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LDRC Prepublication/Prebroadcast Committee Reports on:

Note Retention Policies of Reporters

and

Use of "Advice of Counsel" as a Defense by Reporters

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September 24, 2002

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Note Retention Policies of Reporters

The issue of destruction of notes by reporters on a systematic policy basis has potential legal ramifications that are here explored. With respect to civil litigation that may occur as a result of articles published by reporters, the notes upon which they are based provide an integral piece to the subsequent puzzle that forms a story. Note retention policies are critical to a reporter's daily practice because destruction of such notes may be offered as evidence of actual malice in a defamation or other action. When an article or broadcast appears particularly likely to attract litigation, the premature destruction of notes relevant to the story can be in the reporter's worst interest. Many courts view the destruction or loss of evidence as an admission that the evidence would be harmful to the destroying party. However, the destruction of notes after a set period of time on stories not complained about should eliminate the problem. This article discusses the case law applicable to these concerns.

Proof of actual malice provides the turning point in a number of defamation actions. Once courts permit the destruction or loss of notes to be introduced as evidence it may be considered to give rise to a negative inference of malice and in some instances, strongly supportive of a finding of malice. The Supreme Court of the United States has defined the parameters of actual malice. While a mere failure to investigate may not constitute actual malice, it may if the story reporter's failure to investigate was weakened by inherent improbability, internal inconsistency, or apparently reliable contrary information. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Actual malice may be shown upon proof that the publisher had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Torgerson*, 563 N.W.2d at 480-81 (quoting *St. Amant*, 390 U.S. at 732).

Brown & Williamson and Progeny

The Seventh Circuit provides the largest group of cases specifically addressing the issue of reporter note destruction. In the seminal case, *Brown & Williamson Tobacco Corp. v. Jacobson*, the Seventh Circuit held that a reporter's destruction of his notes permits an *inference* of malice. 827 F.2d 1119, 1134-36 (7th Cir. 1987). Notably, the court found that the reporter's selective destruction of the relevant documents and his violation of his news station's own retention policy contributed to the finding that he had acted maliciously. *Id*. Specifically, the court found that the reporter did not destroy all of the documents pertaining to the defamatory broadcast; rather, he only destroyed those portions of the documents that would have been relevant to this litigation, and he destroyed them after the original case was dismissed, but prior to the time when the opposing party had the ability to appeal. *Id*.

The Seventh Circuit noted, "A court and a jury are entitled to presume that documents destroyed in bad faith while litigation is pending would be unfavorable to the party that has destroyed the documents." *Id*. at 1134 (citing C*oates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985); *see also S.C. Johnson & Son v. Louisville & Nashville Railroad*, 695 F.2d 253, 258-59 (7th Cir. 1982); *see also Nation-Wide Check v. Forest Hills Distributors*, 692 F.2d 214, 217-19 (1st Cir. 1982)). The Seventh Circuit went so far as to say, "The destruction of the documents is strong evidence of actual malice." *Id*. at 1136.

Several jurisdictions in addition to the Seventh Circuit, have followed the reasoning of *Brown & Williamson*. The First Circuit noted that circumstantial evidence is sufficient to draw an adverse inference from a missing document; direct evidence of a cover-up was unnecessary. *Blinzler v. Marriot Int'l*, 81 F.3d 1148, 1169 (1st Cir. 1996). Similarly, a court in the Third Circuit noted that malice, like any mental state, is often not presented by direct evidence, but rather, may be inferred from indirect evidence. *Weinstein v. Bullick*, 1994 U.S. Dist. LEXIS 3149, at *10 (E.D. Pa. Mar. 17, 1994). A court sitting in the Second Circuit found that a jury may infer from a defendant's failure to produce certain documents or data that such records would have been unfavorable to the defendant. *Shaffer v. RWP*

Group, 169 F.R.D. 19, 28 (E.D.N.Y. 1996). A Fourth Circuit court explicitly followed *Brown & Williamson* in its application of a "spoliation inference" wherein evidence destroyed by a party is automatically deemed to have been unfavorable to the position of that party. *Anderson v. Nat'l RR Passenger Corp.*, 866 F. Supp. 937 (E.D. Va. 1994). "Given the rationale of, and the policy behind, the rule, its application necessarily must take into account the blameworthiness of the offending party and the prejudice suffered by the opposing party." *Id*. at 945. Thus, *Brown & Williamson* remains good law within the Seventh Circuit, and its reach extends into other jurisdictions.

