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Supreme Court Strikes Aggregate Contribution Limits on First Amendment Grounds

The Meaning of McCutcheon

By Ronald K.L. Collins & David M. Skover

Happily, we live in a country where citizens can complain, criticize, or even condemn public officials, including the Chief Justice of the United States. By that measure, the First Amendment has been put to robust use lately in light of the Supreme Court's 5-4 ruling in *McCutcheon v. FEC.* The lines are drawn and the battles – political and constitutional – are well underway with no sign of abating anytime soon.

A particularly uninhibited degree of free speech freedom has been tapped to denounce Chief Justice John Roberts for his plurality opinion in *McCutcheon*. University of California Irvine Law Dean Erwin Chemerinsky declared that the opinion was based on "dubious premises," while University of Chicago Law Professor Geoffrey Stone branded it "incoherent." To much the same effect, Stephen Spaulding over at Common Cause maintains that portions of the plurality opinion "strain credulity and defy common sense." Adding to the vilification, Professor Burt Neuborne of New York University Law School tagged the Chief's Justice's constitutional handiwork as a "cavalier approach to *stare decisis*."

The collective view of the First Amendment has succumbed to an individual one. At least in the campaign financing line of cases, communitarian thinking is out and libertarian thinking is in.

As with so many other controversial topics in life and law, however, there are those who hold an entirely different point of view. Take, for example, Brooklyn Law Professor Joel Gora. As he sees it, "the alarmists are wrong again. Today's decision is based on settled campaign finance law and vital First Amendment rights of free speech and political participation. It's a result we should all celebrate, whether you're a conservative or a liberal." And then there is Floyd Abrams. He found the Chief Justice's opinion to be "sound" and Justice Stephen Breyer's dissent to be "totally at odds with the First Amendment . . . [and] deeply disquieting." Jan Baran took issue with *McCutcheon's* critics: "It is hard to see how, when, or why the *McCutcheon* case and its limited holding will now destroy the foundation of our democracy." And though Cato's Ilya Shapiro concluded that the Roberts majority "correctly struck down aggregate contribution limits," he argued "it should've gone further."

There you have it: The First Amendment at work in the marketplace of ideas.

Some Take-Away Points

To echo and build on what we wrote for SCOTUSblog, we think there are several preliminary take-away points that might reasonably be gleaned from the *McCutcheon* opinions – the plurality, concurrence, and dissent. In the days and decades ahead, much will be said about what the Court did in *McCutcheon* and what it all means. For now, we offer the following observations, albeit in abbreviated form.

Balancing is becoming a thing of the past in more and more First Amendment free expression cases, as evidenced most recently by what a majority of the Court did in *McCutcheon*.

The collective view of the First Amendment has succumbed to an individual one. At least in the campaign financing line of cases, communitarian thinking is out and libertarian thinking is in.

Increasingly, legal conclusions are replacing factual determinations in campaign finance cases.

For purposes of campaign finance cases, the notion of "corruption" has become a narrowly defined one that will be rather hard to prove.

For now, *Buckley*'s affirmation of limits on *base* contributions to a single candidate or political committee within an election cycle remains constitutionally permissible. Although the Chief Justice's plurality opinion was careful not to revisit the constitutionality of FECA's base contribution

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limitations to political candidates, committees, and parties, the *Buckley* wall between contributions and expenditures has nonetheless now been breached. One must wonder whether the Justices in the plurality will agree to revisit the constitutionality of the base contribution limitations in a future case, taking up Justice Thomas's invitation to overturn *Buckley*'s First Amendment dichotomy altogether. For example, what if in the future there was a challenge to a base contribution law in a case without any corruption of the kind defined by the Roberts Court?

The win for Shaun McCutcheon put the last nail in the coffin of any First-Amendment-sanctioned concept of systemic political corruption. A solid majority of the Supreme Court Justices now has ruled that the *only* legitimate justification for campaign finance regulation is prevention of political corruption narrowly understood – that is, *quid pro quo* corruption of a candidate virtually akin to bribery. What the current Court will not countenance, then, is any governmental campaign finance regulation directed not solely at the corruption of individual officeholders, but more expansively at the corruption of institutions of government. With such jurisprudential hostility to the prevention of generalized political influence – the kind that is garnered with widespread campaign contributions and expenditures – the future of meaningful and effective campaign finance reform is severely compromised.

Whatever one makes of the various opinions in McCutcheon, it seems likely that campaign finance cases are destined to become a hallmark of the Roberts Court's First Amendment free expression jurisprudence.

Importantly, the continuing constitutional viability of BCRA's limitations on "soft money" contributions to political parties is put into serious question. The Supreme Court upheld those restraints in *McConnell v. Federal Election Commission* (2003) on the rationale that a "soft money" donor could buy excessive political influence. By definition, however, such donations cannot be earmarked for a particular candidate, and so will fall outside the purview of quid-pro-quo corruption. *Citizens United* destroyed one-half of the *McConnell* edifice; it seems only a matter of time before another case demolishes the second half.

McCutcheon v. FEC has been popularly billed as "*Citizens United 2*." A majority of the Justices lifted the lid on aggregate contributions with respect to Shaun McCutcheon, the individual. He is now free to donate to as many candidates and political committees as he wishes to support, provided that he observes (at least for the time being) the legal limit imposed for his contributions to each one. The reasoning of the Court's decision will not stop with McCutcheon and other aggressive and generous individual political donors like him. When it comes to political campaign spending, *Citizens United* put corporations and labor unions on the same First Amendment plane as individuals. If there is no total cap on contributions for Mr. McCutcheon and others like him, there can be no such limitation for corporations or unions either. Eyes will turn to future elections to see whether and how much more money will roll.

Justice Thomas regretted that "the plurality does not acknowledge" that its decision, "although purporting not to overrule *Buckley*, continues to chip away at its footings." Of course, perhaps that was just the stratagem – chip away at *Buckley* much the same way the conservative Court had chipped away at two of its most famous and controversial rulings, *Miranda v. Arizona* and *Roe v. Wade*. If that were to occur, what Thomas lost in the short run could be gained in the long run.

Stare decisis is not what we once thought it to be – it has become a much more flexible concept.

"Judicial restraint," however phrased, has now become the mantra of the liberal Left. Justice Breyer's dissent takes the majority to task for its refusal to defer to majoritarian will and congressional expertise when it comes to judging campaign finance laws.

Yet again, First Amendment "freedoms" have been championed by the conservative Right while condemned by the liberal Left.

The four dissenters were right – expect more challenges to campaign finance cases.

Finally, the *McCutcheon* ruling can only add fuel to the fire of calls for a constitutional convention and/or an amendment to the First Amendment. Justice John Paul Stevens may well lead the charge as evidenced by his proposal to amend the First Amendment, a call to action he issues in his just-released book *Six Amendments: How and*

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Why We Should Change the Constitution (Little, Brown, April 22, 2014).

Whatever one makes of the various opinions in *McCutcheon*, it seems likely that campaign finance cases are destined to become a hallmark of the Roberts Court's First Amendment free expression jurisprudence. What such precedents portend for that area of the law may well be within the realm of reasonable prediction.

But what do they portend for *other* areas of free speech law? That is a question best left to talented First Amendment lawyers who can see beyond one domain of law to another.

Ronald Collins is the Harold S. Shefelman Scholar at the University of Washington School of Law and David Skover is the Fredric C. Tausend Professor of Law at Seattle University School of Law. Their latest book, an e-book released 36 hours after the McCutcheon *ruling, is* When Money Speaks: The *McCutcheon* Decision, Campaign Finance Laws, and the First Amendment *(Top Five Books)*.

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Supreme Court Decisions May Impact Personal Jurisdiction in Online Libel Suits

Is Zippo Flaming Out?

By Jeffrey T. Cox and Erin E. Rhinehart

While the U.S. Supreme Court has several high-profile cases on its docket that will draw attention, the winter of 2014 will be marked in part by the Court's re-affirmation of traditional and time-worn notions of fair play. In less than two months, the Supreme Court issued two decisions limiting the reach of states' personal jurisdiction over potential defendants. *Daimler AG v. Bauman*, No. 11-965, 571 U.S. ___ (2014); *Walden v. Fiore*, No. 12-574, 517 U.S. ___ (2014). Both *Daimler* and *Walden* confirm the Court's allegiance to long-standing principles of personal jurisdiction, and, likely, the Court's reluctance to expand or modify those traditional principles in the millennial world.

Daimler AG v. Bauman

On January 14, 2014, the Court decided *Daimler AG v. Bauman*. In *Daimler*, twenty-two Argentinean residents filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft ("Daimler"), a German company that manufacturers Mercedes-Benz vehicles in Germany.

In less than two months, the Supreme Court issued two decisions limiting the reach of states' personal jurisdiction over potential defendants.

Personal jurisdiction over Daimler was based on the California contacts of a subsidiary of Daimler, which was incorporated in Delaware and had its principal place of business in New Jersey. The subsidiary distributed Daimler-manufactured vehicles throughout the Unites States, including California. Daimler moved to dismiss the plaintiffs' complaint for lack of personal jurisdiction.

The District Court agreed with Daimler and dismissed the complaint. The Ninth Circuit initially affirmed the dismissal; however, on rehearing, the appellate court withdrew its prior decision and reversed. The Ninth Circuit denied Daimler's petition for rehearing en banc. The Supreme Court granted certiorari and reversed.

The Supreme Court reiterated that courts may only exercise general jurisdiction over a foreign corporation when that corporation's contacts with the forum state "are so 'continuous and systematic' as to render it essentially at home" there. *Daimler*, Slip Op., 18-21. The Court explained that, save for the "exceptional circumstance," jurisdiction over a foreign corporation is appropriate only if the forum state is where the defendant corporation is incorporated or has its principal place of business. *Id.* at 20 n. 19. Relying on long-standing precedent, including *Pennoyer v. Neff*, 95 U.S. 714 (1878) and *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court refused to expand the scope of states' general jurisdiction over foreign corporations.

Walden v. Fiore

Two months after issuing its decision in *Daimler*, the Court decided *Walden v. Fiore*. In *Walden*, Anthony Walden, a police officer working at the Atlanta Hartsfield-Jackson Airport as a deputized agent of the Drug Enforcement Administration, seized a large amount of cash from Gina Fiore and Keith Gipson, two professional gamblers, when they were changing planes in Atlanta en route from Puerto Rico to Nevada.

Fiore and Gipson filed suit against Walden in the United States District Court for the District of Nevada, seeking money damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), which provides an implied cause of action for individuals whose Fourth Amendment rights against unreasonable search and seizure are purportedly violated by federal agents (similar to a 42 U.S.C. §1983 claim against the States). Walden argued that Nevada lacked personal jurisdiction over him. Relying on *Calder v. Jones*, 465 U.S. 783 (1984), the District Court agreed and dismissed the complaint. The Ninth Circuit reversed and denied a rehearing en banc. The Supreme Court granted certiorari.

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In a unanimous opinion written by Justice Thomas, the Court (again) reversed the Ninth Circuit's decision and held that the Nevada court may not exercise personal jurisdiction over Walden "because a plaintiff's contacts with the forum State cannot be 'decisive in determining whether defendants' due process rights are violated.'" *Walden*, Slip Op., p. 1 (quoting *Rush v. Savchuk*, 444 U.S. 320 (1980)).

The Court (again) looked to traditional, long-standing principles of personal jurisdiction – refusing to stray from the Court's prior, seminal decisions, including *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). In particular, the Court considered the "minimum contacts" necessary to create specific jurisdiction. The Court emphasized that this inquiry focuses on the relationship among 1) the defendant, 2) the forum, and 3) the litigation: "[T]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, Slip Op., p. 6 (Emphasis in original; quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

Supreme Court Revisits Calder v. Jones

In *Walden*, the Court highlighted its prior decision in *Calder v. Jones*, 465 U.S. 783 (1984), as illustrative of the basic principles that must be applied when courts are presented with questions of personal jurisdiction. *Calder*, a textbook decision on personal jurisdiction, established the "effects test" for determining whether specific personal jurisdiction exists in defamation cases. *See* Cox and Burton, *Current trends in Determining Personal Jurisdiction in Internet Defamation Cases*, MLRC Bulletin, pp. 37-39 (March 2011) (evaluating *Calder v. Jones*, among other decisions applied by courts nationally to determine personal jurisdiction in Internet defamation cases).

If Calder were decided today under Walden, the outcome would likely be the same, but the analysis should be different.

While *Calder* remains good law, the Court's decision in *Walden* strains to distinguish *Calder*. The Court in *Walden* explains that, "[u]nlike the broad publication of the forum-focused story in *Calder*, the effects of [Walden's] conduct on respondents are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction." *Walden*, Slip Op., p. 13. However, in *Calder*, the "effect" of the defendant's article, the injury to the plaintiff, was the primary basis for finding jurisdiction over the defendant. *Calder*, 465 U.S. at 789-790 (relying on the fact that "[the defendants] knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation").

Trying to shoehorn *Calder* into its current decision, the Court then suggests that this "effect" (which is based solely on the *plaintiff's* link to the forum state, a no-no under *Walden*) was considered in combination with "the various facts that gave the article a California focus." *Walden*, Slip Op., p. 10, n.7.

If *Calder* were decided today under *Walden*, the outcome would likely be the same, but the analysis should be different. "[V]iewed through the proper lens – whether the *defendant's* actions connect him to the *forum*," it is likely that the Court would have focused more on the defendant and defendant's specific acts in relation to the forum state and less on the impact of the defendant's actions on the plaintiff. *Walden*, Slip Op., p. 11.

Does Walden Snuff Zippo's Flame in Internet Defamation Cases?

Walden's analysis of *Calder* begs the question, what does all this mean for determining personal jurisdiction in Internet defamation cases? Interestingly, the Court was quick to note that "this case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State. . . . We leave questions about virtual contacts for another day." *Walden*, Slip Op., p. 13 n. 9.

While the Court seems to leave the door open a crack should a "virtual presence" case present, query how "different" the analysis really is (or might be) when evaluating minimum contacts in Internet defamation cases. If the Court holds true to its progeny of personal jurisdiction decisions (a clear trend with the current Court), it is unlikely that technological advances, including the Internet, will uproot traditional principles of personal jurisdiction and alter the focus of the "minimum contacts" inquiry in any meaningful way.

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Ironically, in the early days of Internet jurisdiction cases, most courts rejected *Calder* and looked to *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), an Internet-based trademark dilution and infringement lawsuit. *See Current trends in Determining Personal Jurisdiction in Internet Defamation Cases*, MLRC Bulletin, pp. 39-40 (March 2011).

In *Zippo*, the court established a "sliding scale" approach to personal jurisdiction cases involving the Internet. The court focused mostly on the website at issue – not the defendant. *Zippo*, 952 F. Supp. at 1124. *Zippo's* categorization of websites along a "sliding scale" from "active" to "passive" is unlikely to pass muster under *Walden*. *Zippo*'s approach seems to put the cart before the jurisdictional horse. Given how fractured the current Court often is, the 9-0 decision in *Walden* is not only instructive, but for now would seem to relegate *Zippo* almost to novelty status.

Conclusion

If *Daimler* and *Walden* teach us nothing else, it is that what is old is new again. With respect to defamation cases, regardless where an allegedly defamatory statement is published, a newspaper or a blog, the primary jurisdictional focus must be on the defendant's reach into the forum State, not on the means of publication (or on the impact to the specific plaintiff). Therefore, based on these two decisions, when evaluating personal jurisdiction issues in Internet defamation cases, the key factors to consider are the:

- *Forum-focus of the allegedly defamatory article or post.* Is the article directed toward a certain geographic region or population?

- *Intended readership of the publication.* While it is true that all Internet-based publications are "worldwide," the relevant question is where the publication is actually marketed (or targeted).

- *Actual readership of the publication.* Where is the broadest readership based, regardless of the publication's intended audience?

- *Defendant's aim of the defamatory content.* Who is the subject of the allegedly defamatory statements and where is he or she located? As *Walden* notes, however, "plaintiff cannot be the only link between the defendant and the forum." *Walden*, Slip Op., p. 8.

Two seemingly innocuous decisions on personal jurisdiction, both *Daimler* and *Walden* are instructive and should not be ignored, especially when wandering the unworn path of Internet defamation cases.

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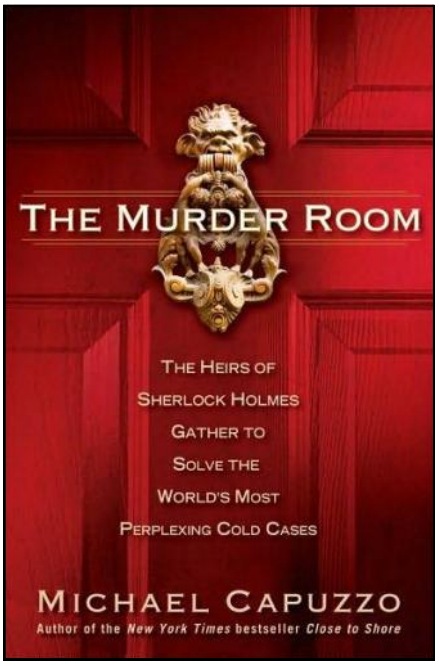
Third Circuit Affirms Summary Judgment for Author and Book Publisher

Publisher Had No Duty to Fact Check Author's Work

It took no Sherlock Holmes for an author to find out that the colorful founder of a crime-solving club had a sexual relationship with his long-time assistant. But the author and publisher may not have foreseen that the assistant would sue for defamation and false light claiming the allegation was false. Any mystery surrounding the likelihood of success for the suit was put to rest by a New Jersey federal district court and, more recently, the Third Circuit which affirmed summary judgment for the author and publisher. *Crescenz v. Penguin Group (USA), Inc.*, No. 13-1242 (3rd Cir. March 26, 2014) (New Jersey law) (unpublished) (Ambro, Fisher, Hardiman, JJ.).

The Court affirmed that the author could not be found negligent for concluding that plaintiff had a sexual relationship with her boss, and the publisher was entitled to rely on the author's work and had no duty to investigate the allegation, even in the face of the plaintiff's pre-publication email claiming the book portrayed her inaccurately.



Background

At issue was a book written by Michael Capuzzo entitled *The Murder Room: The Heirs of Sherlock Holmes Gather to Solve the World's Most Perplexing Cases*, published in 2010 by Penguin Group (USA). The nonfiction bestseller profiled the Vidocq Society, a Philadelphia-based crime-solving club. The club is named after a 19th Century French detective who used psychology to solve cold-cases.

One of the founders of the club – and a key person profiled in the book – is Michael Bender, a forensic artist. The plaintiff, Joan Crescenz, was Bender's assistant and bookkeeper for nearly 30 years. She is also the married mother of three children.

