

MILRC
Media
Law
Resource
Center
MEDIA LAW LETTER

Reporting Developments Through September 29, 2005

MLRC

	London Conference Explores Developments in International Media Law	35
	Mock Trial Explores Libel and Responsible Journalism	37
Legislative Update	Criminalizing Leaks of Information?	52
Ethics	Does an Officer of the Court Owe a Duty To Disclose Clients Confidences About Their Confidential Sources	54

LIBEL & PRIVACY

Canada	No Jurisdiction Over the Washington Post in Internet Libel Case <i>Court considered unenforceability of judgment under U.S. law</i> Bangoura v. Washington Post	5
3rd Cir.	Failure to Charge Jury on Presumed Damages Was Not Reversible Error <i>Affirms trial judgment for New York Times</i> Franklin Prescriptions v. New York Times	7
2nd Cir.	Court Reinstates Libel Suit Over Press Reports of Audit <i>Reports could be found false and were not fair summaries of audit</i> Karedes v. Village of Endicott	10
9th Cir.	Court Affirms Summary Judgment in Favor of Amos Press <i>Magazine published "subscriber alert" about plaintiff</i> I.C. Marketing, Inc. v. Amos Press	11
N.Y. App.	Restaurant Ratings and Reviews Are Protected Opinion <i>Restaurant ratings and reviews "almost invariably" opinion</i> Themed Restaurants Inc. v. Zagat Survey LLC	14
Wash. App.	Appeals Court Overturns Law Punishing False Campaign Statements <i>Statute struck down under strict scrutiny analysis</i> Rickert v. State, Public Disclosure Com'n	15
Okla.	Former State Senator's Criminal Libel Complaint Rejected <i>Prosecutor declines to prosecute political website</i>	16
Ill. Cir. Ct.	Criminal Defendant's Defamation Claim Founders on Privileges <i>Court applied virtually absolute fair report privilege</i> Schwager v. Ricchio	17
Nev. Dist. Ct.	Casino Investigation Company Loses Libel Case Declares Bankruptcy <i>Company files after losing suit to accused "advantage gamblers"</i> In re Griffin Investigations	18

REPORTER'S PRIVILEGE

- | | | |
|-----------------------------|---|-----------|
| 11th Cir. | Panel Modifies Duty of Media Counsel in Confidential Source Case
<i>Court considers defense counsel's duty where source gives false testimony</i>
Price v. Time Inc. | 19 |
| D. R.I. | Source from Taracani Case Sentenced for Leaking Video
Rhode Island v. Bevilacqua | 20 |

ACCESS/ FREEDOM OF INFORMATION

- | | | |
|----------------------------|--|-----------|
| 3rd Cir. | Court Vacates Sweeping Gag Order in Retaliation Suit Against Police
<i>Broad allegations of harm insufficient to show "good cause"</i>
Shingara v. Skiles | 21 |
| N.D. Ohio | Mug Shots Released Once Again in Sixth Circuit
<i>Ohio newspaper challenged post-Favish policy</i>
Beacon Journal v. Dept. of Justice | 23 |
| D. Mich. | Detroit Free Press Wins Attorney Fee Award in Mug Shot FOIA Case
<i>Michigan newspaper challenged U.S. Marshals Service policy</i>
Detroit Free Press v. Dept. of Justice | 24 |
| D. Ala. | Media Intervention in Scrushy Case Improves Access
<i>Media coalition challenges sealing orders</i>
U.S. v. Scrushy | 25 |
| Colo. | Public Records Law Does Not Cover Elected Official's Personal E-Mail
<i>Explicit E-mails Between Government Employees Not Subject to Disclosure</i>
Denver Publishing Co. v. County of Arapahoe | 27 |
| Pa. Ct. | University Coach's Salary Subject to Disclosure
<i>Allows public to evaluate "wisdom" of state spending</i>
Pennsylvania State Univ. v. States Employees Retirement Board | 28 |
| M.D. Fla. | Newspaper Companies Spar Over Courthouse Confidentiality
<i>Filings under seal require showing of extraordinary circumstance</i>
Cox Enterprises, Inc. V. News-Journal Corporation | 29 |

COPYRIGHT / TRADEMARK

- | | | |
|-----------------|---|-----------|
| S.D.N.Y. | Court Dismisses Copyright Claim Over Fossil Photo
<i>Freelancer loses to National Geographic</i>
Psihoyos v. National Geographic | 46 |
|-----------------|---|-----------|

CYBERSPACE

- | | | |
|-------------------------|--|-----------|
| 4th Cir. | Fourth Circuit Address Cybergriper Trademark Issues
<i>No likelihood of confusion</i>
Lamparello v. Falwell | 30 |
| Mich. & Utah | States Enact Kids "Do Not E-Mail" Registries
<i>Statutes require marketers, publishers to scrub e-mail lists</i> | 32 |

BROADCAST

- N.D.N.Y.** **Agency's Coercive Letters to Broadcasters Violate First Amendment Rights** **47**
Kevin Trudeau granted preliminary injunction
Trudeau v. New York State Consumer Prot. Bd.

INTERNATIONAL

- Australia** **Australian Defamation Law Reform** **40**
Victoria's push for uniform defamation laws

- UK** **Court Grants Media Access to Pleadings** **43**
Ruling provides authority for opening up court files

UPDATES

- 10th Cir.** **Court Discusses Overbreadth and Vagueness in Final Judgment Context** **44**
No jurisdiction to hear appeal of vagueness ruling
Jordan v. Pugh

- FRAP** **Judicial Conference Votes to Allow Citation to Unpublished Opinions** **45**
New rule 32.1 might take effect January 2007

- Poll** **Channel One Polls Teenagers' First Amendment Knowledge** **45**
Poll released in anticipation of first National Constitution Day

- 8th Cir.** **Code of Judicial Conduct's Limitations on Campaign Activity Violate First Amendment** **49**
Restrictions on partisan political activity unconstitutional
Republican Party of Minnesota v. White

MLRC Calendar

November 9, 2005

MLRC Annual Dinner

Sheraton New York Hotel and Towers

811 Seventh Avenue on 53rd Street

Cocktail reception at 6pm sponsored by Media/Professional Insurance

Dinner at 7:30pm

Please visit www.medialaw.org for registration information.

MLRC Media Law Resource Center

50-STATE SURVEYS

Updated and published annually, the *MLRC 50-State Surveys* are easy-to-use compendiums of the law in all U.S. jurisdictions, state and federal, that are used by journalists, lawyers and judges, and law schools nationwide. Each state's chapter, prepared by experts in that jurisdiction, is presented in a uniform outline format. For a preview of the *MLRC 50-State Survey* outlines, please check the MLRC web site at WWW.MEDIALAW.ORG

PRE-ORDER 2005-06 EDITION NOW!

A \$25 DISCOUNT WILL BE TAKEN ON THE 2005-06 EDITION IF PAYMENT IS RECEIVED BY OCT. 15

MEDIA LIBEL LAW

(published annually in November)

TOPICS INCLUDE: Defamatory Meaning • Opinion • Truth/Falsity • Fault • Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/Statutory Provisions • Summary Judgment

ALSO AVAILABLE

MEDIA PRIVACY AND RELATED LAW

(published annually in July)

The 2005-06 edition is currently available.

TOPICS INCLUDE: False Light • Private Facts • Intrusion • Eavesdropping • Hidden Cameras • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Relevant Statutes



EMPLOYMENT LIBEL AND PRIVACY LAW

(published annually in January)

The 2005 edition is currently available.

TOPICS INCLUDE: Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort

Canadian Appeals Court Rules Country Has No Jurisdiction Over the Washington Post in Internet Libel Case

By Paul B. Schabas and Ryder L. Gilliland

The Ontario Court of Appeal this month overturned a trial court ruling that would have allowed a former UN Drug Control Official, Cheikh Bangoura, to sue the *Washington Post* in Ontario over articles published by *The Washington Post* in 1997 – three years before Bangoura moved to Ontario. *Bangoura v. The Washington Post*, C41379 (Sept. 16, 2005). The judgment is available online at: www.ontariocourts.on.ca/decisions/2005/september/C41379.htm

It is the first time an appellate court in Canada has considered the issue of jurisdiction in an Internet libel case. The decision provides a useful precedent for other jurisdictions (Canadian and elsewhere), many of which have yet to develop a practical approach to jurisdiction in Internet libel cases.

Background

The trial court was of the view that *The Washington Post*, as a major newspaper “often spoken of in the same breath as the *New York Times* and the *London Telegraph*”.... should have reasonably foreseen that the story “would follow the plaintiff wherever he resided.”

Some described this as the “moving target” approach to jurisdiction, increasing concerns that plaintiffs might “forum-shop” to bring American defendants into Canada, where libel laws are much more plaintiff-friendly than in the U.S. (Canada has libel laws similar to those in England).

Court of Appeal Judgment

The Court of Appeal judgment, a unanimous decision written by Justice Robert Armstrong, emphatically rejected the lower court decision, emphasizing that in order for a libel action to proceed in Ontario there must be a “real and substantial connection” between the action and the jurisdiction.

The judgment illustrates that the Canadian “real and substantial connection test” – applied properly – can serve as a practical tool for determining whether a Court should accept jurisdiction in an Internet libel case. The eight factors considered by Canadian courts in applying the test are:

1. The connection between the forum and the plaintiff’s claim.
2. The connection between the forum and the defendant.
3. Any unfairness to the defendant in assuming jurisdiction.
4. Any unfairness to the plaintiff in not assuming jurisdiction.
5. The involvement of other parties to the suit.
6. The court’s willingness to recognize and enforce a foreign judgment rendered on the same jurisdictional basis.
7. Whether the case is interprovincial or international in nature.
8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

The Court of Appeal dealt with the first two factors in short order. Although the lower court said that damage to Bangoura’s reputation would have the greatest impact in Ontario, where he now lived, the Court of Appeal noted that distribution of the articles in Ontario was minimal (there were only seven subscribers in Ontario in 1997), and that there was no evidence that anyone (other than Bangoura’s lawyer) had accessed the articles, anywhere. Accordingly, there was no evidence that Bangoura suffered significant damages in Ontario.

The Court of Appeal also rejected the finding that because of *The Washington Post*’s status as a leading newspaper, the defendants should have foreseen that they would be sued anywhere in the world, stating:

It was not reasonably foreseeable in January 1997 that Mr. Bangoura would end up as a resident of Ontario three years later. To hold otherwise would mean that a defendant could sue almost anywhere in the world based upon where a plaintiff may decide to establish his or her residence long after the date of publication.

In considering the other factors, the Court of Appeal found no unfairness to Bangoura, who had moved to the jurisdiction years later. It also raised concerns about courts having to enforce foreign awards in similar circumstances, noting that too readily accepting jurisdiction for publications on the Internet “could lead to Ontario publishers and broadcasters being sued anywhere in the world with the prospect that Ontario courts would be obliged to enforce foreign judgments obtained against them.”

(Continued on page 6)

Canadian Court Rules Country Has No Jurisdiction Over the Washington Post in Internet Libel Case

(Continued from page 5)

Perhaps the most interesting aspect of the *Bangoura* decision is its respect for the practice of American courts not enforcing foreign libel awards that are made under laws inconsistent with the actual malice rule established in *New York Times Co. v. Sullivan*. The lower court saw this as an “unfortunate expression of lack of comity,” rather than a factor that would weigh against accepting jurisdiction.

However, the Court of Appeal accepted the American position, stating:

The motion judge’s conclusion does not take into account that the rule in *New York Times v. Sullivan* is rooted in the guarantees of freedom of speech and of the press under the First Amendment of the U.S. Constitution. In any event, the reality is that American courts will not enforce foreign libel judgments that are based on the application of legal principles that are contrary to the actual malice rule. Although the Supreme Court of Canada has rejected the rule for perfectly valid reasons, it is, in my view, not correct to say that the American courts’ unwillingness to enforce a Canadian libel judgment is “an unfortunate expression of lack of comity.” Canada and the U.S. have simply taken different approaches to a complex area of the law, based upon different policy considerations related to freedom of speech and the protection of individual reputations.

Under Canadian law courts can refuse to enforce a foreign judgment if it is based on “repugnant laws and not repugnant facts”, and the Court of Appeal commented that “it could be argued that an American court’s refusal to recognize a Canadian judgment based on principles divergent from *New York Times Co. v. Sullivan* would fall into the category of repugnant law rather than repugnant fact.”

The apparent acceptance of the American practice of not enforcing foreign libel judgments will now be an important factor weighing against assuming jurisdiction against U.S.-based defendants. The fact that a case is international in nature (as opposed to inter-provincial) also weighs against taking jurisdiction.

Thus, two parts of the eight-part test will always weigh against an Ontario court assuming jurisdiction in an international Internet libel case. That said, the other factors must still be considered. If *Bangoura* had resided in Ontario at the time of the publication, and/or if there were evidence that the publication in Ontario were more widespread (as was the case in *Dow Jones & Co. Inc. v. Gutnick* – the leading Australian case, although decided on *forum non conveniens* grounds), the application of the real and substantial connection test may have led to a different result.

Conclusion

The *Bangoura* decision follows closely on the heels of two significant English decisions. Roman Polanski successfully sued Vanity Fair and its American publisher Condé Nast in England without ever setting foot in the country (he was even permitted to testify via video conference – perhaps the first ‘virtual libel tourist’).

Also this year, the English Court of Appeal in *Jameel* threw out a defamation action on the basis of abuse of process because only five people in England – including Jameel’s solicitor and two business associates – accessed the online version of the defamatory item. Jurisdictional challenges were not raised in *Jameel* or *Polanski*, because under English law they will fail as long as there is some publication within the jurisdiction.

The Canadian “real and substantial connection” test, developed over the past fifteen years, may provide an approach worthy of adoption elsewhere, as it forces courts to consider meaningful connections between the action and the jurisdiction, not just whether there was publication within the territory. The Ontario Court of Appeal’s well-reasoned application of the test in *Bangoura* demonstrates that the Canadian approach can lead to a sensible result.

Paul B. Schabas and Ryder L. Gilliland of Blake, Cassels & Graydon LLP in Toronto represented the Washington Post in the matter. The Washington Post was supported on appeal by a broad multinational media coalition led by Kurt Wimmer, Covington & Burling, and Brian Rogers, Toronto.

Perhaps the most interesting aspect of the *Bangoura* decision is its respect for the practice of American courts not enforcing foreign libel awards that are made under laws inconsistent with the actual malice rule.

Third Circuit Holds That Failure To Charge Jury on Presumed Damages Was Not Reversible Error

By Carl A. Solano

In a September 12, 2005 decision, the Third Circuit Court of Appeals affirmed a judgment in favor of *The New York Times* in a defamation action, rejecting the plaintiff's argument that it was error not to charge the jury that damages to the plaintiff's business could be presumed. *Franklin Prescriptions, Inc. v. New York Times Co.*, No. 04-3404, 2005 U.S. App. LEXIS 19586. <http://www.ca3.uscourts.gov/opinarch/043404p.pdf>.

Background

The plaintiff, Franklin Prescriptions, Inc., is a Philadelphia drug store. In October 2000, *The Times* published an article about the risks and benefits of purchasing prescription drugs online and ran a picture of part of Franklin's web page along with the article. Franklin used its web page to advertise, but it did not take drug orders online.

Accordingly, arguing that the risks and illicit activities described in the article did not apply to it, Franklin sued for libel by implication. The case was tried to the Honorable Cynthia Rufe and a jury in a federal district court in Philadelphia in March 2004.

In pretrial proceedings, Judge Rufe held that the case was governed by Pennsylvania law and that, despite its online advertising, Franklin was a private figure that needed only to prove negligence to recover compensatory damages. In addition to contesting a number of liability issues at trial, *The Times* mounted a strong defense on damages, emphasizing that no readers of the article came forward to say that the publica-

tion caused them to change their view of Franklin, and presenting evidence that, despite the article, Franklin's monthly sales increased after the publication.

The jury answered special interrogatories in which it found that the article contained a defamatory implication about Franklin that was untrue and was published "intentionally, recklessly or negligently." But on a separate question, the jury found that the article did not cause any actual harm to Franklin. The court therefore entered judgment for *The Times*. Judge Rufe also denied Franklin's motion for a new trial.

Plaintiff's Appeal

Franklin appealed. It pointed out that because *The Times'* article implied business misconduct, it would be considered defamatory *per se* under Pennsylvania law. Therefore, Franklin argued, Judge Rufe should have charged the jury that damage from the defamatory article could be presumed.

Franklin had submitted a proposed presumed damages charge prior to trial. However, when the court presented its draft of the charge to counsel during the charging conference (which spanned portions of three days at the trial's end), Franklin failed to object to the omission of the presumed damages instruction. Franklin also failed to object after the charge was read to the jury. *The Times* therefore argued that Franklin had waived that ground for reversal.

On the merits, the parties disputed whether presumed damages are available in Pennsylvania. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court held

The jury found that the article did not cause any actual harm to Franklin.



(Continued on page 8)

Third Circuit Holds That Failure To Charge Jury on Presumed Damages Was Not Reversible Error

(Continued from page 7)

as a matter of federal constitutional law that presumed damages may not be awarded without proof of actual malice, but the Court left it to the states to determine whether presumed damages would otherwise be permitted in libel cases.

A standard jury instruction drafted by a committee appointed by the Pennsylvania Supreme Court provided for a presumed damages charge to be given in all libel cases, and that instruction was approved by the Pennsylvania Superior Court (Pennsylvania's intermediate appellate court) in a 1986 decision in which actual malice had been proven, *Frisk v. News Co.*, 523 A.2d 347, 354 (Pa. Super. 1986).

But in 1993, the Superior Court held in *Walker v. Grand Central Sanitation, Inc.*, 634 A.2d 237 (Pa. Super. 1993), that presumed damages are not recoverable in cases of libel *per se*. The court did not discuss whether actual malice was proven in *Walker*, and the decision, which did not cite *Frisk* or the standard jury instruction, did not distinguish between actual malice cases and other cases.

Walker nevertheless has been construed in subsequent decisions as abrogating the law of presumed damages in Pennsylvania libel actions. Therefore, on Franklin's appeal, *The Times* argued that, regardless of whether Franklin had waived the presumed damages issue, there was no reversible error because *Walker*, the most recent Pennsylvania appellate decision on presumed damages, made clear that presumed damages no longer are recoverable in Pennsylvania.

The Times explained that since, under *Gertz*, presumed damages cannot be recovered without proof of actual malice, there was no need for the court in *Walker* to discuss whether its decision was limited to cases in which actual malice was not present. In her post-trial opinion, Judge Rufe had agreed with *The Times* that the presumed damages issue had been waived and also that, in any event, presumed damages were no longer recoverable under Pennsylvania law.

Third Circuit Decision

It was against this background that Franklin's appeal was heard by a panel of the Court of Appeals consisting of Chief Judge Anthony Scirica, Circuit Judge Samuel Alito,

and Senior Circuit Judge Leonard Garth. The Court's opinion was written by Chief Judge Scirica.

Mirroring the Court's focus at oral argument, Judge Scirica devoted much of his opinion to whether Franklin had waived the presumed damages issue by failing to object to the court's charge. That focus was not surprising. Chief Judge Scirica served on the federal Judicial Conference's Advisory Committee on Civil Rules from 1992 to 1998 and chaired its Standing Committee on Rules of Practice and Procedure from 1998 to 2003, so he is quite familiar with the 2003 amendments to Rule 51 of the Federal Rules of Civil Procedure, governing objections to jury charges. Similarly, Judge Alito has been a member of the Judicial Conference's Advisory Committee on Appellate Rules since 1997 and has chaired that committee since 2001.

At the outset, Judge Scirica emphasized that Franklin's request for a presumed damages charge was not sufficient to preserve the issue because Rule 51 requires such a request to be renewed by objection. Franklin's counsel conceded in response to a question from Judge Scirica during oral argument that he had not objected on the record to the absence of the instruction.

He argued, however, that there was no waiver because he had pressed for the instruction during a portion of the charging conference that occurred *in camera* in Judge Rufe's chambers. The Court rejected that argument, noting that Franklin's claim of an off-the-record objection was disputed by *The Times* and was "flatly contradicted" by Judge Rufe, who said in her post-trial opinion that Franklin's recollection of the *in camera* conference was "inaccurate" because she terminated the conference "before addressing Plaintiff's presumed damages instruction."

The Court observed that Judge Rufe gave Franklin ample opportunity to object to the charge on the record, and, while Franklin made on-the-record objections to other aspects of the charge, it recorded no objection regarding presumed damages.

The Court emphasized that the 2003 amendment to Rule 51 now explicitly requires that objections be "on the record, stating distinctly the matter objected to and the grounds of the objection." Therefore, even if there

(Continued on page 9)

Third Circuit Holds That Failure To Charge Jury on Presumed Damages Was Not Reversible Error

(Continued from page 8)

had been an objection during the *in camera* conference, it would not be sufficient to avoid waiver.

Although the Court found waiver under Rule 51, it proceeded to determine whether Franklin nevertheless was entitled to relief under the “plain error” standard, which permits the Court to exercise discretion to correct a fundamental error that goes to “the reputation of judicial proceedings.”

It held that the alleged error regarding presumed damages was neither fundamental nor prejudicial to Franklin. The Court surveyed the state of Pennsylvania law on presumed damages, and, although it recognized in *dictum* that “*Walker* appears generally to foreclose presumed damages under Pennsylvania law,” the Court left open whether the result could be different upon proof of actual malice.