From an evidentiary standpoint outside the media context, the Seventh Circuit has also produced cases that follow in the steps of *Brown & Williamson*. In *Lac Du Flambeau Bd. of Lake Superior Chippewa Indians v. Stop Treaty Abuse, Wisconsin, Inc.*, the court found that document destruction while litigation is pending is an indication that the documents would be unfavorable to the destroying party. 41 F.2d 1190, 1193 (7th Cir. 1994). In *BASF Corp. v. Old World Trading Co.*, the Seventh Circuit determined that a lower court was entitled to draw a negative inference from a party's failure to produce documents. 41 F.3d 1081, 1098 (7th Cir. 1994). Additionally, this inference is a matter of discretion for the trial court and therefore difficult for a higher court to overturn upon review. *Id*. at 1098. Correspondingly, in *Artis v. Indiana*, the Seventh Circuit found that without a showing of bad faith on the part of the defendant, the lower court was not *required* to draw negative inferences from the defendant's failure to produce the requested documents. 1994 U.S. App. LEXIS 3864, at *3 (7th Cir., Feb. 28, 1994).

In *Chang v. Michiana Telecasting Corp.*, a case following in the footsteps of *Brown & Williamson*, the Seventh Circuit held that a scientist alleging defamation had failed to establish that a publisher and republisher acted with actual malice, as required to recover for libel under Indiana law, in reporting that the scientist was offered $1,000,000 to reveal trade secrets to a competitive firm. 900 F.2d 1085 (7th Cir. 1990). Within its analysis, the court noted that "the only colorable basis for inferring malice" was the fact that the reporter's notes relating to the story had inexplicably "vanished." *Id*. at 1090. The court speculated,

> Why destroy notes that support your story? The destruction would imply that the notes would have revealed that the reporter did not believe what he wrote or said. If [the reporter] Meade "destroyed" her notes, that would be a powerful weapon for the plaintiff. It is only a small step, [defendant] Chang insists, to infer that missing notes have been destroyed.

Id. However, the fact that an anonymous tipster materialized after the loss of the notes and largely confirmed the reporter's story, as it was broadcast, saved the day in *Chang* and circumvented the plaintiff's malice argument. The court went on to imply that even absent the tipster's verification, the loss of notes alone might not be sufficient to infer malice:

> The notes are significant only as contemporaneous records of the telephone conversations. Given the record of the parties to these conversations on what was said, any inference from the missing notes could not supply clear and convincing evidence of malice unless Meade wrote something like: "Tipster says X, but because I have not verified it I know X is untrue." Reporters do not write such notes to themselves, and the possibility that Meade jotted down thoughts showing her disbelief of the source's claims is so remote that it does not defeat a motion for summary judgment.

Id. The court in *Chang* held that under these circumstances, the reporter's missing notes, which vanished without explanation, did not raise any inference of actual malice described in *Brown & Williamson*.

In *Torgerson v. Journal/Sentinel, Inc.*, the Supreme Court of Wisconsin followed the inference analysis advanced in *Brown & Williamson* and adopted in *Chang*. 563 N.W.2d 472 (Wis. 1997). However, in *Torgerson*, the analysis did not lead the court to accept plaintiff's argument that the

defendant newspaper had published articles with actual malice. Despite the fact that the media defendant intentionally destroyed the notes from an integral interview, the court found that the destruction "did not raise the inference of actual malice described in *Brown & Williamson*." *Torgerson*, 563 N.W.2d 484. While the court agreed with plaintiff that "destruction of selected materials relevant to likely litigation is inherently suspicious" and "ordinarily sufficient evidence to support a jury verdict of actual malice," they found that the reporter's own testimony weighed against a finding of actual malice. *Id*. at 483-84. In this case the reporter gave uncontroverted deposition testimony which affirmed the accuracy of the news article in question. The Court stated that such uncontroverted testimony from the reporter made the plaintiff's assertion that the destroyed notes would have said otherwise was "no more than a remote possibility. A motion for summary judgment cannot be denied on such a remote possibility . . . ." *Torgerson*, 563 N.W.2d 552.

The Court went on to adopt the view of the earlier cited *Chang* case saying that, while it was troubled by the destruction of the notes, *Chang* provided "the more appropriate analogy for determining the significance of the note destruction in this case" and granted summary judgment for the defendant newspaper on the issue of lack of actual malice. *Torgerson*, 563 N.W.2d 484, 551-553. However, the court admonished the veteran reporter saying that he, "*should have known* that destroying notes which might be relevant to litigation was improper." *Id*. at 484 (emphasis added).

