facts about the plaintiffs, and that the defendants did not act with constitutional actual malice. The trial court denied summary judgment, and the defendants took an interlocutory appeal, which is allowed in Texas when claims are made against the media and a constitutional defense is asserted.

In a published opinion, the Fort Worth Court of Appeals affirmed the denial of summary judgment. *New*

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Times, Inc. v. Isaacks, 91 S.W.3d 844 (Tex. App. – Fort Worth 2002). Although purportedly recognizing the value of political satire, the Court of Appeals held that the satire provided no clues to the reasonable reader as to its fictional nature, and further held that there was enough evidence of actual malice to raise a fact issue. The court apparently considered the *Observer's* admission that it set out to ridicule the plaintiffs' official actions as evidence of constitutional malice.

Texas Supreme Court Reverses

In a lengthy, detailed, and extensively researched opinion, the Texas Supreme Court ruled in favor of the press defendants on virtually every issue presented.

The opinion discusses many key cases, including *Hustler Magazine v. Falwell* and *Pring v. Penthouse International*, along with several other analogous cases, law review articles, and treatises. The end result is an opinion that not only affirms the value of humor and satire as legitimate forms of political discourse, but also sets important standards for evaluating libel cases based on fiction – and, in some respects, for other types of defamation claims, including libel by impression.

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On the first principal question presented – whether a reasonable reader could have misinterpreted the satire as a factual account of actual events – the court, for the first time in Texas, explicitly confirmed that the "reasonable reader" standard is objective.

Since the question of whether a publication is reasonably capable of a defamatory meaning is a question of law in the first instance, a court is to apply a hypothetical reasonable person standard and consider how a person of reasonable intelligence and learning, when considering the entire article and its context, would interpret the challenged article.

This holding is important in at least two respects. First, in this case, the plaintiffs claimed that several people actually read the satire and believed it was real. The Supreme Court confirmed that this is not necessarily relevant, because while actual reasonable people sometimes act unreasonably, the objective, hypothetical reasonable reader does not. So evidence of how some actual readers interpreted an article – for example, in a case of libel by impression – will not be controlling and may not even be relevant.

Second, the court forcefully confirmed existing authority that a reasonable reading must take into account the entire article and its surrounding context. The plaintiffs argued that many readers only read headlines, or the first few paragraphs of an article, and form conclusions or impressions based thereon. The court's opinion holds that such readings are not reasonable, as a matter of law.

Moreover, in response to the Court of Appeals' holding that the satire did not include any obvious clues as to its fictional nature, the Supreme Court said, "The court of appeals has underestimated the 'reasonable reader.'"

Even though the court ruled in favor of the press on the dispositive "reasonable reader" issue, it also addressed the actual malice argument.

The plaintiffs contended that since the satire was admittedly fiction, actual malice was "automatic" – a position that would have established constitutional malice as a matter of law in every kind of non-literal speech such as novels and non-documentary movies (as well as satire and parody). The Court of Appeals had rejected this contention, holding that actual malice would exist only if the defendants knew or reasonably suspected that a reader could get a false impression from the satire. However, the lower appellate court held that the record evidence – primarily the defendants' intent to ridicule – provided potential proof of malice.

The Supreme Court largely agreed with the Court of Appeals' analytical framework for malice, but came to an opposite conclusion based on the evidence. The individual defendants all testified, by affidavit and in deposition, that they neither intended nor suspected that readers would mistake the fictional satire for actual fact.

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The plaintiffs' inability to point to any contradictory evidence was fatal for their claim. The Supreme Court specifically contradicted the Court of Appeals' apparent holding that intent to ridicule could supply evidence of constitutional malice. The court observed that "Equating intent to ridicule with actual malice would curtail the 'uninhibited, robust, and wide-open' public debate that the actual malice standard was intended to foster, particularly if that debate was expressed in the form of satire or parody."

The plaintiffs' counsel has indicated in press accounts that he plans to seek rehearing in the Texas Supreme Court and/or petition the U.S. Supreme Court for certiorari.

Jim Hemphill is a shareholder in the Austin firm Graves Dougherty Hearon & Moody, P.C., and represented the defendants in New Times v. Isaacks along with co-counsel Steve Suskin of Phoenix.

Jury Verdict for *GQ* Magazine, Writer in Oklahoma Libel Suit

By Robert Nelon and Jon Epstein

After two hours of deliberation, a federal court jury in Oklahoma City decided that an article in the December 1997 issue of *GQ* magazine did not defame former FBI agent Jeff Jenkins or invade his privacy by placing him in a false light when it criticized his investigation of the 1995 death of an inmate at the Federal Transfer Center in Oklahoma City. *Jenkins v. Advance Magazine Publishers Inc., et al*., CIV-03-0243-F (W.D. Okla. jury verdict August 25, 2004).

The unanimous jury found in favor of the publisher Advance Magazine Publishers Inc. (and its division Condé Nast Publications Inc.) and former *GQ* Senior Writer Mary A. Fischer on both of the plaintiff's claims after the court directed a verdict on the plaintiff's intentional infliction of emotional distress claim.

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Suspicious Death and Botched Investigation

On August 21, 1995, an inmate named Kenneth Michael Trentadue was found hanging in his cell at the Federal Transfer Center, a prison operated by the U. S. Bureau of Prisons ("BOP") in Oklahoma City.

The BOP told the family the death was a suicide and offered to cremate the body, refused to let an investigator for the State Medical Examiner into the cell, and cleaned and sanitized the cell before any investigative agency could inspect it.

When the body of the inmate was transported to the medical examiner's office for an autopsy, Dr. Fred Jordan, the State Medical Examiner, discovered that the body was bloody, had three deep wounds to the head, a slashed throat, and bruises that were inconsistent with a suicide.

After conducting the autopsy, Jordan listed the cause of death as traumatic asphyxia and the manner of death as "pending" (later changed to "unknown"); and he and his chief investigator, Kevin Rowland, concluded that the death was likely a homicide. Rowland called the FBI and told agents that the death should be investigated and treated like a homicide.

The plaintiff, Jenkins, was the initial case agent for the FBI in the investigation. He was responsible for investigating crimes on government reservations in Oklahoma, which included the Federal Transfer Center and a prison in El Reno. Jenkins undertook the investigation of Trentadue's death despite the fact he had no experience as a homicide investigator and it was well-known that he refused to look at a dead body or photographs of one.

Initially, the BOP resisted having even the FBI investigate Trentadue's death. A special investigations officer at the Federal Transfer Center told Jenkins the morning Tren-

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tadue died that the death was a simple suicide by hanging. The BOP officer omitted to inform Jenkins about the bloody cell or the injuries to the body. Jenkins told the officer to fax him a report, but the officer never did.

When Rowland called the Federal Transfer Center to question why the medical examiner's investigator had been denied access to the cell, a warden told Rowland that the BOP conducted its own investigations into inmate deaths and that neither the medical examiner nor the FBI need to be involved. On September 1, the BOP in Washington, D.C. issued a formal press release saying that the death had been ruled a suicide, even though the medical examiner had not done so and the FBI had conducted minimal investigation.

Although on August 21 Jenkins learned from another FBI agent that Trentadue's body was bloody and that the death did not look like a suicide, and Rowland called him the next day to say the same thing, Jenkins did very little investigation in the days immediately following the death. He did not go to the Federal Transfer Center for several days and did not collect what little evidence the BOP had retained from the cell until nearly three months later. The FBI did not interview any witnesses until a week after the death, and agents did not interview some key witnesses for months.

Putrefied Evidence in Jenkins' Car

According to Rowland, about two weeks after the death, Jenkins called him and asked how to get the smell of a decomposed body out of his car. Jenkins had failed to turn in evidence another agent had picked up from the medical examiner's office on August 21. Apparently he forgot about the evidence and left a bloody sheet and other Trentadue evidence in his car, allowing it to putrefy. (Later, a report from the FBI lab in Washington determined that the bloody sheet was unsuitable for seriological examination.)

Rowland immediately informed others at the medical examiner's office about the call from Jenkins (the Chief of Operations for the MEO, Ray Blakeney, overheard the call) and later told another FBI agent and Jenkins' superiors in the Oklahoma City office about it. Jenkins' superiors reviewed the Trentadue investigation file and determined that Jenkins had indeed turned evidence in late to the evidence room, but they initially treated his mishandling of evidence as a performance matter that did not warrant discipline.

Another FBI agent was assigned to assist Jenkins in the investigation in December 1995, and a few months later Jenkins was removed from the investigation and reassigned to another squad.

The government's investigation of Trentadue's death continued at a modest pace for two years. A federal grand jury directed by lawyers from the Department of Justice Civil Rights Division in Washington ultimately concluded in October 1997 that no BOP personnel had committed any criminal offense.

Family and Media Pressure

In the meantime, Trentadue's family, especially his brother Jesse, a Salt Lake City trial lawyer, maintained that Kenneth had been murdered. Jesse Trentadue wrote hundreds of letters to various public officials in the Department of Justice, the FBI, the Bureau of Prisons, and to Congress contending that the facts showed that Kenneth's death was a homicide and complaining that the government was covering up the murder.

Government officials refused to supply much information of any significance, and most often instructed the Trentadue family to file a FOIA request, which was then either delayed or denied. After a time, in his letters Jesse Trentadue began to refer to the Bureau of Prisons as "B'oops" and the FBI as the "Federal Bureau of Incompetence."

In May 1997 the Trentadue family sued the United States and several individual employees of the Department of Justice, the BOP, and the FBI alleging a variety of claims regarding the death of Kenneth Trentadue.

Among those who took an interest in the Trentadue case was U.S. Sen. Orrin Hatch, who requested (but got little) information from Attorney General Janet Reno, sharply criticized her about the case in a Senate Judiciary Committee hearing in April 1997, and publicly said the death appeared to him to be a murder that the government was covering up.

During 1997, the state medical examiner in Oklahoma was frustrated that he was getting little information from the FBI from which to make a statutorily-mandated determination about the manner of death, and he was disturbed by what he described as the "bizarre

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machinations" of the FBI to try to persuade him Trentadue's death was a suicide.

He likewise went public with his opinion that Trentadue was likely murdered and that the government was engaged in a cover-up. Both Sen. Hatch and Dr. Jordan appeared on an NBC *Dateline* program broadcast in April 1997 and opined that the death was likely a homicide and the government was covering up a murder.

The state medical examiner also gave interviews to local media in Oklahoma City, especially the FOX News station KOKH, in which he repeatedly said he thought Trentadue had been murdered, but that it was unlikely the manner of death would ever be known, because the BOP had destroyed critical forensic evidence by cleaning the cell. Other reports about Trentadue's death appeared on CNN and ABC, in Associated Press articles, and in local print media.

Plaintiff re-filed his suit in federal court, asserting claims of defamation, false light invasion of privacy, and intentional infliction of emotional distress.

The GQ Articles

GQ magazine, a publication of Condé Nast Publications Inc. (a division of Advance Magazine Publishers Inc.), published two articles about Trentadue's death. Both articles were written by Mary A. Fischer, a Los Angeles-based senior writer for *GQ*. The first, entitled "A Case of Homicide?", was published in the September 1996 issue.

The first article focused on the known objective facts about Trentadue's death and the family's belief that the death was not a suicide as the BOP claimed.

The second article, called "Cover-Up in Cell 709A," published in the December 1997 issue of *GQ*, focused more on the government's response to the death. The second article concluded that the FBI botched the investigation from the beginning; and that the BOP initially, and later the FBI and Department of Justice, treated the death like it was a clear-cut case of suicide and engaged in conduct that the article described as a cover-up.

The opinions of Sen. Hatch (and the chief investigator for the Senate Judiciary Committee, Mike Hubbard) and of Dr. Jordan and Kevin Rowland were prominently featured in the article.

The second article detailed the phone call from Jenkins to Rowland about smelly evidence in Jenkins' car, and otherwise described Jenkins' investigation as lacking serious effort. The article said that Jenkins was replaced in December 1995 as the lead investigating agent by another FBI agent. The article also described actions of other FBI agents (after Jenkins was no longer involved in the Trentadue investigation) in trying to persuade the state medical examiner to change his "unknown" determination of the manner of death to "suicide."

Jenkins Sues

Jenkins sued originally in November 1998 in an Oklahoma state court for defamation based on the December 1997 article. The case was removed to federal court and assigned to Hon. Tim Leonard (the judge to whom the *Trentadue v. U.S.* case was assigned).

In February 2002, Jenkins voluntarily dismissed his suit. A year later, after retaining new counsel, plaintiff re-filed his suit in federal court, asserting claims of defamation, false light invasion of privacy, and intentional infliction of emotional distress. (The suit was re-filed after *GQ* and Fischer settled two other cases—one by another FBI agent and the other by a FTC prison guard—which were also based on the second *GQ* article.)

The re-filed suit also named Attorney General John Ashcroft, the FBI, and two of Jenkins' former superiors, Bob Ricks and Richard Marquise, both of whom had served as the Special Agent in Charge of the Oklahoma City office. Jenkins alleged that Ricks and Marquise had defamed him by statements made to other media or to federal investigators, and that the FBI and Attorney General were legally responsible in damages as well.

The government's motion to dismiss the claims against all the federal defendants except Ricks was granted in May 2003. A couple of weeks later, Jenkins dismissed the suit against Ricks, leaving *GQ* and Fischer as the defendants in the case. The re-filed suit was assigned to Hon. Stephen P. Friot.

While Jenkins' first suit was pending, the Department of Justice Office of Inspector General conducted an internal in-

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vestigation into how the BOP and the FBI had handled the Trentadue investigation. It privately issued a blistering report in November 1999 that concluded, among other things, that Jenkins mishandled Trentadue evidence on three occasions (including leaving evidence in the trunk of his car, as Rowland had claimed) and that he had lied to a federal grand jury and to OIG investigators about it.

The FBI Office of Professional Responsibility (OPR), following the OIG investigation, conducted an inquiry of its own and arrived at the same conclusion. Jenkins was terminated from employment with the FBI in September 2001 for lying under oath.

Pretrial Proceedings

After the plaintiff filed two amended complaints, the defendants moved to dismiss his complaint on various grounds, including arguments that the statements about Jenkins either were not defamatory, were expressions of opinion, or were merely allegations made by other public officials the accurate reporting of which could not be actionable.

The motion also raised a statute of limitations argument with respect to false light and intentional infliction claims, which had not been included in the original complaint. The court denied the motion in September 2003, saying the claims, all of which arose out of the same transaction, were not time-barred, and suggesting that the remaining arguments could best be addressed in a summary judgment motion.

The court subsequently allowed the defendants to file two summary judgment motions. The first was directed to the issue of the plaintiff's public or private status; the second went to the merits of his claims. The court granted the first motion, holding that Jenkins was a public official because he was the lead agent for the FBI in the Trentadue investigation and, as such, had some discretionary authority about the course of the investigation which had been criticized in the *GQ* article.

Later, the court denied the summary judgment motion on the merits in a short order that said he could not determine, on the record presented, that there were no genuine issues of fact. The defendants' merits summary judgment motion was supported by more than a hundred exhibits, most of them internal FBI documents from the Trentadue investigation.

However, when the summary judgment motion was filed in April 2004, the defendants had not yet been granted access by the Department of Justice to current and former FBI personnel whose testimony was critical to the development of the facts pursuant to so-called *Touhy* regulations, 28 C.F.R. §§ 16.1 *et seq*.

Jenkins' argument against summary judgment was primarily that the supporting documents contained hearsay, and without explanatory testimony by witnesses they could not be considered. The court seemed reluctant to pick and choose among exhibits in support of the summary judgment motion, or to justify consideration of them under specific rules of evidence, so he denied the motion without elaboration.

The court excluded the testimony of a proposed expert witness, a journalism professor who was prepared to opine that the GQ article had been published with actual malice.

Expert Excluded

The court did grant the defendants' motion *in limine* and excluded the testimony of a proposed expert witness, a journalism professor who was prepared to opine that the *GQ* article had been published with actual malice, mostly because the writer relied on what the professor considered to be "suspect" sources and because she tried but failed to get comment from Jenkins about the telephone call to Rowland regarding evidence in his car.

The professor took the view that in such a "he said/he said" situation, unless the reporter was able to verify the fact and content of the telephone call from both participants in the call, the reasonable reporter could not report about the call.

The professor could not cite any recognized journalism standards to support his view but said simply that is what reasonable journalists would do. In ruling on the defendants' *Daubert/Kumho Tire* challenge to the expert, the court said that while the professor appeared to be qualified to express expert opinions, his proposed testimony did not meet the test of "fit" between the facts he knew or assumed to be true and the opinions he expressed.

The court said that the journalistic failings perceived by the professor, especially the failure to get comment from

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both participants to a telephone call, did not rationally bear on whether the reporter actually believed the information reported about the phone call based on the sources she did have available.

The Trial

The jury, which consisted of eight women, was selected on August 9 and testimony began a week later, on August 16, 2004. At the defendants' request, the court gave pre-instructions to the jury outlining the elements of the plaintiff's three claims and focusing the jury's attention on the requirement that the plaintiff prove *New York Times* actual malice (the court used the terms knowing falsity or reckless disregard of the truth) in order to recover on any theory of liability.

Each member of the jury was provided a full-color copy of the article, and the article was read (recorded on a CD by a professional reader) and displayed on a large screen before opening statements.

Most of the first week of trial was taken up with the examination of the plaintiff and Mary Fischer. Each witness was on the stand for about two days.

Plaintiff's Testimony

Jenkins contended that the article was false and that he had suffered emotional distress as a result of its publication. He adamantly denied that he had mishandled evidence by failing to turn it in to the FBI evidence room or that he called Rowland about getting the smell of a decomposed body out of his car.

He insisted that he turned the evidence in on August 22 (the day after it was picked up from the medical examiner's office by another FBI agent) and that any documentation which showed otherwise was the result of errors by the evidence technician.

Jenkins gave conflicting explanations, however, why the "green sheet" prepared by him in his own handwriting to accompany the evidence when it was turned in bore the date of September 8 – two and a half weeks after Trentadue's death. Jenkins denied that the FBI "botched" the investigation as *GQ* had reported and he contended that the investigation was thorough and well-directed.

He vehemently disagreed with the conclusion of the OIG that Jenkins had mishandled evidence and lied about it, contending that FBI management was out to get him because he was African-American and a whistle-blower.

Reporter's Testimony

Fischer explained the process of investigating and editing an article for *GQ*. She identified her sources (there were no confidential source issues in the case) and the documents she had available to her before the article was published, and explained why she believed what she wrote to be true.

The plaintiff's primary approach in attacking Fischer was to pick on minor errors in facts, many of which did not relate to the reporting about Jenkins. For example, the article reported that Trentadue's "skull was cracked in three places."

Fischer testified that she arrived at that conclusion after talking with Dr. Jordan and Jesse Trentadue, looking at the autopsy report, and examining photographs of Trentadue's body. The plaintiff pointed out, however, the autopsy report did not show three skull "fractures," and Fischer withstood more than an hour of examination explaining how she believe it was correct to describe, in non-medical terms, three deep head wounds as a skull being "cracked" in three places.

Most of the trial testimony other than Jenkins and Fischer came from Kevin Rowland, who described the call from Jenkins and who supported Fischer's reporting in virtually every detail; from former FBI agents, who testified about Jenkins' handling of the Trentadue investigation; and from Jesse Trentadue.

The plaintiff presented testimony of several former FBI employees who criticized the job performance of the evidence technician to whom Jenkins turned in the putrefied evidence, but none of whom had any specific knowledge about the handling of the Trentadue evidence. Most of the former FBI agents called as defense witnesses resided far from Oklahoma and were not available to testify in person, and the defendants were challenged to make the reading of their depositions interesting.

At the close of the plaintiff's case, the court granted the defendants' Rule 50 motion in part and denied it in part.

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The court dismissed the plaintiff's intentional infliction claim but allowed the defamation and false light claims to go to the jury.

As the court saw the issues, the article could reasonably be read, as the defendants contended, to accuse Jenkins of being part of a "botched" investigation by the FBI (the "botched investigation contention").

The defendants argued that the article in that respect was substantially true (if saying the FBI botched the investigation was viewed as a statement of fact) or was merely an opinion based on the substantially true facts disclosed in the article. In any event, the defendants argued, there was not clear and convincing evidence of actual malice.

The court agreed and ruled that the botched investigation contention would not go to the jury. However, the court ruled that the article could reasonably be read as well to imply that Jenkins had consciously suppressed evidence in an effort to steer the investigation to a particular conclusion or to cover-up a murder (the "cover-up contention"). The court ruled that there was a jury issue in that regard and denied the defendants' Rule 50 motion to that extent.

The defendants' closing was very fact-specific and did nothing more than say he was the lead agent in a botched FBI investigation, which was either true or an opinion.