In addition to highlighting Bender's interest in solving cold cases, the book noted his reputation for "sexual exploits." Among other things, Bender claimed he had an open marriage with his wife and had a long-term relationship with plaintiff. According to the book, Bender and plaintiff "made love like clockwork" every Tuesday; plaintiff would answer his door "bottomless," and plaintiff became "jealous of the other girlfriends."

Plaintiff obtained a galley copy of the book and then complained to the publisher that she was portrayed inaccurately. But she stopped short of actually denying a sexual relationship with Bender. For example, in response to the passage that plaintiff and Bender "made love like clockwork" every Tuesday, plaintiff wrote "There's no every Tuesday like clockwork for anything." And: "I did NOT spend [the better half of my life] LUSTING after Frank Bender or his notarity [sic], and waste time with unnecessary jealousy for anyone."

Penguin published the book as scheduled despite plaintiff's complaint. Plaintiff then sued the author and publisher for defamation and false light.

The district court granted summary judgment to the defendants, finding that the author had "overwhelming evidence" of a sexual relationship between plaintiff and her boss. This included Bender's statements to the author prior to publication and in litigation that the two had a sexual relationship; the beliefs of other club members, and the author's own observations of plaintiff and Bender who shared hotel rooms together while traveling. Moreover, assuming that a negligence standard applied, the district court found that even if a jury believed plaintiff's denials, the author could not be found negligent for concluding that plaintiff had a relationship with Bender.

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As for Penguin, the court held that the publisher could reasonably rely on the veracity of the author's work, and was not required under industry custom to independently fact-check the book.

Third Circuit Decision

The Third Circuit affirmed essentially on the reasoning of the district court. On appeal, plaintiff again argued that the author acted negligently by not asking her to verify her relationship with Bender. The Third Circuit disagreed. Looking at the author's sources and own observations there was more than enough evidence to conclude that a relationship existed. Moreover, plaintiff's prepublication email to the publisher did not expressly deny a sexual relationship or otherwise discredit the author's reporting.

It was legally insignificant that another biography of Bender did not report a relationship between plaintiff and Bender. "[T]he decision of another author to focus on other areas of Bender's life did not impeach Capuzzo's conclusions — given the wealth of information he amassed," the Court stated.

Penguin was entitled to rely on the author's work because "publishers do not customarily employ fact-checking staff for non-fiction books, but rely instead on their authors to warrant the truth of the words they write." Moreover, plaintiff's email complaining about inaccuracies did not trigger a duty to independently fact-check the book before publication. Her email did not expressly deny the allegation and Penguin had no reason to doubt the work of the author who was a respected journalist and best-selling author.

The plaintiff was represented by Clifford E. Haines and Danielle M. Weiss, Haines & Associates, Philadelphia. The defendant was represented by Howard J. Schwartz, Wolff & Samson, West Orange, N.J., and Nancy A. Del Pizzo, Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman, Newark, N.J.

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Pennsylvania Court Orders Third Trial in Long-Running Newspaper Libel Case

By Kevin C. Abbott and Justin H. Werner

On appeal from a bench trial verdict in favor of the defense, a Pennsylvania Superior court reinstated the libel and invasion of privacy claims of the individual plaintiffs against the *Citizens' Voice* newspaper in a long-running libel suit over a series of articles discussing the searches and investigation of the plaintiffs. *Joseph v. The Scranton Times, L.P.*, No. 929 MDA 2012 (Pa. Super. March 11, 2014). The court ordered what would be the third trial in the case. The Court affirmed judgment for the newspaper as to the claims of the corporate plaintiffs.

Background

The case, now more than a decade old, was brought by Thomas A. Joseph and his son who allege that they and airport limousine, printing and call center businesses owned by Joseph were defamed by a series of 10 articles discussing searches of Joseph's home and businesses and subsequent grand jury proceedings as part of an investigation into William D'Elia, the reputed head of organized crime in northeast Pennsylvania. D'Elia was subsequently convicted of money laundering and witness tampering. No charges were brought against any of the plaintiffs.

The newspaper defendants have moved for rehearing by the panel or the Superior Court en banc.

The case was first tried without a jury in 2006 before former Luzerne County Court of Common Pleas Judge Mark A. Ciavarella who ruled the newspaper defamed the father and one of the businesses and awarded $3.5 million in compensatory damages. On appeal, the Pennsylvania Supreme Court exercised its rarely used King's Bench jurisdiction to take over the case. After a hearing into the fairness of the trial, the Supreme Court vacated the verdict against the newspaper because of evidence the case was steered to Judge Ciavarella by another judge involved in a racketeering scheme with Ciavarella. Both judges were later indicted and convicted of federal criminal charges.

The case was tried for the second time in 2011 before Luzerne County Court of Common Pleas Judge Joseph Van Jura who entered a defense verdict. He ruled in favor of the newspaper largely on the ground that plaintiffs failed to prove any injury to their reputation or damages caused by the newspaper articles. The trial court explicitly found that the plaintiffs' evidence of injury to reputation was not credible. The trial court found that plaintiffs' expert testimony on the harm to their businesses was speculative and that they had failed to prove any damages caused by the allegedly defamatory statements.

Superior Court Decision

Although the trial court did not make any finding as to whether the plaintiffs met their burden of proving the falsity of any of the statements about them, the Superior Court assumed that the trial court had found falsity based on the trial court's finding that plaintiffs were not public figures, a footnote stating that the newspaper had not proved the truth of certain statements in the articles, and because the trial court would not have reached the issue of damages without first finding liability. The Superior Court rejected the trial court's findings that the individual plaintiffs had failed to prove that they suffered injury to reputation or damages caused by the statements about them. The Superior Court held that the requirement of proving injury caused by false statements did not apply if the statements were made with actual malice. In such a case, the plaintiffs are entitled to presumed damages. Although the trial court found that the plaintiffs' only evidence of "personal humiliation and mental anguish" was their own testimony and they were not credible, the Superior Court held that the trial court should have considered whether the false statements were the cause, either wholly or in part, of the plaintiffs' humiliation or anguish. The Superior Court

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ordered a new trial as to whether the false statements were made with actual malice and whether the individual plaintiffs suffered any general or presumed damages.

As to the claims of the corporate plaintiffs, the Superior Court affirmed the trial court's judgment in favor of the newspaper defendants. The Court held that the trial court properly rejected the plaintiffs' claims that the businesses failed to recognize a speculative potential due to the articles.

The newspaper defendants have moved for rehearing by the panel or the Superior Court en banc, contending that the Superior Court failed to properly credit the trial court's credibility findings, failed to follow Pennsylvania law requiring proof of injury to reputation caused by defamatory statements, improperly equated the trial court's finding that the newspaper failed to prove truth with the plaintiffs' constitutional obligation to prove falsity, and failed to deal at all with the lack of required findings as to fault or as to the newspaper's privilege claim.

Kevin C. Abbott and Justin Werner of Reed Smith in Pittsburgh and Timothy J. Hinton Jr. of Haggerty, Hinton and Cosgrove in Scranton, Pa. represent the defendants.

The plaintiffs were represented by George Croner of Kohn, Swift, & Graft, P.C. in Philadelphia and Timothy P. Polishan of Kelley Polishan Walsh & Solfanelli, LLC in Old Forge, Pa.

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Blogger Entitled to Pre-Suit Retraction Demand for Alleged Defamatory Comments in Blog

By Robert L. Rogers, III

An intermediate appellate court in Florida has issued an opinion construing Florida's retraction demand statute that could have far-reaching consequences both within Florida and throughout the United States concerning whether bloggers should be treated as "publishers" under defamation and libel law. *See* *Comins v. VanVoorhis*, 2014 WL 1393081, at *12-*14 (Fla. 5th DCA Apr. 11, 2014).

Through its opinion affirming summary judgment against a plaintiff who had filed a libel action against the writer of a blog, Florida's Fifth District Court of Appeal held that a graduate student who posted alleged defamatory comments on his blog was entitled under Florida Statutes Section 770.01 to receive a written retraction demand before he could be sued for libel. *Comins* stands as the first Florida opinion to recognize the right of a blogger under Section 770.01 to receive a pre-suit retraction demand.

Comins stands as the first Florida opinion to recognize the right of a blogger under Section 770.01 to receive a pre-suit retraction demand.

Background

The case involved comments published on a blog about a controversial pet shooting in the summer of 2008. Christopher Comins had been charged with misdemeanor animal cruelty after he shot and killed a dog while its owner was attempting to restrain it after the dog had harassed cattle owned by Comins's neighbor.

Matthew VanVoorhis, a doctorate student at the University of Florida, posted comments criticizing Comins's conduct on a blog titled "Public Intellectual" that he operated on a free blogging website under the pseudonym "M. Frederick Voorhees." VanVoorhis had founded "Public Intellectual" in 2007 "in order to publicly comment on issues of public concern in an intellectual manner without tying my comments to my professional identity," and had previously written and posted critiques of academia on his blog, one of which had received a "Thinking Blogger Award." Several viewers of the blog posted Comins's personal and business contact information and death threats in the blog's comments section.

Comins traced the blog to the University of Florida's computer network and, after procuring VanVoorhis's full name and address from university police, sent letters to VanVoorhis through counsel demanding that VanVoorhis either delete the entire blog or, at the very least, delete the comments containing death threats and his contact information. However, those letters did not identify any false or defamatory statements in the blog, and Comins made no attempt before filing suit against VanVoorhis to identify any false or defamatory statements contained in his blog.

Pre-Suit Retraction Demand Statute (Fla. Stat. § 770.01)

Florida is one of 26 states that have statutes that limit the damages libel plaintiffs may recover if they do not provide the publishers or broadcasters they intend to sue written retraction demands that identify the false or defamatory statements that they claim harmed them. *See* Fla. Stat. § 770.01.

Florida is also one of nine such states that require the service of a written retraction demand as a condition precedent for filing suit for libel. Specifically, Florida Statutes Section 770.01 states, "Before any action is brought for publication or broadcast, in a newspaper, periodical, or other medium, of a libel or slander, the plaintiff shall, at least 5 days before filing such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory."

VanVoohis raised Comins's non-compliance with Section 770.01 when moving to dismiss his initial complaint. Comins responded by amending the complaint to allege that VanVoorhis was not entitled to pre-suit notice under Section 770.01 because he is not a media defendant, but that to the

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extent VanVoorhis *was* entitled to such notice, he received it through the letters from Comins's attorney demanding that the blog be deleted.

The trial court subsequently entered summary judgment in favor of VanVoorhis based on Comins's failure to comply with the requirement in Section 770.01 to identify specific false and defamatory statements because VanVoorhis's blog "falls under the rubric of 'other medium' as used in section 770.01."

Applying Fla. Stat. § 770.01

On appeal, Florida's Fifth District Court of Appeal agreed with the trial court that Comins was required to provide VanVoorhis a written retraction demand identifying the specific false and defamatory statements made on his blog, even though VanVoorhis was not a broadcaster or the publisher of a newspaper or magazine. The Court reached this conclusion after providing examining in detail cases against various other kinds of libel defendants that construed Florida's retraction demand statute.

The Fifth DCA began by noting the importance to its analysis of the Florida Supreme Court's discussion in *Ross v. Gore*, 48 So. 2d 412, 414-15 (Fla. 1950), about the legitimate government interests supporting Section 770.01's pre-suit notice requirement, which included "the need for the free dissemination of news and fair comment thereon in order for the public to obtain as much information about a particular event as possible before forming an opinion." *Comins*, 2014 WL at *12. It further agreed with the holding in *Ross* that "it is vital that no unreasonable restraints be placed on the working news reporter or the editorial writer." *Id.*

The Court then explained that the question concerning whether VanVoorhis's blog and blog posts constituted an "other medium" entitled to a pre-suit retraction demand under Section 770.01 must be answered by determining "whether the blog is operated to further the free dissemination of information or disinterested and neutral commentary or editorializing as to matters of public importance." The Fifth DCA concluded (without specifying why) that VanVoorhis's blog *was* operated for such purposes and therefore "is within the ambit of the statute's protection as an alternative medium of news and public comment," but only after acknowledging that it was "not prepared to say that all blogs and bloggers would qualify" for such protection.

Before reaching this conclusion, the Fifth DCA opined about why "the advent of the internet as a medium and the emergence of the blog as a means of free dissemination of news and public comment has been transformative":

> By some accounts, there are in the range of 300 million blogs worldwide. The variety and quality of these are such that the word "blog" itself is an evolving term and concept. The impact of blogs has been so great that even terms traditionally well defined and understood in journalism are changing as journalists increasingly employ the tools and techniques of bloggers—and vice versa. In employing the word "blog," we consider a site operated by a single individual or a small group that has primarily an informational purpose, most commonly in an area of special interest, knowledge or expertise of the blogger, and which usually provides for public impact or feedback. In that sense, it appears clear that many blogs and bloggers will fall within the broad reach of a "media," and, if accused of defamatory statements, will qualify as a "media defendant" for purposes of Florida's defamation law as discussed above. *Id.* at *13.

Implications for Future Libel Actions Against Bloggers

Comins is the latest in a small but growing number of cases concerning the controversial issue of whether and, if so, what kinds of bloggers or publishers of internet content should be afforded the same protection as print and broadcast journalists. Indeed, one of the more hotly debated provisions of the Free Flow of Information Act bill still awaiting passage by Congress is a provision that narrowly defines "covered journalist" to exclude bloggers. *See* Trevor Hunter, *'Free Flow of Information Act' Is Bad for Journalism*, Epoch Times, Apr. 1, 2014.

Comins is also the first opinion of its kind in Florida, as the few prior courts in Florida that have opined on similar actions against bloggers did not address whether the bloggers

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were entitled to pre-suit retraction demands under Florida Statutes Section 770.01.

Earlier this year in *Chevaldina v. RK/FL Management, Inc.*, 2014 WL 443977, at *2-*3 (Fla. 3d DCA Feb. 5, 2014), the court reversed an injunction prohibiting a blogger from posting defamatory comments only grounds that it was an unconstitutional prior restraint on free speech and was overly broad, but did not consider whether the action should have been dismissed for non-compliance with Section 770.01.

In *Dowbenko v. Google Inc.*, 2013 WL 6987174, at *2 (S.D. Fla. Dec. 19, 2013), the U.S. District Court for the Southern District of Florida dismissed an action seeking relief against Google for defamatory comments made on a blog based solely on immunity provisions in the Communications Decency Act (47 U.S.C. § 230(c)(1)) and similarly did not consider the application of Section 770.01.

In *Saadi v. Maroun*, 2008 WL 4194824 (M.D. Fla. 2008), the U.S. District Court for the Middle District of Florida declined to dismiss libel counts seeking relief against two defendants that had posted alleged defamatory statements on their blogs without commenting whether the plaintiff had provided the plaintiffs a pre-suit retraction demand or whether they were required to do so under Section 770.01.

The Fifth DCA's holding in *Comins* is therefore a victory for independent news gathers and publishers in Florida.

The Fifth DCA's holding in *Comins* is therefore a victory for independent news gathers and publishers in Florida, in its recognition that bloggers may be afforded the same statutory protections as broadcasters and print publishers, so long as their blogs are "operated to further the free dissemination of information or disinterested and neutral commentary or editorializing as matters of public interest." *Comins*, 2014 WL at *12-*14.

And although the Court's decision turned on unique statutory language that does not appear in the retraction statutes of other states (publications in an "*other medium*," as opposed to simply newspapers and periodicals), *Comins* may be a useful precedent for bloggers in other states with retraction statutes that do not yet protect independent journalists who publish content exclusively on the internet. Bloggers in most states have no recourse but to challenge their entitlement to statutory protections in the courts by requesting treatment as publishers or journalists, as only Washington has enacted a statute that expressly applies a pre-suit retraction notice requirement to defamatory statements contained in "electronic transmissions" (and that statute is less than one year old). *See* Wash. Rev. Code § 7.96.030(2) (2013).

To its credit, the Fifth DCA did not over-simplify its analysis by dismissing VanVoorhis as "a mere internet-using, private individual," like the defendant in *Zelinka v. Americare Healthscan, Inc.*, 763 So. 2d 1173, 1175 (Fla. 4th DCA 2000), who was held to not be entitled to a Section 770.01 pre-suit retraction notice because he had posted an alleged defamatory comment on an internet message board that he did not own or maintain. By acknowledging the differences between blogs and posts on internet bulletin boards, the Court recognized that "many blogs and bloggers fall within the broad reach of 'media,' and, if accused of defamatory statements, will qualify as a 'media defendant' for purposes of Florida's defamation law." *Comins*, 2014 WL at *13.

Of course, the Fifth DCA arguably gave short shrift to the practical difficulties that persons harmed by defamatory comments posted on anonymous blogs may face in serving retraction demands. For example, Comins was not able to locate VanVoohis by simply looking to the blog with which he took issue. He had to trace the source of the blog to the University of Florida's computer network and serve his initial retraction request to VanVoorhis's pseudonym care of the University of Florida. He appears to have located an actual mailing address for VanVoohis only after reporting the blog to the University of Florida Police Department.

In a footnote, the Fifth DCA dismisses any difficulty Comins faced in communicating his retraction request to VanVoohis and states that, "[f]ailing any other alternative, Comins could have posted a retraction notice in the comments section of VanVoohis's blog." *Id.* at *3 n. 5. However, this alternative may not be suitable to libel victims looking for speedy retraction of defamatory statements on blogs, particularly those who are reluctant to promote offending blogs and invite further comment on defamatory

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statements by posting retraction demands in the comments sections of those blogs.

Those fearing an opening of the flood gates to universal treatment of bloggers conventional print and broadcast journalists also need not panic. The Fifth DCA recognized that "[o]ther blogs run the gamut of quality of expertise, explanation and even-handed treatment of their subjects." *Id.* at * 14. A blog with content not reflecting the same even-handed treatment of their subjects as the Fifth DCA found on the "Public Intellectual" may not be afforded protection under Florida's pre-suit retraction notice statute by the Fifth DCA or other courts in Florida.

Nevertheless, plaintiffs in Florida who are considering filing actions for libel against bloggers should serve retraction demands that specify false or defamatory statements in the defamatory blogs in order to avoid the risk of dismissal of their libel actions for non-compliance with Florida Statutes Section 770.01.

Robert L. Rogers, III is a media and business litigation attorney with Holland & Knight LLP and works in the firm's Orlando office. The Plaintiff/Appellant was represented by Frank H. Gilgore and Christopher M. Harne of Kilgore, Pearlman, Stamp, Ornstein & Squires, P.A. The Defendant/ Appellee was represented by Marc J. Randazza and Jason A. Fischer of Randazza Legal Group, Richard A. Sherman of Richard A. Sherman, P.A., and C. Richard Fulmer, Jr. of Fulmer LeRoy Albee Baumann, PLC.