In *Maguire v. Journal Sentinel, Inc.*, the Court of Appeals of Wisconsin clarified that the *Torgerson* analysis applies only to the destruction of *relevant* notes. 605 N.W.2d 881, 889 (Wis. Ct. App. 1999). In *Maguire*, the court found a reporter's notes irrelevant to the alleged libel; therefore, their destruction was inapplicable to an actual malice determination. *Id*. Thus, in both *Torgerson* and *Maguire*, even the intentional destruction of the reporter's notes was insufficient to support a finding of actual malice, where either their relevancy or other facts mitigated such finding.

Rules of Evidence - "Spoliation"

In addition to the media law cases specifically addressing a reporter's treatment of his notes, general rules of evidence also apply to the issue of reporter note destruction. This distinction is critical for the majority of jurisdictions that have not specifically addressed the practice of reporter note retention. Generally speaking, the destruction, alteration, or suppression of evidence relevant to a cause of action or potential cause of action is known as "spoliation." *See* BLACK'S LAW DICTIONARY 1133 (7th ed. 2000). The treatment of and remedies for spoliation assume three variations, depending upon the jurisdiction. Kathleen Kedigh, *Spoliation: To The Careless Go The Spoils*, 67 MO. L. REV. 597, 598 (1999). First, spoliation can be treated under the rules of evidence; second, it may be treated as an abuse of discovery and subsequently sanctioned; and third, a victim of spoliation may pursue an independent tort against the spoliator for damages incurred as a result of the loss of evidence. *Id*. at 598-601. The rules of evidence are applied in two different forms. *Id*. at 598. In the least-employed form, evidence pertaining to the spoliated evidence is admitted and the jury is permitted to make an assessment. *Id*. In the majority of jurisdictions, however, the rules of evidence dictate that destruction gives rise to a negative evidentiary inference against the spoliator. *Id*.

"State of Mind"

The state of mind required by the party destroying evidence varies by jurisdiction. Some jurisdictions require that the party act in bad faith. Kathleen Kedigh, *Spoliation: To The Careless Go The Spoils*, 67 MO. L. REV. 597, 598 (1999) (citing *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1134 (7th Cir. 1987); *Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759 (D.C. 1990) (defining bad faith as deliberate or with reckless disregard for the relevance of the spoliated evidence*); Moore v. General Motors Corp.*, 558 S.W.2d 720, 733 (Mo. Ct. App. 1977); *Scout v. City of Gordon*, 849 F. Supp. 687, 691 (D. Neb. 1994); *Williams v. CSX Transp., Inc.*, 925 F. Supp. 447, 452 (S.D. Miss. 1996*); Wright By and Through Wright v. Illinois Cent. R.R. Co*., 868 F. Supp. 183 (S.D. Miss. 1994); *cf. Rhode Island Hosp. Trust Nat'l Bank v. Eastern Gen. Contractors, Inc.*, 674 A.2d 1227, 1234 (R.I. 1996) (stating that "a showing [of bad faith] is not essential in permitting the inference").

Other jurisdictions require intent. *Id*. (citing *Brewer v. Quaker State Oil Ref. Corp*., 72 F.3d 326, 334 (3d Cir. 1995); *Beers v. Bayliner Marine Corp.*, 675 A.2d 829, 832 (Conn. 1996); *Collins v. Throckmorton*, 425 A.2d 146, 150 (Del. 1980*); Randolph v. General Motors Corp.*, 646 So.2d 1019, 1027 (La. Ct. App. 1994); *DiLeo v. Nugent*, 592 A.2d 1126, 1132 (Md. Ct. App. 1991); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Jackson v. Harvard Univ*., 721 F. Supp. 1397, 1412 (D. Mass. 1989); *Hirsch v. General Motors Corp.*, 628 A.2d 1108 (N.J. Super. Ct. Law Div. 1993) (stating in dicta that spoliation of evidence occurring after spoliator agreed to preserve evidence satisfies the intent requirement); *Brewer v. Dowling*, 862 S.W.2d 156, 160 n.5 (Tex. Ct. App. 1993) (finding that a presumption arises for intentional spoliation but "express[ing] no opinion about whether this presumption arises in the absence of intentional destruction of evidence); *Jagmin v. Simonds Abrasive Co.*, 211 N.W.2d 810 (Wis. 1973) (finding that the duty of a manufacturer to preserve evidence in a product liability suit was that of a voluntary bailor to a bailee)).

