

# MEDIA LAW RESOURCE CENTER

## ANNUAL DINNER

WEDNESDAY, NOVEMBER 12TH, 2008

### *The Presidency and the Press*

#### **Michael Beschloss**

Author, *Presidential Courage: Brave Leaders and How They Changed America, 1789-1989*  
Presidential Historian for NBC News

#### **David Gergen**

Professor of Public Service and Director of the Center for Public Leadership at  
John F. Kennedy School of Government at Harvard University  
Director of Communications for President Reagan  
Advisor to Presidents Nixon, Ford and Clinton

#### **Joe Lockhart**

Founding Partner with The Glover Park Group  
Chief Spokesman for President Clinton and the Clinton Administration, 1998-2000

#### **Moderated by**

#### **Martha Raddatz**

Chief White House Correspondent for ABC News

Cocktail Reception at 6:00 P.M.

*Sponsored by Media/Professional Insurance*

Dinner at 7:30 P.M.

*Grand Hyatt New York*

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

***RSVP by Monday, October 27, 2008***

**Business Attire**

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER

WEDNESDAY, NOVEMBER 12TH, 2008

*RSVP by Monday, October 27, 2008*

Please reserve:

\_\_\_ Single seat(s) at \$375 each

\_\_\_ Table(s) for 10 at \$3,500 each

\_\_\_ Table(s) for 11 at \$3,875 each

Total Amount Enclosed \_\_\_\_\_

For: \_\_\_\_\_  
(Name(s) of person(s), firm, or organization attending)

Address: \_\_\_\_\_  
\_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

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

*Media Law Resource Center, Inc. 212-337-0200 fax: 212-337-9893 www.medialaw.org  
For further information contact Debra Danis Seiden at dseiden@medialaw.org*

# MEDIA LAW RESOURCE CENTER

## ***Defense Counsel Section 2008 Annual Meeting and LUNCH***

**Thursday, November 13, 2008**

Family style lunch will be served

12:00 NOON to 2:00 P.M.

Meeting will begin promptly at 12:30 P.M.

**Carminé's**

**200 West 44th Street**

just West of Broadway

Price per person: \$50.00

***We are required to give a list of attendees prior to the event  
so please send in your reservation!***

**RSVP by October 27, 2008**

(Reservations are not refundable for cancellations received after Friday, November 7, 2008)

*Media Law Resource Center, Inc*

*212-337-0200 • fax: 212-337-9893 • [www.medialaw.org](http://www.medialaw.org)*

*For further information contact Debra Danis Seiden at [dseiden@medialaw.org](mailto:dseiden@medialaw.org).*

# MEDIA LAW RESOURCE CENTER

## *Defense Counsel Section 2008 Annual Meeting and LUNCH*

Yes, reserve \_\_\_\_\_ seats at the DCS Annual Lunch Meeting for

Firm Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Please list names of individuals attending below (print clearly)

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Name: \_\_\_\_\_ E-mail: \_\_\_\_\_

Payment enclosed @ \$50.00 per person: \_\_\_\_\_

(Reservations are not refundable for cancellations received after Friday, November 7, 2008)

Send payment to:  
MLRC, Inc., 520 Eighth Avenue, North Tower—20th Floor, New York, NY 10018

**MULRC** Media  
Law  
Resource  
Center  
**MEDIA LAW LETTER**

Reporting Developments Through September 30, 2008

**LIBEL / PRIVACY**

<b>Pa. Super.</b>	<b>Appeals Court Affirms \$3.5 Million Libel Damage Award Against Newspaper</b> <i>Articles About Federal Investigation Were False and Negligently Published</i> Joseph v. Scranton Times	<b>3</b>
<b>7<sup>th</sup> Cir.</b>	<b>Divided Seventh Circuit Affirms Summary Judgment for Book Author</b> <i>Disputed Recollection of Events Insufficient Evidence of Actual Malice</i> Madison v. Frazier	<b>6</b>
<b>E.D. Okla.</b>	<b>Court Dismisses Suit Against John Grisham, Random House, Other Authors</b> <i>Books about Criminal Proceedings Are "Core Political Speech" Entitled to Highest Protection</i> Peterson et al. v. Grisham, et al	<b>9</b>
<b>S.D.N.Y.</b>	<b>Court Dismisses Defamation and Copyright Claims Against CBS and AP</b> <i>Fair Report Privilege Applied to Foreign Proceeding</i> Idema v. CBS; Idema v. Associated Press	<b>12</b>
<b>Pa. C.P.</b>	<b>Philadelphia Daily News Wins Summary Judgment</b> <i>No Actual Malice; No Defamatory Meaning in Reporting Plaintiff</i> <i>"Appeared as a Playboy centerfold"</i> Miller v. Philadelphia Newspapers	<b>14</b>
<b>Tex. Dist. Ct.</b>	<b>CBS Wins Summary Judgment in Defamation Case</b> <i>Broadcast About Doctor Was Substantially True, Privileged</i> Neely v. CBS	<b>16</b>
<b>NJ</b>	<b>NJ High Court Adds Motive and Speaker Identity Factors for Non-Media Actual Malice</b> <i>Distinguishes Media and Non-media Speakers</i> Senna v. Florimont	<b>18</b>
<b>3<sup>rd</sup> Cir.</b>	<b>Court Finds NFL Films Violated "Voice of God's" Publicity Right</b> <i>False Endorsement Claim Remanded for Trial on Likelihood of Confusion</i> Facenda v. NFL Films	<b>19</b>
<b>N.Y. Sup. Ct.</b>	<b>Trial Court Dismisses Misappropriation Claim Over Magazine Photo</b> <i>Photograph Bore a Reasonable Relationship to the Article</i> Dominguez v. Vibe Magazine	<b>20</b>
<b>N.J. Sup. Ct.</b>	<b>Suit Against WPIX Dismissed for Failure to Detail Malice</b> <i>Plaintiff Required to Plead Factual Basis of Actual Malice</i> Cats Exclusive Inc. and Jose Pla v. WPIX, Inc., et al.	<b>21</b>
<b>Mont. Dist. Ct.</b>	<b>Montana Jury Awards \$3.2 Million in Libel Suit Against Radio Host</b> <i>Accused Litigation Adversaries of Lying and Fraud</i> Gardner v. Stokes	<b>22</b>

<b>5<sup>th</sup> Cir.</b>	<b>Court Reverses \$33 Million Defamation Judgment in Physician Peer Review Case</b> <i>Verdict No Longer a Benchmark in Media Cases</i> Poliner v. Texas Health Systems	<b>23</b>
<b>N.H. Sup. Ct.</b>	<b>Trial Court Dismisses Thomas Libel Case After Remand From State Supreme Court</b> <i>Newspaper Protected By Qualified Privilege</i> Thomas v. Telegraph	<b>26</b>
<b>N.J. Sup. Ct.</b>	<b>Venezia Plaintiff Dismisses Case without Payment or Deposition by Reporter</b> Venezia v. North Jersey Media Group Inc.	<b>27</b>
<b>REPORTER'S PRIVILEGE</b>		
<b>E.D. Mich.</b>	<b>Court Rules Reporter Must Reveal Sources in Privacy Act Case</b> <i>Court Rejects Qualified Privilege in Civil Context</i> Convertino v. Department of Justice	<b>28</b>
<b>Mont. Dist. Ct.</b>	<b>Court Quashes Subpoena For Anonymous Posters' Identities On Shield Law Grounds</b> <i>Anonymous Poster's Covered By Shield Law</i> Doty v. Molnar	<b>30</b>
<b>NEWSGATHERING</b>		
<b>Ariz.</b>	<b>Arizona Supreme Court Strengthens Its Rule Allowing Cameras In The Courts</b> <i>New Rule Requires On the Record Findings</i>	<b>31</b>
<b>INTERNATIONAL</b>		
<b>The Netherlands</b>	<b>Supreme Court Allows Monitoring of Journalists "In the Interest of National Security"</b> <i>Leak Investigation Justified Monitoring</i> De Telegraaf Case	<b>32</b>
<b>EMPLOYMENT</b>		
<b>NY</b>	<b>New York State Prohibits Non-Compete Clauses in the Broadcast Industry</b> <i>"Broadcast Employees Freedom to Work Act," (N.Y. Lab. Law § 202-k)</i>	<b>33</b>
<b>COPYRIGHT</b>		
<b>N.D. Cal.</b>	<b>Are There Pirates in My Safe Harbor?</b> <i>ISP Entitled to Safe Harbor Protection for User Generated Content</i> Io Group v. Veoh Networks	<b>34</b>
<b>MLRC</b>		
<b>U. S.</b>	<b>Supreme Court Roundtable on the First Amendment</b> <i>Floyd Abrams, Professor Erwin Chemerinsky &amp; Cliff Sloan on the Direction of the Court on First Amendment Issues</i>	<b>37</b>
<b>Ethics</b>	<b>Joint Defense Agreements In Defamation Litigation – A Primer</b>	<b>43</b>

## Pennsylvania Appeals Court Affirms \$3.5 Million Libel Damage Award Against Newspaper

### *Articles About Federal Investigation Were False and Negligently Published*

A Pennsylvania appeals court affirmed a \$3.5 million judgment against the Wilkes-Barre *Citizens' Voice* newspaper over a series of articles discussing a businessman and his company's links to a federal money-laundering investigation. *Joseph v. The Scranton Times, L.P.*, 2008 PA Super 217 (Sept. 18, 2008) (Ford Elliot, Donohue, Popovich, JJ.).

The appeals court held that plaintiff had provided sufficient evidence of falsity, negligence and injury to support the damage award. The bench trial in the case was rather unusual. The trial judge did not rule on the plaintiff's status until after trial and at times seemed to suggest that defendants had the burden of proving truth. On appeal, however, the court found that plaintiff proved falsity and affirmed that he and his company were private figures.

The appeals court also affirmed that the newspaper was negligent. The court agreed with plaintiff's expert who testified at trial that the use of confidential sources without editorial oversight was inconsistent with the newspaper's guidelines – and therefore negligent.

#### **Background**

On May 31, 2001, federal investigators raided plaintiff's home and businesses in connection with an investigation into reputed Northern Pennsylvania crime boss Billy D'Elia. The search warrants were based on probable cause of a criminal conspiracy between "D'Elia and others." Agents were authorized to seize any evidence of RICO crimes, gambling and secreting of assets and removed boxes of documents from plaintiff's home and business.

On June 1, the *Citizens Voice* reported on the raid in an article headlined "Feds Raid Business in Pittston." The next day the newspaper published an article entitled "Home of Acumark Owner Searched by Federal Agents." Both articles reported on the execution of the search warrants, with a comment from plaintiff's attorney denying knowledge of any illegal activity.

The newspaper published an additional eight articles related

to the raid and investigation of D'Elia, citing unnamed sources for updates on the status and course of the investigation. The next article was headlined "Alleged Money-laundering Scheme Linked to Pittston Raid" and suggested that plaintiff had been under video surveillance for months and that money was being laundered through plaintiff's marketing and limousine businesses.

Subsequent articles focused on other people under investigation, but included summaries of the allegations against plaintiff. The newspaper also later reported that the investigation had broadened to include "prostitution, gun running, and drug trafficking" and that a grand jury was hearing testimony of alleged money laundering through plaintiff's businesses.

Plaintiff and his businesses were not indicted for any crimes and the records seized in the raids were eventually returned. (After the bench trial D'Elia and four other men were indicted but no information in their indictments related to plaintiffs.) Plaintiff, Thomas A. Joseph, and his son Thomas J. Joseph, and their marketing and limousine companies, sued the newspaper,

two reporters, the newspaper's corporate parent, and several corporate officers in May 2002, for libel and false light invasion

of privacy.

The defendants' motion for summary judgment was denied without opinion. The case was tried without a jury over eight days between May 16, 2006 and May 26, 2006 before Common Pleas Judge Mark Ciavarella. Plaintiff conceded at trial that he had been close friends with Billy D'Elia, but denied that he or his companies were involved in any wrongdoing.

Plaintiff called Temple University Associate Professor Christopher Harper, formerly a bureau chief for *Newsweek* and ABC News and a producer for the ABC News program *20/20*, as his expert witness on journalistic practices. Harper testified the newspaper violated its own policies and good practices by

*(Continued on page 4)*

---

**the use of confidential sources without editorial oversight was inconsistent with the newspaper's guidelines – and therefore negligent.**

---

**Pennsylvania Appeals Court Affirms \$3.5 Million Libel Damage Award Against Newspaper**

(Continued from page 3)

using anonymous sources without editorial oversight, calling the articles “the equivalent of a journalistic train wreck.”

Plaintiff presented another expert on damages, Andrew Verzilli, emeritus professor of economics at Drexel University, who testified that plaintiff’s businesses lost up to \$3.5 million after the *Voice* stories were published.

The newspaper argued that the articles were substantially true because it was not disputed that federal prosecutors had been investigating plaintiff’s connections to D’Elia and others.

Five months later, Judge Ciavarella issued a terse, three-page verdict, finding that the last eight articles had libeled Thomas A. Joseph and his company Acumark. The court awarded Joseph \$2 million in compensatory damages; and his company \$1.5 million in compensatory damages. The judge denied the request for punitive damages, dismissed the false light claims and the claims of the son. Following entry of judgment, the trial court authored a more detailed opinion.

The newspaper raised four issues of error on appeal. 1) Plaintiffs failed to prove that the articles were false. 2) Plaintiffs were limited purpose public figures required to prove actual malice. 3) Plaintiffs failed to prove negligence. 4) Plaintiffs failed to prove injury.

**Falsity**

With regard to falsity, the appeals court found that the plaintiff was never under video surveillance nor was he the target of a grand jury investigation. The subsequent indictments brought against D’Elia and others for money laundering, obstruction of justice and gun possession did not implicate plaintiff or his companies. And the court credited plaintiff’s testimony that he and his companies were not involved in any illegal activity. Moreover, the court found that a “fair reading” of one of the articles focusing on other suspects, falsely implied that plaintiff was involved in their alleged criminal conduct.

As to the burden of proof to establish falsity, the appellate court rejected the newspaper’s argument that it was erroneously required to prove truth at trial. The appellate court noted that while the trial court did not ignore the newspaper’s failure to present evidence tending to establish truth, the court “did not specifically rely on Appellants’ lack of proof in determining whether Appellees met their burden.” *Slip op.* at 23-24 n.19.

**Plaintiff’s Status**

On appeal the newspaper argued that plaintiff’s long association with a reputed crime figure made him and his company limited purpose public figures. The plaintiff did, in fact, have a long personal and business relationship with Billy D’Elia dating back to the 1970s and knew that he was a reputed crime boss. The newspaper argued that this voluntary association drew plaintiff into a public controversy — namely, the criminal investigation and searches of plaintiff’s home and businesses. But the court found that this relationship did not rise to the level of voluntarily assuming a role of special prominence in a controversy.

The court distinguished this result from the Third Circuit’s decision in *Marcone v. Penthouse Int’l Magazine*, 754 F.2d 1072 (3d Cir. 1985). In *Marcone*, a lawyer sued over an article discussing his connections to drug trafficking motorcycle gangs. The Third Circuit held that Marcone was a public figure because of the public controversy surrounding drug trafficking, his association with the gangs and his indictment on drug charges. In the instant case, however, the plaintiff was never indicted and also testified that he had no recent contact with D’Elia.

**Negligence**

On the issue of fault, the appellate court recited with approval the testimony of Professor Harper who testified about “the inherent dangers in utilizing confidential sources.” *Slip op.* at 33. Harper testified that “confidential and anonymous sources should be used only in very extreme cases. He reasoned that when a source is not named, there is no ability to question whether the source is stating fact or opinion or has a bias.” *Id.*

Harper also testified that the newspaper did not follow its own guidelines on anonymous sources. The newspaper’s guidelines on sources states:

1. While anonymous sources are a critical element of some important stories, frequent reliance on them in the newspaper increases the risk of inaccurate or unfair journalism and can adversely affect the newspaper’s credibility with readers.

(Continued on page 5)



## Pennsylvania Appeals Court Affirms \$3.5 Million Libel Damage Award Against Newspaper

(Continued from page 4)

2. Anonymous statements and quotes should be published only when necessary to provide important information and only after the reporter and the editor in charge are satisfied that the Citizens' Voice is meeting its standards for accuracy and fairness.

3. Reporters should avoid making promises of confidentiality to sources when those promises are not in the newspaper's or the reader's best interests, but reporters should be prepared to honor such promises.

Harper claimed that the newspaper violated its own code as well as generally accepted newsroom standards because the paper's editors did not review and approve the use of anonymous sources. The appellate court agreed, citing to trial and deposition testimony that reporters granted confidentiality without prior editorial approval and that editors did not ask to meet with any of the sources. Further, the court faulted the newspaper for publishing allegations against plaintiff based solely on unnamed sources.

### Injury

The court rejected the newspaper's argument that plaintiff failed to prove injury to reputation, emotional harm or lost busi-

ness. The allegations of criminal misconduct were defamatory per se, and thus plaintiff's own testimony and the testimony of other family members was sufficient to prove reputational and emotional distress damages. Plaintiff had testified that the articles made his life a nightmare and his daughter testified about how the articles upset her father. No other evidence of loss of reputation in the community, or emotional distress, was necessary to sustain the award of \$2 million to plaintiff.

Finally, the court also affirmed the \$1.5 million award of lost profits to plaintiff's business. The newspaper challenged the evidence of lost profits as speculative. The court characterized this argument as "quintessentially a challenge to the credibility" of plaintiff's expert. "However, as long as it was reasonable to infer that Acumark's loss of profits was a result of the defamatory Articles, the evidence was sufficient to sustain Appellee Acumark's burden of proof."

*Plaintiffs were represented by George W. Croner of Kohn Swift & Graf, P.C. in Philadelphia and Timothy Paul Polishan of Hoegen Hoegen & Kelley LLP, Wilkes Barre. The Citizens' Voice was represented by W. Thomas McGough, Jr., Kevin Abbott and Kim Watterson of Reed Smith, LLP in Pittsburgh; and J. Timothy Hinton, Haggerty, McDonnell, O'Brien & Hinton LLP, Scranton.*

## MLRC Calendar

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

**November 12, 2008**  
MLRC ANNUAL DINNER  
*New York City*

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

## Divided Seventh Circuit Affirms Summary Judgment for Book Author

### *Disputed Recollection of Events Insufficient Evidence of Actual Malice*

A divided Seventh Circuit panel affirmed summary judgment to a book author, finding that disputed recollection of events – based on her memory – did not raise an issue of actual malice. *Madison v. Frazier*, 539 F.3d 646 (7<sup>th</sup> Cir. Aug. 22, 2008) (Bauer, Ripple, Wood, JJ.). In addition, the full panel agreed that other portions of the book were subject to the Illinois innocent construction rule and/or involved non-actionable opinion.

#### **Background**

The defendant, Renatta Frazier, is a former Springfield, Illinois police officer who was involved in a highly publicized discrimination case against the city. In 2001, while a rookie officer, Frazier was accused by police officials of improperly responding to a rape complaint. The city began proceedings to fire Frazier and she resigned from the force. Evidence later came out that the accusation against Frazier was unfounded and was a pretext to force her off the force. This led to a discrimination lawsuit that was settled for approximately \$850,000.

Frazier had originally sought out and obtained the help of plaintiff, Carl Madison, a local NAACP official, to champion her cause. But they had a falling out about how to handle the matter.

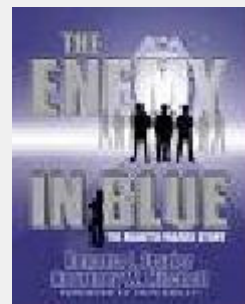
In 2005, Frazier self-published a book about her experiences entitled “The Enemy In Blue.” Among other things, the book recounts her falling out with plaintiff, stating that he “was not working in my best interest” and that she severed ties with him. Frazier also wrote that she was dismayed to hear plaintiff claim that he had dropped her, concluding:

“I couldn't believe what I was reading and hearing ... it didn't happen like that at all. ... Maybe he planned to run for some political office or was trying to obtain a politically connected employment opportunity. Whatever the reason, my respect for him diminished to nothing.... Real men don't lie. I thought, real men don't sell out.”

Plaintiff also complained about a “fantasy section” in the book where Frazier imagined herself lying beaten and bleeding on the streets of Springfield. An imaginary black man shook his head at her and walked away. And her pleas for help were ignored by other black community, political and business leaders who “left [her] for dead.” Plaintiff alleged this implied he was the imaginary man and/or one of the community leaders who ignored plaintiff. Plaintiff sued for libel and false light. He conceded he was a public figure for purposes of the suit.