The Court concluded that it did not need to resolve that question because there was no finding of actual malice by the jury. The jury’s finding that *The Times* acted “intentionally, recklessly or negligently” (a phrase from a Pennsylvania form book that had been used in the verdict form at Franklin’s insistence) was not a finding of actual malice because it left open the possibility that the jury found only negligence and because the jury made that finding only by a preponderance of the evidence (not under the clear and convincing standard that is mandated in actual malice cases).

The Court noted Judge Rufe’s observation in her post-trial opinion that “the evidence at trial fell well short of that necessary for a showing of actual malice.” In light of these considerations, the Court held that there was no fundamental error that prejudiced Franklin.

Apart from the presumed damages issue, Franklin also argued on appeal that the Court erred by not including in its charge an instruction that *The Times*’ publication was defamatory *per se* and that a plaintiff’s damages in such a case are not limited to financial injury. Franklin *had* objected on the record to the omission of that charge, but the Court held that the omission was harmless. Although Judge Rufe’s charge did not use the words “defamation *per*

se,” it did tell the jury that Franklin’s damages were not limited to financial harm and could include impairment of reputation and any other harm that Franklin suffered. There thus was no error.

Conclusion

The Third Circuit’s decision in *Franklin* will be of most benefit to practitioners as a primer on trial practice requirements regarding objections to jury instructions. Its contribution to defamation law is less definitive. The Court did not resolve the parties’ dispute regarding the availability of presumed damages in Pennsylvania actual malice cases, though its *dicta* expressing doubt about their continued viability adds to the body of post-*Walker* jurisprudence concluding that presumed damages are no longer available in Pennsylvania.

The decision also points out the limitations of the “intentionally, recklessly or negligently” formulation of fault charges under the still-often-used Pennsylvania form book, which, it can be hoped, may lead to the ultimate demise of that type of charge.

Carl Solano of Schnader Harrison Segal & Lewis LLP in Philadelphia represented The Times on appeal with the assistance of other members of the Schnader trial team in the case, Elizabeth Ainslie, Jennifer DuFault James, and Harris Feldman. Franklin Prescriptions was represented at trial and on appeal by George Bochetto and David Heim of Bochetto & Lentz in Philadelphia.

The Third Circuit’s decision in Franklin will be of most benefit to practitioners as a primer on trial practice requirements regarding objections to jury instructions.

Any developments you think other MLRC members should know about?

Call us, or send us a note.

Media Law Resource Center, Inc.
80 Eighth Ave., Ste. 200
New York, NY 10011

Ph: 212.337.0200,
medialaw@medialaw.org

Second Circuit Reinstates Libel Suit Over Press Reports of Audit Report

The Second Circuit this month reinstated libel claims against a local newspaper and broadcaster over their news reports about cost overruns in the renovation of a golf course. *Karedes v. Village of Endicott*, 2005 WL 2174407 (2nd Cir. Sept. 9, 2005) (Jacobs, Winter, Gleeson JJ.).

The district court had granted defendants' motion to dismiss, finding the reports were true and/or protected by New York's fair report privilege. Reversing, the Second Circuit held that reasonable jurors could find the reports false.

Background

The plaintiff, John L. Karedes, supervised improvements to a public golf course in Endicott, New York (the "Village"). The project, which involved both municipal and private funding, became the subject of public controversy in 2000 when it went more than one million dollars over budget. An audit commissioned by the Village concluded somewhat obliquely that the Village may have paid for improvements that should have been paid by a private sponsor.

At a February 12, 2000 Village meeting, the Village mayor asked an auditor in attendance about "bills that were paid by the Village for other people." The auditor replied that there was no indication that the bills were not owed by the Village, only that the vendor may have improperly billed the work. Reporters working for the *Press & Sun-Bulletin* and WITV/ WBGH were present at the meeting.

On February 13, 2001, WITV/ WBGH broadcast a report alleging Karedes enabled a private sponsor to charge the Village for expenses incurred by BCCC.

On February 25, 2001, the *Press & Sun-Bulletin* published a front-page story called "Taxpayers footed B.C. Open bills," which stated, among other things, that:

"Some of the vouchers [Karedes] signs are for bills addressed to the B.C. Open for work that auditors said was supposed to be done by [BCCC]."

Karedes was fired in March 2001.

Karedes sued Binghamton Press Company and Gannett Company, owners of the *Press & Sun Bulletin*, and

the Ackerley Group, Inc., operator of WITV/ WBGH in the Northern District of New York.

The court granted the defendants' motions to dismiss, finding that:

"the February 25, 2001 article was neither capable of defamatory meaning nor false, and (alternatively) was protected as a privileged publication . . . ; and (ii) that the February 13, 2001 broadcast was neither capable of defamatory meaning nor false."

Id. at *3 (internal citations omitted). Karedes appealed the dismissal to the Second Circuit.

Second Circuit Decision

Reversing, the Second Circuit found that a reasonable jury could find the publications defamatory. The newspaper article and television broadcast could be construed in both a defamatory and non-defamatory manner and thus under New York law the question of meaning could not be decided as a matter of law by the district court.

Judge Dennis Jacobs observed that under New York law,

"[i]f the words are reasonably susceptible of multiple meanings, some of which are not defamatory, it is then for the trier of fact, not for the court acting on the issue solely as a matter of law, to determine in what sense the words were used and understood."

Id. at *4.

The court also found that New York's statutory fair report privilege, Civil Rights Law Section 74, did not apply, finding that the press reports were not a fair and accurate summary of the undoubtedly confusing Village audit report.

Plaintiff is represented by John A. Gallagher of High, Swartz, Roerts & Seidel, Norristown, PA. WITV/WBGH is represented by Walter E. Diercks of Rubin, Winston, Diercks, Harris & Cooke, LLP, Washington, DC. Binghamton Press Company is represented by Charles D. Tobin, Holland & Knight LLP, Washington, DC.

Ninth Circuit Affirms Summary Judgment in Favor of Amos Press

By Richard M. Goehler

This month the Ninth Circuit affirmed summary judgment in favor of Amos Press, publisher of *Coin World* magazine, on claims of defamation and interference with business relationships brought by an independent subscription sales company over a “subscriber alert” published in the magazine. *I.C. Marketing Inc. v. Amos Press, Inc.*, No. 03-36044, 2005 WL 2174640 (9th Cir. Sept. 9, 2005) (unpublished) (Fernandez, Rymer, and Kleinfeld, J.J.)

Background

Amos Press is a small publisher in Sidney, Ohio, with a long history of publishing hobby magazines and newspapers, including *Coin World*, a weekly newspaper magazine for coin collectors. At issue in this case was an article that Amos Press published about I. C. Marketing (“ICM”) in *Coin World* in the form of a “subscriber alert.”

ICM is an independent subscription sales company located in Medford, Oregon, with an established history of improperly soliciting publications without authorization from publishers – indeed, even in the face of publishers’ demands to stop.

ICM has operated under a number of “dba”s. For instance, one person might receive a mailer from ICM offering a particular magazine listing “Publishers Services Exchange” as the seller, while another consumer receives the same magazine offer, on an identical form, listing “Publishers Services Network” as the seller, and still another consumer receives the same offer from “Associated Publishers Subscription Services.”

All three offers came from ICM. Over the years, in addition to its numerous “dba”s, ICM has also used a number of different addresses.

ICM sells various publications, though it has few, if any, direct authorizations from publishers to do so. Instead, ICM “clears” its magazine sales through companies referred to as “clearinghouses.”

These clearinghouses receive subscription orders from agents, such as ICM, which they have hired to sell the subscriptions that the clearinghouses have been authorized to

sell. The clearinghouses then submit the subscription orders to the publishers (or to another clearinghouse and so on, the last one of which submits the orders to the publishers).

ICM’s Unauthorized Business Tactics

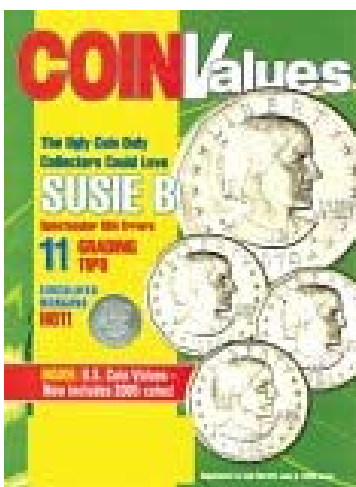
ICM’s use of multiple names and addresses has proven very confusing to consumers and publishers alike. ICM’s direct mailers have also created much controversy and confusion in the marketplace. In this case, consumers, unsure of the source or legitimacy of the solicitations, called Amos Press – as well as other publishers – to complain and seek clarification as to why the particular publications were being offered, why at the rates offered, and why the renewal notices were sent so far in advance of the subscription expiration.

Based on the calls it received from numerous subscribers, Amos Press learned that those subscribers believed that the solicitations came directly from Amos. In addition, customers complained to various state Attorneys General and to their local Better Business Bureaus about ICM’s deceptive mailers.

Some customers also complained that they never received the subscriptions they ordered from ICM. Others complained that the rate ICM offered for the subscription was different than that offered otherwise by Amos Press. Other subscribers sought clarification as to where to send their renewal payments, having been confused by ICM’s mailer directing payment to Medford, OR.

Still others complained that ICM’s mailers were intentionally created to look like invoices to “trick” customers into thinking they were bills for subscriptions that they had already agreed to purchase. Yet others complained that – through the use of fine print – ICM unscrupulously registered them automatically for membership in the “American Consumer Publishers Association,” which cost them \$29.95 unless they realized it and stopped their membership.

The complaints about ICM’s sales tactics did not end with the customers, however. Unsuspecting publishers across the country were inundated with complaints and



(Continued on page 12)

9th Cir. Affirms Summary Judgment in Favor of Amos Press

(Continued from page 11)

questions from subscribers who were solicited by ICM. Most often, these publishers had not authorized ICM to sell subscriptions to their publications. Many publishers had been forced to publish warnings advising their readers that ICM's sales pitch was a scam because ICM was not an authorized subscription agent, and that they should not order publications from ICM.

Dozens of warnings were published by various publishers warning consumers not to purchase magazine subscriptions from ICM and criticizing its business as a scam and unscrupulous.

These complaints against ICM from across the country resulted in at least four different lawsuits being filed against ICM. The Washington Attorney General sued ICM to prohibit it from conducting any solicitation business in that state. Following years of investigation and complaints, the Oregon Attorney General also sued ICM for deceptive trade practices and violations of the simulated invoice statute based upon its deceptive mailers.

In that case, the Oregon Attorney General conducted a "media blitz" to warn unwary consumers of ICM's scam tactics, and the Federal Trade Commission investigated ICM's sales tactics. Publishers also sued ICM accusing it of interfering with its customer relationships, improperly posing as an agent of publishers, and of misusing trademarks to sell magazines that it was not authorized to sell.

Numerous publications, television stations, and Internet sites also published articles or broadcast reports warning consumers about ICM's tactics in selling subscriptions, calling ICM's business a "scam," and advising readers to contact the Attorney General's Office. In addition, other publishers urged readers to send complaints to the State of Oregon, and the Oregon Department of Justice conducted a "media blitz," including appearances on local television programs, to provide a consumers with a hotline number to register their complaints against ICM.

In response to the barrage of complaints, ICM continually insisted – despite customers' claims to the contrary – that its mailers were not deceptive, and that the customers were to blame. ICM agreed, however, that it purposefully created its mailers to simulate invoices because that was "fruitful marketing." In response to publishers' complaints that ICM was improperly posing as an

agent and their demands that ICM stop offering their publications for sale, ICM simply scoffed and continued with its unauthorized offers.

Instead of operating according to the industry rules followed by the publishers and other independent agents who peddled only those publications they were authorized to sell, ICM operated according to its own set of "rules." ICM believed it was legally permitted to sell subscriptions to any publication it chooses, so long as the publisher authorized even one agent to sell its publication – even if ICM was not authorized and even if the publisher demanded that ICM stop soliciting its publications.

Under ICM's logic, if a publisher allowed one agent, it must accept sales from any agent at whatever terms the agent chose to employ.

Amos' Cease and Desist Letters Ignored

ICM and its business tactics were no strangers to Amos Press when Amos published the April 2001 *Coin World* article in dispute in this case. In 1998, ICM improperly and without authorization solicited subscriptions to Amos' *Cars & Parts* magazine. After becoming aware of ICM's activities through subscriber complaints, Amos Press published subscriber alerts warning subscribers about ICM and its sales tactics. Shortly thereafter, the Washington Attorney General filed a lawsuit against ICM based upon its improper solicitation of magazine sales.

A few years later, in early 2001, Amos Press again began receiving complaints from subscribers who had ordered *Coin World* but had not received the subscriptions, who were solicited for *Coin World* renewals even though their current subscription had not expired and were not close to expiration, and who were confused as to the price and location for sending renewal payments.

Amos Press investigated and immediately discovered that the culprit was, once again, ICM. In addition to the subscriber complaints, Amos discovered that ICM was improperly soliciting *Coin World* sales at unauthorized rates and for unauthorized terms. Being familiar with ICM's business already, and knowing that ICM was not an authorized agent for Amos, Amos immediately sent ICM a "cease and desist" letter instructing it to immediately stop soliciting *Coin World* subscriptions. ICM responded, refusing to stop.

(Continued on page 13)

9th Cir. Affirms Summary Judgment in Favor of Amos Press*(Continued from page 12)*

Amos Press then published the April 2001 article in dispute – the “subscriber alert” – for its readers. The article, with its headline “Scam Targets CW Subscribers,” began with a warning that *Coin World* readers had received bogus renewal notices, specifically stating:

“*Coin World* subscribers need to be aware that an unscrupulous firm is conducting a scam masked as a subscription renewal offer to *Coin World*. A growing number of *Coin World* subscribers have reported that they have received renewal notices from an entity calling itself Publishers Services Exchange of Medford, Oregon, claiming to be an agent for renewing subscriptions to *Coin World*. . . .”

District Court Decision

Shortly thereafter, ICM filed a complaint against Amos Press in federal court in Oregon. In response, Amos requested that ICM be enjoined from offering *Coin World* to customers because it was not authorized by Amos and because its improper sales tactics and the incorrect terms and rates it offered caused customer confusion and resulted in complaints and lost sales.

Despite this, ICM continued to solicit *Coin World*. Amos issued numerous additional “cease and desist” letters to ICM, under its various “dbas,” instructing it to stop soliciting subscription sales to *Coin World*. Despite Amos’ very clear instruction to ICM that it had no authority to do so, ICM blatantly ignored the letters and continued to offer Amos’ publications for sale according to ICM’s own terms.

In the Oregon District Court, Amos Press filed a motion for summary judgment arguing that ICM’s defamation claim and claim for intentional interference with economic relations both failed because Amos Press held qualified privileges to make the subject statements in its subscriber alert.

Amos Press also contended that the defamation claim failed because all of the statements were either true, constitutionally protected opinions, or were not defamatory,

and ICM could not prove that the subscriber alert was the cause of any harm to its reputation.

Amos Press also argued that ICM’s interference claim failed because ICM was unable to establish that the interference was improper under Oregon law. The District Court agreed, granting the motion for summary judgment and dismissing the claims of ICM in their entirety. The Court also entered an injunction in favor of Amos Press, finding that Amos Press had suffered irreparable harm from ICM’s improper solicitation tactics and enjoining ICM from contacting any person, by mail or otherwise, with offers to sell subscriptions to *Coin World*.

Ninth Circuit Decision

On appeal to the Ninth Circuit, the Court of Appeals agreed that Amos Press had an important business interest in protecting against confusion and ill will among its subscribers and potential subscribers arising from ICM’s selling techniques.

Accordingly, the Court agreed that a qualified privilege existed and found that even if some of the statements in the subscriber alert were defamatory, the interests of Amos Press, the interests of its subscribers, and the joint interests of both, privileged Amos Press to make the statements it did.

The Court further agreed that ICM’s interference claim was without merit. The Court found that Amos Press had no duty to allow ICM to sell *Coin World* in the face of customer complaints, and when it exercised its business prerogative to disallow these sales, whether as agents, sub-agents, or otherwise, ICM had no right to continue to purport to sell *Coin World* subscriptions.

Finally, the Court of Appeals found that the injunction issued against ICM was appropriate since ICM had threatened to go on selling *Coin World* subscriptions, despite Amos Press disallowing those sales.

Richard M. Goehler and Jill Meyer Vollman, of Frost Brown Todd LLC, were counsel of record for Amos Press, Inc. dba Coin World in this litigation. Plaintiff was represented by Alan Herson.

Even if some of the statements in the subscriber alert were defamatory, the interests of Amos Press, the interests of its subscribers, and the joint interests of both, privileged Amos Press to make the statements it did.

Restaurant Ratings and Reviews Protected Opinion

Summary Judgment for Zagats Affirmed

In an interesting case involving the standards applicable to defamation claims based on anonymous reviewer ratings and comments, a New York appellate court affirmed summary judgment in favor of Zagat Survey, LLC, publisher of the well-known restaurant guide. *Themed Restaurants, Inc. v. Zagat Survey, LLC*, No. 2005 WL 2298234 (N.Y.A.D. 1 Dept. Sept. 22, 2005) (Sullivan, Ellerin, Nardelli, Sweeny, JJ.).

In a typically brief decision, the New York court affirmed that there is no reason to depart from the traditional legal analysis applied when assessing defamation claims simply because a review is an edited summary of multiple anonymous consumer opinions.

The court concluded that the restaurant review was a matter of opinion, adding that “restaurant ratings and reviews almost invariably constitute expressions of opinion.”

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

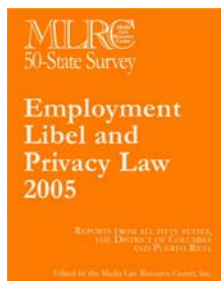
Plaintiff argued that a novel legal question was presented because the *Zagat’s* review was not the traditional review of an establishment by an individual diner, but rather an edited summary comprised of multiple anonymous consumer reviews.

The trial court and appellate court both rejected plaintiff’s argument that such fact pattern called for an alteration of the traditional legal analysis of libel claims.

The appellate court also affirmed dismissal of plaintiff’s related negligence claim since it was based on the same factual allegations underlying its defamation claim.

Ravi Ivan Sharma represented plaintiff. Martin London and Audra J. Soloway of Paul, Weiss, Rifkind, Wharton & Garrison, LLP, in New York represented the defendant.

MLRC 50-STATE SURVEYS



EMPLOYMENT LIBEL AND PRIVACY LAW

(published annually in January)

The 2005 edition is currently available.

For a preview of the MLRC 50-State Survey outlines, or ordering information, please check the MLRC web site at

WWW.MEDIALAW.ORG

Washington Appeals Court Overturns Law Punishing False Campaign Statements

A Washington appeals court panel ruled unanimously this month that a state elections law that punishes false statements in campaigns violates the First Amendment. *Rickert v. State, Public Disclosure Com'n*, No. 32274-9-II, 2005 WL 2140800 (Wash. App. Sept. 7, 2005) (Bridgewater, Houghton, Van Deren, J.J.).

The court reasoned that the statute was subject to strict scrutiny analysis because it punished false – but not necessarily defamatory – political speech. While the goal of the law is to promote integrity and honesty in the elections process, the court ruled that it was not narrowly tailored and was overbroad.

Background

Plaintiff Marilu Rickert was a Green Party candidate for state senate in 2002. She sponsored a campaign brochure that stated in relevant part that her opponent, incumbent Democrat Tim Sheldon, had voted to close a facility for the developmentally challenged.

Sheldon was reelected by approximately 79%. After the election he filed a complaint against Rickert under RCW 42.17.530, which prohibits false political advertising.

Washington's false political advertising statute was first enacted in 1984 and later amended in 1988 to include an actual malice standard. It now provides:

- (1) It is a violation of this chapter for a person to sponsor with actual malice:
 - (a) Political advertising that contains a false statement of material fact about a candidate for public office. However, this subsection (1)(a) does not apply to statements made by a candidate or the candidate's agent about the candidate himself or herself;
 - (b) Political advertising that falsely represents that a candidate is the incumbent for the office sought when in fact the candidate is not the incumbent;
 - (c) political advertising that makes either directly or indirectly, a false claim stating or implying the support or endorsement of any person or organization when in fact the candidate does not have such support or endorsement.

- (2) Any violation of this section shall be proven by clear and convincing evidence.

Under the statute, the state Public Disclosure Commission can fine a candidate up to \$10,000 or remove her from office.

The original version of the law, which did not include the actual malice requirement, was held unconstitutional by the Washington Supreme Court in *State ex rel. Public Disclosure Com'n v. 119 Vote No! Committee*, 135 Wash.2d 618, 957 P.2d 691 (1998). There the state supreme court described the statute as “patronizing and paternalistic” in assuming that “the people of this state are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate.” 135 Wash.2d at 632. But one of the justices suggested that the statute could pass constitutional muster if it required actual malice. Thus, the decision left unanswered whether the State may constitutionally prohibit deliberately false statements directed at another candidate.

The Public Disclosure Commission in the instant case found that Rickert had “sponsored with actual malice political advertising that contained a false statement of material fact about Senator Tim Sheldon.” The Commission fined her \$1,000.

Statute Violates First Amendment

The Court of Appeal first noted that the First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office” and that “a highly paternalistic approach limiting what people may hear is generally suspect. (citations omitted).

