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MLRC UPCOMING EVENTS

MEDIA AND ENTERTAINMENT LAW CONFERENCE January 17, 2013, Los Angeles, CA

LEGAL ISSUES CONCERNING HISPANIC AND LATIN AMERICA MEDIA March 11, 2013, Miami, FL

> MLRC STANFORD DIGITAL MEDIA CONFERENCE May 16-17, 2013, Palo Alto, CA

MLRC LONDON CONFERENCE September 23-24, 2013, London, England

MLRC ANNUAL DINNER & FORUM November 13, 2013, New York, NY

Manhattan Judge Dismisses Libel Claim Brought by Brooklyn Judge

Justice Martin failed to

clear the "high" bar set

for public officials to

prevail in a libel claim.

By Laura R. Handman, Erin N. Reid and Lisa Zycherman

A New York Supreme Court judge granted summary judgment to the Daily News, LP and former columnist Errol Louis ("Daily News"), dismissing a libel claim brought by Kings County Supreme Court Justice Larry D. Martin. *Martin v. Daily News, L.P.*, No. 100053/08 (N.Y. Sup. Ct. N.Y. County, Dec. 3, 2012). In the sometimes difficult annals of judge-plaintiff libel suits, this is a welcome result.

In granting the defendants' motion for summary judgment, New York State Supreme Court Justice Martin Schulman found that Justice Martin failed to clear the "high" bar set for public officials to prevail in a libel claim. "Based upon a review of all the submissions, the plaintiff's arguments concerning Louis's research methods and DNLP's decision to publish" "fall short of establishing that defendants' 'entertained serious doubts as to the truth of [the]

publication or acted with a high degree of awareness of ... probable falsity." As a result of the Court's unequivocal finding that Martin failed to present sufficient evidence of actual malice to preclude summary judgment, the Court ruled moot the parties' cross-motions to exclude

plaintiff's expert on journalism standards and defendants' expert on judicial ethics.

Background

Plaintiff Larry D. Martin, a New York state trial court judge sitting in Brooklyn, filed his original libel action in January 2008 in State Court in Manhattan against the Daily News and its then op-ed columnist Errol Louis, based on four publications in January and February of 2007: two columns, a Daily Politics blog post and a subsequent post by Louis. Suit was also brought against attorney Ravi Batra for two posts on the Daily News website. Martin's complaint alleged that the publications portrayed him as a "corrupt" jurist who improperly presided over a case in which he was accused of having a conflict of interest. The conflict of interest allegedly

arose because Jerome Karp, the lawyer who had defended Martin three years before in proceedings before the New York Commission on Judicial Conduct ("CJC"), was said to be involved as "shadow counsel" behind the scenes in a series of related real estate disputes, one of which was before Martin. When the issue was raised in the proceeding before Justice Martin, he refused to recuse himself. The alleged conflict became the basis for a lawsuit brought by Batra's client, Martin Riskin, against Karp in November 2006. The allegations in the Karp suit and supporting documents were the basis for the columns and blog posts in suit.

Claims Based on Three Out of Four Publications Dismissed

On defendants' motion to dismiss, in its July 14, 2009 decision, No. 100053/08, 2009 WL 2221457 (N.Y. Sup. Ct.

N.Y. County), the trial court dismissed all claims against Batra and claims against the News Defendants based on three of the four publications as not susceptible of a defamatory meaning as to Martin.

The Court denied dismissal of the claim pertaining to Louis' February 2007 column

("Weed Out Bad Judges"), which was primarily a call for more resources for the CJC to investigate judicial wrongdoing. The key portions of the column still at issue were:

[n]ow the judge is in the hot seat again. According to a lawsuit filed in November, Martin is hearing a real estate case, *Singer v. Riskin*, in which *the judges' personal lawyer* – Jerome Karp, who defended Martin before the commission in the letterwriting cases – is representing one of the parties in the case, Ted Singer (emphasis in original).

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That's an obvious conflict of interest. Martin should have disclosed the Karp connection and recused himself from the case – but he didn't. So [Commission Administrator] Tembeckjian's staff will need to spend time and money to sort through the charges.

* * *

[T]he commission needs beefed-up support to do more labor-intensive, old-fashioned investigation and enforcement. It's the only way to keep a close eye on judges who consider themselves above the law.

The Court believed that three aspects of the column were susceptible of defamatory interpretation: a statement that Martin had "an obvious conflict of interest" when he denied recusal and decided motions in one of the related suits because of the alleged involvement of his CJC lawyer; a claimed false implication that the conflict was being investigated by the CJC; and another claimed false implication that Martin was "corrupt." Plaintiff argued that the

corruption implication was derived from (1) the column's references to two notoriously "crooked" Brooklyn judges, (2) the language of the column that immediately followed and led into the discussion of Martin: "It takes time and money to root out these crooks because the corruption can be hidden or subtle, requiring intensive investigation. Take the case of Justice Larry Martin," (3) the column's reference to the prior public admonishment of Martin by the CJC, and (4) the column's closing line that the CJC needed money "to keep a close eye on judges who consider themselves above the law." Plaintiff also relied on the column's headline and subhead: "Weeding Out Bad Judges: More Resources Will Help Nail Corrupt Judges" and the cartoon accompanying the column of a sinister-looking judge under a microscope. The Court ruled that those statements were capable of the defamatory meaning that he was corrupt and were not expressions of opinion nor protected by the fair report privilege accorded by N.Y. Civil Rights Law 74.

Restoration of Columns Held Not to be Republication

In March 2011, more than three years after the initial suit, plaintiff filed a second action alleging that, because the column still in suit had been restored to the Daily News' website in March 2010, after having "fallen off" the site during a conversion from one content management system to another, and because of the added features it exhibited (such as share buttons), the column had been republished triggering a new statute of limitations. In its February 10, 2012 decision, *Martin v. Daily News, L.P.*, No. 103129/11, 2012 WL 1313994 (N.Y. Sup. Ct. N.Y. County), the Court dismissed the new lawsuit finding that, under the single publication rule, the reposting did not constitute republication

triggering the statute of limitations. The restoration of the columns without significant alteration was viewed as "akin to delayed circulation of the original," not republication, and the hyperlinks to social media and networking sites was not reaching a "new audience," even if arguably an expanded one. *See* Anne B. Carroll, "Online Article With 'Share Button' Not A New Publication," MLRC Media Law Letter, Feb. 2012, at 7.

Martin's complaint alleged
that the publications
portrayed him as a "corrupt"
jurist who improperly
presided over a case in
which he was accused of
having a conflict of interest.

Summary Judgment Granted On Actual Malice

Three years of what the Court called "lengthy and somewhat contentious discovery" on claims based on the remaining column ensued, including three days each of deposition of the judge and the columnist, and a battle over production of non-public CJC documents. Ultimately, Batra was ordered to produce his complaint to the CJC about Justice Martin's alleged conflict of interest, a complaint that was, in fact, pending at the time the February 2007 column was published. Discovery also revealed, unbeknownst to the parties at the time, that the CJC had issued a decision declining to investigate Batra's allegations against Martin a week after the column's publication.

(Continued on page 5)

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On December 3, 2012, the Court issued its decision granting the defendants' motion for summary judgment made after the close of discovery. The Court rejected Martin's arguments that bias and actual malice were demonstrated by (1) the inclusion of allegedly erroneous and defamatory statements in the column; (2) Louis' reliance on Batra as a source for his information; (3) Louis' alleged failure to fact check his information prior to publication; (4) his failure to contact the judge for comment prior to publication; (5) Louis' "ulterior motive" of furthering his own career by publicizing "scandalous" information about public officials; (6) defendants' failure to retract the column or publish an editor's note reporting on the decisions, post-publication, by the CJC not to investigate Martin and by Justice Shulman dismissing the lawsuit against Karp that had been the basis for the column; and (7) defendants' reposting of the column in

March 2010. The Court found that "[a] review of the parties' submissions, including Louis's deposition testimony, fails to reveal" that defendants published the column "either with knowledge that it contained false information or with reckless disregard for whether or not the information contained therein was false."

In support of summary judgment, defendants argued that Martin could not establish actual malice by attacking Batra's

reliability because Louis based his column on uncontroverted documentary evidence, not on allegations in the suit drafted by Batra. The Court noted that Louis' deposition testimony established that he was aware of questions regarding the reliability of Batra as a source, and that he addressed that issue in his prior column by acknowledging Batra's notoriety and framing the source's usefulness thus: "Who better to expose a rotten system than a man who once participated in it?" The Court further noted that Louis' decision to summarize the court filings alleging a possible conflict of interest without independently verifying those allegations or detailing the legal complexities was sufficient to relate the substance of those public documents, documents used to support Louis' call for the CJC to investigate the allegations.

Defendants argued, and the Court agreed in previous rulings, that post-publication events did not establish that defendants knew what they published was false or had serious doubts based on the information they had at the time of publication. Defendants maintained that their decision not to issue a retraction or report on post-publication decisions did not support an inference of actual malice because it did not prove a wrongful state of knowledge at the time of the initial publication. The only factual error – the caption of the case over which Martin was presiding – was corrected in a subsequent blog post and the Court had previously held that the error was of "no import."

Defendants also argued that Martin could not establish "purposeful avoidance of the truth" based on Louis' decision not to contact Martin for comment because Louis believed Martin – a sitting judge – could not comment and could not have contradicted the material facts and undisputed documentary evidence, namely that he presided over a case in which Karp, the attorney who had previously represented him before the CJC, had now been retained to negotiate a global

settlement. (Louis had sought comment from Karp's attorney prior to publication.) The Court concluded that plaintiff's arguments concerning Louis' "research methods" "fall short of establishing" that defendants entertained serious doubts as to the truth of the reporting or acted with a high degree of awareness of probable falsity. The Court went on to hold that, "even if, as plaintiff argues," defendants "were unprofessional or negligent in their fact-

checking and/or rush to publication, 'such proof of mere negligence does not suffice to establish actual malice by clear and convincing evidence'" nor a "willful avoidance of knowledge." Citing Mill, Milton and *New York Times v. Sullivan*, the Court reiterated the "breathing space" necessary for even false statements that will produce "the clearer and livelier impression of truth, produced by its collision with error."

Post-publication events
did not establish that
defendants knew what they
published was false or had
serious doubts based on the
information they had at the
time of publication

Motions to Exclude Experts Deemed Moot

The parties also filed cross-motions to exclude expert witness testimony, which the Court found to be moot in view of the decision on summary judgment. The plaintiff offered the testimony of Glenn Guzzo, a former editor and now journalism instructor at the University of North Florida, as an

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expert in the field of journalism. Defendants moved to exclude Guzzo's testimony on the grounds that (1) his opinion on journalism standards was irrelevant where the question presented was whether defendants acted with actual malice, which goes to a subjective state of mind; (2) Guzzo's opinion was unreliable because his report contained material factual errors and omissions; and (3) plaintiff's contention that Guzzo would opine on defamatory meaning was unfounded because Guzzo was not qualified as a linguistic expert and expert testimony about what a reasonable reader would understand is impermissible. Although it did not rule on defendants' motion to exclude Guzzo's testimony, the Court's order granting summary judgment to the defendants noted Louis' deposition testimony that when faced with source reliability issues "he relied on what he referred to as his 'journalistic judgment," and that he viewed "the point of his column 'is to give my opinion on important issues of the day.""

Defendants offered the testimony of Professor Bruce A. Green, the director of the Louis Stein Center for Law and Ethics and Fordham University and an expert on judicial and lawyer ethics, to opine on questions of judicial ethics in connection with defendants' motion for summary judgment. Plaintiff moved to exclude Professor Green's testimony principally on the ground that his opinion misapplied the law and/or usurped the function of the court, but this motion was deemed moot and the Court issued no ruling.

Prior to ruling on summary judgment, the Court, at defendants' request pursuant to the terms of a confidentiality agreement, sealed limited portions of the moving papers. By order dated December 3, 2012, the Court, *sua sponte*, sealed all the defendants' moving papers.

Plaintiff has filed a notice of appeal of the decisions below. The Daily News has noticed the appeal of the sealing order.

Laura R. Handman, Erin N. Reid, and Lisa Zycherman, Davis Wright Tremaine LLP, represented The Daily News and Errol Louis. Anne B. Carroll, Vice President and Deputy General Counsel for the Daily News, did the principal drafting of the motions to dismiss and summary judgment. Since her retirement at the end of August 2012, Matthew Leish, Vice President and Assistant General Counsel, has represented the Daily News and Louis Errol. Louis left the Daily News in November 2010 and is now host of Inside City Hall on New York One. Harold Schwab of Lester Schwab Katz and Dwyer, LLP, represented Justice Martin. Stuart Blander of Heller, Horowitz & Feit, P.C. has also represented the Plaintiff.



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First Circuit Affirms Dismissal of Lawsuit Against Barbara Walters

Memoir Triggered Claims for Tortious Interference, Libel and Emotional Distress

A 29 year old incident recounted more recently in Barbara Walters' memoir was the grist for a suit for tortious interference, defamation and emotional distress. *Shay v. Walters*, No. 12-1494 (1st Cir. Dec. 18, 2012) (Torruella, Selya, Howard, JJ.). Although the allegations painted a "poignant picture," plaintiff failed to state a claim on any of the counts.

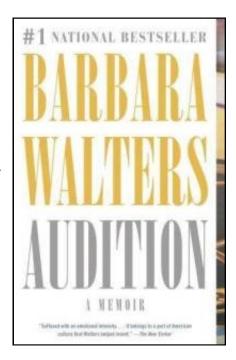
Background

In 1983, plaintiff Nancy Shay attended a private Connecticut boarding school at the same time as Barbara Walters' daughter Jackie. She alleged that she and Jackie were found in bed together arm-in-arm and that she, but not Jackie, was expelled from school. Per the complaint, Barbara Walters told her at the time not to discuss the incident because it would ruin all three of reputations. According complaint, the expulsion led to a decades' long dissent into depression and substance abuse, or as plaintiff more eloquently pleaded, a "revolving door of rehabilitation centers, jails, and unhappiness."