After the close of all the evidence, the court again denied the defendants' Rule 50 motion. Counsel worked with the court's law clerk for a couple of hours on instructions, then the judge himself spent about three hours with counsel going over the instructions, which were exceptionally detailed.

The court instructed the jury about the two "contentions," and said that the court had determined as a matter of law that the plaintiff was not entitled to recover on the "botched investigation contention." The court said the issue for the jury was whether the plaintiff had sustained his burden of proof with respect to the "cover-up contention." The plaintiff registered no objection to the jury instructions.

Closing Arguments

In closing argument, the plaintiff spent little time talking about the facts and tried an emotional approach with the jury – how the plaintiff always had to fight an uphill battle against life, and how destructive to him the *GQ* article had been.

The defendants' closing was very fact-specific – the specific language of the article did not accuse Jenkins of engaging in a conscious cover-up of a murder and did nothing more than say he was the lead agent in a botched FBI investigation, which was either true or an opinion *GQ* had a right to express based on the information available to it when the article was published.

The defendants focused on the belief by Fischer and the *GQ* editors (who testified by deposition) that what was published was true and well-supported by the views of Sen. Hatch, Dr. Jordan, Rowland, and others. The defendants spent little of the closing arguments on damages but pointed out that all of the medical and psychological problems about which Jenkins complained started long before the article was published and seemed to be related to the stress of his job, a divorce, the Oklahoma City bombing, and internal investigations of him by the Department of Justice OIG and FBI Office of Professional Responsibility which eventually led to his termination from FBI employment.

The jury deliberated about two hours before returning a unanimous verdict for the defendants on both of Jenkins' claims. In discharging the jury with its thanks, the court invited the members of the jury to visit with him in chambers after the trial if they had any questions about the trial process or suggestions how to improve jury service, but the judge instructed jury members that local rules prohibited counsel for the parties from having any contact with the jury.

Judgment for the defendants was entered on the jury verdict on August 25, 2004. It is unknown at this time if the plaintiff will appeal to the United States Court of Appeals for the Tenth Circuit.

Jenkins was represented by Roland V. Combs III and Cynthia D'Antonio of Roland Combs & Associates and Aletia Haynes Timmons of Timmons & Associates, all in Oklahoma City.

Robert D. Nelon and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelson in Oklahoma City, represented the defendants.

Judge Denies NY Times Reporter's Motion to Quash Subpoena in CIA Leak Probe

By George Freeman

A federal judge has denied *New York Times* reporter Judith Miller's motion to quash a grand jury subpoena which was part of a Special Prosecutor's investigation into the potentially illegal disclosure of the identity of CIA Agent Valerie Plame. *In Re Special Counsel Investigation*, No. 04-407, 2004 WL 2059555 (D.D.C. Sept. 9, 2004)

In a sealed opinion issued September 9, 2004, and released a week thereafter, Chief Judge Thomas Hogan of the U.S. District Court for the District of Columbia ruled there was no reporter's privilege which could protect the reporter from being compelled to testify about her confidential sources.

The decision sets the stage for Special Prosecutor Patrick Fitzgerald's motion to hold Ms. Miller in contempt, a motion which is likely to be heard by the court in early October.

Focusing on the Branzburg holding in the context of a grand jury proceeding, the court concluded that subsequent growth of the law could simply not trump the Supreme Court's ruling.

Common Law Privilege

The judge's opinion deals mainly with Ms. Miller's assertion of the reporter's privilege grounded in common law. The judge had disposed of the more traditional arguments based on constitutional law and the U. S. Supreme Court's decision in *Branzburg v. Hayes* in an earlier opinion in July which had similarly denied motions to quash filed by *Time* magazine reporter Matt Cooper and NBC's Tim Russert. *See MLRC MediaLawLetter* Aug. 2004 at 11.

Russert and Cooper thereafter testified; however, after Cooper's testimony he was re-subpoenaed in a much broader subpoena than the original. *Time* and Cooper have moved to quash that second subpoena and, before long, may well be involved in the same appeal as *The Times's* Miller.

Interestingly, Ms. Miller never wrote an article about Ambassador Joseph Wilson or his wife Valerie Plame, a fact which distinguishes her case from that of the other reporters who have been subpoenaed. (Strangely, Robert Novak, the columnist who first published that Ms. Plame was a CIA agent, has not publicly revealed what part, if any, he has played in the investigation, if he has been subpoenaed, or how he has responded.

Another reporter who was subpoenaed, Walter Pincus of the *Washington Post*, has also testified, but has done so by apparently discussing the substance of conversations with government employees, without specifically naming them on the record.)

The judge incorporated into his opinion the July opinion denying the earlier motion to quash, an opinion focused on rejecting the constitutionally-based privilege. Although Ms. Miller repeated those arguments in her moving papers, she also hinged her argument on the common law privilege based on Federal Rule of Evidence 501 which states that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."

Relying on precedents stating that the rule gave the courts authority to continue the evolutionary development of privileges and to leave the door open to change, Ms. Miller pressed the notion that given the many developments in reporter's privilege law since *Branzburg* – including the enactment of shield laws in the majority of states and the recognition of the privilege in almost all states and federal circuits – the court should recognize the common law privilege.

Analyzing Branzburg

Judge Hogan denied the invitation, stating that although *Branzburg* was decided 3 years prior to Rule 501, the *Branzburg* court had already undertaken the analysis of whether the public benefit at issue in recog-

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nizing the privilege outweighed the need for probative evidence in a case.

Therefore, focusing on the *Branzburg* holding in the context of a grand jury proceeding, the court concluded that *Branzburg* had already answered the question, and that the subsequent growth of the law could simply not trump the Supreme Court's ruling.

Since *Branzburg* provided that in the grand jury context a subpoena was enforceable as long as the investigation was valid and in good faith, the court refused to recognize the privilege here

The court wrote starkly that in *Branzburg*

> *"the Court pitted a Constitutionally-based protection of the press against society's need to fight crime, and concluded that the need to protect society from crime was more important than the burden on newsgathering. Here, Ms. Miller asks the court to repeat the same balancing test, but instead of supporting her argument with a weighty claim of First Amendment protection, she bases it on a privilege allegedly created through case law and Rule 501."*

The court declined to come to the opposite conclusion than the Supreme Court in *Branzburg*, concluding:

> *"Ms. Miller has no privilege, based in the First Amendment or common law, qualified or otherwise, excusing her from testifying before the grand jury in this matter. Therefore, under the holding in Branzburg and its progeny, Ms. Miller must fulfill her obligation, shared by all citizens, to answer a valid subpoena issued to her by a grand jury acting in good faith."*

Since it did not recognize a privilege, the opinion did not even reach the traditional three-part balancing test urged by Ms. Miller. She may have argued that if the balancing test were applied, she should be allowed to see the Special Prosecutor's submissions to the court with respect to both the asserted critical nature of the testimony sought and the government's exhaustion of alternative sources. It would appear that the government's submission of an affidavit ex parte to explain those matters could be a deprivation of due process to a reporter possibly facing jail.

Moreover, she may have argued that, even under *Branzburg*, it was doubtful that the government had a legitimate need for her testimony and notes since numerous government employees (as well as several journalists) had apparently testified to the grand jury about the very matters the Special Prosecutor had sought her testimony.

Thus, her testimony could well be cumulative. In addition, since the original investigation into what member of the administration leaked Ms. Plame's name, reportedly in retaliation for her husband's Op-Ed piece in *The New York Times* critical of the Administration, appears political in nature, questions certainly can be raised regarding whether the political nature of the inquiry and the lack of apparent jeopardy to Ms. Plame should be weighed against the First Amendment values Ms. Miller was trying to protect.

Other than the judge's opinions, everything else in the case has been sealed and closed, because the proceeding is appertenant to a grand jury proceeding, but notwithstanding that virtually no information about grand jury evidence has been referred to in the briefs and oral argument, which, itself, was closed.

George Freeman, counsel at The New York Times, represented the reporter in this matter with Floyd Abrams of Cahill Gordon & Reindel LLP. Jack Weiss and Theodore Boutrous of Gibson, Dunn & Crutcher LLP prepared an amicus brief on behalf of 18 media companies arguing that a common law privilege under Fed. R. Evid. 501 applied in this and related matters before Judge Hogan.

Michael Moore Wins Partial Dismissal Of Suit Over Movie but DVD Held to Be Republication

By Herschel P. Fink

Film maker Michael Moore has won partial summary judgment in a libel and commercial appropriation action against him by James Nichols, brother of Oklahoma City bomber Terry Nichols, arising from Nichols' appearance in Moore's Academy Award winning documentary, *Bowling for Columbine*. *Nichols v. Moore*, No. 03-74313, 2004 WL 2039356 (E.D. Mich. Sept. 3, 2004).

A portion of the case will continue, however, under a novel ruling on the impact of the DVD version of the film on the "single publication rule."

Right of Publicity Claim Rejected

U.S. District Judge Paul D. Borman rejected Nichols' claim that Moore tricked him into giving an on-camera interview and then "commercially exploited" his appearance in the film and its advertising, finding that such a claim is barred by the First Amendment.

Judge Borman wrote in his 24-page opinion that "courts have been consistently unwilling to recognize the right of publicity cause of action where the plaintiff's name or picture was used in connection with a matter of public interest, be it news or entertainment." *Bowling for Columbine*, Judge Borman wrote, "addresses a matter of important public concern, to wit: the prominence of violence in American society."

Libel Claim

James Nichols also claimed in his lawsuit that Moore libeled him by implying in the film's narration and in a subsequent appearance on the *Oprah* show that he was involved in the bombing conspiracy with his brother, Terry Nichols, and Tim McVeigh.

All three had lived together for a while on James Nichols' Michigan farm before the bombing, and James Nichols himself was initially indicted on conspiracy charges. Ironically, it was Judge Borman who dismissed those conspiracy charges against James Nichols almost 10 years ago. The libel action was assigned to Judge Borman by blind draw.

Moore's motion also argued that Nichols' libel claims were barred by Michigan's one year statute of limitations. Judge Borman agreed that the suit was untimely as to the film and Moore's *Oprah* appearance.

The judge also held that Nichols' "tag along" claims of false light and intentional and negligent infliction of emotional distress were also subject to the one year defamation limitations period, and not the general tort three year period.

DVD Release is Republication

But, in a ruling of first impression, Judge Borman held that the subsequent issuance of the film on DVD constituted a "republication" that was outside the "single publication rule."

> ***In a ruling of first impression, Judge Borman held that the subsequent issuance of the film on DVD constituted a "republication."***

Judge Borman did conclude that a later "rerun" of the *Oprah* broadcast was covered by the single publication rule, relying on New York case law, but, the DVD was another matter. *Citing Zoll v Jordach Ent., Inc.*, 2002 U.S. Dist. LEXIS 24570 at *25; 31 Media L. Rep. 1779 (S.D. N.Y. Dec 24, 2002) (unpublished opinion), the court held that "the critical and controlling factor to be considered in determining whether a subsequent item is a 'republication' is whether the publication has been substantially modified."

Ignoring the undisputed fact that the DVD version of the film is identical to its theatrical release, Judge Borman found that the DVD's "special features," including an interview with Moore and an audio commentary, constituted the necessary "modification." (The lawsuit did not allege that anything contained in the "special features" was actionable.)

The judge also found that an additional "republication" factor was that the "DVD was intended to reach a new audience, to wit: those persons who were either unwilling or unable to attend a screening of the film at a theater, and those who wish to view the 'Special Features' included in the DVD."

A number of Judge Borman's findings will be important in the next summary judgment motion addressing the merits. The judge made findings that demonstrate the "vortex" public figure status of Nichols.

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Michael Moore Wins Partial Dismissal Of Suit Over Movie but DVD Held to Be Republication

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The court wrote that

> "Plaintiff was involved, time and again, in the media relating to one of the central stories of the Film, to wit: the Oklahoma City Bombing. The Court takes judicial notice of the fact that Plaintiff voluntarily appeared for numerous media interviews subsequent to dismissal of the charges in the Eastern District of Michigan. The Court further notes that Plaintiff has co-authored a book, titled 'Freedom's End: Conspiracy in Oklahoma,' discussing the Oklahoma City Bombing."

The opinion also sets the stage for a "fair reports" privilege defense, citing Nichols' 1995 grand jury indictment for making "destructive devices" with his brother Terry and Tim McVeigh, the very thing he claims Moore falsely reported in the film, while also stating that "the feds didn't have the goods on James so the charges were dropped."

Herschel P. Fink of Honigman Miller Schwartz and Cohn, Detroit, represents Michael Moore in this action. Plaintiff is represented by Stefani C. Godsey, Lansing, MI.

Libel Complaint Against *San Diego Reader* Dismissed

A California appeals court granted an anti-SLAPP motion striking a libel complaint against *The San Diego Reader*, a reporter, an editor and the *Readers* owner (the *Reader* defendants), as well as a named source quoted in the complained of publication. *Huff v. Holman*, No. D042059, 2004 WL 1932723 (Cal. App. 4th Dist. Aug. 31, 2004).

At issue was a lengthy article entitled "Harlem West Hustle" which detailed financial and organizational problems with a festival held in San Diego. Among other things, the article reported that several musicians and suppliers of the "Harlem West Festival" were not paid, and that the festival was marred by low attendance and cancellations.

Plaintiff, a promoter of the festival, sued the *Reader* defendants, as well as other sources quoted in the article. The trial court granted the anti-SLAPP motions of various sources, but denied the *Reader* defendants' motion to strike, as well as that of one source who described plaintiff as a "low-class hustler."

"Low-Class Hustler" is Opinion

The court first ruled that the source's description of plaintiff as a "low-class hustler" was not a provably false assertion of fact, notwithstanding one dictionary definition of "hustler" as a person involved in "underhanded activity."

The court found that in context the phrase was "colloquial" and used as a "lusty and imaginative expression of contempt." *Citing Selig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798 (2002) (calling plaintiff "chicken butt" on a radio show was not actionable).

Retraction Notice

As to the *Reader* defendants, the court first found that plaintiff failed to comply with California's retraction statute, Cal. Civ. Code § 48A. Under that section, a libel plaintiff who fails to request a correction prior to suit is limited to recovery of special damages. Here plaintiff, who conceded public figure status, failed to claim any special damages.

Plaintiff did write a colorful letter threatening the newspaper with a lawsuit. In a letter to the paper's owner, plaintiff wrote "your disgusting piece of toilet paper has really done it now. But I'll own it, if you do not retract that article immediately. If you think you can get away with calling me a low-life hustler ... you have another though [sic] coming."

The court found that the general demand to "retract the article immediately" was inadequate to put the newspaper on notice as to what statements were allegedly false, particularly with respect to a lengthy article.

The only specific complaint in the letter was over the phrase "low-class hustler" and the court noted it had already found that phrase non-actionable.

No Actual Malice

Finally the court held that there was insufficient evidence of actual malice against the *Reader* defendants. Notably, the court found that plaintiff's prepublication denial to the newspaper that she owed money to performers and vendors was not evidence that the paper published the article with serious doubts as to the truth of the charges.

Richard Spirra of Luce, Forward, Hamilton & Scripps represented the *Reader* defendants.

Summary Judgment Denied in Libel Suit Over Learning Channel Broadcast

A federal court in New York recently denied summary judgment to Discovery Communications, Inc., ("DCI"), potentially clearing the way for a rare media libel trial in New York. *Lehman v. Discovery Communications, Inc.*, No. 01 CV 4211 ADS WDW, 2004 WL 1941177 (E.D.N.Y. Sept. 1, 2004) (Spatt, J.).

The court first held that the action was not barred by the "single publication rule" and that issues of fact existed as to whether defendant acted with gross irresponsibility – New York's fault standard for private figure claims involving matters of public concern.

Program on Undercover Stings

Plaintiff, a now retired orthopedic surgeon, was one of twenty individuals arrested as a result of a two-year undercover sting operation in Nassau County, New York known as "Operation Backbone," which targeted automobile, disability and worker's compensation insurance fraud. The Nassau County District Attorney's office charged plaintiff with insurance fraud, but he was later acquitted following a jury trial in March of 1999.

The same month plaintiff was acquitted, DCI began airing a television program entitled "World's Most Outstanding Undercover Stings," which included a segment on "Operation Backbone." The program was put together by an independent production company that is not a defendant in the case.

Several video clips of the sting operation were shown, including one showing plaintiff very briefly in undercover footage where his head was barely visible. Another clip showed the mug shots of plaintiff and two other health care providers who were convicted of insurance fraud, with the narrator warning individuals about the hazards accompanying the falsification of insurance claims.

The program aired on the Learning Channel seventeen times from March 21, 1999 until May 24, 2001. On June 21, 2001 plaintiff commenced an action against DCI for libel and slander over the May 24, 2001 broadcast. DCI never had a complaint from anyone about the 16 other times the show aired.

Single Publication Rule Rejected

DCI argued that the "single publication rule" applied to the claims over the May 24th broadcast and that therefore they were barred by New York's one year statute of limitations, citing among other cases *Zoll v. Jordache Enter., Inc.*, No. 01 CV 1339, 2003 U.S. Dist. LEXIS 6991 (S.D.N.Y. Apr. 22, 2003) (statutory misappropriation claim).

In *Zoll*, a federal court in the Southern District of New York held that the "single publication rule" applied to the rebroadcast of a 1970's era commercial even where the publication obviously reached a new audience. The court reasoned that whether a publication is designed to reach a new audience is merely a factor in determining whether there has been a republication and, in fact, required that there be some modification to the original publication for there to be an actionable republication.

The court analogized the rebroadcast to the publication of a morning and evening edition of a newspaper, concluding that here each broadcast of the program was intended to reach a new audience and was therefore actionable.

Here, though, the court rejected the argument, distinguishing *Zoll* as a privacy claim and relying instead on the *Restatement (Second) of Torts* § 577A subs (1) comt that "each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises."

The court analogized the rebroadcast to the publication of a morning and evening edition of a newspaper, concluding that here each broadcast of the program was intended to reach a new audience and was therefore actionable. *Citing, e.g., Firth v. New* York, 98 N.Y.2d 365, 369-70, 747 N.Y.S.2d 69 (2002).

Gross Irresponsibility

The court next addressed the defendant's argument that it was entitled to summary judgment because it was not "grossly irresponsible" in reporting on a matter of legitimate public concern.

The court laid out the criteria governing grossly irresponsible conduct for a publisher, finding that before im-

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Summary Judgment Denied in Libel Suit Over Learning Channel Broadcast

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posing liability under such a standard a court would consider whether a defendant:

"1) followed sound journalistic practices in preparing the allegedly defamatory article; 2) followed normal procedures, including editorial review of the copy; 3) had any reason to doubt the accuracy of the sources relied upon and thus a duty to make further inquiry to verify the information; and 4) could easily verify the truth."

While the plaintiff conceded that the broadcast involved a matter of public concern, in a brief paragraph, the court concluded that issues of fact existed as to DCI's fault. Plaintiff alleged that DCI did not check public records, request documentary proof or contact the plaintiff. Although the program was produced by a separate production company, the court concluded it had to deny summary judgment where DCI's papers were "completely silent as to the practices surrounding the broadcast of its television program" with no "affidavits explaining the standard procedure for DCI in broadcasting a program or stating that its methods are standard practice in its industry."

The issue at trial will be whether DCI grossly departed from industry standards in relying on a reputable production company to produce the report.

Plaintiff proceeded pro se. Steven Rosenfled of Ohrenstein & Brown, LLP represented defendant Discovery Communications, Inc. on the summary judgment motion.

Petition for Cert. Filed in Morris Communications v. PGA

Morris Communications has filed a petition for certiorari with the U.S. Supreme Court on its novel claim that the PGA is violating antitrust law by restricting news organizations from reporting and syndicating realtime golf scores.

In March 2004, the Eleventh Circuit dismissed Morris' claim, holding that the PGA has a "proprietary interest" in the golf scores and a valid business justification to control the market for these scores, concluding that Morris Communications was essentially seeking to "free ride" on scores collected at the PGA's expense. *Morris Communications Corp. v. PGA Tour, Inc.*,364 F.3d 1288 (11th Cir. 2004), *pet. for cert. filed*, 73 USLW 3146 (Aug. 26, 2004)(No. 04-266). *See also MediaLawLetter* April 2004.

The Eleventh Circuit dismissed Morris' claim, holding that the PGA has a "proprietary interest" in the golf scores and a valid business justification to control the market for these scores.

The Eleventh Circuit's decision, however, did not discuss the legal basis of the PGA's "proprietary interest" beyond emphasizing that it *was not* based on copyright or any other intellectual property law. Nor did the court adequately explain how a news organization can "free ride" by disseminating or selling newsworthy facts from a sporting event – at least for purposes of antitrust law.