The court rejected the state's argument that it analogize RCW 42.17.530 to the law of defamation to uphold its restrictions on false statements in political campaigns. Unlike a defamation claim, the election statute requires no injury to reputation. And the court found “no convincing authority suggesting that we should apply only a portion of the law of defamation to the instant case or determine that materially false statements *alone* under

(Continued on page 16)

Washington Appeals Court Overturns Law Punishing False Campaign Statements

(Continued from page 15)

RCW 42.17.530(1)(a), regardless of whether they are defamatory, are not constitutionally protected.” (Emphasis added).

The statute therefore regulates protected speech and would have to survive strict scrutiny. Although the court noted that preserving the integrity of elections by preventing fraud and libel is a compelling government interest, this statute is not narrowly tailored to further that interest.

The court reasoned that the statute is not limited to speech made during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large. It is not temporally limited to statements made close in time to an election when a candidate might be unable to defend against the statements before the public. Furthermore, it does not apply to statements made by a candidate or the candidate’s agent about the candidate herself.

Finally, the statute is unconstitutionally overbroad in that it covers every false statement of material fact made with actual malice – regardless of whether it is defamatory.

Other State Statutes Restricting False Statements in Election Campaigns

- Alaska Stat. § 15.56.012 (2005)
- Colo.Rev.Stat. § 1-13- 109 (2004)
- Fla. Stat. § 104.271 (2005)
- La.Rev.Stat. § 18:1463(C) (2005)
- Ann. Laws Mass. ch. 56, § 42 (2005)
- Minn.Stat. § 211B.06 (2004)
- Miss.Code Ann. § 23-15-875 (2005)
- Mont.Code Ann. § 13-35-301, 302 (2004)
- Nev.Rev.Stat. § 294A.345(1) (2004)
- N.C. Gen.Stat. § 163.274(8) (2005)
- N.D. Cent.Code § 16-1-10-04 (2005)
- Ohio Rev.Code Ann. 3517.21(B) (2005)
- Or.Rev.Stat. § 260.532 (2003)
- Tenn.Code Ann. § 2-19-142 (2005)
- Utah Code Ann. § 20A-11-1103 (2005)
- W.Va.Code § 3-8-11(c) (2005)
- Wis. Stat. § 12.05 (2004)

Former State Senator’s Criminal Libel Complaint Rejected

An Oklahoma prosecutor has declined to file charges based on a former state senator’s complaint alleging that a political website was committing criminal libel, according to *The Oklahoman* newspaper.

State Senator Gene Stipe alleged that the website, McAlester Watercooler (www.mc cooler.net), published defamatory statements against him and his family. After investigating the complaint, McAlester, Ok. Police referred the case to Pittsburg County District Attorney Chris Wilson. See *MLRC MediaLawLetter*, Aug. 2005 at 35.

The last known prosecution under Oklahoma’s criminal libel statute, Okla. Stat. Tit. 21, § 771, resulted in a guilty plea in 1999 by a Tulsa police officer who posted a fake advertisement on the Internet naming a female neighbor as being involved in the “sex toy” business. See 2003 MLRC BULLETIN No. 1 at 99.

Criminal Defendant's Defamation Claim Founders on Privileges

By **Damon Dunn**

A defamation claim by a criminal defendant was dismissed with prejudice by the Illinois Circuit Court in *Schwager v. Ricchio, et al.*, No. 05 L 4815 (September 7, 2005). The court applied a virtually absolute fair report privilege to dismiss a libel claim over the reporting of a criminal conviction.

Background

The plaintiff, a building contractor named David Schwager, sued the Pioneer Press, publisher of the *Norridge News*, its reporter, and Hollinger International, Inc., and Hollinger International Publishing, Inc., a police detective and the Village of Harwood Heights for defamation.

Pioneer Press reported that Schwager pleaded guilty to felony criminal damage to property relating to an arson at his own home. Schwager alleged that he only pleaded guilty to misdemeanor criminal damage to property and that it was unrelated to the fire at his home. He theorized, in part, that the statement in the newspaper that he had pleaded guilty to a felony instead of a misdemeanor was defamatory *per se*.

Schwager also alleged that the detective maliciously provided false facts to the newspaper in an effort to impugn his reputation and that the newspaper published the report with actual malice.

Pioneer Press moved to dismiss the complaint under the official report doctrine because Schwager admitted that the news report was based on the detective's statements.

The newspaper also argued that, because the detective enjoyed immunity to make defamatory statements

under the Local Governmental and Governmental Employees Tort Immunity Act, Pioneer was privileged to re-publish the allegedly defamatory material under the Restatement (Second) of Torts § 612 (1977) because it reasonably believed the original statement was privileged. The detective and Village moved to dismiss under the Local Government Tort Immunity Act.

Schwager responded that the privileges were inapplicable because he had alleged that the detective was motivated by malice and therefore was acting outside the scope of his duties.

Article Was Privileged

Judge Michael J. Hogan of the Cook County Circuit Court agreed with defendants that an allegation of malice did not defeat the relevant privileges as a matter of law. He ruled that the press privileges were essentially absolute once it was established that the news story fairly summarized an official or otherwise privileged source, even if the reporter knew the source's allegations were false or malicious.

The Court also ruled that the detective's statements were immune because they were reasonably related to his official duties as lead investigator in the criminal prosecution and therefore the Restatement privilege for republication applied as well. Accordingly, the Court dismissed the amended complaint with prejudice.

Damon E. Dunn, a member of Funkhouser Vegosen Liebman & Dunn Ltd. in Chicago, Illinois, represented the Pioneer Press and its reporter in this matter. Plaintiff was represented by Eugene K. Hollander. The non-media defendants were represented by Michael G. Cainkar of the Law Offices of Louis F. Cainkar, Ltd.

Save the Date

Symposium for MLRC Members on Blogs, Bloggers, and the Changing Media Business

Wednesday, November 9, 2005, 2:30-4:30pm
New York City

Casino Investigation Company Loses Libel Case, Declares Bankruptcy Company Publishes Books of “Cheaters” For Casinos

A Las Vegas company that sells casinos books containing photos of “advantage gamblers” filed for Chapter 11 bankruptcy in mid-September, after a Nevada jury awarded \$75,000 in libel damages to two men pictured in the books. *Griffin Investigations, Inc.*, Bankr. No. 05-19178 (D. Nev. filed Sept. 7, 2005); *Russo v. Griffin Investigations*, No. A44267 (Nev. Dist. Ct. jury verdicts June 10, 2005 (compensatory) and June 17, 2005 (punitive)).

Griffin Investigations publishes the “Griffin Books,” which contain photographs and information about hundreds of gamblers who use various techniques to tilt casino odds in their favor. While most of these techniques – which include card counting and taking advantage of dealers’ mistakes – are not illegal, most casinos bar such players from their games.

In addition to the books, the Griffin Investigations data is available online, and can be synced with a casino’s surveillance cameras by using facial recognition software.

The libel suit stemmed from an incident in 2000 when Michael Russo and James Grosjean were accused of using “advantage” gambling techniques and were detained at Caesars Palace casino in Las Vegas, based on their identification in the Griffin data. They were both arrested by local police, but were released.

Russo and Grosjean sued both the casino and Griffin; in the same lawsuit Grosjean also sued another casino, the Imperial Palace, over a similar incident in 2001. The case was bifurcated between the two incidents.

In 2004, a jury awarded Grosjean \$99,000 in compensatory damages and \$500,000 in punitive damages against Imperial Palace. See *Russo v. Griffin Investigations*, No. A44267 (Nev. Dist. Ct. jury verdict Nov. 7, 2004). The punitives were reduced to \$300,000 under Nevada’s tort reform statute. See Nev. Rev. Stat. § 42.005.

Trial on the claims against Caesars Palace and Griffin was held in June 2005. The jury found that Griffin had libeled the plaintiffs. It also found against Caesars Palace on claims of libel, false imprisonment and battery. The jury awarded each plaintiff \$50,000 in compensatory damages, to be split evenly between the defendants.

The jury also decided that the plaintiffs should receive punitive damages. Caesars Palace reached a settlement on punitives, but the case proceeded against Griffin. After hearing additional testimony, the jury awarded an additional \$15,000 to Russo and \$10,000 to Grosjean.

In August, a defense motion for judgment notwithstanding the verdict was denied.

In the bankruptcy filing, Griffin cited legal fees from the suit as its largest debt, closely followed by the libel judgment.

The plaintiffs in the libel suit were represented by Robert A. Nersesian of Las Vegas. Griffin was represented by Erika Pike Turner of Gordon & Silver, Ltd. in Las Vegas. Caesars Palace was represented by Cory M. Jones of Cohen, Johnson, Day, Jones & Royal in Las Vegas.



BULLETIN 2005

The Twenty-First Century Anti-Indecency Crusades: Taking Up Government Swords Against Radio, Television and Subscription Services (Bulletin 2005:2)

Contact Debby Seiden at dseiden@medialaw.org for ordering information

Eleventh Circuit Panel Modifies Duty of Media Counsel in Confidential Source Case

By Gary C. Huckaby

On a petition of Time, Inc. (*Sports Illustrated*) for rehearing, an Eleventh Circuit panel modified slightly its decision earlier this year that Time's counsel had a duty to reveal a confidential source in a media libel case. See *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005), modified by, 2005 WL 2249095 (11th Cir. Sep 16, 2005). See also *MLRC MediaLawLetter*, July 2005 at 7.

Background

In May of 2003 *Sports Illustrated* published a story about the activities of Mike Price, former University of Alabama coach, in Pensacola, Florida. The story, which in part relied upon confidential sources, stated that Price had engaged in sexual relations with two women in a Pensacola hotel room while in town for a pro-am golf tournament. Price sued and sought in discovery the identities of the magazine's confidential sources. *Sports Illustrated* contended that the identities of the sources were protected by the Alabama Shield Law, Ala. Code § 12-21-142 (which specifically mentions "newspapers" but not "magazines") and by the First Amendment reporter's qualified privilege established in the Circuit by *Miller v. Transamerican Press, Inc.*, 621 F. 2d 721 (5th Cir.), modified on reh'g, 628 F. 2d 932 (5th Cir. 1980 (per curiam)).

The trial court held that magazines were not covered by the Shield Law and that Price had satisfied the exhaustion test of *Miller*. *Sports Illustrated* took an interlocutory appeal.

In its initial decision, the Eleventh Circuit panel held that Alabama's Shield Law did not apply to "magazines," but that the plaintiff had not exhausted his alternatives under *Miller* for discovering the identity of one of the sources. The court held that Price must take the depositions of four women, one of whom the Court said was possibly the source.

But the opinion went further. At oral argument the court asked defense counsel what he would do if he heard the confidential source deny under oath that she

was the confidential source. Defense counsel answered that he would inform the District Court about the false testimony.

The Court in its opinion stated that it was relying on the statement of counsel in deciding its opinion and that defense counsel would have a duty to inform the court of false testimony by the confidential source.

In effect, the court held that defense counsel must reveal the name of the confidential source.

In a petition for rehearing, defense counsel stated that he was uncomfortable with the Court's questions at oral argument because those questions turned on contingencies that may or may not arrive in the actual depositions and raised ethical matters that had not been briefed by the parties.

Counsel conceded that he misapprehended the application of the Rules of Professional Conduct in answering the Court's questions and in the rehearing petition pointed out that neither the Alabama Rules of Professional Conduct nor the Model Rules of Professional Conduct of the American Bar Association require a lawyer to disclose false testimony of a third party witness given under oath in a pretrial deposition.

Rather, the rules prohibit a lawyer from *offering* false testimony and require a lawyer to correct testimony *offered* on behalf of his client if the lawyer later comes to know that the testimony is false.

The brief of the defendants on rehearing pointed out that the decision of the panel went far beyond these ethical obligations and required counsel himself to effectually reveal the identity of the confidential source who may deny it in a deposition noticed by the plaintiff. Appellant's brief also argued that imposing such a duty of disclosure upon media counsel may create a conflict between the counsel and his client.

In response the appellate panel modified its decision, stating that "if the confidential source falsely denies under oath that she is the confidential source, counsel for the defendants has no obligation to report her perjury to the court if his client's disclosure pursuant to our decision reveals her identity as the source." *Price v. Time*,

(Continued on page 20)

Eleventh Circuit Panel Modifies Duty of Media Counsel in Confidential Source Case

(Continued from page 19)

Inc., No. 04-13027, 2005 WL 2249095 (11th Cir. Sept. 16, 2005).

The Court continued, “If for any reason his clients’ disclosure does not reveal that the witness lied when she denied being the confidential source, counsel will be obligated to report her perjury to the court.”

While the modification of the panel is somewhat more consistent with the obligations of lawyers, it is still inconsistent and potentially places the media lawyer in an impossible position.

One only need look at recent high-profile cases to see how seriously the media takes its obligation to protect a confidential source. Counsel for a media client should never be placed in a position where it becomes his or her duty to reveal the identity of a confidential source, which is information within the attorney-client privilege and which the client may desire to protect as a matter of principle, even to the point of sanctions by a court.

In my view, the comments of the court regarding an attorney’s obligations should not be significant prece-

dent, for it seems to turn on the specific facts of this case and the desire of the court to bring closure to the issue of the identification of the confidential source under the exhaustion test of *Miller*.

Nevertheless, the decision follows a trend where courts are begrudgingly observing the newsgathering privileges that have long been recognized as fundamental under the First Amendment, as opposed to a full, robust application of these protections that are recognized as essential for an informed public.

Gary C. Huckaby and colleagues Scott Burnett Smith and Kimberly Bessiere Martin of Bradley Arant Rose & White, LLP, represent Time, Inc. in this matter. Price is represented by Stephen D. Heninger of Heninger, Burge, Vargo & Davis, LLP in Birmingham, Ala.

This month’s Ethics Column examines whether officers of the court owe a duty to disclose clients’ confidences about their confidential sources.

Source from Taracani Case Sentenced for Leaking Videotape

Joseph Bevilacqua, Jr., the attorney who leaked videotapes to reporter James Taracani, was sentenced in federal court September 9, 2005 to eighteen months in prison on counts of perjury and contempt. Bevilacqua will also serve three years of supervised release and pay fines of \$152,000. His Rhode Island law license has already been revoked.

In 2001, Bevilacqua, then an attorney for the Providence city tax assessor, gave reporter James Taricani a copy of an FBI videotape showing an aide to Mayor Vincent “Buddy” Cianci, Jr. accepting a cash bribe. The video was recorded during a federal investigation into corruption in Providence government; Bevilacqua and all others involved in the investigation were expressly prohibited from distributing the tape.

The footage aired on the Providence NBC affiliate, Channel 10, in April 2001, which resulted in a three-year leak investigation into the disclosure by a special prosecutor. When questioned in 2002 about his role in the leak, Bevilacqua lied to the special prosecutor. Meanwhile, reporter Taricani refused to reveal his source for the tape and was found guilty of criminal contempt in November 2004 and sentenced to six months home confinement. *See MLRC MediaLawLetter* Nov. 2004 at 9.

The Third Circuit Vacates Sweeping Gag Order in Retaliation Suit Against Police

By Amy B. Ginensky, Michael E. Baughman,
Alessandro Martuscelli

On August 24, 2005, the Third Circuit Court of Appeals vacated a sweeping protective order entered by the United States District Court for the Middle District of Pennsylvania that marked confidential “all information” produced during discovery in a retaliation case against the Pennsylvania State Police (“PSP”). *Shingara v. Skiles*, 420 F.3d 301(3rd Cir. 2005) (Greenberg, Becker, Alito, JJ.).

The ruling was a victory for Philadelphia Newspapers, Inc. (“PNI”), publisher of the Philadelphia Daily News, which argued that the protective order precluded it from obtaining access to discovery obtained by the plaintiff which raised serious questions about the functionality of the PSP’s speed radar guns.

In determining whether the PSP demonstrated “good cause” under Federal Rule of Civil Procedure 26(c), the Court held that the PSP had not articulated a clearly defined and serious injury under *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) and that the district court failed adequately to consider the public’s right to know about the conduct of the PSP.

Background

John Shingara, a PSP employee, filed the underlying action under 42 U.S.C. § 1983. In his complaint, Shingara alleged that the PSP retaliated against him for testifying truthfully in a criminal proceeding about the faulty radar systems employed by the PSP.

During discovery, Shingara received documents related to the devices and his counsel gave some of them to The Daily News. The Daily News reported on the documents. Shortly after publication, the PSP orally moved for a protective order that the district court granted on December 14, 2004.

The order provided that:

“All information, including documents, deposition testimony, and other responses to discovery, produced or otherwise disclosed by either of the

parties...during the course of this action shall held in confidence...and shall not be disclosed or made available to any persons other than the parties, [or] their attorneys...”

The order further provided that lifting the protective order with respect to a specific document or other information required a party to establish it was “necessary in the preparation or trial of this action to disclose information.”

PNI moved to intervene in the district court and to vacate the order on December 27, 2004. On April 11, 2005, the district court granted PNI’s motion to intervene but denied its motion to vacate the protective order. PNI filed an appeal asking for expedited briefing, which the Third Circuit granted.

Third Circuit Decision

As an initial matter, the Third Circuit, in an opinion written by Judge Greenberg and joined by Judges Becker and Alito, found jurisdiction to hear PNI’s appeal under the collateral order doctrine, which requires that: 1) the order “conclusively determines the disputed question;” 2) the order “resolves an important issue that is completely separate from the merits of the dispute;” and 3) the order will be “effectively unreviewable on appeal from final judgment.”

The Third Circuit found that the district court’s order easily satisfied the first two prongs of the test. With respect to the third prong, the Third Circuit concluded that “time is of the essence” and “nobody wants to read yesterday’s news.” Therefore, the Court held that PNI’s appeal would be futile if the Court allowed it to appeal only after final judgment.

The Court then tackled the protective order itself. The Third Circuit reaffirmed its commitment to the principle established in *Pansy* that a party seeking a protective order must demonstrate that disclosure would result in a clearly defined, specific and serious injury. Broad allegations of harm are not sufficient to show “good cause” under Federal Rule of Civil Procedure 26(c).

(Continued on page 22)

The Third Circuit Vacates Sweeping Gag Order in Retaliation Suit Against Police

(Continued from page 21)

The court must balance the interests of the public with those of the parties and should explain its reasoning.

The Third Circuit reaffirmed that a district court must balance the following factors before entering a protective order:

- 1) whether disclosure will violate any privacy interests;
- 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
- 3) whether disclosure of the information will cause a party embarrassment;
- 4) whether confidentiality is being sought over information important to public health and safety;
- 5) whether the sharing of information among litigants will promote fairness and efficiency;
- 6) whether a party benefiting from the order of confidentiality is a public entity or official; and
- 7) whether the case involves issues important to the public.

The district court had concluded the case required an analysis that differed from that employed in *Pansy* because *Pansy* involved a protective order over a settlement agreement whereas the present case involved the confidentiality of discovery materials. Relying on this “distinction,” the district court concluded that the PSP’s right to a fair trial would be unduly prejudiced if the documents were released. Additionally, it found that any issues of public concern would reach the public in the future.

The Third Circuit rejected these arguments. Judge Greenberg found that the *Pansy* test does apply to discovery orders, and “the concern that the disclosure of discovery materials to the media could unduly prejudice the public is exactly the type of broad, unsubstantiated allegation of harm that does not support a showing of good cause.”

The Third Circuit disagreed with the PSP that jury selection would be a serious concern, “let alone good cause for a broad and sweeping protective order...” The Court recognized that the PSP defendants did not present any evidence to support their argument that their rights to a fair trial were harmed or would be harmed by the disclosure of additional information.

Moreover, the Court was “confident that a district court [would] be able to select a fair and impartial jury in cases

even where there has been pre-trial media attention...” and held that the underlying action did not present an exception to the usual case.

In addition, the Third Circuit stressed that the district court devalued the important public interests at stake in this litigation. The Court stated that the district court “unacceptably downplayed the fact this case involves public officials and issues important to the public...” and that it never explained how the media attention “trumped those two factors.”

The Third Circuit found that most of the *Pansy* factors weighed against the issuance of the protective order. The parties did not identify any privacy concerns nor could the Court think of any. There was no evidence that PNI sought the information for an improper purpose.

The PSP did not demonstrate that the release of the documents would result in party embarrassment. The Court concluded that the fourth and fifth factors – whether the information was important to public health and safety and whether the release of it would promote fairness and efficiency – were “neutral” or weighed against the confidentiality order.

Furthermore, the Court stated that the last two factors – whether the benefitting party is a public entity or official and whether the case involves important public issues – “clearly weigh[ed] against the protective order.” The Court reiterated that a court must always consider the public interest when deciding to issue a protective order.

Conclusion

This opinion reaffirms the Third Circuit’s directive that district courts must apply a rigorous analysis of the propriety of protective orders before those orders are entered. Lower courts should not blindly sign confidentiality orders without considering the countervailing public interests and whether the orders are appropriate.

Amy B. Ginensky, Michael E. Baughman, Alessandro Martuscelli are with Dechert LLP in Philadelphia and they represented PNI in this matter. PSP was represented by J. Bart Delone, Esquire, Office of the Attorney General. Shingara was represented by Donald Bailey.

Mug Shots Released Once Again in the Sixth Circuit

By Karen C. Lefton

Mug shots of federal criminals are once again accessible in the Sixth Circuit, the result of a Freedom of Information Act lawsuit filed by the Akron (Ohio) Beacon Journal against the U.S. Department of Justice.

The issue arose in March when a Beacon Journal business reporter, Gloria Irwin, was preparing a story about two local men who had pled guilty in federal court in connection with a real estate flipping scam. Gregory J. Geig and David M. Watson had submitted false documents to induce a bank to loan more than the value of the property. Their scheme may have involved dozens of people and hundreds of properties. Ms. Irwin got a tip about the case and embarked upon researching the story.

