520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200

MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through July 25, 2014

LIBEL AND PRIVACY

2014 MLRC/NAA/NAB MEDIA LAW CONFERENCE

September 17-19, 2014 | Reston, VA

www.mlrc2014.com

Early Registration Discounts Are Coming to an End

August 17: Registration goes up by $50
August 20: Hotel block discount ends

REGISTER NOW TO GET YOUR PREFERRED BOUTIQUE SESSIONS!

Employment Law Issues for Media Employers

What to do as a media employer about hiring independent contractors; raising First Amendment defenses and anti-SLAPP defenses to discrimination litigation; including non-disparagement clauses in employment agreements; deploying non-compete agreements and alternatives to non-competes in the broadcast industry; using social media in employment litigation; and analyzing the protections given to employees' social media use by labor law.

Ethics: Social Media for Media Lawyers *(will be held twice)*

Lawyers must become well-versed in the rules governing their use of social media. Among other topics, the two sessions of this boutique will cover how the professional duties of diligence and competence require lawyers to understand how social media platforms operate and to understand how their clients are using social media; when social media activities become attorney advertising or solicitations; when the use of social media leads to the formation of attorney-client relationship; and how social media can be used in litigation.

Pre-Publication/Pre-Broadcast Review *(will be held twice)*

The two sessions of this boutique will address what to look for when conducting pre-publication and pre-broadcast reviews of journalists' work product to address the legal pitfalls on issues like using footage shot with drones, accessing sealed criminal records, making secret recordings, and many more.

Vetting Materials Cross-Borders: Publication & Advertising Issues

Navigating the choppy currents of UK and European libel and privacy law, including the impact of the new Defamation Act, the new "right to be forgotten," the perils of publishing photographs, libeling the dead, Twitter libel, liability for user-generated content. Use of mobile apps, geotargeted ads and new technologies may give rise to exposure in unexpected jurisdictions. International publication regulations for advertising and content -banned words, weather forecasts and more.

Vetting Material Cross Borders: International Copyright

This session will explore the common themes and problems with efforts around the world to modernize copyright for the digital age. Making available/distributing copies to the public: challenges posed by streaming content, linking, and framing. Format shifting and fair dealing. Combating privacy: copyright injunctions and blocking orders.

Vetting Material Cross Borders: Information Gathering

A discussion of the practical and legal concerns when deploying journalists into hostile environments - from physical security and risk of kidnapping to protection of sources and editorial materials in countries opposed to press freedom and personal liberty. How news organizations operating overseas contend with the vagaries of U.S. law and figure out if their activities may run afoul of the Foreign Corrupt Practices Act or other statutes.

Advertising & Commercial Speech: Native Advertising

Many issues are being raised by native advertising as online publishers widely adopt it. Is content generated or sponsored by advertisers commercial speech subject to advertising regulations? What will regulators require of disclosures made to audiences about native advertising? Do sponsors have to vet all claims and clear all third-party rights implicated in native-advertising content? This panel will cover recent regulatory actions and the application of legal precedent to native advertising.

Advertising & Commercial Speech: The Other Issues

This session will cover several topics beyond native advertising: the new Federal Communications Commission rule requiring that prior express written consent be given before telemarketing calls are made to consumers; the implications for advertisers and social media

networks from online sports betting, social games and fantasy sports leagues, including media companies forfeiting ad revenue earned for publishing ads for allegedly illegal internet gambling businesses; what impact the Seventh Circuit's ruling in *Jordan v. Jewel* will have on whether there is any corporate commercial speech that does not consist of brand promotion and does not run into right of publicity problems when making corporate tributes to celebrities; and what media lawyers need to consider when examining insurance coverage for advertising claims under media liability policies.

The FCC and the 21st Century Media Marketplace

Regulations by the Federal Communications Commission affect the ownership arrangements of media outlets and the lay of the land for media operations. Current issues include whether Internet Service Providers are entitled to First Amendment protections as speakers; the future, if any, of net neutrality regulation by the FCC; how the FCC will regulate arrangements among TV broadcast stations, without common owners, to share resources; and if the FCC has enough evidence that joint TV advertising sales agreements, when reaching 15 percent of a station's advertising time, incentivize ad brokers to influence station programming and operations or lead stations to coordinate, rather than compete, for advertising.

Newsgathering

A discussion of cutting-edge legal issues in newsgathering: the legal problems from relying on social media in newsgathering and practical tips on how to verify and vet information; the current state of the First Amendment right to be free from punishment for recording a police officer's public performance of his or her duties; the erection of paywalls that impede the public's online access to public records; and the Federal Aviation Administration's regulation of drones for use in newsgathering.

Entertainment Law: Ripped From The Headlines: Legal Risk Avoidance & Entertainment Works Derived From Real Events

What to do to avoid the legal risks stemming from entertainment works based on real events, including the affirmative defenses to raise, deciding if the acquisition of "exclusive" life story rights is really necessary, the non-legal reasons to acquire life story rights, and the steps to take to legally vet screenplays for TV programs and motion pictures against potential legal claims.

Trial Tales

A panel of lawyers dissect media cases tried over the past two years – with lessons from the frontlines and analysis of trends and common factors – as reported in the Conference's biennial survey of trials involving publication and newsgathering torts against media defendants.

Full program and registration at www.mlrc2014.com

George Zimmerman's Defamation Lawsuit Against NBC Dismissed

Court Grants NBC Summary Judgment; Zimmerman a Public Figure; NBC Did Not Materially Alter His Comments

By Matthew E. Kelley

George Zimmerman is a public figure and cannot prove with the requisite clear and convincing evidence that NBC acted with actual malice in broadcasting news reports containing excerpts from his call to police shortly before he shot and killed Trayvon Martin, a Florida trial court has ruled. *Zimmerman v. NBCUniversal Media, LLC*, No. 12-CA -6178 (Fla. Cir. Ct. Seminole Cnty. June 30, 2014).

Zimmerman's defamation claims failed primarily because the portions of the call excerpted by NBC did not result in a "material alteration" of the words he actually spoke to a police dispatcher while pursuing Martin and because NBC's report that Zimmerman uttered a racial epithet during that call was a rational interpretation of an ambiguous recording. The court also dismissed Zimmerman's claim for intentional infliction of emotional distress.

Seminole County Judge Debra Nelson – who also presided over the 2013 trial at which Zimmerman was acquitted of murder and manslaughter charges – granted NBC's motion for summary judgment and dismissed Zimmerman's complaint in its entirety. Zimmerman filed a notice of appeal on July 22.

Background

Martin's February 2012 killing prompted intense news media attention, social media commentary and protest rallies across the country, all of which quickly focused on the racial aspects of the shooting. Zimmerman, a self-appointed neighborhood watch captain in his Sanford, Florida, townhome community, first encountered Martin while the teenager was walking through the neighborhood on rainy evening, returning to his father's home. Zimmerman immediately determined that Martin appeared "suspicious" and called police and followed Martin, a confrontation ensued that ended when Zimmerman shot Martin at close range. Zimmerman contends that Martin attacked him and that, in the struggle, he fired his handgun in self-defense.

In his call to a police non-emergency line, Zimmerman began by mentioning previous burglaries in the neighborhood and describing Martin as "a real suspicious guy" who "looks like he's up to no good, or he's on drugs or something." The dispatcher asked Zimmerman if the "suspicious guy" was white, black or Hispanic, and Zimmerman replied, "He looks black." After describing Martin's movements for a while, Zimmerman told the dispatcher that Martin was approaching his truck: "He's got his hand in his waistband. And he's a black male."

During the call, Zimmerman stated, "These assholes, they always get away." He then told the dispatcher that Martin was running, and then muttered under his breath, "these fucking ____." Zimmerman claimed he said "fucking punks"; others believed he said "fucking coons." An FBI laboratory tasked with determining what Zimmerman had said concluded that it could not make the determination because of poor recording quality.

(Continued on page 7)

RETURN TO TABLE OF CONTENTS

(Continued from page 6)

The dispatcher then asked if Zimmerman was following Martin. When Zimmerman answered affirmatively, the dispatcher told him, "we don't need you to do that."

While awaiting trial, in December 2012, Zimmerman sued NBC and two of its correspondents and one WTVJ reporter, claiming that four NBC broadcasts and one WTVJ news report that included excerpts from that recorded call defamed him by portraying him as a "hostile racist" who killed Martin out of racial animus rather than self-defense. In one of those broadcasts, NBC reported that Zimmerman could be heard using a racial epithet in the call, and that broadcast included an excerpt of that portion of the call with the words in question "bleeped."

Two other NBC newscasts included the "he looks like he's up to no good" excerpt, followed by the "he looks black" excerpt, with the text of the two phrases shown on screen separated by ellipses. The fourth NBC broadcast included the excerpt in which Zimmerman said, "[t]his guy looks like he's up to no good, or he's on drugs or something," followed by Zimmerman's comment that "he's got his hand in his waistband. And he's a black male."

The portions of the call excerpted by NBC did not result in a "material alteration" of the words he actually spoke.

The fifth report, which was broadcast by WTVJ, the NBC-owned station in Miami, included voice-over stating that it was excerpting portions of the call, and also included the "up to no good, or on drugs or something" excerpt, followed by the "he looks black" excerpt. The dispatcher's question regarding the Martin's race, like most of what was on the recording, was not included in any of the reports. Each of the reports contained several additional elements, including comment by friends of Zimmerman contending that he was not a racist and asserting that he had acted in self-defense, a position echoed in several of the reports by police personnel.

Zimmerman claimed in his complaint that the broadcasts were responsible for injecting the element of race into this controversy, caused him to suffer severe emotional distress, gave rise to death threats and forced him into hiding.

The case was stayed in March 2013 on consent pending the outcome of Zimmerman's criminal proceedings. Zimmerman was acquitted of second-degree murder and manslaughter charges on July 13, 2013. The civil suit was then taken out of suspense and defendants moved to dismiss and in the alternative for summary judgment in March 2014.

Defendants argued, first, that Zimmerman's claims regarding the WTVJ broadcast were barred by virtue of his failure to provide the notice required by the Florida retraction statute. Defendants also contended that, because more than two years had passed since the WTVJ broadcast, the statute of limitations had expired and therefore Zimmerman could not cure this lapse and could not pursue his claim against the WTVJ reporter or any claim based on that report.

Next, defendants argued that Zimmerman was a public figure at the time of the challenged broadcasts. They pointed out that Zimmerman had boasted of his involvement in protests regarding an attack on a black man by the white son of a Sanford police officer, which served to inject his views into a longstanding controversy regarding race relations and public safety in his hometown.