In 2008, Barbara Walters published a memoir entitled *Audition* which contains a chapter about Walters' relationship with her daughter Jackie. The chapter includes a

brief reference to plaintiff and the old incident at the boarding school. According to Walters' version, plaintiff "and Jackie had been found in the nearby town, high on God-knowswhat" and she "told the school that Jackie was never to be allowed to visit [Nancy] again."

In 2011, plaintiff sued Walters for tortious interference, defamation, and emotional distress. Walters moved to dismiss on statute of limitations grounds and for failure to state a claim. The district court granted the motion.



First Circuit Decision

The tortious interference claim was based on Walters' alleged conduct 29 years ago. In essence, plaintiff blamed Walters for her expulsion from school. Massachusetts has a three year statute of limitations for tortious interference, but plaintiff argued the statute should be equitably tolled until the memoir was published, which she says made clear for the first time Walters' involvement in her expulsion. In addition,

her substance abuse problems made it impossible to learn the truth any earlier.

Affirming dismissal, the Court found that plaintiff's own complaint acknowledged an awareness of possible grounds to connect Walters to the expulsion at the time it occurred. Further, "the weight of authority teaches that alcoholism is generally not a basis for equitable tolling."

As to the defamation claim, the Court affirmed that any references to plaintiff were not defamatory. Anyone who recognized plaintiff as the "Nancy" mentioned in the memoir would be aware of the incident and knowledgeable of plaintiff's view that she was the victim of an injustice. To the extent additional and unwanted publicity was triggered by the filing of the lawsuit, that was plaintiff's own doing. Articles discussing the filing of

the lawsuit are not statements attributable to Walters.

The defamation claim also failed under the *Twombley/Iqbal* standard because it failed to plausibly allege either actual malice or negligence. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As Judge Selya wrote for the Court:

While the plaintiff's complaint contains conclusory allegations about "ill-will" and

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"actual malice," it contains no factual assertions that in any way lend plausibility to these conclusions. Similarly, complaint does not contain any facts suggesting that the defendant negligently in publishing the challenged statements. In determining whether allegations cross the plausibility threshold, an inquiring court need not give weight to unembellished bare conclusions, pertinent facts. So it is here.

Finally, the Court found that plaintiff's claim for negligent infliction of emotional distress was derivative of the failed defamation claim, adding "the Supreme Court has made it pellucid that a failed defamation claim cannot be recycled as a tort claim for negligent or intentional infliction of emotional distress." *Citing Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56-57 (1988).

Barbara Walters was represented by Orin Snyder, Gibson, Dunn & Crutcher LLP; and William F. Benson, Sugarman, Rogers, Barshak & Cohen, P.C. Plaintiff was represented by Mark Ellis O'Brien.

Court Analyzes Defamatory Meaning on the Web

Reinstates Claim Over Severed Horse Head Allegation

A New York appellate court reinstated a defamation count over a statement made on a newspaper website accusing plaintiff of leaving a severed horse head in a politician's swimming pool. *LeBlanc v. Skinner*, No. 8310/08 (N.Y. App. Dec. 12, 2012) (Dillon, Angiolillo, Florio, Cohen, JJ.).

Acknowledging the role of online forums as a platform for vigorous debate on community issues, the court found that the allegation was defamatory per se and thus there was no need for plaintiff to plead special damages.

Background

The defamation case arose out of bizarre 2006 incident in the town of Wawayanda, New York. Like a scene out of the *Godfather* movie, a Democratic town councilwomen woke up to find a severed horse's head in her swimming pool. Police investigated the incident but never found the perpetrator.

The incident, not surprisingly, was the subject of local discussion. One anonymous posting to the Times-Record newspaper accused a local businessman of the crime.

"We all know who was behind the HorseHead ... there is only one man around town dumb enough, violent enough and with a vendetta to do that ... Dave LeBlanc ... I hope all this negative publicity on him destroys his business."

Another posting stated "Dave LeBlanc is a terrorist." Similar postings were also made to a local community blog.

LeBlanc filed a libel suit over the postings, later naming as defendants two local Democratic Party officials. The trial court granted summary judgment in favor of the defendants for the comments left on the newspaper's website. The trial court held that plaintiff failed to allege special damages as to those statements.

Defamatory Meaning and the Web

Analogizing online forms to the modern version of the town meeting, the court first affirmed that the accusation on the newspaper site that plaintiff was a "terrorist" was non actionable opinion. "This conclusion is especially apt in the digital age, where it has been commented that readers give less credence to allegedly defamatory Internet communications than they would to statements made in other milieus."

However, the allegation that plaintiff was responsible for the severed horse head was a factual accusation that plaintiff committed a serious crime. As such, there was no need to plead special damages.

Plaintiff was represented by Moacyr R. Calhelha, Calhelha & Doyle, LLC, Cornwall, N.Y. Defendant was represented by Christopher Watkins, Sussman & Watkins, Goshen, N.Y.

Summary Judgment for Virgin Islands Newspaper Affirmed

Public Official Plaintiff Failed to Show Actual Malice

The Virgin Island Supreme Court recently affirmed summary judgment in favor of the Virgin Island Daily News in a libel suit brought by a public official, finding no clear and convincing evidence of actual malice. <u>Joseph v. Daily News Publishing Company et. al.</u>, 2012 V.I. Supreme LEXIS 80 (V.I. Oct. 31, 2012).

In a case involving numerous allegations of misconduct from multiple sources, the court found the newspaper had no reason to doubt the truthfulness of its source for the most serious allegations against plaintiff. Moreover, because there was no evidence of actual malice with respect to the most serious allegations of misconduct, plaintiff's claims over minor inaccuracies were also barred.

Background

At issue were several articles published by the VI Daily News in March 2004 reporting that Ethlyn Joseph allegedly extorted money from restaurant owners while serving as the Island's Director of Environmental Health. One of the articles, entitled "Allegations of Corruption Taint Restaurant Inspections," reported that "[s]ome local restaurant owners say" Joseph "is extorting cash by threatening to close their businesses for questionable health code violations unless they pay her off."

The articles cited specific instances of extortionate demands and restaurant closures for failure to comply. The Daily News reported that it had received phone calls and faxes from restaurant owners accusing Joseph of extorting money from them.

The plaintiff sued the newspaper, individual journalists, and a source alleging defamation and emotional distress claims. Plaintiff did not dispute that she was a public official with respect to the articles discussing her position as Director of Environmental Health. The trial court granted summary judgment to the newspaper defendants for lack of evidence of actual malice.

Actual Malice Analysis

Affirming, the Supreme Court found no genuine issues of material fact with respect to the most serious allegations against plaintiff. Among other things, the defendant source, who accused plaintiff of extortion, testified that all the quotes attributed to him in the articles were accurate. And there was absolutely no evidence that the newspaper should have doubted this source's claims. Thus plaintiff could not prove actual malice with respect to the most serious allegations of extortion and bribe taking.

Allegations of other misconduct, e.g., that plaintiff falsified a report, misused federal grant money, and improperly ran her department, came from other sources. One of these sources testified that she did not remember talking to the newspaper. But this was not evidence of actual malice since it fell short of denying speaking to the newspaper. Moreover, claims over these statements were essentially barred by the incremental harm doctrine.

[A]s the defendants note in their appellate brief, courts have held that, if a defendant is not liable for defamation for the main "gist" of an article or series of articles -- regardless of whether the defendant is not liable because the statements are true or because the plaintiff failed to prove actual malice -- the defendant is also not liable for minor inaccuracies in the same publications, even if those individual statements are false.

Nathan E. Siegel and Michael D. Sullivan of Levine, Sullivan, Koch & Schulz, LLP in Washington, D.C.; and Kavin A. Rames of the Law Offices of K.A. Rames, P.C., St. Croix, VI; represented the Virgin Island Daily News. Plaintiff was represented by Lee J. Rohn of Rohn & Carpenter, LLC and Glenda K. Cameron of Law Offices of K.G. Cameron, St. Croix, VI.

Fair Report Privilege Applies to Police Officers' Statements to Press

Privilege Extends to More Than Just Official Police Statements

A television news report about illegal dumping based on unofficial statements by police officers was protected by the fair report privilege. *DMC Plumbing and Remodeling, LLC v. Fox News Network, LLC, et al.*, No. 12-cv-12867, 2012 U.S. Dist. LEXIS 167318 (E.D. Mich. Nov. 26, 2012) (Borman, J.). The court held that under Michigan law the fair report privilege extends to more than just official police statements and documents.

Background

In April 2011, WJBK-TV, a Fox Television station in Detroit, broadcast a news report about illegal dumping in Detroit. The report included allegations that DMC, a demolition company, was responsible for illegally leaving piles of debris at a city property and was known for illegal dumping in Detroit.

DMC sued WJBK-TV, its corporate parent and a reporter (the WJBK Defendants) and the City of Detroit in state court for a laundry list of torts, including defamation, tortious interference, emotional distress, and §1983 claims based on alleged police-press coordination. Plaintiff alleged that Detroit police falsely accused the company of dumping debris and called WJBK to the scene to film the event. Moreover, plaintiff alleged that WJBK filmed an adjacent property filled with debris, falsely suggested that plaintiff was responsible for the debris.

The WJBK Defendants were able to remove the case to federal court based on federal question jurisdiction because of plaintiff's § 1983 claims; and this year they moved to dismiss for failure to state a claim.

District Court Decision

The WJBK Defendants argued that any false statements of fact in the broadcast were based on information from the police at the scene and therefore plaintiff's claims were barred by the fair report privilege. Michigan's fair report statute, Mich. Comp. Laws § 600.2911(3), provides, in relevant part:

Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true head-note of the report.

Reviewing Michigan case law, the court concluded that the privilege is interpreted broadly and drafted to apply to more than official police reports. Thus the reporter did not have to obtain her information from official records.

Moreover, the broadcast was a substantially true account of police actions against plaintiff. Plaintiff was indeed fined for illegal dumping and blight violations, and its truck was impounded by Detroit police. Thus plaintiff's claim was barred even where it argued that it was not responsible for the illegal debris shown in the news broadcast. "The fact that Plaintiff DMC was ticketed for illegally dumping branches, rather than for the debris shown in the news broadcast, is an inaccuracy that does not alter the complexion of the charge and would have no different effect on the reader than that which the literal truth would produce," the court wrote. Citing Fisher v. Detroit Free Press, Inc., 158 Mich. App. 409, 414, 404 N.W.2d 765 (1987).

Similarly, the statement in the broadcast that DMC had been illegally dumping in the City of Detroit "for quite some time" was a minor inaccuracy that does not, by itself, alter the substantial truth of the news broadcast, particularly where a complaining witness featured in the broadcast stated that he had previously witnessed illegal dumping in the area.

The court dismissed plaintiff's tortious interference, emotional distress and negligence claims as derivative theories based on plaintiff's failed defamation claim.

Herschel Fink, Honigman Miller, Detroit, MI, represented the WJBK defendants. Plaintiff was represented by Christopher J. Trainor and Shawn C. Cabot, Trainor Assoc., White Lake, MI.

Supreme Court Denies Cert. in Publicity and Eavesdropping Cases

Court Refuses to Hear Plaintiff's Petition to Reinstate Multimillion Damage Award Against Hustler

A long-running right of publicity case against *Hustler* magazine finally came to an end this month when the Supreme Court declined to hear the plaintiff's petition seeking to reinstate a multimillion dollar damage award. *Toffoloni v. LFP Publishing Group, LLC, et al.*, 40 Media L. Rep. 1681 (11th Cir. 2012), *cert. denied,* 2012 U.S. LEXIS 9546 (Dec. 10, 2012).

The magazine had published 20-year old nude photos of former model and wrester Nancy Benoit after she was murdered by her husband. In an earlier opinion, the Eleventh Circuit held the photos were not "related in time nor concept" to the murder case and therefore publication was not protected by the newsworthiness exception to Georgia's right of publicity law.

The case eventually went to trial and the jury awarded Benoit's estate \$125,000 in compensatory damages and \$19.6 million in punitive damages. On post-trial motion, the punitive damage awarded was reduced to \$250,000. In an unpublished decision, the Eleventh Circuit threw out all punitive damages since the magazine honestly believed that publication was newsworthy. "Because there was overwhelming evidence that LFP reasonably and honestly (albeit mistakenly) believed that the photographs were subject to the newsworthiness exception to the right of publicity, we conclude that no reasonable jury could find by clear and convincing evidence that punitive damages were warranted in this case."

Court Turns Down Prosecutor's Petition

In late November, the U.S. Supreme Court declined to hear an appeal of a Seventh Circuit decision holding the Illinois eavesdropping statute unconstitutional as applied to people who openly record police officers performing their official duties in public. *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, No. 12-318 (U.S. Nov. 26, 2012).

The Illinois wiretap act makes it a felony to audio record "all or any part of any conversation" unless all parties to the conversation give their consent even in circumstances where there is no expectation of privacy. In addition, the recording of a police officer is a felony with punishment of up to fifteen years in prison.

The Seventh Circuit, in a 2-1 decision, held that the statute likely violated the First Amendment and granted a motion for preliminary injunction against its enforcement. "Criminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast—whether to the general public or to a single family member or friend—and thus burdens First Amendment rights," the majority wrote. As applied, the law interfered with the gathering and dissemination of information about police performing their duties in public.

Judge Posner wrote a lengthy dissent arguing that the majority decision "is likely to impair the ability of police both to extract information relevant to police duties and to communicate effectively with persons whom they speak with in the line of duty. An officer may freeze if he sees a journalist recording a conversation between the officer and a crime suspect, crime victim, or dissatisfied member of the public."

For full background information see <u>"Seventh Circuit Rules Illinois Eavesdropping Act Likely Unconstitutional as Applied to Open Recording of Police Officers,"</u> MediaLawLetter May 2012.

The ACLU was represented by Harvey Grossman, Adam Schwartz, and Karen Sheley; and Richard O'Brien, Linda Friedlieb, Robert Leighton, Matthew Taksin of Sidley Austin LLP in Chicago.