When she requested the booking photographs of Geig and Watson, Ms. Irwin was surprised they were denied. Booking photos had been accessible since the late 1990s as a result of a Sixth Circuit Court of Appeals decision in *Detroit Free Press v. Department of Justice*, 73 F.3d 93 (6th Cir. 1996).

In *Free Press*, the Court held that there was no privacy interest in mug shots where the defendant had been indicted, appeared in open court and was the subject of an on-going proceeding. Those criteria had been met in the Geig-Watson case.

Last year, however, a U.S. Supreme Court decision involving Vince Foster's suicide photos prompted the DOJ to implement a policy withholding all criminal defendants' mug shots. In that case, *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), the Court held that certain death scene photos of Foster were not subject to FOIA and that his surviving family had a privacy interest in them.

The U.S. Marshal's Service extrapolated the *Favish* decision on suicide photos to include criminal defendants' booking photos, and it unilaterally issued a new policy withholding all mug shots, including those in the Sixth Circuit. An August 19, 2004, memo from the Office of General Counsel states that, in light of *Favish*, "we have been advised by the Department of Justice, Office of Information and Privacy (OIP) that the Sixth Circuit precedent regarding mug shots should no longer be considered 'authoritative' or controlling, even within the Sixth Circuit."

The Beacon Journal objected to the DOJ's unilateral overruling of solid Sixth Circuit case law. After exhausting its

administrative appeals, the newspaper filed suit in U.S. District Court for the Northern District of Ohio. A hearing was held in May, and the parties were in the process of briefing the issues when the DOJ indicated that it was re-thinking its new policy.

In August, the DOJ released the Geig-Watson mug shots and issued yet another new policy, which affirmed its intent to comply with the Sixth Circuit's holding in *Free Press*. The August 10, 2005, policy says, "due to recent litigation and review by the Department of Justice, Civil Division, and the Solicitor General's office, we are informed that the Department of Justice OIP will be retracting its guidance calling for the non-disclosure of mug shots in the Sixth Circuit."

However, the newest policy still requires FOIA requests for mug shots in the Sixth Circuit to be forwarded to the OGC "for appropriate response," rather than allowing marshal's office personnel to fulfill the request locally as they had immediately following *Detroit Free Press*.

Given the declaration by Associate General Counsel and FOIA/PA Officer William Bordley that "the USMS continues to believe that *Detroit Free Press* was wrongly decided and that there are significant privacy interests associated with the disclosure of booking photographs taken in the course of criminal proceedings," the Beacon Journal remains concerned that requiring each mug shot request to be forwarded to Washington for "appropriate response" is designed to delay compliance until the event's newsworthiness passes.

After releasing the Geig-Watson mug shots to the Beacon Journal, the DOJ filed a motion to dismiss the lawsuit, which was rejected by U.S. District Judge David D. Dowd. The Court determined that the "Defendants have indicated a propensity for altering the challenged booking photograph policy based on litigation," and that "Defendants have not shown that the challenged conduct cannot reasonably be expected to start up again."

In addition, Judge Dowd wrote: "The Court is of the view that Defendants' 'recogni[tion] that they are bound by *Detroit Free Press* as the law in this circuit' constitutes an admission that their initial refusal to produce the booking photographs was a violation of FOIA in this case."

He is now considering the Beacon Journal's motion for attorney's fees.

Karen C. Lefton handled this case for the Beacon Journal.

Detroit Free Press Wins Attorney Fee Award in Mug Shot FOIA Case Against U. S. Marshals Service

By Herschel P. Fink

The Detroit Free Press won a partial victory on September 20, 2005, when a federal judge in Detroit awarded the newspaper its attorney fees for challenging a 2004 Justice Department policy prohibiting the release of mug shots maintained by the U.S. Marshals Service.

The lawsuit forced the Justice Department to back off its March 2004 directive to Marshals Service offices in the four-state Sixth Circuit, telling them they were free to ignore a 1996 Sixth Circuit opinion in an earlier FOIA lawsuit by the Free Press which held that criminal defendants had no privacy interest in their booking identification photos.

The 2004 policy change came in response to the Supreme Court's opinion in *National Archives and Records Administration v. Favish*, 124 S.Ct. 1570 (2004), involving death scene photos of the body of Vincent Foster, Jr., deputy counsel to President Clinton, who government investigators concluded committed suicide.

The government contended without support that *Favish* had expanded the ambit of privacy protection and undercut the basis for *Detroit Free Press, Inc. v. Dept. of Justice*, 73 F.3d 93 (6th Cir 1996),

where the Court held that criminal defendants mug shots were not exempt from release under FOIA because their release would not constitute an invasion of the defendants privacy.

Following the Free Press' 2005 suit, the Justice Department rescinded its 2004 post-*Favish* policy change, returning to the policy of releasing mug shots throughout the Sixth Circuit in Michigan, Ohio, Kentucky and Tennessee.

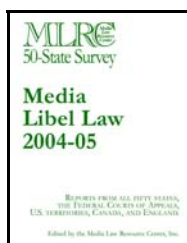
But, U.S. District Judge Anna Diggs Taylor – the same Detroit-based judge who had in 1994 ruled that mug shots were public records – agreed with the government's argument that its voluntary return to the pre-2004 policy of releasing mug shots rendered the Free Press' suit moot.

She also declined to fashion an equitable remedy, requiring immediate release of requested mug shots by local Marshals' offices, as the newspaper had requested. The Justice Department had indicated in Court filings that in the future mug shot requests would be processed centrally in Washington, where release might take 20 business days, thereby undercutting their news value.

Judge Taylor's refusal to issue an injunction against future policy changes and a declaration that FOIA had been violated contrasted with the opposite conclusion of Judge David Doud of the Northern District of Ohio in a similar suit filed almost simultaneously by the Akron Beacon Journal.

Herschel P. Fink of Honigman Miller Schwartz & Cohn LLP, Detroit, represented the Detroit Free Press in this matter.

MLRC 50-STATE SURVEYS



PRE-ORDER 2005-06 EDITION NOW!
A \$25 DISCOUNT WILL BE TAKEN IF PAYMENT IS RECEIVED BY OCT. 15

MEDIA LIBEL LAW

The 2005-06 edition will be available in November, 2005.

For a preview of the MLRC 50-State Survey outlines, or ordering information, please check the MLRC web site at WWW.MEDIALAW.ORG

Media Intervention in Scrushy Case Improves Access

By James P. Pewitt

An alliance of six media companies, led by Bloomberg News L.P., moved for leave to intervene in the federal government's criminal prosecution of Richard M. Scrushy, the founder of HealthSouth, a health-care company based in Birmingham, Alabama.

Scrushy was charged with, and ultimately acquitted of, orchestrating an accounting fraud that overstated HealthSouth's profits by roughly \$2.7 billion dollars. The case was the first criminal prosecution under the act popularly known as Sarbanes-Oxley and represented a stunning defeat for the government in its recent efforts to prosecute financial crime.

The media initially intervened in October 2004, prompted by a consent protective order entered in the case, allowing the parties to file motions and documents under seal. Entered in April 2004, the order required that "Counsel for the parties avoid commenting in court papers that are not filed under seal on evidence that is irrelevant to legal matters at issue therein."

By the time the media intervened, 29 out of the 54 documents that had been filed since entry of the protective order – more than 50% of the filings – had been filed under seal. None of those filings were preceded by public notice of any kind, a public motion to seal, or a public hearing on the propriety of the sealing.

If such motions or hearings were held, the court's docket did not reflect it. Nor did it show the contents of any order or findings by the court as to the necessity or grounds for allowing a filing to be made under seal. The court's docket provided virtually no information about the motions and documents filed under seal.

The media argued that the court had allowed the parties to create a secret docket, which was effectively denying the public access to this criminal proceeding. The media sought limited relief in the form of an order 1) requiring that all previous docket entries pertaining to sealed filings in the case be amended or supplemented to disclose information regarding the substance, type, and/or kind of information that is sealed; and 2) mandating that no additional filing be sealed unless it were first preceded by a motion, publicly docketed, and with suffi-

cient notice to the public, describing the substance, type, and/or kind of information sought to be sealed.

Scrushy's lawyers and the government filed responses to the media's motion to intervene. Although both tended to argue the propriety of the sealing of certain kinds of information presumably filed in the case – namely, personal financial information relating to the government's attempts to seize Scrushy's assets – both seemed also to agree that there ought to be a change in the procedure then employed by the court regarding sealed filings and that the public was entitled to more information about the case than was then available from the court's docket.

Scrushy's lawyers took the position that access to a court docket should be treated like access to any other judicial document and that the "court's discretion to control documents is quite different" from the public's right of access to criminal proceedings. In her initial response, consisting of a single paragraph, the United States Attorney for the Northern District of Alabama wrote that "all attorneys for the United States have an affirmative duty to oppose closure of any judicial proceedings because of the vital public interest in open judicial proceedings." (The U.S. Attorney later amended her response to provide a more detailed position to the court.)

In an order entered on October 18, 2004, the court granted intervention and directed that certain documents previously filed under seal be unsealed and publicly docketed. The court also directed that certain docket entries regarding sealed documents be amended "to give a clearer indication of the nature of the sealed document."

The court, however, "specifically reject[ed]" the media's request that the docket reflect "the nature and substance of sealed information" or that the parties be required to precede a sealed filing with a motion, publicly docketed, and with sufficient notice to the public, describing the substance, type, and/or kind of information sought to be sealed.

According to the court, "allowing the media, and therefore the public, access to the substance of the document in a motion seeking its sealing would defeat the fundamental purpose for sealing the document in the first place."

(Continued on page 26)

Media Intervention in Scrushy Case Improves Access

(Continued from page 25)

The court wrote that:

“As pointed out in the defendant’s response to Intervenor’s motion, a substantial difference exists between court proceedings and documentation filed on the docket of a case, and the court possesses broad discretion over the sealing of matters on the docket.”

The court would, however:

“provide appropriate description of the sealed motions, responses, and orders, both presently on the docket and going forward, so the public may be aware of the general nature of the items involved.”

The court concluded that, as to motions to seal, the parties were to “continue the current practice” of filing the motions themselves under seal and that “[n]either a right nor a mechanism [for] any sort of prior public notice of [sealed] filings exist.”

After Scrushy’s acquittal, the media moved to unseal the numerous documents and court filings sealed during the course of the case, as well as the transcripts of sidebars and chambers conferences that had not been previously released to the public.

After allowing Scrushy, the government, and any other interested person an opportunity to respond to the motion to unseal, the court entered a series of orders unsealing in their entirety literally hundreds of filings and documents.

In its most recent order, entered on September 15, 2005, the court ordered the release of financial documents with only limited redactions of account numbers, identification numbers, and addresses. The court is releasing documents as and when it has reviewed them for any necessary redactions. The court has also acknowledged its obligation to articulate the reasons for maintaining any documents or information under seal at this juncture.

The court has not yet specifically addressed transcripts, other than to say that it and counsel are in the process of reviewing them and that such review is a time-consuming process.

The media intervenors, Bloomberg L.P., Dow Jones Company, The Associated Press, The Reporters Committee for Freedom of the Press, The Hearst Corporation, and

The court entered a series of orders unsealing in their entirety literally hundreds of filings and documents.

The Birmingham News Company, are represented by Gilbert E. Johnston, Jr., James P. Pewitt, and Alan D. Mathis of Johnston Barton Proctor & Powell LLP, Birmingham, Alabama. Scrushy is represented by James W.

Parkman III of Parkman & Associates, Dothan, Alabama; Arthur W. Leach of Thomas, Means, Gillis & Shay, P.C., Birmingham, Alabama; and Donald V. Watkins. The federal government is represented by Richard C. Smith, United States Department of Justice, and Alice H. Martin, United States Attorney for the Northern District of Alabama.

James P. Pewitt is a partner in the firm of Johnston Barton Proctor & Powell LLP, Birmingham, Alabama.



BULLETIN 2005

***The Global Media:
Comparative Studies on European and American Media Law
(Bulletin 2005:3A)***

Contact Debby Seiden at dseiden@medialaw.org for ordering information

Colorado Public Records Law Does Not Cover Elected Official's Personal E-Mail

Explicit E-mails Between Government Employees Not Subject to Disclosure

In an interesting access decision, the Colorado Supreme Court unanimously ruled that the personal e-mails of government employees are not subject to disclosure under the state's Open Records Act. *Denver Publishing Co. d/b/a Rocky Mountain News v. County of Arapahoe*, No. 03SC783, 2005 WL 2203157 (Colo. Sept. 12, 2005) (Martinez, J.).

The court held that only e-mails that address public functions or use of public funds are subject to the Open Records law and, thus, sexually explicit and romantic e-mails between two an elected official and a state employee are not "public records" within the scope of the mandatory disclosure provisions of the law.

Background

Denver Publishing Company had sought disclosure of e-mails exchanged between Tracy Baker, an elected state official, and his Assistant Chief Deputy, Leesa Sale. The two had been in a romantic relationship, but later Sale sued Baker for constructive discharge, sexual harassment, misuse of public funds, and other claims. Arapahoe County hired a private company to investigate the allegations and it produced a report which included 622 e-mails between Baker and Sale, most of a sexual or romantic nature.

The trial court granted the newspaper's petition for access. The Court of Appeals ruled that the e-mails were subject to disclosure but noted that a constitutional privacy exception applied to the open records statute and it remanded to the trial court to determine which messages, if any, fell within the constitutional privacy exception. *See* 95 P.3d 593 (Colo. App. 2003).

Colorado Supreme Court Decision

The Colorado Supreme Court granted review to consider whether a constitutional right of privacy barred disclosure of the e-mails. But after a lengthy review of the history of the Act it found it unnecessary to answer the question. The court instead held that the e-mails were simply not within the scope of the Open Records Act.

Under the "plain language" of the statute and its amendments, the court ruled that e-mails "must be for use in the performance of public functions or involve the receipt and expenditure of public funds. The simple possession, creation, or receipt of an e-mail record by a public official or employee is not dispositive as to whether the record is a public record."

Because the privacy interests of Baker and Sale could be protected through the definition of "public records," it was not necessary for the court to reach the constitutional privacy issue.

Interestingly, many of the sexually-explicit e-mail messages had been published on various websites. But the court noted that the release of the messages did not impact its decision or analysis.

Marc Flink and Casie Collignon, Baker & Hostetler, LLP, Denver, represented Denver Publishing. Thomas B. Kelley and Steven D. Zansberg, Faegre & Benson, Denver, represented the Colorado Press Association and Colorado Freedom of Information Council as amicus curiae.

Save the Date

November 11, 2005

MLRC DCS Breakfast

**Proskauer Rose Conference Center
1585 Broadway 26th Floor
New York City**

University Coach's Salary Subject to Disclosure

A divided Pennsylvania Commonwealth court held that the salaries of Pennsylvania State University (PSU) football coach Joe Paterno and three other university officials are public records subject to the Right to Know Act (RTKA), Pennsylvania's open records law. *Pennsylvania State University v. States Employees' Retirement Board*, No. 2633, 2005 WL 1924428 at *8 (Pa. Cmwlth. Aug. 12, 2005).

Writing for a 3-2 majority, Judge Bernard L. Ginley observed that access to the salaries of state employees allows "the public to meaningfully evaluate the wisdom and appropriateness of these state appropriations."

Background

The suit arose from a request Harrisburg *Patriot-News* reporter Jan Murphy made in December 2002 with the State Employees' Retirement System (SERS) for the salary information of several PSU employees participating in the retirement plan. (SERS is a Pennsylvania agency responsible for administering the State Employees Retirement Code, a benefit plan for state employees. Even though PSU is not a state agency, its employees are eligible under state law to participate in the retirement plan administered by SERS.)

Murphy's request expressly excluded the PSU employees' social security numbers, home addresses and telephone numbers.

Upon receiving notification from SERS of Murphy's application, PSU opposed disclosing the information, claiming it violated the employees' right of privacy. PSU also argued it is not a state agency and therefore is not subject to the Pennsylvania RTKA.

Following an administrative hearing in May 2004, an SERS examiner concluded the PSU salary information maintained by SERS is a public record subject to the RTKA and recommended granting Murphy's request. The SERS Board subsequently granted Murphy's request in November 2004. PSU and its employees appealed the decision of the SERS Board to the state court.

At issue on appeal before the Pennsylvania court was: "(1) whether the salary and earnings information requested by Murphy is a 'public record' under the

RTKA, and if so, (2) whether the information is protected from disclosure under the 'personal security' and 'restricted information' exceptions under the RTKA." *Id.* at *3.

In determining whether the salary information is a public record for the purposes of the RTKA, the court noted that the information must be either an "account, voucher or contract dealing with the receipt or disbursement of funds" or a "minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or groups of persons."

**Salary information is
integral to the
employees' contractual
right to the disbursement
of public funds.**

The court found that the PSU salary information maintained by SERS is a public record "contract" because the salary information is integral to the employees' contractual right to the disbursement of public funds. Moreover, the court determined the salary information maintained by SERS was closely related to a public record "account" that disburses public funds.

The Commonwealth court found PSU employees participating in SERS are subject to the disclosure requirements of the RTKA even though PSU is not a state agency because PSU employees are categorized as state employees for the purposes of the Retirement Code. "The fact that PSU is not defined as a state agency does not change the public character of the information properly sought from an agency subject to RTKA." *Id.* at *7.

The court rejected PSU's claim that the salary information was subject to the personal security exemption from the RTKA. Murphy's request for the disclosure of the PSU employees' salary information was found not to implicate the "physical or economic security" protected by the exception because "salary alone is not so personal and inextricably linked to an individual's identity as to threaten one's personal security." *Id.* at *8.

The court also rejected PSU's claim that the disclosure of the salary information is subject to the Gramm-Leach-Bliley Act, 15 U.S.C. §§6801, et. seq. (GLB Act), which protects the disclosure of nonpublic personal information by financial institutions, because SERS is not a financial institution for the purposes of the GLB Act.

Newspaper Companies Spar Over Courthouse Confidentiality

In a case pitting one newspaper company against another, the United States District Court for the Middle District of Florida has reiterated that it will not accept filings under seal unless ordered by the court after a showing of extraordinary circumstances and particularized need. *Cox Enterprises, Inc. v. News-Journal Corporation, et al.*, Case No. 6:04-cv-698-ORL (M.D. Fla. May 24, 2005) (Spaulding, J.), *aff'd* (June 23, 2005) (Antoon, J.), *motion for reconsideration pending* (filed July 6, 2005).

The News-Journal Corporation ("NJC") publishes the Daytona Beach News-Journal. In May 2004, Cox Enterprises, Inc., the owner of 47.5 percent of NJC's common stock, filed suit against the company and its family-controlled board, alleging that the defendants misused corporate funds to further personal interests by, *inter alia*, agreeing to make a \$13 million upfront payment for the "naming rights" to a yet-to-be-constructed performing arts center, the principal tenant of which was to be a theater company created and managed by the family.

Defendants denied any wrongdoing, and NJC elected to purchase Cox's shares pursuant to a Florida statutory election provision. The court will determine the fair value of Cox's shares at trial.

The St. Petersburg Times published a feature article about the suit shortly after it was filed, (ST. PETERSBURG TIMES, June 1, 2004, at 1A), and an update six months later, (ST. PETERSBURG TIMES, February 28, 2005, at 3D). In the update, The Times quoted certain internal NJC emails that had been produced in discovery by NJC and filed with the court by Cox in support of a motion to compel.

Two months later, after Cox's motion to compel was granted, NJC alleged that Cox had violated the parties' confidentiality agreement by filing the emails. NJC also unilaterally moved for entry of an umbrella protective order that would require that all documents designated by either party as confidential be filed with the court only under seal.

In May, rejecting the motion, the court, per federal magistrate judge Karla R. Spaulding, found that the parties' confidentiality agreement did not prohibit Cox from filing the emails with the court. The court further held that NJC's proposed omnibus protective order was overly broad

and would violate the court's requirement that documents be filed under seal only pursuant to an order of the court based upon a finding of extraordinary circumstances and particularized need.

In June, the court, per federal district court judge John Antoon II, overruled NJC's objection to the ruling and affirmed.

In July NJC filed a motion for reconsideration, which is still pending. The motion argues that the denial of NJC's unilateral motion for entry of an umbrella protective order was "contrary to all controlling Eleventh Circuit precedent" and must be reconsidered "to prevent the manifest injustice which is resulting from the public dissemination of the News-Journal's highly sensitive and confidential business communications."

John A. DeVault and Courtney K. Grimm of Bedell, Dittmar, DeVault, Pillans & Coxe and Peter C. Canfield of Dow, Lohnes & Albertson represent Cox. Defendant NJC is represented by Bruce A. Hanna of Cobb & Cole and, specifically, on the motion to enforce confidentiality agreement and to supplement it by entry of an umbrella protective order, by Richard J. Ovelmen of Jordan Burt.

The LDRC Institute Publishes
MEDIA LAW RESOURCE CENTER
WHITE PAPER ON
REPORTER'S PRIVILEGE

AVAILABLE ONLINE AT
www.medialaw.org

Fourth Circuit Addresses Cybergriper Trademark Issues

Last month the Fourth Circuit Court of Appeals ruled that a cybergriper is entitled to use the domain name www.fallwell.com to criticize Reverend Jerry Falwell, rejecting a host of trademark and related claims. *Lamparello v. Falwell*, 04-2011, 04-2122, 2005 WL 2030729 (4th Cir. Aug. 24, 2005) (Michael, Motz, King, JJ.).