Zimmerman also became a public figure by voluntarily engaging in a course of conduct that was reasonably likely to draw public scrutiny – *i.e.*, creating a neighborhood watch program, calling police on several occasions regarding suspicious teenagers and voluntarily following Martin because he deemed him suspicious, leaving his truck to pursue him and ultimately shooting and killing him. Zimmerman also had become an involuntary public figure, along the lines of Steven Hatfill and Richard Jewell.

Defendants next argued that Zimmerman could not prove actual malice by clear and convincing evidence, relying on two threads of Supreme Court guidance on actual malice. The first argument was that the excerpts used in the broadcasts, viewed in context, had not effected a "material change in meaning" of Zimmerman's statements in the call to police, based on the "material alteration" test established in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 515-17 (1991), which was most recently restated by the Court in *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852 (2014).

Defendants pointed out that Zimmerman volunteered that Martin was "a black male" later in the call to police, so it was not a material change in the meaning to omit the dispatcher's initial question regarding Martin's race. Next, defendants asserted that under the "rational interpretation" doctrine articulated by the Supreme Court in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), and *Time, Inc. v. Pape*, 401 U.S. 279 (1971), plaintiff could not prove that the

(Continued on page 8)

(Continued from page 7)

statement that Zimmerman had used a racial epithet was made with actual malice. They argued that, because his comments on the recording were ambiguous, defendants' assertion that Zimmerman used such an epithet was a rational interpretation of ambiguous source material.

Defendants also argued that Zimmerman could not prove that his purported damages were proximately caused by defendants, given all of the admissions by him and his agents regarding both the damages he allegedly suffered before the broadcasts and regarding the racial aspects of the publicity he had received before the broadcasts.

Finally, defendants asserted that Zimmerman could not make out a claim for intentional infliction of emotional distress. Defendants contended that Zimmerman could not repackage his faulty defamation claim in the guise of another tort, and that their alleged conduct was not outrageous, demonstrating that many other news organizations had presented similarly edited versions of Zimmerman's conversation with the dispatcher.

Zimmerman opposed the motion, arguing that, for purposes of the motion to dismiss, the court was confined to the "four corners of the complaint," regardless of the actual facts, and that the summary judgment motion was premature. Indeed, Zimmerman moved to strike the summary judgment motion on that basis. He also attempted to refute the contention that he should be barred from litigating the claim based on the WTVJ broadcast, and asserted that he was neither a limited purpose nor an involuntary public figure. Zimmerman did not file an affidavit or any other evidence in support of his position.

Defendants argued that Zimmerman was a public figure at the time of the challenged broadcasts.

At argument on the motion, Judge Nelson denied Zimmerman's motion to strike the summary judgment motion and dismissed his claim regarding the single WTVJ broadcast at issue, ruling that his notice was faulty under the retraction statute and that the flaw could not be cured given the expiration of the statute of limitations, which, in Florida, is two years for a defamation claim.

Court's Decision

With regard to the remaining broadcasts, in a 15-page opinion filed eleven days after the argument, Judge Nelson agreed that Zimmerman was a limited-purpose public figure. Zimmerman, she held, had by his actions voluntarily injected his views into an existing controversy regarding race relations and public safety in Sanford. She further concluded that he "pursued a course of conduct that ultimately led to the death of Martin and the specific controversy surrounding it."

Having concluded that the actual malice standard applied to Zimmerman's claims, the court next turned to whether Zimmerman could possibly prove by clear and convincing evidence that defendants had made any false statements about him with actual malice. The court looked first to the *Masson* standard and concluded: "Zimmerman cannot base a defamation claim on NBC's airing of his recorded statement that the man he was following 'looks black' when he *volunteered* precisely that same information at another point during the non-emergency call without prompting by the dispatcher." (emphasis added). NBC's reports, the judge held, "accurately captured the 'gist' and 'sting' of what Zimmerman actually said and were not false in any material sense."

The court next looked to the "rational interpretation" doctrine articulated by the Supreme Court in *Bose* and *Pape*. Judge Nelson concluded that the source material here -- the recording of the call – was ambiguous, particularly given that an FBI analysis could not determine what Zimmerman had said, and held that Zimmerman could not prove that the "epithet" report, even if false, was made with actual malice.

Judge Nelson also ruled that Zimmerman's defamation claims should be dismissed for the additional reason that he could not prove that the broadcasts were the proximate cause of his claimed injuries. Although he asserted that defendants' reports had sent him into hiding and forced him to wear a bulletproof vest, the court recognized that, before any of the reports at issue, Zimmerman had told police he was suffering from post-traumatic stress disorder, had gone into hiding because of death threats, and had been the subject of protests calling for his arrest, all of which caused "his father and friends [to] reach[] out to the media to make the case that he is not a racist." Thus, the court held, the reports at issue simply could not be the "but for" cause of Zimmerman's injuries.

Finally, Judge Nelson dismissed Zimmerman's claim for intentional infliction of emotional distress. She held that

(Continued on page 9)

(Continued from page 8)

NBC's conduct in broadcasting news reports was not sufficiently "outrageous" to support an IIED claim, noting that "multiple other news reports characterized and edited Zimmerman's statements in virtually the same manner as the challenged broadcasts." And she held that Zimmerman could not avoid the First Amendment's limitations on his defamation claims by asserting them as a different tort, citing extensive case law on the issue.

Matthew E. Kelley is an associate at Levine Sullivan Koch & Schulz, LLP. Defendants were represented by Lee Levine and Gayle C. Sproul of Levine Sullivan Koch & Schulz, LLP, Susan E. Weiner and Hilary Lane of NBCUniversal and Gregg D. Thomas and Rachel E. Fugate of Thomas and LoCicero PL of Tampa, Fla. George Zimmerman was represented by James E. Beasley, Jr., Dion G. Rassias, and Maxwell S. Kennerly of The Beasley Firm, LLC, of Philadelphia; and Henry N. Didier, Jr., of Didier Law Firm, P.A., of Orlando, Fla.

MLRC UPCOMING EVENTS

MLRC/NAA/NAB Media Law Conference
September 17-19, 2014 | Reston, VA

MLRC Annual Dinner
November 12, 2014 | New York, NY

DCS Annual Lunch & Meeting
November 13, 2014 | New York, NY

MLRC/Southwestern Entertainment and Media Law Conference
January 15, 2015 | Los Angeles, CA

Legal Frontiers in Digital Media
May 14-15, 2015 | Palo Alto, CA

MLRC London Conference
September 28-29, 2015 | London England

RETURN TO TABLE OF CONTENTS

10th Circuit Reinstates Defamation Claims Over Dateline Hidden Camera Report

Plaintiff Stated a Claim for Defamation; Court Affirms Dismissal of § 1983 Claims

The Tenth Circuit this month reinstated a defamation claim against NBC Universal based on a Dateline investigation of predatory annuity sales to seniors. *Broker's Choice of America, Inc. v. NBC Universal, Inc.*, No. 11-1042 (10th Cir. July 9, 2014) (Briscoe, McKay, O'Brien, JJ.).

The Court held that at the motion to dismiss stage, plaintiff alleged sufficient facts to support his allegation that the Dateline report created the false and defamatory impression that plaintiff taught salesmen to prey on seniors.

Background

At issue is a 2008 Dateline segment entitled "Tricks of the Trade." The news producers secretly filmed a sales agents' seminar given by plaintiff and his company. Among other things, the broadcast showed plaintiff telling sales agents that they should "disturb the hell out of" seniors and give them information so "they can't sleep at night."

In 2011, a Colorado district court dismissed the defamation claims on the ground of substantial truth, relying on plaintiff's own statements about scaring seniors. *See* 39 Media L. Rep. 1557, 2011 WL 97236 (D. Colo. Jan. 11, 2011). The district court also dismissed plaintiff's § 1983 / civil rights claim. Dateline and Alabama state agencies were both investigating the sales practices and the state gave the news producers temporary state insurance licenses to gain access to training seminars. The district court held that plaintiffs failed to allege sufficient facts to show that the media defendants shared a common purpose or were controlled by the state agencies to establish state action.

10th Circuit Decision

The Tenth Circuit affirmed dismissal of the § 1983 claim, but reversed the defamation ruling. In analyzing whether the statements in the broadcast could be false and defamatory, the Court reasoned that "in a case where a plaintiff asserts a defendant's statements gave a false impression by being presented out of context, a more global approach is required." Plaintiff alleged that Dateline selected bits and pieces from his presentation to create the false impression that he scares seniors into buying unsuitable insurance products. Instead, plaintiff claimed he simply discussed the pros and cons of annuities and suggested ethical but scary marketing tactics. Accepting these facts as true, plaintiff stated a claim for defamation.

Plaintiff alleged that Dateline selected bits and pieces from his presentation to create the false impression that he scares seniors into buying unsuitable insurance products.

At the trial court, plaintiff had sought discovery of Dateline's unaired footage from the seminar, but discovery had been stayed pending disposition of the motion to dismiss. On appeal, the Tenth Circuit held that plaintiff is entitled to discover the unaired footage taken by Dateline at the seminar. Analyzing the issue under Colorado's shield law, Colo. Rev. Stat. § 13-90-119(3)(c), the Court noted that the unaired footage does not involve confidential information or confidential sources. Thus the balance of interests between the parties and the public tipped in favor of plaintiff. According to the Court, the outtakes are "the best and perhaps only evidence" to determine whether the broadcast was accurate or created a false impression of the seminar.

Analysis of § 1983 Claims

In a detailed discussion, the Court affirmed dismissal of plaintiff's §1983 claims. Plaintiff alleged three constitutional violations: 1) unlawful search and seizure based on Dateline's use of government provided credentials to attend and record

(Continued on page 11)

RETURN TO TABLE OF CONTENTS

(Continued from page 10)

the seminar; 2) invasion of privacy for recording the seminar; and 3) stigmatization (or harmed reputation) caused by the broadcast.

The Court noted that Dateline and Alabama officials were both interested in investigating plaintiff's sales tactics and based on plaintiff's allegations entered a "marriage of convenience" to do so. State officials provided Dateline producers with credentials as licensed insurance agents so that they could attend and record the seminar. Plaintiff alleged that in return Dateline promised to share the information about the seminar with state officials.

Affirming dismissal, the Court held there was no "illegal search" to support a Fourth Amendment violation. The Court noted that it is generally not illegal for state officials or their agents to enter a private place under false pretenses.

Indeed, the use of false credentials and identities is a traditional law enforcement tool. Thus even assuming Dateline acted under color of law, its attendance and recording of plaintiff in the presence of others was not in violation of the Fourth Amendment.

The Court distinguished the facts of this case where plaintiff consented to Dateline's presence – albeit under false pretenses – from media ride along cases where the press leveraged the coercive power of government to obtain access to private homes or places.