Summary Judgment for Texas Broadcaster Affirmed

By Catherine Robb

The 13th Court of Appeals in Corpus Christi has affirmed summary judgment in a case in favor of Eagle Creek Broadcasting, parent company of KZTV, in a lawsuit brought by a Corpus Christi building official. *Garza v. Eagle Creek Broadcasting*, 3-10-00573-CV (Tex. App. Dec. 6, 2012) (Valdez, Benevidas, Vela, JJ.).

The official alleged he was defamed when placed on administrative leave during an ongoing investigation into financial relationships between city building inspectors and builders. Justices upheld the summary judgment on grounds that the reporting was substantially true, that the official was a limited purpose public figure, that no actual malice was involved, and that some of the statements were not capable of a defamatory meaning.

The lawsuit stemmed from a Sept. 7, 2007 KZTV broadcast concerning Alonzo Garza, chief building officer for the City of Corpus Christi. In this capacity, Garza was responsible for inspecting buildings to ensure compliance with city code. As part of his job, Alonzo inspected foundations, electrical wiring, mechanical issues and plumbing but he did not do roof inspections. Alonzo's brother, Guadalupe, co-owned a business named Baldwin Roofing that did conduct roof inspections.

KZTV reporter Andy Liscano, revealed that Alonzo had completed an "Outside Employment Form Request" for the City of Corpus Christi, requesting approval to work as a consultant and estimator for his brother Guadalupe's roofing business. This request was approved, subject to the following stipulation: "Ensure that you do not review any work for

business in City capacity." The story reported that Alonzo was on administrative leave while the Corpus Christi police and F.B.I. conducted an investigation on alleged bribes and payoffs to city inspectors. Liscano ended his report with a question: "If Alonzo Garza had to be careful not to cross the line by inspecting his own work, what about the other inspectors who reported to him and inspected work done by his brother's company? Did they feel pressure to approve work done by Baldwin Roofing?" The lawsuit contends that city building inspectors do not inspect roofs.

In its successful motion for summary judgment, KZTV's asserted that the statements surrounding the investigation of Alonzo and his work at his brother Guadalupe's roofing company were either literally or substantially true. KZTV attorneys also asserted that Alonzo, Guadalupe, and Baldwin Roofing were limited public figures in this story, and that there was no evidence of malice in reporting the investigation. Therefore, they argued, summary judgment was appropriate. Finally, KZTV asserted that the statements it made were opinion or rhetorical hyperbole, not capable of defamatory meaning.

The 13th Court of Appeals upheld the trial court's judgment on all those grounds asserted by KZTV.

Catherine Robb is of counsel at Haynes and Boone, LLP. Defendant Eagle Creek Broadcasting, parent company of KZTV, was represented by Laura Lee Prather, now of Haynes and Boone, LLP, at the trial and appellate level, and Joseph Larsen of Sedgwick, LLP, at the trial level. Plaintiff Alonzo Garza was represented by Rene Rodriguez and Craig Smith (appellate).

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TV Everywhere: Copyright Protection Nowhere or Somewhere?

Content Without Borders: Issues in International Production and Distribution

Rights (and Wrongs) of Publicity: The Evolving Law of Misappropriation

Journalists Avoid Subpoenas in Raw Milk Case

Wisconsin Shield Law Tested

By Drew Shenkman

In the first-known application of Wisconsin's two-yearold shield law, Judge Guy Reynolds of the Sauk County Circuit Court refused the state's Department of Justice's request to issue subpoenas to three journalists who covered an Amish farmer's sale of unpasteurized milk products. *State* v. *Hershberger* (Wis. Cir. Nov. 29, 2012).

In June 2010, Wisconsin state authorities raided Vernon Hershberger's Loganville dairy farm, shutting it down for selling raw products to the public. During the raid, state authorities placed "seals" on the coolers containing his raw-milk products and issued a "holding order" prohibiting their sale. Prohibited in Wisconsin, the issue of consumption of unpasteurized dairy products is controversial in the nation's largest dairy-producing state.

The next day, Hershberger broke the state's seals and resumed sales. Madisonarea journalists covered Hershberger's defiance, including WMTV-TV's Chris Woodard, *The Capital Times*' Jessica VanEgeren, and WISC-TV's Marc Lovicott. Their reports included comments by Hershberger that he continued to sell because he believed the raw-milk ban harmed Wisconsin families.

State prosecutors filed motions under the shield law in September seeking testimony at the January 2013 trial. While the Wisconsin Shield Law, Wis. Stat. §885.14, provides journalists with an absolute privilege for confidential sources, it provides for a qualified privilege for all other newsgathering information and materials, whether published or unpublished.

The law provides for a two-step process. First, in criminal cases, the party seeking the subpoena must show, without the aid of the information sought from the journalist, that there is probable cause that a crime has occurred. Only then may the court reach the four-part test under which the subpoenaing party must show that the information sought from the journalist is (1) highly relevant, (2) necessary to the proof of a material issue, (3) not obtainable from any other source, and (4) that there is an overriding public interest in disclosure of the information.

Judge Reynolds heard the state's motions on November 27, 2012 before a crowded courtroom full of Hershberger supporters. The state argued that the reporters' testimony was needed to prove that Hershberger defied the state's orders by breaking the seals and resuming sales, and also to authenticate Hershberger's statements to the journalists. The journalists argued that the state failed to meet its burden to show that the information was not obtainable from any other alternative source, and questioned the relevance of the purported "admissions."

During the hearing, the court was shown countless examples of possible alternative sources for the same information sought from the journalists. For example, the

court saw screen-shots from the news reports showing numerous onlookers present at Hersherberger's farm that day. The court also saw other examples of Hershberger speaking publicly, making the same or similar statements that the state claimed were "admissions."

Judge Reynolds convened a teleconference two days later to announce his opinion, denying the state's motions in an hour-long oral opinion. Since the law had not yet been applied, the court pointed

to the long history of Wisconsin's common law privilege as a guide to interpreting the factors under the stronger 2010 statute.

On all four factors, the court found that the state failed to meet its burden. The court questioned both the relevance and necessity of the purported admissions, finding that they were either so vague, or were paraphrases, that they would be nonadmissible hearsay.

More significantly, the court found that even if the admissions and the reporters' authentication testimony were relevant and necessary, the state's total failure to show exhaustion of alternative sources was fatal to its motions: "[The evidence] cannot be shown in the exact same way, as I think the state repeatedly argued, but I'm satisfied essentially from the listing of other information possibly available to the state by [counsel for WMTV] that there is evidence exclusive

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of the reports of the newspersons that can be marshaled to support the state's burden of proof on the elements of each offense."

Finally, although the court did not reach the final balancing factor, it indicated that when doing so it would weigh the nature of the case (such as a serious criminal offense) against the role the journalist played in covering and the public importance of the issue.

Drew E. Shenkman, Holland & Knight, LLP, in

Washington, D.C., represented WMTV, NBC15 Madison and Chris Woodard in this matter; Robert J. Dreps, Godfrey & Kahn, S.C., in Madison, Wisconsin, represented Capital Times Company, Jessica VanEgeren, WISC-TV and Marc Lovicott; Eric D. Defort And Phillip D. Ferris, in Madison, Wisconsin, for the Wisconsin Department Of Justice; andElizabeth G. Rich, Of Elizabeth Gamsky Rich & Associates, S.C., Plymouth, Wisconsin, and Glenn C. Reynolds, Reynolds & Associates, in Madison, Wisconsin, for Defendant Vernon D. Hershberger.

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Legislative Update: Congress's Media Agenda for the Year Ahead

2013 Promises to Be an Interesting Year

By Kathleen Kirby, Ari Meltzer and John Simpson

Despite the intense battle for the White House and control of Congress, we are faced with the *status quo* in Washington. In the House, Republicans still hold a majority. Despite Democrat gains in the Senate, the net impact is negligible as Democrats remain short of the sixty votes necessary for a filibuster-proof majority.

Still, 2013 promises to be an interesting year from a media perspective. Congress has given the Federal

Communications Commission ("FCC" or "Commission") the authority to conduct broadcast incentive auctions. We're seeing renewed focus on media ownership rules, and acute attention paid to television programming issues. Video programming and performance royalties are issues likely to be addressed in the 113th Congress. A wholesale rewrite of the Communications Act is not likely, but lawmakers may consider FCC process reform, especially as part of the Satellite Television Extension ("STELA") Localism Act and reauthorization.

Before we get to 2013, it is important to note that one legislative issue still is percolating in the waning days of the 112th Congress—whether or how Congress might attempt to crack down on leaks of classified information. Earlier this summer, Republicans accused the White House of leaking classified information for political gain. In response, Democrats drafted new protections on the disclosure of national security information and included these provisions in the Senate version of the 2012 Intelligence Authorization bill. Many of the new leaks protection provisions could impact legitimate news gathering operations and have come under increased scrutiny. The 2012 Intel Authorization has been approved in the House without the enhanced leaks provisions, but has not been able to move in the Senate.

2013 promises to be an interesting year from a media perspective.

Congress has given the FCC the authority to conduct broadcast incentive auctions. We're seeing renewed focus on media ownership rules, and acute attention paid to television programming issues.

Spectrum Auctions

Last February, President Obama signed the "Middle Class Tax Relief and Job Creation Act of 2012" (the "Spectrum Act") which includes new authority for the FCC to conduct a reverse "incentive" auction to incent television broadcasters to relinquish spectrum usage rights in exchange for a portion of the forward auction proceeds. The Commission has cited incentive auction authority as a "win-win," noting that

incentive auctions will "open up new business opportunities for current holders of spectrum licenses while helping to meet the demand for spectrum by new services." While the Spectrum Act gave the FCC incentive auction authority as a general matter, the primary focus has been on an incentive auction to reallocate up to 120 megahertz of television broadcast spectrum. Section 6403 of the Spectrum Act outlines the procedures for such an incentive auction. The Commission only gets one chance to conduct an incentive auction of TV broadcast spectrum under Section 6403

of the Spectrum Act, and must do so by the end of 2022.

Under the Spectrum Act, the FCC must first conduct a "reverse auction" to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its usage rights to make spectrum available for assignment through an auction. A broadcaster may choose to relinquish all rights, to move from a UHF to a VHF channel, or to share a channel with another licensee. In the next phase of the incentive auction, the Commission would conduct a "forward auction" in which the agency assigns licenses for the use of spectrum made available through the reverse auction and relocation of broadcast incumbents. The legislation also contemplates that the forward and reverse auctions could take place

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contemporaneously. The sum of bidding in the forward auction must exceed the sum of: (1) the total amount of compensation that the Commission must pay successful bidders in the reverse auction; (2) the costs of conducting the forward auction; and (3) repacking costs and other reimbursements (limited to \$1.75 billion).

The results of the forward auction will determine the amount of spectrum to be cleared for mobile broadband use. The FCC may then undertake a reorganization of TV broadcast spectrum that would "repack" remaining broadcast licensees into channels at lower frequencies, freeing up spectrum at the upper end of the band. The Commission is to use a relocation fund to reimburse reasonable costs incurred by a broadcaster that relocates to a different channel.

As stated above, incentive auctions are part of a package of actions that the FCC will need to take to reallocate up to 120 megahertz of TV broadcast spectrum. Further, in the wake of the Spectrum Act there remain numerous unresolved

questions regarding auction structure and procedures. At the close of 2012, the FCC released a Notice of Proposed Rulemaking pertaining to these incentive auctions and is seeking input on a variety of extremely complicated implementation issues, from auction design to broadcast band repacking

to forward auction bidding rules. We expect significant debate on the final rules to continue well into 2013. The FCC's goal is to conduct auctions early the following year.

Video Programming Reform

At the close of the 112th Congress, both the House and Senate Commerce Committees held hearings investigating the future of video delivery. These hearings exposed the disparate regulatory treatment of rapidly converging distribution technologies and the emergence of online video distributors such as Netflix, Hulu, and Aereo. Members on both sides of the aisle and in both chambers agree that reform of the video distribution marketplace should be a focus in the 113th Congress.

Substantial groundwork already has been laid for updating and modernizing television regulation. Senator Jim DeMint and Congressman Steve Scalise introduced "The Next Generation Television Marketplace Act" in their respective chambers, a bill that would eliminate many broadcast television regulations. (With Senator DeMint's departure, the legislation will undoubtedly find a new champion.) In addition, over the top online video distributors, multichannel video programming distributors ("MVPDs") and content creators have testified before Congress and filed comments at the FCC attempting to define how Internet-delivered video should be treated under the Cable Act and the Communications Act.

Further increasing the likelihood of action in the 113th Congress, key video programming legislation expires at the end of 2014. The Satellite Television Extension and Localism Act ("STELA") is the renewal of legislation granting DBS providers a statutory copyright license for retransmission of certain broadcast television signals. STELA was last enacted in 2010 and expires on December 31, 2014. Renewal of STELA for another five years provides a legislative vehicle for any number of Cable Act and Communications Act modifications. Allowing STELA to expire would result in disparate copyright treatment among MVPDs, strengthening

cable's call for reform of the statutory copyright licenses they championed in the 112th Congress. Under either scenario, the scheduled expiration of STELA will drive video programming policy going forward.

Renewing STELA for another term will provide a legislative vehicle for all video

marketplace participants to seek legislative and regulatory changes. Recent hearings in both the House and the Senate demonstrated that many Members of Congress view statutory copyright licenses as a legislative relic from a time when the nascent cable industry was unable to negotiate and clear copyrights. Further, many Members view Communications Act regulations as antiquated, promulgated at a time when cable did not face competition from DBS and overbuilders, and before the commercialization of the Internet. Renewal of STELA reopens both the Communications Act and the Copyright Act, and enables any number of video programming reforms to be debated, including deregulatory legislation offered by Senator DeMint and Congressman Scalise, repealing broadcast market exclusivity protections, and adjacent market signal importation.