Background

Christopher Lamparello launched www.fallwell.com in 1999 to denounce and counter Falwell's statements about homosexuality. Upon arriving at www.fallwell.com, visitors are expressly alerted that the site is not affiliated with Falwell and a link to Falwell's own Web site, www.falwell.com, is provided.

Falwell, who owns both common law and registered trademarks in his name, sent several cease-and-desist letters to Lamparello demanding that Lamparello terminate use of the Falwell mark.

Lamparello subsequently brought an action against Falwell seeking a declaratory judgment of noninfringement. Falwell counter-claimed, alleging trademark infringement, false designation of origin, unfair competition, and cybersquatting in violation of the Anticybersquatting Protection Act (ACPA). (Although Falwell asserted a federal unfair competition claim under 15 U.S.C. §1126, the district court noted that no such cause of action exists.)

The lower court granted Falwell summary judgment and ordered Lamparello to surrender the domain name to Falwell, but did not award statutory damages or attorney fees. Falwell appealed the denial of statutory damages and attorney fees and Lamparello appealed the order against him.

Fourth Circuit Decision

In the Fourth Circuit decision by Judge Diana Gribbon Motz, the court resolved the trademark and false designation of origin claims purely on the issue of likelihood of confusion.

Emphasizing that the sites "offer opposing ideas and commentary" rather than "similar goods and services," the court found no likelihood of confusion existed under the seven-factor test employed in the Fourth Circuit.

The court noted that even if a consumer were misled by the similarities of the domain names, no one would believe that Reverend Falwell "sponsored a site criticizing himself, his positions, and his interpretations of the Bible." *Id.*

The court rejected Falwell's argument that the "initial interest confusion" doctrine applied to the determination of likelihood of confusion in the case. Under an initial interest confusion analysis, Lamparello's unauthorized use of Falwell's mark in the domain name would be considered outside of the context of the underlying content of Lamparello's site.

Falwell claimed that the initial interest confusion doctrine was adopted by the Fourth Circuit in *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359 (4th Cir. 2001) in which the court enjoined the use of the domain name www.peta.org for a parody site promoting an organization called "People Eating Tasty Animals."

In rejecting Falwell's argument, the court first explained that the Fourth Circuit has never adopted the initial interest confusion doctrine and has instead "followed a very different mode of analysis [that requires] courts to determine whether a likelihood of confusion exists by 'examin[ing] the allegedly infringing use in the context in which it is seen by the ordinary consumer.'" *Id.* at 11 (quoting *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 319 (4th Cir. 1992)).

The court then distinguished *PETA* from Falwell's case because the question in *PETA* was whether the allegedly infringing domain name was a parody and in the parody analysis, unlike that for the likelihood of confusion, the court need not examine the content of the site.

Pointedly, the court also observed that those courts adopting the initial interest confusion doctrine have done so only where the junior use of the mark was for monetary gain, which both parties agreed was not Lamparello's motive in using Falwell's mark.

The court declined to address Lamparello's assertion that the application of Sections 32 and 43(a) of the Lanham Act, which create federal causes of action for trademark infringement and false designation of origin, respectively, are limited only to commercial speech.

(Continued on page 31)

Fourth Circuit Addresses Cybergriper Trademark Issues

(Continued from page 30)

Falwell's ACPA claim failed because the court found Lamparello's use of Falwell's mark evinced no bad faith intent to profit, as required by the statute. Citing recent decisions in the Fifth and Sixth Circuits (*TMI, Inc. v. Maxwell*, 368 F.3d 433 (5th Cir. 2004) and *Lucas Nursery & Landscaping, Inc. v. Grosse*, 359 F.3d 806 (6th Cir. 2004)), the Fourth Circuit held that where the unauthorized junior user of a mark has "neither registered multiple domain names nor attempted to transfer [the domain name] for valuable consideration, . . . the use of a mark in a domain name for a gripe site criticizing the markholder does not constitute cybergripping."

The court noted that even though Lamparello had linked to one book sympathetic to his viewpoint on www.amazon.com, Lamparello did not receive profit from sales of the book and that even if he had, monetary gain alone would not have been enough to prove the requisite bad faith intent under the ACPA.

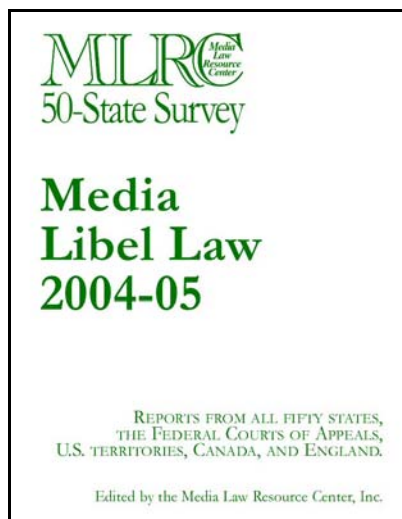
Paul Alan Levy of the Public Citizen Litigation Group, Washington, DC represented Christopher Lamparello. John Holbrook Mildren, Jr. of the Mildren Law Center, Chevy Chase, MD represented Reverend Jerry Falwell.



50-STATE SURVEYS

PRE-ORDER 2005-06 EDITION NOW!

A \$25 DISCOUNT WILL BE TAKEN IF PAYMENT IS RECEIVED BY OCT. 15



MEDIA LIBEL LAW

(published annually in November)

The 2005-06 edition will be available in November, 2005.

TOPICS INCLUDE: Defamatory Meaning • Opinion • Truth/Falsity • Fault • Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/Statutory Provisions • Summary Judgment

For a preview of the MLRC 50-State Survey outlines, or ordering information, please check the MLRC web site at WWW.MEDIALAW.ORG

Michigan and Utah Enact Kids “Do Not E-Mail” Registries

In what may be the first of a wave of state statutes intended to protect minors from “adult content” and products, new “Do Not E-Mail” laws regulating electronic communications to children went into effect in Michigan and Utah in July.

The “Utah Child Protection Registry Act,” Utah Code 13-39-101–02, 201–03, 301–04, and the “Michigan Children’s Protection Registry Act,” Michigan Code 752.1061–1068 allow parents and guardians to request that children not receive e-mails that advertise or link to sites that advertise certain products – even if the children had granted permission to those sites to receive e-mails.

Operation of the Registries

The Michigan and Utah statutes mandate the creation of a [voluntary registry](#) for “contact points” for minors. Contact points are defined as “an electronic identification to which a communication may be sent,” including, but not limited to, e-mail addresses, instant message identities, domain names, and fax numbers. Michigan Code 752.1062; Utah Code 13-39-102.

Parents, guardians, and institutions responsible for a minor’s access to electronic communication, such as a school, may register contact points. In Michigan, registration is effective for three years or until the minor associated with the contact point reaches eighteen years of age. Registration in Utah is effective for two years.

After a contact point is registered, electronic marketers sending communications within the statute to Michigan and Utah must remove, or “scrub,” the address from their marketing list within thirty days of the registration.

The general public will not be granted direct access to the registries. Instead, marketers must pay to check their recipient lists against the registry through use of a third-party contractor, Unspam Technologies, Inc. To illustrate, a marketer with a list of one million addresses will have to pay Unspam Technologies \$12,000 per month to comply with the Michigan and Utah laws.

Covered Communications

The Michigan statute prohibits electronic communication sent to contact points on the registry “if the primary purpose of the message is to, directly or indirectly, adver-

tise or otherwise link to a message that advertises a product or service that a minor is prohibited by law from purchasing, viewing, possessing, participating in, or otherwise receiving.” Michigan Code 752.1065.

The Utah statute bans electronic communication sent to contact points on the registry that promote “a product or service that a minor is prohibited by law from purchasing” or that “contains or advertises material harmful to minors.” Utah Code 13-39-202.

“Material harmful to minors” is defined in the Utah Code as content “of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it: (1) taken as a whole, appeals to the prurient interest in sex of minors; (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and (c) taken as a whole, does not have serious value for minors. Serious value includes only serious literary, artistic, political or scientific value for minors.” Id. 76-10-1201(4).

Penalties

Both statutes provide for criminal and civil penalties.

Criminal penalties in Utah

- A first-time offense is a class B misdemeanor.
- A second-time offense and any subsequent offense is a class A misdemeanor.
- A person who uses information gained from the registry improperly or who obtains, or attempts to obtain, contact points from the registry, or enables a third party to obtain contact points to send a solicitation is guilty of a second degree felony.
- Each communication is a separate offense.

Civil penalties in Utah

- A successful plaintiff in a civil suit may recover actual damages or \$1000 for each violative communication, whichever is greater.

Defenses in Utah

- Internet Service Providers are not liable for the mere transmission of a communication.

(Continued on page 33)

Michigan and Utah Enact Kids “Do Not E-Mail” Registries

(Continued from page 32)

- A reasonable attempt to comply with the scrubbing process is a defense.
- Consent to receive the communication by the minor is no defense.

Criminal penalties in Michigan

- A first-time offense is a misdemeanor punishable by a one-year prison term or a fine of \$10,000, or both.
- A second-time offense is a felony punishable by a two-year prison term or a fine of \$20,000, or both.
- A third-time offense and any subsequent offense is a felony punishable by a three-year prison term or a fine of \$30,000, or both.

Civil penalties in Michigan

A successful plaintiff in a civil suit may recover either:

- actual damages plus attorney fees, or
- \$5,000 for each message transmitted to the plaintiff or \$250,000 for each day the violation occurs, whichever is lesser.

Defenses in Michigan

- Internet Service Providers are not liable for the mere transmission of a communication.

- Accidental transmission of a communication is an affirmative defense.
- Consent to receive the communication by the minor is no defense.

Federal Preemption?

The CAN-SPAM Act enacted in 2003 creates civil and criminal penalties for the distribution of unsolicited commercial electronic mail, commonly referred to as SPAM. Although the CAN-SPAM Act applies to unsolicited commercial e-mails, it contains a broad preemption clause.

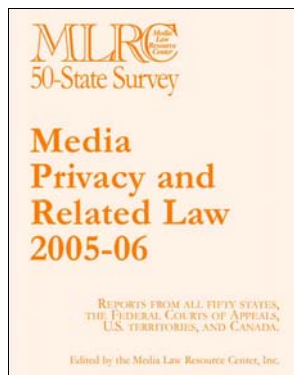
Section 8(b)(1) states:

“This Act supercedes any statute, regulation, or rule of a State or political subdivision that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.”

The Utah and Michigan registration mechanisms are both now functioning, but Michigan is not currently enforcing compliance.



50-STATE SURVEYS



MEDIA PRIVACY AND RELATED LAW

(published annually in July)

The 2005-06 edition is currently available.

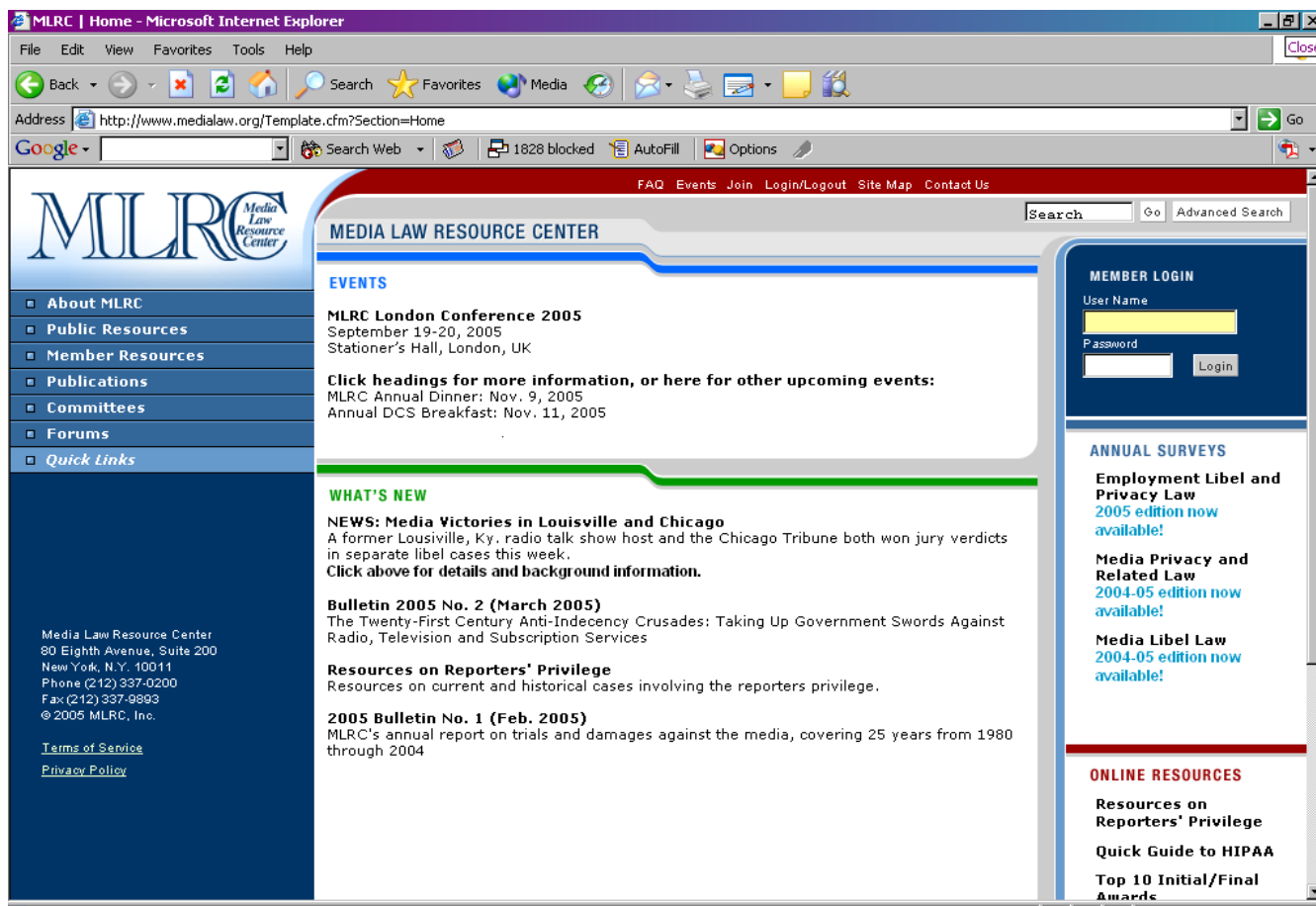
TOPICS INCLUDE: False Light • Private Facts • Intrusion • Eavesdropping • Hidden Cameras • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Relevant Statutes

For a preview of the MLRC 50-State Survey outlines, or ordering information, please visit WWW.MEDIALAW.ORG

Visit MLRC's Website!

www.medialaw.org

The Media Law Resource Center web site offers 24/7 access to the materials and information members have come to rely on.



- The MediaLawLetter, MLRC Bulletins, Reports and Practice Guides, our database of Expert Witnesses, a growing portion of the MLRC libraries of briefs, jury instructions, and closing arguments, and much more are now available at your fingertips.
- MLRC's valuable resources are now archived and searchable.
- In addition, each Committee has its own dedicated page to highlight projects and materials – and each has a web forum to share news, comments and ideas.

Note: Media and Enhanced DCS members have access to the entire site. Basic DCS members may purchase annual subscriptions to online materials – or upgrade to full access.

Contact Debby Seiden, dseiden@medialaw.org, for details.

MLRC London Conference Explores Developments in International Media Law

On September 19-20, over 190 delegates from around the world convened at Stationers' Hall in London to discuss developments in libel, privacy, reporters privilege, newsgathering and related areas of media law.

This was MLRC's fourth, and largest, conference in London – with delegates from Australia, Canada, England, France, Germany, Holland, New Zealand, Scotland, United States and Wales.

Day One

The conference opened with speech from Lord Justice Henry Brooke, of the Court of Appeal of England and Wales, on the subject of "Reynolds and Responsible Journalism." Lord Justice Brooke surveyed recent developments in the law of privilege, noting that the privilege is still evolving under UK law.

Laura Handman, Davis Wright Tremaine, and Mark Stephens, Finers Stephens Innocent, then led a session on Libel Law Developments that picked up the themes of Lord Justice Brooke's speech. The session examined, in a practical way, how the Reynolds privilege is working in UK libel cases with comparisons to recent libel trials and issues in the U.S.

The Honorable Thomas Munro Gault, of the New Zealand Supreme Court, delivered a speech to the conference entitled "What Is the Editor to Do? - Constraints on the Freedom of Expression" – offering personal reflections on the prepublication decisions journalists must make to balance libel and privacy issues against the public's interest in being informed.

Andrew Nicol QC, Doughty Street Chambers, and Charles Tobin, Holland & Knight LLP, led a discussion on developments in the law of reporters privilege – including developments and fallout from the Judith Miller case.

Andrew Caldecott QC, 1 Brick Court, Sebastian Seelman-Eggebert, Latham & Watkins (Hamburg) and Cliff Sloan, The Washington Post Company led a session on privacy law developments, including a discussion of the impact of the *Von Hannover v. Germany* decision by the European Court of Human Rights on publishers worldwide.

Day Two

The second day of the conference began with a speech by Lord Justice Igor Judge on a new pilot program in England allowing cameras in courts on a limited basis. American Judge Hiller Zobel offered his perspective on the U.S. experi-

ence with cameras in courts. Alastair Brett, Times Newspapers Limited and Jonathan Sherman, Boies, Schiller & Flexner LLP led a group discussion on the subject.

The next session, led by John Battle, Independent Television News and Thomas Kelley, Faegre & Benson LLP, focused on the related subject of reporting on court proceedings – including contempt of court restrictions in the UK and other common law jurisdiction that restrict reporting on trials and other criminal proceedings.

The Honourable James Jacob Spigelman, Chief Justice of the Supreme Court of New South Wales, Australia delivered an afternoon speech entitled "The Principle of Open Justice." Judge Spigelman's speech surveyed the concept of open justice in the English and Australian legal systems – with a comparison to U.S. access law developed out of cases such as *Richmond Newspapers v Virginia*.

David Bodney, Steptoe & Johnson LLP and Siobhain Butterworth, Guardian Newspapers Ltd., led an afternoon session focusing on the UK's recently enacted FOIA statute, comparing the language and application of the statute to laws in the U.S. and elsewhere.

Day Two of the conference concluded with a mock jury session on the theme "Libel and Responsible Journalism" moderated by Michael Sullivan, Levine Sullivan Kock & Schulz, LLP. At issue was a mock newspaper story that republished allegations of misconduct against a high-profile athlete. Desmond Browne QC, 5RB, argued on behalf of the Claimant. Gavin Millar, QC, Doughty Street Chambers, argued on behalf of the Defendant. The jury deliberations were televised live to delegates. Jurors split 6-6 on whether the article was defamatory. But they tilted 9-3 in favor of the defendant, finding that the article was published responsibly. Jason Bloom, Courtroom Sciences Incorporated, Dallas, Texas, and Dave Heller coordinated the session with Michael Sullivan.

In-house Counsel Breakfast

Finally, a new session was included as part of the conference. Approximately 50 in-house lawyers from the UK, US and Australia met to discuss issues of particular concern, including retaining counsel and conflicts issues (i.e., "defense-only" representation) and the rise in conditional fee agreements.

Copies of the speeches delivered at the conference will be published shortly by MLRC.

MLRC's London Conference 2005 was presented
with the generous support of:

Bloomberg News
The Hearst Corporation and The National Magazine Company
Media/Professional Insurance
Times Newspapers Ltd.
Covington & Burling
Davenport Lyons
Davis Wright Tremaine LLP
DLA Piper Rudnick Gray Cary USA LLP
Finers Stephens Innocent LLP
Prince Lobel Glosky & Tye LLP
Jackson Walker LLP
Reynolds Porter Chamberlain

And the efforts of our conference planners
and session facilitators:

John Battle, Independent Television News
Alastair Brett, Times Newspapers Limited
David Bodney, Steptoe & Johnson LLP
Siobhain Butterworth, Guardian Newspapers Ltd.
Andrew Caldecott QC, 1 Brick Court
Jan Constantine, Constantine Cannon
Laura Handman, Davis Wright Tremaine LLP
Robert Hawley, The Hearst Corporation
Thomas Kelley, Faegre & Benson LLP
Lee Levine, Levine, Sullivan, Koch & Schulz LLP
Keith Mathieson, Reynolds Porter Chamberlain
Andrew Nicol QC, Doughty Street Chambers
Sebastian Seelman, Latham & Watkins
Jonathan Sherman, Boies, Schiller & Flexner LLP
Cliff Sloan, The Washington Post Company
Mark Stephens, Finers Stephens Innocent
Michael Sullivan, Levine Sullivan Koch & Schulz LLP
Charles Tobin, Holland & Knight LLP
Kurt Wimmer, Covington & Burling
Sandra Baron & Dave Heller, MLRC

Mock Trial at MLRC's London Conference Explores Libel and Responsible Journalism

By Jason S. Bloom, M.A.

In the hypothetical matter of *Scott Collins v. Isaac Intrepid and The Daily Record*, mock jury research was conducted in the form of a Mock Trial at the MLRC London Conference on Tuesday September 20, 2005 at Stationer's Hall, London. For the Mock Trial, a group of 12 mock jurors was recruited from the trial jurisdiction.