Finally, there could be no substantive due process-privacy violation, because no highly personal or intimate matters were revealed. And plaintiff failed to state a claim for constitutional stigmatization because he had no allegations that state officials participated in the editorial creation of the broadcast.

Plaintiff is represented by John J. Walsh, Carter Ledyard & Milburn LLP, New York; and Thomas E. Downey, Jr., Downey & Murray, LLC, Englewood, CO . The media defendants are represented by Thomas B. Kelley and Gayle C. Sproul of Levine Sullivan Koch & Schulz, LLP; and Hilary Lane, NBC Universal, Inc.

Recent MLRC Publications

MLRC Bulletin 2014 Issue 2: Legal Frontiers in Digital Media
All Native Advertising is Not Equal — Why that Matters Under the First Amendment and Why it Should Matter to the FTC • The Google Books and HathiTrust Decisions: Massive Digitization, Major Public Service, Modest Access • The Authors Guild v. Google: The Future of Fair Use? • The Computer Fraud and Abuse Act – Underused? Overused? Misused?

2014 Report on Trials and Damages
MLRC's 2014 Report on Trials and Damages updates our study to include 12 new cases from 2012 and 2013. Our trial database now includes trial and appellate results in 632 cases from 1980-2013.

Resource Materials on the Definition of "Journalist" and "Media" in Litigation and Legislation
Who qualifies as "the media," it seems, is the perennial million-dollar question in an age when the "pen," the camera, and the "press" are all combined in a single device that fits easily in your purse—if not your back pocket—and everyone is a potential publisher. 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.

Non-Competes in the Broadcast Industry
Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers' ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers' efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives.

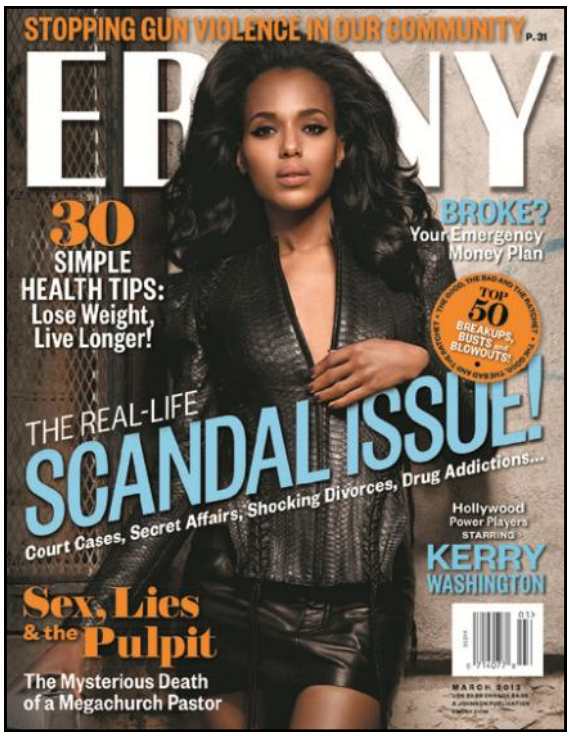
RETURN TO TABLE OF CONTENTS

Illinois State Court Strikes Sex Tape Lawsuit Under California Anti-SLAPP Statute

Former Movie Star Could Not Prove Ebony Magazine Acted With Actual Malice

By Steven P. Mandell, Steven L. Baron, Brendan J. Healey and Catherine L. Gibbons

Leon Isaac Kennedy, or "Leon the Lover" as he was called during his days as a radio DJ, sued Johnson Publishing Company (the publisher of *Ebony* and *Jet* magazines) for defamation and false light invasion of privacy over an *Ebony* article about celebrity scandals. The article discussed a sex tape Kennedy made with his former wife, Jayne Kennedy, and suggested that he was responsible for leaking the tape during their divorce.



A trial judge in the Circuit Court of Cook County, Illinois, dismissed the suit with prejudice under the California anti-SLAPP statute, Cal. Civ. P. § 425.16, finding that the article addressed an issue of public interest and there was no way for Kennedy to show that the defendants published the article with actual malice. *Kennedy v. Johnson Publishing Co.*, No. 14 L 1038 (Cir. Ct. Cook Cnty., Ill. July 9, 2014) (memorandum opinion and order). In its written decision, the court rejected Kennedy's argument that the publisher's failure to review information in its archives was evidence of actual malice. Moreover, because Kennedy had not publicly challenged numerous earlier reports linking him to the leak, the court determined that publisher had no reason to doubt the truth of its own account.

Background: *The Man, The Minister, The Legend…*

In his previous life, Kennedy was a Hollywood actor and radio disc jockey. In 1971, he married Jayne Kennedy, who was well-known in her own right as a model, television host, and sportscaster. The couple was married for about ten years and was the subject of much media attention as one the "it" celebrity couples of their day. When they decided to divorce in 1981, both *Ebony* and *Jet* magazine ran cover stories about the break-up, which featured exclusive interviews with the couple. As was reported in these articles, both Kennedy and Jayne described the split as amicable.

While the couple starred together in movies made for the big screen, during their marriage they also starred together in an explicit sex tape on the small screen. At some point the video was somehow leaked and eventually ended up on the Internet. The video has become somewhat legendary, with several publications describing it as the first in what has become a long series of leaked celebrity sex tapes. Numerous reports linked Kennedy to the release of the tape, including a *Washington Post* article published in 2002. Kennedy never took legal action against that publication or others who (before *Ebony)* reported that he was suspected to have been the source of the leak.

After his divorce from Jayne, Kennedy left the movie business and found a new calling as a minister and evangelist in Burbank, California. Since the early 1990's, Kennedy has continued this work, fortifying, as he described it, his reputation as a man of faith and a person of high morals. According to Kennedy, he has been featured on Christian television shows in the U.S. and around the world.

(Continued on page 13)

RETURN TO TABLE OF CONTENTS

(Continued from page 12)

Ebony's "Scandal" Issue

In March 2013, *Ebony* magazine published an issue devoted to celebrity scandals. Included in this edition was a 12-page article highlighting dozens of celebrity scandals under various headings and subheadings. On the second-to-last page of the article, *Ebony* devoted less than two inches of column space under the page heading "SCANDALOUS! REPEAT OFFENDERS!" and the paragraph subheading: "LIGHTS, CAMERA, ACTION," to the following blurb:

> Before celebs managed to forge careers out of leaked sex tapes, being caught on camera in compromising positions was oh-so taboo. The first example of this trend was the infamous 1980s **JAYNE KENNEDY** sex tape that was viciously leaked by her first husband during their divorce. Fortunately for Kennedy, the Internet wasn't widespread back in the day, so homemade copies were simply passed from perv to perv.

Johnson Publishing's Moves to Strike and Dismiss

Kennedy filed suit against Johnson Publishing based on this publication, alleging defamation *per se*, defamation *per quod*, and false-light invasion of privacy. While Kennedy's complaint did not address whether *appearing* in the sex tape affected his reputation, his suit alleged that he was injured when Johnson Publishing falsely accused him of *releasing* the tape. Specifically, he claimed that the statement that he "viciously leaked" the tape was false not only because someone else stole the tape and leaked it, but also because his divorce was amicable and he remains friends with Jayne.

Kennedy further alleged that Johnson Publishing was well-aware of the amicable nature of their divorce and the couple's continued friendship because they reported on it back in the 1980's. To suggest that Kennedy acted vindictively, to hurt his ex-wife, Kennedy alleged, damaged his reputation as a compassionate man of faith and a spiritual leader. Kennedy also alleged that other elements of the article including the heading "Repeat Offenders" and the use of the term "perv," defamed him because they suggested that he was a criminal and a pervert. Kennedy claimed that because of this publication, he had to cancel a number of upcoming guest ministry appearances, saw a decrease in the number of invitations he received to appear, and suffered from stress and anxiety.

The court rejected Kennedy's argument that the publisher's failure to review information in its archives was evidence of actual malice.

In response to the suit, Johnson Publishing filed two motions—one to dismiss for failure to state a claim and one to strike the action under California's anti-SLAPP statute. The parties agreed to stay discovery and have the court consider defendant's anti-SLAPP motion first.

On July 9, 2014, the court issued a memorandum opinion and order granting the motion to strike under California's Anti-SLAPP statute (but treating it as motion to dismiss under Section 2-619(a)(9) of the Illinois Code of Civil Procedure). The court dismissed the complaint in its entirety with prejudice.

Choice of Law: Applying California's Anti-SLAPP Statute

The court's choice of law analysis was critical to the outcome. In conflict of law cases, Illinois follows the doctrine of *depecage* which refers to the process of cutting up a case into its individual issues, each subject to its own choice-of-law analysis. For example, under the doctrine, a court might apply one state's law to a defamation-plaintiff's claim and another state's law to the defamation-defendant's anti-SLAPP defense.

Johnson Publishing argued that California law should govern its anti-SLAPP defense because Kennedy was a resident of California, the author of the piece researched and wrote it in California and the issue was circulated in California. It also argued that Kennedy had filed suit in Illinois solely to avoid the California anti-SLAPP statute, noting that he originally hired a California attorney who threatened to find a forum that would not apply the statute.

In response, Kennedy argued that Illinois or Delaware law should apply because, under Illinois choice-of-law rules, the domicile of the speaker is more important than the domicile of the plaintiff and, because Johnson Publishing is a Delaware company with its principal place of business in Illinois, the law of one of those jurisdictions must apply.

(Continued on page 14)

(Continued from page 13)

The court noted that the most relevant factors under Illinois choice-of-law principles for determining which state's anti-SLAPP statute applied are: (1) the place where the speech occurred; and (2) the speaker's domicile. The court determined that the first factor was neutral because the defendant published *Ebony* in all three states—California, Illinois, and Delaware. The court also found the second factor to be neutral because although Johnson Publishing was incorporated in Delaware and had its principal place of business in Illinois, the author of the article (a "John Doe" defendant in the case) was a California resident who researched and wrote the piece in California.

Because the two primary factors were not dispositive in resolving the choice-of-law issue, the court looked to other factors typically considered in a "most-significant-contacts" analysis and concluded that the place of injury was the most determinative factor. It then followed long-standing authority holding that a defamation-plaintiff's injury will almost always be most felt where the plaintiff resides, in this case California. The court concluded that because the injury occurred predominately in California, California had the most interest in applying its laws to the dispute and therefore the California anti-SLAPP statute applied.

The video has become somewhat legendary, with several publications describing it as the first in what has become a long series of leaked celebrity sex tapes.