Last year an Illinois federal district court granted summary judgment to defendant. *See* 478 F.Supp.2d 1056 (C.D.Ill. Mar 26, 2007). The fantasy sequence was not actionable because it was clearly presented as fiction. De-

(Continued on page 7)



(Continued from page 6)

defendant's statements speculating about plaintiff's motives were evaluative judgments and not statements of fact. Similarly, the phrases "real men" and "sell out" had no precise meaning and were held not actionable. The accusation that plaintiff was lying, however, was capable of a defamatory meaning. But the claim failed for lack of evidence of actual malice. Defendant's accusation was based on her own recollection of events. Plaintiff provided no evidence to show that Frazier doubted her recollection that she severed ties with defendant before he and the NAACP withdrew its assistance.

### ***Seventh Circuit Ruling***

Judge Bauer, joined by Judge Ripple, and Judge Wood, in part, began by affirming summary judgment over the "fantasy" section of the book. The passage did not identify plaintiff, or anyone else by name, and was therefore "very capable of innocent construction." In addition, this section of the book was not a statement of fact, but a symbolic representation of the defendant's feelings surrounding her discrimination case. This was clear from the "literary context" in which the passage appeared. Here "even the most careless reader must perceive that this 'fantasy' was no more than rhetorical hyperbole." 539 F.3d at 655. Similarly, the author's speculation about plaintiff's motives were statements of opinion.

The court divided, however, over the accusation that plaintiff was a liar. The majority found that while that could be a defamatory statement of fact, the defendant entertained no serious doubts as to its truth. The majority rejected plaintiff's argument that defendant's ill will coupled with her acknowledgement that she wrote the book "mostly" from memory provided evidence of actual malice.

Because plaintiff's defamation claims failed, the court affirmed that his false light claim also failed. *See Muzikowski v. Paramount Pictures Corp.* 477 F.3d 899, 907 (7<sup>th</sup> Cir. 2007).

### ***Dissent***

Judge Wood dissented, finding that a jury could find that the statements accusing plaintiff of lying – and "selling out" – were made with actual malice. First, he noted that four years had elapsed between the events in the book and publication of the book – and the defendant admitted that she did no additional fact checking or investigation to confirm the accuracy of her recollection. "A jury could consider it reckless disregard of the truth to allow four years to elapse without ever checking to see whether this kind of inflammatory statement about another person is indeed true." 539 F.3d at 660.

In addition to the failure to investigate, Judge Wood also thought it significant that the defendant stated in her deposition that she did not recall the details of her conversations with plaintiff; that there were some inaccuracies in the book; and that she had an obvious dislike of plaintiff. Taken together these factors created "a classic jury issue." *Id.*

*Donald M. Craven, Craven & Thornton, Springfield, IL, represented the defendants. Plaintiff was represented by Stephen F. Hedinger, Hedinger Law Office, Springfield, IL, for Plaintiff.*

## Federal Court Dismisses Suit Against John Grisham, Random House, Other Authors and Publishers

### *Books about Criminal Proceedings Are “Core Political Speech” Entitled to Highest Protection*

By Robert D. Nelson and Jon Epstein

The United States District Court for the Eastern District of Oklahoma on Sept. 17, 2008, dismissed on Rule 12(b)(6) motions the suit brought by a former prosecutor, an Oklahoma State Bureau of Investigation agent and an OSBI criminalist against John Grisham, three other authors and their publishers that alleged claims of defamation, false light invasion of privacy, intentional infliction of emotional distress and conspiracy. *Peterson et al. v. Grisham, et al.*, Case No. CIV-07-317-RAW (E.D. Okla.).

The court said that books at the heart of the suit by Grisham (*The Innocent Man*), Robert Mayer (*The Dreams of Ada*), and Dennis Fritz (*Journey Toward Justice*) were core political speech and that the three public-official plaintiffs had failed to make plausible allegations to support any of their claims, including the allegation that the three authors had conspired with the defendant Barry Scheck, the founder of The Innocence Project, to defame them in order to advance the writers' opposition to the death penalty.

#### **Background**

Ron Williamson and Dennis Fritz spent nearly 12 years of their lives in an Oklahoma prison—Williamson on death row—after being convicted in Pontotoc County in 1988 for the Dec. 7, 1982, murder of Debra Sue Carter, a young woman who tended bar at a nightclub in the small town of Ada, Oklahoma. Days before he was to be executed, Williamson's habeas corpus petition was granted by federal judge Frank Seay, on the ground that Williamson had been denied effective assistance of counsel. *See Williamson v. Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995), *aff'd*, 110 F.3d 1508 (10th Cir. 1997). While Williamson was awaiting retrial, DNA testing sponsored by Barry Scheck and The Innocence Project exonerated Williamson and Fritz with respect to the Carter murder. (Subsequent DNA testing showed that the real murderer was the man who had been the prosecution's star witness against Williamson and Fritz.)

The charges against Williamson and Fritz were dismissed in 1999. Williamson died five years later, debilitated by mental problems and long use of alcohol and prescription drugs, the victim of

cirrhosis of the liver. In high school, Williamson had showed promise as a baseball player but, although having played in the minor leagues for a few years, had never made it in the “biggs.” Shortly after being released from prison, ABC brought Williamson, Fritz and some other DNA exonerees to New York. After appearing on a segment of *Good Morning America*, Williamson went to Yankee Stadium and for the first time walked the grounds on which he had always hoped to play.

The *New York Times* obituary about Williamson caught John Grisham's eye. Intrigued by the story of a baseball player unfulfilled, and troubled by the thought of wrongful convictions and near execution, Grisham immediately sought out Williamson's two sisters. They, Fritz and the lawyers who helped exonerate the two men told a compelling story of injustice in small-town America that became Grisham's only non-fiction work, *The Innocent Man*, published by Random House in 2006.

*The Innocent Man* painted a less-than-flattering picture of prosecutor William Peterson, Oklahoma State Bureau of Investigation agent Gary Rogers and OSBI hair analysis expert Melvin Hett, among others. The story of Williamson and Fritz told by Grisham revealed a shoddy investigation of the Carter murder, which went unsolved for more than four years before charges were filed against the two men. There was no physical evidence connecting either Williamson or Fritz to the murder; no fingerprints or other forensic evidence about them was found at the scene of the violent murder. Inconsistent evidence was ignored and key witnesses were not interviewed.

The focus of the investigation turned to Williamson because he was an odd sort, and to Fritz because he was Williamson's only close friend. Ultimately, the evidence used to convict both men consisted primarily of a “dream confession” (after Rogers and others had aggressively interrogated Williamson and prodded him with what police believed to be the facts, Williamson admitted he had a dream about Carter in which both he and Fritz were present at the murder scene, which police conveniently converted into a confession of the murder itself).

Other evidence included the testimony of jailhouse snitches who purportedly overheard Williamson and Fritz make inculpatory statements about Carter's death while they were jailed awaiting

*(Continued on page 9)*

**Federal Court Dismisses Suit Against John Grisham, Random House, Other Authors and Publishers**

(Continued from page 8)

trial and the “junk science” expert testimony of a criminalist who said that hair samples from the crime scene were “microscopically consistent” with those from Williamson and Fritz.

In researching *The Innocent Man*, Grisham discovered that the Pontotoc County convictions of Tommy Ward and Karl Fontenot for the 1984 murder of Denice Haraway, another student who mysteriously disappeared from the convenience store where she worked, bore disturbing similarities to the convictions of Williamson and Fritz. Prosecuted by William Peterson, the two men were convicted of Haraway’s murder based primarily on confessions, including Ward’s “dream confession” taken by Rogers and the testimony of jailhouse snitches, including one Terry Holland who—perhaps not coincidentally—also testified later against Williamson and Fritz.

At the time of their convictions, Haraway’s body had not been found, and the confessions of the two men about how Haraway had been murdered were totally inconsistent with each other and what physical evidence existed. Grisham learned that the Haraway case had been the subject of a 1987 book by Robert Mayer, a former journalist and columnist for *Newsday*, called *The Dreams of Ada*. Mayer and his book were valuable sources for Grisham in writing *The Innocent Man*, and a paperback re-release of Mayer’s book was published by Doubleday, a Random House imprint, contemporaneously with *The Innocent Man*.

Dennis Fritz, too, wrote a book about his experience as Williamson’s friend, convicted murderer serving a life sentence for a crime he did not commit and as to which he had always proclaimed his innocence, and DNA exoneree. Called *Journey Toward Justice*, Fritz’s book recounted the events following Carter’s death and the investigation of her murder, the trials and the experience of being imprisoned and then freed. Fritz, not surprisingly, painted a critical picture of Peterson, Rogers and Hett, among others, from his very personal perspective.

Peterson and Rogers did not like their portraits in any of the defendants’ books. They sued in federal court in September 2007 alleging defamation, false light invasion of privacy, intentional infliction of emotional distress and conspiracy. Their complaint was amended shortly after to add Hett as a plaintiff. Named as defendants were Grisham and Mayer and their publisher, Random House; Fritz and his publisher, Seven Locks Press; and Scheck, who had written a forward in and favorable comments for the jacket cover of Fritz’s book.

The defendants moved to dismiss the 14-page complaint under Fed. R. Civ. P. 12(b)(6) on the ground that the bare-boned allega-

tions failed to state facts sufficient to make any plausible claim as required by *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). The defendants argued that their books represented political speech and because the plaintiffs did not allege that the books falsely accused them of a crime, their publications were absolutely protected by both Oklahoma statutory law regarding fair comment on public officials as well as by the Oklahoma and federal constitutions. The plaintiffs opposed the motion, arguing primarily that *Bell Atlantic* applied only in antitrust cases and that the former “no-set-of-facts” standard under *Conley v. Gibson*, 355 U.S. 41 (1957), should get them past a dismissal motion.

On Feb. 4, 2008, the court entered an order holding the defendants’ motions to dismiss in abeyance and directing the plaintiffs to file an amended complaint. The court concluded that it was governed by the *Bell Atlantic* plausibility pleading standard and that the plaintiffs’ complaint was not specific enough regarding the defamatory content of the books to make any determination of the complaint’s sufficiency. The defendants were given leave to supplement their dismissal motions after the plaintiffs filed their amended complaint.

The plaintiffs took the court at its literal word about specificity. On Feb. 25, 2008, the plaintiffs filed a 115-page second amended complaint. In its 350 paragraphs, the plaintiffs identified the specific passages in the three books about which each of them complained. (Hett did not assert a claim against Mayer because he was not mentioned in *The Dreams of Ada*.) Each of the defendants filed supplemental briefs supporting their motions to dismiss. Those briefs reiterated the arguments made initially that the defendants’ books were protected political speech, that none of the statements or passages about which the plaintiffs complained was actionable for one or more legal reasons, and that the allegation of conspiracy was wholly ineffective to state a claim.

***District Court Decision***

In its Sept. 17, 2008, opinion and order, the court agreed with the defendants. The court posed and answered the question regarding the sufficiency of the amended complaint: “What two words best describe a claim for money damages by government officials against authors and publishers of books describing purported prosecutorial misconduct? Answer: Not plausible.”

The court said that it reviewed the 71 statements in the three books about which the plaintiffs complained in the context of each book in its entirety, to ensure that the language was viewed in con-

(Continued on page 10)

**Federal Court Dismisses Suit Against John Grisham, Random House, Other Authors and Publishers**

text. Having done so, the court concluded that it was not necessary to “address individually each of the seventy-one statements or passages” and that it would “spare the reader from page after page of boring *repetitive* analysis. The court emphasizes the word *repetitive* because after viewing each statement there is only one conclusion that can be reached. *None of the statements are actionable as a matter of law.*”

The court succinctly stated the basis of the dismissal this way:

The books themselves are substantially true and the statements alleged when read in context are not libel per se. They are either protected opinion not provably true or false or are factual statements that do not denigrate the reputation of the plaintiffs any more than the substantially true portions of the books. The statements alleged do not reasonably impute crime to the plaintiffs and are therefore constitutionally and statutorily protected political speech and therefore absolutely shielded from liability.

Earlier in its opinion, the court elaborated on the constitutional underpinnings of the opinion. It said that the claims of the public-official plaintiffs “must be viewed in light of the free speech and free press clauses of the state and federal constitution.” The court noted the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); and it cited Oklahoma authority that “[b]ecause the mere threat (or actual imposition) of liability may impair the unfettered exercise of free speech, the constitution imposes stringent limitations upon its permissible scope.” *Gaylord Entertainment v. Thompson*, 958 P.2d 128, 140 (Okla. 1998).

The court found particularly forceful the broadly worded free-speech clause in the Oklahoma constitution. It relied on *Gaylord Entertainment* for the proposition that “[t]o allow a defamation action to continue once it has been determined that the speech concerned protected political ideas and did not incite lawless action is in itself a violation of the constitution.” *Id.* at 141 (footnote omitted). Speech concerns protected political ideas if it is rationally connected to the ‘author’s quest for a political change’ and even though it may be ‘injurious (or offensive) to the plaintiffs’

interest. . . [it] must be more jealously and intensely guarded than any other form of permissible expression.’ *Id.* at 140–141 (footnote omitted).”

The court found persuasive and discussed at some length two analogous cases cited by the defendants, *Riley v. Harr*, 292 F.3d 282 (1st Cir. 2002), and *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995), in which the authors discussed judicial proceedings and offered their personal perspective of the facts and circumstances which, almost by definition, involve ambiguities and disputes about the facts. The court said that “[p]ublications regarding criminal investigations and prosecutions which are substantially true and rely on the author’s theory of the case and include the author’s own interpretation of the facts and its application to law and criticism of the public officials involved are squarely within the realm of political speech. Where the genre of a book is criminal justice non-fiction and the author’s tone is one of moral outrage and takes a position critical of the public officials involved, the reader is put on notice to expect imaginative expression, rhetorical hyperbole, exaggeration, speculation and personal judgment by the author.”

The court specifically concluded that the three books at issue “concerning our criminal justice system garner the highest federal and state constitutional protection because they are rationally connected to the authors’ quest for political change. They are political speech.” The court then spoke more directly and personally:

Where the justice system so manifestly failed and innocent people were imprisoned for eleven years (one almost put to death), it is necessary to analyze and criticize our judicial system (and the actors involved) so that past mistakes do not become future ones. The wrongful convictions of Ron Williamson and Dennis Fritz must be discussed openly and with great vigor. Similarly, as in the Haraway case, a critic who believes that people are wrongly convicted of murder should be encouraged to speak out on the subject.

In both cases, where life and liberty are at stake, the constitutional commitment to free and open political debate and the chilling effect of litigation decisively outweigh any potential harm caused by caustic statements critical of government officials. Here, the public officials’ actions should be critiqued and debated and the mere threat of liability to these critics (the defendants) would most certainly deter future criticism of

(Continued on page 11)

**Federal Court Dismisses Suit Against John Grisham, Random House, Other Authors and Publishers**

(Continued from page 10)

public officials involved in criminal justice.

Our system of justice is not infallible, mistakes are made and it is important that we analyze how and why those mistakes occur. Unfortunately for the public officials involved, criminal justice is not a pleasant business and public criticism, whether warranted or not, is often sharp and painful. Such is a small price to pay in order to protect and preserve the first amendment freedoms of expression. While the plaintiffs in this case may feel the sting of criticism, because of the enormous constitutional obstacle concerning political speech, they do not plausibly assert any statement which entitles them to relief.

The court did not overlook the irony of this case: “The public official plaintiffs were involved in the mistaken conviction of two men for murder who then spent eleven years in prison before being exonerated. Now the plaintiffs bring suit against, among others, one of the men mistakenly sent to prison, Dennis Fritz, because of the alleged reputational and emotional harm suffered as a result of statements made in books and speeches about that wrongful conviction.”

The court’s sense of irony helped it conclude that the defendants’ published statements were not outrageous, so the plaintiffs failed to state plausible claims for false light and intentional infliction. The court said: “Dennis Fritz spent eleven years in prison wrongly convicted of murder. His written statements [in *Journey Toward Justice*] of personal animosity about the public officials who played a prominent role in his conviction fall well short of conduct necessary to support a claim for intentional infliction of emotional distress. A reasonable person, in light of such a unique and terrible situation as a wrongful conviction, would expect sharp criticism directed at the state actors on behalf of the innocent man.”

The allegations of outrageousness with respect to *The Innocent Man* and *The Dreams of Ada* also got short shrift. The court said the challenged statements “in the context of the books as a whole portray the plaintiffs as the overzealous ‘bad guys’ who used aggressive tactics in the prosecution of the Carter and Haraway cases,” but “a reasonable person would not find the statements outrageous.”

Finally, the court said the plaintiffs made no plausible allegation of conspiracy among the defendants. Although the three books were published at roughly the same time, and the defendants had

endorsed each other’s books, the court rejected the plaintiffs’ contention that the defendants’ “parallel conduct in publishing (and republishing) and endorsing the three books is evidence of an agreement.

“However this appears to be nothing more than an allegation of independent action by the defendants. There is nothing alleged that points to a preceding agreement by the defendants to write and publish these books.” Besides, the court said, the publication of the books was not an unlawful activity—there was no actionable defamation, invasion of privacy or intentional infliction of emotional distress—so there could be no actionable conspiracy.

The court denied the plaintiffs’ alternative motion for leave to amend, finding that amendment would be futile.

**Conclusion**

The court concluded its opinion by footnoting a hyperlink and inviting the reader to view a video clip from the movie “Casablanca” on YouTube. In the clip, Rick Blaine asks Captain Renault why he has ordered Rick’s café (an upscale nightclub and well-known gambling den) to be closed. Renault, who has been ordered by the Germans to find an excuse to shut down the café, explains—just before he is handed his own gambling winnings—that he is “shocked, shocked to discover gambling going on here.”

The court refers to the clip in explaining why it found meaningless an affidavit offered by the plaintiffs to support a conspiracy allegation against Scheck, but the clip undoubtedly expresses the court’s attitude toward the suit as a whole: The court, says the opinion, “is hardly shocked, shocked to discover” that an innocent man, wrongly convicted, would express a sharply critical opinion of his prosecutors, or that other authors such as Grisham and Mayer would find the plaintiffs’ conduct open to pointed criticism and comment.

At present, the plaintiffs’ time to appeal has not expired and the plaintiffs have not indicated if they intend to appeal.

*Robert D. Nelson and Jon Epstein of Hall Estill, Oklahoma City, Oklahoma represented defendants John Grisham, Robert Mayer, Barry Scheck, and Random House. Defendants Dennis Fritz and Seven Locks Press were represented by Cheryl A. Pilate of Morgan & Pilate, Olathe, Kansas. The plaintiffs were represented by Gary L. Richardson, Charles L. Richardson, and Kevin D. Adams of the Richardson Law Firm, Tulsa, Oklahoma.*

## Federal Court Dismisses Defamation and Copyright Claims Against CBS and AP

### *Fair Report Privilege Applied to Foreign Proceeding*

By Michael Berry

On Aug. 26, 2008, Judge Deborah A. Batts dismissed defamation, copyright and an array of related state law claims brought by J.K. Idema and Counter Terrorist Group US (collectively, "Idema") against CBS Broadcasting, Inc., The Associated Press and several AP reporters in two separate suits. Both suits involved similar underlying allegations – that the press falsely reported on Idema's arrest and conviction for torture in Afghanistan and that it improperly used video and photographs owned by Idema. In separate decisions, Judge Batts dismissed all of the claims against both CBS and AP.

In one decision, the judge held that Idema's defamation claim against CBS was barred by New York's fair report privilege, even though the report was based on proceedings in Afghanistan, and she concluded that the various state law claims relating to CBS's alleged misuse of Idema's video were preempted by federal copyright law or missing critical elements. *CBS Broadcasting, Inc. v. Counter Terrorist Group*, No. 05 Civ. 7946 (S.D.N.Y. Aug. 26, 2008).

In the second decision, Judge Batts ruled that the court did not have subject-matter jurisdiction over the suit against AP because Idema had not registered any of the alleged copyrights in the video and photographs at issue, and the court declined to exercise supplemental jurisdiction over the pendent state law claims. *Counter Terrorist Group US v. Associated Press*, No. 07 Civ. 6299 (S.D.N.Y. Aug 26, 2008).

#### Background

As Judge Batts noted, "Idema is no stranger to the Courts," having "brought several suits in state and federal court against various media organizations." See, e.g., *MLRC MediaLawLetter*, June 2006, at 22 (suit against *Columbia Journalism Review*); *LDRC MediaLawLetter*, March 2002, at 15 (suit against *Poughkeepsie Journal*); *LDRC LibelLetter*, November 2000, at 13 (same). The latest suits against CBS and AP arise from Idema's adventures in Afghanistan. According to Idema's complaint against AP, he "joined" with Northern Alliance forces in Afghanistan after Sept. 11, 2001, initially as a fighter and continuing later as a consultant. After the United States invaded Afghanistan, Idema alleged that his "team" became "officially employed by the Ministry of Defense or Afghan CIA" in operations against a "growing terrorist resistance."