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Science Journal Wins Anti-SLAPP Motion

Article Protected by Common Interest Privilege; No Evidence of Malice

In an interesting unpublished opinion, a California federal district court recently granted a science journal's anti-SLAPP motion to strike libel and related claims, holding that the publication of a peer-reviewed science article was protected by a common interest privilege. *Critical Care Diagnostics, Inc. v. American Association for Clinical Chemistry*, Inc., 13-cv-1308 (S.D. Cal. Feb. 18, 2014) (Lorenz, J.).

The court explained that "scholarly activity generally fits within the common interest privilege" – and here the publisher and scientific audience shared scholarly interests and activities.

Background

At issue was an article published in the journal *Clinical Chemistry*, a publication of The American Association for Clinical Chemistry (AACC). The AACC is an international scientific/medical society of clinical and academic chemistry professionals.

The article entitled "Soluble ST2 Is Associated with All-Cause and Cardiovascular Mortality in a Population-Based Cohert: The Dallas Heart Study" discussed a protein marker used in heart disease diagnostics.

The plaintiff Critical Care Diagnostics owns a patent on a related "Presage ST2" protein marker. Although the article did not directly discuss its product, plaintiff alleged it was defamed by three statements in the article.

- One, "to our knowledge, no prior study has evaluated sST2 as a cardiac biomarker in the general population."
- Two, the plaintiff said the article reported its assay was less sensitive at detecting ST2 than the assay used in the study.
- Three, the "development of more sensitive assays is needed to fully explore the potential role of this biomarker for population screening."

The plaintiff sued the AACC and the journal editor for defamation, trade libel and violation of California's unfair

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New MLRC Task Force To Focus on SLAPP Laws and Litigation

MLRC is putting together a SLAPP Task Force, which will focus on SLAPP litigation generally, but also on various state anti-SLAPP laws – which ones work, which ones don't, and how to improve SLAPP protections overall. The object is to share information about new developments and current case strategy, provide a clearinghouse on current SLAPP legal issues (such as the scope and applicability of anti-SLAPP laws in diversity cases in federal court), analyze new state anti-SLAPP bills, promote SLAPP reforms (including a possible federal anti-SLAPP law), collect anti-SLAPP briefs and forms, and develop a model anti-SLAPP law. The group's first conference call will be on Thursday, May 8, at 1 pm Eastern. If you are interested, please contact the Task Force chair, Bruce Johnson of Davis Wright Tremaine LLP at brucejohnson@dwt.com.

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competition statute, alleging it lost a business distribution deal because of the article.

SLAPPed Down

On the anti-SLAPP motion, the court first held that the article arose from protected activity within the meaning of the California anti-SLAPP statute because the article was available on the AACC's website and concerned a matter of public interest – heart disease. This was so even if the article was of interest to a "narrow group of medical or laboratory professionals."

On the merits, the plaintiff could not show a probability of prevailing on its claims.

Plaintiff's defamation claims were barred by the common interest privilege. The court held that scholarly activity generally fits within the common interest. Here the peer-reviewed article was the product of serious and rigorous research and it was targeted to an audience of professionals who shared the publisher's scholarly interests and activities.

Plaintiff had no evidence of actual malice or ill will to overcome of the privilege.

The common interest privilege similarly barred plaintiff's trade libel claim. And the trade libel claim also failed because the statements at issue did not specifically refer to or concern the plaintiff or its product. Finally, the unfair competition failed because the article was not commercial speech.

The AACC was represented by Louis Petrich and Jamie Frieden, Leopold Petrich & Smith, Los Angeles, CA; the defendant-editor was represented by Julie Dann, Lewis Brisbois Bisgaard & Smith, LLP, San Diego, CA. Plaintiff was represented by Francis A. Bottini, Bottini & Bottini, La Jolla, CA.

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Texas Court Strictly Construes SLAPP Statute's Commercial Speech Exemption

Approves $75,000 in Sanctions

By Kent Piacenti

A Texas appellate court recently addressed the commercial speech exception to the state anti-SLAPP statute and explained that"for the exemption to apply, the statement must be made for the purpose of securing sales in the goods or services of the person making the statement." *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012 at *6 (Tex. App.—Austin, Apr. 11, 2014, no pet. h.) (mem.).

Background

From 2002 to 2004, Robert Kinney was an employee of BCG, a legal recruiting company. After leaving the company, Kinney began his own legal recruiting firm, Kinney Recruiting, Inc. In May 2008, Kinney posted a single, anonymous message to an internet website. In the post, he expressed negative opinions of BCG, some related companies, and their owner. According to the message, his opinion was "based on his experience as a former employee."

Kinney's online post fell within the plain text of the Texas anti-SLAPP statute.

BCG, the related companies, and the owner sued Kinney in California state court for libel, unfair competition, and intentional interference with economic advantage. Kinney filed a motion to strike under California's anti-SLAPP statute. The court ruled in his favor and awarded Kinney over $45,000 in attorney's fees and costs.

Subsequently, BCG filed an action against Kinney in Texas state court, asserting claims for breach of an employment contract, breach of fiduciary duty, and violations of the Lanham Act for false and defamatory statements in Kinney's online post. Kinney filed a motion to dismiss under the Texas anti-SLAPP statute.

On July 3, 2012, the trial court heard the motion. On the same day, it issued a "Court's Rendition on Defendant's First Amended Motion to Dismiss and for Other Relief." Two days later, the court issued and filed with the clerk an "Amended Court's Rendition on Defendant's First Amended Motion to Dismiss and for Other Relief." In that document, the court "render[ed]" that (1) the conduct underlying the Lanham Act claim or any other claim for libel or disparagement was protected by the Texas anti-SLAPP statute and (2) the claims for breach of contract and breach of fiduciary duty arose from an alleged employment contract, the validity of which should be determined by the trier of fact.

Consequently, the court "render[ed] dismissal" of the Lanham Act claim but denied the motion to dismiss as to the claims for breach of contract and breach of fiduciary duty. The trial court awarded $75,000 in sanctions against BCG in connection with the dismissal of the Lanham Act claim.

The trial court asked Kinney to prepare an order consistent with the rendition. Kinney prepared an order, and BCG objected and proposed revisions. Kinney filed his notice of appeal on August 31, 2012, and BCG filed its notice of cross-appeal on September 14, 2012. On November 9, 2012, the trial court finally signed the order as submitted by Kinney.

Jurisdiction

The Texas Court of Appeals for the Third District (Austin) first considered its jurisdiction over the interlocutory appeal. The court noted that there is a split of authority in the Texas intermediate appellate courts over whether those courts have jurisdiction to entertain interlocutory appeals under the Texas anti-SLAPP statute. But the court further noted that the Texas legislature, in 2013, resolved any doubt about the matter by expressly providing for interlocutory appeal of a

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trial court's denial of a motion to dismiss filed under the Texas anti-SLAPP statute. The court concluded that retroactive application of the 2013 revisions was appropriate because the revisions spoke to the court's power and did not take away or impair the parties' vested rights. Therefore, the court held that it had jurisdiction.

Application of the Texas Anti-SLAPP Statute

The court next held that Kinney's online post fell within the plain text of the Texas anti-SLAPP statute. The statute applies if a legal action "is based on, relates to, or is in response to a party's exercise of the right of free speech." The "exercise of the right of free speech" includes "a communication made in connection with a matter of public concern." And, "a matter of public concern" includes issues related to "a good, product, or service in the marketplace." Because Kinney's online statements related to the services BCG provides to the public, Kinney met his initial burden of showing by a preponderance of the evidence that his statements fell within the statute's protection.

The court specifically rejected BCG's argument that Kinney's statements did not relate to the exercise of free speech because they were false and defamatory and, therefore, not constitutionally protected. The court explained that whether Kinney's statements were defamatory and thus actionable is the second step of analysis under the anti-SLAPP statute, which precludes dismissal if a plaintiff establishes by clear and specific evidence a prima facie case for each essential element of its claim.

Commercial Speech Exemption

The court also rejected BCG's argument that the anti-SLAPP statute did not apply because Kinney's statements fell within the "commercial speech exemption." That exemption removes from the statute's coverage statements that "arise[] out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is an actual or potential buyer or customer." Because Kinney made his statements anonymously and did not mention his services, the statements did not arise out of the sale of his services, even though he was a competitor of BCG.

The court also rejected BCG's argument that the anti-SLAPP statute did not apply because Kinney's statements fell within the "commercial speech exemption."

The court's holding on that point is significant because it demonstrates that Texas courts have required a tight connection between the challenged statement and the sale of goods or services. As the *Kinney* court explained, "for the exemption to apply, the statement must be made for the purpose of securing sales in the goods or services of the person making the statement." *Kinney*, 2014 WL 1432012, at *6; *see also Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 88–89 (Tex. App.—Houston [1st Dist.] 2013, pet. filed); *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, No. 01-12-00990-CV, 2013 Tex. App. LEXIS 8756, at *12–13 (Tex. App.—Houston [1st Dist.] July 16, 2013, pet. denied).

Notably, the Fifth Circuit, interpreting the Texas anti-SLAPP statute, has applied the commercial speech exemption. *See NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, No. 12-41243, 2014 WL 941049, at *8–11 (5th Cir. Mar. 11, 2014). *NCDR*, however, is not inconsistent with the Texas state court cases because the challenged speech in that case—a law firm's advertisements accusing a chain of dental clinics of performing unnecessary dental work on children to obtain government reimbursements—arose directly from the marketing of the law firm's services to potential clients. *Id.* at *10.

The court next rejected the argument that it lacked jurisdiction over the appeal because the trial court failed to sign an order until more than 30 days after the hearing. Under the statute, the trial court "must rule" on a motion to dismiss no later than the 30th day after the hearing or else the motion is "considered to have been denied by operation of law." The court explained that, although the court did not sign the order within 30 days, it had ruled on the motion when it decided the merits of the motion in its rendition.

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Res Judicata

Next the court considered Kinney's argument that BCG's claims were barred by his affirmative defense of res judicata. The court declined to decide whether the 2013 revisions to the statute relating to affirmative defenses applied because it concluded that, under either version of the statute, BCG was required to overcome any affirmative defense that Kinney established.

Looking to California law to determine the preclusive effect of the California judgment, the court reasoned that, although BCG brought different claims in Texas state court, the new claims arose out of the same factual background and could have been brought in the original California action. Thus, the court concluded that they were barred by res judicata.

Sanctions

Finally, the court considered BCG's challenge to the trial court's award of $75,000 in sanctions. The court reasoned that, when dismissing an action under the Texas anti-SLAPP statute, the statute requires the trial court to award sanctions in an amount sufficient to deter the party who brought the legal action from bringing similar actions and gives the court broad discretion to determine an appropriate amount. Because BCG brought claims that it could have brought in the California action and was not deterred by the California court's award of $45,000 in attorney's fees and costs, the court concluded that the trial court did not abuse its discretion in awarding $75,000 in sanctions.

Kent Piacenti is an associate at Vinson & Elkins in Dallas. BCG Attorney Search, Inc. was represented by Daniel H. Byrne, Ariel Henderson, Dale L. Roberts, and Eleanor Ruffner of Fritz, Byrne, Head & Harrison, PLLC. Robert Kinney was represented by Martin J. Siegel of the Law Office of Martin J. Siegel, P.C. and Greggory A. Teeter of the Teeter Law Firm.

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Motion to Dismiss Libel Suit on Statute of Limitations Grounds Denied

Online Version May Be Intended for Separate Audience

By Cameron Stracher

Whitney Houston's life and tumultuous marriage to Bobby Brown was a source for many pages of tabloid ink. Now, a federal judge has ruled that Brown's lawsuit arising from a *National Enquirer* article about Houston's death is not barred by the statute of limitations, and may proceed through discovery. *Brown v. American Media, Inc. and Derrick Handspike*, No. 13-cv-1982 (S.D.N.Y. March 31, 2014) (Oetken, J.).

Background

In its issue dated April 2, 2012, the *Enquirer* reported that Brown and Houston had rekindled their flame shortly before Houston's death, and secretly planned to re-marry. The article was based primarily on an interview with Derrick Handspike, Brown's former friend and sometime biographer. At the time of publication, Brown was engaged to plaintiff Alicia Etheredge-Brown, whom he subsequently married.

The online publication of the same article, if intended to reach a different audience, would constitute a "republication" and make plaintiff's complaint timely.

Brown filed suit for defamation in the Southern District of New York on March 25, 2013. The *Enquirer* moved for summary judgment before discovery on statute of limitations grounds because, despite the cover date, the article at issue was published no later than March 23, 2012, the date it appeared on newsstands. Thus, Brown had missed New York's one year statute of limitations by two days.

In opposing the motion, Brown's attorney claimed that he had spoken to an unnamed clerk in the Southern District of New York who confirmed that the complaint had been received in the clerk's office on March 22, even though the complaint was date-stamped March 25. While Southern District Court Judge Paul Oetken noted that a complaint is presumed to be filed on the dated it is stamped by the clerk, "clerical errors by the Clerk's Office are not inconceivable." Nevertheless, the Court held it need not determine the actual date of filing because alternative grounds existed for denying defendant's motion.

Single Publication Rule

Because the article had been initially published on the Enquirer's website on March 26, 2013, the Court held that the online publication of the same article, if intended to reach a different audience, would constitute a "republication" and make plaintiff's complaint timely.

Although the court noted that "research has not revealed cases addressing . . . whether the initial online website release of an article that was previously published in a paper form constitutes a republication," it found that the closest case was *Firth v. State*, 206 A.D.2d 666 (3d Dept. 2003), in which the Third Department held that the allegation that a challenged report had been moved to a different Internet address "was sufficient to state a claim for 'republication to a new audience akin to repackaging a book from hard cover to paperback.'"

The Court chose not to address a case relied on by defendants, *Haefner v. N.Y. Media, LLC*, 2009 WL 6346547 (Sup. Ct. N.Y. Cty. 2009), *aff'd,* 82 A.D.3d 481 (1st Dep't 2011), which held that the subsequent release of a Kindle edition of a print book does not constitute a republication for statute of limitations purposes.

AMI is represented by David Schulz and Cameron Stracher of Levine Sullivan Koch & Schulz. Plaintiff is represented by Christopher L. Brown of Brown &Rosen LLC, of Boston, MA.

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Section 230 Bars Tort Claims Against Host of Revenge Porn Website

By Grayson McDaniel

A Texas appellate court held that the Communications Decency Act barred claims of negligence and intentional tort against GoDaddy.com, a web host on which third parties maintained "revenge porn" websites, because it neither created nor developed the content at issue. *GoDaddy.com, LLC v. Toups*, No. 09-13-00285-CV, 2014 WL 1389776 (Tex. Ct. App.—Beaumont Apr. 10, 2014, no pet. h.).

On April 10, 2014, the Beaumont Court of Appeals, in an opinion by the Honorable Charles Kreger reversed the order of the 260th District Court of Orange County, Texas, denying the motion to dismiss sought by GoDaddy.com, and remanded the case for entry of judgment in GoDaddy.com's favor.

Background

In the case underlying this appeal, a putative class of women argued that sexually explicit photographs of them were published without their consent on revenge porn websites hosted by interactive service provider GoDaddy.com, LLC ("GoDaddy"). The women argued that GoDaddy knew of the offensive content, failed to remove it, and profited from it. They also alleged that the revenge porn websites published obscene matter and child pornography in violation of the Texas Penal Code, and that GoDaddy continued to host the content despite knowledge that it was illegal. The putative class alleged causes of action against GoDaddy for intentional infliction of emotional distress, intentional violation of the Texas Penal Code, gross negligence, intentional invasion of privacy, and civil conspiracy.

Plaintiffs argued that intentional state-law torts fall outside the scope of CDA immunity, but the court disagreed

GoDaddy moved to dismiss the complaint pursuant to Texas Rule of Civil Procedure 91a. GoDaddy argued that under Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, an interactive service provider cannot be treated as the publisher of content created and developed by a third party. Plaintiffs responded that the CDA does not protect interactive service providers from content such as the revenge porn because it constitutes obscene material outside of the protection of the First Amendment.

The trial court denied GoDaddy's motion. GoDaddy moved to certify interlocutory review of the court's order. The trial court certified for interlocutory review the issue of whether CDA immunity barred each claim alleged against GoDaddy as a matter of law, based on plaintiffs' admission that GoDaddy neither created nor developed the content at issue. The Court of Appeals reversed the trial court's order and remanded the case for entry of judgment in GoDaddy's favor.

Analysis on Appeal

Rule 91a of the Texas Rules of Civil Procedure allows a party to move the court to dismiss a groundless cause of action. Though not identical, a motion under the rule is similar to a Rule 12(b)(6) motion, and the Beaumont Court of Appeals thus found cases interpreting 12(b)(6) motions instructive.

To support its claim of immunity, GoDaddy relied on the following language, found in section 230 of the CDA, termed the "Good Samaritan provision":

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c).

Plaintiffs argued that intentional state-law torts fall outside the scope of CDA immunity, but the court disagreed, holding that section 230 bars *any* state-law cause of action, intentional or not, against an interactive service provider that would hold it liable for publishing or refusing to remove content created by a third party. *See GoDaddy*, 2014 WL 1389776 at *5 (citing 47 U.S.C. § 230(e)(3) ("[N]o liability may be imposed

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under any State or local law that is inconsistent with this section."); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332-33 (4th Cir. 1997); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102-03 (9th Cir. 2009).

The court also noted that a private party could not bring a suit against GoDaddy for violating the Texas Penal Code, as the Legislature did not intend private parties to enforce the Penal Code. *See id.* at *5 n.3 (citing *Reeder v. Daniel*, 61 S.W.3d 359, 362–64 (Tex. 2001) (noting that the Legislature intended "to treat criminal liability separately from civil liability")).

Plaintiffs argued that the CDA could not extend to content outside the protection of the First Amendment, revenge porn websites were not protected by the First Amendment, and the CDA thus should not bar claims arising from them. The court disagreed.

First, the court noted that nowhere does the CDA state that it applies only to content protected by the First Amendment, and plaintiffs failed to cite any authority so stating. Then, the court determined that reading such an exception into the statute would burden service providers with the need to screen "millions of postings" for potentially actionable content. *Id.* at *6 (citing *Zeran*, 129 F.3d at 331). Such a burden would undermine the CDA's stated purpose of "promot[ing] the continued development" and "vibrant and competitive free market" for the Internet. *Id.* (quoting 47 U.S.C. § 230(b)).