Merits of the Suit: Kennedy Cannot Prove Actual Malice

The court applied the California anti-SLAPP statute's two-part test, first assessing whether the claim arises from a protected category of speech and then determining whether the plaintiff has a probability of prevailing. Cal. Civ. P. § 425.16(e); *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (Cal. App. Ct. 2002). Here, Johnson Publishing argued that the speech was protected because it concerned a matter of public interest and Kennedy was unlikely to prevail because he could not demonstrate that Johnson Publishing published the article with actual malice.

The fact that Kennedy had a personal relationship decades ago with John Johnson, the now-deceased founder of Johnson Publishing, did not mean Mr. Johnson's personal knowledge was imputed to the entire company. Johnson Publishing also attached a variety of prior published sources which had similarly reported that Kennedy was the source of the leak.

Kennedy acknowledged that failure to investigate did not alone establish actual malice but instead argued that Johnson Publishing turned a blind eye to the fact that several decades ago Johnson Publishing had interviewed the couple about their divorce and, thus, had institutional knowledge that their split was actually amicable and they had an ongoing friendship.

The court, however, agreed with Johnson Publishing, finding that the evidence Kennedy presented was insufficient to carry his burden of proving he could demonstrate actual malice. The court noted there was no evidence that the author of the 2013 article or anyone else at Johnson Publishing knew about the articles that appeared 30 years earlier. The court also found that Johnson Publishing would have no reason to doubt the statements in its article linking Kennedy to the leaked sex tape given that Kennedy had never publicly challenged numerous earlier reports that similarly linked him to the leaking of the tape.

Steven P. Mandell, Steven L. Baron, Brendan J. Healey and Catherine L. Gibbons of Mandell Menkes LLC represented Johnson Publishing Company, LLC. Phillip J. Zisook and Brian D. Saucier of Deutsch, Levy & Engel, Chartered represented Leon Isaac Kennedy.

RETURN TO TABLE OF CONTENTS

Utah Appeals Court Revives Privacy Case Over "Before and After" Surgery Photos

Questions of Fact Keep Non-Media Case Alive

The Utah Court of Appeals reversed a trial court decision granting summary judgment to a cosmetic surgeon who was sued for false light, publication of private facts, intrusion upon seclusion, breach of fiduciary duty, and negligent employment and supervision for sharing before and after pictures of the plaintiff with a local journalist. *Judge v. Saltz Plastic Surgery, PC*, 2014 Utah App. 144 (2014) (Pearce, Davis, Voros, JJ.).

The Court of Appeals ruled that there were unresolved questions of fact that rendered summary judgment in favor of the doctor inappropriate. Plaintiff previously settled her claims against the broadcaster.

Background

In 2006, Dr. Saltz performed cosmetic surgery on plaintiff's breasts and torso. Before the procedure, plaintiff signed a consent form that provided:

> I consent to be photographed or televised before, during, and after the operation(s) or procedure(s) to be performed, including appropriate portions of my body, for medical, scientific or educational purposes, provided my identity is not revealed by the pictures.

The Court ruled that there were unresolved questions of fact that rendered summary judgment inappropriate. Plaintiff's claims against the broadcaster were settled.

In 2008, a television journalist working on a story about cosmetic surgery contacted Dr. Saltz. Because plaintiff was pleased with her surgery and because she works in public relations, Saltz asked her if she would be interviewed for the story, and plaintiff agreed. For the story, the reporter filmed a mock physical exam. Without plaintiff's knowledge, the reporter later asked for and received "before and after" pictures of some of Saltz's clients, including plaintiff. The pictures showed her naked body in profile from neck to upper thigh.

The photographs of plaintiff were used in the broadcast and online versions of the story, with black bars redacting a portion of Judge's bust and pelvis. And plaintiff was identified by the reporter while her photograph was on screen.

After the broadcast, plaintiff sued Saltz and the news organization for false light, private facts, intrusion, breach of fiduciary duty, and negligent employment and supervision.

In a series of rulings, the trial court granted summary judgment to Saltz, finding that 1) plaintiff failed to adequately plead special damages on her false light claim; 2) the private facts claim failed for lack of evidence that Saltz publicized the photos by providing them to the reporter, or that the photographs disclosed a private fact (the trial court compared the photograph to wearing a bikini at the beach); 3) the intrusion claim failed because plaintiff consented to educational uses of the photos and the news broadcast had an education purpose. Finally, plaintiff's fiduciary duty and negligent employment and supervision claims failed where her substantive privacy claims failed.

False Light

The Court of Appeals first ruled that questions of fact existed as to whether plaintiff suffered "special damages." The court assumed, without deciding, that Utah law requires the pleading of special damages in a false light claim.

Influential in the court's decision was deposition testimony from some of plaintiff's clients, stating they reduced their business with plaintiff after the news report aired. Plaintiff pointed to testimony of clients suggesting that her "professionalism and good judgment were cast into doubt as a result of the broadcast, that those qualities were important for consultants working for their companies, and that other workers had expressed 'uncertainty and unease' at the prospect of continuing to work with [plaintiff]."

(Continued on page 16)

(Continued from page 15)

Based on this evidence, "reasonable minds could reach different conclusions" as to whether the loss of business was special damages.

Publication of Private Facts

In reversing the district court's summary judgment on the publication of private facts claim, the Court of Appeals focused on the district court's comparison of the facts exposed – a visual of plaintiff's body with bust and pelvis redacted – to the facts exposed voluntarily by plaintiff when she visited a beach in a bikini.

The district court had cited the Restatement (Second) of Torts in finding for the defendant, ruling that plaintiff had previously disclosed the "fact" of her body's appearance by appearing in public with those areas of her body revealed. The court of appeals, however, wrote that this reading of the Restatement went too far, for two reasons. First, the Restatement recognizes context; in this case, the district court failed to take into account the location and manner in which the photograph was taken, which may have created a reasonable expectation of privacy. Second, appearances are not static, and plaintiff may have been happy to reveal what she looked like in a bikini on a certain day at the beach, but not at the time of these photographs. Taken together, genuine issues of material fact exist as to whether the redacted photos revealed a private fact.

"Reasonable minds could differ on whether appearing on television to discuss cosmetic surgery gives rise to a legitimate public interest in viewing explicit photographic documentation of the results of the interviewee's surgery."

Additionally, the district court found that releasing the photographs to the reporter was no guarantee that the photographs were substantially certain to be made public. The Court of Appeals rejected this, stating that a "factfinder could very reasonably and sensibly conclude" that furnishing a reporter with photographs would make it substantially certain that the photographs would be published, calling this "inherently a question of fact."

Similarly, the Court of Appeals found that "reasonable minds could differ on whether appearing on television to discuss cosmetic surgery gives rise to a legitimate public interest in viewing explicit photographic documentation of the results of the interviewee's surgery."

Intrusion Upon Seclusion

The Court of Appeals also considered the consent form and noted it never explicitly mentions the release of the photographs to third parties, therefore there is an ambiguity in the contract, which presents an issue of fact on the scope of consent. Further, questions of fact exist whether the term "educational purposes" covered the use of the photographs by the reporter and whether the on air identification of plaintiff violated the consent she gave.

Remaining Claims

Finally, the Court of Appeals reinstated plaintiff's breach of fiduciary duty and negligent employment claims. The Court found that the disputed issues of fact surrounding plaintiff's privacy claims could make these claims actionable as well.

Appellant was represented by Roger H. Hoole and Gregory N. Hoole. Appellees were represented by Robert G. Wright, Mark L. McCarty, Brandon B. Hobbs, and Zachary E. Peterson.

Libel and Privacy Claims Over News Coverage of Sexual Harassment Complaint Dismissed

Innocent Construction and Fair Report Privilege Protect Media

By Steven Mandell, Natalie Harris and Catherine Gibbons

An Illinois state court this month dismissed libel and privacy claims against the Chicago Sun Times, Fox Television and Cumulus Broadcasting over a news report about a federal lawsuit filed against Northwestern University arising from a student's allegations of sexual harassment by a university professor. *Ludlow v. Sun Times Media, LLC, et al.* No. 2014 L 1529 (Ill. Cir. Ct. Cook Cty. July 16, 2014) (Flanagan, J.). The news report did not name the professor and thus could be innocently construed as not being "of and concerning" plaintiff. Moreover, the news report was a fair and accurate summary of the federal lawsuit allegations about the professor.

Background

On February 10, 2014, Northwestern University undergraduate journalism student Yoona Ha filed a complaint in U.S. District Court alleging discrimination and retaliation by the university following her report of sexual harassment committed by Northwestern philosophy professor Peter Ludlow.

The news report did not name the professor and thus could be innocently construed as not being "of and concerning" plaintiff.

In her federal complaint, Ms. Ha alleged that in 2012, after she had been a freshman student in Professor Ludlow's "Philosophy of Cyberspace" class, she accompanied him to an art event related to his field of research and interest. (The professor's course involved the ethical and moral considerations of the "virtual world" and included the showing of videos of avatar characters engaged in sex.)

According to Ms. Ha's lawsuit, on the evening in question "Ludlow commented on how attractive [she] was and started to rub her back and kiss her at the bar." Then Ms. Ha claimed that Ludlow took her to a bar and urged her to drink until she "was too intoxicated to put up any meaningful resistance to [his] unwelcome advances." Ms. Ha further alleged in her lawsuit that she proceeded to go in and out of consciousness and when she regained consciousness "she was in an elevator going up to Ludlow's apartment, with Ludlow furiously making out with [her]." According to Ms. Ha, she "begged Ludlow to stop," but he "told [her] it was 'inevitable' that they would have sex." Ms. Ha claimed that she woke up in Ludlow's bed with his arms around her and that she "panicked and blacked out."

Ms. Ha alleged that following the incident, Ludlow "begged [her] not to tell anyone, and told her that he could mentor her academically or pay her money." According to Ms. Ha's lawsuit, she was hospitalized after attempting to commit suicide "as a result of the stress and trauma" of these events and she was diagnosed with Post Traumatic Stress Disorder (PTSD) which requires ongoing psychiatric care.

Northwestern University's Investigation

Ms. Ha's lawsuit alleged that she reported the incident to another professor, Northwestern conducted an investigation and the university concluded, among other things, that Ludlow did engage in unwelcome and inappropriate sexual advances toward Ms. Ha. Specifically, Northwestern found that Ludlow "initiated kissing, French kissing, rubbing [Ms. Ha's] back, and sleeping with his arms on and around [Ms. Ha]," according to Ms. Ha's lawsuit.

Ms. Ha also alleged that Northwestern found that Ms. Ha was incapacitated due to heavy consumption of alcohol purchased for her by Ludlow and that Ms. Ha was unable to offer meaningful consent. Northwestern also allegedly found that Professor Ludlow told Ms. Ha that he thought Ms. Ha was attractive, discussed his desire to have a romantic and sexual relationship with her, and shared other personal information of a sexual nature, all of which was unwelcome to Ms. Ha. Northwestern disciplined Ludlow for violating

(Continued on page 18)

RETURN TO TABLE OF CONTENTS

(Continued from page 17)

Northwestern's Policy on Sexual Harassment, but did not terminate his employment, according to Ms. Ha's lawsuit.