Simply allowing STELA to expire does not eliminate the chance for wholesale changes to the video programming marketplace. During the debate over renewal of the Satellite Home Viewer Extension and Reauthorization Act

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("SHVERA"), the precursor to STELA, some industry lobbyists suggested that the necessity of statutory copyright for broadcast content should be reevaluated and replaced by a free market rights clearing framework. In response to this issue, Section 302 of STELA requires the Register of Copyrights to provide recommendations on how to implement a phase-out of the statutory copyright licenses codified under Section 111, 119, and 122 of Title 17 ("Copyright Office report").

One of the recommendations in the Copyright Office report for transitioning to a free market rights clearing framework is a gradual elimination of statutory copyright licenses by "signal type." According to the report, "Congress could consider phasing out the distant signal licenses under Sections 111 and 119 first while retaining the local station provisions of Section 111 and the local-into-local license found in Section 122." The easiest way to begin this proposed phase-out would be to fail to renew STELA by

December 31, 2014, thereby automatically eliminating the Section 119 satellite distant signal license. Allowing STELA to expire would maintain statutory copyright licenses for all cable carriage and for all DMAs receiving local-into-local DBS coverage.

While the Section 119 license has decreasing utility, there are still a number

of satellite subscribers across the country receiving distant signals. Expiration of STELA and the Section 119 compulsory license would force DBS providers and rights holders to negotiate free market mechanism for clearing rights. Success of this negotiation is in the best interest of MVPDs, as it is an essential stepping stone to proving the viability "The Next Generation Television Marketplace Act." Under the guise of regulatory parity, NCTA can use the expiration of STELA to push for changes to the Section 111 copyright license and lobby to advance additional provisions of the DeMint legislation.

On the regulatory side, the FCC let expire the exclusive contract prohibition of its program access rules. The rules banned exclusive contracts for satellite-delivered programming between any cable operator and any cable-affiliated programmer in areas served by the cable operator.

For most programming, a case-by-case analysis that will assess the competitive impact of individual exclusive contracts remains in place. The Commission did conclude,

however, that exclusive contracts for a cable-affiliated, satellite-delivered regional sports network (RSN) had the "purpose or effect" of "significantly hindering or preventing" other MVPDs in the market from providing a competitive service and established a rebuttable presumption that these exclusive deals are not in the public interest.

Media Ownership

The Commission's broadcast ownership rules remain—as they have for more than a decade now—in a state of flux. The agency's mandatory 2010 "quadrennial review" of its restrictions governing the ownership of broadcast stations remains in process as of this writing, even as 2012 draws to a close. In that proceeding, the FCC not only is considering the rules pursuant to the governing legal standard set by Congress in the Telecommunications Act of 1996, but also certain issues remanded to it by the U.S. Court of Appeals for the Third Circuit in a decision issued on review of the FCC's

most recent broadcast ownership decision.

In November 2012, the FCC Chairman's office floated draft rules that would repeal the radio/newspaper and radio/television cross-ownership bans and allow limited cross-ownership of broadcast television stations and newspapers in the same market. The rules have since fallen under significant

scrutiny by Congressional Democrats, who generally oppose media consolidation. As a result, the future of the FCC's ownership proposal is uncertain.

Performance Royalties and Platform Parity

In the waning months of the 112th Congress, two performance royalty reform bills were introduced, one by Congressman Chaffetz (R-UT) and Senator Wyden (D-OR) and another by Congressman Nadler (D-NY). Both legislative proposals attempt to standardize disparate performance royalty rates between terrestrial radio, satellite radio, and webcasters, but take very different approaches. The Nadler bill moves satellite radio under the willing buyer willing seller standard used by the Copyright Royalty Board ("CRB") to enact current webcasting royalty rates. In contrast, the Chaffetz bill moves webcasters to the 801(b)

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standard, a review standard that requires the CRB to take into account the impact of performance royalties on the viability of the industry. The 801(b) standard has historically produced lower rates than the willing buyer/ willing seller model. At this time, it seems unlikely that either of these pieces of legislation is likely to become law in the 113th Congress.

While the issue of performance royalties will continue to percolate and likely will receive a hearing before the end of 2012, absent a major event that changes the status quo, there does not seem to be significant momentum to move legislation. Current CRB royalty rates extend through 2015 and nearly every webcaster has negotiated lower terms with Sound Exchange through the Webcaster Settlement Act. The two biggest catalysts for change will be the CRBs ruling on webcasting royalties after 2015 or the entry of a new webcaster who has enough market influence to negotiate a royalty rate significantly lower than current webcaster rates and is viewed by the Judiciary Committees as restraining competition.

On September 7, 2012, the *Wall Street Journal* reported that Apple was working on a streaming music service to compete with Pandora. Given its existing business relationship with all major record labels, the substantial universe of Apple music devices, and its financial resources, it is likely that Apple is in a position to negotiate streaming terms that upsets the current status quo, and it increases the likelihood of Congressional action for "intra-platform" parity amongst the various webcasters.

As mentioned above, the Chaffetz-Wyden legislation attempts to accomplish intra-platform parity among the webcasters and limited inter-platform parity by moving webcasters to the same standard as satellite radio. This legislation is a non-starter with the record labels, because it does not address their true concern, which is forcing

terrestrial radio to pay a performance royalty. Any legislation introduced to level the playing field among webcasters will have to include true inter-platform parity that addresses terrestrial radio royalties if it is to have any chance of moving. For broadcasters, this legislation probably does not look too different from the agreements signed by Clear Channel and Entercom with record label Big Machine, where some terrestrial revenues are sacrificed for lower streaming rates.

Communications Act Rewrite/Process Reform

Many legislators believe the Communications Act, which received its last major overhaul in 1996, is long overdue for reform. Among the major issues that need to be addressed is regulation of the Internet and Internet-related services, which became ubiquitous after the passage of the 1996 Act. Nevertheless, given the many more imminent issues, including those discussed above, a wholesale rewrite of the Communications Act appears unlikely during the 113th Congress.

FCC process reform also faces an uncertain future in the next Congress. In March 2012, the House, led by Rep. Greg Walden (R-OR), passed the FCC Process Reform Act, which would have required the FCC to publish the full text of rules for comment before a vote, prevent the Commission from accepting "voluntary" merger conditions outside its legal authority, and require time limits for proceedings. The bills stalled in committee in the Senate, however.

With Democrats increasing their Senate majority, the bill probably will fare no better as an independent bill next term. Nevertheless, FCC process reform is likely to remain on the legislative agenda, and may move as part of the STELA reauthorization.

Kathleen Kirby, Ari Meltzer and John Simpson are lawyers with Wiley Rein LLP in Washington, D.C.

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TV Everywhere: Copyright Protection Nowhere or Somewhere?

Content Without Borders: Issues in International Production and Distribution

Rights (and Wrongs) of Publicity: The Evolving Law of Misappropriation

Forum Clause of TV Release Enforced Despite Claims of Coercion

Plaintiff Alleged He Signed Release Under Duress

By Cameron Stracher

Often invoked, but rarely the subject of litigation, the written release is the holy grail of reality television programming: elusive, yet possessed with an incantatory power. Now, in a decision sure to burnish its gloss, a district court in Colorado has held that the forum selection clause in a written release requires the parties to litigate the validity of that release in the forum chosen by the parties, despite plaintiff's claims of duress and coercion in executing the release. *See Distel v. Duane Chapman, et al.*, No. 12CV4252 (Colo. Dist. Nov. 14, 2012).

In *Distel*, plaintiff failed to appear in court in connection with his arrest for methamphetamine possession, among other

charges. A warrant was issued for his arrest, and his bail was revoked by defendant Cody Hergenrader. Hergenrader then engaged bounty hunter Duane "Dog" Chapman and his "posse" (consisting of his wife, son, and an associate, all named as defendants) to apprehend plaintiff. The Chapmans' efforts to apprehend plaintiff were filmed by defendant D&D Television

for the television series, *Dog the Bounty Hunter*, broadcast on the A&E Television Networks (the "series").

Through a tip from his girlfriend, the Chapmans caught plaintiff as he tried to escape in a car. When plaintiff opened the door of the car, the team shot him with pepper ball guns, causing various injuries to his chest, arms, and legs. Subsequently, plaintiff signed a written release permitting D&D to include him in the series, releasing D&D from all claims, and agreeing to litigate any dispute arising from his "appearance or participation" in the series in New York under New York law.

Nine months later plaintiff filed suit in Mesa County, Colorado, and asserted claims for negligence, assault and battery, outrageous conduct, civil conspiracy, and reckless endangerment arising from his capture by the Chapmans. Defendants moved to dismiss plaintiff's claims because a forum selection clause in the release he signed required him to litigate his claims in New York. Plaintiff claimed that the release had been obtained by duress and coercion because the Chapmans refused to take him to the hospital for his injuries until he signed the release and threatened to arrest his girlfriend. Defendants argued that a forum selection clause is enforceable unless plaintiff alleges, and can demonstrate, that the *clause itself* was obtained by duress, coercion, or fraud. Lacking such an allegation, defendants contended, plaintiff's complaint should be dismissed.

The court agreed with defendants and dismissed

plaintiff's complaint. It found first that the contractual forum selection clause was applicable to plaintiff's tort claims. It then found that plaintiff had failed to allege facts establishing that the clause, itself, rather than the entire release, was procured by fraud or undue influence. Finally, it held that the forum selection clause was also applicable to plaintiff's claims against the Chapmans

although they were not signatories to the release because those parties were "closely related" to the contractual relationship between D&D and plaintiff. As a condition of dismissal against the Chapmans, however, the court required them to consent to jurisdiction in New York, which they subsequently did.

To date, plaintiff has not re-filed his claims in New York.

Cameron Stracher and Ashley Kissinger of Levine, Sullivan, Koch & Schulz, assisted by Heddy Gold, Vice President Legal & Business Affairs at A&E Television Networks represented D&D. The Chapmans were represented by Gary Lozow of Foster Graham Milstein & Calisher in Denver, CO. Plaintiff was represented by Greg Leavitt of Harshman & McBee.

Australian Court Finds Google Liable for Defamatory Search Results

What Does This Decision Mean for Internet Service Providers?

By Kate Ballis

A Victorian plaintiff has now more than doubled the damages he has collected from defamation proceedings in the Supreme Court of Victoria this year. Hot on the heels of a AUD\$225,000 award against Yahoo! earlier this year, on 12 November 2012, Google Inc was ordered to pay Milorad (Michael) Trkulja AUD\$200,000 after a jury trial. *Trkulja v Google Inc and Google Australia Pty Ltd* [2012] VSC 533 (there were no findings and no award was made against Google Australia).

The claim related to material in Google Images and Google Search Results (described in the trial as 'the Images matter' and the 'Web matter'). Mr Trkulja claimed that the material conveyed various defamatory imputations about him as it connected him to Melbourne criminal gangs.

The Decision

The jury decided that Google Inc (Google)_had published the Images matter and web matter in the Google Images and Google Search Results, that one of the three defamatory imputations alleged was conveyed by both the web matter and images matter, and that the defence of innocent dissemination was available to Google until the time it was put on notice of the defamatory material by Mr Trkulja's lawyers.

When the jury returned its verdict in response to 24 questions, Google Inc applied *non-obstante* to have the jury verdict dismissed and for judgment in its favour. As a result, Beach J had to decide whether the jury was entitled to return the verdict they had given. He did. In delivering his reasons for dismissing Google Inc's application, he expressed the view that Google Inc was liable for publication. This marked a divergence from the UK line of reasoning, which will be discussed in this article.

The key points arising from Beach J's decision are that:

 the question of whether Google Inc was the publisher of the web matter and images matter was a mixed one of fact and law;

- in the facts of the proceeding (there was evidence that Google had designed the algorithms and created an automated system that generate its search results) the jury could conclude that Google was the publisher before it had received any notice about Mr Trkulja's complaint;
- Google was entitled to rely on the innocent dissemination defence in the uniform *Defamation Act* up until the time it had notice of the defamatory material;
- Mr Trkulja's case could be distinguished from the three key decisions of Justice Eady of the High Court of England and Wales (considered below) in which he found that ISPs (including Google Inc) were merely passive providers of the material and were not publishers.

While Justice Beach's decision applies specifically to online search results, it means that courts may be prepared to find that ISPs could also be publishers. While this is not a decision of the final court of appeal in Australia, judges in other jurisdictions may give it weight when deciding what circumstances will make an ISP liable as a publisher. However, the case should not necessarily have the chilling effect it initially appears to convey, if search engines and ISPs effectively manage the risk of publishing defamatory content. Risk mitigation strategies are discussed in this article

The Material Published by Google

In 2004, Mr Trkulja was shot in the back in a restaurant. Although the police did not link the incident to Melbourne's underworld, various articles were published which suggested that the incident was related.

Mr Trkulja pleaded two separate defamatory publications by Google.

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material conveyed various

defamatory imputations about

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The Google Images Matter

The Google Images matter consisted of Google Images search results based on the term "Michael Trkulja" comprising the following

- a photo of Mr Trkulja with the name of the website, "melbournecrime" below:
- a photo of notorious Melbourne gangland figure Tony Mokbel with "Michael Trkulja" and "melbournecrime" website below; and
- a photo of notorious gangland figure Dennis Tanner, with "Michael Trkulja" and "melbournecrime" below.

When any of the three offending images were clicked on, they took the web user to another Google Images search

results page which included that image, with "melbournecrime" at the top and an extract of the site where the image originated below. The website from which the all the images originated was called "Melbourne Crime" and had a banner of nine photos of various notorious criminals. Below the banner of photos was an article titled "Shooting probe urged, November 20,

2007" and a photo of Mr Trkulja. The article reported on the 2004 shooting of Mr Trkulja.

The Google Web Matter

The Google Web Matter consisted of the first ten results of the185,000 results corresponding to the search term "Michael Trkulja," and also the Michael Trkulja article on the Melbourne Crimes website that is also included in the Images Matter. The first search result stated "Michael Trkulja -Melbourne Crime - Underworld - Ganglands" and below, the introductory line read: "Former music promoter Michael Trkulja was shot in the back by a hitman wearing a balaclava while dining at a St Albans restaurant in June 2004...." The search result linked to the article on Mr Trkulja on the Melbourne Crime website.