The questions in the petition are: 1) Can an entity expand the carefully circumscribed protections that Congress provided in the Copyright Act and assert exclusive control of public domain facts simply by including "copyright-like" restrictions in a standard form contract? 2) Under Section 2 of the Sherman Act, is articulation of a non-pretextual business justification an absolute defense to liability that obviates any need to assess the relative harms and benefits to overall consumer welfare resulting from the challenged conduct?

The petition for certiorari was filed by Donald B. Verrilli, Jr., Ian Heath Gershengorn, Ayodele T. Carroo, Jenner & Block, LLP in Washington, D.C., and George Gabel, Jr., Jerome Hoffman, Steven L. Brannock, David C. Borucke, Holland & Knight LLP, Jacksonville, Florida

SAVE THE DATE

DCS ANNUAL BREAKFAST

Friday, November 19, 2004, 7:00 a.m.

30th Floor, Reuters Building, Three Times Square, New York City

Restaurant's Libel Claim Over *Zagats* Review Dismissed

In a case of first impression involving the standards applicable to defamation claims based on anonymous consumer ratings and comments, a New York trial court recently dismissed a libel and negligence lawsuit brought by a restaurant owner against the Zagat Survey, LLC, publishers of the well-known restaurant guides. *Themed Restaurants, Inc. v. Zagat Survey, LLC*, No. 121719/03, 2004 WL 1878199 (N.Y. Sup. Ct. Aug. 19, 2004) (Lebedeff, J.).

Background

The Zagat Survey for Manhattan Restaurants ("Zagat Survey") is a well-known guide to New York's restaurant scene. Its numerical ratings are compiled from actual restaurant goers who rate an establishment's food, décor, and service. The Zagat Survey also publishes restaurant goers' comments as direct quotes or fair paraphrasings.

Plaintiff owns Lucky Cheng's, a drag queen cabaret-themed restaurant located in Manhattan's East Village. Plaintiff took offense to a review of the restaurant published in the 2004 Zagat Survey that stated that:

> *God knows 'you don't go for the food' at this East Village Asian-Eclectic – rather you go to 'gawk' at the 'hilarious' 'cross-dressing' staff who 'tell dirty jokes', perform 'impromptu floor shows' and offer 'lap dances for dessert;' obviously, it 'can be exhausting', and 'weary well-wishers suggest they 'freshen up the menu – and their makeup.'*

Out of a 30-point scale for food and service, the restaurant received a food rating of 9, and a service rating of 15. Following the publication of the review, plaintiff claimed its restaurant experienced a 35 percent drop in business.

Defamation Analysis

The court recognized that while a plaintiff bringing suit for defamation is normally required to prove the standard elements of libel – that the statement at issue is both "false and defamatory," as well as actual malice if the plaintiff is a public figure – the plaintiff's claim presented a novel legal question in that the publication was not the traditional review of an establishment by an individual diner, but rather an edited summary comprised of multiple anonymous consumer reviews.

In rejecting plaintiff's argument that such fact pattern called for an alteration of the traditional legal analysis of libel claims, however, the court concluded that such surveys may be "accommodated within the existing and accepted defamation principles."

The court recognized that collecting data has long been employed as a technique for assessing public opinion, and that such traditional means of gathering information did not necessitate the development of a novel legal standard.

Additionally, the court found that quoted opinions were "an accepted approach to conveying the remarks of others," and that the defendant's use of anonymous quotations culled from consumer surveys would not alter the guidelines governing adjudication of libel claims.

The two objectionable statements in the review were both subjective statements expressing a writer's viewpoint.

Finally, the court ruled that the defendant's use of such anonymous sources under a methodology in which it disclaimed reliance upon anything other than the submission of consumer opinions and used symbols to alert readers to mixed opinions or "low responses" negated plaintiff's claim that the use of anonymous quotations called for the imposition of a heightened or otherwise novel analysis.

Review Was Opinion

After concluding that the traditional standards for libel claims were applicable to the plaintiff's allegations, the court went on to address the defendant's contention that the review was immune from a defamation claim as an opinion protected by the First Amendment.

Recognizing that restaurant reviews are normally shielded from defamation claims in that they convey a subjective opinion about the food or décor in an establishment, the court held the defendant could nonetheless be held liable if the review included a statement of "historic fact," or a "potentially defamatory factual statement which is capable of being false and is claimed to be false."

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Restaurant's Libel Claim Over *Zagats* Review Dismissed

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The court agreed with the defendant that the review included in the Zagat Survey was nonactionable, holding that the two objectionable statements in the review – that "God knows 'you don't go for the food,'" and "weary well-wishers suggest they 'freshen up the menu- and their makeup'" – were both subjective statements expressing a writer's viewpoint.

In addition, the court found that the numerical ratings were "quintessential opinions" by consumers assessing "subjective qualities," and that a "disagreement over taste and fashion is not the stuff of defamation."

Pleading Constitutional Malice Under New York Law

The court went on to take advantage of an opportunity to "provide guidance" on the pleading standards for actual malice under New York law.

First, the court noted that the restaurant, as a public establishment, was a public figure required to plead actual malice with specificity. The allegation that the defendant "had an obligation to ensure" that the ratings provided were factually true failed this standard.

In addition, the court rejected plaintiff's claims that the defendant knew or should have known the survey could have been improved or consumers could have been screened differently, finding that such allegations only challenged the reasonableness of the methodology employed and thus would go toward establishing negligence rather than "an actual or reckless eliciting or presentation of false information."

Counsel for plaintiff was Ravi Ivan Sharma. Counsel for the named defendants was Martin London and Audra J. Soloway of Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York.

MLRC SYMPOSIUM ON THE REPORTER'S PRIVILEGE
Wednesday, November 17th, 2:30-4:30PM

On Wednesday, November 17th, in the afternoon before the MLRC Annual Dinner, MLRC will host a Symposium on the Reporter's Privilege. It will be held from 2:30-4:30 p.m. at the Copacabana in New York, the venue for the Reception and Annual Dinner.

The Symposium is being held to discuss the key issues that face the First Amendment community with regard to the privilege. How best to position the Constitutional arguments. How hard to push for a federal common law privilege. What elements should the media argue are part of a common law privilege, and drawn from which sources. Evaluating the pros and cons of seeking Supreme Court review of the privilege issues, Constitutional or common law. And whether there should be a stronger push for a federal shield law.

We are inviting an exceptional group of practitioners who are among those currently engaged in arguing these matters. But we are inviting you as well to come, join us and them to debate and thrash through these extraordinarily important matters. The Symposium will be led by Lee Levine, who served as an editor of the MLRC White Paper on the Reporter's Privilege, and Paul Smith. The panelists will include Floyd Abrams, Kevin Baine, Ted Boutrous, Jon Donnellan, and Seth Waxman.

Please RSVP (by sending an email to kchew@ldrc.com) if you are planning to attend. All MLRC members are welcome. But if you want a chair to sit on, we would urge you to let us know if you are coming!

New York Appellate Division Unanimously Dismisses Talk Show Tort Case

By Lanny A. Breuer and Mark Gimbel

On August 26, 2004, the Appellate Division of the New York Supreme Court, First Department, issued a unanimous decision directing the dismissal of a complaint filed by a minor who claimed to have been sexually assaulted while visiting New York for a taping of the *Maury Show*, a nationally syndicated talk show program. *Craver v. Povich*, 2004 WL 1900423 (N.Y. App. Div. 1st Dep't 2004).

The lawsuit, which sought to recover $25 million in damages from Maury Povich and various other individuals and corporations associated with the *Maury Show*, received considerable attention in the media. Its dismissal marks the second time a state appellate court has dismissed a high profile "talk show tort" case by applying long-established tort law principles in holding that no duty was owed by the program or its employees to the Plaintiff.

The Plaintiff's Allegations

Plaintiff Sheila Craver, a 14-year old resident of Texas at the time of the events giving rise to the complaint, alleged that her mother contacted the *Maury Show* in response to a televised solicitation for "out-of-control" teen guests.

After a number of telephone conversations in which the show's staff allegedly was informed that the Plaintiff had an extensive sexual history and was on medication for emotional illness, the Plaintiff was invited to travel to New York and appear on the program. The Plaintiff alleged that a show producer instructed her to bring sexually provocative clothing to the taping and to act in a sexually provocative manner.

The Plaintiff subsequently was flown to New York with her mother and grandmother, the latter of whom was her legal guardian, and transported to the Pennsylvania Hotel, where the family was provided with a hotel room at the program's expense.

Thereafter, at a taping of the show, the Plaintiff allegedly was separated from her mother and grandmother and placed under the care and supervision of show employees, who again allegedly urged her to act and dress provocatively.

While still separated from her guardians and under the supervision of *Maury Show* staff, the Plaintiff allegedly was approached by an individual who introduced himself as "Maury's Limo Driver." The driver purportedly complimented the Plaintiff on her good looks and sexuality, offered to "show her around town at night," and obtained her contact information in New York. At some point during this interaction, the Plaintiff's mother allegedly arrived and expressed concern to show employees, who purportedly told her not to worry and that everything was "under control."

The Plaintiff subsequently left the taping and returned to the Pennsylvania Hotel with her mother and grandmother. Later that evening, the driver allegedly called upon the Plaintiff a number of times at the hotel room she shared with her family but was turned away by the mother and grandmother. Thereafter, the Plaintiff allegedly snuck away from her family, met the driver, and was driven to a dark, secluded area, where she claims to have been raped.

In July 2002, the Plaintiff filed a $25 million lawsuit against Maury Povich and a number of individuals and corporations associated with the *Maury Show* (the "Maury Show Defendants"), asserting claims for negligence, negligence per se, negligent and intentional infliction of emotional distress, negligent hiring and retention, and slander.

The Maury Show Defendants promptly filed a motion to dismiss the Complaint for failure to state a cause of action, arguing, *inter alia*, that they had no duty to protect or supervise the Plaintiff because she was in the custody of her mother and grandmother at the time of the alleged assault.

Trial Court Decision

In November 2003, after taking the motion under advisement for nearly a year, Justice Lebedeff of the Supreme Court, New York County, issued a decision granting in part and denying in part the Maury Show Defendants' motion to dismiss.

The judge dismissed the Plaintiff's negligent infliction of emotional distress, negligence per se, and slander claims, but sustained the claims for negligence and negligent hiring and retention. In sustaining the negligence claim, Justice Lebedeff rejected the Maury Show Defendants' principal argument that the duty to protect and supervise a minor is coextensive with physical custody and control, reasoning that a "caretaker is not automatically exempt from responsibility merely because of a suspension of physical supervision of an injured minor where, as here, the conditions created by the

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NY Appellate Division Dismisses Talk Show Tort Case

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caretaker are still in effect." *Sheila C. v. Povich*, 768 N.Y. S.2d 571, 577 (N.Y. Sup. Ct. 2003), *rev'd*, 2004 WL 1900423 (N.Y. App. Div. 2004).

The Maury Show Defendants filed an immediate appeal, and the Plaintiff subsequently filed a cross-appeal challenging the court's dismissal of her negligence per se and emotional distress claims.

Appellate Division Decision

On August 26, 2004, the Appellate Division issued a unanimous decision directing that the Plaintiff's Complaint be dismissed in its entirety. In dismissing the Plaintiff's core negligence claim, the court relied on a long line of New York cases, beginning with the Court of Appeals decision in *Pratt v. Robinson*, 39 N.Y.2d 994 (1979), which establish that the duties owed by temporary custodians of minors are coextensive with physical custody and control and terminate once a child is returned to a parent or guardian.

In light of these cases and public policy considerations, the Court rejected the Plaintiff's argument that the Maury Show Defendants had a continuing duty to protect and supervise her even after she left the custody of show employees:

> *Carried to its logical conclusion, the expanded orbit of duty urged by the Plaintiff would have required defendants to not only return her safely to her guardians, but to then continue to monitor the adequacy of the supervision provided by her guardians and, perhaps, to provide round-the-clock surveillance. It is also unclear if the duty the Plaintiff seeks to impose on defendants would terminate at the airport, once the Plaintiff was home in Texas, or at some later date.*
>
> * * *
>
> *[T]o expand the duty of care here to encompass the Plaintiff, who had left defendants' physical custody and control and was returned to the supervision of her guardians, would place individuals that provide temporary care and supervision to minors at grave risk to a prohibitive number of lawsuits and concomitant liability.*

Craver, 2004 WL 1900423, at *4-5.

In addition to reaffirming longstanding limitations on the duties owed by nonparent custodians, the decision is significant because it is the first to apply, in the talk show context, the New York rule that a cause of action for negligent or intentional infliction of emotional distress must be supported by allegations of outrageous conduct "'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at *7 (*quoting Murphy v. Am. Home Prods. Corp.*, 58 N. Y.2d 293, 303 (1983)).

The decision is significant because it is the first to apply, in the talk show context, the New York rule that a cause of action for negligent or intentional infliction of emotional distress must be supported by allegations of outrageous conduct.

According to the court, the Plaintiff's allegation that employees of a talk show encouraged her to "act provocatively, and allowed her to be introduced to a purported rapist, with whom she later had a voluntary meeting, well after she was no longer in the physical custody of defendants, simply does not rise to the level of conduct necessary to sustain either cause of action." *Id.*

The decision makes clear that emotional distress claims against talk shows will be subject to the same rigorous scrutiny at the pleading stage as emotional distress claims against other defendants.

Implications for "Talk Show Torts"

Craver v. Povich is the second case in which an appellate court has thrown out a lawsuit brought by a plaintiff who claims to have been injured after appearing on a talk show.

In *Graves v. Warner Bros.*, 253 Mich. App. 486 (Mich. Ct. App. 2002), the Michigan Court of Appeals vacated a $29 million jury verdict in favor of the estate of a man who was killed after appearing on the *Jenny Jones Show* and admitting a homosexual crush on another show guest, who proceeded to murder him several days later.

In vacating the jury verdict, the court applied traditional tort rules circumscribing the duties owed by a business

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NY Appellate Division Dismisses Talk Show Tort Case

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owner to an invitee and held that the defendants owed no duty to the protect the victim once he left the show's studios. *Id.* at 497-98. Collectively, the decisions in *Craver v. Povich* and the Jenny Jones case suggest considerable judicial aversion to what Justice Lebedeff, the trial judge in the *Craver* case, characterized as the "emerging category of Talk Show Torts," *Sheila C.*, 768 N.Y.S.2d at 574.

If any lesson can be drawn from the two decisions, it is that novel "talk show tort" claims are not likely to succeed where they collide with traditional tort law principles.

Lanny Breuer, a partner at Covington & Burling in Washington, DC, and Mark Gimbel, an associate in the firm's New York office, represented The Maury Show Defendants. Plaintiff was represented by Alexander Stotland and Robert A. Burstein of Rand Rosenzweig Smith Radley Gordon & Burstein, LLP and David M. Blum of the Law Office of David M. Blum, New York.

Lawsuit Over 20/20 Hidden Camera Report to Go to Trial

Last month a California federal court denied ABC's motion for summary judgment in a lawsuit based on its use of hidden cameras for an investigative report on Hollywood acting workshops. *Turnbull v. American Broadcasting* Co., No. CV 03-3554 SJO (FMOx) (C.D. Cal. Aug. 19, 2004) (Otero, D.J.).

Despite the generally open nature of the acting workshops and their purpose of furthering participants acting careers, the court – in a notably harsh opinion – found that the operators and participants in the workshops could have a reasonable expectation of privacy and that the filming could be "highly offensive."

Background

In February 2002, California's Labor Commission began an investigation into certain Southern California acting workshops for allegedly violating the state's Labor Code by charging actors to meet casting directors.

The Commission issued a cease and desist letter to 14 workshops finding that their primary and overriding purpose was "to extract fees from veteran and aspiring actors for the opportunity to audition before casting directors." California's Labor Code prohibits employers from charging applicants fees as a condition of obtaining employment.

In March 2002, ABC's *20/20* investigated the workshop controversy. A producer, Yoruba Richen, enrolled in several workshops in the Los Angeles area, paying fees of approximately $25-30 each time. Fifteen to 20 actors attended these workshops. Using a concealed camera, she recorded footage of the workshops, portions of which were broadcast in November 2002 during sweeps week.

After the broadcast the Department of Labor reached an agreement with the workshops, permitting them to operate after they made various changes to their procedures and with the disclaimer that they were educational only and not for purposes of employment.

After the broadcast, several workshop operators and participating actors sued ABC for eavesdropping under California Penal Code § 632, common law and statutory invasion of privacy, intentional infliction of emotional distress, and trespass. Plaintiffs alleged the program made them look like "whores" and desperate losers on the fringe of the acting community in Los Angeles.

Plaintiffs dropped their claim for intentional infliction of emotional distress and all the other claims were addressed by the district court's August 19, 2004 decision.

California's Eavesdropping Statute

The court first addressed ABC's argument that it had not violated Cal. Penal Code § 632, which bars the recording of a confidential communication by means of an electronic amplifying or recording device when done intentionally and without the consent of all parties to the communication.

Under Cal. Penal Code § 632(c), the term "confidential communication" is defined in relevant part as:

> *any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties*

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> *thereto, ..., but excludes a communication made ... in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.*

Under the statute, a communication is confidential if a participant has an objectively reasonable expectation that the conversation is not being overheard or recorded. *See Flanagan v. Flanagan*, 27 Cal. 4th 766 (2002). ABC contended that each plaintiff was clearly aware that his or her conversations were being overheard by the ABC producer and others present for the workshops, which occurred in a large meeting room. The District Court appeared to hold, however, that plaintiffs need only show that they did not expect that the conversations would be recorded, and that plaintiffs could recover under the Penal Code section even if they reasonably expected that the conversations could be overheard.

The district court also concluded that because of the small size of the workshops and their "private" nature, a triable issue of fact existed as to whether plaintiffs had a reasonable expectation of privacy during the sessions.

The court analogized the workshops to AA meetings, anger management classes and writing workshops – where participants would not expect their statements to be recorded. The court cited as among the "private" statements recorded during the workshops one participant's imitation of a chicken, another's statement that she played "trailer trash" parts and an allegedly "overtly sexual comment" between two participants.

The court rejected what it described as ABC's inference that "because plaintiffs were attending an acting class, they must want to be famous" and "have a lower threshold of privacy rights."

Intrusion Claim

The court similarly concluded that the plaintiffs' cause of action for intrusion survived summary judgment.

Citing to *Shulman v. Group W Productions, Inc*., 18 Cal. 4th 200, 230 (1998) and *Sanders v. American Broadcasting Companies, Inc*., 20 Cal. 4th 907 (1999), the court held that plaintiffs could have a reasonable expectation of privacy within the workshop settings.

In addition, a jury could find the recordings to be "highly offensive" based on the defendants "motivation." Drawing selectively from defendants depositions, the court concluded that "the primary motive appears to be an aesthetic one" – by which the court apparently meant that while the hidden recordings would make the report more interesting or informative, they were not "essential." The court concluded that there was no justification for using hidden camera filming and suggested – without real factual support – that ABC had not followed its own protocols for hidden camera filming.

Trespass

While ABC argued that the plaintiffs' trespass claim was precluded by a workshop owner's consent to Richen's attendance at the workshops, the court found that ABC could still be held liable upon a showing that the scope of consent was exceeded by defendants' actions.

The court noted that aside from the fact that the workshop owner would have declined a request by ABC to film the actors in that video cameras and recorders were banned in the workshops, at least one workshop sign-in sheet advised participants that

> "by signing below, I agree that: - I am here to practice my acting . . . and sharpen my craft, - I am here to hone my audition techniques and learn from industry guests . . ., - I am here to develop relationships with those industry guests . . ."

The court found that such evidence created a triable issue of fact as to whether Richen exceeded the scope of consent in attending the workshops and thus denied summary judgment on the trespass claim.

Civil Code Section 1708.8

The court also permitted plaintiffs statutory "anti-paparazzi" claims to go forward under Civil Code Section 1708.08. This section became effective on January 1, 1999 and was designed to deter intrusive conduct by photographers and reporters.

The statute provides in relevant part:

(a) A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another

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without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

(b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

Following on its previous findings, the court simply concluded that the statutory claims could go forward because defendants

> "1) may have committed trespass; 2) recorded personal conversations and other matters without permission; and 3) did so in a manner that was offensive to a reasonable person."

Proposed Injunction

The court did rule that plaintiffs' proposed injunction under which defendants would be enjoined from using hidden cameras to gather news in California was overly broad in that "[t]here is a place for the lawful use of hidden cameras."

In addition, the court noted that the plaintiffs' proposed injunction raised an issue as to standing, and held that plaintiffs could not be granted relief based upon "the legal rights and interests of third parties" as such potential future plaintiffs did not share a "common factual nexus" with the operators and actors in the instant case.

Reputational Damages

ABC sought a ruling that plaintiffs were not entitled to recover reputational damages on their assorted privacy claims. The court dismissed the argument as "vague and convoluted."