Professor Sues Local News Media

On February 10, 2014, the same day Ms. Ha filed her complaint in federal court against Northwestern, the *Chicago Sun-Times* published, and disseminated via wire service, an online article about the lawsuit with the headline: "Student allegedly raped by professor suing Northwestern University." Notably, neither the headline, nor the article, identified Professor Ludlow by name.

Chicago-based television station WFLD Fox 32 and talk radio station WLS AM 890 obtained the wire service story and published it verbatim on their respective websites. The story recounted Ms. Ha's lawsuit allegations, including her claims that a Northwestern philosophy professor had sexually assaulted her, "furiously" made out with her, that she "begged him to stop" and that he told her it was "inevitable that they would have sex."

Moreover, the news report was a fair and accurate summary of the federal lawsuit allegations about the professor.

Days later, Professor Ludlow sued the *Chicago Sun-Times*, Fox Television Stations, Inc. and Cumulus Broadcasting, LLC for defamation and false light invasion of privacy, alleging that all the news stories were false and defamatory because they used the word "raped" in their headlines even though Ms. Ha's lawsuit never used the word "rape" and her lawsuit alleged that Mr. Ludlow "sexually assaulted" her without any specific allegation of sexual intercourse.

Complaint Dismissed With Prejudice

The three media defendants moved to dismiss Professor Ludlow's complaint for failure to state a claim. The Court granted defendants' motions and dismissed Professor Ludlow's complaint without leave to amend. The Court concluded that Professor Ludlow failed to plead facts which would lead others to understand that the article was "of and concerning" him because the article did not name him and held that "the defamation claim here is . . . susceptible to an innocent construction as it could be reasonably interpreted as referring to someone other than the Plaintiff and not injurious to him." The Court also held that because the article did not name him, the article "is not defamation *per se* as the Plaintiff would need to refer to extrinsic facts to demonstrate the defamatory nature of the word as to him."

The Court also held that the article was a fair report of Ms. Ha's lawsuit against Northwestern University. Professor Ludlow conceded that the federal complaint was an "official proceeding" and the Court held that the word "raped" in the article headline was a fair abridgement of the sexual assault allegations in the complaint. The Court held that "[i]n common usage and in dictionaries, the terms 'rape' and 'sexual assault' are synonymous." In addition, the Court concluded that use of the word "rape" in the headline of the article had the same "gist or sting" as the allegations of sexual assault and other related complaint allegations (including the professor's unwelcome sexual advances, sexual conduct, and statements regarding inevitable sex, and the student's awakening with the professor's arms around her and her lack of consent).

The Court did not address the wire service defense raised by the media defendants that simply republished the *Sun-Times* wire story and headline, which has yet to be recognized, in Illinois.

Sun-Times Media, LLC was represented by Damon E. Dunn and Seth A. Stern of Funkhouser Vegosen Liebman & Dunn Ltd., Chicago. Cumulus Broadcasting, LLC was represented by Floyd A. Mandell, Carolyn M. Passen, and Eugene E. Endress of Katten Muchin Rosenman LLP, Chicago. Fox Television Stations, Inc. was represented by Steven P. Mandell, Natalie A. Harris and Catherine L. Gibbons of Mandell Menkes LLC, Chicago. Peter Ludlow was represented by Kristing M. Case and Kate Sedey of The Case Law Firm, Chicago.

RETURN TO TABLE OF CONTENTS

Sixth Circuit Affirms Summary Judgment Dismissing Law School's Libel Claim

School Sued Plaintiffs' Lawyers Critical of School's Placement Data

Thomas M. Cooley Law School was unable to surmount the high hurdle of actual malice to pursue a $17 million defamation lawsuit over negative online comments made by plaintiffs' lawyers researching a lawsuit over post-graduate law school employment data. *Thomas M. Cooley Law School v. Kurzon Strauss, LLP*, No. 13-2317 (6th Cir. July 2, 2014).

The Sixth Circuit affirmed the lower court rulings that the law school was a limited-purpose public figure and that summary judgment was appropriate because no reasonable jury would conclude the defendants published their statements with actual malice.

Background

Thomas M. Cooley Law School has four campuses in Michigan and a campus in Florida. The law school sued two New York -based attorneys for online comments criticizing the school's post-graduate employment data and its overall value as a legal education institution.

Anziska began to explore suing over law schools' post-graduate employment data.

Defendant Jesse Strauss was one of the two members of Kurzon Strauss, and defendant David Anziska was of counsel to Kurzon Strauss for a period of time in 2011. In the wake of negative publicity about the poor employment prospects for law school graduates due to the recession, Anziska began to explore suing over law schools' post-graduate employment data, including Thomas M. Cooley's data.

Anziska wrote on the website JD Underground, in part, that:

> "these schools are preying on the blithe ignorance of naïve, clueless 22-year-olds who have absolutely no idea what a terrible investment obtaining a JD degree is. Perhaps one of the worst offenders is the Thomas Cooley School of Law, which grossly inflates its post -graduate employment data and salary information. More ominously, there are reports that ... students are defaulting on loans at an astounding 41 percent, and that the school is currently being investigated by the U.S. Department of Education [DOE] for failing to adequately disclose its students' true default rates."

Anziska also wrote that "most likely schools like Thomas Cooley will continue to defraud unwitting students unless held civilly accountable."

When Thomas M. Cooley sent a cease and desist letter, Strauss posted a statement retracting Anziska's allegations as "couched as fact," including that others had published reports about Thomas M. Cooley graduates' default rate on their loans and that the law school faced a DOE investigation.

However, shortly afterwards Anziska circulated a proposed class-action complaint against Cooley, which was posted online by an unknown party. The complaint stated that the law school "blatantly misrepresented and manipulated its employment statistics to prospective students, employing the type of 'Enron-style' accounting techniques that would leave most for-profit companies facing the long barrel of a government indictment and the prospect of paying a substantial criminal fine." Anziska's proposed complaint also said that Thomas M. Cooley "grossly inflates its graduates' reported mean salaries."

Cooley sued the lawyers for defamation, tortious interference with business relations, breach of contract and false light.

Cooley lost in the district court at the summary judgment stage. The district court first found that Thomas M. Cooley Law School is a limited public figure in the public controversy over the "challenging job market recent college graduates, and recent law school graduates, confront in the aftermath of the financial crisis of 2008." Second, the court found that a jury could not find by clear and convincing evidence that the defendants acted with actual malice. There

(Continued on page 20)

(Continued from page 19)

was no evidence that Anziska or his codefendants had subjective knowledge that the statements about Thomas M. Cooley were false.

Sixth Circuit Decision

Judge Richard Allen Griffin, writing for the Sixth Circuit, concluded that the law school is a limited public purpose figure under the *Gertz v. Robert Welch, Inc.* test.

One, a public controversy exists about whether law schools are reporting accurate post-graduate employment data and if graduates can afford to pay back their law school loans "given the difficulty of securing meaningful legal employment," according to the panel.

Two, Cooley voluntarily injected itself into the public debate by publicly responding to issues such as whether it was under investigation by the Department of Education; it has access to effective channels to communicate its position through its website, written publications and other mechanisms; and Cooley plays a prominent role in the controversy over the value of legal education because it has the largest enrollment of any law school in the country and "has been actively participating in the public discourse," the panel said.

There was no evidence that the defendants acted with actual malice by purposely avoiding the truth, especially because they were investigating the veracity of Cooley's law school employment data.

When the appeals court turned to the issue of actual malice, it agreed with the lower tribunal that there was not sufficient evidence in the record to show clear and convincing proof of actual malice by the defendants.

The law school argued that a reasonable jury could find actual malice because the defendants retracted the JD Underground post but then published the same statements in a proposed class action complaint.

Judge Griffin noted that Strauss retracted the post "only to the extent it was couched as fact … Defendants have steadily held the opinion that plaintiff misrepresented employment statistics and salaries, which is corroborated by their conduct in actually filing a proposed class action against plaintiff." (The defendants, though, lost their putative class action against Thomas M. Cooley at the motion to dismiss stage.)

There was no evidence that the defendants acted with actual malice by purposely avoiding the truth, especially because they were investigating the veracity of Cooley's law school employment data.

Cooley also attacked the depth of the defendants' investigation, suggesting an over-reliance on "crazy blog post [s]." But Anziska testified that he believed he wrote truthfully when he posted on JD Underground of his awareness of reports of high default rates on Cooley loans and of reports of an investigation by federal regulators into Cooley. There is no proof of actual malice with the absence of evidence that Anziska and his codefendants subjectively doubted the truth of those statements, the circuit said.

With the rejection of the defamation claim by the Sixth Circuit, the law school's other claims fell too.

The panel also rejected consideration of an issue of first impression in the Sixth Circuit: whether Cooley did not need to show actual malice because the defendants' statements were unprotected defamatory commercial speech. The issue was forfeited by being raised for the first time on appeal.

Thomas M. Cooley Law School was represented by Michael P. Coakley, Brad H. Sysol, and Paul D. Hudson of Miller Canfield Paddock & Stone PLC in Detroit; and Cherie Lee Beck. Jesse Strauss, of Strauss Law P.L.L.C. in New York, represented himself and the former law firm of Kurzon Strauss. Defendant Anziska represented himself.

RETURN TO TABLE OF CONTENTS

Florida Court Claims Public Interest in Resolving Defamation Action Between New York Residents

Defendant's Defamatory Statement Was Posted on a Blog

By Robert L. Rogers, III

In a curious opinion omitting consideration of several key facts, an intermediate appellate court in Florida affirmed an order denying a motion to dismiss a defamation action for *forum non conveniens* on grounds that could prove troublesome for defendants sued for defamatory statements posted by others on internet blogs. *Nordlicht v. Discala*, 2014 WL 2480168 (Fla. 4th DCA June 4, 2014).

Relying upon a distinguishable opinion construing personal jurisdiction, the appellate court affirmed the Florida trial court's refusal to transfer the case to New York, the jurisdiction where all of the plaintiffs and defendants reside, on grounds that public interests favor retaining the action in Florida.

Background

The dispute involves statements made by defendant Mark Nordlicht about plaintiff Abraxis Discala, a former Florida resident who now lives in New York or Connecticut, in an email that Nordlicht sent to a recipient not identified in the opinion. Discala claims that Nordlicht made defamatory statements that connected Discala to a multi-million dollar Ponzi scheme in Florida. Although Discala resided in Florida at the time Nordlicht sent the subject email, the opinion does not suggest that Nordlicht sent that email to anyone located in Florida.