Notice to Google

On 22 September 2009, Mr Trkulja's former lawyers wrote to Google Inc and complained about the Images Matter only, requesting removal of the content resulting from searching for images of "Michael Trkulja." At some time before 10 October 2009 a page containing photographs of Mr Trkulja, Mr Mokbel and Mr Tanner was sent to Google Inc but did not include the larger photograph of Mr Trkulja, and the article.

A witness for Google Inc conceded, however, that notwithstanding the failure by Mr Trkulja's solicitors to specifically provide a copy of the webpage upon which the article appeared, it would take little effort to work out from the page of photographs supplied to Google Inc, the identity of the website that linked his name to Mr Mokbel and Mr Tanner. If one of the images was clicked on it would link to the webpage.

Mr Trkulja and/or his lawyers did not put Google Inc on notice of the Web matter.

Publication by Google of the **Images and Web Matters**

Under the Defamation Act, in a trial by jury, the jury must decide publication, whether the publication is defamatory of the plaintiff, and whether the defendant can

rely on any defences. The judge decides the damages. In summary, the jury found in relation to both the Images and Web Matter that:

- Google was the publisher;
- the material conveyed one of the defamatory imputations pleaded, that "the plaintiff was so involved with crime in Melbourne that his rivals hired a hit man to murder him";
- Google could rely on the defence of innocent dissemination until 10 October 2009 when it was put on notice of the Images Matter;
- As Google was never put on notice of the Web Matter, it could rely on the defence of innocent (Continued on page 22)

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dissemination for the entire period of publication complained of. The judgment does not explain why the jury found that Google Australia was not publisher of either the Images or Web Matters. This is most likely because it did not design or control the automated system.

Key Findings

Google Inc's first submission in support of its application to have the jury's decision set aside was that as a matter of law, it was not a publisher of the Images Matter. Google referred to the decisions of Justice Eady in *Bunt v Tilley, Metropolitan Schools* and *Tamiz v Google Inc* and contended that the decision in *Tamiz* (that a content platform operator would not be liable for the defamatory content of blog authors, even if put on notice) reflects the law in Australia. Beach J stated that:

"the question of whether a particular internet service provider might be a publisher in respect of defamatory material published through or via or with the assistance of a particular internet product is "fact sensitive." [18]

The jury decided that Google Inc (Google) had published the Images matter and web matter in the Google Images and Google Search Results

Beach J distinguished *Bunt v Tilley* and *Tamiz* based on their facts as they related to the hosting of internet services without intervention, such as the generation of search results. While Beach J noted that the facts of *Metropolitan Schools* are similar, as the case related to Google's search results, he said that Eady J did not consider the fact that search engines do exactly as intended by those who own them and provide their services. He also notes that in that case, Google did take steps to remove the content. In any event, Beach J states that none of these cases form the common law of Australia, because under Australian law, even if an entity's role is passive, it can still be a publisher:

"To say as general principle that if an entity's role is a passive one the it cannot be a publisher, would cut across principles which have formed he basis for liability in the newsagent/library type cases..." [28]

Although not making a decision on this point he certainly suggests that in Australia, an ISP could be a publisher.

Google Inc also argued that there was no human intervention between the request made to the search engine and the publication of the search results. Beach J found that it was open for the jury to conclude that Google Inc was a publisher, even before it had any notice from Mr Trkulja because:

"Google Inc intended to publish the material that its automated systems produced, because that was what they were designed to do upon a search request being typed into one of Google Inc's search products." [18]

Beach J relied on common law principles, and drew an analogy between Google Inc and a newsagent who sells a paper containing a defamatory article. While the newsagent may not have intended to publish the defamatory material, it

has the relevant intention to publish the newspaper for the purposes of defamation law. Although a publisher, the newsagent could usually rely on the defence of innocent dissemination. Similarly, Beach J found that the jury was entitled to conclude that Google Inc could rely on the innocent dissemination defence until it was put on

notice of the Images Matter.

Beach J referred to the fact that Google Inc alone had created the page of images returned by searching "Michael Trkulja" as a result of its automated search engine program and it was intended by the individuals who work for Google Inc and wrote those computer programs or that spread of images to be created. Otherwise, he said that there would be no actual original publisher of the image page. (This is akin to the scenario of a person who designs a robot that can write non-fiction books of its choosing, being found liable as a publisher, as it intended to create a robot that was capable of writing defamatory material.)

Google Inc submitted that even after it had notice of the material complained of, it is not capable of being liable as a publisher. Beach J rejected this submission and stated that where, after relevant notice is given of the material complained of, an entity with the power to stop publication

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	Case	Alleged publication	Country	Was the internet intermediary a Publisher?	Was it a publisher before notice given?
Internet Service Provider ¹	Bunt v Tilley	Internet service was provided by ISPs in the most literal sense.	UK	No	N/A
Google Web Search	Metropolitan International Schools Ltd v Designtechnica Corp	Google search engine results.	UK	No	Not a publisher, even though it had notice.
	Trkulja v Google Inc and Google Australia Pty Ltd	Google search engine results.	Australia	Yes, Google Inc was. Google Australia was not.	Yes
	A v Google New Zealand Ltd ²	Google search engine results.	NZ	Yes, would be.	N/A
Google Image Search	Trkulja v Google Inc and Google Australia Pty Ltd	Google image search results, and image with extract of originating site.	Australia	Yes, Google Inc was. Google Australia was not.	Yes
Google Blogger	Tamiz v Google Inc & Anor	Google's blog sites, where content is published by user.	UK	No	N/A
Google AdWords	ACCC v Google Inc ³ (note this is a misleading or deceptive conduct case)	Advertiser can buy AdWords. When purchased word is entered into a Google Search Engine, responding advertisement	Australia	Yes	N/A

¹ In the literal sense.

² HC Auckland, CIV: 2011-404-002780, 12 September 2012. Note, the plaintiff lost his application because he could not establish that Google New Zealand Ltd had the ability to control publication. Even though the judge rejected the plaintiff's claim, he went on to look at the situation if it could have been argued that Google NZ was a publisher of the search results.

³ [2012] FCAFC.

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fails to do so after a asonable time, this can lead to the nference that the entity consents to the publication, and the court could also find that the relevant entity is the publisher.

Trkulja v Yahoo [2012] VSC 88

Mr Truklja was awarded \$225,000 in damages by a different judge after suing Yahoo!7 for defamation over a search result linking to the same webpage on the Melbourne Crime website and which included the same 2007 article, as the Google searches had returned. Mr Truklja argued that a Yahoo!7 search results page, together with the Melbourne Crime webpage gave rise to various defamatory imputations, including the same imputation as was made out against Google. In late 2009, Mr Trkulja had written to Yahoo!7 asking it to remove the search result.

The jury decided that the material was defamatory of Mr Trkulja and that Yahoo!7 had no defences. The jury did not

need to consider the question of publication, as it had been agreed between the parties that, in order to prove publication, Mr Trkulja was required to show that the content had been downloaded and read by at least one person using the Yahoo!7 search engine which the judge found he had.

Google Inc's first submission in support of its application to have the jury's decision set aside was that as a matter of law, it was not a publisher of the Images.

Impact of Trkulja v Google

Providing access to content in Australia: The Trkulja decision will impact search engines, ISPs and other online content providers throughout the world through which content can downloaded in Australia. While it clearly applies to search engines, Beach J suggests that even a purely passive ISP could be found to be a publisher under Australian law. The decision could therefore reach to any online program developers, or App developers, that develop software with the intention of generating new material, and even to an ISP providing an internet service to a website. However, Beach J points out, each decision is fact specific and an ISP may not be found liable for every service that it provides. For example, Google hosts the blog site, Blogger.com, it provides Web Search Results and Image Search Results, it offers the AdWords, a service where customers can purchase keywords

linked to their product so that their advertisement shows up when the keyword is searched.

Comparison to other common law jurisdictions: The table below shows recent findings by Australian, New Zealand and UK courts in relation to different types of internet services. Note that the law as to whether an ISP acting completely passively is a publisher, is not settled in Australia. However, Beach J suggests that they could be.

Who to sue? The jury in Trkulja v Google found that Google Australia was not publisher of the material. Although, Beach J did not go into reasons for this decision, it appears to reinforce the fact that Google Australia Pty Ltd does not have control over the internal workings of the search functions and therefore cannot be found to be publisher of the content. The same may apply to other ISPs with local offices worldwide that just manage the advertising and marketing departments, but are not involved in creating the search functions or providing the internet service.

International application and forum shopping: While the

Trkulja decision does not set a precedent for courts outside Australia, judges in common law jurisdictions may give weight to the finding on publication, as the common law principles of publication are relatively similar throughout common law jurisdictions. However, the innocent dissemination defence differs in its application from jurisdiction to jurisdiction,

therefore a judge could give weight to the Trkulja decision on the principle of publication, but make a different finding and damages award in relation to the application of the innocent dissemination defence in that particular jurisdiction. It will be interesting to see if the court considers this in the claimant's appeal in *Tamiz*.

There has been discussion about whether the decision might open the floodgates to potential claims against ISPs being issued in Victoria. However, there will be jurisdictional issues to consider, especially the issue of where the plaintiff holds his or her reputation. The nature of the Web matter and the images matter should also be considered in terms of whether the material in question is simply a URL link to an article or a combination of images or the content put together and displayed as a result of the request.

The fact that a jury found that Google Inc had published the material in both the web and images matters is also a

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point worth considering. If the general consensus from the man or woman on the street is that Google Inc is publishing material in its search results, then a jury could come to the same conclusion elsewhere in the world, regardless of the jurisdiction.

Contribution from original publishers: If ISPs are found liable as publishers of defamatory content, they may look to the publishers of the original defamatory content on the website, such as the website owner, or author of the article for contribution under s23B of the Victorian Wrongs Act 1958 because their websites are set to allow Google to crawl and include their content in its search results. Although there are no decisions applying s23B in a defamation case, it has been pleaded in defamation matters that are currently on foot in Victoria. The provision entitles a person who is liable for damages to seek to recover a contribution from any other person liable in respect of the same damage. The Melbourne Crime website is now defunct, but in a situation where the article was published on a mainstream media outlet's website. then the ISP may be entitled to seek contribution from the media outlet, and/or the journalist, or may seek to join the third party from the beginning.

Right to Freedom of Expression

In the recent case against Google New Zealand in New Zealand (which I referenced in the table above), the High Court, in considering allegedly defamatory search results stated:

'Whilst the right to freedom of expression as protected by the [New Zealand Bill of Rights Act] ought to be considered in the development of the law in this area, it may not be an unreasonable limit upon that right to hold that a search engine is a publisher of both specific URLs and words that appear in snippets.'

In *Tamiz*, Justice Eady considered that weight should be given to the European Convention on Human Rights and Fundamental Freedoms and the Human Rights Act where the law is uncertain. He stated:

'Where the law is uncertain, in the face of rapidly developing technology, it is important that judges should strive to achieve consistency in their decisions and that proper regard should be paid, in doing so, to the values enshrined in the European Convention on Human Rights and Fundamental Freedoms. In particular, one should guard against imposing legal liability in restraint of Article 10 where it is not necessary or proportionate so to do.'

Although in the Trkulja decision, Beach J did not have to consider section 15 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, which provides a right to freedom of expression, it would appear, based on his decision, that he would hold the same view as in the New Zealand case. The issue in this case is that the plaintiff sued Google New Zealand and not Google Inc. If the complainant in the New Zealand case brings a claim against Google Inc, based on the principles foreshadowed by the High Court, it may be another important decision for common law jurisdictions.

Risk Mitigation

In order to prevent any chilling effect resulting from this judgment, ISPs should develop an effective, user friendly, and functional take down policy and procedure which users of the site can read and understand. This may include requiring the complainant to identify:

- the source of the defamatory material, eg search results, a webpage, a blog etc, and provide the URLs;
- the specific content contained in the material that they consider defamatory;
- the identity of the person allegedly defamed;
- the imputations that they believe arise;
- where the complainant is based;

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- when the information was first published;
- any indicators of the extent of publication; and
- any other information they think it is necessary for the ISP to know in order to make an informed decision.

This kind of information should assist the ISP to assess the risk of leaving the content online. It may require engaging with the complainant and seeking a legal view a to the risks of a claim for being successful in the jurisdiction in which the person resides. quest. This may involve considering the seriousness of the nature of the material, whether the ISP could be a publisher and what defences it could rely on.

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Notes

- 1. [2007] 1 WLR 1233.
- 2. [2009] EMLR 27.
- 3. [3023] EWHC 449.



UPCOMING EVENTS

MEDIA AND ENTERTAINMENT LAW CONFERENCE January 17, 2013, Los Angeles, CA

LEGAL ISSUES CONCERNING
HISPANIC AND LATIN AMERICA MEDIA
March 11, 2013, Miami, FL

MLRC STANFORD DIGITAL MEDIA CONFERENCE May 16-17, 2013, Palo Alto, CA

MLRC LONDON CONFERENCE September 23-24, 2013, London, England

MLRC Annual Dinner & Forum November 13, 2013, New York, NY

2012 MLRC Survey of Actions to Identify Newspaper Website Commenters

Newspapers See High Rate of Success in Protecting Identity of Commenters

By Michael A. Norwick and Lindsey Davis

Over the past several years, user comment areas on newspaper websites have become commonplace. Subpoenas and other discovery procedures seeking to compel newspapers to disclose the names, e-mail addresses, IP addresses and other identifying information of commenters have become prevalent as well. Newspapers, traditionally the guardians of the identity of their sources, now face the question of whether and to what extent they should protect the identity of readers who post comments on their websites.

It is unclear how often newspapers voluntarily comply with such discovery requests, or otherwise resolve these types of demands without litigation. But when newspapers have chosen to litigate, they have been highly successful in convincing courts around the country that commenter identity is protected because of the First Amendment value of anonymous speech and/or reporters' privilege law.