The court also rejected ABC's argument that the broadcast on the controversy was covered by California's statutory fair report privilege, Civil Code § 47(d).

The court wrote that "there is no privilege, based on the first amendment or otherwise," protecting the media from liability for torts committed while gathering the news. And it added dismissively that "ABC might as well be trying to claim privilege for theft or assault."

Disgorgement and Punitive Damages

Finally, as to plaintiffs' damages, the court ruled that they could be entitled to both a disgorgement of proceeds under the anti-paparazzi statute, Cal. Civ. Code § 1708.8 (c), and to punitive damages.

The court found that the damages provision of Cal. Civ. Code § 1708.8 was devised to prevent paparazzi photographers and other journalists from selling images obtained by intrusions. As to punitive damages, the court concluded there was sufficient evidence that ABC consciously disregarded plaintiffs' privacy rights for the issue to go to the jury.

On August 30, 2004 defendants filed a notice of motion and motion for certification of questions of law for interlocutory appeal under 28 U.S.C. § 1292(b). That motion is still pending.

Plaintiffs are represented by Neville L. Johnson, Brian A. Rishwain, and James T. Ryan of Johnson & Rishwain LLP. Defendants are represented by Steven M. Perry and Lynn H. Scaduto of Munger, Tolles & Olson LLP.

Save The Date

MLRC ANNUAL DINNER

WEDNESDAY, NOVEMBER 17, 2004

6:00 p.m. Cocktail Reception
Sponsored by Media/Professional Insurance

7:30 p.m. Dinner

The Copacabana
560 W. 34th St., New York City

RSVP by Friday October 29, 2004

Update: Court Okays Damage Award in Retaliatory Firing Case

A New York federal trial court judge upheld a $30,000 jury damage award to former Brooklyn homicide prosecutor Robert Reuland who claimed Brooklyn District Attorney Charles Hynes demoted and later fired him in retaliation for statements he made to *New York* magazine, and in a book he authored, entitled *Hollowpoint*, about a fictional district attorney's office. *Reuland v. Hynes*, No. 01 CV 5661 (E.D.N.Y. Sept. 2004) (Gleeson, J.). *See also MLRC MediaLawLetter* June 2004 at 20.

Among the statements at issue was a quote from Reuland stating: "Brooklyn is the best place to be a homicide prosecutor…. We've got more dead bodies per square inch than anyplace else." The quote was included in a profile of Reuland, published in an article on New York's "young legal guns."

In June 2004 the trial court denied summary judgment to Hynes on Reuland's § 1983 claim. Accepting plaintiff's allegations as true on summary judgment, the court found that "no reasonable actor in Hynes's position could have believed his actions were lawful."

The court also concluded that at this stage, "it is a fair inference" that the novel and *New York* magazine quote involved matters of public concern – but declined to rule on the issue as a matter of law, reserving it for the jury.

Public Concern

Following a one week trial in July, the jury returned a verdict in favor of plaintiff. The jury found that plaintiff was demoted in retaliation for his statements – but also found that the statements did not involve a matter of public concern. At trial, the defense argued that the statements were not a matter of public concern because plaintiff's motive was to increase the publicity for his book. And the jury's finding arguably meant that the statements were not protected by the First Amendment.

In a post-trial motion the defendant sought to set aside the damage award as contrary to the jury's findings of fact on public concern.

In a September ruling, district court Judge John Gleeson upheld that damage award, finding that "Despite the jury's findings that Reuland did not make the statement to New York magazine to address a matter of public concern, that statement nonetheless addresses a matter of public concern."

Update: First Circuit Tells District Court to Rule on Scope of Puerto Rico's Criminal Libel Statute

Last year the First Circuit held that Puerto Rico's criminal libel statute was unconstitutional, at least in prosecutions of the media for statements about public figures. *Mangual v. Rotger-Sabat,* 317 F.3d 45 (1st Cir.2003). *See MLRC MediaLawLetter* Feb. 2003 at 15.

The Court held that the statute was unconstitutional because it did not require proof of actual malice for statements about public officials and did not recognize truth as a complete defense. The scope of the First Circuit's holding, though, was somewhat confusing. In one part of the decision the court stated that the statute is "unconstitutional on its face" because of its defects, *id*. at 67, but in conclusion "holds" the statute unconstitutional as applied to statements about public figures. *Id*. at 69.

Mangual involved a threatened prosecution of reporters for reporting on allegations of police corruption. On remand to the federal district court in Puerto Rico for entry of an injunction, the press plaintiffs sought summary judgment that the statute was also unconstitutional as applied to any statements of public concern.

The district court denied the press plaintiffs' motion, finding it was "foreclosed" by the First Circuit's ruling. In a decision this month, the First Circuit reversed and remanded, instructing the district court to rule on the merits of the press plaintiffs' motion. *de-Jesus v. Rodriguez,* 2004 WL 1948769 (1st Cir. Sept. 2, 2004) (Lynch, Lipez, Howard, JJ.).

The Commonwealth of Puerto Rico had not answered the summary judgment motion below and it is not clear whether it will attempt to defend the statute on remand.

Juan Marchand Quintero, in San Juan, represented the press defendants in this matter.

Employment Law: Defamation Claim Against Former Employer Subject to Arbitration

By Gregory P. Williams and Jim Dines

In a case involving both defamation and employment law issues, the California Court of Appeal held that an employee's claims for torts allegedly committed by his employer after his discharge, including defamation, were within the scope of an arbitration clause in his employment agreement. *Buckhorn v. St. Jude Heritage Medical Group*, 18 Cal.Rptr.3d 215, 2004 WL 1925969 (Cal.App. 4 Dist. Aug. 31, 2004) (reversing trial court's denial of a motion to compel arbitration).

Background

Plaintiff Carl Buckhorn was a physician employed by defendant St. Jude Heritage Medical Group ("the Medical Group"). At the time of his hire, Buckhorn entered into a 45-page employment agreement with the medical group which included a binding arbitration clause. The arbitration clause stated that in the event a dispute arose between the parties concerning any provisions of the agreement, such dispute would be submitted to arbitration.

The Medical Group subsequently terminated Buckhorn's employment. According to Buckhorn, the Medical Group then defamed him by informing Buckhorn's patients that Buckhorn had left the group because of marital problems, mental problems, loss of his insurance coverage, that he was no longer practicing medicine, or that he had just disappeared. Buckhorn filed suit against the Medical Group for defamation, as well as numerous other causes of action that were related to his termination.

The Medical Group responded to the suit by moving to compel arbitration pursuant to the arbitration clause in the employment agreement. Buckhorn argued that the arbitration clause only governed "contract related actions," *i.e.*, his claims for fraudulent inducement of contract and wrongful termination.

Buckhorn's position was that his tort causes of action, including defamation, were not covered by the employment agreement because they were based on damage to his reputation occurring after his termination. The trial court denied the Medical Group's motion to compel arbitration on other grounds, and the Medical Group appealed.

Defamation Claims Subject to Arbitration

The California Court of Appeal ruled that the defamation and other tort claims were covered by the arbitration clause. In doing so, it rejected Buckhorn's argument that torts committed after the termination of employment were not covered by the employment agreement.

The Court held that the issue turned on whether the tort claims were "rooted in the contractual relationship between the parties, not when they occurred." The Court noted that Buckhorn's tort causes of action claimed damages based on a loss of expected future income from his patients.

Because those patients had consulted him in his capacity as an employee of the Medical Group, the employment agreement would be relevant to any economic interest of Buckhorn.

The Court relied on previous California law that set forth a strong public policy in favor of arbitration, that doubt must be resolved in favor of arbitration, and that tort claims were subject to arbitration unless they were "wholly independent" of the contract between the parties. The Court thus reversed the trial court's denial of the motion to compel arbitration.

Arbitration Clauses and Libel

The issue of enforceability of arbitration clauses in employment contracts is one that has been heavily litigated in recent years, including whether or not defamation claims are covered.

For example, earlier this year, a New York court addressed whether claims by a radio announcer for defamation against his former employer, a radio station, were covered by the arbitration clause in the announcer's personal services agreement. The court ruled that the claims were covered because the "extremely broad arbitration clause plainly cover[ed] all of the causes of action . . . each of which [was] indisputably related to and connected with" the personal services agreement. *DiBello v. Salkowitz*, 772 N.Y.S.2d 663 (N.Y.A.D. 1 Dept. 2004).

As both the Buckhorn and DiBello cases demonstrate, the issue of whether claims for defamation are covered by arbitration clauses is based on large part on contract law,

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Defamation Claim Against Former Employer Subject to Arbitration

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and thus resolution of the issue will turn in each case on the specific language of the clause.

In addition, not all courts have been as arbitration-friendly as the California Court of Appeal was in the Buckhorn case. As a result, the relationship of defamation claims and arbitration will likely continue to be litigated in courts around the country.

Eric Y. Nishizawa and Ricardo A. Torres II represented the plaintiff. William V. Whelen and Karin Dougan Vogel of Sheppard, Mullin, Richter & Hampton in San Diego and Peter M. Stone, Daniel M. Glassman and Michael J. Rozak of Paul, Hastings, Janofsky & Walker, Costa Mesa, represented the defendants.

Gregory P. Williams and Jim Dines are media attorneys with Dines & Gross, P.C. in Albuquerque, New Mexico. Jim Dines is a member of MLRC's Employment Law Committee.

Local Politico Wins Libel Suit

$400,000 Verdict for Column on College Land Sale

On September 3, an Illinois jury awarded $400,000 in damages to Frank Zuccarelli, a local Democratic party official and college trustee, in a libel action against a local newspaper that criticized his role in the college's sale of real estate. *Board of Trustees v. Southland Community Newspaper*, No. 01-L-1828 (Ill. Cir. Ct., Cook County jury verdict Sept. 3, 2004).

The jury apparently found that the newspaper article was not opinion and was published with actual malice because the newspaper could have obtained the correct details of the land sale through a FOIA request. The defendants are planning to file a motion for judgment not withstanding the verdict.

Background

In January 2001, *The Southland Community Newspaper*, a now defunct weekly newspaper, published a front page article that South Suburban College in suburban Chicago sold 50 acres of property to a developer for $250,000 without open bidding for the parcel. The article quoted the newspaper's owner and another local politician criticizing the land sale and Zuccarelli's role in the sale. The college had actually sold 12.9 acres for $1.25 million.

The article was published in the midst of the primary campaign between the newspaper's owner, William Shaw, and Zuccarelli for a town supervisor position. After Zuccarelli won the February 2001 primary, he and the entire college board of trustees sued the newspaper, reporter Ray Hanania, Shaw and the other local politician quoted in the article.

The other trustees' claims were dismissed during the course of the litigation.

Trial

According to news reports, plaintiff's attorney, Steven A. Adatto of Kusper & Raucci in Chicago, argued that the defendants could have obtained documents under the state's freedom of information law that would have revealed the accurate facts of the property sale.

"Anybody in this room could get those records," Addatto argued, according to coverage in the Northwest Indiana *Times*. "None of the defendants bothered to get the records. Maybe they already had the records, the real estate contract, and just chose to ignore them."

Addatto also cited the newspaper's failure to obtain the documents and the inaccuracies in the column as evidence of actual malice. "It makes you think, did they have the real information," Addatto argued, according to coverage in the Northwest Indiana *Times*. "Did they know the truth? Did they just fail to follow the documents?"

Defense counsel Christopher Millet of Bougeois & Millet in Westchester, Ill. argued that the complained of statements were opinions and that the newspaper and reporter had not acted with actual malice.

Moreover, he countered that the college should have made the details of the sale easily available. "Why should we be strapped with the Freedom of Information process?," he asked in closing arguments, according to the *Times*. Millet argued that since the college did not make the information public, the newspaper had to rely on individual sources for information about the land sale. "My clients are being sued because they did their jobs," he argued.

Millet also argued that Zuccarelli was subject to criticism as a public figure. "You're in court not because he is sensitive, but because he wants money," Millet said. "He asked you for $400,000. We think you should award him zero and a lesson in life."

After less than two hours of deliberation, the 12-member jury awarded $150,000 in compensatory and $250,000 in punitive damages, split evenly among the four defendants.

After the verdict, Millet said that he would ask Illinois Circuit Judge Carol McCarthy for a judgment notwithstanding the verdict.

Default Against Newspaper Likely to Lead to Damages

In a case recently discovered by MLRC, a default was entered last November against a California newspaper publisher who refused to reveal the paper's sources for allegedly libelous articles. *Bohl v. Hesperia Resorter*, No. SCV SS68052 (Cal. Super. Ct., San Bernardino County default entered Nov. 2003).

A hearing on damages and the newspaper publisher's assets is scheduled for Oct. 4, although the publisher said that he would seek an order from an appeals court to block the hearing. The plaintiff in the case is seeking $4 million.

Background

At issue are articles published in 1999 and 2000 in the *Hesperia Resorter,* the *Apple Valley News,* and the *Adelanto Bulletin* regarding Nancy Bohl, the wife of San Bernardino County sheriff Gary Penrod.

The articles alleged that Bohl's company, which provides psychological services to police officers, obtained a contract with the sheriff's office because of her then-dating relationship with Penrod, and that Bohl passed on confidential information about officers to sheriff's department officials. Headlines on the articles included "Sleeping with Penrod Pays Off" and "Sheriff Penrod Spies on Deputies."

The suit, filed in September 2000, named the various newspapers, owner Raymond Pryke, and reporter Mark Gutglueck as defendants.

Publisher Refuses to Reveal Sources

During discovery, Pryke and Gutglueck initially refused to reveal the sources for the articles. As a sanction, in November the trial court entered a default judgment against Pryke, and denied a anti-SLAPP motion that had been filed by Gutglueck.

In December Pryke and Gutglueck identified individuals who they said were their sources, but these individuals testified that they had not told the newspaper that Bohl had violated client confidentiality.

The plaintiff then moved to dismiss the case against the reporter, since the newspapers' owner had already been found liable by the default. The defense objected, apparently in an attempt to go to trial and obtain a defense verdict, then argue that the default verdict against Pryke should be vacated as inconsistent with the trial verdict.

On Sept. 1, Superior Court Judge Christopher Warner granted plaintiff's motion to dismiss the reporter from the case, clearing the way for the damage hearing.

The plaintiff is represented by John Rowell of Cheong, Denove, Rowell & Bennett LLP in Los Angeles. Pryke, Gutglueck and the newspapers are represented by Stanley W. Hodge of Victorville, California.

FCC Announces $550,000 Fine Against CBS Affiliates Over Super Bowl Show

On September 22nd, the FCC formally issued a $550,000 fine against 20 Viacom-owned CBS affiliates over last winter's Super Bowl halftime show that concluded with singer Janet Jackson exposing her breast. *In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVII Halftime Show,* File No. EB-04-IH-0011. The decision is available online at www.fcc.gov.

The FCC found that Jackson's breast-baring "was designed to pander to, titillate and shock the viewing audience" and was indecent in the context of a sexually suggestive song and choreography.

The FCC also found that while CBS officials arguably had no advance knowledge of the breast-baring finale to the halftime program, it was "well aware of the overall sexual nature of the Jackson/Timberlake segment," "touted it as 'shocking' to attract potential viewers," and "failed to take reasonable precautions to ensure that no actionably indecent material was broadcast."

The FCC leveled the statutory maximum fine of $27,500 against 20 affiliates, for a total forfeiture to Viacom, as licensee, of $550,000. The Commission stated that the size of the fine was warranted given the "the history of recent indecent broadcasts by Viacom-owned radio stations."

Two Commissioners, Democratic appointee Michael Copps, and Republican appointee Jonathan Adelstein, would have held non-Viacom owned affiliates liable as well.

Update: Before Charges Are Dropped More Secrecy Ordered in Kobe Bryant Case

By Steven D. Zansberg

Two days before the prosecution folded its tent and dismissed the charges against Kobe Bryant (on Wednesday, September 1), Judge Terry Ruckriegle heard oral argument from the news media challenging plans to conduct individual voir dire behind closed doors.

Although there had been informal talk for months that prospective jurors in the sexual assault case would be questioned individually in camera concerning highly personal and sensitive information, such as their experience with sexual assault, on Wednesday, August 25th, word leaked out, through court personnel, that the court was planning to conduct closed-door questioning on a wide range of topics, including juror exposure to previous press reports about the case.

Accordingly, on Thursday morning, August 26th, twelve media companies filed an objection to closure of voir dire and request for an opportunity to be heard prior to closing any portion of the trial. That afternoon, Judge Ruckriegle issued an order that directed the parties to respond to the media's objection by 3:00 p.m. on Sunday and set a hearing on the objection for Monday morning at 7:30 a.m.

In his order, Judge Ruckriegle chastised the press for having waited until the day before jurors were summoned to appear in court and fill out questionnaires, with voir dire set to begin on Monday, August 30th.

In his response to the media's objection, Bryant relied heavily upon the Second Circuit's decision in *United States v. [Don] King*, 140 F.3d 76 (2d Cir. 1998), in which juror candor in response to questions about racial bias was found to be a sufficiently weighty interest to override the press' and public's First Amendment right of access to voir dire.

Noting that this case involved inter-racial sexual relations, graphic details of a rape-kit exam, and other socially divisive issues, Bryant argued that the court need not require individual jurors to affirmatively ask to be questioned behind closed doors on specific topics.

Without explaining why it was necessary to shield the press and public from jurors' responses to questions concerning their exposure to pre-trial publicity, Bryant argued that closed-door questioning on that topic was required to prevent contamination or tainting of other jurors by exposure to earlier jurors' answers.

The prosecution filed its response brief under seal on Sunday evening, and was ordered to provide a copy, unsealed, to the news media at the outset of the hearing on Monday morning.

In their response, the prosecution listed seventeen questions from the 82-question jury questionnaire, which it believed should be addressed in chambers. Among the topics identified by the People were, "Have you or anyone close to you ever been a suspect in, arrested for, or charged with a criminal offense?" and "Have you or anyone close to you ever been a victim of a crime, whether reported to law enforcement authorities or not?", "What have you read, seen, or heard about this case?", and "When you first learned about this case, what were your reactions?" "Have your reactions changed?"

Early Morning Oral Argument on the News Media's Objection

At the hearing, the news media argued that its objection was not untimely because the press had not learned of the court's plans to close vast portions of the voir dire until Wednesday, August 25th, and promptly filed its anticipatory objection on Thursday morning, the 26th.

The news media reiterated that it was not opposed to in camera questioning of those individual jurors who affirmatively requested to be so questioned on highly sensitive and personal topics, such as their own experience, or those of people close to them, with sexual assault.

However, the news media objected to any questioning on topics other than "highly personal and sensitive" matters upon which individual jurors had affirmatively requested to be questioned outside the presence of the public.

Relying primarily upon the *Press Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984), and the Second Circuit's more recent decision in the Martha Stewart case

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(*ABC Inc. v. Stewart*, 360 F.3d 90 (2d Cir. 2004)), counsel for the news media pointed to the importance of assuring public trust in the judicial system by allowing the public to observe how a fair and impartial jury is selected in a case of such overwhelming pubic interest and press attention.

Contrary to how Mr. Bryant had portrayed the *Press Enterprise* case – as one involving a clash only between juror privacy and the First Amendment – counsel for the news media pointed out that the *Press Enterprise* case was fundamentally a clash between a defendant's Sixth Amendment right to a fair trial and the First Amendment right of access.

Indeed, the trial court in *Press Enterprise* had closed the voir dire out of a concern that "if the press were present, juror responses would lack the candor necessary to assure a fair trial." *Press Enterprise Co.*, 464 U.S. at 503. Moreover, no prospective jurors were parties to the appeal in *Press Enterprise*; instead the case presented a pure clash between the rights of the defendant (who asserted the juror candor concerns) and the rights of the media and the press to attend judicial proceedings.

In that context, the United States Supreme Court expressly required individual jurors to make an affirmative request (which can occur outside of public proceedings) that they be questioned on particularly sensitive topics in private. Any closure order that extended beyond such affirmative individualized requests is inherently overbroad and, therefore, unconstitutional.

Less Restrictive Means Proposed to Avoid Taint

Moreover, questions about what prospective jurors had read in the newspaper or seen on TV about this case do not satisfy the "highly personal and intimate, sensitive" criterion to warrant in camera questioning. The court's apparent concerns about taint or cross-contamination of the prospective jurors could be accommodated by questioning prospective jurors about those topics outside the presence of other members of the general venire, but in the presence of the public and press.

Such was the express direction given by the Wisconsin Supreme Court in *State ex rel. LaCrosse Tribune v. Circuit Court*., 340 N.W.2d 460 (Wis. 1983). Here, the press had proposed three less-restrictive alternative means to avoid cross-contamination: (1) separate out and isolate the prospective jurors who had no prior press exposure, (2) provide a microphone and audio feed to a press listening tent during the in camera questioning of jurors on prior media exposure, and (3) allow for pool reporters to sit in on the in camera questioning on prior media exposure.