Defamation defendants should be troubled by the Fourth DCA's determination that Nordlicht's alleged defamation "can be considered a tortious act directed at Florida."

The alleged defamatory statement eventually reached Florida, not through Nordlicht's email, but after it was "published on an internet blog" by a non-party blogger also not identified in the opinion The opinion does not mention who published the blog, or even whether the blogger was known by Nordlicht.

In fact, Discala's Amended Complaint reflects that Nordlicht's email was sent to a writer in New Jersey who works for Hedge Fund Alert, which published the blog referenced by the Fourth DCA. After Hedge Fund Alert published its blog, its subject matter was republished "on many occasions in myriad publications and internet websites over the next two-plus years." Eventually the information first published by Hedge Fund Alert reached at least 11 different businesses (none of whom are claimed to have any connection in Florida) and at least 16 persons in Florida who purportedly chose to not do business with the plaintiffs.

Discala does not allege that any of those persons or businesses actually read the Hedge Fund Alert blog. Discala merely allege that they learned about the content of Nordlicht's alleged defamatory statement in the two years after Nordlicht sent his email to the Hedge Fund Alert from at least one of the "myriad periodicals or internet websites" that republished the information after the Hedge Fund Alert published its blog. Discala alleges no effort by Nordlicht or the Hedge Fund Alert to target audiences in Florida.

Forum Non Conveniens Analysis

Nordlicht moved to dismiss Discala's defamation action based on *forum non conveniens* and urged the Court to transfer the case to New York because all of the parties and most of the evidence and witnesses are located there. Discala opposed the motion because he resided in Florida at the time Nordlicht sent the subject email, the alleged defamatory statements concerned a Ponzi scheme centered in Florida, and some of Discala's damage witnesses live in Florida. The trial court denied Nordlicht's motion without explaining its reasons.

In affirming the denial of Nordlicht's motion, Florida's Fourth District Court of Appeal focused on the second and third prongs of Florida's test for determining whether to dismiss a case for *forum non conveniens*, under which the court must determine:

(Continued on page 22)

(Continued from page 21)

1. Whether an adequate alternative forum exists that possesses jurisdiction over the action;
2. Whether "private interests" (adequate access to evidence and witnesses, practicalities and expenses associated with litigation) favor an alternative forum enough to overcome the strong presumption against disturbing a plaintiff's choice of forum;
3. Whether "public interests" favor resolving the dispute in an alternative forum; and
4. Whether the plaintiffs can reinstate their lawsuit in an alternative forum without undue convenience or prejudice.

Since the first and fourth prongs were not in dispute, the Fourth DCA began its analysis by holding under the second prong that private interests did not favor either forum since both Nordlicht and Discala claimed to have multiple witnesses residing in each forum who would be inconvenienced if the action were litigated outside their home state.

Discala's obvious intent was to shop for a better forum.

The controversial holdings are contained in the Fourth DCA's analysis of the "public interest" prong. The Fourth DCA began by recognizing that the "public interest" test focuses on "whether the case has a general nexus with the forum sufficient to justify the forum's commitment of judicial time and resources to it." It further noted the court's interest in protecting its docket "from cases over which it may be able to assert jurisdiction but which lack significant connection to the forum."

The Fourth DCA then determined that public interests favored keeping the action in Florida because "this defamation can be considered a tortious act directed at Florida and its residents." It further held that "Florida has a general nexus to the defamation as well as the damages ensuing from it," and also to the Ponzi scheme discussed in the subject blog and email.

Defamation defendants should be troubled by the Fourth DCA's determination that Nordlicht's alleged defamation "can be considered a tortious act directed at Florida," even though it was contained in an email sent from New York to a single recipient in New Jersey.

In reaching this conclusion, the Fourth DCA relied on *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1206 (Fla. 2010), in which the Florida Supreme Court held that a nonresident commits defamation in Florida for purposes of personal jurisdiction analysis "when the nonresident makes allegedly defamatory statements about a Florida resident by posting those statements on a website, provided the website posts containing the statements are accessible in Florida and are accessed in Florida." However, *Internet Solutions* involved critically different facts.

In *Internet Solutions*, the nonresident defendant posted the defamatory statements on the website accessed by readers in Florida, and the blog was actually read by persons who lived in Florida (including persons who posted comments on the blog under names like "Mrs. C near OrlandoFL"). In this case, Nordlicht did not post the blog at issue. Furthermore, there is no indication, in either the Fourth DCA's opinion or Discala's Amended Complaint, that Hedge Fund Alert's blog was actually read or "accessed in Florida." Instead, Nordlicht merely sent an email to New Jersey that allegedly set off a landslide of nationwide publicity that eventually reached Florida.

The Fourth DCA seems to suggest that a person located outside Florida can commit defamation in Florida simply by uttering a defamatory statement in an email sent to a recipient outside Florida, if the recipient posts the message on a nationwide blog that is accessible in Florida, which is then republished on multiple other websites that are eventually read by Florida residents. The DCA suggests that the non-resident commits defamation in Florida under such circumstances, even if no one in Florida read the blog posted by the recipient of his email. This strains the limits of even the personal jurisdiction analysis applied in *Internet Solutions*.

And, of course, the courts in *Nordlicht* were not conducting personal jurisdiction analysis. The Fourth DCA was not determining whether the defendants' conduct had sufficient connection to Florida to justify exercising personal jurisdiction over them, but instead whether such connection to Florida favored litigating the action in Florida instead of another more appropriate forum where all of the parties reside. In other words, where *Internet Solutions* involved determining whether a Florida court *could* hear a dispute, *Nordlicht* involved determining whether a Florida court

(Continued on page 23)

(Continued from page 22)

should hear the dispute. The Fourth DCA's reliance on *Internet Solutions* can therefore be criticized for this additional reason.

Discala's obvious intent was to shop for a better forum and to take advantage of Florida's friendlier treatment of plaintiffs who assert internet-based defamation actions. For example, courts in other states like Connecticut, Maine, New York, and North Carolina have crafted more strict jurisdictional tests for internet defamation than the one adopted in *Internet Solutions*, requiring plaintiffs to show that the defendant targeted an audience in the forum state.

Nordlicht is therefore a troubling precedent for non-resident defamation defendants sued in Florida.

Nordlicht is therefore a troubling precedent for non-resident defamation defendants sued in Florida, and could make it even easier for plaintiffs with defamation claims only vaguely connected to Florida to keep their actions in Florida courts.

Robert L. Rogers, III is a media and business litigation attorney with Holland & Knight LLP and works in the firm's Orlando office. The Plaintiffs/Appellees were represented by Daniel M. Samson, Elliot B. Kula, and W. Aaron Daniel of Kula & Sampson, LLP and Jared A. Levy of Dimond, Kaplan & Rothstein, P.A. The Defendants/Appellants were represented by Robert K. Burlington, Jeffrey B. Crockett, and Susan E. Raffanello of Coffey Burlington, P.L.

Vetting Stories About Interviews With Alleged Victims and Witnesses

By Charles D. Tobin and Adrianna C. Rodriguez

Interviews with crime victims and witnesses often provide our clients with the richest, most memorable journalism. Their painful and sometimes graphic stories humanize what could otherwise be formulaic recitations of charges and court procedure. When told well, these stories can encourage other victims to come forward, move a community to action and even help solve crimes.

But, these stories—first-hand accounts from those who experienced or witnessed the crime—are also often the ones that portray the accused in the most negative and damaging light. For this reason, they are among the most perilous legal terrain to maneuver for prepublication review.

Fair report privilege is, of course, the journalists' chief legal ally when reporting victims' and witnesses' stories based on official court proceedings, indictments, and the like. Under the privilege, in nearly all circumstances, the law does not hold the journalist accountable for false accusations in the documents or testimony as long as the journalists' account "is accurate and complete or a fair abridgement" of the official proceeding. *See* Section 611, *Restatement (Second) of Torts*.

Interviews with crime victims and witnesses often provide our clients with the richest, most memorable journalism.

But as three recent decisions by two federal courts and one state court demonstrate, statements by victims and witnesses that go beyond the information provided in the official records of a case may or may not be covered by the privilege. That increases the risk to the journalist—and the challenges for counsel in helping their clients get stories into print, on the air, or online. Compounding the concerns for counsel and client are the different approaches these courts have taken, and the different outcomes that have resulted.

Fine v. ESPN, Inc.,
42 Med. Law Rep. 1564 (N.D.N.Y. March 31, 2014)

Laurie Fine, the wife of former Syracuse basketball assistant head coach Bernie Fine, sued ESPN for defamation arising out of two articles published on ESPN.com and an accompanying video. The journalism reported on allegations that she and her husband sexually abused underage boys in their care. Bernie Fine was investigated for the child abuse claims, but was never charged, because prosecutors determined the claims were outside of the statute of limitations.

The publications reported on and broadcast an audiotape purportedly between Laurie Fine and one of the victims, Bobby Davis, in which Fine purportedly acknowledged that she knew her husband had been molesting Davis. The ESPN stories included interviews with Davis and Davis' babysitter.

ESPN brought a motion under Fed.R.Civ.P. 12(c) for judgment on the pleadings arguing that the publications were protected by New York's fair report privilege, Civil Rights Law § 74, under which "fair and true" reports of any "official proceeding" are absolutely privileged. To assert the privilege, ESPN relied on (1) a copy of the tape that was in police files, (2) the Syracuse Police Department reports from the investigation, (3) a transcript of the district attorney's press conference, and (4) the search warrant application for Fine's home.

The court had no trouble finding that the police reports and the search warrant application were "official proceedings." However, closer questions troubled the court regarding how much of the articles actually reported on those "official proceedings," and whether the articles were "fair and true" ultimately led to the denial of ESPN's motion: "If context indicates that a challenged portion of a publication focuses exclusively on underlying events, rather than an official proceeding relating to those events, that portion is insufficiently connected to the proceeding" to warrant protection as a report of an official proceeding. The court further noted that the privilege did not apply to commentary on the proceeding or additional facts not established in the proceeding.

(Continued on page 25)

RETURN TO TABLE OF CONTENTS

(Continued from page 24)

Based on this, the court held that the portions of the articles that quoted or described the tape recording, which had been given to the police, were privileged. Similarly privileged were portions that provided background for the tape such as Davis' statement to ESPN that the incidents referred to in the taped conversation with Laurie Fine began when he was 18 and in high school.