For this Survey, MLRC searched its own publications and compilations, ¹ as well as other publicly available sources ² for information on litigations involving newspaper website commenters from January 2008 through November 2012. Our inquiry focused on traditional print newspaper publishers that have an accompanying online news website. During this nearly five-year period, we found 36 cases in which the identities of newspaper website commenters were sought. ³

A decision on the merits was rendered in 27 cases. In 21 (78%) of these cases, the court refused to disclose user identities. The party seeking disclosure was successful in only five (5) (19%) of the cases. In the one remaining case, *In re: Indiana Newspapers Inc.*, No. 49A02-1103-PL-234 (Ind. App. Feb. 21, 2012), a final decision is still pending.

The demands for commenter identities arose in both civil and criminal suits, but by far, the most common situation is a plaintiff seeking to bring a defamation (and/or related tort) claim against the anonymous commenter. Of the 36 actions in this Survey, 19 (53%) were brought to pursue a defamation claim; seven (7) (19%), to identify potential witnesses or evidence in criminal cases; four (4) (11%), to identify potential witnesses or evidence in civil cases; four (4) (11%), related to the subpoenaing party's concern about the bias of potential jurors or an actual juror; and four (4) (11%), were criminal inquiries in which the anonymous comments were alleged to contain threats.

Of the 14 defamation cases in our survey that have received a final disposition on the merits, disclosure was denied in 11 (79%) cases and granted in three (3) (21%).

A shield law argument was raised in thirteen (13) of the 27 cases. The argument was successful in nine cases, ⁹ and was rejected in four. ¹⁰

Most of the cases in our Survey also cite one or more of the leading cases on the protection for anonymous online speech that require courts to consider, inter alia, the merits of the underlying action, if notification has been given to the anonymous speaker, and/or the subpoenaing party's need for the information. *See Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-761 (N.J. App. Div. 2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Doe v. 2TheMart.com, Inc.*, 140 F. Supp.2d 1088 (W.D. Wash. 2001) and *Sony Music Entertainment Inc. v. Does 1–40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004).

A few courts rejected these precedents and applied their own state's procedural law. See, e.g., Maxon v. Ottawa Publishing Co., 929 N.E.2d 666 (Ill. App. 2010) (rejecting the standards articulated in Dendrite and Cahill, and instead

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applying Illinois Supreme Court Rule 224 governing petitions for discovery before suit); *accord Stone v. Paddock*, No. 09L5636 (Ill. App. Nov. 17, 2011).

For excellent overviews of the various legal standards for the disclosure of anonymous speaker identities, as well as thoughtful discussions about the public policy considerations for courts applying reporters' shield laws to anonymous commenters, see Kissinger, supra, n.2; Martin, supra, n.2. See also Patrick C. File, Forgo the Flimsy Shield: Why News Organizations Should Think Twice Before Claiming Shield Laws Extend to Anonymous Online Commenters, 2 J. MEDIA L. ETHICS 50 (Winter/Spring 2010).

Of the 21 cases in which the courts refused to require disclosure by the newspaper, nine (9) (43%) of the decisions cited state reporters' shield laws as grounds for the decision; seven (7) (33%) cited a lack of relevance or compelling need for the commenter identities sought; six (6) (29%) cited the failure of the party seeking disclosure to attempt to discover the speaker's identity through alternative means; five (5) (24%) cited the failure of the plaintiff to adequately state a claim for defamation; two (2) (9.5%) cited the failure to notify the anonymous user of the action; and two (2) (9.5%) cited non-substantive procedural grounds. Several courts cited two or more of the aforementioned rationales for denying disclosure, and some state shield laws incorporate one or more of these factors, such as relevance, and attempts at using alternative sources; so the reasons the courts cited for denying disclosure, as aggregated above, are not mutually exclusive.

In conclusion, when newspapers go to court to prevent the disclosure of the identity of anonymous commenters on their websites, they are successful in the vast majority of cases. Most of the cases involve plaintiffs seeking to bring a defamation claim. In denying disclosure, courts have relied both on the constitutionally based protection for anonymous speech and the statutory protection for sources.

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Notes

¹ MLRC, with the assistance of its sister organization, the MLRC Institute, tracks anonymous speech cases, and a variety of other disputes impacting online speech at its "Actions Against Online Speech" blog, available at http://mlrcblogsuits.blogspot.com/

² The following sources of information were particularly helpful: Ashley I. Kissinger, Katherine Larsen & Matthew E. Kelley, *Protections for Anonymous Online Speech*, COMMUNICATIONS LAW IN THE DIGITAL AGE 2012 (PLI Nov. 2012); Jason A. Martin, Mark R. Caramanica and Anthony L. Fargo, *Anonymous Speakers And Confidential Sources: Using Shield Laws When They Overlap Online*, 16 *COMM. L. & POL'Y* 89 (Winter 2011) and the *Legal Threats Database*, maintained by the staff of the Citizen Media Law Project at Harvard Law School's Berkman Center for Internet & Society, http://www.citmedialaw.org/database.

³ The distribution of cases, by year action initiated, was as follows: 2008, 5 cases; 2009, 10 cases; 2010, 8 cases; 2011, 6 cases; 2012 (Jan.-Nov.) 7 cases.

^{4.} In the other nine cases, the subpoena or court application was withdrawn prior to a decision on the merits, and in others, a trial court decision is still pending or is unknown.

^{5.} One of those 21 cases includes a trial court decision denying a John Doe's motion to quash a subpoena on the newspaper, which was reversed on appeal. *Stone v. Paddock*, No. 09L5636 (Ill. App. Nov. 17, 2011). In the other 20 cases, the (Continued on page 29)

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disclosure of the commenter's identity was denied by a trial court, and either the decision was not appealed or MLRC is unaware of any pending appeals. To the best of our knowledge, the news organizations were actively involved in opposing disclosure in each of these cases, except that in one case, *State v. Hyde*, No. 09 CF 2305 (Ill. Cir. Ct. Lake County May 17, 2011), where our information is based solely upon news media reports, we cannot confirm this.

⁶ This includes one case in which an Illinois trial court denied the plaintiff's application to require the disclosure of the identity of an anonymous commenter, but the Appellate Court of Illinois reversed. *Maxon v. Ottawa Publishing Co.*, 929 N.E.2d 666 (Ill. App. 2010). In the other four cases, disclosure of the commenter's identity was ordered by the trial court, and either the decision was not appealed or MLRC is unaware of any pending appeals. Additionally, it should be noted that in *Alton Telegraph v. Illinois*, No. 08-MR-548 (Ill. Cir. May 15, 2009), the court allowed only two of five commenters to be subpoenaed. The court quashed the subpoena on three of the commenters, finding that their comments were not sufficiently relevant to the underlying investigation.

⁷ In that case, a trial court ordered the newspaper, *The Indianapolis Star*, to produce documents identifying a commenter, but the Indiana Court of Appeals reversed and remanded after the court adopted heightened protection for anonymous speech. On remand, the trial court held that plaintiff made a showing sufficient to require the production of records related to the user's identity. *Miller v. Junior Achievement of Central Indiana, Inc.*, 49D07-1003-PL-014761 (Ind. Super. Oct. 19, 2012). The newspaper appealed the decision, and was granted a temporary stay, but on December 7, 2012, the Court of Appeals of Indiana, in a 2-1 decision, dismissed the stay, holding that it lacked jurisdiction to hear the appeal. *In re Indiana Newspapers, Inc.*, Cause No. 49A02-1211-PL-898 (Ind. App. Dec. 7, 2012). As this article goes to press, the *Indiana Star* is considering whether to further appeal the case.

⁸ In one case, *State v. Coe*, No. 1227878 (Tex. Dist. June 15, 2010), criminal defense counsel argued (unsuccessfully) that commenter identities were needed *both* to find defense witnesses and to protect the jury pool from biased jurors. For this reason, the calculations shown in the text do not total one hundred percent.

⁹ See Beal v. Calobrisi, No. 08-CA-1075 (Fla. Cir. Oct. 9, 2008); Carpenter v. Does, No. 2012-895-5 (Ga. Super. July 2012); People v Bruce, No. 09M3247 (Colo. Springs Mun. Oct. 27, 2009); State v. Martinez, No. 17042B (Tex. Dist. 2009); State v Mead, No. 10 CRS 2160 (N.C. Super. Aug. 16, 2010); Doe v. TS, No. CV08030693 (Or. App. Sept. 30, 2008); Doty v. Molnar, No. DV 07-022 (Mont. Dist. Sept. 3, 2009); Costello v. SuperValu Inc., No. 41-2009-CA-001150, 39 Media L. Rep. 2407 (Fla. Cir. Aug. 30, 2010); State v. Coe, No. 1227878 (Tex. Dist. June 15, 2010).

^{10.} See Alton Telegraph v. Illinois, No. 08-MR-548 (III. Cir. May 15, 2009) (in which the trial court held that that five commenters on *The Telegraph*'s website were not sources for the purposes of the Illinois Shield Law, and ordered information to be disclosed on two of the five commenters the court believed to be relevant to the underlying criminal matter); *In re Indiana Newspapers Inc., supra* (similarly holding that the newspaper site commenters were not protected under the Indiana Shield Law, but remanding the case for consideration under a modified *Dendrite* standard); *Clem v. An Unknown Person*, No. 08-CI-1296 (Ky. Cir. Mar. 26, 2010) (finding that the "posting was not procured or obtained by any reporter. . . for the purposes of publishing the information in the *Richmond Register*, but quashing the subpoena for failure to identify the defamatory statements and give notice to the poster); *Jacobson v. Doe*, Case No. CV-12-3098 (Idaho Dist. July 10, 2012) (state-constitution based reporters' privilege did not extend reporter acting as facilitator or administrator of newspaper's blog).

APPENDIX

The study analyzed the following 36 cases, listed alphabetically:

- (1) Alton Telegraph v. Illinois, No. 08-MR-548 (Ill. Cir. Ct. May 15, 2009).
- (2) Beal v. Calobrisi, No. 08-CA-1075 (Fla. Cir. Ct. Oct. 9, 2008).
- (3) Bizub v. Paterson, No. 2007CV1960 (Colo. Dist. Ct. El Paso County Aug. 22, 2008).
- (4) *Bd. of County Comm'r of Shelby County v. Cooper*, No. 2:11-cv-02101-SHM-cge (W.D. Tenn.) (Filed Aug. 15, 2012). *See* Michael Lollar, *Shelby County Commissioners vote to pursue subpoena of online commenters' identities*, THE COMMERCIAL APPEAL, July 30, 2012. *See also The Commercial Appeal's* letter objecting to subpoena.
- (5) Broussard v. Doe, No. 2012-8388 (La. Dist.) (Filed Sept. 4, 2012) (complaint).
- (6) Carpenter v. Does, No. 2012-895-5 (Ga. Super. July 2012). See Michelle Floyd, <u>Judge grants motion to quash subpoena</u>, ROCKDALE CITIZEN, July 2, 2012; see also, <u>Motion to Quash</u>.
- (7) <u>Clem v. An Unknown Person</u>, No. 08-CI-1296 (Ky. Circ. March 26, 2010).
- (8) Costello v. SuperValu Inc., No. 41-2009-CA-001150, 39 Media L. Rep. 2407 (Fla. Cir. Ct. Manatee County Aug. 30, 2010).
- (9) Doe v. TS, No. CV08030693 (Or. App. Sept. 30, 2008).
- (10) Doty v. Molnar, No. DV 07-022 (Mont. Dist. Ct. Sept. 3, 2009).
- (11) Enterline v. Pocono Med. Ctr., 751 F. Supp. 2d 782(M.D. Pa. 2008).
- (12) Grand Jury Subpoena in re: *State v. Davidson* (E.D Tenn. Oct. 2009). *See FBI widens death-threats probe, subpoenas KNS online records*, NEWS-SENTINEL, Oct. 27, 2009
- (13) H.W. Holdings (IL) See Steve Myers, <u>Anonymous news site commenter outs herself after newspaper agrees to ID her</u>, POYNTER, Dec. 7, 2011.
- (14) <u>In re: Indianapolis Newspapers, Inc.</u>, 963 N.E. 2d 534 (Ind. App. Feb. 21, 2012). On remand, <u>Miller v. Junior</u>
 <u>Achievement of Central Indiana, Inc.</u>, 49D07-1003-PL-014761 (Ind. Super. Oct. 19, 2012); appeal dismissed, <u>In re</u>
 <u>Indiana Newspapers, Inc.</u>, Cause No. 49A02-1211-PL-898 (Ind. App. Dec. 7, 2012).
- (15) Jacobson v. Doe, No. CV-12-3098 (Idaho Dist. July 10, 2012).
- (16) Lavelle v. Gannett, No. 60310/2011 (N.Y. Sup. May 18, 2012).