Based on these considerations, the court held that the CDA provides immunity from civil suit for interactive computer service providers "even when the posted content is illegal, obscene, or otherwise may form the basis of a criminal prosecution." *Id.* at *7; *accord, e.g.*, *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. 2006) (dismissing claims pursuant to the CDA alleging that Yahoo! violated federal criminal law when it knowingly hosted and profited from an e-group on which illegal child pornography was posted, distributed, and transmitted).

Plaintiffs attempted to raise a new argument on appeal, that GoDaddy violated its policies prohibiting the use of websites for an illegal purpose or in promotion of illegal activity, and requested that the court permit them to replead. The court declined, holding that such repleading would be futile as it would continue to attempt to treat GoDaddy as the publisher of the third-party content at issue. *GoDaddy*, 2014 WL 1389776 at *9. The court instead reversed the trial court's denial of GoDaddy's motion to dismiss and remanded the cause for entry of judgment in GoDaddy's favor. *Id.*

Grayson McDaniel is an attorney with Vinson & Elkins L.L.P in Austin, Texas. Aaron M. McKown and Paula L. Zecchini, attorneys at Wrenn Bender LLLP, and Mark Simon, attorney at Scheef & Stone, LLP, represented GoDaddy.com on appeal. John S. Morgan, P.C., attorney at Morgan Law Firm, represented plaintiffs on appeal.

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Quentin Tarantino's Contributory Copyright Infringement Claim Against Gawker Dismissed

By Matthew L. Schafer

A California federal district court this month dismissed filmmaker Quentin Tarantino's contributory copyright infringement claim against Gawker Media, LLC. *Tarantino v. Gawker Media*, No. CV 14-603-JFW (C.D. Cal. April 22, 2014) (Walter, J.).

Tarantino had alleged Gawker contributed to the violation of his copyright by linking to unauthorized copies of a leaked Tarantino script available online. According to Tarantino, the links induced the direct infringement of his work by making the public more likely to download or view the script.

Background

On January 21, 2014, Tarantino discovered that a draft of his screenplay, *The Hateful Eight*, had been leaked online after he distributed copies of it to several actors. That same day, Tarantino did an interview with the Hollywood blog, *Deadline*, saying that he would shelve the script due to his outrage over the leak.

After Tarantino sat for the interview, Gawker published an article discussing it and ended its report asking readers "to name names" of the leakers "or leak the script to us." Gawker was one of several media organizations to report upon the script leak and Tarantino's resulting threat to pull the film project. As one other publication put it: "Hollywood assistants are now promulgating a link anyone can use to download a PDF of the script that will no doubt end up online in the coming days."

Once copies of the script did show up online – anonymous posters uploaded copies of the script to the websites AnonFiles.com and Scribd.com – Gawker wrote another article reporting that fact, discussing the film script, and linking to copies of it.

Thereafter, Tarantino brought suit against multiple Doe defendants claiming that the Doe defendants, including the operators of AnonFiles and the original poster who put the script online, had directly infringed on his copyright in the script. He also named Gawker as a defendant, alleging that Gawker was liable for contributory infringement, because its use of hyperlinks to the script in a report about the leak, "intended to and did directly cause . . . the dissemination of and infringement of Plaintiff's copyrighted work" by the general public.

Motion to Dismiss

Gawker filed a motion to dismiss. Gawker argued that the Complaint (1) failed to plead any facts showing that Gawker contributed to the initial postings of the script online and (2) failed to plead any facts showing infringement by any member of the public.

Specifically, the complaint lacked facts showing that anyone actually clicked on the links Gawker had provided or, for that matter, did anything more than view the script online, which would not constitute a direct infringement.

The Court sided with Gawker. According to the Court, Tarantino's Complaint had to be dismissed because nowhere in the "Complaint does Plaintiff allege a single act of direct infringement committed by any member of the general public that would support Plaintiff's claim for contributory infringement." Judge Walter went on to explain, "Instead,

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Plaintiff merely speculates that some direct infringement must have taken place." What's more, Tarantino's opposition admitted that it could not "explicitly identify one particular, known individual who downloaded or printed copies of the Screenplay."

In so holding, the Court found that Tarantino's general allegations to contrary, which were largely based on "information and belief," were insufficient under *Iqbal* and *Twombly*. "General allegations such as those relied on by Plaintiff are plainly insufficient to state a claim for contributory infringement," the Court explained.

The Court also observed that Gawker "did not invite its readers to copy, distribute, or make any infringing use of the screenplay." Gawker instead "encourage[d] [its website] visitors to read the Screenplay." Even assuming that certain visitors to Gawker's site did ultimately access the script for that purpose, it would not constitute an actionable infringement. The Court noted that "[s]imply viewing a copy of [an] allegedly infringing work on one's own computer does not constitute the direct infringement necessary to support Plaintiff's contributory infringement claim."

"[Simply viewing a copy of [an] allegedly infringing work on one's own computer does not constitute the direct infringement necessary to support Plaintiff's contributory infringement claim."

Gawker also argued that its inclusion of links to source material for its news report that the script had now appeared online was a transformative "fair use" within the meaning of the Copyright Act. Gawker noted that Tarantino himself set in motion the circumstances by which the script circulated and that Gawker made minimal use of the script – it reproduced no part of it but merely linked to another publication. In addition, Gawker's use did not usurp the primary market for and purpose of the script: to make a movie.

Having dismissed Tarantino's Complaint on pleading grounds, however, the Court declined to consider Gawker's fair use argument. Although the argument was "persuasive and potentially dispositive" of the issues before the Court, the Court "decline[d] to consider those arguments until Plaintiff has had an opportunity to demonstrate that he can state a viable claim for contributory copyright infringement."

Given what the Court described as the Ninth Circuit's liberal policy of granting leave to amend, the Court granted Tarantino leave until May 1, 2014 to attempt to amend his Complaint to state a viable claim.

Gawker Media, LLC was represented by Robert Penchina, Thomas Curley, and Matthew L. Schafer of Levine Sullivan Koch & Schulz, LLP, as well as, Kevin L. Vick and Jean-Paul Jassy of Jassy Vick Carolan LLP. Quentin Tarantino was represented by Martin D. Singer, Evan N. Spiegel, and Henry L. Self of Lavely & Singer P.C.

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EBook Not a Derivative Work Under Copyright Restoration Statute

A Change in Medium Only Not a New Derivative Work

By Mona Houck

In a case of first impression involving the copyright restoration statute, a New York federal district court ruled that an ebook is not a derivative work. *Peter Mayer Publishers Inc., d/b/a Overlook Press v. Daria Shilovskaya and Sergey Shilovskiy*, No. 12-cv-8867 (S.D.N.Y. March 31, 2014) (Gardephe, J.).

Background

The case involved *The Master and Margarita*, a Russian novel by Mikhail Bulgakov that critics have called one of the greatest works of the 20th century. Russian authorities suppressed the novel, and it was first published in France in 1968, decades after Bulgakov's death. The work entered the public domain in the United States because of failure to comply with formalities of the Copyright Act. While the book was in the public domain, the predecessors in interest of Overlook Press began publishing an English translation.

In 1994, Congress passed the Uruguay Round Agreements Act, codified at Section 104A of the Copyright act, which restored United States copyright protection to many foreign works that had fallen into the public domain, including *The Master and Margarita*. While restoring protection to foreign works, Section 104A also provided that parties who had relied on the public domain status of those works and created derivative works could continue to exploit their own creations, as long as they paid reasonable compensation to the copyright holders.

Overlook Press continued to publish its translation, in hardcover and in paperback, paying royalties to the Bulgakov heirs. But, last year, when Overlook Press began preparing an ebook version of its translation, the heirs objected, contending that publication of the translation in electronic form would be a separate derivative work from the print publications and that Section 104A did not authorize new derivative works. Overlook Press filed an action for declaratory judgment, seeking a determination that its publication of an ebook of its translation would not infringe on the heirs' copyright interests.

Judge Gardephe concluded that the conversion was a change in medium only and therefore not a new derivative work.

Motion for Summary Judgment

Based on stipulated facts, Overlook moved for summary judgment. The Court agreed with Overlook, determining that the mere fact of publishing an existing print work as an ebook does not create a new derivative work.

Judge Gardephe reviewed the definition of "derivative work" under Section 101 of the Copyright Act and focused on its two requirements: 1) that a derivative work be in a form that has been "recast, transformed, or adapted," and 2) that it "must represent an original work of authorship." He concluded that neither requirement was present in publishing an existing text in ebook form.

In considering the kinds of work that are recast, transformed or adapted, he looked to the examples listed in the definition: translation, musical arrangement, dramatization, fictionalization, etc. All of those examples, he noted, involve changes or alterations in the content of the existing work, not in the medium alone. He concluded that the definition must be interpreted to refer to content-based changes.

He then noted that changes in medium are generally lacking the creativity necessary to justify copyright protection. He cited the cases that have embraced the concept

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of "media neutrality," -- the view that a change in medium does not affect a copyrighted work's status. Because the process of transferring the print version of the work to an electronic version "would involve nothing more than rote copying," Judge Gardephe concluded that the conversion was a change in medium only and therefore not a new derivative work.

He discussed the *Rosetta Books* case, which determined that an ebook did not fall within the contractual term "book form," but concluded that the case was of little relevance, given that it depended on interpretation of the parties' contracts.

Judge Gardephe then addressed the heirs' argument that the ebook would be an original work because of the creativity required to develop the software. He dismissed that argument, noting that the software is separately copyrightable and that it would not alter the content of the translation. He said the defendants' focus on the software was misplaced and that the issue was the degree of creativity and originality necessary to convert the print version of the translation into an ebook. His conclusion was that the procedure was basically "pure transcription," which does not satisfy the originality requirement for copyrightability and therefore cannot constitute a new derivative work.

Overlook Press was represented by Mona Houck, David S. Korzenik and Eric Rayman of Miller Korzenik Sommers. The Bulgakov estate was represented by Timothy O'Donnell.

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Court Rejects Trademark Infringement Claim Against MoveOn.org

Group Sued Over Use of Tourism Logo

By Dan Zimmerman and Mary Ellen Roy

As the Lieutenant Governor of Louisiana, Jay Dardenne serves as the head of the Louisiana Department of Culture, Recreation and Tourism (the "Department"). He developed a slogan – "Louisiana, Pick Your Passion" – and a logo using the slogan that substituted exclamation points for the two "i"s in "Louisiana." The Department began using the slogan and logo in connection with the state's tourism marketing efforts. The logo was registered as a service mark with the State; the phrase "Pick Your Passion" was registered with the USPTO.

MoveOn.org, a liberal public policy advocacy group, developed a multi-state project to raise awareness in states that had rejected the expansion of Medicaid coverage as part of the Affordable Care Act by parodying those states' tourism marketing campaigns.

Reproduction of logo, left, and billboard.

MoveOn.org put a billboard up along a Louisiana interstate highway that, undoubtedly, played off of the Department's slogan, reading: "LOU!SIANA Pick your passion! But hope you don't love your health. Gov. Jindal's denying Medicaid to 242,000 people."

MoveOn.org refused to comply with a cease and desist letter from the Lt. Governor, who then filed suit, seeking an injunction requiring MoveOn.org to remove the billboard and to stop using Louisiana's registered service mark. *Dardenne v. MoveOn.Org*, No. 14-150 (M.D. La. April 7, 2014).

District Judge Shelley Dick posed the question before the Court as being "whether MoveOn.org may use the State's registered service mark as part of its means and manner of criticizing the State or the Governor."

The Court found it "clear" that MoveOn.org was not using the mark "for the purpose of gaining attention to products and services associated with the mark, but as a parody." Still, the Court said, parody use could infringe the mark if there was a likelihood of confusion. There was not. The Court stated: "The State argues that viewers of the billboard will be confused into thinking that the Lieutenant Governor, as the alleged owner of the service mark, is being critical of the Governor. In this Court's view, the Lieutenant Governor underestimates the intelligence and reasonableness of people viewing the billboard."

The Court asked if a motorist viewing the billboard was likely to conclude that the State of Louisiana – the actual owner of the mark – was criticizing Governor Jindal. "The Court thinks not."

The Court concluded, in a "slam-dunk" for MoveOn.org: "the State has not demonstrated a substantial likelihood of prevailing on its burden of proving confusion by viewers of the billboard. Furthermore, the State has failed to demonstrate a compelling reason to curtail MoveOn.org.'s political speech in favor of protecting of the State's service mark. Finally, the State failed to demonstrate that injunctive relief is required to ameliorate irreparable injury. There has been no showing of irreparable injury to the State."

Ms. Roy is a partner and Mr. Zimmerman a staff attorney at Phelps Dunbar, LLP. MoveOn.org is represented by Dara Lindenbaum and Joseph Sandler of Sandler, Reiff, Young and Lamb, P.C., Washington, D.C., and Stephen Bullock, Lesli Harris and Matthew Almon of Stone, Pigman, Walther, Wittmann, LLC, New Orleans, LA. Mr. Dardenne is represented by Dale Beringer and James Bullman of the Beringer Law Firm, Baton Rouge, LA.

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Court Rejects Subpoena Seeking Documents Leaked to the New York Times

By David McCraw

In 1998, the Second Circuit shocked news media lawyers and their clients by ruling in *Gonzales v. NBC* that there was no federal reporter's privilege protecting a reporter's work product unless a confidential source was involved. A few months later, on reconsideration the circuit reversed course and concluded that non-confidential information was subject to a qualified privilege after all. But exactly what must a litigant show to overcome that privilege, and does it apply to materials that were not created by journalists but instead leaked to them from inside a company?

Those questions were at the heart of a recent case in the Southern District of New York in which The New York Times defeated a motion to compel brought by the plaintiffs in a securities fraud class action involving HCA Holdings, one of the nation's biggest hospital companies *New England Teamsters & Trucking Industry Pension Fund v. The New York Times Company*, No. 14-mc-59-P1, 2014 U.S. Dist. LEXIS 55417 (S.D.N.Y. April 21, 2014).

Does a qualified privilege apply to materials that were not created by journalists but instead leaked to them from inside a company?

Background

The subpoena fight had its roots in The Times's coverage of waste and mounting expense in medical care. In August of 2012, the newspaper published an in-depth story detailing the large number of unnecessary surgical procedures being performed at HCA hospitals. The article was the result of extensive reporting by reporters Reed Abelson and Julie Creswell and was based in part on internal HCA documents provided to them by a confidential source.

The article offered a troubling look at how wrong things can go inside a hospital system driven by bottom-line concerns. It recounted how patients were subjected to medical procedures that they did not need, and, when told of the wrongful practices, executives at HCA turned a blind eye, concerning themselves instead with the financial impact of the procedures.

At the time of the article, HCA was already a defendant in a federal securities fraud suit in Tennessee brought by investors who claimed that HCA had failed to truthfully disclose its financial condition in a 2011 securities offering. While unnecessary surgery was not an element in the fraud claim, the plaintiffs' lawyers, upon reading The Times story, hoped to make the case that HCA had also defrauded investors in 2011 by not revealing how much money was being made by procedures that would have to be disclosed once the facts about the surgical practices became public.

A subpoena was served, The Times objected on the basis of *Gonzales*, and the plaintiffs then moved to compel the disclosure of three sets of internal HCA documents that had been among the materials leaked to the reporters and mentioned in the story.

In *Gonzales*, 194 F.3d 29 (1998), the Second Circuit set up two branches of the reporter's privilege, a stronger one for subpoenas aimed at unearthing confidential information, such as the names of sources, and a second, weaker one for non-confidential information. The lower privilege, which was applicable to the subpoenaed HCA documents, can be overcome by a showing that the information sought is of "likely relevance to a significant issue" and "not reasonably obtainable from other available sources."

The crux of the plaintiffs' case was two-fold: first, that *Gonzales* applied only to work product actually created by reporters, such as notes and interviews and, second, that the HCA materials were not available from HCA itself because HCA lawyers said they did not know what particular documents had been leaked to The Times.

The Times argued that *Gonzales* and its progeny were clear: The privilege applies to journalists' *files* – the term actually used in *Gonzales* – no matter whether those files are notes, outtakes, interview recordings, research materials, or leaked documents. All of those things, not just journalist-created work, trigger the public policy underlying *Gonzales* – that without a privilege for non-confidential materials, the press "would be sucked into litigation" and the "resulting

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wholesale exposure of press files to litigant scrutiny . . . could impair [the press's] ability to perform its duties." 194 F.3d at 35.

Sources would be hesitant to speak to the press and "[i] ncentives would also arise for press entities to clean out files containing potentially valuable information." *Id.* Most importantly, "permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties." *Id.*

But the main focus of The Times case was the inadequacy of the plaintiffs' showing that other reasonably available sources had been exhausted. It turned out that one of the three sets of documents had been located in discovery by HCA, which then claimed privilege. The privilege issue was the subject of motion practice in Tennessee, and the judge had not yet ruled on the plaintiffs' motion to compel there. The Times argued that those documents could not be deemed unavailable until and unless the Tennessee court ruled in HCA's favor – and that it was improper for the plaintiffs to try to use the New York courts to moot a live issue before another federal judge.

The main focus of The Times case was the inadequacy of the plaintiffs' showing that other reasonably available sources had been exhausted.

The other two sets of documents raised a more fundamental issue of proof. Typically, parties seeking to overcome *Gonzales* rely on deposition testimony and interrogatory responses in which fact witnesses detail that they have been unable to come up with the information that the reporters have. Not so here, where the plaintiffs built their case on statements from HCA's outside counsel, who said at a discovery conference in Tennessee that they had "no clue…no idea" what documents The Times had. With all due respect to lawyers, The Times argued that unsworn attorney statements at a court conference did not meet *Gonzales*'s requirement of a "clear and specific" showing that the information is not obtainable from other available sources.

As part of its opposition, The Times submitted a declaration from reporter Julie Creswell, who pointed out that, in seeking comment from HCA prior publication, she had emailed the PR staff and provided details about the leaked documents now at issue and the HCA executives who had created or received them. There was no proof in the record that HCA had ever bothered to contact the PR people as part of discovery.

Motion to Compel Denied

Judge Robert Sweet denied the motion to compel. He agreed with The Times that it was improper for plaintiffs to "attempt to open parallel litigation" to obtain materials that were subject to a pending motion over privilege in the Tennessee action. Moving to the other documents, he criticized the plaintiffs for failing to provide "any deposition testimony from HCA records custodians or Rule 30(b)(6) witness or interrogatory responses from any HCA witnesses." The plaintiffs' use of comments made by HCA's counsel was inadequate because they were "unsworn statements by counsel that do not describe or discuss the type of search HCA has done to locate [documents]." The judge also noted that Ms. Creswell's declaration had provided information on the documents, and the parties had not yet used that information in discovery.