Sports Star Accused of Misconduct

The Claimant in the exercise was "Scott Collins," a world-record holding track star, who claimed that "*The Daily Record*" and its reporter, "Isaac Intrepid," defamed him by publishing an article headlined "Daily Record Exclusive: 100 Meter Record Holder Faces Career Threatening Doping Probe."

The article accurately reported that Collins tested positive for the banned drug "Zedral B." It reported his manager's denial which claimed the result was a false positive caused by Collins use of an over-the-counter cold remedy to alleviate his respiratory problems. The article also republished allegations linking Collins to steroid use.

The defense position was that the article was not defamatory – that it simply raised legitimate questions. But if found to be defamatory, the defense argued that publication was protected by a qualified privilege under UK law, i.e., that it was "responsible journalism."

Having jurors determine whether a publication is responsible journalism is a departure from current UK law. At present, jurors are only allowed to determine disputes over predicate facts. The judge then determines whether the privilege applies.

For purposes of the exercise, the question of responsible journalism was put to the jurors to see what factors indicative of responsible journalism actually resonate with average people.

The Exercise

At the outset of the Mock Trial, the mock jurors were given time to review the article before listening to a neutral overview of the case, as presented by Michael Sullivan of

Levine Sullivan Koch & Schulz. After this, the Barristers presented summary arguments to the mock jurors, with the conference delegates as the trial audience.

Gavin Millar QC, Doughty Street Chambers, representing the defendants, went first. He emphasized the press's right to raise serious questions about matters of public concern, e.g., the use of drugs in sports. Desmond Brown QC, 5RB, represented the Claimant. He stressed the seriousness of the newspaper's allegations and potential flaws in the publication of the story, e.g., failing to directly contact Collins.

Following the presentations, the 12 mock jurors retired to deliberate for one hour. The jury deliberations were broadcast via closed-circuit television to the conference delegates. The mock jury deliberated the following questions:

Meaning

1) The first step in reaching a decision is to determine the natural and ordinary meaning of the article in dispute. Claimant has argued that the article is defamatory in that it implies he is guilty of taking performance enhancing drugs – a serious accusation that would naturally damage his reputation.

Defendant has argued that the article is not defamatory. That at worst, the article only means that reasonable grounds exist to inquire whether Claimant has been taking such drugs and that this meaning cannot reasonably be considered defamatory.

Is the article defamatory?

Defense of Responsible Journalism

2) If the article is defamatory, you may nevertheless find in favor of the Defendant if he proved by the balance of probabilities that the article was published responsibly. If Defendant failed to prove this, you must find in favor of Claimant.

In deciding whether the article was published responsibly you should consider the totality of circumstances under which Defendant researched and published the article, balancing each, as appropriate under the circumstances. The

Mock Trial at MLRC's London Conference Explores Libel and Responsible Journalism

(Continued from page 37)

relevant factors may include a) the seriousness of the allegation against Claimant; b) the importance to the public in learning of the allegation; c) the source of the allegation; d) the steps Defendant took to verify the article; e) the urgency of reporting the allegation; f) whether Defendant made sufficient attempts to speak to Claimant prior to publication; g) and the balance and tone of the article. This list of relevant factors is not meant to be exhaustive; you may consider other pertinent circumstances of publication

Did Defendant prove the article was published responsibly?

Damages

3) If the article is defamatory and was not published responsibly, Claimant is entitled to an award of damages to vindicate his reputation, and to compensate him for injury to reputation and the distress the article caused him.

An award of more than £200,000 is generally considered excessive. But the decision as to damages is yours and yours alone.

What amount of damages do you award Claimant?

Results

The initial mock jury vote on defamatory meaning was 9-3 for the Claimant. But after 30 minutes of deliberations, the mock jury panel deadlocked on the issue 6-6.

They then considered the question of responsible journalism. The mock jury panel deliberated the issue and ended up with a 9-3 vote in favor of the defendants, finding that the article was published responsibly. These 9 jurors focused primarily on the article's balance in discussing the failed drug test – and did not appear to fault the newspaper for also republishing unproven allegations of steroid use.

Damages were then discussed by the three mock jurors who voted in favor of the Claimant on defamatory meaning and rejected the responsible journalism defense. The three mock jurors, all women, would have awarded damages in the amounts of £ 50,000, £ 100,000 and £100,000.

The most prevalent pro-Claimant jury themes were: sympathy for Mr. Collins, the timing of the article, and

the inference that the length and great detail in the article demonstrated an intent to be defamatory, rather than just informative.

The defense themes that were most operative in the mock jury deliberations were: the public's right to know, nothing stated in the article was untrue, and that Mr. Intrepid was reporting the story "as is."

Group Discussion

Upon conclusion of the deliberations, the mock jury was released and the conference delegates had a brief group debrief, offering their impressions of the Mock Trial and the jury system. This included several spirited comments by UK delegates questioning the ability of jurors to follow legal instructions. It also included spirited defenses of the jury system by lawyers from both sides of the Atlantic.

Jason S. Bloom, M.A. is a senior trial consultant at Courtroom Sciences, Inc. in Irving, TX. He assisted in the presentation of this mock jury exercise. Mr. Bloom specializes in assisting attorneys with case presentations, trial strategy, and jury selection. He can be reached at (972) 717-1773 or by email at jbloom@courtroomsciences.com.

MLRC
Media
Law
Resource
Center

BULLETIN 2005

MLRC's Supreme Court Report Certiorari Petitions in the 2004 Term (Bulletin 2005:3b)

Contact Debby Seiden at dseiden@medialaw.org for ordering information

MLRC London Conference 2005 – Mock Jury Exercise Article

Daily Record Exclusive: 100 Meter Record Holder Faces Career Threatening Doping Probe

By Isaac Intrepid
Special to Daily Record

Testers employed by the World Anti-Doping Agency have revealed to the **Daily Record** that Scott Collins, the 100 meters world record holder, has tested positive for the banned drug “Zedra1B.”

The result is not positive confirmation that Collins has used the illegal performance enhancing drug. That will hinge on the results of the new test he submitted to this week.

Collins, the favourite for gold in this weekend’s World Championships, submitted to mandatory retesting earlier this week at his training base in Seaside. The results won’t be known until after the World Championships – casting a cloud over his participation. Collins manager confirmed that Collins will race and that there is “absolutely no reason for him not to.”

Collins meteoric rise from the college ranks to world record holder in only eighteen months has drawn the attention of fans as well as the Anti-Doping Agency.

Three months ago testers surprised Collins at his hotel in Singapore where he was staying as part of a delegation promoting a 2012 Olympic bid. In an angry late night confrontation, Collins allegedly pushed a tester out of his hotel room. WADA later conceded that it was a violation of its own rules to conduct random testing after midnight. But testers were frustrated the next day too when Collins left the delegation and returned early to the U.K.

Random testing is routine, but some think Collins’ rise merits special attention. Photos of Collins at UCLA show a “bean pole” sprinter – as his coach there described him. His dramatically developed physique during the subsequent 2004 season in which he broke the world mark has been the subject of intense speculation in sporting circles.

Other sprinters have expressed surprise at the improvement Collins has shown under his German trainer, Dr. Gunter Meisner. One sprinter who declined to be named, told the **Daily Record**, “two years

ago Collins was middle of the pack – now he’s setting records. To do that you are either the best athlete of the century or you’re using something.”

The news about the test result comes at a critical time for Collins’ endorsement career. He has reportedly been offered \$1 million per year for the next five years by *McDonalds* to promote the fast-food chain’s new “Running Ronald” menu of reduced-fat burgers and multivitamin juices.

McDonalds was sorely embarrassed last year when its Happy Meal pitchman, American baseball slugger Joe McGuire, admitted during a criminal investigation that he had taken steroids for several years.

Whether this new scandal will sour *McDonalds* on the Collins deal remains to be seen. Advertising analysts warn that in the current climate businesses have to approach athlete endorsement deals with extreme caution.

However doubts remain over WADA’s ability to test for “Zedra1B” -- a powerful “new generation” compound that

can rapidly build muscle mass and strength. The compound can be nearly impossible to conclusively detect because it is chemically similar to a substance found in over the counter cold and flu medications – leading to risks that athletes will be tarred by false positives.

This was highlighted by last month’s decision of the Court of Arbitration for Sport in Lausanne to overturn a lifetime ban imposed on the Jamaican hurdler, Earl Bennett, following evidence that he had been taking a flu-remedy.

All attempts by the **Daily Record** to contact Collins at his training camp failed. However his sister and manager, Kelly Collins, confirmed that her brother had tested positive for Zedra1B and had been retested in Seaside. She said he “has faced terrible jealousy” from many established sprinters on the circuit and that he “has nothing to hide despite the false positive on one sample.”

Punishments for doping violations range from a suspension to a lifetime ban.



Update: Australian Defamation Law Reform

Victoria's push for uniform defamation laws in Australia

By Chris Sibree

Uniform defamation laws throughout Australia have long been a holy grail. For many years the States and Territories have retained their own laws relating to defamation. Some States and Territories have retained the common law while others have enacted legislation. This legal patchwork has serious implications for the Australian media which is required to negotiate seven sets of defamation laws, particularly in the modern environment of national publication and online new services.

Commonwealth Attorney-General Phillip Ruddock revived the call for uniform defamation laws a number of years ago by proposing reform at a national level based on his preferred defamation framework using the Federal Government's corporations power under the Constitution. His blueprint included retaining a right of action for corporations and the dead and requiring a publisher to prove both truth and a public interest in the subject matter before a justification defence arises.

In 2004, the Australian Standing Committee of Attorneys-General (SCAG), comprising the Attorneys-General of all Australian States and Territories, responded by putting forward their preferred Uniform Defamation Model Provisions to be enacted in their respective jurisdictions. SCAG, critical of certain parts of the Commonwealth's proposed reforms, produced a more media-friendly proposal.

Mr Ruddock has warned the States and Territories that they must enact acceptable uniform defamation laws by the beginning of 2006 or the Federal Government would impose its own, but was prepared to make compromises in the interest of achieving reform.

Victoria's Reform Bill

The *Defamation Bill 2005* (Vic) (the Bill), which received its Second Reading on 7 September 2005, is Victoria's step towards enacting model defamation laws. It follows model bills introduced in the Western Australia and South Australia parliaments earlier this year. Other Australian jurisdictions are now following suit. It is likely therefore that the States and Territories' model defamation laws will be enacted before the end of the year.

Many features of the Bill's proposals should be welcomed by the media, especially the offer of amends procedures, the cap on non-economic damages and a one year limitation period. Also, importantly, it makes truth alone a defence to defamation, in line with the common law. The Bill compared favourably to the Federal Government's proposals which are far more plaintiff-friendly.

One main area of concern remains for the media. That is the defence of qualified privilege, which is based on the current provisions in the New South Wales *Defamation Act*. New South Wales' Courts have interpreted the requirement of "reasonableness," required to make out the statutory defense, in a manner that makes it very difficult for the media to prove.

The key elements of the Bill are:

Retention of the general law of defamation

The Bill retains the common law of defamation for civil liability, except to the extent that the Bill provides otherwise. The test for defamatory meaning is still common law based.

1. Defamation proceedings barred for certain entities or persons

The Bill bars a corporation from suing for defamation unless it is not a public body and it either is a not-for-profit entity or employs fewer than 10 persons and is unrelated to another corporation. This alters the current Victorian position bringing it into line with the current New South Wales *Defamation Act* and is contrary to the Commonwealth's approach. The proposed provision does not preclude an individual associated with a corporation from suing for defamation merely because defamatory material also defames the corporation.

The Bill also prohibits a deceased person, or any of their representatives, from suing or being sued for defamation, including where publication occurs prior to death. This reflects the current position in all States and Territories, except Tasmania, and is contrary to the Commonwealth's proposal.

(Continued on page 41)

Update: Australian Defamation Law Reform

(Continued from page 40)

2. Offers of amends

The Bill outlines a detailed “offer of amends” procedure, similar to that found in New South Wales, the Australian Capital Territory and the United Kingdom. Under the procedure, it provides a time frame within which a publisher must make an offer and what the offer must include.

The proposed procedure is beneficial to publishers, particularly as rejection of a reasonable offer provides a publisher with a defense to any defamation claim.

A Court must, unless the interests of justice require otherwise, generally award indemnity costs (which is about 90% of legal costs, rather than the usual party/party costs) against an unsuccessful party if the Court is satisfied that the party unreasonably failed to make or accept a settlement offer. Any statement or admission made in connection with an offer to make amends is not admissible in any proceedings. An apology does not constitute an admission of fault or liability.

3. Defenses

The Bill codifies defenses of justification, fair reporting of a public document or a proceeding of public concern, absolute privilege, qualified privilege, honest opinion and innocent dissemination. Generally, the defenses are similar to the current common law defenses. The differences between the current Victorian common law position and the Bill’s proposals are outlined below:

- a. The Bill’s “contextual truth” defense is wider than the current common law *Polly Peck* defense. (Normally at common law, to establish a defence of justification the defendant must prove the truth of each defamatory imputation pleaded by the plaintiff. However, where the imputations complained of were not separate and distinct but carried a “common sting,” the *Polly Peck* defence provides a justification defence where the defendant proves that this common sting was true: see *Polly Peck (Holdings) Plc v Trefold* [1986] QB 1000 at 1032.) This is because the Bill’s “contextual truth” defense applies even if the contextual imputations are separate and distinct from the defamatory imputations of which the plaintiff complains.
- b. The Bill extends the defense of absolute privilege to matter that is subject to absolute privilege under corresponding Australian model defamation laws.
- c. The codified defense for fair reporting of public documents and proceedings of public concern lists more matters to which the defense applies. Further, the defense is only defeated where the plaintiff proves that the material was not published honestly for the information of the public or the advancement of education.
- d. A statutory qualified privileged defense is contained in the Bill based on section 22 of the *Defamation Act 1974* (NSW). The statutory defense differs from the common law by providing a broader basis for finding that a recipient had the necessary interest in receiving the defamatory information. As for the common law, the defense still fails where publication was actuated by malice. The drawback of the proposed new defense is that it retains the requirement of the publisher to prove it was “reasonable” in the circumstances. However, the defense does require the Court to take into account both the public interest in publishing the matter expeditiously and the nature of the defendant's business environment when assessing “reasonableness.”
- e. The Bill’s “honest opinion” defense (akin to that of fair comment at common law) clarifies that the opinions of employees, agents and third parties are also capable of supporting the defense for a corporation.
- f. The Bill’s “innocent dissemination” defense clarifies that providers of Internet and other electronic and communications services will generally be considered subordinate distributors and are not liable for publication of defamatory material on services they provide, except where they knew or ought reasonably to have known the material was defamatory or their lack of knowledge was due to negligence on their part. (Under clause 91 of schedule 5 of the *Broadcasting Services Act 1992* (Cth), internet service providers and internet content hosts are given a limited amount of protection

(Continued on page 42)

Update: Australian Defamation Law Reform

(Continued from page 41)

for common law claims, including claims for defamation for material hosted or carried by them. However, the extent of the protection is not absolute and its breadth is unclear, not applying to ordinary email or broadcasting services.)

4. Damages and costs

One of the most important features of the Bill is a cap on damages for non-economic loss of A\$250,000 (approximately \$189,000 U.S.) The Commonwealth provisions propose no cap and there is currently no cap at common law in Victoria. This amount is indexed and can only be exceeded where the Court is satisfied that the circumstances are such as to warrant an award of aggravated damages. No award of exemplary or punitive damage can be made under the Bill. Damages are to be assessed by the presiding judge, and not the jury.

The Bill sets out factors that can be relied on in mitigation of damages, such as the making of an apology or cor-

rection by the publisher and whether the plaintiff has brought proceedings for defamation in relation to another publication having the same meaning or effect as the publication in question.

Aside from the impact that an offer of amends may have when determining costs, the Bill provides that the Court may also have regard to the way in which parties conducted their case when making costs orders.

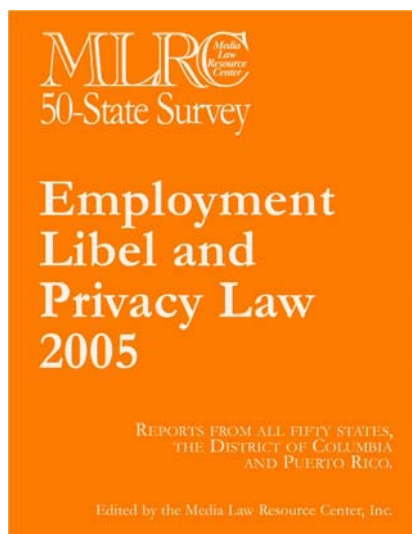
5. Limitation of actions

The Bill prohibits a plaintiff from commencing proceedings for defamation more than one year after the publication of the defamatory material, except by order of the Court in certain situations. Currently in Victoria, a plaintiff has six years to commence defamation proceedings under the *Limitation of Action Act 1958* (Vic).

Chris Sibree is a lawyer with Minter Ellison in Sydney, Australia.



50-STATE SURVEYS



EMPLOYMENT LIBEL AND PRIVACY LAW

(published annually in January)

The 2005 edition is currently available.

TOPICS INCLUDE: Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort

For a preview of the MLRC 50-State Survey outlines, or ordering information, please check the MLRC web site at WWW.MEDIALAW.ORG

UK Court Grants Media Access to Pleadings

By Gina Latner

An unlikely division of the UK's High Court of Justice, the Technology and Construction Court, gave an important ruling which provides authority for opening up court files to journalists. *Multiplex Construction (UK) Limited -v- Cleveland Bridge UK Limited* (Aug. 31, 2005) (Wilcox, J.).

In the UK Court not all files and records are open for inspection. In the instant case an application was made pursuant to Civil Procedure Rule 5.4, which provides:

5.4 (5) Any other person (ie. apart from a party to the proceedings) may:- (b) if the court gives permission, obtain from the records of the court a copy of any other document (ie. other than the claim form, judgment etc) filed by a party, or communication between the court and a party or another person.

In the application by the Australian Broadcasting Corporation ("ABC") and its journalist, Sarah Curnow, the Court, exercising its discretion, ordered disclosure of the statements of case (pleadings) in a case between the UK subsidiary of an Australian construction giant, Multiplex Construction (UK) Limited and a steel fabrication subcontractor on their Wembley football stadium project site, Cleveland Bridge UK Limited.

The ABC wanted to see the documents to assist with the production of a television program about Multiplex, including the activities of Multiplex UK, and covering the dispute relating to the Wembley project. Such serious journalistic interest was held to be demonstrably legitimate for these purposes.

Cleveland Bridge gave their consent to the Application, but it was fiercely resisted by Multiplex on various grounds including, their argument that the "public justice" or "open justice" principle only applies to trials and not interlocutory hearings, that the case was too complicated for the public, and that the target company, a publicly quoted on the Australian Stock Exchange, would have to face burdensome disclosure obligations and media scrutiny.

Mr. Justice Wilcox held that it would be fair and just to order disclosure of the documents sought. The ruling adds

weight to the fundamental principle of open justice in English law, and strength to the presumption that cases should be heard in public and decisions made in public.

The Judge robustly rejected the Claimant's argument that interlocutory proceedings should be distinguished from trial proceedings with regard to the requirement for open justice. In doing so he stated that there can be no legitimate distinction to be drawn between decisions made in interlocutory proceedings and those at final trial.

Multiplex UK's argument that pleadings are a moving target and potentially such that disclosure at an interlocutory stage would not be in the interests of justice because it would place commercial parties under a significant burden to respond to media scrutiny, was rejected on the basis that

the powers of the Court to prevent vexatious and embarrassing pleadings are a sufficient safeguard for these purposes.

The Judge commented that it is not the role of the Court to judge whether matters are too complex to be understood by the public.

The role of the press in reporting judgments and interlocutory proceedings is a fundamental freedom, and there ought be no denial to the media of the statements made to the Court outlining the nature of a significant commercial dispute which had already endured public comment.

This judgment affirms the principle, and indeed the new culture of freedom of information within the UK justice system, and confirms the relaxation of previous attitudes which took a more cautious approach to disclosure of court proceedings. It upholds the principle of open justice in interlocutory proceedings as part of the overall trial process and gives confidence to journalists in their role as the watchdog of our justice system.

Gina Latner is a lawyer with Finers Stephens Innocent LLP in London. She represented Australian Broadcasting Corporation in this case together with Stephen Collins (of ABC), Mark Stephens of Finers Stephens Innocent LLP and Andrew Nicol QC of Doughty Street Chambers. Multiplex Construction (UK) Limited were represented by Alex Panayides of Clifford Chance LLP and Paul Darling QC of Keating Chambers.

The ruling adds weight to the fundamental principle of open justice in English law, and strength to the presumption that cases should be heard in public and decisions made in public.

10th Circuit Discusses Overbreadth and Vagueness Doctrines in Final Judgment Context

In an interesting procedure decision, the U.S. Court of Appeals for the Tenth Circuit addressed the relationship between the overbreadth and vagueness doctrines under the final judgment rule of FRCP Rule 54(b). *Jordan v. Pugh*, 04-1095, 2005 WL 2293799 (10th Cir. Sept. 21, 2005) (Seymour, Brorby, and McConnell, JJ.).

The court held it had no jurisdiction to hear an appeal of a dismissal of a First Amendment vagueness claim when an overbreadth claim remained before the district court.

Background

The plaintiff Mark Jordan is a federal prisoner in Colorado. He wrote two articles recounting his experience in prison that were published in a magazine called *Off!*, a student run publication at the State University of New York at Binghamton. He was later disciplined for violating 28 C.F.R. §540.20 which regulates inmate correspondence with representatives of the news media. Specifically, §540.20 (b), states that federal prisoners “may not act as reporter or publish under a byline.”