During that time, Idema claimed that he and "his Panjshir commandos obtained and captured al-Qaida training tapes." Idema licensed the tapes to CBS, which broadcast portions of the video during a segment of the CBS news magazine *60 Minutes II*. Idema also asserted that CBS subsequently broadcast excerpts from the video on the CBS Evening News and provided a copy of the video to CNN for use on *Larry King Live*, which allegedly disrupted Idema's "economic relationships with each of the other US news networks and numerous foreign news networks."

Later, as Idema continued his "counter-terrorist operations" in Afghanistan in 2004, he and his team captured alleged al-Qaida terrorists, held them in "custody," and "interrogated" them in Idema's "compound." On July 5, 2004, the Afghan government arrested Idema on charges that he and his "counter-terrorist team" were "running a torture chamber," "torturing innocent Afghans" and other illegal conduct." An Afghan court later "convicted Idema and ordered that he be incarcerated."

Idema claimed that the charges were false and that, shortly before his arrest, various CBS employees visited his compound in Afghanistan and witnessed his interrogation of purported terrorists. He alleged that, based on these visits, CBS employees "knew that no torture was occurring" and had videotapes "that confirmed that no torture had occurred." Following Idema's arrest, CBS allegedly "withheld this exculpatory information." Idema also alleged that CBS falsely reported that Idema and "his team of mercenaries had

abused eight Afghan prisoners," had "innocent Afghans hanging from the ceiling of

his basement," and "were simply 'rounding up innocent Muslims with long beards.'"

Separately, Idema claimed that, after his arrest, he and his lawyer gave photographs and video to AP reporters who promised that the images would be kept "off the record" and would not be distributed without a proper license from Idema's photo agency. Idema claimed that AP later used these images in its reporting without his permission and without obtaining a license from his agency. He also alleged that, like CBS, AP falsely reported the facts underlying his arrest, trial and conviction in Afghanistan.

(Continued on page 13)



## Federal Court Dismisses Defamation and Copyright Claims Against CBS and AP

(Continued from page 12)

### *The Suit Against CBS*

Idema filed suit against CBS in North Carolina state court in August 2005, claiming that CBS breached the agreement governing its use of Idema's video by using it in subsequent CBS news broadcasts and by providing a copy of it to CNN. After CBS sought to remove the case to federal court, Idema voluntarily withdrew the suit. Because Idema threatened to re-file his claims, CBS filed a declaratory judgment action in New York federal court seeking a declaration that it had used the video in accordance with its arrangement with Idema.

Idema responded by filing an array of counterclaims against CBS. All but one of the counterclaims asserted state law causes of action arising from CBS's use and distribution of the video (breach of contract, tortious interference with prospective economic advantage and contractual relations, conspiracy, fraud, and unfair and deceptive trade practices). In the remaining counterclaim, Idema contended that CBS defamed him in its reporting on his arrest and conviction in Afghanistan. Specifically, Idema alleged that CBS knowingly reported false facts about his interrogation techniques and repeated false statements made by Afghanistan's Interior Minister and various witnesses who testified at Idema's trial in Afghanistan. CBS answered the counterclaims and then moved for judgment on the pleadings.

In a lengthy opinion, Judge Batts granted CBS's motion and dismissed all of Idema's claims with prejudice. In its motion, CBS argued that Idema's defamation claim was barred by Section 74 of New York's Civil Rights Law, which establishes an absolute privilege for fair and accurate reports of official proceedings. Idema countered that the fair report privilege neither applies to foreign proceedings, nor to statements made by foreign officials. The court rejected Idema's argument.

Judge Batts carefully reviewed the case law addressing whether New York's fair report privilege applies to foreign proceedings, noting several cases in which courts had applied the privilege to claims arising out of reports about the actions of foreign governments. Ultimately, she found those cases to be persuasive and concluded that "in the absence of controlling authority to the contrary," New York's law covers CBS's reporting on Idema's criminal proceedings in Afghanistan. The court then held that CBS accurately reported the Afghan Interior Minister's comments about Idema's case and the witnesses' statements against him. Based on these rulings, Judge Batts held that Idema's defamation claim failed as a matter of law.

In another notable section of her opinion, Judge Batts dismissed several of Idema's state law claims on the ground that they were

pre-empted by federal copyright law. In analyzing those claims, Judge Batts applied the "extra element" test, whereby a state cause of action survives preemption only if it requires proof of an extra element that makes it "qualitatively different from a copyright infringement claim." Idema's contract, conspiracy and tortious interference with contract claims failed that test. As Judge Batts explained, Idema's contract claim was based solely on CBS's alleged "illegal loaning and distribution" of his video, which are exclusive rights protected by the Copyright Act. Thus, the claim was pre-empted. Likewise, the conspiracy and tortious interference with contract claims were pre-empted since they were based on the same underlying conduct, CBS's distribution and use of the video. Judge Batts dismissed Idema's remaining claims on various state law grounds.

### *The Suit Against AP*

As in the CBS case, Idema contended that AP defamed him in its reporting on his arrest and conviction in Afghanistan and advanced a variety of claims based on AP's alleged use and distribution of his images. Unlike the CBS action, however, the claims against AP included copyright infringement and contributory infringement. AP moved to dismiss the suit pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the court lacked subject matter jurisdiction over the suit and that Idema had failed to state any cognizable claim.

On the same day that Judge Batts dismissed the claims against CBS, she also granted AP's motion, ruling that the court lacked subject-matter jurisdiction because Idema had not registered his works with the Copyright Office. She noted that the Copyright Act requires a plaintiff to register his work before initiating a copyright claim and that the Court of Appeals for the Second Circuit has held that this requirement is jurisdictional. Accordingly, Judge Batts dismissed the copyright claims. She then explained that the court lacked diversity jurisdiction over Idema's state law claims because both Idema and AP are domiciled in New York. Since Idema's two federal claims were dismissed, the court declined to exercise supplemental jurisdiction over his state claims.

*CBS Broadcasting Inc. is represented by Anthony Bongiorno and Mary Kate Woods of CBS, and Robert Panchina, Gayle C. Sproul, and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P. The Associated Press is represented by David A. Schulz, Gayle C. Sproul, and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P. Idema appears pro se, and Counterr Group is represented by John E. Tiffany, Francis Pizzulli (CBS case only), and Vijayant Pawar (AP case only).*

## Philadelphia Daily News Wins Summary Judgment

### ***No Actual Malice; No Defamatory Meaning in Reporting Plaintiff “Appeared as a Playboy Centerfold”***

By Robert C. Clothier

Despite the Pennsylvania Supreme Court’s decision in *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899 (Pa. 2007), which had some media lawyers concerned that winning summary judgment on actual malice grounds would become much harder, Pennsylvania trial courts continue to grant summary judgment on the basis that the plaintiff cannot adduce clear and convincing evidence of actual malice.

The latest decision comes from the Philadelphia Court of Common Pleas, which dismissed a libel lawsuit brought by a woman who claimed she was defamed by the paper’s reporting that she had posed nude for *Playboy* magazine. *Myra Belle Miller v. Philadelphia Newspapers LLC, et al.*, No. 4093 (Aug. 19, 2008). The trial court held that the reporter’s failure to recall the source of the *Playboy* statement or to do more to investigate the statement did not prove actual malice.

The court also held that the *Playboy* statement was incapable of defaming her and did not harm her reputation because prior reporting that she had had an affair with former President Bill Clinton and modeled nude had damaged her reputation to the point that the *Playboy* statement “could do it no further harm.” In effect, the court found plaintiff to be libel proof.

#### ***The Lawsuit***

Plaintiff, a former Miss Arkansas, had brought a discrimination lawsuit against her employer, claiming that she lost her job at a local area school as a result of her affair with President Clinton. The *Philadelphia Daily News* reported on the lawsuit in late 2004, and the article contained a statement that the plaintiff had “appeared as a *Playboy* centerfold.”

Alas, that statement was incorrect, and the paper published a retraction and apology, and placed a “strikethrough” through the *Playboy* statement in the online version of the article along with the retraction and apology. Plaintiff thereafter sued the *Daily News* and its reporters for libel.

#### ***No Actual Malice***

In its summary judgment motion, the *Daily News* argued that the plaintiff was a limited purpose public figure who could not adduce clear and convincing evidence of actual malice. The trial court ruled that the plaintiff was a public figure because she had given several interviews about her affair with President Clinton and was mentioned in at least twenty books about Clinton. The court felt the “character of a former president is a controversy that undoubtedly ‘affects the general public ... in an appreciable way.’” And the plaintiff “injected herself into the controversy first by having the illicit affair and then by airing its details to the general public.”

The court then analyzed whether the statement about the plaintiff posing

---

**... neither the reporter’s failure to remember her source... nor her failure to try to contact *Playboy* or any other source... was evidence of actual malice.**

---

nude in *Playboy* was “germane

to Plaintiff’s participation in the controversy” involving her affair with Clinton and subsequent lawsuit against her employer. With a less-than-clear explanation, the trial court said that it was:

“Since the controversy which has catapulted Plaintiff into the public spotlight [i.e., her lawsuit against her employer] involved her relationship with a president who had a reputation for relationships with beautiful women, and since Plaintiff, as a Miss Arkansas, was a professional beauty queen, the alleged exhibition of her beauty in other forums, i.e., presidents and *Playboy*, was germane to the controversy.”

With that analysis, the trial court turned to whether there was sufficient evidence of actual malice to send the case to the jury. After stating the correct standard, the court concluded that neither the reporter’s failure to remember her source for the *Playboy* statement, nor her failure to try to contact *Playboy* or any other source to confirm the truth of the statement, was evidence of actual malice.

Rather, the court found, such evidence was “just as likely to prove that [the reporter] made an honest mistake in judgment.”

(Continued on page 15)

## Philadelphia Daily News Wins Summary Judgment

(Continued from page 14)

And that mistake came about, according to the reporter, because she “confused” the plaintiff “with a different Miss Arkansas who did pose for *Playboy* and also had an affair with President Clinton.” Who knew there were *two* Miss Arkansas with such a connection to Clinton?

### **Defamatory Meaning**

The trial court didn’t stop there and addressed the other two bases for the paper’s summary judgment motion. The paper argued that the statement about posing nude for *Playboy* was incapable of a defamatory meaning. The trial court agreed, essentially finding the plaintiff to be libel proof, though the court never used the term.

The court found that plaintiff’s own testimony showed that “public knowledge of her affair with Bill Clinton lowered her reputation to a point where the *Playboy* statement could do it no further harm.” The court also found that there were numerous other reports about her posing nude, and Plaintiff’s own testimony again showed that “she considered her reputation already damaged because of the public perception that she modeled nude.”

Though relying on the plaintiff’s own views on modeling nude, the court acknowledged a different view, noting that for some, “posing nude for others, under appropriate circumstances, is considered to be no less than the celebration of ultimate beauty.” The times they are a-changin’.

Lastly, the court addressed the paper’s contention that the plaintiff could not prove she was harmed by the *Playboy* statement. Based on the other reporting about her affair and posing nude, the court “found that her reputation suffered no further injury.” But the court recognized that the plaintiff “suffered embarrassment” that could have been avoided “had Defendants used ordinary care in preparing their article.”

But, jumping back to its actual malice determination, the court concluded that “as a society we have made the decision that in order to ensure the freedom of our press, absent malice, any possible humiliation or mental anguish suffered is not recoverable.”

*Robert C. Clothier is partner and chair of the Media, Defamation and Privacy Law Practice Group in the Philadelphia office of Fox Rothschild LLP. The media defendants were represented by Maura Fay McIlvain of Dilworth Paxson. Plaintiff was represented by Wayne Ely of Timothy M. Kolman & Associates.*

### MLRC MediaLawLetter Committee

Jay Ward Brown (Chair)

David Tomlin (Chair)

Dave Heller (Editor)

Robert D. Balin

Michael Berry

Katherine M. Bolger

Thomas M. Clyde

Robert J. Dreps

Jon Epstein

Rachel E. Fugate

Michael A. Giudicessi

Charles J. Glasser

Richard M. Goehler

Karlene Goller

Shelley M. Hall

S. Russell Headrick

Russell T. Hickey

David Hooper

Jonathan Katz

Leslie Machado

John Paterson

Deborah H. Patterson

Bruce S. Rosen

Indira Satyendra

## **CBS Wins Summary Judgment in Defamation Case**

### ***Broadcast About Doctor Was Substantially True, Privileged***

By Daniel J. Kelly

A Texas state court judge has granted summary judgment to CBS in a lawsuit brought by a neurosurgeon who claimed he and his professional association were defamed by an investigative news report broadcast on the television station owned and operated at the time by CBS in Austin, Texas. *Neely v. Wilson, CBS Stations Group of Texas, L.P., d/b/a KEYE-TV, and Viacom Inc.*, No. GN401858 (200<sup>th</sup> Jud. Dist., Travis Co., Tex.).

The Honorable Stephen Yelenosky granted summary judgment on July 3, 2008, to CBS Stations Group of Texas, L.P., d/b/a KEYE-TV, CBS Corporation (formerly known as Viacom Inc.), and investigative reporter Nanci Wilson (collectively, "CBS"). The broadcast at issue aired in January 2004. The defamation action was filed in June 2004 by Dr. Byron Neely and his professional association (collectively, "Dr. Neely").

CBS argued on summary judgment that the broadcast was true and that news organizations were free to publish allegations from third parties involved in a public controversy. CBS also argued the broadcast was a substantially true account of judicial or official proceedings, that Neely was a limited-purpose public figure, and that reporter Wilson did not act with actual malice.

Judge Yelenosky held a four-hour hearing and then granted the motion about a week later. The court entered final judgment on July 16, 2008. Neely has appealed the summary judgment ruling.

#### ***Background***

The broadcast at issue detailed allegations and controversies surrounding Dr. Neely's care of two former patients, an autopsy report on one of those patients by the Travis County Medical Examiner's Office ("Medical Examiner"), a public disciplinary action taken against Dr. Neely by the Texas State Board of Medical Examiners ("Medical Board"), and responses to these allegations by one of Dr. Neely's attorneys.

Specifically, the broadcast reported on Dr. Neely's public discipline by the Medical Board in December 2003, including the Medical Board proceedings against Dr. Neely, which resulted in findings that he had self-prescribed numerous controlled substances from 1999 to 2002 and that he had a history of hand tremors. The broadcast also described allegations from a malpractice lawsuit against Dr. Neely by Paul Jetton, a former NFL football player. Jetton alleged, among other things, that Dr. Neely negligently performed an unnecessary procedure and that Dr. Neely was

drug impaired while treating him in 1999.

The other malpractice lawsuit reported in the broadcast involved Dr. Neely's treatment in 1999 of Wei Wu, a software engineer who committed suicide after he was operated on by Dr. Neely and diagnosed with a brain cancer. The Medical Examiner's autopsy report of Wu revealed no residual cancer in Wu's brain.

Dr. Neely alleged that the broadcast falsely portrayed that he was addicted to drugs, that he was drug impaired while performing surgeries, performed unnecessary surgeries, and had hand tremors during surgeries. Dr. Neely further claimed the broadcast omitted a host of material facts.

After extensive discovery, CBS moved for summary judgment on three, independent grounds: (1) substantial truth, (2) limited purpose public figure and no actual malice, and (3) statutory privilege.

#### ***Substantial Truth***

CBS argued that the broadcast satisfied the substantial truth test in Texas. With respect to the reporting on the third-party allegations, CBS argued that the truth of the underlying allegations by the Medical Board, Jetton, Wu's family and the Medical Examiner is not relevant to the summary judgment motion and that CBS need only show that the allegations were made and accurately reported, not that the underlying allegations are true.

In response, Neely argued that CBS may republish allegations by third parties, but only when those allegations are "under investigation." In addition, at oral argument, Neely's counsel argued that, in order for the third-party allegation rule to apply, the allegations themselves must be substantially true. CBS argued that Texas courts have not created some type of prerequisite of an investigation for the third-party allegation rule to apply and that, even if they had, there were several investigations involving Dr. Neely. In its letter ruling, the court discussed neutral reportage, but decided instead to focus on actual malice.

#### ***Public Figure Status***

CBS also argued it was entitled to summary judgment because Dr. Neely is a limited-purpose public figure and that he failed to show CBS acted with actual malice. Texas follows the standard three-prong test in determining whether a libel plaintiff is a limited-purpose public figure: (1) the pre-existing controversy at issue was public in the sense that people were discussing it and that people,

*(Continued on page 17)*

## CBS Wins Summary Judgment in Defamation Case

(Continued from page 16)

other than the immediate participants in the controversy, were likely to feel the impact of it; (2) the plaintiffs had more than a trivial or tangential role in the controversy; and (3) the alleged defamation was germane to their participation in the controversy. See, e.g., *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568 (Tex. 1998).

With respect to the first prong, Dr. Neely argued that he was not involved in any ‘current’ public controversies at the time of the broadcast and that no one other than Jetton, Wu and the Medical Board would feel the impact of the controversies because the malpractice lawsuits had been resolved and the Medical Board’s investigation was over. On the second prong, Dr. Neely argued that he did not voluntarily inject himself into the controversies, that he did not seek out publicity, and that there was no prior publicity about him.

The court agreed with CBS’s position that Dr. Neely is a limited-purpose public figure. In discussing *Swate v. Schiffers*, 975 S.W.2d 70 (Tex. App. –San Antonio 1998, pet. denied), a case cited in CBS’s briefs, the court stated in its letter ruling that “public discipline by the state authority authorized by the legislature to protect the public is by legislative determination a matter of public concern into which the disciplined profession is drawn.”

The court also rejected Dr. Neely’s argument that he was not a public figure because there was no prior publicity about him. The court observed that, prior to the broadcast, Dr. Neely’s discipline was posted on the Board’s website and that his discipline was mentioned in an Austin newspaper article. Moreover, the court explained that, in any event, public figure status is not dependent on extensive prior media coverage.

After determining Dr. Neely was a limited-purpose public figure, the court determined that he failed to carry his burden of showing actual malice. In particular, the court found that the reporter’s 52-page affidavit established that she believed the broadcast was true and that she did not have any awareness of any probable falsity in the broadcast. In addition, the court agreed with CBS that Dr. Neely’s so-called evidence of malice was insufficient as a matter of law. In many ways, Dr. Neely’s claim of actual malice mirrored his claim that the broadcast was false by omissions (i.e., that CBS should have included additional information in the broadcast and that those omissions created a substantially false impression).

### **Broadcast is Privileged**

Finally, CBS argued it was entitled to summary judgment because the broadcast is privileged. Texas’s statutory privileges

protect media reports on (1) allegations that are fair, true and impartial accounts of a judicial proceeding or (2) if the accounts are a “reasonable and fair comment on or criticism of [a] ... matter of public concern published for general information.” Tex. Civ. Prac. & Rem. Code § 73.002(b)(1) and (2).

Here, CBS argued the broadcast was privileged because it reported on the Medical Board’s discipline of Dr. Neely, the malpractice lawsuits involving Dr. Neely and the Medical Examiner’s autopsy report for Wu. Dr. Neely argued the fair comment privilege did not apply because these matters were no longer of public concern. He also argued the official and judicial proceeding privilege did not apply because the Medical Board proceedings had concluded and the malpractice suits were over by the time of the broadcast.

The court rejected Dr. Neely’s arguments and agreed that both privileges apply. In particular, the court noted the Medical Board’s discipline of Dr. Neely and the malpractice lawsuits continued to be matters of public concern. The court also found that the statements of the official and judicial proceedings reported in the broadcast were fair and true accounts of those proceedings.

### **Sealing Request Denied**

Following the court’s summary judgment ruling in CBS’s favor, another judge, the Honorable Scott H. Jenkins, denied Dr. Neely’s motion for protective order and/or motion to seal court records. Dr. Neely had sought to seal CBS’s summary judgment briefing and a number of CBS’s summary judgment exhibits, including Dr. Neely’s pharmacy records, documents from the Medical Board proceedings and testimony from Dr. Neely’s deposition. The court ordered all records unsealed, reasoning that Dr. Neely had failed to demonstrate an interest that outweighed the strong presumption of open court records. Dr. Neely has not appealed that ruling.

*Dan Kelly is an associate with Vinson & Elkins L.L.P. in Dallas, Texas. Hazel-Ann Mayers, Vice President, Assistant General Counsel, Litigation, and Anthony Bongiorno, Vice President and Associate General Counsel, Litigation, represent CBS. CBS is represented in the Texas lawsuit by Michael Raiiff, Tom Leatherbury, Dan Kelly, Michael Marin, and Katie Burrus, attorneys at Vinson & Elkins L.L.P. Dr. Neely is represented by Gary Richardson of The Richardson Law Firm in Tulsa, Oklahoma; Cindy Olson Bourland of Merica & Bourland in Austin, Texas; and Jamie Baskin of The Baskin Law Firm in Austin, Texas. On appeal, Dr. Neely is also represented by J. Bruce Bennett of Cardwell, Hart & Bennett of Austin, Texas.*

## NJ High Court Adds Motive and Speaker Identity Factors for Non-Media Actual Malice

By Bruce S. Rosen

In its first retrenchment of New Jersey's expansive application of the actual malice rule, the New Jersey Supreme Court has made the motive and identity of a speaker a factor in determining actual malice protection for non-media business competitors. *Senna v. Florimont*, A-35-07, 2008 WL 4299800 (N.J. Sept. 22, 2008).