The dismissal was granted without prejudice, and the plaintiffs are free to renew if HCA ultimately cannot locate the documents. However, The Times also questioned whether the documents met *Gonzales*'s relevancy prong – they do not address corporate finance and are not from the immediate time period of the 2011 securities offering – and those arguments would still be in play in any renewed motion.

One historic note: Judge Sweet was the author of the district court decision in one of the Second Circuit's most important privilege decisions, *New York Times Company v. Gonzales*, a case involving an attempt by prosecutor Patrick Fitzgerald to get The Times's phone records to find a confidential source. In a sweeping decision, Judge Sweet found that the reporter's privilege existed under the First Amendment, the common law, and Rule 501 of the Federal Rules of Evidence (382 F.Supp.2d 457 (S.D.N.Y. 2005)). It was perhaps the most comprehensive affirmation of the federal privilege ever written by a federal judge – and was of course reversed by the Second Circuit (459 F.3d 160 (2006)) over a vigorous dissent from Judge Robert Sack.

The Times was represented by David McCraw and D. Victoria Baranetsky of The New York Times Company Legal Department. Plaintiffs were represented by Scott S. Saham of Robbins Geller Rudman & Dowd.

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Other Side of the Pond: UK Media Law Developments

No Special Constitutional Rights for Journalists; Prince Charles' Diary and More

By David Hooper

On 18 August 2013 David Miranda the partner (referred to in the judgment as the spouse of Glenn Greenwald) was detained for a period which totalled nine hours at Heathrow airport under the Terrorism Act 2000. He was carrying 58,000 highly classified documents, many of them secret or top secret, related to British Intelligence which had been stolen by Edward Snowden who had fled to Russia. Miranda had been tasked seemingly by his partner Greenwald to transport this material from Rio de Janeiro to another journalist in Berlin.

Security Services had evidently got wind of this as a Port Circulation Sheet had been issued on 16 August to counter-terrorism police requesting that Miranda be detained for questioning. Miranda was duly stopped and questioned for no more than nine hours to determine if he was concerned in the commission, preparation or instigation of acts of terrorism. The Snowden documents had been the basis of Guardian articles published on 6 and 7 June 2013.

The Court headed by Lord Justice Laws firmly rejected the idea that Miranda had been detained for an improper purpose.

The detention of Miranda was challenged on the basis that paragraph 2(1), Schedule 7 Terrorism Act 2000 did not permit questioning fur such purpose, alternatively if it did, it was suggested that the use of this power was disproportionate and alternatively that if such a power was granted under paragraph 2(1), that would offend against Article 10 European Convention of Human Rights.

The Court headed by Lord Justice Laws firmly rejected the idea that Miranda had been detained for an improper purpose or that the exercise of these powers was disproportionate, referring to established case law that the means used to justify limiting the relevant right or freedom should be no more than was necessary to meet the legislative objective and in the Court's view there should be no inconsistency with Article 10. *Miranda v Secretary of State for Home Department* (2014) EWHC 255 (Admin)

Laws LJ agreed with Lord Steyn that freedom of speech was the "*life blood of democracy*". However, a journalist enjoys no heightened protection for his own sake. Miranda was not himself a journalist but the protection of journalists extended to those involved in collaborative activity with journalists. The judges rejected any idea that the police had acted in bad faith. The Court also firmly rejected some fairly extravagant claims that the role of journalists was akin to that of judges in scrutinising actions by governments.

One felt that the number of interveners resulted in the role of the press being talked up to an extent that the Court found unacceptable. The material being carried by Miranda was not as such journalistic material, although he was acting in assistance of Greenwald's activities as a journalist. A balance had to be struck in the security field between the responsibility of the government and the responsibility of journalists.

The power under Schedule 7 had been created to provide a reasonable but limited opportunity for the ascertainment of the possibility that a traveller at a port may be concerned directly or indirectly in the commission, preparation or instigation of acts of terrorism. The case was all about balancing the needs of security against the freedom of speech. In freedom of speech the Court held one has to balance the rights of the individual with the rights of the community. Free speech is a collective and not an individual interest and as Laws LJ stated a servant of democracy. In this case the Court came down very firmly on the side of national security.

Will Prince Charles's Musings See the Light of Day?

Prince Charles as heir to the British throne is an assiduous letter-writer and has sent a number of letters to ministers

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regarding government policy on matters such as environmental issues in which he has a strong interest rather than, it would appear, the more lower level political issues of the day. A Guardian journalist, Rob Evans, sought to obtain copies of Prince Charles' letters under the Freedom of Information Act. His application had been resisted by the government departments. However, the Upper Tribunal had after a hearing lasting six days, ruled in favour of Rob Evans and ordered their disclosure.

Rather than the departments seeking permission to appeal this ruling, the Attorney General had - to the surprise of many – exercised his powers under section 53 Freedom of Information Act and vetoed the release of these documents. A Divisional Court had reluctantly upheld the Attorney General's action expressing surprise that the Attorney General could act in this way.

However, the Court of Appeal ruled that the Attorney General had not acted reasonably in making a section 53 order and had used a flawed approach in the exercise of his power. *R (Evans) v Attorney General* 2014 EWCA 254. T he Court of Appeal was also of the view that there was a breach of article 6 of the European Convention of Human Rights in that Mr Evans had been denied his right of access to a Court. The Court of Appeal also felt that the exercise of the powers under section 53 was incompatible with EU Regulations relating to access to environmental information.

A Guardian journalist, Rob Evans, sought to obtain copies of Prince Charles' letters under the Freedom of Information Act.

The Attorney General's approach was held to be defective by the Court of Appeal. The fact that he would have reached a different decision in weighing the competing interests of press access to the information and the confidentiality of the communications on governmental issues with which the Prince of Wales would be ultimately dealing in his role as constitutional monarch was insufficient to issue an order under Section 53. The Attorney General could point to no error of law or fact made by the Upper Tribunal in its judgment after the six day hearing nor had the government department sought to appeal. The Court of Appeal therefore quashed the order made by the Attorney General. The Attorney General has obtained permission to appeal to the Supreme Court – so more anon.

No Disclosure Orders Behind Closed Doors

Sam Kiley a reporter for BSkyB had while embedded in a unit in Afghanistan met two officers who were subsequently arrested under the Official Secrets Act 1989 accused of leaking material which had come into their possession from the Cabinet Security Committee, COBRA. In the course of the criminal investigation against the two officers, BSkyB were asked to produce in accordance with section 9 and paragraph 4 of Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE), communications passing between them and the two officers, it being alleged that these communications had threatened military security.

An application under PACE required that there should be reasonable grounds for suspecting that an indictable offence had been committed, that the special procedure permitted by PACE should result in the production of special procedure material at the relevant premises (in this case BSkyB television) and that it was likely to be of substantial value to the investigation and likely to constitute relevant and admissible evidence.

However, when the application was made at the Central Criminal Court (the Old Bailey) successfully as it turned out – the judge had surprisingly taken evidence from the Police to determine whether the criteria set out in PACE were fulfilled but he had done so *in the absence of representatives of BSkyB* having been persuaded that this was necessary in the interests of national security.

The Administrative Court had quashed the order made by the Old Bailey judge and this was upheld by the Supreme Court. *R (BSkyB) v Commissioner of Police* [2014] UKSC17. The Court applied the principles in *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 requiring that evidence used in such trials must be disclosed to all. The Supreme Court stated that the statutory procedure under PACE was highly sensitive and difficult and affected journalists' rights. Parliament had set up a procedure under which the application *must be between parties* and those faced with PACE application should know what evidence the Court would take into account and have an opportunity to challenge it.

The Old Bailey judge had been at error in excluding BSkyB. It was noted that in matters of particular sensitivity it

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would be open to the authorities to issue a Public Interest Immunity Certificate in which case there *could* have been an ex parte application, but such certificates are rare and government ministers may be held accountable in Parliament for their issue.

Damages for Unauthorised Photographs of Children in Public

This is an interesting decision on the question of whether the media are entitled to publish photographs of the children of celebrities in public places. The Mail Online published a series of pictures of the singer Paul Weller relaxing in a café in Santa Monica, California with his daughter aged 16 and his twins aged 10 months. This was a public place and there were no features of the pictures which were particularly intrusive. However, there were a series of pictures of the facial expressions of the children. *Weller v Associated Newspapers* [2014] EWHC 1163.

Dingemans J held that the children did have a reasonable expectation of privacy following the case of *Murray (*JK Rowling*) v Express Newspapers* [2008] EWCA Civ 446. Children should be protected from intrusive publicity and their faces were one of the chief attributes of their publicity.

There was in the judge's ruling no public interest in the sense of contributing to public debate in publishing these photographs which had been taken by paparazzi.

It was, in the judge's ruling, a wrongful misuse of private information and a breach of the Data Protection Act on the basis that personal information must be gathered, processed and used fairly and lawfully. There was in the judge's ruling no public interest in the sense of contributing to public debate in publishing these photographs which had been taken by paparazzi and where the singer had requested that they be not photographed.

The newspaper made the point that these photographs were lawful under California law and that there was nothing intrinsically objectionable about the photographs and made the point that the daughter had modelled in Teen Vogue. This cut no ice with the judge who awarded the daughter £5,000 and the babies £2,500 each. The newspaper has stated that it will appeal.

Judges Will Increasingly Throw Out Weak or Ill-Founded Cases

McEvoy v Michael [2014] EWHC 701 concerned a fierce political dispute between local councillors. Election material had been circulated by one political party against the incumbent councillors under the heading "Snouts in the Trough." The leaflet included allegations of hypocrisy and accusations of money needlessly spent on "jollies." The leaflet was accompanied by a cartoon with the face of one of the councillors superimposed on a picture of a character in a well-known TV series who would be perceived as a loveable rogue. It was a fairly rare case of libel in Wales heard at first instance.

The judge robustly protected political speech pointing out the European Court of Human Rights had made it clear that the limits of acceptable criticisms are wider in relation to politicians acting in their public capacity than in relation to private individuals, *Jerusalem v Austria* [2003] 37 EHRR 25.

Some of the comments were defamatory but were permissible as statements of opinion. In other instances it was clear that the Court would be slow to spell out allegations of dishonesty which would have to be proved to be true in what was essentially political speech. These cases pre-date the coming into force of the Defamation Act 2013 on 1 January 2014 as the Act is not retrospective, but already the Courts are implementing the spirit of the Defamation Act 2013.

Vile Abuse Is Not Libel

Ms Uppal was a former Miss India who one can only imagine had fallen on slightly hard times when she agreed to appear in a reality television series called Big Brother which involves a period of voluntary imprisonment in a house with a number of self-publicising misfits in the hope of the prize of £100,000 and 15 minutes of fame. One of the contestants took the opportunity when interviewed to abuse Ms Uppal in vile and racist terms of which perhaps the most repeatable was calling her a "piece of shit." The programme-makers had shut him up and disassociated themselves from his remarks.

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Understandably offended she unwisely sued for libel seeking to spell out meanings that it was being suggested that she was sexually promiscuous or socially or intellectually inferior. The Court was having none of this and said that this was simply vile abuse where the situation had been mitigated by the prompt act of the television company. It was not, however, libel. *Uppal v Endemol UK Limited* [2014] EWHC 1063

Limits of Parliamentary Privilege

The Court of Appeal upheld an earlier ruling that in certain circumstances the rule against being sued for libel which attaches to what is said in Parliament under Article 9 Bill of Rights 1689 (proceedings in Parliament cannot be questioned or impeached in courts outside of Parliament) can in certain circumstances extend to the repetition of those remarks outside Parliament. *Makudi v Triesman* [2014] EWCA Civ 179

The Claimant was a member of the Executive Committee of FIFA and Lord Triesman was a leading official in the English Football Association concerned with the unsuccessful English bid to hold the World Cup in 2018. As is well-known, there were extensive allegations of corruption or unethical behaviour on the part of certain FIFA delegates. The result of their deliberations had – to the surprise of some – been to award the 2018 competition to Russia and the 2022 competition to Qatar.

Lord Triesman had given evidence to the Culture Media and Sports Committee in the House of Commons in which he had to the displeasure of Mr Makudi suggested that there had been improper and unethical behaviour in Thailand in relation to the FIFA bid. The English Football Association set up an enquiry under James Dingemans QC – now a libel judge - and Lord Triesman had given broadly similar evidence to his committee of enquiry whereupon he was sued by Mr Makudi.

The claim was struck out as violating Article 9 Bill of Rights 1689. Parliamentary privilege can extend outside Parliament if there is a legitimate interest in the repetition of the Parliamentary utterance, a close nexus between the speaking inside and outside Parliament and an obligation to speak about the subject on the second occasion.

Removing Archive Material Under Contempt of Court Powers

I wrote earlier about proposals to remove archive material accessible online during the currency of a criminal trial to avoid undue prejudice to the defendant. See MediaLawLetter December 2013. The power had been exercised in the case of R v *Harwood re Associated Newspapers* where details of earlier disciplinary proceedings concerning a previous act of violence against a police officer on trial for manslaughter were ordered to be taken down during his trial.

The whole issue of contempt of court including how to deal with jurors who disobey the instructions of judges not to do their own internet research was reviewed by the Law Commission. The question of allegedly, contemptuous archive material has now come before Parliament in Clauses 37 and 38 of the Criminal Justice & Courts Bill.

Under Clause 37 the Attorney General can request removal of material which he considers to be prejudicial from an online archive.

Under Clause 37 the Attorney General can request removal of material which he considers to be prejudicial from an online archive.

Where media have previously published material in their online archive they will in the normal course of events have a defence to a claim of strict liability under the Contempt of Court Act but they would lose this if the Attorney General serves a take-down notice under the proposed new legislation.

The issue would then become whether the online material constituted a substantial risk of serious prejudice of a trial. It would be open to the media to argue that it did not, but they would have an uphill struggle as the Attorney General would have decided that it did have such a risk and the Attorney General is of course the person who triggers any prosecution for contempt of court. It would therefore be a brave paper that maintained the online archive in the face of a take-down notice by the Attorney General.

Under Clause 38 there is provision for the courts to have injunctive powers to order the temporary removal of such material during the currency of the trial. If such an injunction was issued, the paper would have to comply as failure to do so would of itself be contempt. British media organisations are currently strongly lobbying against these proposals and I shall report the outcome in due course.

David Hooper is a partner at RPC LLP in London.

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Journalist's Conviction for 'Scandalising the Court' Overturned by Privy Council

Offense Can No Longer Be Treated as a Strict Liability Crime

By Anya Proops

Should judges be able to jail their critics? This is the stark question which was posed in the recent Privy Council case of *Dhooharika v Director of Public Prosecutions* [2014] UKPC 11. In a judgment which is likely to give considerable comfort to responsible journalists who speak out about judicial wrong-doing, the Privy Council has held that it is only those who publish in bad faith, with the aim of undermining the administration of justice itself, who will fall within the purview of the criminal law.

Background

Mr Dhooharika is a journalist and editor in chief of the Mauritian newspaper *Samedi Plus.* In 2010, he published articles and editorial containing allegations against the Chief Justice of Mauritius. The published materials were based on interviews with a former barrister and Member of Parliament, Mr Hurnam. Mr Hurnam claimed that the Chief Justice had been biased when deciding a case behind closed doors.

The Privy Council clearly recognised the potential for the offence to have a serious chilling effect on journalism.

The editorial suggested that the allegations were sufficiently serious to call for a tribunal of enquiry on the question of whether there had been a violation of the code of judicial conduct. Mr Dhooharika was subsequently prosecuted by the Mauritian Director of Public Prosecutions on the basis that, through his publications, he had committed the offence of 'scandalising the court'. In particular, it was alleged that the materials he had published had brought the judiciary into disrepute and lowered public confidence in the courts.

Mr Dhooharika was convicted by the Supreme Court of Mauritius following a hearing at which he was not permitted to give oral evidence in his defence. He was sentenced to three months in prison. Mr Dhooharika appealed his conviction to the United Kingdom's Privy Council, the court of final appeal for UK overseas territories and many Commonwealth countries.

The Offence of 'Scandalising the Court'

The offence of 'scandalising the court' has a rather unhappy pedigree. It originally emerged as an offence in England in the 18th century, where it was used as a weapon to suppress the radical John Wilkes and other critics of the government. By the end of the 19th century, it was regarded by the Privy Council in the case of *McLeod v St. Aubyn* [1899] AC 549 as being obsolete in England, where courts were 'satisfied to leave to public opinion attacks and comments derogatory to, or scandalous to them'. However, the Privy Council also took the view that the offence was still necessary in 'small colonies consisting principally of coloured populations', particularly so as 'to preserve in such a community the dignity and respect for the court'. And so the 'small islands' principle was born.

In 2013, the United Kingdom Parliament formally recognised that the offence was a dead letter in England and Wales and removed it from the statute books. However, whilst the offence may officially have become history in its country of origin, it remains alive and well in the Commonwealth and elsewhere, where it is commonly used as a means of suppressing those who voice legitimate criticisms of the judiciary.

As recently as 1999, in the case of *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, the Privy Council declined to strike down the 'small islands' principle. Its view was that, in newer, more fragile democracies, judges needed the additional protection afforded by the offence. But how is

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this principle to be reconciled with the fundamental and universal right to freedom of speech? Moreover, why should judges, uniquely amongst State officials, be permitted to both silence and punish those speak out against them?

It was precisely these questions which the Privy Council was called upon to address in *Dhooharika*, where it was argued on behalf of Mr Dhooharika that the offence of scandalising the court was unconstitutional and represented an unjustified interference with the right to free speech.

The Privy Council Judgment

In its judgment, the Privy Council clearly recognised the potential for the offence to have a serious chilling effect on journalism. However, it also took the view that it could not go so far as to say that this rendered the offence unconstitutional or otherwise unlawful, particularly as 'local conditions' in countries such as Mauritius may justify retention of the offence. The Privy Council specifically noted in this context that, whilst the offence may have been abolished in England, it continued to subsist in a wide range of common law jurisdictions, including Scotland where it carries the rather arcane name of "Murmuring Judges.' It also noted that the European Court of Justice had not declared the offence to be per se incompatible with right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights, provided that any restrictions on free speech were proportionate.

The Privy Council held that the offence could no longer be treated as a strict liability offence or one where the editor bore the burden of proving that he acted in good faith.