Still other jurisdictions require gross indifference, reckless disregard, or negligence. *Id*. at 598-99 (citing *Battocchi v. Washington Hosp. Ctr*., 581 A.2d 759, 767 (D.C. 1990) (finding a jury instruction as to spoliation mandatory if spoliation is deliberate or reckless and discretionary if spoliation is merely negligent); *Barker v. Bledsoe*, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979) (finding negligence sufficient to obtain an adverse inference or sanctions against the spoliator); *Weinreich v. Sandhaus*, 850 F. Supp. 1169 (S.D.N.Y. 1994) (implying that negligence is sufficient if proof exists that spoliated evidence actually reflected the adverse inference)).

Additional jurisdictions merely require a showing of prejudice to the victim of spoliation. *Id*. at 599 (citing *New Hampshire Ins. Co., Inc. v. Royal Ins. Co*., 559 So.2d 102, 103 (Fla. Dist. Ct. App. 1990); *Weinreich v. Sandhaus*, 850 F. Supp. 1169, 1181 (S.D.N.Y. 1994); *Anderson v. Nat'l R.R. Passenger Corp.*, 866 F. Supp. 937, 945 (E.D. Va. 1994) (also taking into account the blameworthiness of the spoliator); *cf. Bolling v. Montgomery Ward & Co., Inc.*, 930 F. Supp. 234, 238 (W.D. Va. 1996) (finding that a spoliation inference should not be applied "where there is no significant evidence of an intent to conceal")).

Still others require notice of a potential claim. *Id* (citing *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Partington v. Broyhill Furniture Indus., Inc.*, 999 F.2d 269, 272 (7th Cir. 1993); *Shipley v. Dugan*, 874 F. Supp. 933, 940 (S.D. Ind. 1995) (finding that inadvertence was sufficient if spoliator had notice of claim); *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah Ct. App. 1994)).

Finally, remaining jurisdictions require a showing that the evidence existed, the spoliator had control of the evidence, and the evidence was withheld or suppressed. *Id*. (citing *Wardrip v. Hart*, 949 F. Supp. 801, 804 (D. Kan. 1996); *F. R. Patch Mfg. Co. v. Protection Lodge*, No. 215, Int'l Ass'n of Machinists, 60 A. 74 (Vt. 1903)).

Rationale for Adverse Inference

Two rationales support an adverse inference determination from the destruction of evidence. *Nation-Wide Check v. Forest Hills Distributors*, 692 F.2d at 218. First, the "evidentiary rationale" takes the common sense view that,

> [A] party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document.

Id. The second rationale focuses on the inference's prophylactic and punitive effects. *Id*. Permitting the inference to be drawn "presumably deters parties from destroying relevant evidence before it can be introduced at trial." *Id*. Viewed as a penalty, the inference places "the risk of an erroneous judgment on the party that wrongfully created the risk." *Id*. Both of these rationales logically explain the majority view that destruction of evidence, under any circumstance, is objectionable.

In *Nation-Wide Check v. Forest Hills Distributors*, a case cited in *Brown & Williamson*, the First Circuit noted,

> When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him.

692 F.2d at 217. Notably, the court went on to say, "[t]he inference depends, of course, on a showing that the party had notice that the documents were relevant at the time he failed to produce them or destroyed them." *Id*. at 218. This cautionary note may be critical in "notice" jurisdictions, as a reporter there would not be liable for destroying notes as a matter of practice, absent notice of possible litigation. In *Nation-Wide*, the court phrased the issue as being a matter of relevance; notably, whether the destroyed documents were at all relevant to the suit.

> Once this minimum link of relevance is established, however, we believe that the district court has some discretion in determining how much weight to give the document destruction, and prophylactic and punitive considerations may appropriately be taken into account.

Id. at 219. Thus, the court found that policy considerations and notions of fairness logically precede negative inference determinations.

Notions of relevance and fairness are inextricably intertwined with the malice analysis and determining what motivated the destruction of the evidence. In *S.C. Johnson & Son v. Louisville & Nashville Railroad*, also cited by *Brown & Williamson*, the court cautioned, "[t]he crucial element is not that the evidence was destroyed but rather the reason for the destruction." 695 F.2d at 258. The court explained:

> It is elementary that if a party has evidence…in its control and fails to produce it, an inference may be warranted that the document would have been unfavorable. *However…it must appear that the party had some reason to suppose that non-production would justify the inference…the totality of the circumstances must bring home to the non-producing party notice that the inference may be drawn.*

Id. at 259 (emphasis added) (quoting *Commercial Ins. Co. of Newark v. Gonzalez*, 512 F.2d 1307, 1314

(1st Cir. 1975)). Under this line of reasoning, an inference may not be drawn merely because evidence was destroyed. Rather, the complaining party must also provide proof that the defendant acted with some degree of illicit motivation.