However, the court held that other portions of ESPN's publications were clearly not part of the investigation or background on it, and fell outside the privilege. These included ESPN reporting that a voice-recognition expert it hired had identified the voice on the tape as Laurie Fine and statements made by Davis and his babysitter describing their opinion on the case. The court rejected ESPN's argument that these statements were not substantially different from the statements the victims had given police, holding that "an ordinary viewer" would not understand the statements being presented as those given to police, in large part because the articles made no reference to the police reports or search warrant application.

Although the scope of the fair report privileged varies in each jurisdiction, the Fine, Tharp, and Piscatelli cases provide insight into courts' applications of the privilege in journalism that directly reports on statements by victims and witnesses.

The court further held it could not consider on this motion whether the reports on the tape were "fair and true" because, although ESPN had attached it and the law enforcement records to its motion as documents integral to the complaint, the plaintiff had disputed the authenticity and accuracy of the tape. Moreover, the court declined to fully evaluate the contents of the law enforcement records holding that it could take judicial notice of the documents to establish their existence and legal effect, but not for the truth of the matters asserted.

The outcome on this motion: the court dismissed some of the statements ESPN reported, holding that they came squarely within the protections of privilege because they derived from the official record or merely provided background. Other victim and witness statements ESPN reported remained in the case because they fell outside of the privilege, according to the court.

Tharp v. Media General,
42 Media L. Rep. 1111 (D.S.C. Dec. 16, 2013)

Louis Clay Tharp was arrested and charged with first degree sexual abuse and first-degree kidnapping on a minor in 2010 after allegedly forcing a minor to perform oral sex on him in a locker room. The police department issued a press release on the arrest. The charges against him were eventually dropped.

Two months after the charges were dropped, on the date of a scheduled court appearance, WBTW-TV and the *Morning News* in Florence, S.C. broadcast and published in the newspaper and online an interview of the victim and his mother, and a mug shot of Tharp. The stories stated at the end that Tharp's options were "to plead guilty or request a trial." Tharp was not interviewed, or contacted, for the story.

A year later, Tharp's records were ordered expunged. Two weeks after that, Tharp sued the station and newspaper for defamation.

In denying WBTW's and the *Morning News*'s summary judgment motion, the court rejected arguments that the reports were privileged. Specifically, the court held that privilege "is inapplicable to the instant case in which the disputed publications publish [ed] information originally based upon their own investigation and interviews, rather than a government report or action." Further, the court found the information in the publications went "beyond what specifically could have been gleaned from the press release or other public records concerning the alleged incident."

In addition, several other facts about the report on Tharp clearly troubled the court.

First, the court noted that the station made no effort to contact Tharp at the time of the story, and only included the victim's and his mother's accounts.

Second, the publications also omitted information from the official records that cast doubt on the victim's story. In the published interviews, the victim told the reporter he had been held at gunpoint by one man, who was never identified

(Continued on page 26)

(Continued from page 25)

or arrested, and forced to perform sexual acts on Tharp. The police department's press release, however, never mentioned a second gunman, and the arrest warrant said that the victim reported that Tharp told him that if he tried to run, an accomplice waiting outside with a gun would stop him; the warrant did not, however, reference the actual presence of a second man. Not only was this distinction omitted from the published story, but a draft of the story produced in discovery showed the reporter had included a statement from police that they had video surveillance of the scene and that it "did not indicate a gunman was involved." As a result of the station's omission, and in light of the absence of a reference to a gunman in the press release and the inconsistency between the search warrant and the victim's statement on camera, the court found he station had "reasons to doubt the veracity" of the victim's story.

Piscatelli v. Van Smith,
35 A.3d 1140 (Md. Jan. 23, 2012)

While the New York and South Carolina court decisions would not bring victims' and witnesses' statement within the ambit of privilege, Maryland's high court reached the opposite conclusion where it found the witness statement perfectly mirrored what police had recounted in a court record.

Counsel should consider, if time and client constraints permit, whether to review the official record himself or herself rather than rely on a summary from the reporter.

The *City Paper* of Baltimore published lengthy investigative reports about murders of two nightclub promoters in which a man had already been convicted and sentenced. The articles suggested that instead, nightclub owner Nicholas Piscatelli, who was never charged, may have been involved in the murders.

Specifically, one article included a description of a discovery memorandum that the reporter found in the court file, but that was not introduced at trial. It reported that one of the victim's mothers told detectives an unknown man had approached her shortly after her son's murder and told her Nick Piscatelli had hired someone to commit the killings.

The article also contained quotes from the reporter's direct interview with the mother. She told him a man approached her at a benefit being held for her son's child, and said he knew who was behind the murder. She told the reporter she didn't know who Piscatelli was but her reaction was "I was like, Whoa!" And she repeated in very similar language from the memorandum: "He said Nick Piscatelli was behind my son's murder" and that Piscatelli "hired someone to do it" and "covered his tracks."

In affirming the award of summary judgment for the newspaper, the Maryland Court of Appeals held that the reporting of the victim's mother's statements accusing Piscatelli of the murders was privileged. The court noted the quotes from the memo were exact, and the details of the mother's recollection were reported in a manner "consistent with the contents of the memorandum and [did] not add additional details or allegations." As a result, they did not defeat the newspaper's privilege.

Lessons Learned

Although the scope of the fair report privileged varies in each jurisdiction, the *Fine*, *Tharp*, and *Piscatelli* cases provide insight into courts' applications of the privilege in journalism that directly reports on statements by victims and witnesses. The following issues, gleaned from the decisions discussed above, may provide a useful framework for counsel in reviewing stories that rely on these types of statements.

Of course, counsel should know the precise parameters of privilege in your jurisdiction:

In New York, as the *Fine* case demonstrates, even material beyond the record may be protected, so long as it is background information that is reported in close proximity to, and tied in with, the portions of a story that cite to the record. The reader's and viewer's understanding that the information comes from official records will be crucial.

In South Carolina, as the *Tharp* case demonstrates, the privilege may be entirely unavailable, no matter how closely what the victim or witness says parallels the official record.

In Maryland, as evident from *Piscatelli*, the privilege will embrace interview statements parallel to, and reported in

(Continued on page 27)

(Continued from page 26)

tandem with, the official record, so long as they do not add new allegations.

Counsel should consider, if time and client constraints permit, whether to review the official record himself or herself rather than rely on a summary from the reporter. Some stories, particularly longer form pieces or those where the piece heavily relies on the victim more than the record, may warrant a first-hand review.

Watch out for "News 11 has investigated" and "But here's what they haven't told police." Clients want to advance the story themselves rather than repeating what police said or records show. They want to be the "news leader" and not the "news rehasher". Counsel needs to recognize, however, and help the client recognize, that the more they tell their audience that they are not relying on the official record, the more out on their own they may find themselves in litigation.

Refer to the official source for the information as much as possible in the story. For example, phrasing like "Mrs. Jones tearfully recounts the horrific story she told police" while showing the indictment in the background during the interview will remind viewers—and the court—that the story is about an official proceeding. Have the journalist refer to and ask about the official record in a tear-jerking interview.

Include interviews with the other side, be it the victim or the accused, or make reference in the story to the unsuccessful attempts to reach the other side for comment.

Counsel should not lose their own sense of smell in the process of trying to help clients get stories to air. We all want to get to the green light for our journalists. But if the victim or witness is saying something that doesn't sound right, or is different—even if only in nuance—from the records, question it. The questions are better coming from you than from opposing counsel after suit is filed.

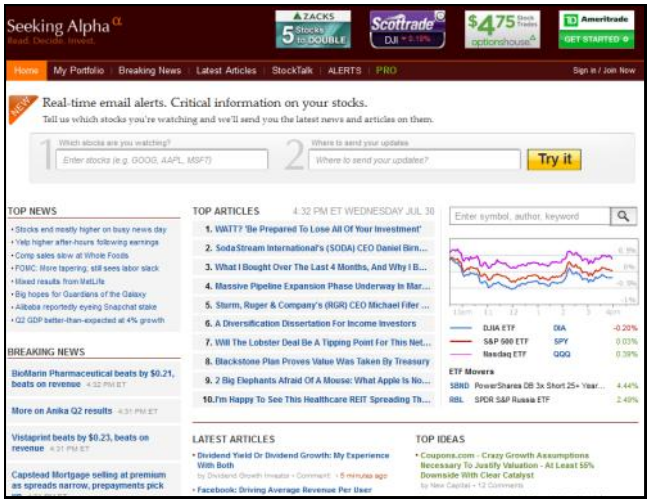
Charles D. Tobin is a partner, and Adrianna C. Rodriguez is an associate, with the Washington, D.C., office of Holland & Knight LLP. This article derives from a presentation to the MLRC Prepublication/Prebroadcast Review Committee.

New York Court Protects Identity of Pseudonymous Corporate Critic

Article Was Expression of Opinion; Anonymous Online Speech Merits Constitutional Scrutiny of Disclosure Demands

By Terence P. Keegan

On June 26, 2014, the Supreme Court of the State of New York, New York County denied a public company's pre-suit petition to force a financial news website to disclose the identity of a pseudonymous critic. In doing so, the Court delivered a classic analysis of expressions of opinion as protected by Article I, Section 8 of the New York State Constitution, while reiterating the "well settled" standard of reviewing a petition for pre-action disclosure under CPLR §3102(c) – which requires denial of such a petition where a plaintiff has failed to make a "strong showing" of a "meritorious cause of action." *NanoViricides, Inc. v. Seeking Alpha, Inc.*, No. 151908/2014 (Sup. Ct. N.Y. County June 26, 2014), *notice of appeal filed* (July 28, 2014).



The *Seeking Alpha* decision represents an encouraging development for individuals who post, tweet or share their thoughts and ideas anonymously online, as well as for websites and news outlets that host or publish information from anonymous sources. The Court has reaffirmed the strong protection against defamation claims that the State affords to expressions of opinion on the internet, while recognizing that courts should give special consideration to protecting the identities of anonymous online speakers from plaintiffs' disclosure demands.

While the Court tacitly acknowledged the federal constitutional implications of exposing the identity of an anonymous internet speaker, it did not address the interplay between CPLR §3102(c) and what has come to be known as the *Dendrite* line of cases – the judicial framework that courts in a number of other states have adopted over the last 13 years for balancing First Amendment interests in cases involving anonymous online speech.

Nevertheless, the *Seeking Alpha* decision primes New York courts to further delineate the scrutiny that companies, public figures, and other defamation plaintiffs must overcome when asking a court to order the disclosure of an anonymous critic's identity. Some lower New York courts have already found *Dendrite* persuasive, and it is difficult to imagine that any appellate court in the state would ever fall short on the protections due to anonymous speakers, or require any lower level of scrutiny than the states that have adopted the *Dendrite* framework.