However, having declined to rule that the offence was unconstitutional, the Privy Council then went on to recast it to the point that it is now likely to apply only in the most extreme and exceptional cases, thus depriving the offence of much of its practical effect. In particular, the Privy Council held that the offence could no longer be treated as a strict liability offence or one where the editor bore the burden of proving that he acted in good faith. Instead, it is now very clearly for the prosecution to prove, beyond reasonable doubt, that the editor or journalist published in bad faith. In other words, it is not enough that a journalist has been simply 'wrong-headed'. He or she must have published with the intention of undermining the administration of justice. It will surely be only in the most exceptional cases that the prosecution will be able to discharge the burden of proving this form of wrongful intent.

In addition to this *mens rea* element, the Privy Council has made clear that the published materials must themselves be of a kind that they create a real risk of undermining public confidence in the administration of justice. Again this will be a high threshold for any prosecutor to meet. Certainly, in many cases, the more extravagant the allegations, the less likely they are to be believed and, hence, the less likely they are to pose a real risk to the administration of justice.

The Privy Council went on to overturn Mr Dhooharika's conviction. It held that, whilst the published materials were 'plainly ill-judged', there was no proper basis upon which the Supreme Court could have held that Mr Dhooharika acted in bad faith. This was particularly in view of the fact that Mr Dhoorharika had not himself espoused the views expressed by Mr Hurnam and had expressly conceded that it was not for *Samedi Plus* to judge the Chief Justice. The Privy Council also held that the conviction in any event fell to be quashed as Mr Dhooharika had not received a fair trial from the Supreme Court, not least because of the Court's failure to permit Mr Dhooharika to give oral evidence in his defence.

The overall effect of the judgment is that the offence of scandalising the court, whilst still a feature of the common law landscape, no longer casts such a long and chilling shadow.

Anya Proops acted on behalf of Mr Dhooharika, instructed by Mark Stephens of HKFSI. She is a leading expert on freedom of information and data protection/privacy and is co-founder of panopticonblog.com, the leading information law blog. She regularly acts for media organisations and has acted in over 60 cases for the UK Information Commissioner.

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Judge Unseals "Squeaky" Fromme Shrink Report

Manson Follower Made Attempt on President Ford's Life

By Karl Olson and Susan Brown

In a walk down memory lane, a federal judge in Sacramento, California has unsealed an audio recording of a psychiatrist's interview of Lynette "Squeaky" Fromme, a Charles Manson follower who was convicted of an attempt on the life of then-President Gerald Ford in a Sacramento park in 1975. *United States v. Fromme,* (E.D. Cal. April 16, 2014).

The ruling originated in a motion to unseal filed by the *Sacramento Bee* last year in conjunction with a retrospective on the case being held by the Eastern District of California Historical Society. Judge Kimberly Mueller last year unsealed nearly all of the court records from the case, including some which had originally been sealed, but initially held that the tape of Fromme's competency interview should remain sealed. The *Bee* asked Judge Mueller to reconsider that portion of the ruling based upon the Ninth Circuit's ruling in the "Unabomber" case, *United States* v. *Kaczynski*, 154 F.3d 930 (9th Cir. 1998).

Judge Mueller ordered the *Bee* to serve Fromme with its papers – she has been released from prison and now lives in upstate New York – and then decided to review the tape in camera. In an April 16 ruling, Judge Mueller decided to unseal the entire tape, without redactions, finding, "Unlike the redactions in Kaczynski there is no discussion of 'private information' or information that has 'the potential to embarrass a person not before the court.'

Instead, the recording exclusively explores, through Dr. [James] Richmond's questioning, defendant's background, demeanor and mental state and explores defendant's motivation, desire and ability to represent herself. Dr. Richmond reviews these issues for the purpose of determining whether defendant was competent to stand trial and represent herself, if she wished. Thus, the court finds unsealing the entire report 'serve[s] the ends of justice by informing the public about the court's competency determination.'" The *Bee's* coverage can be found here and here.

President Ford's two-plus-year term in office included two attempts on his life in northern California, both of which have given rise to media law cases. On September 22, 1975, Sara Jane Moore attempted to shoot the President outside the St. Francis Hotel in San Francisco. A former Marine named Oliver Sipple grabbed Ms. Moore's arm as she shot, causing her to miss and possibly saving the President's life. When the late San Francisco Chronicle three-dot columnist reported that Sipple was gay, Sipple sued for invasion of privacy. (At that time, being gay, even in San Francisco, was something people often could not tell their families, even though Sipple was "out" in the Castro District.) Sipple's lawsuit resulted in a well-known decision rejecting his claim, *Sipple v. Chronicle Publishing Co.* (1984) 154 Cal. App. 3d 1040.

Shortly after Moore's attempt on the President's life, the red-clad Fromme accosted the President in a park near the California Capitol building. The gun didn't go off, but the attempt left many people thinking that northern California was full of crazies. Fromme ended up defending herself – throwing an apple at a witness at one point – and was convicted of attempted assassination.

On the tape, Fromme expressed confidence in her ability to represent herself. Asked by the psychiatrist, "What would you estimate to be your percentage chance at this point of being found not guilty?", Fromme replied, "Oh, I feel, I feel definitely I have probably a 70 percent chance on the percentage scale. I don't feel that I'll be convicted of attempted assassination." She was wrong. Though she didn't represent herself at trial, she was convicted and remained in prison until released on parole in 2009.

Judge Mueller has now added another chapter to the media law jurisprudence resulting from the two unsuccessful attempts on President Ford's life.

Karl Olson and Susan Brown of San Francisco's Ram, Olson, Cereghino & Kopczynski represented the Sacramento Bee in this case.

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Company "D'oh!": Fourth Circuit Reaffirms Public's Right to Access Judicial Records

Rebukes District Court for Wholesale Sealing to Protect Corporate Reputation

By Robert D. Balin, Edward J. Davis and Eric J. Feder

In a recent decision that should prove especially useful to news organizations, the Fourth Circuit held that the economic reputational interests of a private party are not sufficient to overcome the First Amendment right of public access to court records. *Company Doe v. Public Citizen, et al*, No. 12-2209 (April 16, 2014) ("Slip Op.").

The *Company Doe* case did not involve national security, trade secrets or other types of confidential information typically involved in public access disputes. Instead, the plaintiff in *Company Doe*, a private company, moved to litigate the entire case anonymously and under seal on the ground that wholesale sealing was necessary to protect its corporate "reputation" in connection with claims that one of its products was unsafe.

The district court did not rule on the motion for over nine months, all the while keeping the entire case under "temporary" seal during the pendency of the litigation. The district court ultimately released an opinion retroactively granting the motion to seal and granting Company Doe summary judgment, with the court's opinion redacted to the point of incoherence. To make matters worse, the case was the first legal challenge to an important new federal consumer information program.

The Fourth Circuit reversed the district court's sealing order in its entirety and, in so doing, provided strong reaffirmation of the public right of access to judicial proceedings.

Yet, because of the district court's sealing order—which sealed not only nearly all of the pleadings and filings in the case, but also sealed even the docket sheet itself—the public and press were unable to monitor the litigation, assess the merits of Company Doe's complaints about the federal program, or evaluate the district court's reasoning in granting summary judgment to Company Doe.

In a sweeping decision, the Fourth Circuit reversed the district court's sealing order in its entirety and, in so doing, provided strong reaffirmation of the public right of access to judicial proceedings, and of the procedural safeguards that district courts should apply when asked to seal court records.

Background

The *Company Doe* case concerned a public internet database of consumer complaints about product safety that is maintained by the Consumer Product Safety Commission ("CPSC"), pursuant to the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2055a (the "CPSIA"). The purpose of this public database is to "provide consumers an avenue to report safety hazards about specific consumer products and to learn of and evaluate the potential dangers posed by products that ha[ve] entered the stream of commerce." Slip Op. at 6.

CPSIA establishes minimum requirements that product safety reports must meet to be included in the database. The manufacturer of a product about which a complaint has been submitted is notified and has an opportunity to object to inclusion of the complaint in the database if it is "materially inaccurate." If the Commission substantiates the manufacturer's objection, the report must be corrected or excluded from the database.

The product safety database went live in early 2011 and was the source of considerable public controversy from the outset. *See, e.g.,* Timothy Noah, *Who's Afraid of the CPSC: The hysteria over a new government database for consumer complaints*, Slate, Mar. 8, 2011, http://www.slate.com/articles/business/the_customer/2011/03/whos_afraid_of_the_cpsc.html. Manufacturers in particular voiced concerns that a database of consumer complaints would inevitably be filled with inaccurate reports that could have devastating effects on their businesses.

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District Court Proceedings

In the *Company Doe* case, an unidentified local government agency submitted to the CPSC a report raising safety concerns about a product Company Doe manufactured. The company objected to the report as materially inaccurate. The CPSC went back and forth several times with Company Doe with revisions to the report, attempting to cure the alleged material inaccuracies, but the parties were unable to reach a resolution. Company Doe then filed suit in the District Court for the District of Maryland to enjoin the CPSC from including the product safety report in its public database.

At the same time, the company filed a motion to litigate the entire case under seal and under a pseudonym. The company's theory was that, since it was seeking to prevent a damaging report from being released to the public, the disclosure of its identity and the facts of the report in the course of the litigation would sacrifice the relief it sought to obtain by filing suit.

Three consumer advocacy groups (Public Citizen, Consumer Federation of America, and Consumers' Union, which publishes *Consumer Reports* (the "Consumer Groups")) filed objections to Company Doe's sealing motion pursuant to the district court's local rules. The court, however, did not rule on these objections until after Company Doe and the CPSC had fully briefed, and the court had decided, summary judgment motions in the underlying case – a period of over nine months after the motion to seal was filed. Throughout that time, nearly all of the court filings in the case, as well as the vast majority of the docket sheet entries, were maintained under "temporary" seal and were thus inaccessible to the public.

Sealing was particularly inappropriate in the Company Doe case, which was the first legal challenge to a new federal regulatory program.

The district court ultimately granted Company Doe's motion for summary judgment and permanently enjoined the inclusion of the product safety report in the CPSC database on the ground that the report was materially inaccurate. In the same opinion, the court granted in substantial part Company Doe's request to seal the case. The court agreed with the company that, because the challenged report was materially inaccurate and injurious to the company's reputation, unsealing the case would cause the plaintiff to "sacrifice the same right it sought to safeguard by filing suit." 900 F. Supp. 2d at 609.

The court held that "the public's abstract interest in learning of the CPSIA's interpretive fate" was outweighed by "the Plaintiff's comparably concrete interest in preserving its reputational and fiscal health." *Id.* at 609-10. The court also granted Company Doe's request to proceed under a pseudonym, reasoning that to do otherwise would "force [the plaintiff] to forfeit the rights [it] sought to fend [*sic*]." *Id.* at 611.

Nevertheless, in recognition of what the district court considered the public's "residual interest" in the subject matter of the case, the court ordered Company Doe to propose appropriate redactions to the court's summary judgment opinion so that it could be at least partially released to the public. *Id.* at 610. The redactions to the opinion that was ultimately released were extensive, with much of the substance of the court's decision rendered almost totally incoherent.

For example, a key passage in the court's analysis of the accuracy of the challenged product safety report reads as follows: "In short, the report states that [REDACTED] But the report does not indicate how [REDACTED] is connected to [REDACTED] Nor does it specify any other [REDACTED] Indeed, in stating that [REDACTED] the report would seem to discount such a possibility." *Id.* at 593. While the district court also unsealed a few other documents, the vast majority of the court filings in the case (and most of the docket sheet) remained under seal even after the case had been decided.

The CPSC chose not to appeal the ruling on the merits. The Consumer Groups, however, appealed the district court's broad sealing of the case to the Fourth Circuit and several groups filed *amici* briefs. The American Civil Liberties Union, the AARP, and a coalition of media organizations filed briefs in support of the Consumer Groups, and a coalition of manufacturers' trade associations filed a brief in support Company Doe.

The Fourth Circuit Decision

The Fourth Circuit reversed. In so ruling, the court offered a robust affirmation of the public right of access to

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judicial records, using language that should warm the hearts of those opposing sealing orders.

As the court explained, the public right of access to judicial proceedings and records is protected by both the common law and the First Amendment. The presumptive common law right extends to all judicial documents and records, and may be rebutted only by showing that "countervailing interests heavily outweigh the public interests in access." Slip Op. at 37 (citation omitted). The First Amendment right applies only to particular judicial records and documents, but when it attaches, access may be restricted only if closure is "necessitated by a compelling government interest and the denial of access is narrowly tailored to serve that interest." *Id.* (citations omitted).

The Fourth Circuit had little trouble concluding that the First Amendment access right attached to the various motion papers in the *Company Doe* case, as well as to the lower court's summary judgment opinion: "Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible." *Id*. at 41.

The Court of Appeals further held that the First Amendment protects the right of access to docket sheets, agreeing with other circuits that "docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment." *Id*. at 44 (citation omitted).

The Fourth Circuit seemed especially troubled by this aspect of the district court's sealing decision:

> By sealing the entire docket sheet during the pendency of the litigation, as the district court permitted in this case, courts effectively shut out the public and the press from exercising their constitutional and common -law right of access to civil proceedings. But there is a more repugnant aspect to depriving the public and press access to docket sheets: no one can challenge closure of a document or proceeding that is itself a secret.

Id. at 44. Having determined that the First Amendment presumptively protected public access to the documents in the case, the Fourth Circuit assessed whether any "compelling government interest" justified the district court's closure order. The court again had little trouble finding that no such interests existed in this case. The district court had concluded that Company Doe's interest in "preserving its reputational and fiscal health" outweighed the public's right of access.

The circuit court disagreed: "A corporation very well may desire that the allegations lodged against it in the course of litigation be kept from public view to protect its corporate image, but the First Amendment right of access does not yield to such an interest." *Id*. at 46. In fact, the court noted, "every case we have located" has held such economic interests insufficient even "under the less demanding common-law standard." *Id*. at 47. The interests that have on occasion justified closure of judicial proceedings have been interests of the gravest import in our society—the right to a trial by impartial jury or interests of national security, for example. The Fourth Circuit ruled, however, that:

> [a]djudicating claims that carry the potential for embarrassing or injurious revelations about a corporation's image, by contrast, are part of the day-to-day operations of federal courts…. [W]hether in the context of products liability claims, securities litigation, employment matters, or consumer fraud cases, the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company.

Id. at 46-47. The Fourth Circuit noted that the district court's "apprehension over the ramifications of disclosing the facts germane to this case cannot be squared with the principles of public discourse that underlie the First Amendment." *Id*. at 50. The Fourth Circuit further held that, even if corporate harm could in rare circumstances theoretically outweigh the right to access, any claimed harm to Company Doe was unsubstantiated and speculative—particularly given that the district court's decision actually vindicated Company Doe's claims about the product safety report's inaccuracy.

The Fourth Circuit also rejected the district court's rationale that unsealing the case would force Company Doe to sacrifice the right it was suing to uphold:

> The relief Company Doe secured by prevailing on its claims was the right to keep the challenged report of

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> harm removed from the online database. That remedy is distinct from the right to litigate its claims in secret and to keep all meaningful facts about the litigation forever concealed from public view. Neither the CPSIA nor the Administrative Procedure Act confers upon district courts carte blanche to conduct secret proceedings, and, more importantly, the Constitution forbids it.

Id. at 49-50. Similarly, the court rejected Company Doe's argument (which the District Court had accepted) that disclosure of the information in the litigation would impinge upon the company's First Amendment right to petition the courts. The Fourth Circuit explained that, while "[t]he First Amendment right to petition the government secures meaningful access to federal courts," "[i]t does not provide for a right to petition the courts *in secret*." *Id*. at 51-52 (emphasis added) (citation omitted).

In finding that the district court's sealing order violated the First Amendment right of access to judicial proceedings, **the** Fourth Circuit pointed out that sealing was particularly inappropriate in the *Company Doe* case, which was the first legal challenge to a new federal regulatory program. The case thus "implicate[s] public concerns that are at the core of the interests protected by the right of access: the citizen's desire to keep a watchful eye on the workings of public agencies and the operation of the government." *Id*. at 52 (internal citation and quotation marks omitted) (recognizing that "[t]he interest of the public and press in access to civil proceedings is at its apex when the government is a party to the litigation").

The Fourth Circuit also held that the district court had abused its discretion in allowing Company Doe to proceed under a pseudonym. The district court had weighed the prejudice to Company Doe against the "risk of unfairness" to the CPSC. The circuit court held that the district court erred in giving "no explicit consideration" to the public's interest in open proceedings. *Id.* at 59. The Fourth Circuit joined other circuits in holding that "a district court has an independent obligation to ensure that extraordinary circumstances support [] a request [to proceed under a pseudonym] by balancing the party's stated interest in anonymity against the public's interest in openness" as well as "any prejudice that anonymity would pose to the opposing party." *Id.*

Finally, the Fourth Circuit found that the lower court had committed not only substantive error but procedural error as well. The Court of Appeals was particularly troubled by the fact that the district court waited nine months to rule on the sealing motion, thereby allowing the case to remain under seal during the entire pendency of the litigation. The Fourth Circuit explained that "[t]he public's interest in monitoring the work of the courts is subverted when a court delays making a determination on a sealing request while allowing litigation to proceed to judgment in secret." *Id*. at 54.

Therefore, at the urging of the Consumer Groups and media *amici*, the Court "t[ook] th[e] opportunity to underscore the caution of [the court's] precedent and emphasize that the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies," and thus district courts should "act on a sealing request as expeditiously as possible." *Id*. at 55. The district court had delayed ruling on the sealing motion under the theory that the merits of the sealing motion were "inextricably intertwined" with the merits of the case overall, but the circuit court noted that "the public right of access under the First Amendment and common law is not conditioned upon whether a litigant wins or loses." *Id*. at 56.

Conclusion

The Fourth Circuit's opinion in this case powerfully affirms the importance of public access in general, and firmly establishes that a private litigant's reputational and pecuniary concerns will almost never suffice to prevent public access to judicial records and proceedings.

Robert D. Balin, Edward J. Davis, Eric J. Feder and Leslie G. Moylan of Davis Wright Tremaine LLP represented the media amici *in this appeal. Scott M. Michelman and Allison M. Zieve of Public Citizen Litigation Group represented the Consumer Groups. Baruch A. Fellner of Gibson, Dunn & Crutcher LLP represented Company Doe. Benjamin Wizner of the American Civil Liberties Union represented the American Civil Liberties Union. Julie Nepveu of AARP Foundation Litigation represented the AARP. Cary Silverman, of Shook, Hardy & Bacon LLP represented the manufacturers' association* amici.

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Florida Appellate Court Reverses Trial Court Orders Excluding Media From Jury Selection

Lower Court Erred in High Profile Murder Trial Ruling

By Timothy J. Conner

A Florida Appellate Court, in a first of its kind ruling in Florida, has issued a 27 page opinion unanimously vacating two orders of a trial court in Jacksonville, Florida, which had excluded the media from critical portions of the jury selection process in a high profile criminal trial. *Morris Publishing Group v. Florida and Dunn*, No. ID14-0630 (Fla. App. April 25, 2014).