Does Openness Enhance or Inhibit Candor?

Counsel for the news media questioned the very presumption that jurors would be less candid in responding to questions if the voir dire were conducted in open court. Counsel for the media asked, rhetorically, "Where is there any evidence to support this hypothesis?"

Everywhere else in our system it is understood and accepted that open proceedings and public scrutiny contribute to candor, not inhibit it; indeed, this is the very basis for the public trial guarantee. Openness is understood to promote candor among witnesses, attorneys, and judges; why, suddenly, does this not apply to prospective jurors?

Both the *Press Enterprise* and the *Stewart* courts say that openness enhances candor, and there is no reason to presume that this same dynamic does not apply where controversial and socially polarizing issues are discussed. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 46 n. 4 (1984) ("Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings") (emphasis added) (*quoting Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring)).

Moreover, a closer look at *Press Enterprise* suggests that the Second Circuit got it wrong in the *Don King* case. In *Press Enterprise*, a 26-year-old African-American male stood accused of the rape and murder of a 15-year-old white girl.

Racial issues were very much at the heart of the case (see Justice Marshall's concurrence, arguing that six weeks of voir dire were justified because of the legacy

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of racial bias in our society). Yet there is no discussion in the court's opinion that topics such as "racial bias" and inter-racial rape should be discussed outside the presence of the public, nor that such topics are exempt from the affirmative request requirement set forth in the court's opinion.

In addition, it is hard to see how a prospective juror could be more chilled than by having to answer such questions in the close physical presence of the defendant, Kobe Bryant, who would be present for all in-chambers questioning. As an alternative means to promote candor, the media proposed not divulging the names of the jurors but only the substance of their testimony on such topics.

The prosecutor and Mr. Bryant's attorneys responded by invoking, again, the *Don King* case and its acceptance of an assumption that prospective jurors can't be candid in public, particularly when they are asked their views on socially charged issues such as racial bias.

Mr. Bryant's counsel stated that "anything that might chill juror candor jeopardizes the defendant's Sixth Amendment right to a fair trial." Both parties argued there was no need for jurors to specifically request to be questioned in chambers, at least not where juror candor, as opposed to privacy concerns, was at stake.

Closed-Door Questioning

After taking the matter under advisement, and a one-hour recess, Judge Ruckriegle returned to the bench and issued his oral findings (that were followed by written opinion on Tuesday, August 31st).

In his ruling, Judge Ruckriegle limited the scope of closed-door questioning of prospective jurors to five topics: (1) all questions upon which individual jurors requested that information be disclosed only in private, and which the court finds implicates personal privacy matters; (2) questions concerning the juror's personal experience with sexual assault; (3) a single question concerning potential racial bias; (4) questions concerning exposure to pre-trial publicity, but only where responses on the jury questionnaire indicated potential bias; and (5) a single question about familiarity with the alleged victim in the case, if the answer reflected potential bias.

The court found that such closure was necessary to further the compelling interest of the defendant's fair trial rights under the Sixth Amendment. Specifically, the court found that all such questioning needed to be conducted outside the presence of the press and the public in order to ensure juror candor and to avoid cross-contamination or taint.

Agreeing with the prosecutor and Bryant, the judge rejected any requirement that individual jurors affirmatively request to be questioned on certain topics outside the presence of the public and press:

> "The constitutional responsibility for selection of an impartial jury does not rest on the affirmative and fortuitous requests of prospective jurors, the majority of whom are unfamiliar or inexperienced with the legal process."

Agreeing with the prosecutor and Bryant, the judge rejected any requirement that individual jurors affirmatively request to be questioned on certain topics outside the presence of the public and press.

But see CNN, Inc. v. United States, 824 F.2d 1046 (D.C. Cir. 1987) (requiring jurors to make individualized requests for closure and the court to determine if each such request is legitimate).

The court quickly considered and rejected all of the alternative means that the press had proposed as unworkable. Immediately after the hearing, the parties began questioning the prospective jurors, individually, in chambers. Because the questioning on these topics did, ultimately, appear to be fairly limited, 164 jurors were questioned behind closed doors in two days, just before the prosecutor moved to dismiss the charges against Bryant.

Calling All Social Scientists: Get To Work!

What was so troubling about Judge Ruckriegle's ruling was his willingness, with practically no meaningful analysis, to rely unquestioningly upon the Second Circuit's *King* decision and the Fourth Circuit's decision in *In re South*

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Update: Before Charges Are Dropped More Secrecy Ordered in Kobe Bryant Case

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Carolina Press Association, 946 F.2d 1037, 1041 (4th Cir. 1991) ("fear of publicity that might be given to answers of venire persons during voir dire may so inhibit or chill truthful response that an accused is denied the fair trial to which he is entitled").

In his written ruling, Judge Ruckriegle found that "the news media fails to recognize the effect of the media presence on juror candor concerning pre-trial publicity when prospective jurors know their prejudice and bias will be the subject of widespread dissemination and comment."

Thus, as other judges had done before him, Judge Ruckriegle was willing – in the absence of any empirical data pointing in any direction – to conclude that jurors would be less candid if they were questioned in the presence of the press and the public concerning their exposure to previous press reports and issues of racial bias.

Such conjectural arguments about human behavior were raised thirty years ago when TV and still cameras were first introduced into courtrooms. In the wake of that historical event, a hefty body of social science literature has been developed that largely dispels the notion that trial participants are adversely affected by the presence of cameras in the courtroom.

To date, however, there is a woeful paucity of such empirical evidence developed with respect to prospective jurors' candor being affected, positively or negatively, by the presence of reporters and the public during voir dire. Nevertheless, judges appear all too willing to presume that openness inhibits candor, rather than enhances it. Thus, the need for reliable social science data on this point is manifest.

In the interim, counsel for the media in future cases would be well-advised to emphasize (although it was not successful before Judge Ruckriegle) the precise facts that were at issue in *Press Enterprise*, and to persuade trial judges that the United States Supreme Court has already addressed a case involving significant overtones of racial bias and inter-racial sexual assault.

In that context, the Court announced the binding legal standard to justify closure of individualized voir dire: only upon an affirmative request for such closed-door questioning on "embarrassing" topics can a court properly close this vital portion of the trial, without violating the First Amendment.

Hal A. Haddon and Pamela Robillard Mackey represented Mr. Bryant. Dana J. Easter represented the People.

Thomas B. Kelley, Steven D. Zansberg, Christopher P. Beall, and Eileen Kiernan-Johnson of Faegre & Benson's Denver office represented the twelve media companies who objected to closure of voir dire.

Chicago Wins FOIA Claim Over Gun Data

The Seventh Circuit held that the City of Chicago was entitled to obtain data from a federal firearms database notwithstanding a federal appropriations statute directing that no money be spent to disclose such information. *Chicago v. U.S. Dept. Treasury*, No. 01-2167, 2004 WL 2066043 (7th Cir. Sept. 16, 2004) (Bauer, Rovner, Williams, JJ.).

The Bureau of Alcohol Tobacco and Firearms ("ATF") argued that the Consolidated Appropriations Act of 2004, which prohibits the use of federal funds to disclose gun database information to the public, relieved it of any obligation under FOIA to provide Chicago with the requested information.

In a unanimous decision, the Seventh Circuit held the ATF must provide the information because the appropriation statute does not specifically exempt the databases from disclosure under FOIA. The court noted that the measure simply directs that "no funds ... shall be available" to the ATF to disclose gun database information.

The court found that "this sort of indirect language is not normally used to create substantive exemptions under FOIA" and did not "repeal by implication" the ATF's general duty of disclosure under FOIA.

HIV Disclosure Leads to Billion-Dollar Suit Against Dallas Newspaper

Implications for State Health Privacy Statutes, HIPAA

By Debra E. Deardourff and Charles D. Tobin

A Dallas newspaper is seeking summary judgment in a billion-dollar lawsuit arising out the alleged disclosure of a man's HIV-positive status. The litigation is the latest in a growing trend of actions involving the news media that pit legal protections for the publication of truthful, non-private, lawfully obtained information against a panoply of federal and state health care-privacy laws and regulations.

Article About Alleged Church Improprieties

In December 2003, the *Dallas Observer* published a story concerning the Dallas-based Cathedral of Hope church, which the article described as the "world's largest gay and lesbian church."

The article focused on an ongoing public controversy about allegations against top church officials, including fiscal mismanagement and potential insurance misconduct by a tax-exempt religious organization. It mentioned the plaintiff, who filed the litigation under the "John Doe" pseudonym, in the context of reporting on insurance benefits for unpaid church volunteers.

A former employee of the church had furnished the *Observer*'s reporter with a series of electronic messages, including the information that church officials had requested the former employee to add plaintiff to the church's health insurance policy and that he was HIV-positive. The former employee refused and ultimately resigned.

John Doe filed the lawsuit in the District Court of Dallas County, Texas alleging that the newspaper's owner, New Times, Inc., and others violated Chapter 81 of the Texas Health and Safety Code. *John Doe v. New Times Inc., Dallas Observer, LP, J.D. Sparks, and Jean Morris*, Cause No. NO04-00577, filed April 13, 2004.

The statute prohibits the release or disclosure of HIV-"test results." The statute defines "test results" as:

> *any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.*

Tex. Health & Safety Code § 81.101(5) (2004).

Section 81.103, Texas Health and Safety Code, requires HIV test results to be kept confidential and provides criminal penalties for unauthorized disclosures. Tex. Health & Safety Code § 81.103(a) (2004). Specifically, the statute provides:

> *A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.*

Tex Health & Safety Code § 81.103(a) (2004).

If a person releases or discloses a test result or other information, or allows a test result or other information to become known, while acting with criminal negligence, a person commits a Class A misdemeanor. Tex. Health & Safety Code § 81.103(j) (2004). Section 81.104 of the Texas Health & Safety Code in addition to providing for a civil cause of action, sets forth different maximum penalties for negligent ($5,000) and willful ($10,000) violations and provides for the aggrieved party to recover attorney's fees. Tex. Health & Safety Code § 81.104(c) (2), (3) (2004).

John Doe contends that the *Observer* willfully and wrongfully disclosed his test results. He has sued the newspaper and the free-lance writer, alleging the statutory violations and claims for civil conspiracy. Plaintiff seeks damages in excess of $1 billion based on the newspaper's circulation of at least 110,000 and his allegation that each viewing of the article on the *Observer's* website constitutes a distinct, wrongful disclosure.

Summary Judgment Sought

On August 20, 2004, the *Observer* and the writer filed a motion for summary judgment arguing that John Doe's theory of the case misrepresents Texas statutory

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HIV Disclosure Leads to Suit Against Dallas Newspaper

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law and disregards the First Amendment and the Texas Constitution. Specifically, the defendants argue the following grounds:

- The newspaper did not "release or disclose" a "test result" or "allow [a] test result to become known," under the Texas Health & Safety Code, as the journalists did not review the test results themselves;
- The newspaper published true, non-private, lawfully obtained information, and because punishment would not further a state interest of the highest order, liability is prohibited by the First Amendment and the Texas Constitution;
- The newspaper did not act with negligence and thus cannot be held liable under the state statute;
- Because there is no liability for any substantive claim, plaintiff's conspiracy claim cannot be sustained;
- Plaintiff's damages theory is contrary to the language and intent of the statute.

The newspaper argues the Texas statute's text and legislative history make clear that it is designed to prevent the disclosure of actual, confidential AIDS/HIV blood test results only by health care workers, employers, insurers, and others with direct access to the results. The statute, the newspaper argues, is not designed to redress the dissemination of that information by the tested person or by anyone who obtained knowledge of the results other than through viewing the actual test results. The *Observer* asserts that because it did not have access to any of John Doe's actual test results, the statute does not apply.

The newspaper also maintains that the plaintiff's HIV-positive status was not private. John Doe belonged to a Cathedral of Hope-related choral group known as "Positive Voices" in which all members were openly HIV positive.

The printed materials accompanying Positive Voices' publicly available CDs identify John Doe, by name, multiple times and even include photographs. Further, John Doe admitted in discovery to making broad disclosures himself of his HIV status without taking steps to prevent the wider distribution of this information.

The *Observer* therefore asserts that traditional First Amendment defenses forbid the imposition of liability for the publication of non-private, truthful information that it obtained lawfully from the church.

The newspaper's summary judgment motion remains pending decision.

Other States' Statutes Narrowly Construed

Although a court has yet to interpret the Texas HIV/AIDS confidentiality statute, courts in other states have narrowly construed similar statutes that forbid punishment of the publication of true, non-private facts. *See e. g. Tiano v. Monterey County Herald*, 27 Media L. Rep. 1637 (Cal. Super. Ct. 1999); *Doe v. Alton Telegraph*, 805 F. Supp. 30, 31 (C.D. Ill. 1992); *In re Multimedia KSDK, Inc*., 581 N.E.2d 911, 913 (Ill. Ct. App. 1991); *Hillman v. Columbia County*, 474 N.W. 2d 913, 918 (Wis. Ct. App. 1991); *Van Straten v. Milwaukee Journal Newspaper Publisher*, 447 N.W.2d 105, 112 (Wis. 1989).

For example, two decisions in Illinois strongly support aspects of the arguments the *Observer* has made in the Texas lawsuit. The Illinois HIV/AIDS confidentiality statute, 410 ILCS 305/9 (2004), prohibits "the disclosure by any person…of the results of an HIV test," and further states that "[n]o person to whom the results of a test have been disclosed may disclose the test results to another person" except as provided by statute. 410 ILCS 305/9 Sec. 9 (2004).

According to a federal court applying the Illinois statute, "when information about a person's HIV status is already known and publicly available it is not capable of being 'disclosed' in the literal sense of the word." *Doe*, 805 F. Supp. at 31.

Similarly, an Illinois appeals court held that because the HIV status of a woman was largely public, no "test result" was at issue, and because the media entity involved did not have personal knowledge that the plaintiff ever submitted to an HIV test, or of test results themselves, the Illinois HIV/AIDS confidentiality statute was inapplicable. *Multimedia*, 581 N.E.2d at 914.

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Similarly, the Wisconsin HIV/AIDS confidentiality statute provides that "[n]o person may disclose the results" of an HIV test except in very narrow defined circumstances. Wis. Stat. § 252.15(5)(a) (2004).

A Wisconsin court, in dismissing a privacy action against a newspaper, held that the statute was "directed toward health care providers and blood banks" – entities that have access to actual blood test results – "and not newspapers." *Van Straten*, 447 N.W.2d at 112.

Another Wisconsin court later interpreted the HIV/AIDS statute narrowly, holding that imposing liability for the disclosure of test results to members of the general public "would give the statute an extraordinary long reach, affecting the transmittal of information about AIDS victims in a wide variety of social contexts." *Hillman,* 474 N.W.2d at 917-18.

The Hillman court quoted a California court's holding that a statute broadly prohibiting "[a]ny person" from disclosing the result of a blood test to detect AIDS only applies "to persons and institutions that conduct tests for AIDS" or that handle or distribute such test results. *Urabaniak v. Newton,* 226 Cal. App. 3d 1128, 1143 (1991).

In 1999, a California court held a newspaper is not liable for reporting the fact that a deputy sheriff was injured in a prison and was exposed to the HIV infection and undergoing testing. *Tiano*, 27 Media L. Rep. at 1638. All of the information reported by the newspaper had been disclosed in public documents or in public court hearings. *Id.* Consequently, the court held that the newspaper publication was privileged because it was a fair and true report of a judicial proceeding. *Id.*

It bears mention that while statute-based claims for the news media's disclosure of an individual's HIV status appear largely unsuccessful, common law causes of action, under the right facts, may be more productive for plaintiffs. *See e.g. WMAZ v. Kubach*, 212 Ga. App. 707 (1994) ($500,000 jury verdict in common law privacy claim upheld where the plaintiff, an HIV patient, voluntarily agreed to appear in a broadcast on the condition that his face be digitized and unrecognizable; however, the station failed to digitize his face as promised).

HIPAA and the News Media

The enactment of the federal Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 1320d-6, and the recent enactment of the HIPAA privacy regulations, complicate reporting in several ways.

HIPAA often has become a brick-wall barrier in the media's efforts to obtain public information, as spokespeople for numerous hospitals and agencies now fear giving out any information. HIPAA also has been cited as the basis for privacy-type claims against the news media, though recent rulings have uniformly defeated those efforts. For excellent reference for what and whom HIPAA does and does not cover, *see* MLRC Newsgathering Committee Memo: HIPAA—A Quick Guide (August 7, 2003).

Congress enacted HIPAA to improve the efficiency and effectiveness of the health care system by facilitating the exchange of information with respect to financial and administrative transactions carried out by health plans, health clearinghouses, and health care providers who transmit information electronically. *See South Carolina Medical Association v. Thompson*, 327 F.3d 346, 348 (4th Cir. 2003).

HIPAA directed the Department of Health and Human Services to create national regulations for patient information. The HIPAA privacy rule went into effect in February 2003, and anyone who unlawfully discloses medical information faces massive penalties of as much as $250,000 in fines and 10 years in prison. 42 U.S.C. § 1320d-6 (2004). Consequently, government and healthcare providers are asserting HIPAA to withhold historically public information.

First responders, coroner's offices, fire fighters, police officers and state attorneys are just a handful of government entities asserting HIPAA to withhold incident reports and medical information. Members of the news media have been forced to turn to other sources for newsworthy information. However, the Texas and Kentucky attorneys general have helped clarify that HIPAA does not silence all of these sources:

On August 24, 2004, the Kentucky Attorney General ruled that police departments may not rely on HIPAA's privacy rule to withhold information records requested

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under the state Open Records Act. Ky. Att'y Gen. Open Records Decision 04-ORD-143 (2004). *See article in this issue.*

A reporter from The Kentucky Enquirer had made a written request to a police department for an accident report detailing a fatal garbage truck accident. Id. The police department redacted the names, addresses, and birth dates of the driver and three others, including the person who was killed. *Id.*

The paper appealed the redactions to the attorney general's office. The police department in response argued that HIPAA prevented them from releasing any information that would identify a person treated by city emergency medical personnel. *Id.* The attorney general ruled that HIPAA did not apply to police department records, as the department is not a "covered entity" for purposes of a HIPAA analysis.

On February 13, 2004, the Texas Attorney General ruled that requests to state and local government officials for patient information are governed by the Texas Public Information Act and not by the more restrictive federal rules of HIPAA. Tex. Att'y Gen. ORD 681 (2004). He further ruled that HIPAA would apply to emergency first-responders because they are "health-care providers." However, Abbott specifically ruled that the HIPAA privacy rules would not apply to police officers.

On the liability side, on August 2, 2004, the U.S. District Court for the District of Colorado held that HIPAA did not give a plaintiff a private right of action against the Rocky Mountain News for the publication of confidential medical records. *University of Colorado Hospital Authority v. The Denver Publishing Company*, Case No. 03-WM-1977 (D. Colo. Aug. 2, 2004).

The newspaper had anonymously obtained a confidential peer review report of a top neurosurgeon on the staff of the plaintiff, a university hospital. The court denied the hospital's motion seeking a prior restraint to prevent the Rocky Mountain News from publishing the peer review report, and the newspaper published the report on its website. After the newspaper moved to dismiss the hospital's complaint in its entirety, the hospital amended to seek damages, pursuant to the privacy provisions of HIPAA, for the publication.

In dismissing the complaint, the federal court held that the "statutory structure of HIPAA ... precludes a private right of action." *Id*. at 5 – 6 (citations omitted). Further, the court held that "§ 1320d-6 does not focus on individuals whose privacy may be at risk, but instead on regulating person who might have access to individuals' health information." *Id*. (citations omitted).

Consequently, solid precedent now exists for the proposition that HIPAA does not prevent government in all instances from releasing health-care information about individuals, and that the federal statute does not provide a private cause of action against the news media.

Debra E. Deardourff and Charles D. Tobin are with the Tampa and Washington, D.C. offices of Holland & Knight LLP.

Kentucky Attorney General Rules HIPAA Does Not Bar Release of Police Reports

By John Greiner

On August 24, 2004, the Kentucky Attorney General issued an opinion, 04-ORD-143, that ordered the City of Covington to release certain police "incident reports" identifying individuals who had been injured in two separate incidents that had occurred in the spring of this year.

The opinion is available online at: http:// ag.ky.gov / civil/orom/04ord143.doc.

The *Kentucky Enquirer* had requested the reports, but Covington produced only redacted versions, contending, in part, that the Privacy Rule promulgated under the federal Health Insurance Portability and Accountability Act ("HIPAA") barred the release of personally identifying information.