The court unanimously held that employees of a boardwalk carnival who publicly accused a competitor of fraud could not enjoy actual malice protections which appeared to protect all speakers when alleging consumer fraud or wrongdoing involving highly-regulated industries.

### Background

*Senna* involved boardwalk broadcasts over a public address system by employees of one carnival attraction that the owner of another attraction was "dishonest" and "a crook" who "ran away and screwed his customers" at a former location by not honoring their prize tickets.

The high court had granted leave to appeal from a ruling by the Appellate Division, which had applied a trio of N.J. Supreme Court cases holding that news stories describing issues of public health, safety, libel plaintiffs, highly regulated industries and regulatory or consumer fraud are matters of public concern requiring application of the actual malice standard. *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125 (1986), *Sisler v. Gannett Co.*, 104 N.J. 256 (1986) and *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392 (1994).

### State Supreme Court Ruling

The *Senna* Court rejected application of the "highly regulated industries," rule for those involved in boardwalk carnivals (which are regulated by the state) and instead applied *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), which involved a credit report that the U.S. Supreme Court referred to as commercial speech entitled to less protection. Based on *Greenmoss*, the New Jersey high court ruled that the

critical inquiry in *Senna* was the content, form and content of the speech and to distinguish between media and non-media speakers.

The Court took pains to insist that caselaw involving application of the three cases to media or media related defendants had not changed: "When published by a media or media-related defendant, a news story concerning public health and safety, a highly regulated industry, or allegations of criminal or consumer fraud or a substantial regulatory violation will, by definition, involve a matter of public interest or concern," the Court said.

---

**... the Court insisted that it will not protect "commercially disparaging expressions" with the same vigor as it does media-related speech on these issues**

---

While the Court tried to show that in other states and in New Jersey certain protections accorded only to media (such as through the News-person's Shield,

N.J.S.A. 2a:84:84A-21 in New Jersey), it ignored a number of New Jersey cases including *Dairy Stores, supra*, which applied fair comment privileges to non-media speakers.

Nevertheless, the Court insisted that it will not protect "commercially disparaging expressions" with the same vigor as it does media-related speech on these issues. "There seems to be no sound reason why, under our common law, a business should not be expected to exercise due care in speech that may affect the well-being of a competitor," the Court said.

"Clearly information that is of benefit to the public can arise in most any circumstance, such as when an economic competitor discloses damaging details about another's business. However in weighing reputational interests and free speech rights in that scenario, the negligence standard sets the right balance and provides sufficient protection to the speaker and the target of the speech."

*Bruce S. Rosen is a partner with McCusker Anselmi, Rosen & Carvelli in Florham Park, N.J., Plaintiff was represented by Scott E. Becker. Defendant was represented by Frank L. Corrado of Barry, Corrado, Grassi & Gibson.*

## Third Circuit Finds NFL Films Violated “Voice of God’s” Publicity Rights

### ***False Endorsement Claim Remanded for Trial on Likelihood of Confusion***

In a lengthy decision, the Third Circuit affirmed summary judgment in favor of the estate of announcer John Facenda on a Pennsylvania right of publicity claim over the use of Facenda’s voice in an NFL Films television production promoting a football video game. *Facenda v. NFL Films*, No. 07-3269, 2008 WL 4138462 (3<sup>rd</sup> Cir. Sept. 9, 2008) (Ambro, Chagares, Cowen, JJ.).

Although the court was mindful that right of publicity law not impinge on artistic expression, it found that the television production was essentially an advertisement for the video game. The court also remanded plaintiff’s related false endorsement trademark claim for a trial on the issue of confusion.

#### ***Background***

John Facenda was a legendary narrator of NFL films and highlight reels, and was described by some as the “Voice of God” for his distinctive baritone. Facenda died in 1984. A few months before his death he signed a release with NFL Films allowing it to use recordings of his voice in any manner “provided, however, such use does not constitute an endorsement of any product or service.”

His estate sued over a 22 minute film called “The Making of Madden NFL 06” about the popular video game. The film, created in 2005, used 13 seconds of Facenda’s voice, uttering three lines: 1) “Pro football, the game for the ear and the eye; 2) “This sport is more than a spectacle, it is a game for all seasons; and 3) X’s and O’s on the blackboard are translated into imagination on the field.” The rest of the film contains comments by NFL players praising the video game and interviews with the game’s creators. The film aired on NFL cable stations in August 2006 before the release date of the video game.

The district court granted summary judgment to Facenda’s estate. The court found that the film was promotional and not a documentary or journalistic work. Therefore it was not governed by the release and the estate succeeded on both the federal and state law claims. See 488 F.Supp.2d 491 (E.D.Pa. May 3, 2007) (Hart, J.). The district court granted NFL Films’ motion for an interlocutory appeal. See 2007 WL 1575409 (E.D.Pa. May 24, 2007).

#### ***Third Circuit Decision***

On appeal, NFL Films argued that Making of Madden was not commercial speech and was protected by the First Amendment. Citing, e.g., *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Moreover, even if part of the film had commercial aspects, NFL Films argued that those aspects were inextricably intertwined with the artistic and informational content of the film.

The Third Circuit, however, found that the film was most like a television ‘infomercial.’ Although the film did not advertise the price of the video game, it was essentially a promotion for the product, containing only positive comments, and including a clock at the end to display the number of days remaining before the release of the game.

Having rejected the NFL’s First Amendment defense, the court went on to consider plaintiff’s false endorsement and right of publicity claims.

On the false endorsement claim, the district court applied the approach of the Ninth Circuit in *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9<sup>th</sup> Cir. 2001). In *Downing*, the Ninth Circuit considered a false endorsement claim brought by a group of 1960’s surf legends over the use of their photograph in a magazine published by clothing manufacturer Abercrombie & Fitch.

The factors the Ninth Circuit considered in *Downing* were: 1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant’s product is intended; 2) the relatedness of the fame or success of the plaintiff to the defendant’s product; 3) the similarity of the likeness used by the defendant to the actual plaintiff; 4) evidence of actual confusion; 5) marketing channels used; 6) likely degree of purchaser care; 7) defendant’s intent [in] selecting the plaintiff; and 8) the likelihood of expansion of the product lines.

The Third Circuit “substantially agreed” with this approach and found that *Downing* corresponded to the Third Circuit’s decision in *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460 (3d Cir.1983) – and provided a framework for analyzing false endorsement claims.

Nevertheless, the court found that overall the *Downing* factors involve questions of fact in what it called a “fact-intensive”

(Continued on page 20)

## Third Circuit Finds NFL Films Violated “Voice of God’s” Publicity Rights

(Continued from page 19)

inquiry on likelihood of confusion. The Third Circuit also faulted the district court for making credibility determinations about intent at the summary judgment stage; found it had misapplied two of the *Downing* factors; and remanded for the claim for trial.

**Right of Publicity**

The Third Circuit affirmed summary judgment in favor of Facenda estate on its right of publicity claim. Pennsylvania’s right of publicity law, 42 Pa. Cons. Stat. Ann. Sec. 8316, provides in relevant part that “Any natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose” without consent has a cause of action for an injunction and damages. A post-mortem right of publicity for thirty years after a person’s death. *Id.* Sec. 8316(c).

On appeal, NFL Films did not raise a First Amendment defense to the claim, but argued that the claim was preempted by federal copyright law. As the court phrased the question:

“When does the right of individuals to avoid commercial exploitation of their identities interfere with the rights of copyright owners to exploit their works?” The court based its answer largely on the distinction between commercial and expressive works, citing to David Nimmer’s analysis of the issue in his copyright treatise. *See 1 Nimmer on Copyright* Sec. 1.01[B][3][b][iv][I].

Because “The Making of Madden NFL 06” was a promotional piece akin to advertising, and plaintiff did not collaborate in its creation, preemption was inappropriate. ‘Facenda,’ the court concluded, “consented to participation in films documenting NFL games, not an advertisement for a football video game.” And his release specifically preserved that right by carving out endorsements.

*NFL Films was represented by Bruce P. Keller and S. Zev Parnass of Debevoise & Plimpton in New York; and Robert N. Spinelli and Catherine N. Jasons of Kelley Jasons McGowan Spinelli & Hanna, Philadelphia. The estate of John Facenda was represented by Paul L. Lauricella, The Beasley Firm, Philadelphia; and Tracy P. Hunt, Newtown, PA.*

## New York Trial Court Dismisses Misappropriation Claim Over Magazine Photo

A New York trial court this month dismissed a statutory misappropriation claim based on the use of plaintiff’s photograph in a magazine article. *Dominguez v. Vibe Magazine*, No. 112004/07 (N.Y. Sup. Ct. Sept. 15, 2008) (Ling-Cohan, J.). Noting that the newsworthiness exception to New York’s misappropriation law should be liberally applied, and that the issue of newsworthiness is best left to editorial judgment, the court granted Vibe Magazine’s motion to dismiss the complaint.

The plaintiff, Maria Kristina Dominguez, had sued over the use of her photograph in an article profiling music producer Sean Combs (aka “P Diddy”). The article in the November 2006 issue of Vibe included a discussion of Combs’ annual “White Party”; an all white dress code affair for celebrities that he hosts in East Hampton, NY and other locations.

The article was illustrated with photographs from several past White Parties. One of the photographs, taken in 2003, showed plaintiff and two other women topless and dressed as mermaids. In her lawsuit, plaintiff alleged she was a private individual whose image is not of public interest and that Vibe published the photograph for trade or advertising purposes.

Granting the motion to dismiss, the trial court noted that “the test is not whether plaintiff is a public or private figure, but rather whether the photograph in which plaintiff appears bears a reasonable relationship to a newsworthy article and is not a disguised advertisement.” Slip op. at 7.

The court concluded that the article on Sean Combs was ‘undeniably’ a matter of interest to many people and his annual party is the subject of tremendous public attention. And the photograph bore a reasonable relationship to the article. Thus notwithstanding plaintiff’s conclusory allegations that the article was an advertisement in disguise, and published to make a profit, dismissal was appropriate.



## Suit Against WPIX Dismissed for Failure to Detail Malice

By Bruce S. Rosen and Lisa Washburn

A New Jersey Superior Court judge has dismissed a libel suit against Tribune Company's WPIX, Inc. ("WPIX"), which owns and operates television station WPIX (TV), New York, for broadcast coverage of a dispute over a publicly run animal shelter because the plaintiffs, the veterinarian and his corporation which provide medical services to the shelter, failed to adequately plead a factual basis for actual malice. *Cats Exclusive Inc. and Jose Pla v. WPIX, Inc., et al.*

The decision, read from the bench by Judge Brian R. Martinotti in Bergen County, is one of a handful of cases to apply the 2004 Appellate Division case *Darakjian v. Hanna*, 366 N.J. Super. 238, which requires plaintiffs in actual malice cases to plead a factual basis for actual malice in their complaint. After the ruling, Steven R. Klein, Esq., of Cole Schotz Meisel Forman & Leonard in Hackensack, N.J., who represents Cats Exclusive, Inc. and José Pla, D.V.M., a Cats Exclusive owner and primary veterinarian of the Bergen County Animal Shelter in Teterboro, N.J., said that his clients would not refile the complaint against WPIX.

Plaintiffs are continuing to press their case against two individuals who appeared in the broadcast and who are accused of posting defamatory material on Petco, Inc.'s public website, petfinder.com.

### Background

Plaintiffs sued WPIX for libel and related torts over broadcast coverage of a public debate about treatment of animals by the shelter. WPIX moved to dismiss the complaint under *Darakjian*, but in the alternative asked the court to: (a) require repleading; (b) declare actual malice the proper fault standard; and (c) dismiss the requested relief which sought to enjoin WPIX from rebroadcasting the segment and require broadcast of a retraction if liability was found. Judge Martinotti ruled that animal welfare issues are a matter of public concern requiring proof of actual malice for WPIX and the other defendants; he declined to rule on the prior restraint issue as moot.

Because the complaint was so detailed in describing the public nature of the dispute, WPIX was able to seek the ac-

tual malice determination without the need for further discovery. The complaint also described Dr. Pla's earlier attempts to defend himself online and in person before County officials against allegations by two former BCAS volunteers, co-defendants Glenn Gilbert and Michelle Cohen, who sharply criticized Dr. Pla's treatment and euthanasia of cats at the shelter. This public dialogue was carried on through Internet postings to an open online discussion forum and at public meetings, ultimately resulting in an investigation by Bergen County and the removal of co-defendants from the shelter's volunteer program.

### Lack of Evidence of Actual Malice

As in the *Darakjian* case, plaintiffs here provided no facts to support an allegation of actual malice; rather, plaintiffs posited merely conclusory statements that purport to connote malice under relevant case law. When pressed, plaintiffs argued that WPIX's decision to publish the story in the face of Bergen County's finding that the allegations against Dr. Pla were unfounded was evidence of actual malice, a position rejected by the court. In addition, plaintiffs sought discovery to find actual malice, a request roundly rejected by the Appellate Division in *Darakjian*. *Darakjian* dealt with fair report coverage of a municipal meeting and ruled that where actual malice applies, especially where there is a fair report, a specific factual basis for actual malice must be shown. What that case gave with one hand it took with another because that panel also ruled that, in contrast to the Restatement (Second) Torts, the fair report privilege can be defeated by a showing of actual malice.

*Darakjian* is frequently cited by media counsel in New Jersey but rarely applied in state courts apparently because it is counterintuitive for trial judges who routinely deny motions to dismiss and are used to New Jersey's notice pleading requirements, even though those requirements have exceptions for defamation.

*WPIX was represented by Bruce S. Rosen and Kathleen A. Hirce of McCusker, Anselmi, Rosen & Carvelli of Florham Park (formerly Chatham) N.J. Lisa Washburn is in-house counsel for Tribune Company in Chicago.*

## Montana Jury Awards \$3.2 Million in Libel Suit Against Radio Host

### *Accused Litigation Adversaries of Lying and Fraud*

A Flathead County, Montana jury ordered the owner of a radio station in Kalispell, Montana to pay \$3.2 million because of his on air comments about the owners of the property where the radio station's studio and transmission towers are located. *Gardner v. Stokes*, No. DV-07-729 (Mont. Dist. Ct., Flathead County jury verdict Sept. 17, 2008).

The station owner and the plaintiffs were involved in a land use dispute. In 2007, after defendant lost in litigation before the Montana Supreme Court he made statements on his radio show accusing plaintiffs of perjury and bank fraud.

#### **Background**

The defendant John Stokes purchased KGEZ-AM in 2000, re-branding it as "The Edge" and adding conservative talk radio programs, including a morning show he hosted himself. Last year, several Kalispell residents and the Montana Human Rights Network challenged the station's 2004 re-licensing, arguing that the station was not serving the public interest. The FCC rejected their objections and renewed the station's broadcast license. *See In re: KGEZ(AM), Kalispell, MT*, DA 07-1949 (F.C.C. letter ruling April 30, 2007).

The station broadcasts from two transmission towers along U.S. highway 93 south of Kalispell. Through an easement executed by the preceding property and station owners in 1949, the towers occupy 31 acres of a 160-acre property that is currently otherwise used for hay baling.

Shortly after his purchase, Stokes informed the property owners, Douglas and Ruth Anderson and Davar and Todd Gardner, of his intention to enlarge the radio towers, or relocate them somewhere else in the 160-acre property. The Andersons and Gardners objected, arguing that the 1949 easement covered only the 31 acres actually used by the station, not the entire tract. They filed suit, seeking a declaratory judgment on the property issue and also seeking to force Stokes to repair the feeder lines to the transmitters.

Ruling on several summary judgment motions, the district court eventually ruled for the property owners; on appeal, the Montana Supreme Court affirmed. *Anderson v. Stokes*, 2007 MT 166 (Mont. July 11, 2007); *see also Stokes v. Montana*, 2007 MT 169 (Mont. July 12, 2007) (affirming dismissal of claim against

state for alleged interference with easement by widening of U.S. 93).

Stokes apparently spoke about the dispute on the air several times. In 2007, after the Montana Supreme Court ruled against him in the land dispute, Stokes apparently said on the air that Davar Gardner and his son Todd had lied under oath and submitted false affidavits in the case. He also alleged that they had committed bank fraud by getting a \$900,000 loan under false pretenses.

The Gardners demanded a retraction, then sued in November 2007 after Stokes did not comply with the demand. A defendant's failure to retract after such a request is a prerequisite for punitive damages in Montana.

#### **Libel Trial**

Ruling on a summary judgment motion, Montana District Judge Katherine Curtis held that because of the Gardners' prominence in the community – they own a local RV park and a renowned auction house – they were public figures. The jury was thus instructed that that it had to find actual malice in order to award compensatory or punitive damages.

Although Judge Curtis had also held prior to trial that the statements were untrue, Stokes testified at trial that he had verified the statements and that they were accurate. But other witnesses and evidence presented at trial, including bank documents, contradicted Stokes' assertions.

After a three-day trial and 75 minutes of deliberation, the jury found that the statements were defamatory and awarded \$1.8 million – \$900,000 per plaintiff – in compensatory damages.

The jury also determined that Stokes should pay punitive damages, so the court held a proceeding on this issue, as required by Montana law. *See* Mont. Code § 27-1-221 (7)(a). During this proceeding, Stokes told the court that the compensatory award was enough to bankrupt the station. The jury then deliberated for another 55 minutes before awarding \$2 million in punitive damages. Eleven of the twelve jurors agreed with the punitive award. Ten are required for a binding verdict.

*Stokes was represented by Gregory E. Paskell of Kalispell. The Gardners were represented by Robert K. Baldwin of Goetz, Gallik & Baldwin, P.C. in Bozeman, Mont.*

## Fifth Circuit Reverses \$33 Million Defamation Judgment in Physician Peer Review Case

### *Verdict No Longer a Benchmark in Media Cases*

By Daniel L. Tobey

On July 23, 2008, a unanimous panel of the United States Court of Appeals for the Fifth Circuit reversed a \$33,000,000 defamation judgment against a major hospital and its former chairman of Internal Medicine and rendered judgment in their favor. *Poliner v. Texas Health Systems*, 2008 WL 2815533 (5th Cir. 2008).

Not only did the original \$366 million jury verdict and the judgment produce a chilling effect on hospital peer review, this non-media case established a new benchmark in hoped-for damages in defamation suits against the media. Significantly, the Fifth Circuit went further than simply (and rightly) reversing the judgment under the federal Health Care Quality Improvement Act (HCQIA). The court also acknowledged, without reaching, the “substantial arguments that...Poliner failed to prove the substantive elements of his claims” and the “compelling arguments” that the excessive size of the verdict alone would have provided grounds for reversal.

#### *Summary of Facts*

On May 12, 1998, cardiologist Lawrence Poliner performed an angioplasty on a patient experiencing a heart attack. Dr. Poliner opened one partially blocked artery but failed to notice that another major artery was completely blocked. The patient also experienced post-procedure bleeding, went into shock and was transferred to the Intensive Care Unit, where the patient was near respiratory failure.

This and several other prior patient events involving Dr. Poliner were considered by the Internal Medicine Advisory Committee (IMAC) of Presbyterian Hospital of Dallas, chaired by Dr. James Knochel. On May 13, Dr. Knochel consulted with hospital administrators, members of the IMAC, the director of the cardiac cath lab and the Chief of Cardiology, and then offered Dr. Poliner a voluntary, temporary restriction of his cath lab privileges during a further investigation (this temporary restriction of privileges was termed an “abeyance” under the hospital’s medical staff bylaws). Dr. Poliner’s alternative, according to Dr. Knochel, was suspension. The next day, Dr. Poliner requested time to consult with an attorney but was denied. He agreed to the abeyance in writing and retained counsel.

Dr. Knochel then appointed an ad hoc committee of six cardi-

ologists to review 44 of Dr. Poliner’s cases. The committee found substandard care in more than half of those cases. Dr. Knochel and the IMAC then requested an extension of the abeyance from Dr. Poliner in order to continue the investigation. Dr. Poliner again consented in writing, again after learning his alternative was suspension. In total, Dr. Poliner’s abeyance lasted fewer than 30 days.

On June 12, the IMAC unanimously recommended that Dr. Poliner’s echocardiography and cath lab privileges should be suspended, citing concerns including “poor clinical judgment,” “inadequate skills, including angiocardiology and echocardiography,” and “substandard patient care.” See *Poliner* at \*3. Dr. Knochel suspended Dr. Poliner’s privileges. Five months later, a hospital hearing panel found that the suspension of Dr. Poliner’s privileges was justified based on the information available at the time but reinstated his privileges with conditions.