In the first order under review, the trial court had physically excluded the media from the courtroom during an early stage of the voir dire proceedings, and instead had set up an "overflow" courtroom with an audio feed for media members. In a second order the trial court later cut off the audio feed while the prosecution and defense attorney exercised peremptory strikes and challenges for cause until the jury had been selected.

In its Opinion issued April 25, 2014, the Appellate Court ruled that each of these orders violated the right of the press under the First Amendment to be present in the courtroom and to observe the process of jury selection. The Appellate Court also ruled that the trial court orders violated Florida common law which provides a right of access to court proceedings independent of the right provided by the First Amendment.

By limiting their observation of the proceedings to audio, Petitioners were deprived of the ability to see the judge, prospective jurors, and attorneys to evaluate their demeanor, body language, and other non-verbal expressions.

Background

The defendant, Michael Dunn, was being prosecuted for one count of murder in the first degree, and three counts of attempted murder in the first degree. Dunn, a white male, had fired shots with a handgun into a vehicle occupied by four black teenagers, killing one of them, over a dispute regarding loud rap music. The case generated substantial public interest, not only because of the seeming similarity with the facts of the George Zimmerman/Trayvon Martin case, but also because the same prosecutor from that case, Angela Corey, would be handling the Dunn trial.

Anticipating significant media interest, and a need for a larger than normal pool of potential jurors, the trial court decided to establish an "overflow" courtroom for the media's use during the trial proceedings. The overflow courtroom was to be equipped with an audio feed for members of the media to be able to listen in on the proceedings. *The Florida Times-Union* and First Coast News objected to this plan, and asserted a First Amendment right, as well as a right under Florida common law, to be present in the courtroom where the jury selection was to take place in order to have the opportunity to not only hear, but to observe the judge, lawyers, and potential jurors, their reactions, facial expressions, and other behaviors.

The trial court initially denied the motion and the first day of trial the media was not allowed into the courtroom where the jury was being selected. Subsequently, the trial judge entered a written order memorializing his oral ruling finding that the media had no right to be physically present at jury selection, and that the audio feed was enough to satisfy any right of access issues. The following day, however, the trial judge reversed course and said that upon reconsideration representative members of the media could be present. Nevertheless, when it came time for the parties to exercise juror strikes the trial judge not only excluded members of the media from the courtroom, but also cut off the audio feed to the overflow courtroom.

Appellate Court Ruling

The Appellate Court first conducted an extensive review of United States Supreme Court precedent addressing access to criminal trials and proceedings, as well as the Florida common law right of access which exist apart from the First Amendment guarantees under the federal Constitution. The

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Court then turned to apply this body of law to the facts of the case. In addressing the trial court's first order which excluded the media from physical access to the courtroom during the voir dire process, the Court stated:

> Our first decision point is to determine whether the qualified right of public access to criminal trials, guaranteed by the First and Fourteenth Amendments, attaches to the jury selection proceedings at issue. We conclude that *Press-Enterprise I* [*Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)] is directly controlling and answers that question affirmatively.

Opinion at p. 16.

The Court then turned its attention to the overflow courtroom and audio feed:

> We must next decide whether there was closure of constitutional magnitude so as to require the *Press-Enterprise I* balancing test. The trial court states in its order that there has been "*no* closure *nor* any prohibition of media access during jury selection; rather the audio feed serves as the media and public's access to the proceedings." We disagree. By limiting their observation of the proceedings to audio, Petitioners were deprived of the ability to see the judge, prospective jurors, and attorneys to evaluate their demeanor, body language, and other non-verbal expressions.

The Court's Opinion is a strong statement regarding the rights of the media to be physically present inside the courtroom during all substantive phases of a criminal proceeding.

Opinion at pp. 16-17 (emphasis in original).

The Court then determined that the trial court had failed to engage the appropriate analysis under *Press-Enterprise I*. The Court stated that it would "liberally" read the trial court's exclusion order as being concerned with safeguarding the defendant's Sixth Amendment right to a fair trial. The Court ruled, however, that even in the face of the Sixth Amendment right, the trial court would be required to "articulate specific findings supported by the record that closure was essential to preserving the defendant's right, and that there were no reasonable alternatives to protect that interest."

The Court addressed the purported reasons advanced by the trial court for exclusion, and rejected them as not being supported by any record evidence, *and* as having nothing to do with protecting the defendant's right to a fair trial.

> The reasons given for closure in this case included the suggestion that the courtroom was too small to accommodate all of the prospective jurors, the media outlets, and the families of the victims; that "arrangements were made with the Media Committee months in advance of the trial to hear real-time audio of the jury selection process" and Petitioners waited until the last minute to lodge an objection; and that it would be unfair to allow the media access to the courtroom when the families of the victims had agreed not to be present. These findings are unsupported by record evidence *and* the order fails to show how these factors would constitute an infringement on the defendant's Sixth Amendment right to a fair trial.

Opinion at pp. 18-19 (emphasis supplied).

The Court next addressed the order of the trial court to leave off the audio feed to the overflow courtroom during the process of the parties exercise of juror strikes. The trial judge had called a recess towards the end of the day, and had ordered the courtroom emptied during the recess. The trial judge then reconvened the jury selection process and did not advise anyone, other than the parties, and limited courtroom personnel, that he was back on the bench. The doors to the courtroom were shut and guarded. The audio feed, which had been turned off during the recess, was not turned back on. Therefore, not only was the media excluded from the courtroom, the members of the media who were present did not even know that court had reconvened. An hour or so later, the courtroom was reopened and it was announced that a jury had been picked.

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On appeal, the State attempted to argue that the closed-door proceeding to exercise strikes and finalize the jury selection was merely a "bench conference" to which no right of access attaches in any event. While agreeing that there is no public right of access to "bench conferences," the Appellate Court rejected the State's position. Although the suggestion that what had occurred was a "bench conference" was seen as dubious, the Court ruled:

> We need not parse the terms used to describe the proceeding for the purpose of our analysis, for "the First Amendment question cannot be resolved solely on the label we give the event . . . ." *Press-Enterprise II*, 478 U.S. at 7. "[A] proceeding that would be subject to a right of access if held in open court does not lose that character simply because the trial court chooses to hold the proceeding in chambers." *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 363 (Cal. 1999). *A functional analysis is necessary to determine whether the closed proceeding is part of the trial process to which the First Amendment right of access attaches.*

Opinion at p. 23 (emphasis supplied).

Applying that functional analysis, the Court ruled that the purported "bench conference" was "in fact, a substantive part of the trial. In the context of a defendant's right to be present for trial, Florida courts have consistently held that the 'challenge of jurors is one of the essential stages of a criminal trial where the defendant's presence is required.'"

The Court went on to state that when challenges are being made to the potential jurors it is fundamentally a substantive part of the trial and it does not matter where the procedure is conducted. Accordingly, the First Amendment right of the press to be present attached.

The Court then held that even if First Amendment rights were not implicated by the closure, the trial court violated Florida common law regarding the right of access to criminal proceedings as well.

The Court's Opinion is a strong statement regarding the rights of the media to be physically present inside the courtroom during all substantive phases of a criminal proceeding. It comprehensively addresses a right fundamental to the newsgathering process - the ability to not just hear the proceedings, but to observe body language such as facial expressions, smiles, frowns, the rolling of eyes, crossed arms, scowls, and knowing glances.

By adopting the functional analysis for determining whether the right of access attaches to the particular proceedings, the Court foreclosed the ability of the trial judge and participants to attempt to circumvent the right to be present by declaring that action may be taken "in chambers" or in a "bench conference."

The Opinion will serve as needed guidance for the trial courts in Florida in the proper handling of access issues in criminal cases that garner a significant amount of public attention.

Thankfully, the emphasis will be on a presumption that favors an open court that cannot be arbitrarily closed.

Timothy J. Conner is a partner in the Jacksonville, Florida, office of Holland & Knight LLP. Morris Publishing Group LLC, d/b/a The Florida Times-Union ("The Florida Times-Union"), and Multimedia Holdings Corporation, and Gannett River States Publishing Corporation, d/b/a WTLV/ WJXX First Coast News ("First Coast News"), were media petitioners in the case, and were represented by George D. Gabel, Jr., Jennifer A. Mansfield, Paul R. Regensdorf, and Mr. Conner, of Holland & Knight's Jacksonville Office.

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Second Circuit Rules for New York Times in FOIA Case Over Targeted Killings

By Victoria Baranetsky

In what appears to be a first for a federal appeals court in a national security case, the Second Circuit has rejected the government's claim that a document must be kept secret, reversed the district court, and ordered disclosure of the document. *New York Times v. U.S.* (2d Cir. April 21, 2014).

The document at issue sets out the Department of Justice's legal rationale for the use of targeted killings against terrorism suspects. The decision came in April on appeals filed in Freedom of Information Act suits by The New York Times and the American Civil Liberties Union.

More than two and a half years after the FOIA cases were originally filed, the court found that it was no longer "logical or plausible" for the government to argue that its legal analysis could be classified. The court concluded that the Obama administration had waived its rights to secrecy by repeated public statements on the lawfulness of targeting killing. Statements included those by senior public officials like John Brennan, Director of the Central Intelligence Agency, and Attorney General Eric Holder, as well as a white paper released by the Justice Department, which set out the legal conditions for the use of lethal force in foreign countries against U.S. citizens.

The document at issue sets out the Department of Justice's legal rationale for the use of targeted killings against terrorism suspects.

While the court said operational details in the memorandum could be redacted, it directed the release of the sections laying out the government's legal reasoning, which appear to be the bulk of the 41-page memo.

Background

The Times case stemmed from two FOIA requests filed in 2010 by reporters Charlie Savage and Scott Shane, who sought the government's legal memoranda to write about the growing controversy among legal academics and activists over whether targeted killings could be carried out lawfully. The topic had become a major news story when a 2011 drone strike in Yemen killed Anwar al-Awlaki, an al-Qaida leader and his son, both United States citizens.

In response to the reporters' FOIA requests, DOJ acknowledged that it had one relevant memorandum (the so-called "OLC-DOD Memorandum") but asserted that it could be withheld under FOIA Exemptions 1 (national security), 3 (materials that are confidential under statute), and 5 (intra- and inter-agency deliberations). DOJ also gave a "Glomar response" and declined to confirm or deny whether any other legal memoranda exist, claiming that the very fact of the existence or nonexistence of such documents is itself classified.

After the Times lawsuit was filed, the ACLU initiated a similar FOIA suit against the government, and the two actions were consolidated. Despite the trickling release of public statements by senior officials on targeted killings, the government persisted in claiming that the legal rationale was a matter of national security that must be kept secret. Much of the plaintiffs' argument turned on whether legal analysis could properly be treated as classified information under Executive Order 13256, which sets out the Executive Branch's power to classify, or under laws pertaining to the intelligence services. The Times asserted that disclosure of legal analysis would not logically reveal any national-security secrets.

In January 2013, in a circuitous, self-described "Alice-in-Wonderland" opinion, the U.S. District Court Judge Colleen McMahon castigated the government throughout a 68-page decision for refusing to release the legal memoranda but ultimately ruled that the law did not allow the court to order the documents to be disclosed.

"I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitutions and laws, while keeping the reasons for their conclusion a

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secret," wrote Judge McMahon. "The Alice-in-Wonderland nature of this pronouncement is not lost on me." (*New York Times Vo. v. United States* DOJ, 2013 U.S. Dist. LEXIS 979).

Second Circuit Decision

Trying to make sense of the Carrollean confusion, the Second Circuit, in an opinion written by Jon Newman and joined by judges Jose Cabranes and Rosemary Pooler, unanimously reversed the decision. The Second Circuit premised its decision largely on waiver, relying in large part on the government's disclosure of the white paper, which became public one month after Judge McMahon's decision. The circuit wrote, "Whatever protection the legal analysis might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the DOJ White Paper."

While the court reserved judgment on whether legal analysis could be classified as a secret, it stated that the district court "astutely observed" that "legal analysis is not an intelligence source or method." The court also wrote that the government's argument that it needed to withhold the legal analysis to maintain the secrecy of military plans or intelligence activities, sources, and methods was no longer logical or plausible – the standard used in national security FOIA cases to assess whether the government's argument for classification should be sustained. The court did recognize that "in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation, but that is not the situation here."

Despite the trickling release of public statements by senior officials on targeted killings, the government persisted in claiming that the legal rationale was a matter of national security that must be kept secret.

Because district courts have been so reluctant to second-guess the government's claims as to national security, these statements by the court may undermine future arguments concerning legal analysis and national security.

The court made an additional ruling that may be determinative in future FOIA litigation. It rejected the government's often-used argument that any DOJ Office of Legal Counsel opinion can be withheld under the Exemption 5 as an "inter-agency or intra-agency" communications exemption because its disclosure would inhibit agencies throughout the government from seeking OLC's legal advice. Rejecting that position, the court wrote, that "argument proves too much. . . . We need not fear that OLC will lack for clients." It reasoned, "surely" agencies are "sophisticated enough to know that" the attorney/client privilege and deliberative process privilege can be waived and "the advice publicly disclosed." This slight mockery of the deliberative process privilege is also "surely" to be a blow to future Exemption 5 arguments.

In the second part of its ruling, the Second Circuit again sided with the plaintiffs, striking the government's Glomar response in which the government declines to say whether it has any documents responsive to a FOIA request. The court ruled that DOJ must provide The Times and the ACLU with a "Vaughn index" identifying other responsive documents that were being withheld so that the plaintiffs could decide whether to seek those materials in further proceedings before the district court.

The court noted that the Glomar response was a recent tactic first used by the government in FOIA cases in 1992 (and that it has since ballooned in use). In past cases, the courts have said that the government could provide a Glomar response in national security cases unless the plaintiff was able to show that the government had previously acknowledged have the specific documents at issue. But the Second Circuit said the strict requirement that plaintiffs need to identify an official disclosure of the undisclosed information to beat the Glomar response "mad[e] little sense." The opinion also criticized that such a "rigid application" of the requirement "may not be warranted in view of its questionable provenance." Although the court maintained the standard "remains the law of this Circuit," its derision of a rigid standard may make Glomar responses less likely to stand in future cases.

To give the government time for an appeal, the Second Circuit stayed its order and redacted certain portions of the opinion. The court wrote that "in the event that our ruling . . . is not altered in any further appellate review, an unredacted

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version of this opinion, together with a redacted version of the OLC memorandum, will be filed." The government has not indicated whether it will appeal.

The court's decision was written with restraint, withholding any grandstanding statements about open access as a fundamental virtue of democracy, but the opinion was extremely important in its clear message to other federal courts that they have an indispensable role to play as independent arbiters in FOIA and on national security issues. Its actions reminded other courts that they must review claims thoroughly, especially when the government asserts national security as a reason for not disclosing information.

That is especially true since the decision comes on the heels of the opinion by Judge McMahon refusing authority to overturn the government and a recent opinion of the District Court for the Northern District of California that ruled in favor of the government on the same memorandum. The opinion explicitly reminded all courts, in this new age of secrecy, that they must exercise the bedrock principle of Madisonian checks and balances – given that courts are the one critical check on the Executive Branch's power to interdict disclosure.

The Times was represented by David McCraw, Assistant General Counsel, and Nabiha Syed, Steve Gikow, and Victoria Baranetsky, First Amendment Fellows at The Times. The ACLU was represented by Eric Ruzika, Joshua Colangelo-Bryan, and Colin Wicker of Dorsey & Whitney and Jameel, Jaffer, Hina Shamsi, and Brett Kaufman of the ACLU. The Department of Justice was represented by Matthew Collette and Sharon Swingle, Department of Justice Appellate Staff Attorneys, and *AUSA Sarah Normand.*

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Lawsuit Challenging State Court Access Delays Belongs In Federal Court, Ninth Circuit Rules

Reverses District Court's Dismissal on Federal Abstention Grounds

By Rachel Matteo-Boehm and Leila Knox

A lawsuit challenging a state court's clerk's policies resulting in delayed access to civil court records "presents an important First Amendment question … that should be decided by the federal courts," and the media plaintiff who brought the case should not be left "twisting in the wind" while deprived of a federal forum, the Ninth Circuit Court of Appeals ruled in a strongly worded opinion reversing a California federal district court's dismissal of a 42 U.S.C. § 1983 access challenge on federal abstention grounds. *Courthouse News Service v. Planet*, 2014 U.S. App. LEXIS 6349 (9th Cir. April 7, 2014).

At issue in the appeal was nothing less than the continued availability of the federal courts to address systematic violations by state courts of the First Amendment right of access to public court records. In contrast, under the district court's reasoning, parties seeking to prevent or cure state court First Amendment violations would be effectively barred from seeking redress in federal court, and instead be left to enforce their rights in the very state courts that are denying those rights.

The media plaintiff who brought the case should not be left "twisting in the wind" while deprived of a federal forum, the Ninth Circuit Court of Appeals ruled.

In addition, the panel effectively recognized, for the first time in the Ninth Circuit, a First Amendment right of access to civil court records and proceedings. And as if this were not enough, the 32-page opinion is filed with helpful language about matters such as the importance of access to court records and proceedings, the media's role in that process, and the relative simplicity of providing prompt access, making it recommended reading for media practitioners both inside and outside the Ninth Circuit.

Delays in Access at Ventura County Superior Court

For decades, news reporters on the courthouse beat have visited the clerk's office near the end of the day to review – and report on – newly filed civil complaints. In keeping with this practice, it has been a longstanding tradition for courts to provide reporters who make these daily in-person visits with access to the day's new civil complaints at the end of the same day they are filed. This same-day access ensures that the public can learn about newly filed lawsuits while they are still newsworthy. Federal and state courts around the country still provide this same-day access, in many instances before the complaint is fully processed.

In recent years, however, access delays have cropped up in some state courts. The Ventura County Superior Court in California has been one of the most egregious offenders. In that court, the clerk refuses to provide access to newly filed civil complaints under after "the requisite processing is completed" – i.e., information about the complaint has been entered into a cumbersome computer program, double checked, and, as the Ventura clerk himself put it, the complaint has been "approved for public viewing." The result of this policy has been pervasive and substantial delays in access. At the time the lawsuit underlying the Ninth Circuit appeal was filed, more than 75% of newly filed complaints were not made available for media or public review for two or more court days, and actual delays in access stretched up to 34 calendar days.