The Attorney General's opinion represents another victory for the media in its ongoing battle against governmental entities determined to stretch HIPAA beyond the application for which it was originally intended.

The Attorney General's opinion represents another victory for the media in its ongoing battle against governmental entities determined to stretch HIPAA beyond the application for which it was originally intended.

The Requests

By letter dated April 20, 2004, the *Kentucky Enquirer* requested a copy of the accident report "of the overturned CSI garbage truck taken at 9:30 a.m. Tuesday [April 20, 2004] at Madison and Hands Pike." In a response dated April 26, 2004, the Covington Police Department provided a copy of the report after the following information was redacted:

1. Operator's name, date of birth, and street address;
2. The names of two "involved persons," their addresses, and dates of birth; and
3. The name and address of an "involved person" who apparently died on April 22, 2004.

On May 11, 2004, the *Kentucky Enquirer* submitted a written request for copies of:

1. The incident report for a May 6, 2004, shooting on East 13th Street in Covington;
2. The accident report for a May 1, 2004, auto accident on Hands Pike at Edwin Drive; and
3. A letter dated May 2003, signed by Dan Miles, outlining the Department's policy on the release of reports, which had at one time been posted at the Covington Policy Department.

Once again, the Department redacted, without statutory citation, or accompanying explanation, the name, address, date of birth, social security number, race, and gender of persons identified in the records, as well as vehicle ID and registration numbers.

City's Defense

Covington asserted two defenses. It argued first that the Privacy Rule promulgated under HIPAA applied because the City of Covington is a health care provider. It arrived at this conclusion because the city provides emergency medical service. Under Covington's view, the entire city, and all of its departments, including the Police Department, were subject to the Privacy Rule.

Covington also contended that Kentucky's Open Records Law exempted "personal information" contained in police or ambulance reports from disclosure.

AG's Opinion

The Attorney General disposed of the HIPAA defense rather easily. Relying on a previous Texas Attorney General Opinion, Tex. Att'y Gen. ORD-681 (2004), the Kentucky Attorney General found that the Covington Police Department is "neither a health plan, a health clearinghouse, nor a health care provider." Thus, by definition, the HIPAA Privacy Rule does not apply. The Attorney General Opinion is quite clear:

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Kentucky Attorney General Rules HIPAA Does Not Bar Release of Police Reports

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> *Records generated by police officers do not contain protected health information, even if those records reflect the officer's observations of an individual's medical condition, and such records are not governed by the Privacy Rule. The incidental delivery of emergency aid by a police officer does not transform the police officer into a health care provider since his primary function is the protection of public safety. Simply stated, HIPAA has no application to records generated by a police department in discharging its duty to protect public safety. Our decision therefore turns on the application of the Open Records Act, and the exception cited, to those portions of the records withheld.*

Having rejected Covington's HIPAA defense, the Attorney General considered the City's defense under Kentucky's Open Records Act.

As to the accident report, the Kentucky Attorney General reasoned that KRS 189.635(6), which requires the release of vehicle accident reports to newsgathering organizations, requires the release of *unredacted* reports. Relying on a previous Opinion, 02-ORD-19, the Kentucky AG noted:

> *[B]cause KRS 189.635(6) places no restriction on the information in the accident reports that must be disclosed to newsgathering organizations, limiting only the uses to which the information may be put, these organizations are entitled to unrestricted access to accident reports per KRS 189.535(6).*

As to the incident report concerning the shooting, the Attorney General applied a balancing test, and determined that the public interest in the information outweighed the victim's privacy interest. As the Attorney General noted:

> *Disclosure of the identities of the victim and "involved persons" provides opportunity for public review of the manner in which the Covington Police carry out the public business of law enforcement and crime investigation. Further, the nature of the offense, homicide, does not implicate a heightened privacy interest inuring to the victim or "involved persons", absent some extenuating circumstance.*

Municipalities, claiming concern over the stiff fines mandated for violations of HIPAA's Privacy Rule, have almost reflexively claimed HIPAA as a defense to any public record request even remotely concerning medical care. It is important to remember that the Privacy Rule does not apply to all health information across the board. The critical question is *who* maintains the information.

If the entity maintaining the information is itself not a health plan, health care clearinghouse or a health care provider, it simply cannot invoke HIPAA as a shield to a records request. This conclusion is obvious from even a cursory review of the statute. Unfortunately, a number of public entities seem to have missed this point. The Attorneys General of Texas and Kentucky have provided significant weapons to help drive home the correct interpretation.

John Greiner, a partner with Graydon, Head & Ritchey in Cincinnati, Ohio, represented the Kentucky Enquirer in this matter.

DID YOU GO TO TRIAL RECENTLY? If you know of a libel, privacy, or case with related claims that went to trial recently, please let us know. It will be included in our annual report on trials, which is published each year. E-mail your information to erobinson@ldrc.com.

Second Circuit Upholds Access to Judicial Documents Despite Confidential Settlement

By Eugene R. Scheiman and Daniel J. Friedman

In a case of first impression, the Second Circuit recently held that litigants cannot evade the public interest in access to judicial documents by a confidential settlement and the filing of a FRCP Rule 41(a)(l)(ii) stipulation of dismissal. *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004) (Sack, McLaughlin, Sotomayor, JJ). The decision is available online at: http://caselaw.lp.findlaw.com/data2/circs/2nd/037621p.pdf.

The Second Circuit held that a district court may raise the public's interest in access on its own. The Court also held that it was without power to vacate a published decision and order that improperly disclosed the parameters of a confidential settlement, stating that "the genie is out of the bottle" and the Court does not have "the means to put the genie back."

Litigants cannot evade the public interest in access to judicial documents by a confidential settlement and the filing of a stipulation of dismissal.

Background Facts

The case arose out of claims for sex discrimination brought against Deutsche Bank AG ("the Bank") by Virginia Gambale ("Gambale"), a former managing director of the Bank, in the federal district court in the Southern District of New York before Judge Harold Baer, Jr.

During discovery the parties entered into a broad "So Ordered" Stipulation of Confidentiality (the "Stipulation of Confidentiality"), which permitted a party producing confidential documents to move for a further protective order should the other party attempt to file documents designated as confidential with the district court.

After the Bank moved to seal certain Bank documents submitted by Gambale in opposition to the Bank's motion for summary judgment, the parties entered into an additional "So Ordered" Stipulation (the "Temporary Sealing Stip and Order") providing that the documents would be temporarily sealed until Judge Baer ruled on the Bank's request that the documents be permanently sealed.

After the district court in large part denied the Bank's motion for summary judgment, the parties executed a settlement agreement that contained

(1) a non-admission of liability clause;
(2) a confidentiality provision; and
(3) a clause providing that any documents filed under seal would remain permanently under seal.

At a conference, the parties advised the district court that the case had been settled confidentially, and asked the court to retain jurisdiction in order to hear future disputes about settlement payments. The court then asked the parties to disclose the amount of the settlement "since at the moment it's all confidential," and the parties did so, with the Bank's counsel reiterating that "at the moment it's all confidential."

The district court then asked the parties to submit letters explaining why the settlement terms should not be made public. A transcript of this conference, including the disclosure of the settlement amount, was filed with the court under seal.

According to the Bank, at a subsequent conference the district court stated that it would make the settlement terms public unless the Bank agreed to have a third party conduct a global and multi-year sex discrimination review of the Bank which the court would review and act on if necessary to combat discrimination. The Bank refused.

Two days later the parties submitted a Stipulation of Dismissal with Prejudice pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, which does not require approval by a court to be effective.

The district court then sua sponte ordered that the Bank "may" move to have the temporary seal on the documents pursuant to the Temporary Sealing Stip and Order made permanent. The Bank did not submit a motion to the court on the merits, and instead only argued that the filing of the Stipulation of Dismissal divested the district court of jurisdiction over the matter.

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Second Circuit Upholds Access to Judicial Documents Despite Confidential Settlement

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In an Order dated July 1, 2003 that was published on Westlaw and Lexis, the district court, relying upon the common law right of public access to judicial documents, ordered the unsealing of the Bank's documents filed under temporary seal and gave a general description of the contents of those documents.

The July 1st Order also noted the range of the monetary component of the parties' confidential settlement. The court stayed its July 1st Order for two weeks, allowing the Bank to obtain a stay from the Second Circuit.

After the Bank appealed the July 1 Order, and because Gambale no longer had an interest in the appeal having settled with the Bank, the Second Circuit sua sponte appointed pro bono counsel to brief the issue of public disclosure and to argue that the Order be affirmed.

Upon the Bank's motion, the Second Circuit also stayed the unsealing order pending appeal, but denied the Bank's motion to seal the July 1st Order itself which had been published and was thus public.

Dismissal Does Not Divest Jurisdiction

In a unanimous decision written by Judge Robert D. Sack, the Second Circuit ruled that the district court did not abuse its discretion in unsealing the summary judgment documents.

The Court first reasoned that while as a general rule the filing of a Rule 41 stipulation divests a court of jurisdiction, it does not follow that such a filing divests a court of jurisdiction either to dispose of its files or to modify or vacate previously issued protective orders.

This is particularly the case where judicial documents subject to the right of public access are at issue, for

> "[t]he public's stake in the propriety and particulars of the court's adjudication does not evaporate upon the parties' subsequent decision to settle."

377 F.3d at 140.

The Court further reasoned, relying upon the Supreme Court's decision in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) as well as Second and other Circuit Court precedent, that "every court has supervisory power over its own records and files." *Id.* at 598. That supervisory power does not disappear when jurisdiction over a controversy is lost.

In addition, noting that it has never ruled on a district court's jurisdiction to modify a protective order sua sponte after the parties have settled, the Second Circuit saw "no reason why the absence of a motion of a party to the litigation or some third party requesting that a seal or protective order be lifted should remove a federal court's ability to monitor and modify its previous orders in exercise of its 'supervisory power over its own records and files.'" 377 F.2d at 141 (quoting *Nixon*).

Presumptive Access to Documents

Turning to the issue of whether Judge Baer properly unsealed the documents, the Second Circuit found that the summary judgment documents were presumptively subject to public access.

In this regard, the Second Circuit has held that "the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995).

The Second Circuit had previously stated in dicta that "the presumption of access to documents that do not serve as the basis for a substantive determination – such as documents submitted on a motion for summary judgment which is denied, thus leaving a decision on the merits for another day – is appreciably weaker" than where a decision on the merits is made. *United States v. Graham*, 257 F.3d 143, 151 (2d Cir. 2001).

Nonetheless, the Court rejected, albeit without discussion, the Bank's argument that because Gambale's summary judgment motion was for the most part denied, the documents submitted on that motion should not be presumptively open.

Finally, the Second Circuit held that, because the Bank made the strategic decision below to rely solely on its argument that the district court was without jurisdiction to unseal the documents, the district court was well

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Second Circuit Upholds Access to Judicial Documents Despite Confidential Settlement

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within its discretion to order the seal lifted. The Second Circuit thus did not reach the countervailing arguments against access raised by the Bank for the first time on appeal.

Interestingly, in a footnote the Court states that the Second Circuit has recognized a presumption against access to sealed documents when there was reasonable reliance upon a protective order, citing *Martindell v. International Telephone & Telegraph Corp*., 594 F.2d 291 (2d Cir. 1979) and *SEC v. TheStreet.com*, 273 F.3d 222 (2d Cir. 2001). See 377 F.3d at 142 n.7.

That was indeed the the holding of the Second Circuit in Martindell in 1979. However, more recently the Second Circuit in the TheStreet.com modified Martindell significantly, holding that there is a presumption of access to sealed "judicial documents" even where the parties reasonably rely on a protective order. Thus, counsel argued that the Court did not have to address whether the Bank reasonably relied on the protective order.

The Second Circuit did find that the district court abused its discretion in disclosing the parameters of settlement agreement since the agreement itself was not part of the judicial record.

It is unclear what impact, if any, the Second Circuit's footnote in Gambale will have on the Court's holding in TheStreet.com. In any event, the footnote did not effect the outcome because the Court concluded that the Bank could not have reasonably relied upon the Temporary Sealing Stip and Order because it was explicitly temporary.

Won't Vacate Published Decision

The Second Circuit did find that the district court abused its discretion in disclosing the parameters of the settlement agreement since the agreement itself was not part of the judicial record (the parties never filed it with the court).

The Court noted that the settlement amount only became part of the record because of the transcription of a relatively informal conference relating to settlement, the court's off-hand request to be told the settlement amount and the fact that the transcript was filed with the district court.

Thus, the Court found that absent a further showing of public interest in the settlement amount, the Bank's interest in maintaining the confidentiality of its settlement outweighed the relatively weak presumption of access attaching to the settlement disclosure, and ordered the district court to maintain a seal on the transcript unless all confidential information is redacted and no party has otherwise shown that the document should be sealed in its entirety. 377 F.3d at 143-44.

While the Court held that the transcript containing the actual settlement figure should remain under seal and that it was an abuse of discretion for the district court to have disclosed the parameters of the settlement, the Court refused to vacate the July 1 Order because it was published by Westlaw and Lexis and thus public.

The Court stated that "[w]e simply do not have the power, even if we were of the mind to use it if we had, to make what has thus become public private again.... The genie is out of the bottle, albeit because of what we consider to be the district court's error. We have not the means to put the genie back." 377 F.3d at 144.

Eugene R. Scheiman, a partner at Buchanan Ingersoll, P.C. in New York, was appointed by the Second Circuit sua sponte as pro bono counsel to brief and argue as amicus curiae the issue of public disclosure. He was assisted by Daniel J. Friedman, also of Buchanan Ingersoll. Counsel for Virginia Gambale did not participate in the appeal. Ronald M. Green of Epstein, Becker & Green, P.C., represented Deutsche Bank.

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

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Kentucky Media Win Access to Voir Dire in High Profile Criminal Trial

By Bethany Breetz

Voir dire in a high profile murder trial was scheduled to begin September 20 in Louisville, Kentucky. That morning the trial judge closed the courtroom. Following motions for emergency relief by two local media outlets to the Kentucky Court of Appeals, an appellate judge directed the trial judge to stop voir dire so that a hearing could be held on the motions for emergency relief. *Cape Publications, Inc. d/b/a The Courier Journal v. The Honorable Judith McDonald-Burkman,* No. 2004-CA-1929-OA, and *Belo Kentucky, Inc., d/b/a WHAS-TV v. The Honorable Judith McDonald-Burkman,* No. 2004-CA-1930-OA.

Before voir dire began the next morning, the appellate judge ordered the trial court to make seats available to the media, including permitting a television camera with video and audio feed to a remote monitor for pooled use, as agreed, by the local television stations.

The court's order recognized that the "press has a fundamental right of access to criminal trials" and that "any decision to limit the right must be justified by a sufficiently important countervailing interest, and the limit must be no more restrictive than necessary."

Background

In January 2004, McKenzie Mattingly, a Louisville Metro police detective, shot 19-year-old Michael Newby three times in the back in what police said was an undercover drug deal gone awry. Mattingly is white; Newby was black. The shooting and subsequent criminal charges against Mattingly for murder and wanton endangerment have drawn much publicity and resulted in a variety of protests.

Before voir dire in the murder trial began, the trial judge stated that the courtroom would be cleared for the entirety of voir dire. Her stated reason for doing so was that she intended to voir dire the entire 150-person jury panel at the same time, and the courtroom had a 115-person capacity, leaving no room for the media or other spectators, including Newby's and Mattingly's families.

The WHAS-TV reporter present objected and raised the possibility of a video feed to the courthouse's media room, but the trial judge denied that request. Apparently the trial judge had previously advised a local newspaper reporter of her intention to close the courtroom, and counsel for *The Courier Journal*, who was present, was granted permission to intervene.

Counsel argued against closure, specifically referencing *Press Enterprise v. Superior Court*, 464 U.S. 501 (1984). Both the prosecutor and defense counsel supported the trial judge's closure, arguing that closure was necessary to protect the defendants right to a fair trial. The trial court overruled the media's objection.

Voir Dire Halted

WHAS-TV and *The Courier Journal* filed petitions for writs with the Court of Appeals and sought emergency relief on those petitions. Due to the emergency nature of the relief requested, the matter was referred to Court of Appeals Judge William Knopf rather than to a 3-judge panel, as is normally the case.

Judge Knopf immediately scheduled a hearing and directed the trial court to adjourn the proceedings for the day so that the prosecutors and defense counsel could attend the hearing. The following morning, Judge Knopf issued a consolidated order granting intermediate relief on both motions.

The court's order recognized that the "press has a fundamental right of access to criminal trials" and that "any decision to limit the right must be justified by a sufficiently important countervailing interest, and the limit must be no more restrictive than necessary." The court found "of great concern" the trial judge's indication that members of the press and public would not be admitted as seating became available.

Judge Knopf, recognizing that the situation was difficult, found that the trial court had abused its discretion and that the abuse warranted relief. "Although there is a legitimate concern for public safety in the crowded courtroom, that concern does not justify the total exclusion of the press, particularly in the absence of an assured means of currently monitoring the proceedings." (Footnote omitted).

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KY Media Win Access to Voir Dire in High Profile Criminal Trial

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Judge Knopf specifically ordered, during both general and individual voir dire, that one seat be made available to a WHAS-TV reporter (to share, as it had agreed, with other stations until more seating became available) and another be made available to a Courier-Journal reporter.

In addition, he ordered that a portable television camera, with pooled video and audio feed to a remote monitor, and a WHAS-TV photographer (or designee) be allowed in the courtroom at a location to be determined by the trial judge. He further ordered that the trial court allow time for the television feed to be installed before starting trial. The television feed was installed and voir dire resumed, with the media present.

Bethany A. Breetz of Stites & Harbison, PLLC, Louisville, Kentucky, represented WHAS-TV. The Courier Journal was represented by Jon L. Fleischaker of Dinsmore & Shohl LLP, Louisville, Kentucky.

Northern District of Illinois Distinguishes *McKevitt v. Pallasch*, Quashes Subpoena for Reporter's Notes

By Samuel Fifer and Gregory R. Naron

Last year, Judge Posner's decision in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) severely limited the application of a federal reporters' privilege in the Seventh Circuit. This month the Northern District of Illinois issued a significant opinion distinguishing *McKevitt*.

In *Hobley v. Chicago Police Commander Jon Burge, et al*., No. 03 C 3678 (N.D. Ill. Sept. 16, 2004), Magistrate Judge Geraldine Soat-Brown partially granted the *Chicago Reader's* (and reporter John Conroy's) motion to quash a subpoena seeking Conroy's notes.

In the underlying case, the plaintiff, Mr. Hobley, alleged torture by the Chicago Police Department. This was a closely watched motion because of the scandalous police brutality allegations and the nature of the subpoena. *The Reader* essentially broke this story some years ago; cases brought by now-freed prisoners (some of whom had been on death row) are maturing and reaching trial, and this subpoena related directly to the genesis of the story.

While Magistrate Soat-Brown denied the motion to quash in part — deeming three unsolicited letters Hobley sent to the reporter while he was in prison to be fair game — she held the reporter's notes "are different," and are protected. This latter part of the opinion is significant and quite favorable, especially in a post-*McKevitt* world.

Acknowledging that "*McKevitt* is the law in this Circuit," Magistrate Soat-Brown nevertheless found "the facts *in McKevitt* ... are different from the situation here." For one thing, "the decision in *McKevitt* did not discuss the subject of reporters' notes, because the plaintiff only sought the tape recordings. Nothing in McKevitt suggests that a reporters' notes are discoverable in civil litigation simply because the reporter interviewed a party to that litigation."

The heart of the court's analysis parsed what was "reasonable in the circumstances" — the phrase Judge Posner used in *McKevitt*. "In determining whether a request is 'reasonable in the circumstances,' courts should look to the established discovery procedures set forth in the Federal Rules of Civil Procedure," *i.e*, Rule 45(c), governing subpoenas.

Magistrate Soat-Brown agreed with Conroy's argument that his notes were "confidential work product" based on "15 years and thousands of hours gathering information on claims of police brutality."

In the end, she analogized "reporter's work product" to "trade secrets" (see Fed. R. Civ. P. 45(c)(3)(B)(i), permitting court to quash subpoena to protect against "disclosure of a trade secret or other confidential research, development, or commercial information"), and found "nothing in the Federal Rules … suggests that research for the purpose of news reporting is to be given less protection than research for the purpose of product development."

That, along with the fact that defendants showed no substantial need for the notes, but rather, appeared to be on a fishing expedition, led the court to quash the subpoena for the reporter's notes.

David W. Andich, Rock Island, Ill., and Robert Minetz, Park Ridge, Ill., represented the *Reader* and reporter John Conroy.

Samuel Fifer is a partner, and Gregory R. Naron of counsel, at Sonnenschein Nath & Rosenthal, Chicago, Illinois.