Jordan challenged the constitutionality of the restriction on First Amendment grounds, alleging the restriction was vague and overbroad on its face and as applied.

The district court granted partial summary judgment to the defendants, holding that the regulation was not unconstitutionally vague on its face and that the individual defendants were entitled to qualified immunity. The court made a specific finding that there was no just reason to delay the entry of final judgment on these two claims and entered partial judgment pursuant to Rule 54 (b). The court stayed the remaining claims pending appeal of the order granting summary judgment.

10th Circuit Decision

The Tenth Circuit, in an opinion by Judge Michael McConnell, dismissed the appeal for lack of jurisdiction, holding that partial summary judgment on the vagueness claim was not “distinct and separable” from the overbreadth claim left unresolved, within the meaning of Rule 54(b).

Judge McConnell reasoned that the vagueness claim was not severable from the overbreadth claim because the legal and factual inquiries necessary to deciding both are virtually identical and provide for the same relief: invalidation of the challenged statute.

Surveying Supreme Court decisions and legal commentary, he noted the substantive overlap of vagueness and overbreadth claims. In the instant case both doctrines require consideration of identical factual questions of whether §540.20(b)’s prohibition on acting as a reporter and publishing under a byline affects a substantial amount of protected First Amendment activity. Thus, “for purposes of Rule 54(b), vagueness and overbreadth are alternative theories underlying the same claim.”

According to the Court:

“To be sure, once parties have expended the effort of briefing and argument on appeal, it may appear wasteful and inefficient for the appellate court to decline to rule. But in the long run it will be less wasteful and more efficient for district and appellate courts to adhere to the rule that only separate and distinct claims can be isolated for appeal under Rule 54(b). Interrelated legal claims and alternative theories for recovery should be litigated together and appealed together.”

Save the Date

November 11, 2005

MLRC DCS Breakfast

**Proskauer Rose Conference Center
1585 Broadway 26th Floor
New York City**

Judicial Conference Votes to Allow Citation to Unpublished Opinions

On September 20, 2005 the Judicial Conference of the United States, the policy-making arm of the federal judiciary, voted to enact a rule change that will allow lawyers to cite unpublished appellate court opinions. The Conference is composed of the chief judge from each of the thirteen circuits, one district judge from each circuit and the chief judge of the Court of International Trade.

[New Federal Rule of Appellate Procedure 32.1](#) states in relevant part:

Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like.

Currently, the Second, Seventh, Ninth and Federal Circuits ban the citation of unpublished opinions and the practice is discouraged in most other circuits. It is estimated that up to eighty percent of appellate court deci-

sions are designated “unpublished,” even though many of them are widely available on electronic databases.

Assuming the rule is approved by the Supreme Court and left intact by Congress, it will be effective January 1, 2007. The rule is prospective.

Opponents of the rule change, including Judge Alex Kozinski of the Ninth Circuit, claim that if implemented, the rule change will increase the workload of appellate court judges because the judges will have to refine such opinions, which are often written by their clerks and staff attorneys.

Proponents of the change argue that the rule will make the judicial process more transparent and the law in each circuit more consistent.

In an interesting note, U.S. Chief Justice nominee John Roberts supporting the new rule as a private lawyer and as a judge on the D.C. Circuit. He served on the advisory committee that recommended the rule change and stated at a 2004 advisory committee meeting that: “A lawyer ought to be able to tell a court what it has done.”

Channel One Polls Teenagers’ First Amendment Knowledge

In anticipation of the first-ever National Constitution Day on September 17, 2005, Channel One, the leading in-school news broadcaster to middle and high school students, conducted an online poll designed to test teenagers’ knowledge of their First Amendment rights.

The heartening results reveal that most of the 500 teens surveyed nationwide are aware of the rights protected by the First Amendment. When asked what rights are not protected under the First Amendment:

- Only 2% did not know that the First Amendment protects freedom of speech
- 8.6% did not know that the First Amendment protects the freedom to assemble
- 8.8% did not know that the First Amendment protects religion
- 9.4% did not know that the First Amendment protects the freedom of the press

- 15% did not know that the First Amendment protects the right to petition

A majority of the students polled – 67.7% – knew that a public school has the right to bar certain extracurricular groups from using school facilities. Most of the students – 78.3% – also knew that public schools cannot require students to salute the flag during the recitation of the Pledge of Allegiance.

However, only 53.2% knew that the U.S. government cannot censor Internet speech.

National Constitution Day, to be celebrated annually on September 17, was created as part of a new law authorized in the “Consolidated Appropriations Act, 2005” mandating that schools receiving federal funds implement an educational program about the U.S. Constitution.

The questions are available at http://channelone.com/news/2005/02/01/first_amendment/.

New York Court Dismisses Copyright Claim Over Fossil Photo

In a recent copyright dispute involving photographs and illustrations of a fossil of two dinosaurs that fought to the death more than eighty million years ago, a New York federal court awarded summary judgment to the defendant, National Geographic Society. *Psihoyos v. National Geographic*, No. 04 Civ. 4941 (S.D.N.Y. Aug. 3, 2005) (Berman, J.).

The plaintiff, Louis Psihoyos, alleged that a photograph and an illustration of the “fighting dinosaurs” fossil published in the March 2003 issue of National Geographic Magazine infringed copyrights he holds in his own photograph of the fossil and in an illustration of the fossil that he commissioned from a scientific-illustrator.

The district court accepted defendant’s argument that any similarity between the photographs was dictated by their common subject matter. Specifically, the court concluded that the photographs were not “substantially similar” because the shared overhead perspective “flows naturally from the subject matter of the photograph,” and, in that regard, took note of plaintiff’s admission that “‘overhead was, for me, the money shot.’”

With respect to the sand in which the fossil is embedded in both photographs, the court held that “the use of sand ... merges with the ‘idea’ of showing the Fossil in its ‘natural setting’” and “is also scene a faire because it is the obvious choice of background for the Fossil.”

As to the illustrations at issue, the court identified “several significant differences” undercutting any find-

ing of “substantial similarity” and noted that plaintiff’s illustrator had admitted to relying on an earlier illustration of the fossil prepared by National Geographic’s freelance illustrator.

Because many of the allegedly infringed elements first appeared in that earlier illustration, plaintiff’s attempt to rely upon them backfired. Moreover, the court took into account the admission of plaintiff’s illustrator that the illustration published by National Geographic “just doesn’t look like my style.”

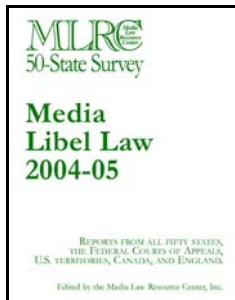
Finally, the court rejected any claim of copyright infringement based on the arrangement of the photographs and illustrations on the page. The court held that the side-by-side placement of a photograph and an illustration of the fossil “merges with the idea of showing a ‘before and after’ view.” In addition, the court identified numerous salient differences in layout, including orientation, size, bordering, and captions.

The order granting summary judgment to the National Geographic Society is currently on appeal to the Second Circuit.

National Geographic Society was represented by Robert M. Callagy, Benjamin Means and Kristina Zarlengo of Satterlee Stephens Burke & Burke, LLP, in New York and Terrence B. Adamson, Angelo Grima and Karen Kerley-Schwartz of the National Geographic Society in Washington, D.C.



50-STATE SURVEYS



PRE-ORDER 2005-06 EDITION NOW!
A \$25 DISCOUNT WILL BE TAKEN IF PAYMENT IS RECEIVED BY OCT. 15

MEDIA LIBEL LAW

(published annually in November)

The 2005-06 edition will be available in November, 2005.

For a preview of the MLRC 50-State Survey outlines, or ordering information, please check WWW.MEDIALAW.ORG

Agency's Coercive Letters to Broadcasters Violate First Amendment Rights

By Andrew A. Jacobson and Wade A. Thomson

In a decision bolstering commercial speech protection and broadcasters' independence, a federal district court judge in Albany, New York awarded a preliminary injunction to Kevin Trudeau and Alliance Publishing Group ("Trudeau") against a New York State agency. *Trudeau v. New York State Consumer Prot. Bd.*, 05 CV 1019 (N.D. N.Y. Sept. 6, 2005).

Trudeau is an infomercial magnate and author of the best-selling book, *Natural Cures "They" Don't Want You To Know About* (the "Natural Cures book"). Trudeau's infomercial for the Natural Cures book had been challenged by the New York State Consumer Protection Board ("CPB"), which sent letters to broadcasters and cable stations urging them to pull the infomercials because the CPB deemed the infomercials misleading.

The district court judge ruled that the letters violated Trudeau's First Amendment rights because they gave the impression that adverse governmental consequences could follow if the broadcasters and cable stations did not comply. The judge also found that Trudeau had established for the purposes of a preliminary injunction that the infomercials constituted non-misleading speech deserving constitutional protection.

Background

Trudeau is an author and consumer advocate, and has produced and appeared in a series of infomercials in which he bluntly criticizes government agencies and government health policies and promotes the Natural Cures book. The Natural Cures book has topped several best-sellers lists, including the *New York Times*, the *Wall Street Journal*, and *USA Today*.

In July, the CPB contacted Trudeau with questions about the book and advised Trudeau that the CPB intended to "debunk" the book. The CPB admitted that it had initiated the inquiry without having read the book and after receiving only two consumer complaints -- from

among more than 3 million purchasers of the book. The CPB posted a press release claiming that the infomercials for the book were misleading and making other claims about Trudeau.

Trudeau subsequently learned that the CPB intended to ask broadcasters and cable stations to pull the infomercial. After the CPB refused to give Trudeau three-days notice if it intended to contact the stations, Trudeau filed a complaint and motion for temporary restraining order in the United States District Court for the Northern District of New York to prevent the CPB from contacting broadcasters.

At an initial hearing, Judge Gary L. Sharpe denied the motion for a restraining order, finding that it essentially was moot because a copy of CPB letter was included in

The letters violated Trudeau's First Amendment rights because they gave the impression that adverse governmental consequences could follow if the broadcasters and cable stations did not comply.

the CPB's brief in opposition; thus, Trudeau had the three-days notice of the letter. However, Judge Sharpe allowed Trudeau to file a renewed motion seeking to block the CPB from sending the letters. The next day, Sharpe granted the renewed motion for a TRO, enjoining the CPB from contacting broadcasters in any form similar to the letter.

In the time between the court's denial of the first motion and the entry of the TRO the next day, the CPB -- with notice of the renewed motion -- mailed out a revised letter to 102 cable and broadcast stations asking them to remove Trudeau's infomercial and attaching a CPB press release "applauding" Judge Sharpe's earlier denial of Trudeau's request for a TRO.

The letter, on CPB's letterhead (including the Seal of the State of New York and the imprint of George E. Pataki, Governor), advised the broadcast and cable stations that the CPB considers the infomercials misleading and "encourages your organization to remove it from your programming." Several broadcast or cable stations that received CPB letter pulled the infomercial.

On September 6, 2005, the court held a hearing on Trudeau's motion for a preliminary injunction and the CPB's motion to dismiss. The Court granted Trudeau a preliminary injunction, denied the CPB's motion to dis-

(Continued on page 48)

Agency's Coercive Letters to Broadcasters Violate First Amendment Rights

(Continued from page 47)

miss, and ordered a further hearing on Trudeau's request for a retraction or other relief to restore the status quo in light of the CPB's mailing of the letters.

Letter to Broadcasters Was Coercive

In granting Trudeau's motion for a preliminary injunction, Judge Sharpe held that the CPB's letter was coercive. The victory for Trudeau was substantial in part because Judge Sharpe applied a heightened standard to the request for injunctive relief. First, Judge Sharpe noted that any judicial restraint on the government's speech would be "extraordinary."

Second, without deciding whether the infomercial was core speech, commercial speech, or a hybrid of the two, the judge assumed that it was merely commercial speech and thus deserving of less protection than core or hybrid speech. (Representatives of the Federal Trade Commission publicly had stated their view that the Natural Cures infomercial is "an expression of opinion protected by the First Amendment.")

Judge Sharpe held that the CPB had implied that there was judicial force behind their letters by touting the "federal court order," and that the CPB had gone beyond less restrictive means by encouraging the stations to pull the infomercials. The court ruled that the test for whether a government communication is coercive is based upon the reasonable recipient's perception, and case law cited by Trudeau — including *Bantam Books v.*

Sullivan, 372 U.S. 58 (1963) and *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) — established that the CPB's letter went beyond being a mere opinion or persuasive, and was coercive.

"While it's absolutely true that the [CPB] doesn't have the authority to cause them any problems along the line of what they might perceive," Sharpe said in the hearing, "I'm not sure anybody would objectively look at that kind of letter and not run the risk in the reverse: 'Well, [CPB] versus some other state agency, it's all the same thing, it's the New York State Attorney General, we don't need problems with the New York State Attorney General and, therefore, we're gonna pull the ad.'"

Following the court's ruling, the CPB issued a statement maintaining its position that the infomercial is misleading. The litigation between the parties continues.

Kevin Trudeau and Alliance Publishing Group are represented by David J. Bradford, Daniel J. Hurtado, Andrew A. Jacobson, Andrew W. Vail, and Wade A. Thomson from the Chicago office of Jenner & Block LLP, Daniel Mach and Victoria H. Jueds from Washington D.C. office, and Michael J. Grygiel of McNamee, Lochner, Titus & Williams in Albany, New York. Jacobson is a partner in the Chicago office and a member of the firm's Litigation, Intellectual Property, and Telecommunications practice groups. Thomson is an associate in the Chicago office and a member of the firm's Litigation and Media and First Amendment practice groups.

Save the Date

LEGAL CHALLENGES OF CREATIVITY IN A CHANGING AND INCREASINGLY REGULATED MEDIA ENVIRONMENT

**January 26, 2006
Los Angeles, California**

En Banc Eighth Circuit Holds Code of Judicial Conduct's Limitations on Campaign Activity Violate First Amendment

By Samuel Fifer and Gregory R. Naron

Three years ago, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the United States Supreme Court held that one part of the Minnesota Supreme Court's canons of judicial conduct (the so-called "announce" clause of Canon 5, which prevented judicial candidates from "announcing their views on disputed legal and political issues") was a content-based restriction that "burdens a category of speech that is "at the core of our First Amendment freedoms" – speech about the qualifications of candidates for public office." *Id.* at 774.

The state's asserted interest was in the "impartiality of the state judiciary"; Justice Scalia, writing for the majority, focused on the definition of "'impartiality' in the judicial context," finding its traditional "root meaning" to be "the lack of bias for or against either party to the proceeding.

Impartiality in this sense assures equal application of the law." *Id.* at 775-76. Having so defined "impartiality," it was no stretch to conclude that the announce clause was "barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues." *Id.*

Justice Scalia rejected an alternative definition of impartiality – a "lack of predisposition regarding the relevant legal issues in a case" – finding that kind of impartiality "has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law." *Id.* at 777. He also found impartiality could not be defined as "open-mindedness," because the announce clause was a "woefully underinclusive" means of serving that salutary goal; after all, a candidate could announce his view on an issue "up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected." *Id.* at 779-80.

On remand, the Eighth Circuit Court of Appeals took up two other parts of Canon 5: the "partisan activities" clause

(which prevented judicial candidates from declaring partisan affiliations), and the "solicitation" clause (which prevented them from personally soliciting campaign contributions). A divided Court of Appeals panel held the solicitation clause was constitutional, and remanded for further proceedings on the partisan activities clause. *Republican Party of Minnesota v. White*, 361 F.3d 1035 (8th Cir. 2004).

En Banc Review

En banc review was granted and the panel decision vacated. On August 2, 2005, a majority of the Court sitting *en banc* ruled: the Canon 5 clauses restricting partisan political activity and campaign solicitations were, like the announce clause, unconstitutional under the First Amendment. *Republican Party of Minnesota v. White*, 2005 WL 1802507 (8th Cir., Aug. 2, 2005) (*en banc*) ("White II").

In the *White* litigation, a candidate for a seat on the Minnesota Supreme Court identified himself as a Republican Party member, spoke at party gatherings, and personally solicited campaign contributions. After a complaint was filed with the state office of professional responsibility, he withdrew from the race. Two years later, he ran again, this time asking the office of professional responsibility for an advisory opinion on the solicitation and partisan activities clauses. When he got an inconclusive response, he (joined by the party and others), brought suit, alleging that Canon 5 unconstitutionally restricted his free speech rights.

Writing for the *en banc* majority, Circuit Judge C. Arlen Beam (echoing Justice Scalia) placed the speech at issue at the core of the constitution's guarantees. "If Minnesota sees fit to elect its judges, it must do so using a process that passes constitutional muster," and "[p]rotection of political speech is the very stuff of the First Amendment," which finds its "fullest and most urgent application" in the "conduct of campaigns for political office." *White II*, 2005 WL 1802507 at *5, quoting *Buckley*

Clauses restricting partisan political activity and campaign solicitations were, like the announce clause, unconstitutional under the First Amendment.

(Continued on page 50)

En Banc Eighth Circuit Holds Code of Judicial Conduct's Limitations on Campaign Activity Violate First Amendment

(Continued from page 49)

v. Valeo, 424 U.S. 1, 15 (1976). So too, association “is itself an important form of speech, particularly in the political arena.” *Id.* at *9.

Unquestionably, Canon 5 “directly limit[ed] judicial candidates’ political speech.” Even so, the Canon 5 provisions could be sustained if they met the “strict scrutiny” test -- *i.e.*, if they were narrowly tailored to meet the state’s asserted compelling interest in preserving the independence and impartiality of its judiciary. *Id.* at *5.

The “idea” behind the solicitation and partisan activities clauses of Canon 5, advanced by the state, was that a judge “must be independent of and free from outside influences in order to remain impartial and to be so perceived.” *Id.* at *8. Defining “impartiality” as a “lack of bias for or against” a party to a proceeding, and acknowledging that this was indeed a compelling interest, the court held the Canon 5 clauses were not narrowly tailored to serve that interest.

With respect to the partisan activities clause, the court found it functionally indistinguishable from the “announce” clause the Supreme Court declared unconstitutional. Just as the justification for the announce clause posited that “*expressing one’s self of particular issues* will destroy a judge’s impartiality,” the partisan activity clause posited that “*associating with a particular group* will destroy a judge’s impartiality.”

In both instances, the clause is “barely tailored to affect any interest in impartiality toward parties.” *Id.* at *9. The court dismissed concerns about potential bias where a political party is itself a litigant, noting that there, “recusal is the least restrictive means of accomplishing the state’s interest.” *Id.* at *10.

An alternative definition of “impartiality” could be “described as openmindedness”; while neither the Supreme Court nor the *en banc* Eight Circuit ruled on whether that was a compelling interest, they both held that even if it was, “the ‘woeful[] underinclusive[ness]’ of the clause betrayed any intended purpose of upholding openmindedness.” *Id.* at *11.

“Underinclusiveness” was a major emphasis of Judge Beam’s opinion. He commented that “[a] clear indicator of the degree to which an interest is ‘compelling’ is the tight-

ness of the fit between the regulation and the purported interest”; that is, “if an interest is compelling enough to justify abridging core constitutional rights,” the state’s regulations will protect that interest from other, similar threats. *Id.* at *7.

“Underinclusiveness in a regulation may reveal that motives entirely inconsistent with the stated interest actually lie behind its enactment.” *Id.* at *11.

Thus, the rule against judicial candidates engaging in partisan activities was found “woefully underinclusive” in that it “restricted speech only during a campaign,” requiring candidates who may have been a “life-long, active member of a political party” to “sweep under the rug” that affiliation “for a few months during a judicial campaign.” *Id.* at *12.

Equally indicative of underinclusiveness -- *i.e.*, that the state did not bother to guard the asserted interest from “all significant threats” -- was the fact that Canon 5 restricted associative activity only with political parties, while allowing judicial candidates to align themselves with “the constitutional, legislative, public policy and procedural beliefs” of interest groups such as the NRA, the National Organization for Women, or the Christian Coalition, all of whom convey a “stronger message of alignment with particular political views and outcomes.” *Id.* at *13.

The majority dismissed the state’s – and dissent’s – assertion that political parties are a greater “threat” to judicial openmindedness than interest groups, because parties can hold candidates in their “thrall,” noting that this attempted distinction would “turn, at least in part, on the content of the message each seeks to convey,” and that such “line-drawing” is inherently “suspect” from a First Amendment standpoint. *Id.* at *14.

However, as the dissenting opinion pointed out, the Supreme Court’s decision in *McConnell v. FEC*, 540 U.S. 93 (2003) suggests that legislators are “fully entitled” to draw “real world” distinctions between political parties and interest groups, since parties have “influence and power” that “vastly exceeds that of any interest group.” *White II*, at *29 (Gibson, J., dissenting, quoting *McConnell*, at 188.

As to the solicitation clause, which “bars judicial candidates from personally soliciting individuals or even large gatherings for campaign contributions, it also restricted

(Continued on page 51)

En Banc Eighth Circuit Holds Code of Judicial Conduct's Limitations on Campaign Activity Violate First Amendment

(Continued from page 50)

“core political speech” based on its subject matter; “promoting a political message requires the expenditure of funds.” *Id.* at *15, citing *Buckley v. Valeo*, 424 U.S. at 15-19. Again, the majority held the asserted state interest – an impartial judiciary insulated from “undue influence flowing from financial support” – did not withstand strict scrutiny. *Id.*

Here, the court observed other provisions in Canon 5 ensured candidates would not discover contributors’ identities (i.e., all contributions are made to the candidate’s committee, which “shall not” disclose to candidates who either contributed or rebuffed a solicitation. *Id.* at *16.