Advising Reporters

As for the question of how long a reporter should retain his or her notes, case law does not directly address this issue. A reporter's safest practice is to retain all notes for a pre-determined amount of time, with the requisite time set by station policy. However, no case law explicitly mandates this practice. Nonetheless, if courts view destruction of notes as proof of actual malice, retention of notes for the time period in which litigation may be brought should erase the negative inference. Experience dictates that if a potential plaintiff believes a published story about him or her is factually incorrect or otherwise actionable, his or her complaint or grievance will surface within the first thirty days following publication or broadcast. However, there are situations where a complainant does not surface until near the statute of limitations expiration date, most commonly, two years. Thus, it may be a wiser practice to retain notes for the full period covered by the statute. The main exceptions promoting an even longer period of time for retention is (1) if the media entity has reason to believe that the story may lead to litigation or (2) if the story is a matter of national or recurring importance.

We suggest that after two years, the usual statutory period, a reporter can routinely purge notes for stories that have not received complaints and are not suggestive of litigation. Practical considerations, such as the need for desk and storage space, give a sound basis for a note destruction policy that could be shorter. Adherence to standardized station policies outlining note destruction time frames help eliminate the inference that notes were purged out of ill-will or in an effort to stymie litigation.

One remaining issue is the repercussion that follows from a reporter violating his or her own station policy. The court in *Torgerson v. Journal/Sentinel, Inc.* cautioned that, "[a] court's role is to interpret and apply the law, not to enforce standards of journalistic accuracy or ethics." 563 N.W.2d at 484. Arguably, this statement could be read to imply that a station's standard is irrelevant to the actual malice determination. In *Woods v. Evansville Press Co., Inc.*, the Seventh Circuit noted, "[J]ournalism skills are not on trial in this case. The central issue is not whether [the article] measured up to the highest standards of reporting or even to a reasonable reporting standard, but whether the defendant[] published [the article] with actual malice." 791 F.2d 480, 489 (7th Cir. 1986), *quoted in Torgerson*, 563 N.W.2d at 484.

The distinction between unethical journalistic practices and actual malice is critical. Mere disregard of a station policy may be insufficient to hold a journalist liable for actual malice, as to do so would create a paternalistic legal framework. However, a finding that a journalist violated his or her station policy arguably *supports*, but does not mandate, an actual malice determination. Whether an action was done with actual malice, irrespective of the station policy, is the critical inquiry. It may be that the reporter and media entity can avoid a negative inference if he or she has a non-intentional reason for the premature destruction of notes in violation of policy. In other words, whether a reporter adhered to the station policy merely provides a starting point from which to begin analyzing if he or she acted with actual malice. However, we have no case law to offer in support of this comment, nor do we find any case law which negates it either.

Adherence to a station policy will likely protect a reporter and the media entity from liability by providing a justiciable claim for why the reporter destroyed his or her notes absent actual malice. Similarly, if a reporter's story conflicts with his or her notes, this mistake may be evidence of negligence, but arguably not enough to satisfy the actual malice requirement. As mentioned above, *Brown & Williamson* notes that a reporter's violation of his news station's own retention policy adds to the finding that he had acted maliciously. 827 F.2d 1119. However, in *Brown & Williamson*, the finding that the

reporter violated his station's policy was not determinative; rather, it was merely one element in the actual malice calculus. Given that the case law bases a finding of actual malice on the combination of note destruction plus some evidence of bad faith, arguably the violation of a station policy speaks to a reporter's bad faith or illicit motive unless some reason supportive of inadvertence or inattention for the destruction is found. The available case law leads to the finding that while a station policy *is* relevant, to what degree the above considerations will eliminate the negative inference of destruction is largely untested.

Conclusion

In conclusion, a reporter's best defense in litigation challenging the accuracy or validity of a story are the notes substantiating the story. On the other hand, if the reporter intentionally destroyed his notes, absent or contrary to station policy, an adverse inference will likely arise to give added support to a finding of malice. From a legal standpoint, a reporter's best practice in this litigious age is to retain all notes for a period of two years with such notes preserved for much longer times in the event of a complaint or litigation. If litigation ensues then such notes should be preserved until the case is finally and completely resolved.