Internal Investigative Report Attached to Bankruptcy Motion is Judicial Record Subject to Access

By David Finger

In an interesting access decision, the federal court in Delaware held that an internal investigative report attached to a bankruptcy motion was a judicial record subject to access. *In re Peregrine Systems, Inc.*, 311 B.R. 679 (D. Del. 2004), *stay denied*, 312 B.R. 755 (D. Del. 2004).

The decision by Judge Kent A. Jordan reversed a decision of the U.S. Bankruptcy Court that sua sponte struck the document from the record in response to a motion to unseal.

Background

After allegations of scandal and mismanagement pushed Peregrine Systems, Inc. into the Delaware bankruptcy court, Peregrine hired Latham & Watkins to do an internal investigation. The resulting 700+ page report details the results of that investigation, and apparently some of it is juicy.

The Committee of Unsecured Creditors, which was given access to the Latham Report, filed a motion in Bankruptcy Court to appoint a trustee, and attached the Latham Report as an exhibit. The motion and report were filed under seal pursuant to a stipulation between Peregrine and the Committee.

Motion to Intervene

The Copley Press, Inc., filed a motion to intervene and unseal the motion and the Latham Report, on the ground that the sealing did not meet the requirements of the First Amendment, federal common law and Section 107 of the Bankruptcy Code.

At the hearing on the motion, U.S. Bankruptcy Judge Judith K. Fitzgerald never addressed the merits of the motion, and decided sua sponte to strike the Latham Report from the record on the ground that it was filed prematurely, prior to any evidentiary hearing.

As to the right of access, Judge Fitzgerald stated, "If I choose to file a roll of toilet paper that's not relevant to anything, then what good is the roll of toilet paper? It's not relevant to anything. Well, just because somebody chooses to file a roll of toilet paper, I'm not sure that that gives the world the right of access to it."

Judge Fitzgerald held that when the Latham Report (or any part of it) is introduced at an evidentiary hearing, then it would be appropriate to undertake an access analysis. However, the motion to appoint a trustee was negotiated away, and there was never any evidentiary hearing.

On appeal to the district court, Judge Jordan held that, upon filing, the Latham Report became a judicial record subject to the presumptive right of access. Judge Jordan held that the Bankruptcy Court did not give proper weight to the public right of access, and ordered that the Latham Report be placed back into the record, and that the Bankruptcy Court undertake a proper access analysis.

Subsequent Events

Subsequently, Peregrine moved for a stay pending appeal in the District Court. That motion, however, was denied on the ground that before a decision was issued Peregrine filed a Notice of Appeal to the Third Circuit, which divested the District Court of jurisdiction.

Peregrine has filed for an emergency stay pending appeal from the Third Circuit. As of the writing of this article, there has been no decision.

David L. Finger of Finger & Slanina, LLC appeared for The Copley Press, Inc. Kimberly E.C. Lawson of Reed Smith LLP, and Laura Brill of Irell & Manella, LLP appeared for Peregrine Systems, Inc.

Pennsylvania Juvenile Court Allows Access to Hearing Transcript in Closed Case

By David Strassburger

A Pennsylvania trial court last month released the transcript of a permanency hearing in a juvenile dependency case at the request of a newspaper allowed to intervene in the case, even though the case was closed. *In the Interest of Kristen Tatar*, 90 WCCB 1999, Court of Common Pleas of Westmoreland County (Aug. 11, 2004).

The decision is a potential breakthrough for media representatives seeking access to juvenile dependency records in Pennsylvania.

Background

Kristen Tatar was born on January 29, 1999, with a rare medical condition that required surgery to attach her esophagus properly to her stomach. Physicians responsible for Kristen's post-operative care reported to caseworkers for the Westmoreland County Children's Bureau that they suspected Kristen's parents were neglecting her. On December 14, 1999, Kristen was taken into the custody of the Bureau, and on January 14, 2000, she was declared a dependent child.

Kristen thereafter shuffled between her parents' custody and foster care due to inconsistent cooperation from her parents with the Bureau's directives. On September 17, 2001, a special master held a periodic permanency hearing in Kristen's case. Based upon the testimony at the hearing, the special master awarded physical and legal custody to her parents, who at that time were living in an adjacent county. The court entered an order a few days later authorizing Kristen's return to her parents.

On August 7, 2003, Kristen's corpse was discovered stuffed in a cooler outside her parents' home. The date of death was estimated as July 4, 2003. Her corpse, and a subsequent investigation by law enforcement officials, suggested that Kristen had been the victim of severe and inhuman neglect, starvation, and abuse. Her parents are awaiting trial on charges of capital murder.

The decision is a potential breakthrough for media representatives seeking access to juvenile dependency records in Pennsylvania.

Newspaper Sought Hearing Transcript

Tribune-Review Publishing Company, owner of The Tribune-Review, learned that an audiotape of the September 17, 2001 permanency hearing existed and was in the possession of the Bureau. The Tribune-Review sought leave to intervene in Kristen's closed dependency case so that the tape could be delivered to the court, the hearing transcribed, and the transcript released to the public.

Three parties opposed access: the Bureau, the Guardian *ad litem* for Kristen's brother, and court-appointed counsel for Kristen's mother in the dependency action.

In granting access, the Court, citing *In re M.B.*, 819 A.2d 59 (Pa. Super. 2003), explained that a presumption of openness applies to dependency proceedings arising from the "open courts" mandate of Article I, section 11 of the Pennsylvania Constitution.

Although the Court in *M.B.* recognized the presumption, it found that the presumption had been overcome in that case. The dependent children in *M.B.* had suffered the devastating loss of their sister, and were forced to testify to personal matters in court. The *M.B.* court found that the dependent children had a compelling interest in privacy that outweighed the public's interest in access.

By contrast, in *Tatar* the Court found insufficient evidence to rebut the presumption. The distinguishing feature of *Tatar* was that, unlike in *M.B.*, a dependent child died after the child had been returned to the custody of the parents, raising the possibility that the Bureau or the court committed error that contributed to the tragedy.

According to the Court: "The public must have an informed, meaningful and vigorous debate and inquiry as to whether the government failed in this particular case, why it failed, and what steps, if any, should be taken to prevent other children from being exposed to similar circumstances. [U]nder the specific and limited circumstances in this case, public debate would act only to ensure accountability in the system by identifying potential shortfalls, inadequacies or related defects in the system as a whole."

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PA Juvenile Ct. Allows Access to Hearing Transcript in Closed Case

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Citing *M.B.*, the Guardian *ad litem* for the brother argued that further publicity would cause emotional harm to the brother. The Court concluded that this possibility was insufficient to overcome the presumption favoring access.

One of the critical factors for the *M.B.* Court was the need to protect children from the embarrassment of testifying in a public proceeding. That concern was not present in the *Tatar* case because the dependency case was over, the minor sibling had not testified, and there was little chance of the minor sibling testifying in the criminal trial.

To the extent the brother was mentioned at the September 17, 2001 hearing, the Court's *in camera* review revealed that the references were few, uniformly positive, and could easily be redacted. The Court acknowledged that any additional publicity might cause emotional harm to the brother, but gave that factor little weight because there inevitably would be significant, additional publicity surrounding the homicide trials.

The Bureau argued that access would have a chilling effect on full and frank reporting of mental health, drug, alcohol, and other family problems that can give rise to dependency cases. The Court rejected that argument out of hand as a speculative, hypothetical fear, not a countervailing, particular interest required to overcome the presumption in favor of access.

The Mother argued that access could jeopardize her right to a fair homicide trial. Counsel for the Mother, however, did not represent the Mother in the criminal case, and criminal defense counsel for the Mother, although given notice, declined to take a position on the Mother's behalf. The Court therefore assumed that the Mother did not oppose access.

The Court also found no reason to believe that the traditional remedies available to criminal defendants complaining of pretrial publicity, i.e., careful and extensive *voir dire*, or a change of venue, were not adequate to ameliorate any potential harm caused by the release of the September 17, 2001 transcript.

At the end of its Opinion, the Court addressed a nagging procedural issue in Pennsylvania. The general rule in Pennsylvania is that intervention may be allowed only during the "pendency of an action"; i.e., intervention is not permitted in closed cases. *See, e.g., In re Estate of Albright*, 545 A.2d 896 (Pa. Super. 1988).

The Guardian *ad litem* and the Bureau argued that the dependency case was closed, and therefore the Tribune-Review could not intervene. The Court rejected that argument. Instead, it followed the Third Circuit's decision in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780 (3d Cir. 1994), which endorsed intervention in terminated cases to allow access to sealed or confidential records because "the public and third parties may often have no way of knowing at the time a confidentiality order is granted what relevance" a particular case may have to their interests. Accordingly, the Court made the September 17, 2001 transcript available for public inspection.

David Strassburger is a shareholder in the Pittsburgh law firm of Strassburger McKenna Gutnick & Potter, P.C. He represented The Tribune-Review in the Tatar case.

U.S. Admits Seizure of Reporters' Tapes of Scalia Speech Was Wrong

The United States has admitted liability in a suit brought against the U.S. Marshal's Service after a marshal seized and erased recordings made during a speech by Supreme Court Justice Antonin Scalia. *The Hattiesburg American v. United States Marshals Service*, No. 3:04CV344-LN (S.D. Miss. 2004)

On April 7, 2004, Justice Scalia, in Hattiesburg, Mississippi to turkey hunt with Fifth Circuit Judge Charles Pickering, spoke at Presbyterian High School, a local private school.

At his direction, a U.S. Marshal directed TV cameras to leave the room, but nothing was said that would have prohibited print reporters from taping the speech. During the speech, a U.S. Marshal noticed the tape recorders of Hattiesburg American reporter Antoinette Konz and Associated Press Reporter Denise Grones.

Marshal Melanie Rube confronted the reporters, took their recorders and either erased or ordered the erasure of the Scalia speech.

Justice Scalia promptly apologized for the incident and said he should have made his "ground rules" more clear. He said the recordings should not have been erased. He also said that in the future he would allow "print media" to use tape recorders at his speeches.

When no apology was forthcoming from the Marshal's Service, however, the reporters and their news organizations sued it and Marshal Rube for damages, declaratory relief, and injunctive relief.

The U.S. Marshal's Service did not file an answer and contending it was not a subject to suit. Instead, the United States answered on its behalf and confessed liability under the Privacy Protection Act of 1980, 42 U.S.C. Section 2000aa.

It simultaneously moved to dismiss the claims against Marshal Rube and others under the First, Fourth, and Fifth Amendments to the U.S. Constitution. In its motion the U.S. contends that the Privacy Act is the sole remedy for the Marshal's misconduct.

Because the seizure did not take place as part of a criminal investigation, the answer appears to admit that the Privacy Act's sanctions apply outside of the criminal context.

The United States also submitted a declaration from the general counsel of the Marshal's Service saying that the Marshal Service now has a policy that marshals "are not to have a role or responsibility regarding photography, audiotaping or videotaping" at such events "except when the personal security and safety of the federal judicial officer is believed to be in jeopardy." The affidavit does not explain, however, whether the policy is written or oral.

The Marshal Service now has a policy that marshals "are not to have a role or responsibility regarding photography, audiotaping or videotaping" at such events "except when the personal security and safety of the federal judicial officer is believed to be in jeopardy."

Based on the affidavit, the United States moved to dismiss the claims for declaratory and injunctive relief.

The news organizations have not responded to the motions as of the date of this article. *Sparrow v. Goodman*, 361 F. Supp. 566 (D.N.C. 1973) supports their claim for injunctive relief if the marshals acted pursuant to instructions from their superiors.

Luther Munford and John Sneed of Phelps Dunbar LLP, and Leonard Van Slyke Jr. of Watkins Ludlam Winter and Stennis, all located in Jackson, Mississippi, represent the news plaintiffs in this matter.

Germany Will Not Appeal ECHR's Princess Caroline Privacy Ruling

This month the German government announced it will not appeal a June ruling by the European Court of Human Rights that the country's courts failed to adequately protect Princess Caroline's right to privacy. *See von Hannover v. Germany*, No. 59320/00 (June 24, 2004); *MLRC MediaLawLetter* June 2004 at 34; July 2004 at 49.

The decision is available through the Court's website www.echr.coe.int.

In a decision with potentially enormous consequences, the European Court of Human Rights held that Germany violated Article 8 of the European Convention on Human Rights (respect for private life) when it dismissed complaints from Princess Caroline over photographs taken of her in public and published in a number of German tabloid magazines.

In a statement delivered on September 1, Germany's Justice Minister, Brigitte Zypries, explained that the German cabinet opted against appealing the ruling for two reasons. First, it strengthens the privacy rights of "prominent persons who do not hold public office or otherwise play a role in public life and, as such, should not have to tolerate uncontrolled reporting about their private lives."

Second, the ruling causes "no change in the current legal situation" because it "does not affect reporting on persons who have positions of responsibility in society, in particular persons who hold public office."

Not all interested parties agreed with the cabinet's narrow reading of the ruling. Various groups urged the German government to file an appeal to the ECHR's Grand Chamber, which must be done within three months of a ruling.

Under Article 43 of the ECHR, parties can seek reconsideration of a seven-judge ECHR decision to an 18-judge Grand Chamber in "exceptional circumstances."

German news organizations penned an open letter to Chancellor Gerhard Schroeder, arguing that the ruling constituted censorship and would restrict reporting on the private lives of public figures and on issues of public interest, such as their business dealings and contacts.

Media lawyers in the United Kingdom also lodged a request that the government seek reconsideration. In a proposed petition for the German government requesting appeal, the Olswang law firm wrote that the ruling now requires member states to apply the European court's standard on balancing privacy and freedom of expression, one which favors privacy, instead of the standard established by the democratic institutions of a member state.

The Olswang petition is available online at: www.olswang.com/pdfs/hanover_petition.pdf.

Almost two weeks after the announcement that the government would not appeal the ruling, the World Association of Newspapers and the World Editors Forum (writing on behalf of 18,000 publications in 100 countries) sent a letter to Minister Zypries urging Germany to file an appeal. It argued that the requirement that there be a "public interest" curtails the press and abridges freedom of expression. *See* http://www.wan-press.org/article5405.html.

Paris Appeals Court Upholds Acquittal of Princess Diana Photographers

On September 14, a French appeals court affirmed the acquital of three photographers who took photographs of the August 31, 1997 car crash that killed Princess Diana and her companion Dodi al Fayed.

The decision upholds the November 2003 verdict of a lower court, which cleared Jacques Langevin, Christian Martinez and Fabrice Chassery of breaking French privacy laws on the grounds that they did not photograph any intimate moments and that the inside of a car does not constitute a private place.

The appeals court similarly found that the inside of a car following a crash is not a private place and that the photographers did not capture images of al Fayed's private life. *See* "French Appeals Court Confirms Acquittal of Diana Photographers," Yahoo News, Sept.15, 2004 (available online at http://sg.news.yahoo.com/040914/1/3n470.html).

The case stems from a criminal complaint for invasion of privacy brought by Mohamed al Fayed, Dodi's father. As such, only the photographs of Dodi were at issue before the court. The prosecutor's office supported the appeal, but in June requested that the photographers be acquitted with respect to pictures taken at the scene of the crash in recognition of freedom of the press.

Fabrice Dubest, Mohamed al Fayed's lawyer, told the press that his client would appeal the decision to France's highest court, the Cour de Cassation.

Third Circuit Court of Appeals Tweaks Earlier Decision on Media Ownership Rules

By Kathleen Kirby

On September 3, the Third Circuit issued two decisions concerning media ownership, one reaffirming its stay of the Federal Communications Commission's (FCC or Commission) new rules governing common ownership of newspapers and broadcast stations, and one permitting new local radio ownership rules to take effect. *Prometheus Radio Project v. F.C.C.*, No. 03-3388, 2003 WL 22052896 (3d Cir. Sep 03, 2003).

Those of you who have followed the ownership rules saga will recall that in June of this year, a three-judge panel of the Third Circuit released its decision in the controversial appeal of the FCC's July 2003 "Omnibus" *Report and Order* ("*Order*") on media ownership regulations, 18 F.C.C.R. 13,620 (2003), which had significantly relaxed the agency's restrictions on common ownership of television stations, radio stations and daily newspapers. *See Prometheus Radio Project v. Federal Communications Commission*, No. 03-3388, 2004 WL 1405975 (3d Cir. June 24, 2000); "Third Stays Media Ownership Rules," *MLRC MediaLawLetter* July 2004 at 59.

In its 2-1 decision, the Third Court affirmed portions of the Commission's decision, but found fault with the FCC's proposed new limits on TV, radio and cross-media combinations, and remanded the case to the Commission for further proceedings.

In doing so, the Third Circuit extended the stay it had imposed in September 2003 on implementation of the new media ownership rules, effectively leaving previously existing ownership restrictions in place pending completion of the agency proceedings on remand.

Newspaper/Broadcast Cross-Ownership

In its June decision, the court rejected the FCC's new newspaper/broadcast cross-ownership rule, which would have permitted common ownership of certain combinations of newspapers, television and radio stations in local markets where there are more than 3 television stations. The court said that while the FCC was justified in relaxing what had been a complete ban on newspaper/broadcast cross-ownership, the agency had failed to provide a reasoned analysis for the specific limitations it adopted. The court kept the absolute prohibition on cross-ownership in place pending an FCC decision on remand.

The Tribune Company (which, pursuant to an FCC policy that permits broadcast licensees to acquire newspapers and keep them until their license renewal date, has certain television broadcast combinations that are due to expire over the next few years) filed a motion asking the court to lift its stay of the new cross-ownership rule in markets with more than 9 television stations.

Tribune argued that because the court upheld the public interest determinations that supported repeal of the cross-ownership ban as it applied to the largest markets, a continuing stay of the FCC's *Order* is overbroad. Moreover, Tribune said, the stay needlessly "violates Tribune's and others' First Amendment rights" and "prevents newspapers and broadcasters from achieving . . . the very benefits of common ownership that the FCC found and that this Court has now expressly upheld."

The Petitioners, who include Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ of the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumers Union and Consumer Federation of America, opposed Tribunes's motion on a number of grounds.

First, they argued, the court had expressly rejected Tribune's suggestion that the methods used by the FCC in its "line drawing" did not apply to larger markets. Moreover, said the Petitioners, the court had already denied Tribune's First Amendment objections.

Finally, they argued that Tribune's motion would have the court engage in the same impermissible judicial line-drawing that its opinion in the case stressed was reserved for the expert agency.

The court rejected Tribune's request, simply stating that "inasmuch as we held in our Opinion and Judgment of June 24, 2004 that the cross-ownership rules proposed by the Federal Communications Commission in its Report and Order and Notice of Proposed Rulemaking are not supported sufficiently as required by the Administrative Procedure Act and the Telecommunications Act of 1996, the foregoing motion by Tribune for a partial lifting of the stay of the cross-ownership rules is denied."

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Third Circuit Court of Appeals Tweaks Earlier Decision on Media Ownership Rules

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Local Radio Ownership

In its 2003 *Order*, the FCC did not change the number of radio stations that a single owner may hold in any one local market. That cap is set at different numbers depending on the size of the market; the larger the market, the more stations one owner can hold (*e.g.,* in the largest locales, one owner may hold up to eight radio stations).

The FCC did decide, however, to adopt a new standard for geographically defining a "local radio market," opting for the market standards utilized by Arbitron, a market research firm that conducts local ratings surveys for most population centers, rather than the more complicated signal contour overlap approach that had been in place for decades.

At the same time, the FCC decided to include noncommercial stations in its count. In instances where the rule change would result in existing radio station combinations being "noncompliant" with the FCC's new rules, the current owner would be permitted to retain its existing clients, but would be prohibited from selling them intact unless to a qualifying small business entity.

The FCC also determined that certain joint sales agreements—generally, agreements which authorize a broker to sell commercial time on a radio station owned by someone else—should be attributable to the broker for purposes of the FCC's ownership rules.

The Third Circuit upheld these rule changes in its original decision, yet did not permit them to take effect because of its stay of the entire FCC *Order*. The FCC subsequently filed a Petition for Panel Rehearing, asking that the court lift the stay only as it applied to the revised radio market definition, the transfer restrictions, and the attribution of radio joint sales agreements. Since the court upheld these revised rules, the FCC said, "there is no sound reason to prevent the Commission from implementing those rules during the pendency of any proceedings on remand."

The National Association of Broadcasters (NAB) responded that "the FCC's request to disrupt the *status quo* should be denied, emphasizing that the Third Circuit's decision affirming the shift to Arbitron is subject to further review and possible reversal by the U.S. Supreme Court. To permit the FCC to implement a change that "abandons more than 60 years of practice," while its order is on review, said the NAB, would create "needless chaos and disruption in the industry and will impose irreparable harm on smaller and financially troubled stations seeking to use a merger to strengthen their position and better serve their listeners."