In May 2000, Dr. Poliner brought suit against Presbyterian Hospital, Dr. Knochel and other doctors involved in the peer review process. Dr. Poliner asserted that the peer review was conducted in bad faith by business competitors. He alleged defamation and other tort claims, federal and state antitrust claims, violations of the Texas Deceptive Trade Practices Act and breach of contract. He later added his professional association as an additional plaintiff.

#### *Peer Review Immunity*

Defendants moved for summary judgment under HCQIA, a federal statute designed to encourage robust hospital peer review by granting reviewers a limited immunity from suits for money damages. Here, the District Court (the Honorable Jorge Solis) divided the peer review process into two parts: the abeyance and the five-month suspension. The court held that, as a matter of law, the suspension was protected by HCQIA and dismissed all suspension-related defamation and other claims against all defendants.

However, the district court found fact issues as to whether the abeyance qualified for HCQIA immunity. The District Court observed that, under the hospital medical staff bylaws, a physician must agree to an abeyance of his or her privileges. Since Dr. Poliner’s only alternative to accepting the abeyance was a formal suspension, the court reasoned that the abeyance, if coerced or involuntary, would be a *de facto* summary suspension under the

*(Continued on page 24)*

## Fifth Circuit Reverses \$33 Million Defamation Judgment in Physician Peer Review Case

(Continued from page 23)

medical staff bylaws. The court held that a jury should decide whether Dr. Poliner in fact agreed to the abeyance or whether the abeyance, if recharacterized as a “summary suspension,” satisfied the bylaws and qualified for HCQIA and/or state law immunity.

### *Defamation and Disparagement Claims*

The hospital and Dr. Knochel also moved for summary judgment on Poliner’s defamation and business disparagement claims, arguing, among other things, that the personal defamation claims were barred by the one-year statute of limitations and that the alleged statements were both true and entitled to a qualified, common interest privilege. Without detailing the allegedly actionable statements, the District Court accepted Dr. Poliner’s contention that each “statement” concerning the suspension gave rise to a separate cause of action.

The Court further accepted Dr. Poliner’s theory of compelled self-publication, noting that Poliner was “forced to publish” his suspension in correspondence with state agencies and third-party payors. Accordingly, the court found that Poliner had presented evidence of publication within one year of filing the suit and denied the hospital and Dr. Knochel’s motion for summary judgment on the defamation claims. *Poliner v. Texas Health Systems*, 2003 WL 22255677, \*16 (N.D. Tex. 2003). The court further found that a fact issue existed as to the truth of the alleged statements and that, if a qualified privilege applied, there would still be a fact issue as to whether the hospital and Dr. Knochel acted with malice. *Id.* at \*17. As a result, Dr. Poliner’s abeyance-related claims, including the defamation and business disparagement claims, proceeded to trial.

### *An Eye-Popping Verdict*

The jury found for Poliner and his professional association on all abeyance-related claims and awarded more than \$360 million damages, including \$90 million for defamation and \$110 million in punitive damages. *See Poliner v. Texas Health Systems*, 2006 WL 770425 (N.D. Tex. Mar. 27, 2006) (“Memorandum Opinion and Order”); *Poliner v. Texas Health Systems*, 239 F.R.D. 468 (N.D. Tex. 2006) (“Amended Memorandum Opinion and Order”). Notably, the jury found only about \$10,000 in economic damages at trial.

Post-trial, defendants filed a renewed motion for judgment as a matter of law as well as a motion for new trial and a motion for remittitur. On the defamation claims, plaintiffs pointed to several

alleged false, defamatory statements: 1) the abeyance decision itself, which they also characterized as defamation by conduct; 2) Dr. Knochel’s memorandum appointing the ad hoc committee; and 3) two reference letters confirming that Dr. Poliner’s privileges had been temporarily restricted. Defendants argued, among other things, that some of these alleged statements were not even statements, that there was no evidence that any of these alleged statements was false, and that any statements were privileged. However, the District Court returned to its reasoning concerning the *de facto* summary suspension.

The court held that, if the abeyance was a *de facto* summary suspension, then the hospital had implicitly made the false statement that Dr. Poliner was a dangerous doctor, even though the hospital had used the term *abeyance*. The court found that defendants did not have enough information to meet this more stringent suspension standard (“present danger”) at the time of the abeyance. Additionally, the court rejected defendants’ common law privilege arguments and held that perceived procedural defects in the peer review process indicated that the peer reviewers had acted with malice. Finally, the court rejected defendants’ statute of limitations arguments, holding, among other things, that the alleged defamation had been republished within the statute of limitations and that the defendants had somehow waived their statute of limitations arguments.

The District Court denied the hospital and Dr. Knochel’s renewed motion for judgment as a matter of law and motion for new trial but remitted the damages to \$22.5 million (\$10.5 million for mental anguish, \$10.5 million for injury to career and reputation, and \$1.5 million in punitive damages) and then added more than \$11 million in prejudgment interest. In picking these remitted amounts of actual damages, the court refused to apply the Fifth Circuit’s Maximum Recovery Rule and ignored the five-month suspension for which defendants were immune as a matter of law. The court’s remittitur of punitive damages was accomplished pursuant to the Texas statutory cap on punitive damages, TEX. CIV. PRAC. & REM. CODE § 41.008, which provides for a maximum, per defendant award of \$750,000 in punitive damages when only noneconomic actual damages have been awarded.

The verdict and judgment received national attention and became an aspirational benchmark for plaintiffs’ attorneys in a variety of suits, including defamation cases against the media. *Time* profiled the case from Dr. Poliner’s perspective, stating that he recovered from the hospital and “three colleagues who trumped up charges of substandard care against him to eliminate him as a com-

(Continued on page 25)

## Fifth Circuit Reverses \$33 Million Defamation Judgment in Physician Peer Review Case

*(Continued from page 24)*

petitor.” Multiple health care industry and bar association seminars focused on the case. References to *Poliner* appeared in pleadings and mediations as a basis for seeking similarly inflated damages, and subsequent plaintiffs demanded “Poliner-type money” in settlement discussions.

### *Court of Appeals Reaffirms Peer Review Immunity*

Presbyterian Hospital and Dr. Knochel appealed the judgment. On July 23, 2008, the Court of Appeals reversed and rendered judgment for the hospital and Dr. Knochel, holding that both abeyances deserved immunity under HCQIA as a matter of law. Judges King, Higginbotham and Southwick composed the panel. Judge Higginbotham wrote the opinion.

Significantly, the Court commented in light of its holding: “Because Defendants are immune under the HCQIA, we have no occasion to consider Defendants’ other substantial arguments that we must reverse and render judgment based on state law immunity and because Poliner failed to prove the substantive elements of his claims. . . . Nor need we reach the compelling arguments that, at the very least, we would have to reverse and remand for a new trial because of the jury’s excessive verdict and manifest trial errors.”

### *Conclusion*

The size of the jury’s eye-popping verdict and the District Court’s unprecedented rationale and judgment garnered a great deal of attention in the legal community. The effects of the exaggerated verdict were felt in defamation suits beyond the health care context, and it is telling that the Fifth Circuit felt compelled to comment upon the size of the verdict and to imply that such a verdict would independently justify a new trial. Accordingly, even without the issue of HCQIA immunity, it is unlikely that *Poliner* will continue as an aspirational benchmark for plaintiffs in defamation suits. With the opinion of the Fifth Circuit, not only are peer reviewers once again free to protect patient safety, media defendants are relieved of an onerous precedent.

*Daniel Tobey is a medical doctor and an associate at Vinson & Elkins L.L.P. Presbyterian Hospital of Dallas and Dr. Knochel were represented post-verdict and on appeal by Tom Leatherbury, Penelope Nicholson, Cathy Smith, Gabriela Gallegos, and James Blacklock of Vinson & Elkins L.L.P. The plaintiffs were represented at trial by Michael Logan and Karin Zaner of Kane Russell*

*Coleman & Logan PC and Charla Aldous of the Aldous Law Firm and, on appeal, also by Jeffrey Levinger of Hankinson Levinger LLP.*

©2008

**MEDIA LAW RESOURCE CENTER, INC.**  
**520 Eighth Ave., North Tower, 20 Fl.**  
**New York, NY 10018**

### **BOARD OF DIRECTORS**

Ralph P. Huber (Chair)  
 Dean Ringel  
 Dale Cohen  
 Stephen Fuzesi, Jr.  
 Henry S. Hoberman  
 Marc Lawrence-Apfelbaum  
 Karole Morgan-Prager  
 Kenneth A. Richieri  
 Elisa Rivlin  
 Susan E. Weiner  
 Kurt Wimmer

### **STAFF**

Executive Director: Sandra Baron  
 Staff Attorney: David Heller  
 Staff Attorney: Eric Robinson  
 Staff Attorney: Maherin Gangat  
 MLRC Fellow: Carolyn Conway  
 MLRC Institute Fellow: Jennifer Liebman  
 MLRC Administrator: Debra Danis Seiden  
 MLRC Publications Assistant: Philip J. Heijmans

## New Hampshire Trial Court Dismisses Thomas Libel Case After Remand From State Supreme Court

### *Newspaper Protected By Qualified Privilege*

By William L. Chapman

On remand, a New Hampshire superior court granted summary judgment in favor of Telegraph Publishing Co. and several police officers on libel claims over a newspaper report on plaintiff's prolific criminal career. *Thomas v. Telegraph Publishing Co.*, No.02 C 0466 (N.H. Sup. Ct. Aug. 19, 2008).

The case arose out of a front page article in the *Nashua Telegraph* headlined "Police say burglar's luck has run out after 25 years: Nashua is a suspect in more than 1000 crimes since the 1970's officials say." The plaintiff claimed that some 50 statements in the article were false and defamatory.

#### **Background**

Last year the New Hampshire Supreme Court issued a lengthy decision in the case reinstating some of plaintiff's claims. See *Thomas v. Telegraph Publishing Co.*, 155 N.H. 314, 929 A.2d 993, 35 Media L. Rep. 1769 (N.H. 2007). The court recognized the libel proof plaintiff doctrine, although it declined to apply it in the case. In addition, the article was based on formal and informal statements from the police and the New Hampshire Supreme Court addressed the fair report privilege at length. The Court first held that the privilege is conditional and can be defeated by common law malice.

The Court then held that the privilege encompasses the contents of arrest records or other "official" public records, but rejected the argument that the privilege should extend to all oral statements by law enforcement officers and other public officials, emphasizing that under New Hampshire law the privilege covers only "official" reports. See also *MLRC MediaLawLetter* May 2007 at 13; Sept. 2007 at 13.

At issue on remand were a number of statements to which the fair report privilege did not apply. Telegraph Publishing and the police officer separately moved for summary judgment based on New Hampshire's common law qualified privilege that protects a statement "published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth."

#### **Trial Court Decision**

The trial court first consider whether the qualified privilege protected the statements made by the police officers to the *Nashua*

*Telegraph* reporter. The court found that the officers had made the statements in their official capacity in response to questions the reporter had asked about the plaintiff, that the statements were based on information "they had learned as a result of their status as police officers," that it was lawful for the officers to respond to the reporter's request for information, and that the statements "served a justifiable purpose in informing the public about the then-pending allegations against the plaintiff as well as the plaintiff's criminal history.

The court further found that the officers had a reasonable belief in the truth of what they told the reporter because the "statements were based upon their knowledge of the plaintiff's criminal record as well as their own personal investigations of the plaintiff." Given these findings, the court ruled that the officers' statements were protected by the qualified privilege.

Turning to Telegraph Publishing's claim of privilege, the court began by accepting recitals in the reporter's affidavit that "the article 'was published in good faith as part of The Telegraph's continuing coverage of local crimes and news stories of interest and importance to the community,'" the reporter "'considered it [his] professional duty to report such matters to the public,'" and that "[t]here was no doubt that this story was a matter of public interest, one about which [he] believed the public had a right to know."

The court found that the reporter had "extensively researched the information he placed in the article," and that he believed the information he had obtained from the officers was true because it was consistent with information he had obtained from court records. On this record, the court ruled the qualified privilege applied.

To overcome the privilege, the plaintiff had the burden of proving that Telegraph Publishing and the police officers had acted with common law malice, that is "ill will, evil motive or intention to injure ... also a wanton disregard of the rights of others and the consequences likely to follow." The plaintiff submitted no evidence to meet this burden so the court granted summary judgment for all the defendants.

The plaintiff has appealed the trial court's decision to the New Hampshire Supreme Court.

*William L. Chapman is a partner with Orr & Reno, P.A. in Concord, New Hampshire. Plaintiff acted pro se. The Telegraph Publishing Co., is represented by Richard C. Gagliuso of Gagliuso & Gagliuso.*

## Update: Venezia Plaintiff Dismisses Case without Payment or Deposition by Reporter

By Bruce S. Rosen

A libel suit filed by a fired probationary patrolman against North Jersey Media Group Inc. (“NJMG”), publishers of *The Record*, which led to a New Jersey Supreme Court decision on waiver of the Newsperson’s Privilege, *In re Venezia*, 191 N.J. 259 (2007) has been dismissed by the plaintiff without any payment or other action by NJMG and without plaintiff ever taking the deposition of the reporter.

### Background

The law suit involved a statement attributed to Laurence Cherchi, the mayor of Leonia, N.J. and published in *The Record* in December 2004, which stated the reason Michael Venezia was fired as a probationary patrolman was because he was “convicted of an undisclosed crime,” which Cherchi was quoted as saying was “serious enough to take Venezia off the police force.”

The news story at issue, written by Andrew Glazer (who was also named as a defendant in the case along with Cherchi and the municipality), alluded to Cherchi having received legal advice from the borough attorney that would support his obtaining an employee’s expunged criminal record.

Venezia, the son of a Superior Court judge who was well-connected to the Bergen County Democratic organization, maintained that he had no previous conviction and that the news story had damaged his reputation. All discovery in the case related to the issue of an expungement was sealed, although there were motions pending seeking to compel information related to Venezia’s personal history when the case was dismissed. Venezia was deposed for two days and his deposition was still incomplete. No depositions of any reporters or editors were taken.

The settlement ending the case came after talks between the insurance pool representing the municipality and Cherchi and the plaintiff, although it is unknown what, if any, settlement was paid.

The December 2004 news story never treated Cherchi’s allegations as fact, but instead analyzed Cherchi’s allega-

tions in the context of political charge and counter-charges between him and Paul Kaufman, his predecessor as mayor and it questions the validity of Cherchi’s assertion by stating “Public Records do not reveal that Venezia has been convicted of a crime.”

Moreover, at the time Cherchi was under indictment by the Bergen County prosecutor – who also had ties to the Bergen County Democrats -- for allegedly intimidating the police chief into providing him with Venezia’s personnel file. Cherchi, who publicly denied making the statement, later entered and completed a pretrial intervention program.

Venezia, represented by Chasen, Laynard & Lamparello in Secaucus, a law firm with strong political ties and which represents Bergen County, initially sought Glazer’s pre-action deposition before it filed suit for libel against *The Record* and Glazer because Glazer was about to leave the Record to go on a fellowship in Bolivia. A Superior Court judge in Passaic County ordered the deposition to proceed and the Appellate Division ruled that Glazer could not be questioned because of the Newsperson’s Privilege.

### Waiver of Privilege

Last year, the New Jersey Supreme Court ruled in *In re Venezia* that to the extent that Glazer spoke to the Bergen County Prosecutors or the Borough attorney to stand behind and authenticate his news story, he had waived the privilege and would have to testify. See *MLRC MediaLawLetter* June 2007 at 25.

Glazer, now a producer for Dan Rather Reports, never testified before the case was dismissed.

Because of his status as a police officer for Leonia, and more recently for the Bergen County Police Department, the Superior Court declared Venezia to be a public figure requiring that he plead and prove actual malice.

*Bruce S. Rosen and Katherine A. Hirce of McCusker of Anselmi, Rosen & Carvelli in Florham Park, N.J., represented Andrew Glazer and North Jersey Media Group Inc. in the litigation.*

## Michigan Federal Court Rules Reporter Must Reveal Sources in Privacy Act Case

### *Court Rejects Qualified Privilege in Civil Context*

On August 28, 2008, a federal district court judge ruled that a non-party reporter for the *Detroit Free Press* must testify as to his unnamed sources in a Privacy Act claim brought by a former assistant U.S. attorney against the government. *Convertino v. U.S. Dept. Justice*, No. 07-CV-13842 (E.D. Mich. Aug. 28, 2008).

Judge Robert H. Cleland held that the information sought by the plaintiff was neither privileged nor beyond the scope of discovery as permitted by the Federal Rules of Civil Procedure.

#### **Background**

On Jan. 17, 2004, the *Detroit Free Press* published an article under the byline of David Ashenfelter titled "Terror Case Prosecutor is Probed on Conduct." The article detailed an internal investigation led by the Department of Justice Office of Professional Responsibility into possible ethics violations by plaintiff Richard Convertino, a former assistant U.S. attorney, in a prosecution of four terrorism suspects in the 2003 trial *United States v. Koubriti*.

In the article, Ashenfelter reported that "[U.S. Justice] Department officials, who spoke on condition of anonymity, fearing repercussions," divulged that Convertino had engaged in ethical wrongs during the prosecution.

Convertino filed a suit against the Department of Justice in the U.S. District Court for the District of Columbia under the federal Privacy Act, 5 U.S.C. § 552a, for its alleged publication of confidential information about the internal investigation. During discovery, Convertino sought from the Department of Justice the identities of the individuals mentioned in the article. However, Department of Justice representatives claimed that an exhaustive investigation into the matter was "unable to determine by a preponderance of the evidence" the identity of the source.

The Department of Justice Office of the Inspector General's investigation focused on about 30 employees who had knowledge of, or access to, the documents that contained the information disclosed in Ashenfelter's article. Convertino then served subpoenas upon Ashenfelter and the

*Detroit Free Press* demanding disclosure of the sources' identities.

#### **No Qualified Privilege**

In response to the subpoena, Ashenfelter asserted that the identity of his sources was shielded by a qualified reporter's privilege. Ashenfelter acknowledged that the Sixth Circuit in dictum had rejected a qualified reporter's privilege in the context of a grand jury investigation in *In re Grand Jury Proceedings*, 810 F.2d 580, 584-86 (6<sup>th</sup> Cir. 1987), but he argued that the district court was free to recognize a reporters' privilege in the context of a civil case. Citing *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1312 (W.D. Mich. 1996) ("Unlike the *Branzburg* and *In re Grand Jury* cases which involved grand jury proceedings or other cases where a criminal defendant's Sixth Amendment right to a fair trial was at stake, confidential source questions in civil cases raise different concerns.").

Judge Cleland reviewed the post-*Branzburg* case law in the federal circuits at length, but concluded that he is bound by Sixth Circuit precedent to reject recognition of a privilege.

However, this court cannot agree to characterize as *Grand Jury* dicta what is more clearly seen as the Sixth Circuit's conclusion: reporters are not entitled to a First Amendment privilege.... Simply put, this court is bound by the Sixth Circuit's determination: *Branzburg* forecloses recognition of a qualified First Amendment privilege for reporters. "The Sixth Circuit's decision in *Grand Jury*, though a minority of one, is the law in this circuit." *Slip op.* 11-12 (citations omitted).

Ashenfelter also sought protection under the Michigan reporters' shield law, but the court determined that the shield law would not apply because Convertino only asserted fed-

(Continued on page 29)



## Michigan Federal Court Rules Reporter Must Reveal Sources in Privacy Act Case

(Continued from page 28)

eral claims; thus, federal law would determine evidentiary privileges.

The court also rejected Ashenfelter's assertion that he should be protected under a reporters' privilege as a feature of federal common law. "This court declines to circumvent the Sixth Circuit's ruling against a reporters' privilege by making artificial distinctions between one grounded in the First Amendment and one based in common law." *Slip op.* at 14.

Finding that the Sixth Circuit Court of Appeals does not recognize a qualified First Amendment privilege for reporters, the district court found that Convertino's motion to compel disclosure may be blocked only if it constitutes discovery abuse under Fed. R. Civ. P. 26. Under Rule 26, a court may find discovery abuse if the information sought is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;" or if "the party seeking discovery has had an ample opportunity to obtain the information by discovery;" or if the discovery's "burden or expense...outweighs its likely benefit.

The court found that Convertino's subpoena to Ashenfelter did not constitute discovery abuse. "Convertino's case has a pressing need for the identity of Ashenfelter's sources, and discovery from Ashenfelter seems, at this point, the only way to get it." *Slip op.* at 18. Moreover, the court concluded that Convertino's Privacy Act claim, outweighed any interest in protecting the identity of sources.

The discovery requested of Ashenfelter – his presence at a deposition and the presentation of documents already within his control – will by no means cripple his resources, and in any case his burden is small when compared to the money damages Convertino could potentially recover in this action.