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Use of "Advice of Counsel" as a Defense by Reporters

By Dan Byron and Jonna McGinley

September 24, 2002

Use of "Advice of Counsel" as a Defense by Reporters

Attorney-Client Privilege and Waiver

The question has arisen whether the use of "advice of counsel" as a defense by reporters in defamation and other cases constitutes a waiver of the attorney-client privilege between the reporters and their counsel. The attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients" by protecting confidential communications made for the purpose of rendering legal services. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The basic elements required to establish a claim of the attorney-client privilege are:

(1) the asserted holder of the privilege is or sought to become a client;
(2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
(3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
(4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), *quoted in Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 n.1 (N.D. Cal. 1976).

The client, not the attorney, holds the privilege; therefore, an attorney may not waive the privilege on behalf of his or her client. *See, e.g., United States v. Walters*, 913 F.2d 388 (7th Cir. 1990). However, the privilege may be waived, either expressly or impliedly, under certain circumstances. *See, e.g., Kremer v. Cox*, 682 N.E.2d 1006, 1017 (Ohio Ct. App. 1996). Several courts have concluded that a litigant waives his attorney-client privilege by placing his attorney's advice directly at issue in the litigation. *See, e.g., Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 699-700 (10th Cir. 1998); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3rd Cir. 1995) ("Under such circumstances, the client has made a conscious decision to inject the advice of counsel as an issue in the litigation"); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863-64 (3rd Cir. 1994) (holding that where a party neither raises advice of counsel as an affirmative defense nor evinces a clear intent to waive the attorney-client privilege by placing at issue reliance on the advice of counsel, the party does not lose the protection of the privilege when his or her state of mind is placed at issue); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992).

We find no case law covering the "advice of counsel" issue with regard to the testimony of journalists or reporters specifically. There is a 1995 decision, however, which considers the issue of whether an attorney for a media entity can cause a waiver of the attorney-client privilege as a result of his disclosure to the plaintiff of a libel review report prepared for his client. *Abdullah v. Sheridan Square Press*, 1995 WL 413171 (S.D.N.Y. 1995). This case involved a claim for libel based upon the publication of a book. Plaintiff had moved to disqualify the attorney and his firm from continuing to represent a publisher on the basis that the attorney had provided his client with a libel review report of the challenged manuscript which had been given in discovery to the plaintiff. Plaintiff argued that the attorney could be compelled to testify with regard to any legal advice given in connection with the issuance of the disclosed report and he and his firm should therefore be disqualified. Plaintiff theorized that submission of the libel review report to the plaintiff waived the attorney-client privilege as to those discussions between the attorney and the publisher which were connected to his writing of the report.

The court, however, disagreed and held that the attorney and his firm were not necessary witnesses, that any testimony of the lawyer was merely cumulative and that no material discrepancy existed between the attorney and his client's testimony. In conclusion the court stated that "the attorney's publication to the plaintiff of communications between himself and his clients, *i.e.*, [attorney's] alleged 'libel review,' does not result in the waiver of the attorney-client privilege as to any undisclosed portions of such communications, or as to any other related communications concerning the same subject matter." 1995 WL 413171, *2 (citing *In Re Von* Bulow, 828 F.2d 94, 102 (2d Cir. 1987)).

The important point to note is that in this instance the attorney's disclosure of advice to a plaintiff does not waive the attorney-client privilege. *See also* the cited case of *In Re Von Bulow*, 828 F2d 99, where it was held that because the attorney-client privilege belongs solely to the client and may only be waived by him, an attorney may not waive the privilege without his client's consent.

Non-Media Defendants, Implied Waiver

As for cases outside the media arena, there is abundant case law applicable to this issue in general. In cases where waiver of the attorney-client privilege is sought because a claim or defense based upon "advice of counsel" is asserted, "[c]ourts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice." *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d at 863.

> Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant matter. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.

Id. Additionally, finding a waiver in this situation is "consistent with the essential elements of the privilege." *Id*. In order for the privilege to be waived, the client must affirmatively place his attorney's advice at issue, providing predictability for the client with respect to the circumstances by which he waives his privilege. *Id*.

The federal standard for determining whether a client has impliedly waived the attorney-client privilege is generally stated as follows:

(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party;
(2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
(3) application of the privilege would have denied the opposing party access to information *vital* to his defense.