The court granted the FCC's Petition. Following the lifting of the stay, the FCC temporarily barred the filing of applications for radio station acquisitions. The action gives the agency staff some time to adapt their review processes to the new standard.

Observers currently expect the FCC (and others, such as Tribune and NAB) to seek high court review.

What Next?

Meanwhile, a motion filed by Viacom for a partial lifting of the stay as it applies to radio/television cross-ownership remains pending. Viacom argues that because no party appealed the FCC's decision with regard to radio/television cross-ownership, the Commission need not revisit the rule on remand and the court should allow the liberalized rule to take effect.

Because the same cross-media limits adopted by the FCC and faulted by the court as they apply to newspaper/broadcast cross-ownership also apply to radio/television cross-ownership, it does not appear likely that the court will grant Viacom's motion.

These latest court developments move the FCC closer to making a decision on whether to appeal the Third Circuit decision to the U.S. Supreme Court. Although observers currently expect the FCC (and others, such as Tribune and NAB) to seek high court review, the agency could instead initiate new rulemakings to reconsider the rules that were struck down. The two Democratic Commissioners have been urging the latter course. Petitions for certiorari, if any, are not due until December 2, 2004, after the November elections.

Kathleen Kirby is of counsel at Wiley, Rein & Fielding LLP in Washington, D.C.

LEGISLATIVE UPDATE

Defense, Patient Safety, Journalists Visas

By Kevin Goldberg

Congress returned to Washington on September 7 after a very long August recess that incorporated the two party conventions. With less than one month before the tentative recess date of October 1 – to allow members to return to their home Districts and campaign for reelection, there is not much time to get important business done.

Bills that previously seemed destined for passage may fall victim to an otherwise-crowded legislative calendar. However, even more likely is that current bills may be added to existing legislation, often without the knowledge of interested parties.

As best we can predict, these are bills that are still in play which will affect the media as we come to the end of the 108th Congress.

National Defense Authorization Act (S 2400)

- This reauthorization of defense funding offers another example of a secrecy-based provision that is introduced in secret. The Senate added Section 1034, related to nondisclosure of certain products of commercial satellite operation, to its version of this legislation without a hearing on the matter or prior consultation with the House of Representatives.
- Section 1034 would exempt any satellite images from disclosure under FOIA, even though those images are not classified. This would include maps, reports or analyses that are "derived from" commercial satellite images. Further, state or local laws to the contrary would be preempted to the extent that these government officials could not release this information even if they wanted to. What is particularly interesting about this class of information is that it is not created by the government, but purchased from commercial vendors for government use – thus, it was available to any potential purchaser at one time.
- The bill is currently before a conference committee chaired by Rep. Duncan Hunter (R-CA). It is to Rep. Hunter that inquiries, comments or advocacy should be directed.

Patient Safety and Quality Improvement Act (S 720)

- This bill was introduced by Sen. Jim Jeffords (I-VT), Bill Frist (R-TN) and John Breaux (D-LA) on March 26, 2003.
- The bill notes that 'research on patient safety unequivocally calls for a learning environment, rather than a punitive environment, in order to improve patient safety.' Increased voluntary data gathering, but not increased mandatory data gathering, from within the health care field is apparently necessary to achieve this goal of a learning environment. Organizations supporting this increased voluntary data gathering also support legal rules that will allow them to review this protected information in order to 'collaborate in the development and implementation of patient safety improvement strategies.'
  - It contemplates the creation of 'patient safety organizations' who will receive 'patient safety data' that is voluntarily provided by health care providers.
  - These 'patient safety organizations' are public or private entities that:
    - Conduct efforts to improve patient safety and quality of health care delivery;
    - Collect and analyze patient safety data voluntarily submitted by a provider;
    - Develop and disseminate information to providers regarding patient safety,
    - Including recommendations, protocols or information on best practices; or
    - Utilize patient safety data to encourage safety and minimize patient risk.
  - 'Patient safety data' is defined as any data, reports, records, memoranda, analyses, deliberative work, statements, or quality improvement process. This does not specifically include individual medical records, nor is it information that contains personally identifiable information. Rather, patient safety data will most likely consist of aggregated statistics reflecting trends in a given organization or office, such as the number of people who died during surgery in

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the past year or the number of patients who died from post-operative infection. It may also include individual reports — minus personally identifying information — of medical or administrative errors which are reported to the patient safety organization in order to receive feedback regarding the ability to avoid similar mistakes in the future.

- A health care provider submitting this information can be any person or entity furnishing medical or health care services, including, but not limited to, physicians, pharmacists, renal dialysis facilities, ambulatory surgical centers, long term care facilities, behavioral health residential treatment facilities and clinical laboratories.
- The bill's controversial provisions grant confidentiality to this patient safety data. The legislation states that all patient safety data shall remain privileged and confidential, preventing its release even in the face of a subpoena or discovery request (or its use as evidence) in any civil, criminal or administrative proceeding, or its disclosure pursuant to FOIA. Disclosure of this information can only occur if:
  - A health care provider makes the disclosure as part of a separate request for information that contains this information (such as a proper request for a patient's file when that file contains a reference to patient safety data or the data itself); or
  - A health care provider or patient safety organization releases the information as part of a disciplinary proceeding or criminal proceeding if the information is material to the proceeding, within the public interest and not available from any other source.
- A House version was introduced on February 11, 2003 by Rep. Michael Bilirakis (R-FL), with approximately twenty co-sponsors.
- Some believe that S 720 would trump existing state laws, such as a recently-passed Illinois law which requires the reporting of hospital-acquired infections. This concern stems from the very broad definition of 'patient safety data.' Any advocacy against this bill must contain opposition to this definition. By including 'any data, reports, records, memoranda, analyses, or statements that could result in improved patient safety or health care outcomes that are (1) collected or developed by a provider for reporting to a patient safety organization, (2) requested by a patient safety organization, or (3) collected from a provider', in the definition of 'patient safety data', the bills would allow health care providers or patient safety organizations to bring records, information, or other evidence of improper care through the back door into the safe haven of protection from disclosure (the bills' supporters disagree, claiming that the bills would not limit the availability of any information already in the public domain, nor would they relieve physicians from maintain a proper standard of care). In addition, the exception for information that has been collected or developed separately from patient safety data is not sufficiently precise to allow a requestor to claim access to such records — they would apparently allow medical information such as specific patient records to be grouped with patient safety data in a way that results in both being protected by the law. It almost certainly would restrict access to the self-generated 'hospital report cards' that are a good indication of a hospital's health care practices.
  - The differences between the two bills have been resolved and the measure has been cleared for a Senate Floor vote – the last impediment to its potential passage. Again, however, the lack of active congressional work days left in this session may mean a bullet is dodged.

HR 4823 (Journalist's Visas)

- Introduced by Rep. Zoe Lofgren (D-CA) on July 13, 2004, this bill seeks a simple solution to a devastating problem.
- Under the Visa Waiver Program, citizens from 27 friendly countries can travel to the United States for up to 90 days without getting a visa prior to entry; US citizens traveling to these nations have reciprocal rights. In either case, certain exceptions apply:
  - Persons convicted of certain serious felonies and those with highly communicable diseases are not eligible to participate in this program.

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- Nor are persons who are coming to the United States solely for the purpose of engaging in very complex, long term business transactions.
- Finally, journalists are prohibited from entering the United States without an 'I-visa', which must be obtained from a United States Consulate prior to entering the United States.

  - The requirement to obtain an I-visa prior to coming to the United States to engaging in reporting has been part of US law since being enacted as part of the Immigration and Nationality Act in 1952 and is considered a relic of the Cold War.
  - It was largely dormant prior to 18 months ago, when the Department of Homeland Security, without prior public notice, began enforcing it at the borders. In that time, an estimated 15 journalists have been detained and arrested at airports across the country when it was revealed that they were entering the United States to engage in reporting. These journalists were handcuffed and detained in holding cells before being summarily deported without a hearing or trial of any kind. In many cases, they were forcibly searched and denied the right to a phone call or even an attorney.

  - Upon pressure from various journalism organizations, the Department of Homeland Security has stated that it will allow reporters to enter the United States without a visa on one occasion – presuming that most reporters are ignorant of the I-visa requirement. However, any second offense will result in arrest and deportation, with the possibility of being barred from entering the United States in the future.

- Rep. Lofgren's bill would simply specifically exclude journalists from those classes of persons ineligible to participate in the Visa Waiver program, putting them on equal footing with all other citizens of these friendly nations. It was referred to the House Judiciary Committee, but has not received any action from that committee.

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or kmg@cohnmarks.com

ETHICS CORNER

The Timing, Love, and Tenderness Necessary to Effectively Represent Multiple Clients in Settlement Negotiations

By Bradley H. Ellis, Frank J. Broccolo, and Ellen F. Burns

Last year, Michael Bolton filed a lawsuit against his former counsel levying serious accusations concerning their representation of him during a copyright infringement action.

The crooner identified a melange of purported breaches of his former counsel's ethical and fiduciary duties to him, including their alleged failure to

(1) advise Bolton of potential and actual conflicts between himself and an insurance carrier,
(2) promptly and accurately communicate settlement offers; and
(3) effectively account for Bolton's financial interests during their settlement negotiations with Plaintiffs.

The averments in the Complaint are startling – detailing an alleged conspiracy between Bolton's former counsel and their other client, an insurance carrier, to move his case to trial. The purported motive was that the insurance carrier could seek indemnification from Bolton in the event of any adverse judgement, but not if the case settled.

After a multi-million dollar judgment was entered against Bolton, and the insurance company filed an action for indemnification against him, Bolton's malpractice claim against his former counsel quickly ensued.

Regardless of whether these allegations have any merit, at a minimum, the Complaint highlights an attorney's various ethical and fiduciary responsibilities to multiple clients during settlement negotiations, and serves as an effective reminder of the consequences that could befall a lawyer who fails to observe those duties.

Disclosure Rules

Attorneys must always disclose any potential conflicts of interest to their clients, and obtain their clients' informed consent to the representation, including with respect to his or her ability to negotiate a settlement of that matter. See ABA Model Rules, Rule 1.7; Cal. Rules of Prof. Resp. Rule 3-310 (C); DR 5-105 (C) (New York); *Export Dev. Corp. v. Uniforms for Industry, Inc.*, 1991 U.S. Dist. LEXIS 914, *15-16 (E.D.N.Y.) (ordering plaintiffs' attorney to advise clients of potential conflict with respect to settlement negotiations and obtain their informed consent)*; Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 716, 201 Cal.Rptr. 528, 545 (Cal. Ct. App. 1984) (requiring attorneys to disclose all areas of potential conflict that may affect a client's ability to make "fully informed decision" regarding representation).

Attorneys must always disclose any potential conflicts of interest to their clients, and obtain their clients' informed consent to the representation, including with respect to his or her ability to negotiate a settlement of that matter.

Timely identification of potential conflicts is essential. Many of these potential conflicts are apparent when representation includes the insurance carrier and/or publishing company, as well as the individual reporter, author, songwriter or producer.

Check for Indemnification Agreements

At the very inception of litigation, counsel should carefully review any applicable insurance policy or publishing agreement that affects his or her clients. Indemnification provisions in these agreements will oftentimes be the source of potential conflicts between the insurer and its insureds, or between the publishing company and the author.

For example, if the applicable agreements provide that neither the publishing company nor the insurance carrier can obtain indemnification from an author or producer unless there is an adverse judgment, those corporate entities theoretically have a greater interest in pressing a case toward trial (depending upon the ability of the individual defendant to satisfy any likely judgment).

Conversely, if a case is unlikely to resolve itself for anything less than hundreds of thousands of dollars, and an author is required to indemnify the publishing company or carrier for any settlement, the individual might be more willing to proceed to a disposition on the merits, because

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the chance of winning at trial provides an opportunity to escape liability altogether.

Moreover, attorneys should be mindful that authors or artists might not approach settlement discussions with the same cost-benefit analysis employed by their corporate clients. A biographer that has written a thoroughly-researched expose concerning a celebrity plaintiff will understandably be reluctant to enter into a settlement agreement that implies carelessness on his or her part. Nor will a songwriter be enthused about settling with a plaintiff who asserts a baseless claim of copyright infringement, where the works at issue are entirely original.

Thus, any effective settlement will need to balance an individual author's or artist's personal need for vindication against the financial risks at stake.

Any potential conflicts must be carefully explained in the engagement letter, and individual clients without any legal or business experience must be treated with particular tenderness. Having these persons sign releases, waivers and engagement letters filled with legalese will likely not satisfy an attorney's obligations to apprise the client of conflicts, such that the clients can make an informed decision about whether or not to proceed with independent counsel.

Nor will it necessarily shield an attorney from liability in any subsequent malpractice action brought by those persons. *See, e.g., Swift v. Choe*, 674 N.Y.S.2d 17, 19, 242 A.D.2d 188, 192 (1998) (Order dismissing malpractice action was reversed; the existence of a letter of acknowledgement and a subsequently executed release did not foreclose plaintiff's argument that he did not fully understand and appreciate the risk he was undertaking by consenting to multiple representation).

As the litigation proceeds, counsel must be alert to changes in the posture of the case giving rise to new potential conflicts or that turn potential conflicts into actual ones. The settlement stage in particular is a time for vigilance in discerning conflicts that may develop, each of which require additional disclosures and consent by the clients.

Authors or artists might not approach settlement discussions with the same cost-benefit analysis employed by their corporate client.

Settlement Offers

First, counsel must treat all of his clients with the same love and respect. For example, settlement offers must be communicated to all of the clients – not simply to the insurance carrier or publishing company – in a prompt manner. *See, e.g.,* California Code of Professional Conduct 3-510 (A*); In re Yagman*, 263 A.D.2d 151, 153 (1999) (finding that the New York rules of professional conduct impliedly impose such a duty).

Attorneys should always forward settlement offers to each client individually, and never rely upon another client to forward a proposal. Moreover, when presenting these offers, it is important to describe them in an objective manner, not favoring the interests of one client over another.

Aggregate settlements must be treated with special care by a lawyer handling multiple clients. Early disclosure of potential conflicts is imperative. *See* Center for Professional Responsibility/American Bar Association, Annotated Model Rules of Professional Conduct, 2003 A.B.A. R. 1.8 at 144 (5th ed.).

Further, because the lawyer must respect the client's decision with respect to settlement, both as to its desirability as a strategy and its form, full disclosure to each client is critical. *See, e.g., In Re Hager*, 812 A.2d 904 (D.C. Ct. App. 2002).

In California, for example, no aggregate settlement may be entered into without the "informed written consent of each client." Cal. Code of Professional Conduct 3-310(D). Most importantly, the consent must be unanimous; so called "majority rules" aggregating settlements are not ethically proper. *See Hayes v. Eagle-Picher Industries, Inc*., 513 F.2d 892 (10th Cir. 1975).

Not only must all critical terms of the settlement be disclosed, but each client must be informed of every other client's claim and share of the settlement. *See* American Bar Association/The Bureau of National Affairs, Inc., Lawyer's Manual on Professional Conduct, 2003 A.B.A. 51:313.

Informed consent cannot be obtained if the only disclosure to a client consists of the amount of his or her share of the settlement. *See Adams v. BellSouth Telecommunica-*

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tions, Inc., 2001 U.S. Dist. LEXIS 24821, *9 (S.D. Fla. 2001). For a disclosure to be considered sufficient, it should also include any terms relating to the lawyer's fees, the lawyer's conduct in the future with respect to the subject matter of the litigation, as well as the total amount of the settlement. *Id.*

To the extent that consensus cannot be reached, an actual conflict might develop where one client insists on settlement, and another refuses to resolve the matter. *See, e.g., Hayes*, 513 F.2d at 894 ("[I]t was untenable for [a] lawyer to seek to represent both the clients who favored the settlement and those who opposed it"); *Nat'l Farmers Union Prop. & Cas. Co. v. O'Daniel*, 329 F.2d 60, 66 (9th Cir. 1964) (Conflict of interest occurred where one client desired settlement and another client wished to continue litigation); *accord, Knisley v. Jacksonville*, 147 Ill. App. 3d 116, 497 N.E.2d 883 (Ill. App. Ct. 1986).

Moreover, as in any transaction, during settlement negotiations a lawyer must never advance the interests of one client at the expense of the other. *Crookham v. Riley*, 584 N. W.2d 258 (Iowa Sup. Ct. 1998) (attorney found liable to shareholder who received a lesser settlement due to lawyer's greater attention to other shareholder's claim); *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. Sup. Ct. 1997) (ex-client stated claim for breach of fiduciary duty when he alleged that his former counsel placed the interest of his co-defendants above his own during settlement discussions); *Schlesinger v. Herzog*, 672 So.2d 701, 709-710 (La. Ct. App. 4th Cir. 1996) (mere disclosure of a potential conflict of interest does not sanction a lawyer's advancement of one client's position in a transaction at the expense of the other).

Accordingly, an attorney cannot – absent informed written consent of all of his or her clients – enter into a settlement agreement on behalf of one client for a nominal sum, leaving his or her other clients facing a greater amount of potential liability.

To the extent that irreconcilable differences develop between clients' settlement positions, the hiring of co-counsel or "shadow" counsel, who is able to offer independent advice to the individual client, might be necessary. The engagement letter executed with an individual defendant should advise him or her when a lawyer plans to continue representing a corporate defendant in the event that such an actual conflict occurs – the ethical equivalent of a prenuptial agreement.

However, the early identification and disclosure of potential conflicts of interest will hopefully encourage compromise between a lawyer's clients, and might quell any potential disagreements before they begin to fester. Many times the effective resolution of a case will necessitate very different types of concessions on the part of an author or artist, on the one hand, and a corporate client, on the other.

For example, a biographer might need to issue a press release that acknowledges inaccuracies in a book or article he published. A corporate client might, in exchange, agree to waive indemnification rights, and absorb the entire cost of settlement and legal fees. In the absence of both of these concessions, an effective resolution of the matter outside of Court might prove impossible.

A candid discussion of potential conflicts of interest at the inception of each case will also help to ensure that clients are not surprised or confused about the resulting effects of a settlement agreement, or the potential risks involved in litigating a matter to trial – as Bolton contends in his Complaint. Documentation of that discussion, the possible consequences of such conflicts, and of a lawyer's intent to continue representing a corporate client if dual representation becomes unfeasible, is the best protection a lawyer has against charges of infidelity.

Paying careful attention to each of your clients' different interests and expectations from the very beginning of a case, and as it proceeds, and especially with respect to settlement negotiations, may well determine whether your clients sweetly sing your praises after their litigation has been resolved, or instead shriek a shrill note by filing a malpractice suit.

Bradley H. Ellis, Frank J. Broccolo, and Ellen F. Burns are with Sidley Austin Brown & Wood LLP in Los Angeles.

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

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MLRC SYMPOSIUM ON THE REPORTER'S PRIVILEGE
Wednesday, November 17th @ 2:30-4:30

On Wednesday, November 17th, in the afternoon before the MLRC Annual Dinner, MLRC will host a Symposium on the Reporter's Privilege. It will be held from 2:30-4:30 p.m. at the Copacabana in New York, the venue for the Reception and Annual Dinner.

The Symposium is being held to discuss the key issues that face the First Amendment community with regard to the privilege. How best to position the Constitutional arguments. How hard to push for a federal common law privilege. What elements should the media argue are part of a common law privilege, and drawn from which sources. Evaluating the pros and cons of seeking Supreme Court review of the privilege issues, Constitutional or common law. And whether there should be a stronger push for a federal shield law.

We are inviting an exceptional group of practitioners who are among those currently engaged in arguing these matters. But we are inviting you as well to come, join us and them to debate and thrash through these extraordinarily important matters. The Symposium will be led by Lee Levine, who served as an editor of the MLRC White Paper on the Reporter's Privilege, and Paul Smith. The panelists will include Floyd Abrams, Kevin Baine, Ted Boutrous, Jon Donnellan, and Seth Waxman.

Please RSVP (by sending an email to kchew@ldrc.com) if you are planning to attend. All MLRC members are welcome. But if you want a chair to sit on, we would urge you to let us know if you are coming!

MEDIA LAW RESOURCE CENTER

TWENTY-FOURTH ANNUAL DINNER

WEDNESDAY, NOVEMBER 17, 2004

WITH PRESENTATION OF THE

WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD

TO

TED TURNER

WHO WILL BE INTERVIEWED ON THE OCCASION OF THE AWARD BY

Tom Brokaw
NBC News

6:00 p.m. Reception
Sponsored by Media/Professional Insurance

7:30 p.m. Dinner

MLRC Symposium on the Reporter's Privilege
2:30-4:30 p.m., before the Dinner
(please contact kchew@ldrc for more info)

Copacabana, 560 W. 34 St., New York City

DCS ANNUAL BREAKFAST

Friday, November 19, 2004, 7:00 a.m.

30th Floor, Reuters Building, Three Times Square, New York City