Moreover, while the court cited Ashenfelter's First Amendment interests as the "biggest factor counseling against dis-

closure," it found that the danger is minimized in this case because his sources may have violated federal law by revealing the information and "potential sources of further similar violations should be deterred from interactions of this kind" with journalists. *Id.* at 18-19. The court likened this case to a reporter's observation of criminal conduct, as in *Branzburg*. Thus, the court ruled that Convertino's motion to compel should be granted in regard to Ashenfelter.

### *Detroit Free Press Subpoena*

In granting Convertino's motion to compel as to Ashenfelter, the court determined that the information sought from the Detroit Free Press would be, under Rule 26, "unreasonably cumulative [and] duplicative" because the information can be obtained from Ashenfelter, a "source that is more convenient, less burdensome, [and] less expensive." Because such granting such a subpoena against the Detroit Free Press would amount to Ashenfelter's having to depose both as an individual and as an agent of the newspaper corporation, such an order would be unnecessary for Convertino to receive the information he seeks.

In denying Convertino's motion to compel as to the Detroit Free Press, the court also noted that "the potential adverse effects on news gathering activities, posed by any order compelling disclosure of a confidential source, suggests that an order to disclose should be as narrow as possible, and that no additional information is likely to be provided by the newspaper itself.

*The Detroit Free Press Inc. and David Ashenfelter are represented by Herschel P. Fink and Brian D. Wassom of Honigman, Miller in Detroit. Plaintiff Richard G. Convertino is represented by Lenore M. Ferber of Convertino Assoc. in Plymouth, Mich.; Stephen M. Kohn of Kohn, Kohn in Washington; and Robert S. Mullen of Progressive Legal Services in Plymouth, Mich. Defendant U.S. Department of Justice represented by Jonathan Eli Zimmerman of the U.S. Department of Justice in Washington.*

## Court Quashes Subpoena For Anonymous Posters' Identities On Shield Law Grounds

By Ashley Kissinger

On September 3, a trial court in Montana broke new ground in holding that Montana's shield law barred a defamation plaintiff's effort to obtain identifying information about anonymous website posters.

In *Doty v. Molnar*, plaintiff *pro se* Russell Doty sued political rival Bradley Molnar for defamation and false light invasion of privacy. No. DV 07-022 (Mont. Dist. Ct., Yellowstone County). Doty subpoenaed the *Billings Gazette*, Montana's largest regional newspaper, for the IP and e-mail addresses of, and other identifying information about, various persons who had posted comments, using pseudonyms, to articles in the *Gazette*.

The *Gazette* moved to quash the subpoena primarily on the ground that it was privileged from providing the information sought by Montana's Media Confidentiality Act. The Act provides, in pertinent part:

[N]o person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or gathered, received, or processed in the course of his employment or its business.

Mont. Code Ann. § 26-1-902(1). The *Gazette* also contended that its provision of the subpoenaed information would violate the First Amendment rights of the anonymous posters, citing *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D. Ariz. July 25, 2006); *Dendrite Int'l v. Doe* No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); and *Doe v. TheMart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

In response, Doty contended that the shield law, which was enacted before the proliferation of the Internet, might protect the identities of authors of articles and guest editorials published in the newspaper, but does not apply to third parties posting to the newspaper's website. "Blogs and online comment simply are not 'news,'" he argued, and he noted that the *Gazette* had not submit-

ted evidence demonstrating that it used any of the particular online postings at issue in the course of its news reporting.

With respect to the *Gazette's* First Amendment argument, Doty argued that he had made a "concrete showing" of a *prima facie* case of defamation and false light as required by the Arizona court in *Best Western*, and established the various other elements required by that court to obtain anonymous posters' identities. He requested that the court order the *Gazette* to notify the anonymous posters of the subpoena and give them an opportunity to respond.

After oral argument, Judge Todd Baugh of the Thirteenth Judicial District of Montana told Doty from the bench "that the Shield law does protect that which you seek to have them produce for you." Thus, he concluded, "the Court doesn't even get to the constitutional issue" of the anonymous posters' speech rights because "the legislature has already decided that with this statute."

The decision is significant in two respects. First, it appears to be the first decision in which a court quashed a subpoena to a media entity seeking the identities of anonymous website posters on the ground that a state shield law afforded a privilege from disclosure of the information. The only other published decision touching upon the issue is *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423 (2006). And in *O'Grady*, a California appellate court, *in dicta*, suggested that anonymous website posters are *not* 'sources' of news whose identities are protected from disclosure by California's shield law.

Second, the court appears to have held that Montana's shield law not only affords a statutory privilege to journalists, but also in effect, codifies the First Amendment rights of persons to speak anonymously to (or through) media entities, reflecting a legislative determination that those rights outweigh the rights of civil litigants to obtain the anonymous speakers' identities.

While this state trial court decision is tied in some respects to the specific language of the Montana statute, and has no precedential value outside of that State, it is a potentially heartening development and might encourage a similar approach by courts in other jurisdictions.

*Ashley Kissinger is a partner in the Denver, Colorado office of Levine Sullivan Koch & Schulz, L.L.P. with experience handling and writing about subpoenas for anonymous speakers' identities.*

## Arizona Supreme Court Strengthens Its Rule Allowing Cameras In The Courts

### *New Rule Requires On the Record Findings*

By David J. Bodney

On September 16, 2008, the Arizona Supreme Court amended and strengthened its rule governing cameras in the courts. Effective January 1, 2009, Rule 122 of the Arizona Supreme Court will require judges – before they can limit or prohibit camera access – to issue “specific, on-the-record findings” that the likelihood of harm outweighs the public benefits of camera coverage. Moreover, the new rule eliminates language that had forbidden appellate review by giving “sole discretion” for these decisions to the trial judge.

On November 1, 2007, KPNX Broadcasting Co., the NBC affiliate in Phoenix, filed a Petition to Amend Rule 122 in the Arizona Supreme Court. In substantial measure, KPNX based its petition on the number of requests for camera coverage that had been denied with increasing frequency in recent years, often without explanation or hearing – and often in cases of acute public interest and concern. KPNX’s petition sought to add basic procedural safeguards to a rule that had not been altered since its inception 25 years ago.

Under the existing rule, judges need only give “due consideration” to a half dozen factors before denying a request for camera coverage. Those factors include the impact of coverage on (a) a party’s right to a fair trial, (b) the privacy rights of a party or witness, and (c) the safety and well-being of any party, witness or juror. In addition, the rule requires judges to weigh the likelihood that coverage “would distract participants or would detract from the dignity of the proceedings.” Finally, the enumerated factors allow judges to assess the adequacy of the court’s physical facilities, as well as any other factor affecting the “due administration of justice.”

Drawing on recent decisions in Mississippi and New Hampshire, KPNX’s petition cited numerous studies that found significant benefits and few measurable harms attributable to cameras in the courtrooms. The petition identified four other states – Florida, Massachusetts, Tennessee and Washington – that either presumptively favor camera coverage of courtroom proceedings, or require courts to make specific factual findings and consider less restrictive alternatives before prohibiting coverage.

During a comment period that lasted more than six months, KPNX enlisted the support of the presiding judge of the Maricopa County Superior Court, the state’s largest judicial system, who suggested a few additional changes to the station’s proposal. For example, the presiding judge added a seventh factor for consideration in deciding whether to allow camera coverage – the timeliness of the request. Under the new Rule 122, most requests to tape or photograph a proceeding must be made “no less than two days in advance of the hearing.” If there is any objection to a request, or to an order allowing photographic coverage, the court must hold a hearing “promptly.”

During the petition’s comment period, the supreme court received 13 favorable submissions – including ones from the Reporters Committee for Freedom of the Press, the Arizona Broadcasters Association, *The Arizona Republic* (like KPNX, a Gannett company), the E.W. Scripps Company, a state legislator, three Tucson news stations and the former Chief Justice of the Arizona Supreme Court who presided over the televised impeachment trial of former Governor Evan Mecham. Most of the objections to KPNX’s proposal came from Southern Arizona and other less populated parts of the state. Judges in Cochise, Mohave and Pima Counties, together with the Pima County Bar Association, filed objections. In fact, one judge in Mohave County opposed a more focused lens in its courtrooms because “[s]ome of our non-lawyer JPs and Magistrates may not truly reflect the highest levels of professionalism or knowledge, which would reflect poorly upon the judiciary as a whole.”

KPNX filed a reply in support of its petition that incorporated the few additional changes proposed by the presiding judge of the Maricopa County Superior Court. In the end, the Arizona Supreme Court adopted KPNX’s proposed changes verbatim, dropping only one word. In the original proposal, judges could limit or forbid camera coverage only upon specific, on-the-record findings of a “substantial” likelihood of harm that outweighs the public benefits. In the new rule effective January 1, the word “substantial” will not appear. But for the first time, specific, on-the-record findings will be required, and appellate review will be allowed.

*David J. Bodney, Peter S. Kozinets and Chris Moeser of the Phoenix office of Steptoe & Johnson LLP represented KPNX in its petition to the Arizona Supreme Court.*

## Netherlands Supreme Court Allows Monitoring of Journalists “In the Interest of National Security”

### *Leak Investigation Justified Monitoring*

By **Christien Wildeman**

In January 2006 reporters Joost de Haas and Bart Mos of the Dutch newspaper *De Telegraaf* gained access to state secret files of the Dutch General Intelligence and Security Service (AIVD) relating to an investigation in the late 1990s into organized crime figure Mink Kok, and into possible corruption within the judicial investigation authorities. The reporters wrote a number of articles on the subject. Before publication they sent the AIVD copies of the state secret files.

After publication the journalists were detained and questioned by the public prosecutor on suspicion of violating state secrets laws. The case was eventually dropped. However, during this examination the journalists were allowed to look into the police files, which contained official AIVD reports with detailed information on their meetings, telephone conversations and other discussions.

The journalists, *De Telegraaf*, the Dutch Association of Journalists and the Dutch Society of Editors initiated preliminary relief proceedings against the Netherlands government for the actions of the AIVD. They demanded that the government be prohibited from using the special powers of the AIVD against the journalists and that the information already obtained be destroyed.

#### *Security vs. Press Rights*

The government took the position that under the Intelligence and Security Services Act 2002 it could not confirm or deny whether the AIVD monitored the journalists. The court, however, in preliminary relief proceedings, found that the journalists provided sufficient evidence to support their claim.

The journalists argued that the AIVD's actions were an unauthorized infringement of their privacy within the meaning of Article 8 of the ECHR and the free access to information arising from Article 10 of the ECHR and the protection of journalistic sources based thereon. Moreover, the journalists argued that the AIVD did not have the right to use its special powers against journalists who were not the targets of an AIVD security investigation.

The Court in preliminary relief proceedings ruled that there was an infringement of Articles 8 and 10 of the ECHR, but noted that this does not necessarily mean that an investigation by the AIVD is never allowed. The protection of journalistic sources is not absolute. An infringement can be justified if it is provided by law and necessary in a democratic society. The principles of proportionality and subsidiarity must be taken into account in that respect.

These latter requirements were not met and the Court in preliminary relief proceedings allowed the claims of the journalists in a judgment of June 21, 2006.

The government lodged an appeal. In a judgment dated August 31, 2006 the Court of Appeal found that the requirement of proportionality was met because of the state interest in identifying who leaked the information to the journalists. The objective of the government is “to prevent the dissemination of the state secrets at issue by tracing the leak [within the AIVD] and the investigation, possibly also to protect the life of others, of the consequences of the disclosure of the state secrets at issue.” And although the Court of Appeal acknowledged that the protection of journalistic sources is fundamental in a democratic society, it found that the infringement was in reasonable proportion to the objective.

The Court of Appeal also ruled that the requirement of subsidiarity was met at the start of the monitoring until the AIVD - as appears from official reports - identified a suspected source (although it is not clear who this person is). From that moment on the AIVD should have ceased its investigation against the journalists and the monitoring was an infringement of their rights. However, the Court of Appeal left it to the Supervisory Commission of the AIVD to decide what to do with the information obtained.

The journalists appealed to the Supreme Court, arguing that the entire monitoring was an infringement. On July 11, 2008 the Supreme Court rejected their appeal and upheld the judgment of the Court of Appeal.

#### *Conclusion*

The result of this decision could be the continued monitoring of journalists under a broad “national security” objective especially in times of terrorism. In this case, involving documents from an old criminal investigation in the 1990s, the government, relying on the Intelligence and Security Services Act, gave no factual information beyond invoking “national security,” “prevent (further) dissemination of state secrets” and “security of AIVD sources and other parties concerned.”

*De Telegraaf* has decided to file a complaint with the European Court of Human Rights in Strasbourg. It will be interesting to see whether in these times of fear of terrorism the ECHR will dare to take a critical stand in defining matters of “national security.”

*Christien Wildeman is a lawyer with Kennedy Van der Laan in Amsterdam, The Netherlands.*

## New York State Prohibits Non-Compete Clauses in the Broadcast Industry

By Darren Rumack

In early August, New York became the latest state to significantly limit the freedom of employers in the broadcast industry to restrict where their employees work upon conclusion of their employment.

The “Broadcast Employees Freedom to Work Act,” (N.Y. Lab. Law § 202-k) prohibits broadcast employers from enforcing non-compete provisions against former employees, and bans contract provisions that condition employment based on non-compete agreements. As a result, broadcast employers will no longer be able to prevent employees from taking another job in a particular region, with a competitor in the same market, or within a defined period of time, following the conclusion of their employment.

In passing the bill, New York Governor David Paterson stated that: “[B]roadcasters, like other

members of the media, play an important role in our democracy by providing the public with critical news and analysis that help us shape the ongoing discourse about the future of our society.” Governor Paterson continued, “[T]he contract provisions we’re banning placed an unfair burden on these professionals by limiting their ability to move to other employers within the same market or within a certain time period. With the approval of this bill, we hope to empower broadcasters with greater independence as they pursue employment options.”

The law applies to both on-air and off-air employees in television, radio, cable, internet and satellite-based broadcasting services, as well as any other entity that provides broadcasting services, such as news, weather, traffic, sports, or entertainment reports or programming. Interestingly, the law specifically excludes “management employees,” but does not actually define who constitutes a “management employee.”

This law prohibits New York State broadcast industry employers from requiring an employee, as a condition of their employment (whether by contract or otherwise), to agree that at the conclusion of the employment the em-

ployee will refrain from obtaining employment with a competitor in: (a) any specified geographic area; (b) for any specific period of time; (c) with any particular employer; or, (d) in a particular industry.

Affected employees cannot waive this prohibition on non-compete clauses. Any clause, covenant, or agreement waiving this prohibition is not enforceable in a court of law.

Additionally, the law does not apply to agreements not to work for a competitor during the term of the employee’s employment contract. Therefore, employers can still place restrictions on employees who leave to work for a competitor while their employment contract is still in effect.

Finally, the law contains a civil damages provision for violations of the Act, along with attorney’s fees and costs.

This law will have a significant effect on the broadcast in-

---

### **This law will have a significant effect on the broadcast industry in New York State.**

---

dustry in New York State. The prohibition on non-compete

clauses will enable employees to jump to another TV station, or broadcast company without having to wait out a contractual non-compete clause – granting employees more flexibility in finding new jobs. This will be particularly advantageous to on-air talent seeking to jump to a new station without having to go to another geographic market.

Since broadcast employers will not be able to restrict where their talent works following completion of their contract, this piece of legislation should facilitate greater movement of employees between broadcast companies.

This new law follows a trend in other states that prohibit non-compete provisions in the broadcast industry, including Arizona, California, Massachusetts, and Maine. While a number of states have adopted laws prohibiting non-compete clauses in the broadcast industry, it is too early to say if this trend will continue across the nation, but remains an issue worth watching in upcoming months.

*Darren Rumack is an associate in Fox Rothschild LLP’s Labor and Employment Department, resident in the New York, NY office.*

## Are There Pirates in My Safe Harbor?

By Toby Butterfield and Alexis Mueller

The Northern District of California recently granted summary judgment to an internet service provider (“ISP”) whose website permits uploading of user generated content, on the grounds that the ISP had established it was entitled to Safe Harbor protection from liability under §512 of the DMCA. *Io Group, Inc. v. Veoh Networks, Inc.*, No. C06-03926 (N.D. Cal. Aug. 27, 2008) (Lloyd, J.).

The decision is a useful chart for those navigating the digital high seas, and describes what instruments are needed to guide ships of on-line commerce into the DMCA’s Safe Harbor.

### Factual Background

The underlying dispute is a copyright claim by Io Group, Inc. (“Io”), a publisher of adult entertainment, against Veoh Networks, Inc. (“Veoh”), the operator of an online video distribution website which provides a means of uploading, sharing and viewing of video clips of varying length. Veoh offers both user-created and user-submitted content, as well as commercially produced videos licensed from sources such as Turner, CBS, US Magazine and Road & Track Magazine.

On cross-motions for summary judgment, the court decided that the safe harbor provision of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(c), protected Veoh from copyright liability for the infringing activity of its users, namely, the unauthorized uploading of ten of Io’s adult video properties.

### Qualifying for the DMCA Safe Harbor

To qualify for the safe harbor under § 512(c), an entity must satisfy certain threshold requirements. First, an entity must be a service provider, which is defined as a “provider of online services or network access, or the operator of facilities therefor.” 17 U.S.C. § 512(k)(1)(B). There was no dispute that Veoh met that definition. *Slip Op.* at 12-13.

However, to qualify, the service provider must also adopt and reasonably implement, and inform its users of a policy that provides for the removal of infringing materials and the termination of repeat infringers, as appropriate. 17 U.S.C. § 512(i)(1)

(A). Finally, a service provider must accommodate and not interfere with “standard technical measures” used by copyright owners to identify or protect their copyright works. 17 U.S.C. § 512(i)(1)(B). The DMCA defines “standard technical measures” broadly. 17 U.S.C. § 512(i)(2)(A)-(C).

Io contended that Veoh did not implement its repeat infringer policy reasonably. The court found otherwise, because Veoh had: (a) designated a copyright agent; (b) responded to infringement notices with days; (c) terminated accounts of repeat offenders after one warning and banned the user’s email address; and (d) adopted a means for generating a digital fingerprint for each video file to facilitate with identifying and removing infringing materials and preventing identical files from being uploaded at a later time. *Slip Op.* at 13-14.

Io also contended that Veoh unreasonably did not prevent repeat infringers from reappearing on Veoh’s site under a different user name with a different email address. The court found otherwise, citing the Ninth Circuit’s recent *Perfect 10 v. CCBill* decision that “a service provider need not affirmatively police its users for evidence of repeat infringement.” *Slip Op.* at 14:17-27. Io presented no evidence that any repeat infringer had, in fact, established a new account under a pseudonym, much less that Veoh’s intentionally allowed this to happen. *Id.* 15:13-14.

Finally, Io also argued that Veoh should have tracked users’ identities by IP address. Unpersuaded, the court reiterated that “section 512(i) does not require service providers to track users in a particular way.” *Id.* 16:6-7. Veoh thus qualified for the DMCA safe harbor.

### Entering the DMCA Safe Harbor

DMCA § 512(c) limits a qualifying service provider’s liability “for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” 17 U.S.C. § 512(c). However, a qualifying service provider only enters the safe harbor if it designates an agent to receive notices of alleged copyright violations; lacks the requisite knowledge; does not receive a financial benefit from activity it controls; and swiftly removes infringing content. 17 U.S.C. § 512(c)(1)(A)-(C).

(Continued on page 35)

## Are There Pirates in My Safe Harbor?

(Continued from page 34)

Io contended that Veoh had not entered the safe harbor because: (a) the infringing materials were not stored on Veoh's system "at the direction of a user"; (b) Veoh was aware of apparent infringement; and (c) Veoh had the right and ability to control the infringing activities and derived a direct financial benefit from such activities.

First, Io contended that the files were not created at the direction of Veoh's users, because Veoh automatically converted any compatible video files uploaded by its users into the Flash format and still image thumbnails. The court disagreed, holding that Veoh did not lose safe harbor protection by automatically processing of user-submitted content, citing the Second Circuit's recent *Cartoon Network v. CSC* decision about who "does" any copying with a complex computer system. *Slip Op.* at 19:19-20 and 20:15-17. See *The Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480-cv and 07-1511-cv (2d Cir., Aug. 4, 2008).

Second, Io argued that Veoh was aware of apparent infringing activity (even though Io did not send Veoh a notice and take-down letter before suing) because of the following "red flags": (a) Veoh had constructive notice of Io's copyright registrations; (b) the works in question were apparently professionally created; (c) one of the works contained Io's trademark; and (d) the material did not include the label required of adult video content under 18 U.S.C. § 2257(f)(4).

The court was unconvinced, because: (a) none of the allegedly infringing clips included Io's copyright notice; (b) Io's trademark only appeared several minutes into one clip and no evidence was presented as to Veoh's awareness and willful ignorance of the Io's trademark; (c) there is little to no real world distinction between "professional" and amateur video productions; and (d) the matter before the court did not concern whether there was a violation of 18 U.S.C. § 2257(f)(4).