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- (17) Mary and Phil Brown v Doe, No. A-12-658911-C (Nev. Dist). (Pending as, of 9/4/12). See Francis McCabe, Anonymous 'Lawyer' may be revealed, LAS VEGAS REVIEW-JOURNAL, June 1, 2012. See also Motion to Quash Subpoena.
- (18) Maui Police Grand Jury Investigation (Haw. 2011), see Ilima Loomis, <u>Police withdraw subpoena</u>, say online <u>commenter ID'd</u>, MAUI NEWS, June 25, 2011.
- (19) Maxon v. Ottawa Pub. Co., 929 N.E. 2d 666 (Ill. App. Ct. 2010).
- (20) Mazzuchelli v. Doe et. al. (Mass. Cmmw. Nov. 2011). See Kevin Rudden, Mazzuchelli Gets Names of Bloggers, TOWN CRIER, May 17, 2012. See also Brian Benson, Milford's Paul Mazzuchelli files defamation lawsuit calling for commenters' names, MILFORD DAILY NEWS, Nov. 11, 2011.
- (21) McVicker v. King, 266 F.R.D. 92 (W.D. Pa. 2010).
- (22) *Montana v Winter* (Mont. August 2010) *See* Molly Priddy, *Online Comment as Evidence*, FLATHEAD BEACON, Sept. 21, 2010.
- (23) Ottinger v. Journal News, 36 Media L. Rep. 2018 (N.Y. Sup. Ct. Westchester County July 8, 2008).
- (24) People v Bruce, No. 09M3247 (Colo. Springs Mun. Ct. Oct. 27, 2009). See Ashley I. Kissinger, Katharine Larsen, and Matthew E. Kelley Protections for Anonymous Online Speech in COMMUNICATIONS LAW IN THE DIGITAL AGE 2012 509, 589 (PLI 2012).
- (25) *People v. Kuehl*, No. 09HF0538 F A (Cal. Sup. Ct. Orange County Aug. 18, 2009). <u>See</u> Ashley I. Kissinger, Katharine Larsen, and Matthew E. Kelley *Protections for Anonymous Online Speech* in COMMUNICATIONS LAW IN THE DIGITAL AGE 2012 509, 586 (PLI 2012).
- (26) <u>Sedersten v. Taylor</u>, No. 09-3031-cv, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009).
- (27) State v. Coe, No. 1227878 (Tex. Dist. Ct. June 15, 2010). See Nancy Flake, Judge <u>agrees with HCN; online comments protected</u>, CLEVELAND ADVOCATE, June 16, 2010. See also Jason A. Martin, Mark R. Caramanica and Anthony L. Fargo, Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online 16 COMM. L. & POL'Y 89, 110 (Winter 2011).
- (28) State v. Hyde, No. 09 CF 2305 (Ill. Cir. Ct. Lake County May 17, 2011). See Dan Rozek, <u>Lawyers in Island Lake trial</u> subpoena newspaper to learn comment poster IDs, CHICAGO SUN TIMES. Tony Gordon, <u>Evidence in theft case may have been altered, prosecutors say</u>, Daily Herald, May 17, 2011.

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- (29) State v. Martinez, No. 17042B (Tex. 104th D. Ct. 2009). See Daralyn Schoenewald, Judge <u>rules names of ARN online</u> <u>commenters do not have to be turned over</u>, REPORTER NEWS, June 19, 2009. See also, Patrick C. File, Forgo the Flimsy Shield for Anonymous Online Commenters, 2 J. MEDIA L. ETHICS 50, 66 (Winter/Spring 2010).
- (30) State v Mead, No. 10 CRS 2160 (N.C. Super., Aug. 16, 2010).
- (31) Stone v. Paddock, No. 09L5636 (Ill. App., Nov. 17, 2011).
- (32) Straus Newspapers Inc v. People (N.Y. Sup. Feb. 9, 2010). See Ashley I. Kissinger, Katharine Larsen, and Matthew E. Kelley, Protections for Anonymous Online Speech in COMMUNICATIONS LAW IN THE DIGITAL AGE 2012 509, 623 (PLI 2012).
- (33) *United States v. Kahre*, No. 2:05-cr-121, 2009 WL 1361319 (D. Nev. May 12, 2009). *See* John Whitely, *Inquiry into Web remarks continues, federal judge says*, LAS VEGAS REVIEW-JOURNAL, Sept. 30, 2009,
- (34) Varrenti v. Gannett, 929 N.Y. S. 2d 671 (N.Y. Sup. Aug. 3, 2011).
- (35) Vinogradov v. Montana State University-Bozeman, DV-03-49 (Mont. Dist., June 5, 2009).
- (36) Zherka v. Bogdanos, 08 Civ. 2062 (S.D.N.Y. Feb. 24, 2009) (Transcript)

MLRC UPCOMING EVENTS

MEDIA AND ENTERTAINMENT LAW CONFERENCE January 17, 2013, Los Angeles, CA

LEGAL ISSUES CONCERNING HISPANIC AND LATIN AMERICA MEDIA March 11, 2013, Miami, FL

> MLRC STANFORD DIGITAL MEDIA CONFERENCE May 16-17, 2013, Palo Alto, CA

MLRC LONDON CONFERENCE September 23-24, 2013, London, England

MLRC ANNUAL DINNER & FORUM November 13, 2013, New York, NY

Pennsylvania Federal Court Rules **Press Has Right to View Execution**

History and Logic Support Press's Right of Access

Under the logic prong, the

court found that permitting

the press to view an entire

execution without

obstruction contributes to

the proper functioning of the

execution process.

In early November, a Pennsylvania federal district court held that the press has a qualified First Amendment right to view the entire process of lethal injection executions. The Philadelphia Inquirer v. Wetzel, No. 12-cv-01917 (M.D. Pa. Nov. 6, 2012) (Kane, J.).

Although no Supreme Court or Third Circuit opinion had yet addressed whether the press is entitled to witness and report on state-sponsored executions, the district court held that the history and logic test of Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), supported such a right. (The Ninth Circuit had previously recognized such a right in

California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002).)

Background

The Philadelphia Inquirer and The Patriot-News challenged state protocols in place for press access to the pending execution of Hubert Michael (since stayed by the courts). Under the protocols,

certain steps of the lethal injection process were conducted behind a closed curtain.

The district court first rejected the state's argument that access was foreclosed by the Supreme Court's decision in Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978), which held that the press does not have a general right of access to prison facilities. See also Pell v. Procunier, 417 U.S. 817, 834 (1974) (newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public).

As a factual matter, executions in Pennsylvania are not conducted inside penal institutions, but at a purpose-built execution complex outside the prison. But even if the execution took place inside the prison, Houchins would not control, the court concluded, since plaintiffs were not seeking "unregulated access" to prisoners.

History and Logic Test

Applying the Richmond Newspapers test, the court found a long history of public and press access to executions - from public hangings in the 1800s to media presence at electrocutions.

> Under the logic prong, the court found that permitting the press to view an entire execution without obstruction contributes to the proper functioning of the execution process. Among other things, it promotes a more informed discussion of the death fairness and transparency concerning the death penalty, especially pending challenges to constitutionality of execution by lethal

injection as being cruel and inhuman punishment.

Having recognized a qualified right of access to view the lethal injection execution without obstruction, the court found that the Pennsylvania rules restricting access were not narrowly tailored to serve the state's interest in governing executions.

The newspapers were represented by H. Justin Park of Schnader Harrison Segal & Lewis LLP in Philadelphia; Mary Catherine Roper of the ACLU of Pennsylvania; Paul H. Titus and Stephen J. Shapiro of Schnader, Harrison, Segal & Lewis LLP in Pittsburgh; and Witold J. Walczak of the ACLU of Pittsburgh.

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MLRC's 2012 Defense Council Section Meeting

DCS Executive Committee President Elizabeth Ritvo called the Annual Meeting to order, welcomed everyone, and thanked them for attending.

She reviewed the DCS Committee structure noting that committees are essential to MLRC. They are a way for attorneys to get to know each other and learn from each other's expertise. She encouraged new attorneys to get involved not only for their own education, but also for the strength of the organization to develop the next generation of leadership.

Starting in January a new Media Trademark & Copyright Committee will be formed, chaired by Tim Jacoby of the Washington Post and Maya Windholz of NBC Universal. This will not be an advocacy committee, but will serve as a resource to explore trademark and copyright issues, with useful collaborations with the Internet and Entertainment Committees.

Welcome from MLRC Board of Directors

MLRC Chair Susan Weiner welcomed everyone to the meeting and thanked them, noting the degree to which MLRC is enhanced by the Defense Counsel Section. DCS reports and committees contribute significantly to the organization.

DCS Board and Election of Treasurer

Starting January 1, 2013, Bob Latham will serve as DCS President, Louis P. Petrich will serve as Vice President, and Samuel Fifer will serve as Secretary. Elizabeth Ritvo will hold emeritus status.

The DCS Executive Committee nominated Chuck Tobin of Holland & Knight to join the DCS Board as Treasurer. By oral vote, the DCS membership approved Chuck Tobin as Treasurer.

Executive Director's Report

Sandy Baron and incoming DCS President Bob Latham both thanked Liz Ritvo for her terrific and energetic term as DCS President. Sandy thanked the DCS Executive Committee for its hard work throughout the year and delivered a report on accomplishments in 2012 and plans for 2013. [See Annual Meeting Report in the November MediaLawLetter.]

Advertising & Commercial Speech Committee

Co-Chair Steve Baron reported that the committee functioned as a phone-conference committee throughout the last year. The committee held phone discussions on California Shine the Light Privacy Laws and the EU Cookies Initiative. An upcoming meeting will discuss legal issues surrounding Pinterest and Telephone Consumer Protection Act class actions from a defense lawyer's perspective. In 2013, the committee continue to follow regulatory and developments in social media and advertising and consumer class actions arising out of traditional and online media.

ALI Task Force

Chair Tom Leatherbury reported that after several quiet years the American Law Institute this year announced a new phase of the Restatement Third of Torts, especially intentional torts. The Task Force will be active in this project, which will likely kick off over the next several months. He also encouraged MLRC members to join ALI to participate in its projects.

California Chapter

Co-Chair Rachel Matteo-Boehm reported that the California Chapter hosts quarterly lunch meetings focusing on topics of interest to the California media law community. Traditionally these meetings are based at Southwestern Law School, but due to construction, the quarterly meetings have been rotating, with October's meeting held at Fox. This has also enabled the group to host video conferences, allowing those in Northern California to participate. One of the Committee's goals is to integrate Northern California lawyers into the Chapter's activities, especially Northern California's digital community. The Cal Chapter will explore issues of interest to the entertainment community in Southern

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California and the digital community in Northern California at future meetings.

Employment Law Committee

Co-Chair David Jacobs highlighted the committee's publications, including an update to the "Basic Guide to Employment Defamation and Privacy Law" and a report on "Legal Considerations for U.S. Media Employers Who Send Employees Into "Harm's Way." The committee is currently working on a report about media companies' use of interns. This is David's last year as co-chair, and he thanked Tanya Menton of ABC and Thomas Wilson of Vinson & Elkins for continuing the leadership.

Entertainment Law Committee

Louis Petrich reported on behalf of the committee chairs. The Committee conducts monthly teleconference meeting with its more than 50 members on topics such as copyright, trademark, idea submission, defamation, invasion of privacy, right of publicity, anti-SLAPP, and entertainment disputes. In many cases, those who represented the litigants are on the call to offer insights. A sub-committee is currently working on a whitepaper, tentatively titled "Can Art Imitate Life: The Use of Trademarked Products in Expressive Work" that the committee hopes to publish by the end of the year.

Ethics Committee

Chair Leonard Niehoff reported that the committee engaged in three activities throughout the year. First, it helped facilitate the ethics boutique sessions at the MLRC Media Law Conference in Virginia in September. Second, the committee reorganized the Ethics Column archives by subject matter to make them more usable. And third, committee members wrote columns on ethical issues for the MediaLawLetter. A list of proposed Ethics Column topics will be circulated to committee members to generate new articles in 2013.

International Media Law Committee

Co-Chair Lynn Oberlander noted that she is leaving the committee to join the MLRC Board. Gillian Phillips of The Guardian will be the new Vice-Chair. Throughout the year, the committee held bi-monthly phone meetings on various subjects, including Latin American media law developments, and data protection laws in the UK. The committee will continue these meetings on new subjects in 2013, and will also assist MLRC's International Lawyer's Project. The next meeting of the committee will discuss the Leveson Report and its proposals for new press regulation in the UK.

Internet Law Committee

Co-Chair Katherine Surprenant reported that the committee updated and streamlined its "Practically Pocket-Sized Internet Law Treatise." The committee has started to have quarterly calls, which are intended to update members on treatise topics. Each call focused on one treatise topic. Calls have been completed on the topics of bloggers as journalists and internet anonymity. The committee plans to end the year with a teleconference on online consumer fraud. Committee members have also been circulating case summaries and updates to various treatise topics to keep it current for MLRC members.

Legislative Affairs Committee

Nathan Siegel on behalf of the committee chairs reported on the recently published whitepaper on "Implications for the News Media of 'Anti Leaks' Proposals in Congress," an issue the committee will continue to monitor. The committee is also working on a white paper on potential federal anti-SLAPP legislation likely to be introduced during the next session of Congress, and a report about other media-related legislation in the next Congress. Nathan reported that the committee will continue to hold quarterly meetings to update members about pending and potential legislation.

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Litigation Committee

Bob Latham on behalf of the committee chairs reported on this year's update to the "MLRC Jury Instruction Manual," more than doubling its size. The committee has three projects in the works. The "Issue Checklist for Motions to Dismiss and Summary Judgment," will be updated to include online litigation. The committee is working on an update to the Discovery Roadmap for Defamation Litigation covering electronically stored information. Third, the committee is updating the national roster of expert witnesses and expects to reach out to members for opinions of those experts on the list.

MediaLawLetter Committee

Co-Chair Thomas Clyde reported that the committee focuses on assisting the publication of the MediaLawLetter. This year the committee provided advice on online archiving of the monthly newsletter and content sharing with the MediaLawDaily. Both publications rely on member contributions for alerts on new developments. Tom urged all members, but especially those outside of New York and California, to report on developments within their states. He announced that Michael Berry, Levine Sullivan Koch & Schulz, LLP, and Russell Hickey, Axis Pro, will be the new co-chairs of the committee for 2013.

Membership Committee

Co-Chair Toby Butterfield reported on the committee's efforts to seek out organizations and firms that could benefit by becoming MLRC members. The committee maintains a targeted list of potential members and holds quarterly conference calls. This past year, 17 firms and 8 organizations joined MLRC. The committee is looking for two new co-chairs to join Robert Lystad of Axis Pro in heading the committee, as both Toby and Susan Seager will be rotating out of the co-chair position.

New Legal Developments Committee

Co-Chair David Giles reported on the committee's

efforts to assist MLRC in identifying emerging issues and trends. The committee holds quarterly telephone calls. Topics covered in the calls included anti-SLAPP statutes, data collection and data privacy, anti piracy litigation, fair use, and others. David Bodney of Steptoe & Johnson LLP will join as co-chair in 2013, as Jonathan Hart of Dow Lohnes PLLC rotates out of the position.