Chase Manhattan Bank v. Drysdale Securities Corp., 587 F. Supp. 57, 58 (S.D.N.Y. 1984), *quoted in S. Cal. Gas Co. v. Pub. Util. Comm'n*, 784 P.2d 1373, 1379 n.11 (Cal. 1990). "Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct." *Id*.

Second Circuit

In the Second Circuit, pleading "advice of counsel" waives any privilege that formerly protected attorney-client communications. *See Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964). In New York, a state subject to the Second Circuit's rulings, the waiver operates "with respect to

all communications to or from counsel concerning the transactions for which counsel's advice was sought." *Village Bd. of the Village of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (N.Y. 1987) (emphasis added). In addition, "selective disclosure" of "self-serving communications" while reliance on the privilege for "damaging communications" is impermissible. *Id*; *see also United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("the attorney-client privilege cannot at once be used as a shield and a sword").

The Second Circuit has recognized that implied waiver may be found where the privilege holder "asserts a claim that in fairness requires examination of protected communications." *Bilzerian*, 926 F.2d at 1292. In *Bilzerian*, the court found the waiver particularly applicable where a client "put his knowledge of the law and the basis for his understanding of what the law required in issue," yet attempted to shield himself from inquiry by pleading an advice of counsel defense. *Id*. "Whether fairness requires disclosure has been decided by the courts on a case-by-case basis, and depends primarily on the specific context in which the privilege is asserted." *In Re Grand Jury Proceedings; United States v. Doe*, 219 F.3d 175 (2d Cir. 2000).

DC Circuit

Similarly, the United States Court of Appeals for the District of Columbia Circuit relies on fairness considerations to determine when waiver is appropriate. In *United States v. White*, the D.C. Circuit refused to find a waiver of the attorney-client privilege based on "a general assertion lacking [any] substantive content that one's attorney has examined a certain matter." 887 F.2d 267, 271 (D.C. Cir. 1989). The court explained,

> "Where a defendant neither reveals substantive information, nor prejudices the government's case, nor misleads a court by relying on an incomplete disclosure, fairness and consistency do not require the inference of waiver." *Id*.

See also Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992) (fair to find that party who put advice in issue waived privilege by claiming tax position stated in securities disclosure document was reasonable because it was based on advice of counsel); *see also Kremer v. Cox*, 682 N.E.2d 1006, 1023 (Ohio Ct. App. 1996) (Mahoney, J., concurring in judgment, "Fairness requires that the court not permit the attorney-client privilege…be used as [a] weapon instead of [a] shield."). Thus, in some jurisdictions, the existence of waiver and its scope may be influenced by overall fairness.

California

Consistent with jurisdictions nationwide, courts sitting in California have noted that, "[a]n important consideration in assessing the issue of waiver is fairness." *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. at 929 (N.D. Cal. 1976) (citing *Bierman v. Marcus*, 122 F. Supp. 250 (D.N.J. 1954)); *see also So. Cal. Gas Co. v. Pub. Util. Comm'n*, 784 P.2d at 1378. A party may not selectively disclose communications while asserting the privilege in other, related communications about the same subject. *Handgards*, 413 F. Supp. 926 (citing *Int'l Telephone and Telegraph Corp. v. United Telephone Co. of Fla.*, 60 F.R.D. 177, 185-86 (M.D. Fla. 1973)). A voluntary waiver of the privilege in one circumstance acts as a waiver of the remainder of privileged communications about the same subject. *Id*. However, California courts generally limit implied waivers "to situations where the client has placed into issue the decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters." *Transamerica Title Ins. Co. v. Superior Court of Santa Clara County*, 233 Cal. Rptr. 825, 829 (Cal. Ct. App. 1987).

In California district court, "[t]he *deliberate injection* of the advice of counsel into a case waives the attorney-client privilege as to communications *and documents* relating to the advice." *Handgards*, 413 F. Supp. at 929 (emphasis added). In *Handgards*, the court held that a defendant impliedly waived his attorney-client privilege when he indicated his intent to call his attorneys as witnesses. *Id*. at 926. Where a party places into issue a matter that is normally privileged, California courts find that "the gravamen of the lawsuit is so inconsistent with the continued assertion of the privilege as to compel the conclusion that the privilege has in fact been waived." *Transamerica*, 233 Cal. Rptr. at 828. In addition, the court in *Handgards* expanded the waiver beyond the admissibility of evidence at trial and found the waiver operated as early as discovery. 413 F. Supp. at 929. Noting that "the same rules of privilege govern the scope of discovery as generally govern the admissibility of evidence at trial," the District Court found materials expected to fall under a waiver of the privilege at the time of trial were subject to pretrial discovery. *Id*. This expansive reading of the privilege waiver leaves little protection for the party asserting an "advice of counsel" defense.