The court deemed incredible the notion that putting a candidate’s signature on a campaign solicitation would “magically endow him or her with a power to divine, first, to whom that letter was sent, and second, whether that person contributed to the campaign or balked at the request.” Candidates would be even less likely to trace contributions made in response to a request transmitted to large assemblies of voters. *Id.*

Judge John R. Gibson filed a dissenting opinion in which Judges McMillian and Murphy joined. The dissenters criticized the majority for discussing “openmindedness” as if the concern was protecting candidates from “experiences that would affect their subjective frame of mind,” when in fact, the threat “comes not from within the candidates, but from without and consists of the candidates placing themselves in debt to powerful and wide-reaching political organizations that can make or break them in each election.” *Id.* at *18.

In other words, unlike the “announce” clause invalidated by the Supreme Court, “the partisan activities and solicitation clauses regulate how certain speech affects a judicial candidate’s relations with people, and organizations of people, not the candidate’s relation with issues.” *Id.*

Further amplifying its reasoning, the dissent deemed the state’s interest in “openmindedness” was “simply a facet of the anti-corruption interest” recognized in cases like *Buckley* and *McConnell*. And, the corruption concern is not limited to payment of money, but also includes the “impartial execution of the laws.” *Id.* at *20, quoting

United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548 (1973) (upholding restrictions on executive branch employees’ partisan political activities).

“The need for ‘neutrality’ identified in *Letter Carriers* is even more important for the judicial branch”; where judges are “allowed or forced to make themselves dependent on party largesse,” that “affects the state’s ability to provide neutral judges and the public’s perception of such neutrality.” *Id.* at *21-22.

As for the majority’s “underinclusiveness” emphasis, Judge Gibson noted that the Supreme Court had “twice upheld speech restrictions on strict scrutiny review” where the measure addressed “only the most critical threat to the governmental interest, even where some threat to the interest remained unaddressed.” *Id.* at *27, citing *McConnell*, and *Austin v. Michigan State Chamber of Comm.*, 494 U.S. 652 (1990).

For example, the restrictions on television campaign advertising upheld in *McConnell* were not deemed under-inclusive because they did not address print or the internet.

Conclusion

The *en banc* decision has potentially far-reaching impact on the many states that mandate non-partisan judicial elections. As Justice Scalia noted, the majority of states that elect judges use a version of the ABA Model Code of Judicial Conduct on which Minnesota’s Canons were based. Further litigation may be spawned by candidates and advocacy groups wanting to test the new ethical latitude enunciated in the *White* opinions.

And of course, time will tell whether the Supreme Court will write yet another chapter in the *White* saga itself. The *en banc* dissent’s focus on cases like *McConnell* and *Letter Carriers* highlights the weak points of the majority’s decision and maps out how defendants might make another run at certiorari.

Samuel Fifer is a partner, and Gregory R. Naron is of counsel at Sonnenschein Nath & Rosenthal LLP. William F. Mohrman of Mohrman & Kaardal, Minneapolis, argued for the plaintiffs. Assistant Minnesota Attorney General Thomas C. Vasaly, St. Paul, Minn., argued for the state.

LEGISLATIVE UPDATE

“Official Secrets Act”

By Kevin M. Goldberg

The need to focus on confirmation hearings for John Roberts and the disastrous conditions in Louisiana and Mississippi have forced Congress, especially the Senate Judiciary Committee, to stop working on the Free Flow of Information Act and the Open Government Act for the time being.

No hearings are scheduled on either bill in either chamber of Congress – or on any other media-related bills for that matter. Even important legislation pertaining to the transition to digital television has been delayed. However, in the wake of a speech given by Rep. Peter Hoekstra (R-MI) in July, there are some concerns that a new version of an “Official Secrets Act” may be introduced in Congress.

Free Flow of Information Act (HR 3323 and S 1419)

The most recent action held on these bills was a hearing in the Senate Judiciary Committee on July 20, 2005. There are no future hearings scheduled at this time in either the House or the Senate.

Open Government Act of 2004 (S 394 and HR 867)

The subcommittee on Government Management, Finance and Accountability of the House Government Reform Committee held a hearing on the topic of FOIA generally, though this bill and the FASTER FOIA Act (discussed below) on May 11, 2005.

Identification of Statutes that Would Affect FOIA (S 1181)

- Though the Open Government Act’s momentum has slowed somewhat, discussion of the proliferation of the so-called “(b)(3)” exemptions to FOIA – when another statute exempts a specific class of information from disclosure upon request – led to Senators Cornyn and Leahy introducing S 1181, which simply consists of that section of the Open Government Act that would require any bill that seeks to exempt information from

release under FOIA to specifically cite to 5 U.S.C. § 552 in order for that new exemption to become effective. This will allow those who track FOIA legislation to find all potential new exemptions that are often inserted as one paragraph of a much larger, non-FOIA specific, bill.

- S 1181 was introduced on June 7, 2005 and passed the Senate Judiciary Committee just two days later. It has now passed the full Senate but its House prospects are uncertain; House members have indicated that they would prefer passing one comprehensive FOIA bill, which may or may not be the Open Government Act, rather than enacting piecemeal legislation.

Possible Legislation Criminalizing Leaks of Classified Information

- In a speech given at the Heritage Foundation in Washington, DC on July 25, 2005, Rep. Peter Hoekstra (R-MI) stated his interest in stemming the tide of classified information that makes its way out of government files and into the public domain.
 - Mr. Hoekstra stated that, “Each year, countless unauthorized leaks cause severe damage to our intelligence activities and expose our capabilities. The fact of the matter is, some of the worst damage done to our intelligence community has come not from penetration by spies, but from unauthorized leaks by those with access to classified information.”
 - He called for “culture within the Intelligence Community where zero tolerance is the norm.”
- These statements sounded suspiciously like an attempt to resurrect the legislative language introduced by Sen. Richard Shelby (R-AL) in 2000, which would have criminally punished any revelations of classified information whatsoever—making all government information a “state secret” and greatly restricting access to this information. Potential whistleblowers would likely stop talking to the media about issues of public concern for fear of losing their jobs – or worse.

(Continued on page 53)

LEGISLATIVE UPDATE

(Continued from page 52)

- Rep. Hoekstra indicated in his July 25 speech that he was interested in holding hearings on the issue. It now appears that three such hearings will be held during the month of September in the House Intelligence Committee. The first two hearings will be closed to the press and public (as are 90 percent of that committee's hearings); however, the third hearing is expected to be open to the public and to discuss the role of the press in obtaining leaked information and its effect on national security, with at least one witness testifying from the media's point of view.

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 Kevin. Goldberg@cohnmarks.com.

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@medialaw.org

MLRC MediaLawLetter Committee

David Tomlin (Co-Chair)
Bruce Rosen (Co-Chair)
David Heller (Editor)
Robert Balin
Jim Borelli
Jay Ward Brown
Peter Canfield
Thomas Clyde
Robert Dreps
Judy Endejan
Jon Epstein
Charles Glasser, Jr.
Richard M. Goehler
Karlene Goller
Steven D. Hardin
S. Russell Headrick
Russell Hickey
David Hooper
Jonathan Katz
Debora Kristensen
Eric Lieberman
Daniel Mach
John Paterson
Deborah H. Patterson
Mark J. Prak
William Robinson
Charles D. Tobin
Paul Watler

©2005

MEDIA LAW RESOURCE CENTER, INC.
80 Eighth Avenue, Suite 200
New York, NY 10011

BOARD OF DIRECTORS

Henry Hoberman (Chair)
Dale Cohen
Harold W. Fuson, Jr.
Stephen Fuzesi, Jr.
Ralph P. Huber
Marc Lawrence-Apfelbaum
Kenneth A. Richieri
Elisa Rivlin
Susan E. Weiner
James E. Stewart (ex officio)

STAFF

Executive Director: Sandra Baron
Staff Attorney: David Heller
Staff Attorney: Eric Robinson
Staff Attorney: Maherin Gangat
MLRC Fellow: Raphael Cunniff
Legal Assistant: Kelly Chew
Staff Coordinator: Debra Danis Seiden

ETHICS CORNER

Does An “Officer Of The Court” Owe A Duty To Disclose Clients’ Confidences About Their Confidential Sources?

By Bruce E. H. Johnson

In its July 15th decision, *Price v. Time Inc.*, 416 F.3d 1327 (11th Cir. 2005), the Eleventh Circuit ruled that *Sports Illustrated* magazine could not avail itself of Alabama’s shield law in defending against a defamation action brought by former Crimson Tide football coach Mike Price.

The court agreed that a First Amendment confidential source privilege existed, but suggested that the privilege might be overcome by the plaintiff after taking depositions from the four women who were possible sources for the story, which detailed sexual shenanigans by Price after a visit to a Pensacola topless bar.

(The case involves one of the more interesting examples of “circumstantial” evidence. Price alleged that he had not had “aggressive sex” with two women that night, as detailed in the article, but was unable to remember what happened because of his excessive drinking. (The magazine reported that, at one point in the proceedings, the women in the hotel room started screaming “Roll Tide” and Price yelled back “It’s rolling baby, it’s rolling.”) As a result, Price was unable to offer any direct evidence to substantiate his claim of falsity. Instead, Price resorted to other ways to establish the allegation that he had not had sex, by pointing to his excessive drinking and the fact that he did not have his supply of Viagra with him.)

In considering possible problems arising from these depositions, the Eleventh Circuit went further, and surprised some legal ethics practitioners, when the panel suggested that defense counsel had a **duty as an “officer of the court”** to reveal to the trial court the identity of his client’s confidential source when the plaintiff takes depositions of the four women and none of them admits to being the source of the *Sports Illustrated* article. The court stated:

At oral argument we asked counsel for the defendants about his duty to correct false testimony that he hears a witness give on a material matter. More

specifically, we asked him point blank what he would do if he heard the person he knows to be the confidential source deny under oath in deposition that she was the confidential source. It would be fair to say that counsel was somewhat uncomfortable with this question, but he did assure us that he would do his duty as an officer of the court and inform the district court that the witness’ sworn denial was false. That assurance is important to our decision that Price should be required to depose the four women, one of whom almost certainly is the confidential source, before the defendants are forced to divulge the source’s name. It is important because it assures us the identity of the confidential source (or perhaps the absence of one) is virtually certain to be discovered either from the deposition testimony of the women or through the ethically compelled disclosures of counsel for the defendants, correcting any material testimony that he knows to be false.

On August 5, 2005, the lawyer for Time Inc., and the reporter, Don Yaeger, filed a petition for panel rehearing. The lawyer conceded that he had been asked “a series of hypothetical questions probing what might occur in those depositions” and that, when the court inquired “what he would do if he heard the confidential source deny under oath that she was the confidential source,” he answered “that he would inform the District Court about the false testimony.”

His petition added: “The undersigned now realizes that his answer to the Court’s questions [was] in error.” This was because neither the Alabama Rules of Professional Conduct nor the American Bar Association’s Model Rules of Professional Conduct mandate such a duty “when testimony is given in a pretrial deposition.”

Rather, “the rules only require an attorney to correct false testimony if that testimony has been offered by the lawyer on his client’s behalf.” Time’s petition requested that the decision be modified because, if left corrected, “the panel’s opinion will serve as a precedent based upon a misconception.”

(Continued on page 55)

ETHICS CORNER

(Continued from page 54)

According to the petition, Alabama Rule of Professional Conduct (“Ala. RPC”) 3.3(a)(3) prohibits a lawyer from “knowingly” offering evidence that the lawyer “knows to be false” but sitting through a deposition is not tantamount to “offering” evidence. Thus, if the plaintiff takes the depositions of the alleged sources, and one of them lies in denying she was the source, counsel for defendants “will have no obligation to correct the testimony at that time because counsel will not be ‘offering’ it.”

The language of Alabama’s rule certainly supports Time’s argument, because its duties (as regards false evidence) turn on whether the lawyer “offered” the evidence. Indeed, Ala. RPC 3.3(a) states as follows:

- (a) A lawyer shall not knowingly*:
 - (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 - (3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(* Both the former, and current, ABA Model Rules define the terms “knowingly,” “known,” or “knows” as denoting “actual knowledge of the fact in question” and note that a “person’s knowledge may be inferred from circumstances.” There may be situations where a lawyer, by piecing together information from the case, suspects, thinks, and even believes that a witness is lying, and maybe has concluded that a jury will find so, but does the lawyer have “actual knowledge” of that fact?)

Time’s argument is also supported by the *Restatement (Third) of the Law Governing Lawyers*, which states (at § 120, comment d) that a lawyer has no duty to correct false

deposition testimony by an opposing party or witness – indeed, the *Restatement* suggests that a lawyer may have strategic reasons for not correcting the false testimony of a third-party witness before trial. Any contrary rule, the petition argued, would imperil the attorney-client privilege (assuming the clients have disclosed the identity of the source to their counsel) and result in a conflict of interest between client and lawyer.

In response to Time’s petition for rehearing, Price did not take issue with the ethics law cited by Time but instead argued that the panel should either stand by its original opinion, which had ordered Price to conduct depositions of the four women premised on the assurance given by opposing counsel that false testimony would immediately be rooted out, or eliminate the First Amendment requirement of exhaustion of alternate sources and force Time to reveal the identity of its source. “The potential for mischief and prejudice to Price,” his lawyer argued, “is not vague or speculative if the avoidance of the assurance of identifying the source is permitted.”

Time, in reply, stated that the issue was not whether the trial court could order the **clients** to disclose the name of the confidential source after Price had exhausted other alternatives during the depositions and had met the other elements for overcoming the qualified First Amendment confidential source privilege. Rather, Time suggested, the issue presented by the petition was whether the **lawyer** could also be compelled to disclose that information.

Petition for Rehearing Denied

On September 16, 2005, the Eleventh Circuit denied the petition, with unusually strong language – stating that “in imposing [the] requirement [to depose the four women before seeking access to information in Time’s possession] we took into account this assurance given to us by counsel for the defendants.” Given this “commitment”, the court added, the later argument, “that it is the perfect prerogative of an officer of the court to stand silently by as the search for truth is led astray by perjury – assuming, of course, that the perjury serves his client’s interests”, was “an interesting position.”

In this case, the court said, it would simply “hold counsel to his word. Even if lawyers cannot be counted on to

(Continued on page 56)

ETHICS CORNER

(Continued from page 55)

inform the court on all occasions when a witness is perjuring herself, we think courts still have the right to hold lawyers to their word.”

The Eleventh Circuit allowed the decision to be amended in one matter. In response to the argument from Time’s attorney that its ruling created a conflict because the client, not the lawyer, has the disclosure duty, the court amended its decision – by stating that the lawyer’s duty to disclose the identity of the confidential source in this case would not arise until the clients had refused to comply with a trial court’s disclosure order after the four depositions had concluded. If the clients do not reveal the source’s identity, the court added, counsel would have a duty to do so.

The Eleventh Circuit agreed that this ruling put the defense lawyer in a “difficult situation” but stated it was “confident” that his clients would not “attempt to defy a court order.”

So, aside from the obvious problem of the risks of representations made and questions answered during oral argument which a lawyer might later regret,¹ what ethical issues are presented here?

Does a lawyer owe a duty to the court to reveal confidential client information about a client’s confidential source simply because a third-party witness becomes uncooperative or attempts to shade the truth?

From a legal ethics perspective, given the language of the Alabama Rule, the legal analysis offered by Time’s lawyer on the petition for rehearing seems relatively straightforward. Sitting through a deposition is not the same as offering testimony.

But the panel’s comments raise some troubling and tricky issues about what ethics requirements exist after the deposition has been concluded and motion practice relative to the deposition testimony – and court hearing or even a trial – has begun.

ABA Model Rules

Furthermore, the stakes have potentially been raised by the changes made in the ABA Model Rules which are now

under consideration by various states. (For the current state-by-state status report about these ABA proposals, check the listing at http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf.)

Prior to the ABA’s Ethics 2000 proposals, as shown by the Alabama language, the lawyer’s duty of candor to the court focused on knowingly “false” “evidence” that the lawyer “has offered” to the Court, not on false testimony by the opponent or by witnesses that is not “offered” by the lawyer. As shown by the Alabama language, the duty of candor to the court was governed by ABA Model Rule 3.3(a), which states that a lawyer shall not “knowingly”:

Does a lawyer owe a duty to the court to reveal confidential client information about a client’s confidential source simply because a third-party witness becomes uncooperative or attempts to shade the truth?

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The ABA Model Rules, however, now include a new provision, ABA Model Rule 3.3(b), which by its terms may mandate a duty of disclosure arising from the “criminal” or “fraudulent” conduct of any “person” that happens to be “related to”² any court proceeding:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Also, the ABA reforms have added a new subsection (c), which apparently mandates the elimination of the attorney-client privilege of the client, by requiring the lawyer to take action to remedy the person’s wrongdoing “even if compliance requires disclosure of information” that is an attorney-

(Continued on page 57)

ETHICS CORNER

(Continued from page 56)

client communication, when the duty to take “reasonable remedial measures” arises under subsection (b).

This novel duty to break client confidences merely to report on the fraud or misconduct by any “a person” in connection with anything “related” to a “proceeding” is potentially far-reaching,³ but the ABA has suggested that it is not a major change from existing law. As the ABA Commission noted in its report:

The Commission recommends adoption of a new provision (b) addressing the lawyer’s obligation to take reasonable remedial measures, including disclosure if necessary, where the lawyer comes to know that a person is engaging or has engaged in any sort of criminal or fraudulent conduct related to the proceeding. This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) (“A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal”) and DR 7-108(G) (“A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson’s or juror’s family, of which the lawyer has knowledge”).

Thus, if these ABA reforms are adopted, a duty to disclose confidential client information about a confidential source may arise if the lawyer “knows” that a deponent lied during a deposition that is “related” to the adjudicative proceeding – even if the lawyer is not offering that testimony, and even if the lawyer’s knowledge that the confidential source has lied stems from a confidential communication from his or her client. (Of course, this analysis may differ depending on whether and to what extent a state adopts the ABA’s proposed language.)

The *Price* case, which after all focuses on the deposition stage of the confidential source battle, has not yet addressed that issue – and, with the order on the petition for rehearing, which has transformed the legal rule threatened by the initial panel decision into nothing more than a judicial remedy for a lawyer’s *faux pas*, the decision seems to have little precedential value in evaluating these ethics risks.

But, as more states adopt the new ABA Model Rules, media lawyers in the future may encounter the problem – and, given this risk, should carefully consider when and whether they want to learn the name of any confidential source from their clients. The risk that a court will order a lawyer to disclose confidential client communications whenever any “person” lies during a deposition has been increased with these rules changes.

Can you safeguard your client’s confidences if you can no longer safeguard your own? Obviously, if a lawyer learns the name of the confidential source, at least in those states where the ABA reforms are applicable, the lawyer should carefully read the applicable ethics rules and consider how to navigate through the problems apparently created by any changes made by the ABA Model Rules.

Bruce Johnson is a partner in David Wright Tremaine LLP’s Seattle office and a member of the Defense Counsel Section’s ethics committee. His partners Laura Handman and Jeff Fisher submitted a media amicus brief in the Price appeal.

Notes:

1. The problems created by concessions during oral arguments are not unfamiliar to the First Amendment Bar. As Floyd Abrams notes in his recent memoir, *Speaking Freely: Trials of the First Amendment*, Yale Law professor Alexander Bickel, who argued the “Pentagon Papers” case in the Supreme Court, made a crucial concession – that his clients’ right to publish was not absolute and that the publication could be halted if the Court found it would cause the deaths of innocent American soldiers -- which Abrams believes garnered enough votes among the Justices to win a majority of the Court. Nonetheless, a few days after the argument, one of Bickel’s clients, the ACLU, filed a post-argument memorandum with the Court, disavowing (in Bickel’s words) his “inclinations to humanity.”

2. Is a civil deposition – which has not yet been offered into evidence by anyone, or even transcribed – “related” to a court proceeding? (The deposition takes place in a pending “proceeding” certainly.) The author hasn’t looked into this interesting question, but history buffs may recall that this very issue was discussed by commentators *ad nauseam* during the recent Clinton-Lewinsky brouhaha, when the President’s opponents insisted that perjury had occurred when the President denied under oath any “sexual relations” with Lewinsky.

3. To carry the Clinton analogy further, under ABA Model Rule 3.3(b), would the attorney for Monica Lewinsky owe a duty to disclose her confidential communications to him as soon as he learned that the President, in his *Jones v. Clinton* deposition, had denied having “sexual relations” with her?

MLRC Calendar

November 9, 2005

MLRC Annual Dinner

Sheraton New York Hotel and Towers

811 Seventh Avenue on 53rd Street

Cocktail reception at 6pm sponsored by Media/Professional Insurance

Dinner at 7:30pm

Before the MLRC Annual Dinner...

Symposium for MLRC Members on Blogs, Bloggers, and the Changing Media Business

Sheraton New York Hotel and Towers

811 Seventh Avenue on 53rd Street

2:30-4:30pm

November 11, 2005

MLRC Defense Counsel Section Breakfast

Proskauer Rose Conference Center

1585 Broadway 26th Floor

January 26, 2006

MLRC & Donald E. Biederman

Entertainment & Media Law Institute of

South Western Law School

Los Angeles

*Legal Challenges of Creativity in a Changing
and Increasingly Regulated Media Environment*