Newsgathering Committee

Tom Williams reported on behalf of the committee that it will work more closely with the State Legislative Affairs Committee, as many things it studies are issues of state law. The committee is working on a study of credentialing issues and has sent out a survey to the membership to identify problems in this area. He urged members to complete the survey. Additionally, the committee is working on a comprehensive survey of state right to be forgotten legislation (such as expungement statutes), and a project on dealing with restrictions on tweeting, blogging, or otherwise electronically transmitting information while court is in session.

Pre-Publication/Pre-Broadcast Committee

Thomas Burke reported on behalf of the committee. The committee focuses on legal issues from the prepub/pre-broadcast perspective, which this year focused on anonymous posters, vetting blog names for trademark infringement, and Section 230 issues. The committee completed one whitepaper this year, "MLRC Social Media Project," on social media policies. The committee expects to complete another whitepaper on issues of photos in the digital age by the end of the year. The committee has also created training materials on potential liability for use of photos and potential liability for audio-visual coverage of events.

State Legislative Affairs Committee

Cynthia Counts reported on behalf of the committee. The Committee was started last year by Laura Prather and Elizabeth Allen of Gannett has been asked to serve as co-chair next year. Last year, the committee worked

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with more than 30 government regulations attorneys in more than half the jurisdictions of the United States to identify and track legislative trends. The committee exchanged ideas of how to effectively utilize the legislative process and discussed areas of legislation including anti-SLAPP, open government, public notice, cameras in the courtroom, right of publicity, and many more. Draft legislation, court rules, and current model bills can be found on the committee's MLRC webpage. The committee holds monthly phone meetings while legislatures are in session. The committee's goals for 2013 include making the web page more beneficial and soliciting members from other states. The committee will continue to work on broadening and adopting anti-SLAPP and retraction legislation and supporting public notice and open government laws generally.

Bench-Bar-Press Dialogue Project

Laura Handman reported that she and Eric Lieberman, Washington Post Company, co-chair a Bench -Bar-Press Dialogue Project in Washington, D.C. The project grew out of the Council for Court Excellence, a bench bar improvement organization. The project has created the "Journalists Guide to DC Courts," to assist people covering DC courts who do not have training or a background in law. The group has put on seven panels so far, and will host an eighth panel about leaks and the law. Two closed door sessions have been held, leading to judges requesting more training. This has been very helpful in opening and creating a dialogue between the bench, the bar, and the press. Moreover, it could be a model for many states. Those interested should let Laura know and she will be reaching members to promote similar initiatives in other states.

Report on the MLRC Institute

[See <u>Annual Meeting Minutes</u>]

New Business

There being no new business, the meeting was adjourned.



MediaLawLetter Committee

Thomas M. Clyde (Chair)

Jon Epstein (Chair)

Dave Heller (Editor)

Robert D. Balin

Michael Berry

Katherine M. Bolger

Robert J. Dreps

Judith Endejan

Rachel E. Fugate

Michael A. Giudicessi

Charles J. Glasser

Karlene Goller

Shelley M. Hall

Russell T. Hickey

David Hooper

Leslie Machado

Michael Minnis

John Paterson

Deborah H. Patterson

Bruce S. Rosen

Indira Satyendra

Ethics and the Use of Contract Attorneys

By Elana Zeide

In recent years, law firm partners and corporate counsel have increasingly turned to lawyers hired on a contract basis to cope with fluctuating workloads and shrinking budgets. There are obvious advantages to retaining independent legal service providers, often referred to as contract attorneys (regardless of the type of services they provide). Per-project attorneys typically bill at much lower fees than their firm counterparts, and are directly responsible in ways that often make their work more time- and cost-efficient. As easy communication becomes less dependent upon shared physical space, outsourcing discrete projects is an affordable and simple way to keep staffing lean and cut costs. Such arrangements, however, also raise ethical considerations that require attention before moving forward.

The Benefits of Using Contract Attorneys

Contract attorneys give supervising attorneys unparalleled flexibility in terms of project management. Independent attorneys working on a project basis are no longer viewed as a second-tier, emergency option, but have become a strategic ongoing component of many legal practices. Beyond the commonplace use of junior attorneys to assist with burdensome document review, more sophisticated contract attorneys can provide specialized expertise that permanent employees may not possess, coverage when employees take leave, and extra support for a labor-intensive project. Experienced outside attorneys can also bring background knowledge and context to a project that junior associates cannot. For matters requiring prompt attention, contract attorneys are also less likely than a larger firm to require a slow and complex conflict-checking process.

There is no standard contract attorney-hiring entity relationship. In several years of practicing law on a contract basis for media clients, I have provided sole practitioners, inhouse counsel, and corporate entities with services including discovery management, prepublication review, and in-depth legal research. Smaller firms can use contract attorneys to represent clients in matters outside traditional practice areas and on larger-scale matters that would otherwise be unwieldy. Larger firms and in house counsel can cut costs and avoid distracting key permanent staff from other projects by outsourcing discrete, straightforward projects. These can include drafting motions, conducting depositions, performing

due diligence, responding to DMCA complaints, ensuring compliance with new securities disclosure regulations, or preparing a 50-state survey on an evolving social media issue.

Ethical Considerations

Outsourcing legal work to contract attorneys also raises specific ethical considerations that should be incorporated into hiring and practice procedures to ensure compliance with ABA and state rules. In 2008, the ABA Standing Committee on Ethics and Professional Responsibility discussed a variety of ethical concerns raised by outsourcing legal services in Formal Opinion 08-451. Many considerations raised in the opinion have subsequently been incorporated into several states' ethical rules. On August 6, 2012, the ABA House of Delegates approved amendments to the Model Rules of Professional Conduct and their Commentary. These revisions address outsourcing attorneys' ethical obligations related to Model Rule 1.1 (Competence); Model Rule (Responsibilities Regarding Nonlawyer Assistants); and Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

Specifically, hiring attorneys must ensure that independent attorneys providing legal services are competent to provide the services requested, do not have any conflicts of interest, and maintain adequate client confidentiality. They should ascertain if contract attorneys will be considered non-lawyers because they are not authorized to practice law in a particular jurisdiction, and conform to any resulting professional responsibility obligations. Finally, hiring attorneys should ideally obtain a client's informed consent to provide services through a contract attorney. Some jurisdictions also prohibit attorneys from charging more than the cost of the contract attorneys' services.

Ensuring Competence

Model Rule 1.1 requires attorneys to ensure that tasks are delegated to competent attorneys. This extends to lawyers retained on a permanent and per-project basis. Competence is rarely an issue at firms or within corporate counsel departments where attorneys have frequent contact with colleagues. However, contract attorneys should be thoroughly screened and directly supervised.

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The <u>Comment [6]</u> recently added to Model Rule 1.1 indicates that the hiring attorney must "reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client." It suggests several criteria counsel should use in evaluating contract attorneys, including the education, experience and reputation of the nonfirm lawyers; the nature of the services provided; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed. The Comment notes that particular attention should be paid to rules relating to confidential information.

Hiring counsel should conduct a background check to verify the independent provider is qualified to practice in the relevant jurisdiction, is in good standing, and has no pending ethical complaints or malpractice claims against him or her. In states where attorneys must obtain malpractice insurance, hiring attorneys should confirm that the contractor they retain has secured such coverage. The contract attorney's ongoing education should also be considered in light of what is now Comment [8] to Model Rule 1.1, which requires attorneys to keep "abreast" of changes in the law and its practice, "including the benefits and risks associated with relevant technology."

Supervising Contract Attorneys and "Nonlawyers"

A hiring attorney should clearly define the nature, scope and duration of the assignment under Model Rule 1.2. Supervising attorneys must exercise direct supervision over contract attorneys as they would in-house attorneys pursuant to Model Rule 5.1(b). Several jurisdictions also require outsourcing attorneys to consider whether a supervising attorney has sufficient competence to review contractors' work outside his area of expertise. See, e.g., San Diego County Bar Ass'n, Ethics Op. 2007-1 (2007) (a supervisory attorney must know enough about a subject in question to judge the quality of contractors' work).

The new amendments to the Comments to Rule 5.3 and Rule 5.5 require supervising attorneys to make reasonable efforts to ensure that the engagement is compatible with legal ethics obligations and clarify that lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law. While these comments are primarily relevant to the retention of contract attorneys abroad, they may also apply when an attorney performs services as regarding a state

in which he is not admitted to practice. Accordingly, a supervising attorney must make reasonable efforts – not just reasonably believe – that a contract attorney who may be considered a "nonlawyer" fulfills his obligation to provide competent representation. This simply means that less experienced or out-of-state attorneys require closer supervision.

Preventing Conflicts of Interest

Formal Opinion 08-451 requires outsourcing attorneys to verify that contract attorneys do not work for a client's adversaries or on substantially related matters in order to fulfill the hiring attorney's duty to prevent conflicts of interest under the Model Rule 1.7-1.10. A contractor's conflict of interests are not imputed to a firm unless the scope and duration of the relationship is such that the outside attorney "becomes associated" with the firm. Outsourcing attorneys can prevent such association by explicitly delineating a project's scope and restricting the contractor's access to unrelated confidential information. See District of Columbia Legal Ethics Committee, Op. 352 (Feb. 2010).

An independent contractor's conflicts usually become apparent immediately upon consulting the attorney about a specific project, but hiring attorneys should nevertheless check that the attorney does, in fact, maintain records akin to conflict database. See, e.g., Virginia Bar Ass'n Legal Ethics Op. 1850 (Dec. 28, 2010) (noting contract attorney working for multiple firms "should confirm she uses a conflicts database to conduct an appropriate conflicts analysis on each case before accepting any new client matters from these firms").

Preserving Confidentiality

Both outsourcing and contract attorneys have independent obligations to safeguard a client's confidential information against disclosure under Model Rule 1.6. However, the recent amendment added section 1.6(c), which explicitly states that unauthorized access to or the inadvertent disclosure of confidential information does not constitute a violation of the Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors relevant to reasonableness include: (1) the sensitivity of the information; (2) the likelihood of disclosure if additional safeguards are not employed; (3) the cost of employing additional

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safeguards; (4) the difficulty of implementing the safeguards; and (5) the extent to which the safeguards adversely affect the lawyer's ability to represent clients, by, for example, by making a device excessively difficult to use. Comment [18] to Rule 1.6.

Hiring attorneys can use a variety of approaches to ensure compliance with confidentiality rules when dealing with contract attorneys. They should ensure that the contract attorney has put adequate technological and physical measures in place to protect against inadvertent disclosure of confidential information, including firewall protection and secure document disposal procedures. They can ask the contract attorney to sign a confidentiality agreement. In particularly sensitive matters, they might even elect to limit the information they share with a contract attorney. Confidentiality deserves careful attention in this context, but compliance with the rules should be easy to achieve with an experienced contract attorney.

Disclosing Use and Cost of Contract Attorneys to Client

As a best practice, clients should typically be informed when a firm wants to retain a contract attorney to work on a particular project. Formal Opinion 08-451 does not require disclosure when temporary lawyers work under the direct supervision of a lawyer already representing the client, and a number of jurisdictions follow this approach. However, several states do require disclosure and the newly accepted Comments to Rule 1.1 move beyond the obligation stated in that Formal Opinion and suggest that a lawyer "ordinarily" should consult with the client about the scope and allocation of responsibility when attorneys from more than one law firm are providing legal services on a particular matter. Many authorities waive the disclosure requirement when outside attorneys perform "a discrete and limited task, especially if the task does not require the disclosure of confidential information." See The Commissions' Report to the House of Delegates; Virginia Bar Ass'n Legal Ethics Op. 1850 (Dec. 28, 2010) (requiring disclosure and consent for all attorneys other than those performing "tangential, clerical or administrative tasks.").

Adding Surcharges to Contract Attorney Costs

Formal Opinion 08-451 remains the ABA's primary authority on the disclosure and billing considerations

attorneys must adhere to when using contract attorneys. It declares that attorneys are not required to disclose the cost of independently provided legal services, just as they would not be obligated to disclose individual financial arrangements with their employees. Other authorities, however, require outsourcing attorneys to disclose the cost of services provided. See, e.g., <u>Prof1 Ethics Comm. for the State Bar of Texas</u>, Op. 577 (Mar. 2007).

Formal Opinion 08-451 also reaffirmed an earlier opinion that concluded firms may add surcharges above the costs of a contract attorney's services, as long as the total amount charged to a client is reasonable in accordance with Model Rule 1.5. See Formal Opinion 00-420 (Nov. 29, 2000) (Surcharge for Contract Lawyer); see also Carlson v. Xerox Corp., 596 F. Supp. 2d 400 (D. Conn. 2009) (appropriate to bill contract lawyers' time as legal services in light of evidence of how billing lawyers trained, supervised, and monitored them). However, this is not the case in all jurisdictions, and outsourcing attorneys must also use caution in characterizing the work provided. The ABA Ethics Opinions consistently maintain that firms may only markup charges for contract attorneys' work if they are formally billed as a fee, following the rationale that attorneys may make a profit on legal services rendered. If billed as a cost or expense, the billing lawyer may not charge more than the actual cost plus a reasonable allocation of overhead directly associated with that contract lawyer.

Conclusion

The procedures detailed above can be distilled into the commonsense notion that supervising attorneys need to ensure that the legal services they provide to a client are in accordance with accepted standards of professional responsibility--regardless of whether they obtain such services from a permanent or contract attorney. With some due diligence and a few simple precautions, law firms and departments can take advantage of the flexibility and cost-efficiency offered by per-project attorneys without worrying whether they are fulfilling their duties of professional responsibility.

Elana Zeide is a contract attorney practicing in New York. She is a graduate of Yale University (B.A., 1996), Columbia University's School of the Arts (M.F.A. in Nonfiction Writing, 2003); and New York University's School of Law (J.D., 2005). She can be reached at elana@zeideesq.com.