Indiana

Likewise, in federal district court in Indiana it has been said, "[w]hen a party relies on advice of counsel…the general rule is that the party waives the attorney-client privilege regarding all otherwise privileged communications on the subject of the advice." *Eli Lilly and Co. v. Zenith Goldline Pharm., Inc.*, 149 F. Supp. 2d 659, 661 (S.D. Ind. 2001); *see also Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098-99 (7th Cir. 1987) (applying Indiana privilege law and noting that disclosure applies only to communications on the *specific matter* at issue). In *Harter v. Univ. of Indianapolis*, the court explained:

> [W]hen a client files a lawsuit in which his or her state of mind (such as good faith or intent) may be relevant, the client does not implicitly waive the attorney-client privilege as to all *relevant* communications unless the client relies specifically on advice of counsel to support a claim or defense.

5 F. Supp. 2d 657, 664 (S.D. Ind. 1998) (emphasis added). Thus, reliance on "advice of counsel" erases the protection of the privilege from all related communications. Indiana courts also echo concerns regarding fairness and condone the use of the privilege as both a shield and a sword. *Eli Lilly*, 149 F. Supp. at 662. If a party claiming waiver of the privilege (plaintiff) can obtain the privileged material through lesser-intrusive means, the party claiming an advice of counsel defense (defendant) should not be compelled to disclose the privileged material. *Bartlett v. State Farm Mutual Auto. Ins. Co.*, 206 F.R.D. 623, 2002 U.S. Dist. LEXIS 9284, at *9 (S.D. Ind. May 22, 2002).

Scope of Waiver

The scope of the waiver is generally consistent across jurisdictions. The Third Circuit, which has developed an extensive body of law in this area, notes that in determining to what extent the privilege is waived, the party claiming the privilege "should not be permitted to define selectively the subject matter of the advice of couns el on which it relied in order to limit the scope of the waiver of the attorney-client privilege and therefore the scope of discovery." *Glenmede Trust Co. v. Thompson*, 56 F.3d at 486.

The court in *In re Pioneer Hi-Bred Int'l, Inc.*, held that the attorney-client privilege was waived "with respect to all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice," to the extent the documents dealt with the merger advice at issue. 238 F.3d 1370, 1374-75 (Fed. Cir. 2001). *In re Pioneer* emphasized that establishing a connection

between the communication or documents and the advice rendered was critical in finding a waiver. Generally speaking, the waiver operates with respect to all documents that relate to the subject matter of the advice provided by the attorney to his or her client.

Attorney vs. Client

An additional consideration with regard to waiver is the subsequent conflict that may arise between the client and his or her attorney, whose advice the client claims to have relied on, possibly to the client's detriment. Notably, under state rules of professional conduct, an attorney is instructed to avoid representation of a client "if the representation of that client may be materially limited…by the lawyer's own interests." MODEL RULES OF PROF'L CONDUCT R.1.7(b) (1995) The Model Rules of Professional Conduct provide paradigm rules, which states may choose to follow; Rule 1.7, addressing conflicts of interest, has been adopted by most states. However, under this conflict rule, an attorney may continue representation if the attorney "reasonably believes" his client would not be "adversely affected," *and* the client consents after consultation. MODEL RULES OF PROF'L CONDUCT R.1.7(b)(1) and (b)(2). Generally speaking, if an attorney feels he cannot adequately represent his client, he must refrain from representation. A disagreement over the "advice of counsel" provided might create a conflict that requires attorney disqualification.

Conclusion

While a detailed survey of how individual states treat the "advice of counsel" defense and what limits courts place around required disclosure may be useful, it does not appear to be particularly necessary. Generally speaking, jurisdictions nationwide treat a client's application of the "advice of counsel" defense consistently. Generally, courts will require disclosure of testimony, documents and materials related to the subject matter for which the client sought advice. In that connection, we who give advice to reporters or editors regarding the content of news stories should understand from the outset that such advice could someday be revealed to adverse parties and we should plan accordingly. If the advice is sound, however, it should serve to libel proof the news article and assist in eliminating the possibility of litigation or liabilities in connection therewith. Thus it may well be in our client's best interests to willingly assert the advice of counsel defense and provide to opposing counsel the conversations and documents related to same. Under such an analysis, we should see this defense as a useful tool and a help, not a hindrance.