The court concluded Veoh was not aware of apparently infringing activity and stated that "even assuming Veoh's sufficient knowledge or awareness of the allegedly infringing activity in question, Veoh would not lose safe harbor protection" because it acted expeditiously to remove and disable access to infringing material upon receiving notice thereof. *Slip Op.* at 23:2-4, 23:22-5.

Third, Io contended that Veoh had the "right and ability to control" the infringing activity because it selectively enforced policies that prohibit users from engaging in various types of conduct on its website. However, the court concluded that the

issue is "not whether Veoh has the right and ability to control its system, but rather whether it has the right and ability to control the infringing activity," *Slip Op.* at 24:26-25:1 (emphasis added), and went on to explain that "to escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent." *Id.* at 26:20-21 (citing *A&M Records, inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9<sup>th</sup> Cir. 2001) (internal citations omitted)). The court concluded that there was no indication that Veoh failed to police its system "to the fullest extent permitted by its architecture" and that it took steps to reduce, not foster, the incidence of copyright infringement on its website. *Id.* at 29:3-4, 29:15-16.

Finally, Io contended that Veoh should have verified the source of all incoming videos by obtaining the identities and addresses of the submitter and producer and the submitter's authority to upload each file, by hiring more employees or by limiting its website to a smaller number of users and/or files, if necessary. The court disagreed, stating that "the DMCA was intended to facilitate the growth of electronic commerce, not squelch it," and that "Veoh qualifies for safe harbor." *Slip Op.* at 30:17-19.

### Analysis

Much has been written and spoken about how the § 512 safe harbor depends on an ISP using "Standard Technical Measures," a term only generally defined by the Act, and which by definition varies over time. This case is therefore another useful ruling on what measures are now "standard." Eliminating repeat offenders is required, but ISPs need not screen for the Internet Protocol address used by alleged repeat offenders. Identifying repeat infringers who use an identical e-mail address is sufficient. This ruling sets a low bar for eliminating repeat offenders, as Hotmail, Yahoo and Gmail all provide multiple free e-mail addresses.

Second, this decision creates an echo of the Second Circuit's recent decision in *Cartoon Network v. CSC*, *supra.*, in which the Second Circuit ruled on whether the owner and operator of a complex computerized system for downloading television programs was a direct infringer when its users selected which files to be copied, stored and later played back. The Second Circuit concluded that only the end user was engaging in a volitional act of copying, not the owner and operator of the service. Likewise in this decision, the Northern District of Cali-

(Continued on page 36)

## Are There Pirates in My Safe Harbor?

(Continued from page 35)

fornia has concluded that an ISP “is not precluded from Safe Harbor under § 512(c) by virtue of its automated processing of user-submitted content.” *Slip. Op.* at 19:19-20. The lesson for ISPs is to rely on the computers to do the copying, and not to “actively participate or supervise the uploading of files.” *Id.* at 20:8. The *Veoh* Court even cited *Veoh*’s lack of supervision in concluding that *Veoh* enjoyed safe harbor protection.

Finally, the *Veoh* Court considered the reasonableness of *Veoh*’s actions to remove or disable access to infringing material, and its right and ability to control infringing activity in light of the numerous Ninth Circuit decisions in this area in recent years. The *Veoh* Court distinguished *Napster* as an example of a system created with the sole purpose of providing for “a forum for easy copyright infringement,” and concluded that “there is no indication that *Veoh* has failed to police its system to the fullest extent permitted by its architecture.” *Slip. Op.* at 29:3.

Io’s suggestions that *Veoh* could have improved or changed its business operations to prevent infringing activity did not create a genuine issue of material fact, as “the DMCA does not require service providers to deal with infringers in a particular way.” *Id.* at 30:8.

In its overall analysis, the *Veoh* decision bears some similarities to *Tiffany (NJ) Inc. vs. eBay, Inc.*, 04 Civ. 4607 (RJS)

(S.D.N.Y., July 14, 2008), in which the district court deferred to *eBay*’s decisions about what measures were necessary to prevent infringing material appearing on its website. Like the *Veoh* decision under the DMCA, the *Tiffany* Court subjected *eBay* only to an overall general review of the reasonableness of its measures. Although the *Tiffany* Court was considering trademark liability, not copyright issues or the DMCA, its overall approach is somewhat similar.

However, little analysis has been given, either in this case or in others in this area, to the incentives the law seems

to be creating. The law seems to favor safe harbors for ISPs who have designed a system architecture which fails to prevent infringements so long as an ISP is using its system to the full extent possible. Courts are reluctant to analyze whether the ISP’s system overall is deficient. Perhaps court-appointed experts, such as the expert appointed by the District Court in *Cartoon Network v. CSC*, should provide courts with impartial technical advice, to help them understand the state of the technology in the fast-moving internet technology market.

*Toby Butterfield and Alexis Mueller are with Cowan DeBaets Abrahams & Sheppard LLP in New York. Io Group is represented by Gill Sperlein, San Francisco. Veoh is represented by Michael Elkin, Jennifer A. Golinveaux, and Matthew Alex Scherb of Winston & Strawn LLP, San Francisco.*

---

**The lesson for ISPs is to rely on the computers to do the copying, and not to “actively participate or supervise the uploading of files.”**

---



**NOW AVAILABLE!**

**MLRC 50-State Survey:  
Employment Libel and Privacy Law 2008**

**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

[Click here to access an order form](#)



**We asked a group of renowned First Amendment lawyers and Supreme Court practitioners to answer questions about the direction of the Court on First Amendment issues. Their responses were published in our Supreme Court Bulletin and are reprinted below.**

## Supreme Court Roundtable

**Floyd Abrams, Professor Erwin Chemerinsky and Cliff Sloan**

*1. Does the current Court have a discernable First Amendment philosophy or direction?*

**Floyd Abrams:** There are three Supreme Courts in First Amendment issues – liberal, conservative and Justice Kennedy. The liberals are generally sympathetic to First Amendment interests in cases involving sexual content on the Internet, speech of students and government employees and, most broadly, truthful speech about matters of public concern. Conservatives find their First Amendment when Congress limits the expenditure of funds that may influence elections, when states suppress the speech of pro-life protesters near abortion clinics, and when privacy interests (although nowhere specified in the Constitution) clash with First Amendment interests. Justice Kennedy is consistently and significantly more First Amendment-protective than all other members of the Court. In the two recent First Amendment cases that I consider to be the worst in recent memory – *Hill v. Colorado*, 530 U.S. 703 (2000), upholding sweeping limitations on the speech of anti-abortion protesters in the vicinity of abortion clinics and *McConnell v. FEC*, 540 U.S. 93 (2003), upholding sweeping limitations on campaign expenditures, Kennedy dissented in both. And in the two greatest recent First Amendment victories – *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), striking down portions of the Child Pornography Act of 1996, and *Bartnicki v. Vopper*, 532 U.S. 514 (2001), holding portions of the Federal Wiretapping Act unconstitutional as applied to the press in certain circumstances, Kennedy wrote the first and joined the second. In the former cases, liberal anti-speech votes carried the day; in the latter ones, liberal pro-speech votes prevailed. Kennedy voted for the pro-speech position in all. Of course, Kennedy is not as predictable as that may suggest and there are cases in which more than one side has a legitimate claim to be carrying the First Amendment banner and others in which competing interests should prevail over those that claim the protection of the First Amendment. Even when Justice Kennedy does not join the “pro-speech” side of a case, he sometimes seeks to limit the precedential impact of the ruling by making clear that

he will not extend it another inch. His concurring opinion (with Justice Alito) in the recent *Morse* case (permitting punishment of a high school student’s speech outside the school), is one illustration of this. In any event, taken as a whole, Justice Kennedy stands alone as a consistent defender of First Amendment interests. As a result, there is no easily summarized First Amendment “philosophy” of the Court.

**Professor Chemerinsky:** This is a Court that generally favors government power over individuals (and business over consumers and employees, though that generally is not relevant in the First Amendment area). The two most important First Amendment cases so far from the Roberts Court have been *Morse v. Frederick*, 127 S. Ct. 2618 (2007) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Both were 5-4 decisions to favor government power over speech, with the majority comprised of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito. The former said that a school could punish a student’s speech even without any showing that the speech caused any disruption or posed any harm. The latter created a bright line rule that there is no First Amendment protection for the speech of government employees on the job in the scope of their employment. These are major losses for freedom of speech. The one area where “speech” claims have prevailed is in the area of campaign finance. There have been three major campaign finance cases from the Roberts Court: *Randall v. Sorrell*, 548 U.S. 230 (2006), *Federal Election Commission v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) and *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008). Each has sided with the challenger to the campaign finance law, the latter two by 5-4 margins. The dispute in these cases is whether campaign contributions should be regarded as speech and what justifications are sufficient to allow limits. In these cases, it is the conservative Justices who regard campaign contributions as speech and want to eliminate all or most of the limits.

**Cliff Sloan:** It’s especially hazardous to talk about the Court’s “direction” right now because the Court seems to be at a once-in-a-generation crossroads. Its future hangs in the balance in the Presi-

*(Continued on page 38)*

## Supreme Court Roundtable

(Continued from page 37)

dential election – a prospect that’s often talked about, but which seems overwhelmingly likely this year. More than any time in recent memory, the Court is at a genuine tipping point, in which its identity will be forged by new appointments in the next few years. The most dramatic change in the Court’s approach to First Amendment issues has been the replacement of Justice O’Connor by Justice Alito. In campaign finance in particular, this change has led to a Court that is more receptive to the First Amendment interests asserted in challenging campaign finance regulations. In terms of an overall philosophy, I think that the Court right now has a series of individuals with their own philosophies, or groups of Justices with similar philosophies, rather than a distinct overarching approach of the Court. The current Court often muddles through on First Amendment issues – a stance which, depending on the future direction of the Court, may or may not look like it was a desirable approach. As in other areas, a key question for the Supreme Court on First Amendment issues will be whether a majority seeks to revisit and overrule existing precedents. Justice Scalia, for example, publicly has stated (in Norman Pearlstine’s *Off The Record*) that, “given the chance,” he would “probably” vote to overrule *New York Times v. Sullivan*. In many areas of constitutional law, Justice Thomas has shown an eagerness to overturn long-settled precedents.

### 2. Do recent First Amendment decisions in campaign finance and employee speech cases (or other areas) shed any light on the Court’s attitude towards press issues?

**Floyd Abrams:** Cases relating to campaign finance limitations tell us absolutely nothing about how Supreme Court Justices will vote in other cases. The four most predictably conservative members of the Court plus Justice Kennedy take the First Amendment seriously in such cases; the four more liberal members barely acknowledge any First Amendment interest at all in speech (or what they view as merely spending money that is somehow attendant to speech) within months of elections. The same is basically true in reverse in cases such as *Garcetti*; the conservatives (Justice Kennedy included on this one) lean hard against the assertion of broad speech rights of government employees while the four liberal-ish jurists would give far more protection to such speech. Lesson: one can’t predict votes in this area by simply thinking in general terms based on liberal/conservative labels. And in some cases – flag burning comes to mind – one can’t predict at all.

**Professor Chemerinsky:** It is difficult to generalize from the campaign finance and the employee speech cases to press issues. The campaign finance cases reflect a strong sense by the conservatives that *Buckley v. Valeo*, 424 U.S. 1 (1976) was wrong and that limits on contributions are unconstitutional. Justices Scalia, Kennedy, and Thomas have expressly taken this position and Chief Justice Roberts and Alito have voted in that direction in every case so far. The employee speech case, *Garcetti v. Ceballos*, reflects a Court very deferential to the government as employer. That was also reflected this past term in *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008) which held that government employees cannot bring class-of-one equal protection claims. The resolution of press issues will depend so much on context and the issue and the way in which it is presented. If, for example, it is about press access to prisons, I think that the Court is very likely to side with the government. Likewise, if it is about student newspapers, *Morse v. Frederick* suggests the government will prevail (again depending on the facts and specific issue). But in other contexts, the Court might be very sympathetic to press claims.

**Cliff Sloan:** It is unlikely that they do shed significant light on press issues. The Justices tend to be very contextual in their approach. One might think, for example, that the emphasis of five Justices (Roberts, Alito, Kennedy, Scalia, and Thomas) on the importance of protecting core political speech in the campaign finance speech area might lead them to a strong defense of press freedom because it similarly represents core protected speech. As noted, however, Justice Scalia, a strong First Amendment advocate in campaign finance (and in certain other areas, such as flag-burning), has stated that he thinks *New York Times v. Sullivan* should be overruled. Justice Scalia would argue that these positions are entirely consistent based on his historical approach to the First Amendment, but they illustrate the difficulty of applying a Justice’s strong First Amendment language in one context to another context. And it’s important to note that context does matter in assessing the merits of a First Amendment claim. In my view, for example, the First Amendment claims in opposing campaign finance regulation frequently are overwrought. With all due respect to Floyd Abrams’s role as one of the advocates against the constitutionality of the McCain-Feingold Act, I do not agree with him that the Supreme Court’s decision upholding the Act was one of “the worst in recent memory” on First Amendment issues.

(Continued on page 39)

## Supreme Court Roundtable

(Continued from page 38)

### 3. Justice Kennedy is described as the new swing vote on the Court. Does he have a First Amendment outlook that could make itself felt in media cases? Are there any other bellwether Justices?

**Floyd Abrams:** As I have said, Justice Kennedy stands alone on the Court in terms of his general support for First Amendment interests. When he does not believe those interests are significant in a particular case, i.e. *Garcetti*, the party asserting a First Amendment claim will invariably lose – often in an opinion assigned to him either because (a) he might not join the sort of opinion another jurist might write or (b) because he is known to be sympathetic to First Amendment claims. As regards media claims, there may be some cases in which the Court will rule with the media – especially if the Internet is involved – but I wouldn't count on the Court broadly protecting “press” interests outside areas such as those involving prior restraints where the law is clearly established that near-absolute protection exists.

**Professor Chemerinsky:** For much of his time on the Court, Justice Kennedy has been a very pro-speech Justice. In fact, one study found him the most pro-speech Justice and Justice Breyer the least pro-speech Justice. But that has not been reflected in the last few terms. He was in the majority in the 5-4 decision in *Morse v. Frederick*. He wrote the majority opinion in *Garcetti v. Ceballos*. This term, in *United States v. Williams*, 128 S. Ct. 1830 (2008) he was in the majority (in a 7-2 decision) upholding the new federal child pornography law which allows punishment even if the material is not actually child pornography. It is very difficult to reconcile this with his earlier opinion in *Ashcroft v. Free Speech Coalition*. During the Roberts years, Justice Kennedy has not been a pro-speech Justice. But if it is a 5-4 decision, in the speech area or any other area of constitutional law, it is a safe prediction that it will be 5-4 with Justice Kennedy in the majority.

**Cliff Sloan:** I think that the voting patterns on the Court are somewhat less predictable than Professor Chemerinsky suggests. In fact, the emphasis on Justice Kennedy's role as an inevitable swing vote often is exaggerated. Remember, for example, that, this past Term, Justice Kennedy was in dissent in fully one third of the Supreme Court's 5-4 decisions. Here's another indication: last Term, contrary to public perception, Justice Clarence Thomas actually was in the majority in 5-4 cases the same number of times as

Justice Kennedy. To be sure, last Term may have been unusual. The Term before last, Justice Kennedy was in the majority in every 5-4 decision, which put him in the majority in 5-4 cases more than any other Justice. But last Term's unpredictable pattern at least suggests that the common view of Justice Kennedy as the invariable swing vote is far too sweeping. It's no exaggeration to say that all of the Justices should be viewed as “bellwether Justices” and potential “swing votes” on media issues (and on other issues as well). That's certainly true from an advocacy perspective. Even with regard to Justice Kennedy, he frequently has defended First Amendment values with strong language, but he also has proven that his votes are not always predictable. Speaking of Justice Kennedy, with regard to Professor Chemerinsky's observation that it's difficult to reconcile Justice Kennedy's votes in the two virtual child pornography cases, it's notable that Justice Kennedy voted in those two cases the same way as Justice Stevens and Justice Breyer – still another indication that the conventional portrait of Justice Kennedy as the controlling balance wheel on the Court is painted with too broad a brush.

### 4. This coming term, the Court will review the Second Circuit's 'fleeting expletive' decision in *FCC v. Fox*. Is there any chance the Court will reconsider *Pacifica* in light of the new media landscape as suggested by the Second Circuit?

**Floyd Abrams:** I think it unlikely that the Court will reverse *FCC v. Pacifica*, 438 U.S. 726 (1978). It has thus far refused even to narrow it and I would be very surprised if this Court – the Roberts Court – came close to overruling Justice Stevens' opinion in *Pacifica*. However, the Court may well rule for Fox. The punishment of “fleeting expletives” seems both arbitrary and often ridiculous. While I think Justice Breyer, rarely a First Amendment enthusiast, is a tough vote for Fox to get (see Judge Leval's dissent below) Justice Thomas (but not Justice Scalia) seems to me a possible vote for Fox on this one.

**Professor Chemerinsky:** I believe that there is a strong chance that the Court will reconsider *Pacifica*. Social sensibilities about profanity are different. They are far more common in the media and everyday use. Also, the media is different. *Pacifica* was part of the Court developing a medium-by-medium approach to inde-

(Continued on page 40)

## Supreme Court Roundtable

(Continued from page 39)

cent speech, treating it differently over the broadcast media, over cable, over the Internet, over telephones. Today, people receive all of these services from one provider. The distinctions in terms of speech protection make little sense. *Pacifica* was wrong when it was decided. The George Carlin monologue was a wonderful expression about society's hang-ups about language. What a fitting tribute to George Carlin's memory for the Court to overturn the decision in the year he died.

**Cliff Sloan:** I think that there is a significant chance that the Supreme Court will reconsider *Pacifica*, or, at least, that individual Justices will raise doubts about it. As many of the briefs point out, the factual premises that the Court relied on in *Pacifica* about the unique status of broadcasting no longer are present. It's possible that the Court will find against the government without reaching this issue. The government's erratic and arbitrary record in enforcing its fleeting expletives doctrine is striking. This record may lead the Supreme Court to reject the FCC's action on the same basis as the Second Circuit – that it fails to pass the test of reasoned decision making. But it also is conceivable that the record of bizarre and unpredictable government enforcement actions will be the trigger that causes the Court, or individual Justices, to recognize that the *Pacifica* standard now has been superseded by events and should be jettisoned. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court famously, and importantly, held that the Internet is entitled to the same full First Amendment protections as other media, and that the Internet should not be subject to the weaker *Pacifica* protections. In light of the explosion of media alternatives and the reshaping of the media landscape since the *Pacifica* decision, this may well be the Term in which the Supreme Court finally reaches the same conclusion about broadcasting itself.

**5. The Supreme Court has not considered a media libel case since *Masson v. New York* in 1991. Are there any libel law issues that the Court might or should accept for review in the near term? E.g., post-trial injunctions?**

---

**The George Carlin monologue was a wonderful expression about society's hang-ups about language. What a fitting tribute to George Carlin's memory for the Court to overturn the decision in the year he died.**

---

**Floyd Abrams:** While there are issues that the Court may yet decide as to which there is considerable disagreement below – the treatment of neutral reportage, for example – the real issue is whether *New York Times v. Sullivan* itself will survive. Justice Scalia has already asserted his desire to reverse the ruling (possibly forcing him to recuse himself?) and we should not underestimate the level of anger at and disdain of the press by a considerable number of the Justices.

**Professor Chemerinsky:** There are countless media issues that remain unresolved. The example of post-trial injunctions of speech is a good one. The related issue of whether injunctions are permissible as a remedy in defamation cases, and if so when, was raised but not decided in *Tory v. Cochran*, 544 U.S. 734 (2005). There remain major unresolved issues concerning defamation law (such as the standards of liability for plaintiffs who are not public figures when the speech does not involve a matter of public concern.) Also, and probably most importantly, there will be issues regarding the war on terrorism and speech. These might be access issues or perhaps ones related to the state secrets doctrine.

**Cliff Sloan:** At some point, I think that the Supreme Court is going to have to hear a case on the scope of Internet jurisdiction in libel cases. Many courts in other countries are applying a breathtakingly expansive view of jurisdiction based on Internet presence, including in libel cases. The issue may come to the Court in the context of the enforceability of judgments from foreign countries.

**6. The Supreme Court has been active in reviewing the constitutionality of punitive damage awards. Should large compensatory damages awards in First Amendment cases be subject to constitutional scrutiny?**

**Floyd Abrams:** I see no realistic chance that the Court will provide protection to the press from compensatory damages awards. If it does, it will come in the form of an opinion in another area that is by its nature applicable to libel and privacy ruling as well. But I

(Continued on page 41)

## Supreme Court Roundtable

*(Continued from page 40)*

don't think that will happen anywhere and certainly not in a press case. Put another way, I think there is a clear and significant majority on the Court against reaching out to protect the press or to afford any more protection than currently exists.