As a result of the Ventura Clerk's policy, Courthouse News Service ("CNS") was unable to provide timely news coverage of new complaints filed in the Ventura County Superior Court, even though one of its reporters visited the court on a daily basis for the express purpose of reviewing the new civil filings. After CNS's efforts to work cooperatively with the Ventura clerk to resolve the delays were rebuffed, on September 29, 2011, CNS filed a § 1983 lawsuit against the

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clerk in the United States District Court for the Central District of California.

District Court Proceedings

CNS's suit alleged that the clerk's policy of delaying access to newly-filed complaints until after they were processed deprived CNS – and by extension its subscribers – of their First Amendment right of access to civil court complaints, and that the clerk could not satisfy the stringent requirements for overcoming the First Amendment right of access. Together with its complaint, CNS filed a motion for a preliminary injunction. The case was assigned to Central District Judge Manuel Real.

The case against the Ventura clerk was similar to an action CNS had filed two years earlier challenging a Houston state clerk's refusal, on similar administrative grounds, to allow access to newly filed civil actions in a timely manner. In that action, Southern District of Texas Judge Melinda Harmon granted CNS's motion for a preliminary injunction requiring the Houston state clerk to provide same-day access to new civil cases. Thereafter, the parties agreed to a stipulated permanent injunction providing for continued same-day access with limited carve-outs, such as where the filing party is seeking a TRO or other immediate relief or has properly filed the filing under seal. *See Courthouse News Service v. Jackson*, 2009 U.S. Dist. LEXIS 62300 (S.D. Tex. July 20, 2009); *Courthouse News Service v. Jackson*, 2010 U.S. Dist. LEXIS 74571 (S.D. Tex. Feb. 26, 2010).

The panel effectively recognized, for the first time in the Ninth Circuit, a First Amendment right of access to civil court records and proceedings.

Although the two actions were very similar, the district court proceedings in the Ventura case took a different turn than they had in Texas. In addition to opposing CNS's motion for a preliminary injunction, the Ventura clerk filed a motion to dismiss arguing, among other things, that the district court should dismiss the case on the basis of two federal abstention doctrines.

First, the Ventura clerk argued that the matter should be left to the state courts on the basis of the abstention doctrine announced in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), which cautions restraint by federal courts in interpreting unsettled state laws in which federal law claims are entangled. In addition, the Ventura clerk urged the district court to abstain under the doctrine announced in *O'Shea v. Littleton*, 414 U.S. 488 (1974), a seldom-used and narrow application of *Younger v. Harris*, 401 U.S. 37 (1971). *O'Shea* abstention has been almost exclusively confined to cases, typically class actions, that place federal courts in the position of overseeing and reviewing a state court's adjudication of cases on their merits.

In a ruling from the bench on November 28, 2011, Judge Real granted the Ventura clerk's motion to dismiss on both abstention grounds. As to *Pullman* abstention, Judge Real concluded that the First Amendment question would be avoided if the California courts construed a California state statute (Gov't Code § 68150) that requires court records to be made "reasonably accessible" to members of the public to require same-day access to newly filed unlimited civil complaints. And as for *O'Shea* abstention, Judge Real adopted – on a motion to dismiss – the Ventura clerk's factual assertions that the relief sought by CNS would substantially interfere with the state court's budget and operations. The district court thus abstained and dismissed the action in its entirety, never considering the merits of CNS's preliminary injunction motion.

Ninth Circuit Reverses

Needing an answer to the critical question of whether the federal forum was available to litigate violations of the First Amendment right of access by state court officials, CNS appealed. In a April 7, 2014 opinion, Ninth Circuit Judge Kim McLane Wardlaw, writing for a unanimous three-judge panel that included circuit judges John Noonan and Mary Murguia, found the district court abused its discretion in abstaining, and reversed and remanded so that "the First Amendment issues presented by this case may be adjudicated on the merits in federal court, where they belong."

Along the way, the court not only made it clear that *Pullman* and *O'Shea* do not allow a federal district court to abstain from deciding a claim alleging a deprivation by a state court of the First Amendment right of access, but addressed several other important issues bearing on the First Amendment right of access to court records and proceedings.

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Pullman Abstention

The Ninth Circuit has developed three independently mandated requirements to permit a district court to exercise discretion to abstain under *Pullman*: (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open; (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy; and (3) the proper resolution of the possible determinative issue of state law in uncertain.

In its opinion, the court focused almost entirely on the first factor, which, it noted, "is almost never satisfied in First Amendment cases because the guarantee of free expression is always an area of particular federal concern." In answer to this, the Ventura clerk argued that the rule against *Pullman* abstention in First Amendment cases did not apply because, among other things, the case was not a "free expression" case, but rather an "access to information" case, and because there was not a danger of chilling protected speech. The court disagreed on both counts.

The court also signaled its skepticism with the Ventura clerk's protestations ... that providing same-day access ... each day would impose an onerous burden on a cash-strapped court.

First, the court rejected the Ventura clerk's argument that a claim for violation of the First Amendment right of access to court records did not implicate the right of free expression. As the court noted, "The Supreme Court has repeatedly held that access to public proceedings and records is an indispensable predicate to free expression about the workings of government." The court also recognized that the danger of chilling speech – one of the reasons why *Pullman* abstention has been found by the Ninth Circuit to be inappropriate in First Amendment cases – was also implicated because the delay in litigation created by abstention deterred "informed public discussion of ongoing judicial proceedings."

As part of its discussion of *Pullman* abstention, the court effectively recognized that the First Amendment right of access extends to civil records and proceedings. While noting that the Ninth Circuit had not "expressly held that the First Amendment right of access encompasses civil cases," the court also observed it would be "highly doubtful" the Ventura clerk could decide to not give out complaints at all without violating the First Amendment, and further recognized that "the federal courts have widely agreed that [the First Amendment right of access] extends to civil proceedings and associated records and documents."

In reaching the conclusion that a First Amendment right of access claim fell within the general rule against abstaining under *Pullman* in First Amendment cases, the court noted that its decision was consistent with the Second Circuit's decision in *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004), a case well known to many MLRC members, although perhaps not for abstention. In that case, which involved a First Amendment challenge to the Connecticut state court's practice of sealing dockets, the Second Circuit held that *Pullman* abstention was not proper because, *inter alia*, "the weight of the First Amendment issues involved counsels against abstaining."

O'Shea Abstention

In its 1971 opinion in *Younger*, the U.S. Supreme Court established a rule against federal courts enjoining ongoing state court proceedings. Three years later, in *O'Shea*, the Supreme Court considered a case involving a class of African-American plaintiffs who claimed a group of public officials, including a county magistrate and judge, denied them their civil rights by setting higher bonds, imposing harsher confinement conditions and bringing mere ordinance violations to trial in a racially discriminatory manner, and sought to enjoin the magistrate and judge from engaging in such practices. As the Supreme Court explained, the plaintiffs in *O'She*a sought nothing less than an ongoing federal audit of state court criminal proceedings, which was the very federal interference in state court proceedings that *Young*er sought to prevent. Thus, while *Younger* counsels against federal interference with the adjudication of *pending* state court proceedings, *O'Shea*'s focus was a concern about federal interference with the adjudication of *future* state court proceedings.

Prior to the district court's ruling, *O'Shea* had never been applied to a case seeking access to court records under the First Amendment, and in its opinion, the Ninth Circuit rejected the notion that the relief sought by CNS would

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impose an "ongoing federal audit" of the Ventura County Superior Court.

As part of its *O'Shea* discussion, the court also signaled its skepticism with the Ventura clerk's protestations, both at the district court level and in the Ninth Circuit, that providing same-day access to the mere handful of new civil complaints filed in Ventura Superior each day would impose an onerous burden on a cash-strapped court.

To the contrary, the court observed that "[i]n courthouses around the country – large and small, state and federal – CNS reporters review civil complaints on the day they are filed" and "[t]he Ventura County Superior Court has available a variety of simple measures to comply with an injunction granting CNS all or part of the relief requested, should CNS prevail on the merits of its claims." For instance, the court said:

> The court could give reports a key to a room where new complaints are placed in boxes for review before being processed, as does the Los Angeles Division of the U.S. District Court for the U.S. District Court for the Central District of California. It could adopt the practice of the New York County Supreme Court in Manhattan and place paper versions of new complaints in a secure area behind the counter where reporters are free to review them on the day of filing. Or it could follow the Santa Monica branch of the Superior Court for Los Angeles County and permit reporters to view the cover page of all newly filed complaints each afternoon and request full text of any that seem newsworthy. *To permit same-day access, the Ventura County Superior Court may not need to do anything more than allow a credentialed reporter – the same reporter who has been regularly visiting the courthouse for the past twelve years – to go behind the counter and pick up a stack of papers that already exists.* (emphasis added).

Nor does the possibility that some additional federal litigation might later arise to enforce an injunction justify abstention under *O'Shea*, the court said. As the court explained, accepting such a view "would justify abstention as a matter of course in almost any civil rights action under § 1983."

The Ninth Circuit concluded, "We take no position on the ultimate merits of CNS's claims, which the district court has yet to address in the first instance. But those claims raise novel and important questions that the federal courts ought to decide."

Courthouse News Service was represented by Rachel Matteo-Boehm, Roger Myers and Leila Knox from Bryan Cave LLP in San Francisco, as well as former Bryan Cave counsel David Greene (currently a senior staff attorney at the Electronic Frontier Foundation). Defendant Michael Planet was represented by Robert Naeve, Erica Reilley and Nathaniel Garrett from Jones Day. The Reporters Committee for Freedom of the Press, represented by Lucy Dalglish, Gregg Leslie and Kristen Rasmussen, supported Courthouse News as amicus curiae.

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This updated report offers a review of that question by examining legislative developments and court decisions in a variety of situations, ranging from libel and right of publicity issues, to state shield laws and reporter's privilege changes, to application of state and federal open records laws.

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Ethics Corner

Where Is the Line on Advising Clients Regarding Direct Contact With Represented Parties?

By Timothy J. Conner

The other side's lawyer is so obstreperous that it is getting in the way of resolving what should be a simple business spat, and the solution is right there, right in front of you. But with everything being filtered through "Mr. Deal Breaker" the only thing that's going to happen is that both sides will spend a lot more time and money litigating. And for what? There is no overarching principle at stake. If only the clients could speak directly to each other like reasonable business people, maybe they could get back to business.

You mention to your client that perhaps they could call their counterpart. After all, they know each other as professionals, have been in the same industry for years, have even played golf together once during a conference. The client thinks that is a good idea, and ask you what they can say, whether you can give them some talking points, maybe even draft up an agreement that could be used to settle the whole thing and give that to them as a frame of reference. Nothing wrong with that, right?

The question is how far can the lawyer go in counseling the client? Can you script what should be said, can you provide talking points, can you draft a settlement agreement that is executable and thus binding?

Well, now that you mention it there is a bit of tension in some of the rules that govern lawyer conduct on these issues. And if you practice in California, Kansas, Massachusetts, Minnesota, or New York (and perhaps any number of other jurisdictions), you will be crossing the line into impermissible conduct.

On the other hand, the American Bar Association's Standing Committee on Ethics and Professional Responsibility believes any of these actions are perfectly permissible. The Committee addressed the tension in the Model Rules (which most jurisdictions have adopted in varying forms), and how to resolve it, in its Formal Opinion 11-461, issued August 4, 2011.

The preamble to that Opinion states:

> Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer's assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.

The Opinion addresses the inherent friction between ABA Model Rules of Professional Conduct 4.2 and 8.4(a), and "explores the limits within which it is ethically proper … for a lawyer to assist a client regarding communications the client has a right to have with a person the lawyer knows is represented by counsel." Rules 4.2 and 8.4(a), and their pertinent comments, provide:

> Rule 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
>
> **Comment**
>
> [4] … Parties to a matter may communicate directly with each other, *and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. …* .(emphasis supplied).
>
> RULE 8.4: MISCONDUCT
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

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Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. *Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.* (emphasis supplied).

So, on the one hand a client may communicate with an adversary who is represented by counsel. Client to client communications implicate free speech rights, and the rules governing lawyers cannot be applied to the clients in any event. The view of the ABA is that clients should be able to rely on assistance from their lawyer about those communications. The question is how far can the lawyer go in counseling the client? Can you script what should be said, can you provide talking points, can you draft a settlement agreement that is executable and thus binding?

How far you can go in advising a client regarding communications with a represented party will turn on the interpretation of these rules in the governing jurisdiction.

Some authority states that because of Rule 8.4(a)'s prohibition against violating or attempting to violate the Rules of Professional Conduct through the acts of another, a lawyer may not "script" or "mastermind" a client's communication with a represented person and may violate Rule 4.2 by preparing legal documents for the client to have a represented person sign without the assistance of their counsel. *What constitutes "scripting" or "masterminding" the communication is not clear, but such a standard, if too stringently applied, would unduly inhibit permissible and proper advice to the client regarding the content of the communication, greatly restricting the assistance the lawyer may appropriately give to a client*.

(ABA Formal Opinion 11-461 p. 3) (citations omitted) (emphasis supplied).

The Opinion concludes that a lawyer can go pretty far in providing advice to a client about direct contact with a represented party - as far as drafting a binding settlement agreement to be presented for execution (with a couple of limiting provisos). The Opinion states that the advice a lawyer can give includes "the subjects or topics to be addressed, issues to be raised and strategies to be used." It also does not violate the Rules for the lawyer to be the originator of the idea for the client to make the direct contact with the represented party.

For example, the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. Such advice enables the client to communicate her points more articulately and accurately or to prevent the client from disadvantaging herself. The client also could request that the lawyer draft the basic terms of a proposed settlement agreement that she wishes to have with her adverse spouse, or to draft a formal agreement ready for execution. Rules 4.2 and 8.4(a) may permit the lawyer to fulfill the client's request without violating the lawyer's ethical obligations.

(ABA Formal Opinion 11-461 p. 4).

The Opinion then throws in the admonishment that in advising the client a lawyer must be careful not to violate the underlying purposes of Rule 4.2 to prevent "overreaching." An example of overreaching provided by the Opinion is "assisting the client in securing from the represented person an enforceable obligation."

Wait a minute, isn't that what a settlement agreement is? Well, of course it is. That's why the Opinion also states that if you prepare a settlement agreement for the client in this context you need to "at a minimum" tell the client to encourage the other party to consult with their counsel before signing it, and include "conspicuous" language on the signature page that warns the other party to consult with their lawyer before signing.

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Other examples of overreaching would be getting the client to try and have the other represented party reveal confidential information ("my lawyer says we have a strong case - what does your lawyer say?"), or trying to obtain an admission against interest ("come on Tom, you know you guys violated the deal we had").

The position taken by the ABA on these issues has met with resistance. Shortly after the Committee issued Formal Opinion 11-461, Martin Cole, director of the Office of Lawyers Professional Responsibility for the Minnesota State Bar Association, wrote a piece that was published in Bench & Bar of Minnesota criticizing the Opinion. In that article, Cole reiterated that "[i]t has long been the position of the Director's Office and its interpretation of Rule 4.2 that an attorney *may* initiate the idea of the client contacting the adverse party directly but *may not* script any such communication or draft an agreement to be presented to the adverse person, even at the client's request. The latter level of involvement is perceived as an 'end run' on the protections of Rule 4.2 and thus has been found to violate the rule and can subject the attorney to discipline." (emphasis in original).

California also takes a contrary view. The California Court of Appeal discussed the Opinion in *San Francisco United School Dist. ex rel Contreras v. First Student, Inc.*, (2013) 213 Cal. App. 4th 1212, a qui tam action brought pursuant to the California False Claims Act. The Court addressed the distinctions between California Rule of Professional Responsibility 2-100, particularly in light of California State Bar Formal Opinion 1993-131 (1993), and the ABA's Opinion.

Rule 2-100 provides in relevant part that "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

California State Bar Formal Opinion 1993-131 states that while an attorney need not discourage a client from having a direct communication with a represented party, Rule 2-100 is violated when the content of the communication originates with or is directed by the attorney. Accordingly, the attorney may not script questions, statements, and the like, and also may not draft documents - e.g., a settlement agreement - to be used in those communications.

The Court cited with approval language from *Snider v. Superior Court* (2003) 113 Cal. App. 4th 1187, 1197-98, expressing the view that a "bright line" test is necessary as a practical matter in this area of the law as an attorney must know beforehand whether conduct is permissible, not later when the risk of disqualification is hanging over their head. The Court noted that the ABA Opinion states "a more liberal approach to where this line must be drawn" in allowing attorneys to advise clients regarding direct contact with represented parties.

That does in fact seem to be the difficulty with the ABA's Opinion. While the underlying purposes of the Opinion - providing appropriate guidance to clients who may wish to contact their adversarial counterparts directly, which they have every right to do - are understandable, the limitation of not straying into the realm of "overreaching" is hard to define in concrete terms. What constitutes overreaching will vary with the circumstances.

For instance, is the represented party on the other side a sophisticated CEO, or an individual who runs a small business and has never been involved in a lawsuit before? What about a personal injury plaintiff who may be in desperate economic straits? An elderly person who potentially lacks capacity? The judgment of whether a particular action is overreaching may look different six months or a year removed. It may also appear different to the Judge or disciplinary board in the cold light of day than it did to the lawyer at the time.

A situation that arises frequently is where parties in litigation, or on the opposite sides of a transaction, have ongoing business relationships. What happens when the client calls or sends drafts of proposed communications to be sent to the other side related to the ongoing business relationship, but with the obvious concern about its impact on the pending matter? Or what if the client calls and says "Hey Carol, can you take a look at this and see if we can somehow use it to our advantage in the [pending matter]"?

The ABA Opinion does not specifically address the issues in that context. The "no contact" rule established by Rule 4.2, however, is limited to no contact *with respect to the subject of the representation*. The "overreaching" restriction is intended to keep a lawyer from taking some action that would take advantage of an opposing party and prejudice their position in a pending matter in the absence of advice from their own counsel. It would seem ethical to vet your client's proposed

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communications to make sure they do not say something prejudicial to them in the pending matter. If, on the other hand, the point is to use the communication from a different business transaction to somehow develop evidence to be used in the pending matter against the opposing party then it would seem to cross over into the realm of "overreaching."

These are worthy topics of discussion. With Formal Opinion 11-461, the ABA has placed its stamp of approval on a broad range of conduct allowing lawyers to advise clients on direct contact with another represented party.

There are considerations outlined in the Opinion that justify the ABA's approach. While there is scant authority on the friction between Rules 4.2 and 8.4(a), there are several jurisdictions that have been explicit in placing limitations on a lawyer's conduct that are far more restrictive than what the ABA would allow.

How far you can go in advising a client regarding communications with a represented party will turn on the interpretation of these rules in the governing jurisdiction.

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