**Professor Chemerinsky:** No Supreme Court case has suggested constitutional limits on compensatory damage awards. The reasoning of cases like *BMW v. Gore*, 517 U.S. 559 (1996), *State Farm v. Campbell*, 538 U.S. 408 (2003) and *Philip Morris v. Williams*, 549 U.S. 346 (2007) is all about due process as a limit on punitive damages. It is not possible to apply this to compensatory damages. I do not see any indication in these cases that the Court is inclined to impose constitutional limits on compensatory damages.

**Cliff Sloan:** I don't think that the Court will address large compensatory damage awards in the same way that it has addressed punitive damage awards. There is a very significant difference between the intended role of compensatory damages (to compensate) and the intended role of punitive damages (to punish). As a result, by their nature, punitive damages trigger due process concerns far more readily than compensatory damages. On the other hand, I certainly think it's possible that, in a particular case, if an excessively large compensatory damages award is masking another reality, such as a crippling punishment for certain speech, the award may well be an important element of the Supreme Court's willingness to take the case and of the Court's eventual approach to the case.

*7. Is the Court likely to hear more commercial speech cases and if so how far will this Court go to reduce the distinctions between protections for commercial and non-commercial speech?*

**Floyd Abrams:** The Supreme Court over the past three decades has decided more cases dealing with when commercial speech is protected than any other sort of speech. Just a few years ago, I thought the Court might well reduce the distinction between commercial and political speech, limiting the former to consumer protection-like situations. But then came *Nike v. Kasky*, 539 U.S. 654 (2003), not the hardest case for a First Amendment victory, and the Court thought it was far more complicated and difficult than many people (myself included) did. So will the Court really move farther

down the road of giving commercial speech more protection? I'd say it's no better than 50-50.

**Professor Chemerinsky:** Again, I think that this very much will depend on the context in which the case is presented. I believe that the Court will be very protective of true commercial speech. I don't believe that the Court will be receptive to attempts to regulate commercial speech to discourage harmful behavior (such as tobacco or alcohol consumption). The hard cases will be those that pose issues at the line between commercial and non-commercial speech. *Nike v. Kasky*, from a few years ago, is an example of this and, of course, the Court did not decide it. The issue was whether a company's claims about its production processes (that it did not exploit workers), made to sell products, is commercial speech. That issue comes up in a number of different contexts, such as when companies run issue ads to help sell their products. The Court never has dealt with these questions. The Roberts Court is quite pro-business and that is likely to be reflected in its commercial speech decisions. I predict that, overall, it will be more receptive to commercial speech claims than many other First Amendment claims.

**Cliff Sloan:** I think we're going to see the Court taking more commercial speech cases. The Court continues to show great interest in business-related cases. I also think that the Court will be giving commercial speech enhanced protection. The particular form of this enhanced protection is not entirely certain. The Court may fashion an entirely new standard, or, as it has done in other areas, it may re-interpret the existing standard.

*8. Will the new digital media environment provide the impetus for the Court to redefine the concept of "reasonable expectation of privacy"?*

**Floyd Abrams:** As the public ever more willingly surrenders its privacy for transient gains – using E-ZPass to get across a bridge more quickly, providing Social Security numbers to get credit more quickly – I suspect the Court may well expand privacy rights in cases against the press. This would be both ironic and odd: even those of us who are enthusiastic about reading privacy rights into the Constitution as against the government recognize that it's a close call. But to do so, as has occurred in Europe, not against the government but against a serious assertion of speech rights by the

*(Continued on page 42)*

## Supreme Court Roundtable

(Continued from page 41)

press, seems to me highly problematic. But I wouldn't bet against it.

**Professor Chemerinsky:** The Court inevitably will have to deal with privacy issues in the context of new technologies. "Reasonable expectation of privacy," as many have pointed out, is inherently problematic because it allows for the elimination of privacy just by taking away the expectation of privacy. So many technologies allow for the gathering and dissemination of private information. The Court's decision almost surely will depend on the context and circumstances of the case.

**Cliff Sloan:** The "reasonable expectation of privacy" standard has the inherent problem suggested by Professor Chemerinsky – that the expectation theoretically can be reduced to zero. But that problem is longstanding, and the Supreme Court has not shown an interest in revisiting it. The digital media environment will raise questions about applying this standard in new circumstances, but not, I think, questions about the underlying standard. In fact, in my view, the privacy issue in digital media that will be of most concern to media companies is the possibility of well-intentioned but misguided government regulation in the online privacy arena. There is a great deal of misunderstanding on this issue, and I fear that certain types of regulation might unwisely and unnecessarily limit media companies in their digital media initiatives. At a time when media companies face severe business challenges, digital media offers a potential lifeline for new media business opportunities. Ill-considered regulation under the privacy banner may shred this lifeline before media companies can fully realize the opportunities of digital media.

### ***9. Do the Sony and Grokster decisions provide enough guidance for lower courts to properly decide cases like Google Books and Viacom v. Google?***

**Floyd Abrams:** I do not think either *Sony v. Universal*, 464 U.S. 417 (1984) or *MGM v. Grokster*, 545 U.S. 913 (2005), will lead the way to a ruling in the Google case. But I think Google has much to be concerned about in that case.

**Professor Chemerinsky:** No, *Sony* and *Grokster* do not provide much guidance at all, other than on the narrow questions presented. But this is a situation where technology is moving so much faster than the law.

**Cliff Sloan:** It's a mistake to think that the Supreme Court needs to issue detailed new opinions to resolve contested copyright and intellectual property issues in the online environment. The question is how established principles play out in the online environment, not whether there is a new body of law to govern the Internet. In *Grokster*, for example, the Supreme Court applied what it took to be established principles about unlawful inducement, and did not see itself as promulgating a new body of law. In many of these cutting-edge cases, in fact, the winning party will be the party that most convincingly establishes that its position fits within familiar principles, rather than the party arguing that a new body of law is necessary. The crucible of litigation, and the factual record that it generates, also will play an important role in the outcome, just as it did in *Sony* and *Grokster*.

*Floyd Abrams is a partner with Cahill Gordon & Reindel in New York specializing in freedom of speech and press issues. He was co-counsel for The New York Times in the Pentagon Papers case and has argued before the Supreme Court in several landmark cases, including Nebraska Press Association vs. Stuart; Landmark Communications v. Virginia Smith; Smith v. Daily Mail; Nixon v. Warner Communications; CBS v. FCC; and Harper & Row v. The Nation.*

*Erwin Chemerinsky is a nationally renowned professor of constitutional law and federal civil procedure. He was named the founding dean of the Donald Bren School of Law at UC Irvine, effective July 1, 2008. Professor Chemerinsky is the author of the recently published book Empowering Government: Federalism for the 21st Century (Stanford University Press 2008).*

*Cliff Sloan is a partner in the intellectual property group at Skadden, Arps, Slate, Meagher & Flom LLP in Washington, D.C. Before joining Skadden he served as general counsel at Washingtonpost.Newsweek Interactive, The Washington Post Company's online subsidiary, and was publisher of Slate Magazine. From 1989-1991 he was Assistant to the Solicitor General, briefing and arguing cases to the U.S. Supreme Court.*

## ETHICS CORNER

### Joint Defense Agreements In Defamation Litigation – A Primer

By Samuel Fifer

*Hy Smersh, the New Yorker magazine's Pulitzer-prize winning investigative reporter, has been covering the seizure of the U.S. Embassy in Fredonia. Militants are holding 75 hostages in the Embassy. In addition to the usual State Department officials, Marines and a few shadowy types who may work for intelligence agencies, one of the hostages is a mysterious "entrepreneur" by the name of Bill Brown. Rumors have been flying about what brought him to Fredonia, an unfriendly place for U.S. Citizens even before the Embassy takeover.*

*Frustrated with the lack of movement in the hostage negotiations, Smersh turns his attention to Brown. Confidential sources tell Smersh that Brown has been in Fredonia seeking to export diamonds mined there under brutal conditions. He decides to sit on the story until the hostages are released, concerned that Brown might be harmed by the militants. Suddenly, the hostages are released. Smersh's blockbuster story -- "Bill Brown, the 75<sup>th</sup> Hostage: Merchant in Blood Diamonds" -- is vetted by the New Yorker's editors and its inside and outside counsel. Smersh is grilled about his sources, who he refuses to identify by name but identifies, generically, as "State Department officials."*

*The story is published and in response, an outraged Brown says he was not trading in "blood diamonds," but rather, was in Fredonia to distribute Fredonian-language Bibles. Since circulating Bibles is a capital offense in Fredonia, Brown was secretive about his activities -- for his own safety and to protect those to whom he gave the Bibles (and who were now being rounded up). In Brown's defamation suit, the New Yorker's usual outside counsel, Ted Floyd, is hired to represent everyone. However, Smersh continues to refuse to share the identity of his sources with Ted, or any-*

*one else. Discovery in the case is fast-tracked and the first crisis shows up when Ted tells New Yorker management that under the circumstances he does not see how he can represent the magazine and Smersh, so the magazine hires separate counsel for each.*

*Despite the possible conflicts of interest between the New Yorker and Smersh that led to the hiring of separate counsel, the defendants' interests are otherwise clearly aligned. What steps can and should be taken to allow their counsel to work together and coordinate their defense of the case?*

Even where co-defendants deem it necessary to be represented by separate counsel – as the New Yorker and Smersh did in our hypothetical – their essentially common interest in the outcome of the case makes it advantageous to share information in order to mount a common defense strategy. "Uninhibited communication among joint parties and their counsel about matters of common concern is often important to the protection of their interests."<sup>1</sup> Under proper circumstances, attorney-client privileged information and attorney work product shared among separately represented co-defendants maintains its privileged status under the "joint defense privilege."

In joint defense situations, parties purposely retain separate counsel in order "to avoid difficulties resulting from actual or potential conflicts of interest among the parties." ... The joint defense privilege allows the parties to exchange relevant information addressing their common interest or defense without compromising each party's need to safeguard and protect its own interests from too close an association with the other parties.<sup>2</sup>

The joint defense privilege "permits a client to disclose information to [its] attorney in the presence of joint parties and their counsel without waiving the attorney-client privilege and is intended to preclude joint parties and their attorneys from disclosing confidential information learned as a

*(Continued on page 44)*

## Ethics Corner: Joint Defense Agreements In Defamation Litigation – A Primer

(Continued from page 43)

consequence of the joint defense without permission.”<sup>3</sup>

By definition, communications subject to the privilege must “first satisfy the traditional requisites for the attorney-client or work product privilege before they become or remain privileged.”<sup>4</sup> That is, “unless the communication would have been under the attorney-client or work product privilege, it will not be privileged simply because the defendants discussed it together.”<sup>5</sup> Rather, shared or jointly created material must be disclosed pursuant to a common legal interest and an agreement to pursue a joint defense.<sup>6</sup> Although not used by most lawyers, written joint defense agreements (“JDA”) should be employed in order to withstand a challenge to the privilege.<sup>7</sup>

### *Under What Circumstances Does the Privilege Apply?*

“In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.” *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3rd Cir. 1986).

“The defenses need not be compatible in all respects to apply the joint defense privilege.”<sup>8</sup> Thus, in *United States v. McPartlin*, one defendant’s attorney told his client “to meet with [other attorney’s] investigator because it was in the interest of all the defendants to ‘poke holes’ in the [evidence].” The Seventh Circuit held that the defendant “was entitled to the protection of the attorney-client privilege, because his statements were made in confidence to an attorney for a co-defendant for a common purpose related to both defenses,” even though their defenses were antagonistic in all other respects.<sup>9</sup>

On the other hand, a general meeting to discuss matters of common interest to defendants will not necessarily be covered by the privilege if the meeting is not intended to further a common litigation purpose.<sup>10</sup> Those invoking the privilege must have a “manifested common interest in the litigation;” not “merely a common business interest.”<sup>11</sup> In addition, the parties must express an intent to cooperate in the litigation and do so. As one court pointed out, the cooperation element is essential to “the joint defense privilege’s underlying assumption that the parties’ communications

were made in furtherance of their agreed-upon joint defense strategy.”<sup>12</sup>

Relatedly, actual or potential litigation is a prerequisite for the joint defense privilege to apply.<sup>13</sup> Consequently, communications relating to litigation planning or defense strategies will likely be protected if they relate to a common defense.<sup>14</sup> For example, in *Davis v. Costa-Gavras*, a libel suit was brought against the author of a book, its publishers, and the movie studio that produced a film based on the book.<sup>15</sup> The plaintiffs there argued that the author’s presence at the studio’s pre-production review meeting (along with counsel for the studio and its insurers) meant that communications at the meeting were not confidential. The studio argued that the author “was a potential codefendant and thus the meeting was a pooling of information for a joint defense.”<sup>16</sup>

The court found that because the “purpose of the meeting was to ensure the [studio’s] compliance with the law,” and the author “was likely to be named a defendant in any anticipated lawsuit,” any communications made at the meeting were deemed privileged.<sup>17</sup> Thus, in our hypothetical, in addition to joint defense communications between the New Yorker, Smersh and their counsel in the course of litigation, their pre-litigation communications (vetting) should also arguably be privileged.

### *Is a Written Joint Defense Agreement Required?*

“No written agreement is generally required to invoke the joint defense privilege.”<sup>18</sup> Thus, whether or not it was “memorialized in writing” or “was made orally or informally,” a court may find it “clear that all defendants [were] participants in [a] joint defense agreement and therefore may claim a privilege for protected communications between themselves and their counsel.”<sup>19</sup> However, “one party’s mistaken belief about the existence of a joint defense does not, and cannot give rise to a joint defense privilege.”<sup>20</sup>

Thus, even though a writing is not generally required, it is “certainly prudent practice to execute a written agreement before significant communications are exchanged,” in order to withstand a challenge to the privilege and eliminate any doubts regarding the existence of a joint defense agreement. “Without a written agreement, the party’s burden of proving

(Continued on page 45)



## Ethics Corner: Joint Defense Agreements In Defamation Litigation – A Primer

(Continued from page 44)

that a statement was made in the common interest will undoubtedly be more difficult.”<sup>21</sup>

For example, in *United States v. Weissman*, the court rejected the parties’ assertion that there was an oral joint defense agreement due to “the lack of any mention of a JDA in [the attorneys’] notes.”<sup>22</sup> Likewise, in *Bevill, Bresler & Schulman*, the court rejected a joint defense privilege claim where the party asserting it “produced no evidence that the parties had agreed to pursue a joint defense strategy.”<sup>23</sup>

Similarly, in refusing to recognize an oral joint defense agreement, the First Circuit expressed concern that the only evidence of its existence was a lawyer’s affidavit.<sup>24</sup> Accordingly, although most courts do not require a written joint defense privilege, they should be employed in order to ensure that confidential communications remain protected.

### *What Should the Joint Defense Agreement Contain?*

In order to pass muster, joint defense agreements should contain the following basic points:

- (1) the belief that the respective clients share a similar interest in the case; (2) that the attorneys want to separately pursue these similar interests without waiving any privilege, including the attorney-client privilege; (3) that any information that would normally be protected from disclosure to outside parties will remain so even though exchanged between the parties to the agreement; (4) that the attorneys believe that a sharing of information concerning their clients’ similar interests is essential to proper representation of them; and (5) that the shared information will not be disclosed to parties outside the agreement without prior consent of the party that originally provided the information.<sup>25</sup>

Beyond this, a written joint defense agreement should also cover potential ethical dilemmas that may arise down the road. For example, a joint defense agreement “should

eliminate, to the extent possible, any possibility of disqualification of counsel and any limitation on counsel’s representation of her or his client based upon participation in the joint defense group and receipt of joint defense information pursuant to a joint defense agreement.”

Thus, careful counsel will include in a written joint defense agreement terms, acknowledged by the signatures of both counsel and clients, providing that neither the joint

defense agreement nor activities undertaken pursuant to the joint defense agreement are intended to create any attorney-client relationship

and that clients included within a joint defense agreement can look for counsel only to those attorneys with which they have a written engagement letter.<sup>26</sup>

### **Conclusion**

Defamation cases, like other complex litigation, may involve separately represented parties with similar interests. In cases like *Brown v. Smersh and The New Yorker*, it would seem self-evident that the co-defendants are aligned in a common goal, such that their communications – both in pre-publication review, and in litigation – should be privileged. Nevertheless, courts do sometimes find parties’ *post hoc* assertions of intent to advance a common interest unconvincing or unsupported. To limit this risk, and deal with potential ethical dilemmas going forward, joint defense agreements should be memorialized in writing.

*Samuel Fifer is a partner with Sonnenschein Nath & Rosenthal LLP in Chicago, Illinois.*

### **Endnotes**

1. *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979).
2. *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 213 B.R. 433, 438 (Bankr. S.D.N.Y. 1997) (citations omitted).
3. *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 15-16 (D.D.C.

(Continued on page 46)

---

**... a written joint defense agreement  
should also cover potential ethical  
dilemmas that may arise down the road.**

---

**Ethics Corner: Joint Defense Agreements In Defamation Litigation – A Primer**

(Continued from page 45)

2005).

4. *Id.* at 16.

5. *Trading Technologies Intern., Inc. v. eSpeed, Inc.*, 2007 WL 1302765, at \*1 (N.D. Ill. May 1, 2007).

6. *Minebea Co.*, 228 F.R.D. at 16.

7. Patrick J. Sharkey, *Unwrapping The Mystery Of Joint Defense Agreements*, 17 No. 6 Practical Litigator, 43 (Nov. 2006).

Many seasoned practitioners dislike written Joint Defense Agreements, reasoning that revealing their existence, if not their terms, is inevitable in discovery and undesirable to boot.

8. Sheehy & Sherwood, *The Joint Defense Privilege And Its Ethical Implications*, 66 Def. Couns. J. 366, 369 (July 1999).

9. *United States v. McPartlin*, 595 F.2d at 1335 n. 12. See also *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 939 (8th Cir. 1997) (joint defense privilege applies “whenever the communication was made to facilitate the rendition of legal services to each of the clients involved in the conference”).

10. See e.g., *United States v. Weismann*, 195 F.3d 96, 100 (2d Cir. 1999).

11. *Trading Technologies*, 2007 WL 1302765, at \*10.

12. *Ludwig v. Pilkington North America, Inc.*, 2004 U.S. Dist. LEXIS 16049, at \*13 (N.D.Ill. 2004).

13. *Polycast Technology Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 50 (S.D.N.Y. 1989); *Bevill, Bresler & Schulman*, 805 F.2d at 126.

14. *Polycast*, 125 F.R.D. at 50.

15. *Davis v. Costa-Gavras*, 580 F. Supp. 1082 (S.D.N.Y. 1984).

16. *Id.*, at 1098

17. *Id.*

18. *United States v. Stepney*, 246 F.Supp.2d 1069, 1079-80 n. 5 (N.D. Cal. 2003).

19. *Trading Technologies*, 2007 WL 1302765, at \*2.

20. *United States v. Sawyer*, 878 F. Supp. 295, 297 (D. Mass. 1995) (citing *Bevill, Bresler & Schulman*, 805 F.2d at 126).

21. *Minebea Co.*, 228 F.R.D. at 16 (quoting 2 Stephen A. Saltzburg, *Fed. Rules Of Evid. Manual*, p. 501-35-36 (8th ed. 2002)).

22. *United States v. Weissman*, 195 F.3d at 99-100.

23. *Bevill, Bresler & Schulman*, 805 F.2d at 126.

24. *In re Grand Jury Subpoena*, 274 F.3d 563, 569 (1st Cir. 2001).

25. Jerry Custis, *Litigation Management Handbook*, § 1:22 (citing *Nat’l Med. Enter., Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996)).

26. Sharkey, *Unwrapping The Mystery Of Joint Defense Agreements*, supra. See also *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 251-53 (5th Cir. 1977) (attorney not “allowed to proceed against a co-defendant of a former client” in matter substantially related to one in which “confidential exchanges of information took place between the various co-defendants in preparation of a joint defense”), discussed in *United States v. Stepney*, 246 F.Supp.2d at 1075, passim. The Sharkey article contains a model form of JDA; other model JDAs, ranging from the cursory to the prolix, can be found in a variety of published sources. See, e.g., 1 Joel Androphy, *White Collar Crime*, § 3:73 (2d ed.); 1 William E. Hartsfield, *Investigating Employee Conduct*, § 10:45; 3 Roger J. Magnusson, *Shareholder Litigation*, § 28:35; 7A Geoffrey W. Gill, *West’s Fed. Forms, Admiralty*, § 11941 (4th ed.).

**RECENTLY PUBLISHED FROM MLRC**

**Bulletin 2008 No. 3:**

**MLRC’s Supreme Court Report**

**Click this ad for more**