Background

Seeking Alpha (www.seekingalpha.com) is a free online platform for investment research, featuring commentary, analysis, discussion and debate about U.S. financial markets. The website functions as a forum for news on stocks and other financial matters, with content overwhelmingly comprised of posts by third-party sources such as money managers, financial experts, and individual investors (i.e., not professional journalists employed or hired by Seeking Alpha). Contributors and commenters are free to write under pseudonyms, as part of Seeking Alpha's effort to ensure that users can express independent viewpoints with confidence.

On February 11, 2014, an anonymous Seeking Alpha user writing under the pseudonym "Pump Terminator" posted an article on Seeking Alpha's website about NanoViricides, Inc. ("NNVC"), a company traded on the NYSE MKT exchange that is engaged in researching and developing antiviral drugs.

(Continued on page 29)

RETURN TO TABLE OF CONTENTS

(Continued from page 28)

The article, entitled "NanoViricides: House of Cards with -80% Downside, 'Strong Sell' Recommendation," included a disclosure that the author was "short NNVC. I wrote this article myself, and it expresses my own opinions. I am not receiving compensation for it. I have no business relationship with any company whose stock is mentioned in the article."

The 3800-plus-word article critiqued the conduct of NNVC's corporate managers, linking to a number of publicly available documents – including a "must-read" complaint filed by an NNVC shareholder in a Colorado federal court against the company's chief executive officer and president, which according to the author "outlines countless examples and allegations of NNVC managers Seymour and Diwan abusing shareholders and looting the company." The author also pronounced NNVC as "the worst US reverse merger we have ever seen," and stated that the article was "the first report in a series we will release outlining the most egregious shareholder violations we are aware of in any NYSE company."

NNVC subsequently brought a proceeding against Seeking Alpha to obtain identifying information about "Pump Terminator" in advance of commencing a libel action against the author. Seeking Alpha opposed the petition on a number of grounds, among them, that the statements NNVC claimed it would challenge were protected by the "fair report" privilege under N.Y. Civ. Rights Law § 74 (a defense ultimately not reached by the Court); and that the statements were protected from suit by both the New York and U.S. Constitutions as expressions of opinion.

The Seeking Alpha decision represents an encouraging development for individuals who post, tweet or share their thoughts and ideas anonymously online.

Statements Protected Opinion

The Court first noted that "[t]he law in New York governing pre-action discovery is well settled." As the First Department held in *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 38 (2011) – another case involving a corporation's petition to disclose an online speaker's identity in advance of commencing a libel claim – discovery under CPLR §3102(c) is available "only 'where a petitioner demonstrates that it has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong.'" Additionally, the Court noted, "'[C]ourts traditionally require a strong showing that a cause of action exists.'" *Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 426–27 (Sup. Ct. N.Y. County 2009) (citations omitted).

Next, the Court recited the elements of a cause of action for defamation under New York law, which were uncontested by the parties. *See Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999). Quoting the First Department in *Sandals*, the Court identified a threshold legal issue of all libel actions in New York: "[s]ince falsity is a *sine qua non* of a libel claim and since only assertions of fact are capable of being proven false . . . a libel action cannot be maintained unless it is premised on published assertions of fact, rather than on assertions of opinion." *Sandals*, 86 A.D.3d at 38 (citations and internal quotation marks omitted).

On this threshold legal issue, the Court stated, "[t]he Court of Appeals in *Immuno AG. V. Moor-Jankowski*, 77 N.Y.2d 235, 243 (1991), 'announced that the New York State Constitution provides broader speech protections than does the United States Constitution'" (quoting *Sandals*, 86 A.D.3d at 40). *See also Immuno AG. V. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (comparing the free speech guarantee of N.Y. Const. art. I, §8, with that of U.S. Const. amend. I). The Court noted that "the dispositive inquiry" in ascertaining expressions of opinion was the same "under either Federal or New York law": namely, "whether a reasonable reader could have concluded that [the article] was conveying facts about the plaintiff" (citing *Gross v. New York Times Co.*, 82 N.Y.2d 146) (1993). However, the Court emphasized that courts in New York examine both the words of a challenged statement, as well as the communication's contextual signals to readers, to determine whether the statement is an expression of opinion protected by Article I, §8 of the State Constitution. *See Sandals*, 86 A.D.3d at 39-40.

On this point, the Court followed the First Department's imperative to lower courts to review libel allegations over statements made online "within the unique context of the Internet." *Sandals*, 86 A.D.3d at 43. For instance, "bulletin boards and chat rooms 'are often the repository of a wide range of casual, emotive, and imprecise speech'"; accordingly, "the online 'recipients of [offensive] statements do not necessarily attribute the same level of credence to the

(Continued on page 30)

(Continued from page 29)

statements [that] they would accord to statements made in other contexts." *Id.* at 43–44 (citations omitted).

The Court finally recited the Court of Appeals' longstanding distinctions between nonactionable expressions of "pure" opinion – i.e., statements that are either accompanied by a recitation of facts upon which they are based, or statements that, at the least, do not imply that they are based upon undisclosed facts – and actionable expressions of "mixed" opinion that imply "that the speaker knows certain facts, unknown to his audience, which support his opinion." *Steinhilber v. Alphonse*, 68 N.Y.2d 235, 252 (1991).

In considering these principles, the Court found the allegedly defamatory statements to constitute nonactionable expressions of opinion (what could be termed "Section 8 opinion"). The Court initially observed "the immediate context of the statements" – namely, the author's disclosure statement – "would lead a reasonable reader to likely believe that the author was conveying his or her opinion about NNVC's business practices and its stock value." Also significant, the Court noted, was the fact that "the actual article contains the phrases 'we believe,' 'it seems to us,' or the relevant equivalent over fifteen times."

The decision primes New York courts to further delineate the scrutiny that companies, public figures, and other defamation plaintiffs must overcome when asking a court to order the disclosure of an anonymous critic's identity

Examining the online context of the communication, the Court took notice of the Seeking Alpha website's "Read. Decide. Invest." tagline, which it found to "clearly give[] the impression that the website is designed to give people a place to express their opinions and for the reader to then form his or her own assumptions based on the posted articles." As the website's articles "are almost exclusively published by third-parties and not actual reporters," the Court found that readers are likely to "view the assertions in the articles, like the one herein at issue, with some skepticism and to treat its contents as opinion rather than fact."

Finally, applying the *Steinhilber* standard, the Court determined that all of the statements challenged by NNVC – indeed, the entire article – constituted an expression of "pure opinion." "The statements made by the author in the article are either followed by a recitation of 'facts' uncovered from public filings or publicly available material, which are linked to in the article itself, or no implication is given that they are based on undisclosed facts," the Court found. By way of example, the Court noted that the author had linked directly to the complaint in the shareholder action against NNVC, "giving readers the opportunity to review the underlying 'facts'" for themselves.

Having found NNVC's arguments that the statements at issue conveyed false facts or "mixed opinions" to be without merit, the Court concluded that NNVC had failed to demonstrate a meritorious cause of action for defamation.

NNVC filed a notice of appeal to the First Department on July 28, 2014.

First Amendment Interest in Anonymous Speech: Implicated, But Not Reached

The Court found its holding "in line with the First Department's urging in *Sandals* that courts should protect against 'the use of subpoenas by corporations and plaintiffs with business interests to enlist the help of ISPs via court orders to silence their online critics, which threatens to stifle the free exchange of ideas'" (quoting *Sandals*, 86 A.D.3d at 45). "[I]t is paramount in an open and free society," the Court concluded, "that we protect the anonymity of those whose 'publication is prompted by the desire to question, challenge and criticize the practices of those in power without incurring adverse consequences'" (quoting *Sandals*, 86 A.D.3d at 44).

Disposing of NNVC's petition against *Seeking Alpha* on the legal grounds that the statements at issue were protected opinion, the Court did not examine NNVC's CPLR §3102(c) "showing" any further. However, the Court's echo of the First Department's admonition to scrutinize such disclosure demands from corporate plaintiffs indicates that, in cases not so readily dismissed as a matter of law, plaintiffs would have to come forward with a good deal more facts to win Court approval.

The requirement that a CPLR §3102(c) petitioner's showing must be "strong" is undoubtedly in a respondent's favor. Yet close evidentiary calls are bound to happen, and future cases involving anonymous online speakers may well

(Continued on page 31)

(Continued from page 30)

center on just how "strong" a plaintiff's evidentiary showing of a meritorious cause of action must be.

The potential lack of clarity in New York runs in contrast to emerging authority from a growing number of other jurisdictions, where courts reviewing defamation plaintiffs' requests to obtain internet speakers' identities have expressly held that such plaintiffs must first establish the merits of their claims by a summary judgment standard.

These cases, stemming from the Superior Court of New Jersey, Appellate Division's decision in *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (2001), provide clear, yet flexible guidance on how lower courts can consistently strike a "balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation." *Id.* at 760. *See Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005) (adopting a modified version of the *Dendrite* balancing test, and holding that "a defamation plaintiff must satisfy a 'summary judgment' standard before obtaining the identity of an anonymous defendant"); *see also, e.g.*, *Doe v. Coleman*, 2014 WL 2785840, at *3 (Ky. Ct. App. June 20, 2014) ("[W]e believe that the test set forth in *Dendrite Int'l, Inc. v. Doe No. 3* . . . as modified by *Doe v. Cahill* . . . strikes the proper balance between the First Amendment right to engage in protected anonymous speech and the right to seek legal redress for actionable defamatory speech.").

The website is designed to give people a place to express their opinions and for the reader to then form his or her own assumptions based on the posted articles.

Importantly, the *Dendrite* line of cases does not represent mere state court musings on the First Amendment. Rather, the *Dendrite* analysis is grounded in U.S. Supreme Court holdings that "rights afforded by the First Amendment remain protected even when engaged in anonymously." *Dendrite*, 342 N.J. Super. at 148; *see, e.g.*, *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 341–42 (1995).

A handful of lower New York courts have found the *Dendrite* line of cases persuasive in deciding whether to grant a defamation plaintiff's CPLR §3102(c) request to obtain an online speaker's identity. However, these courts have seldom reached the issue of the sufficiency of plaintiff's evidentiary showing, instead deciding the petition as in *Seeking Alpha*, on threshold matters of law. *See, e.g.*, *In re Greenbaum v. Google, Inc.*, 18 Misc. 3d 185, 187–88 (Sup. Ct. N.Y. County 2007) (denying plaintiff's petition and holding that "[w]hile *Dendrite* is persuasive authority, the court need not reach the issue of the quantum of proof that should be required on the merits because, here, the statements on which petitioner seeks to base her defamation claim are plainly inactionable as a matter of law.").

The state's appellate courts, too, have been silent on the interplay between CPLR §3102(c) and the *Dendrite* line of authorities. *See Sandals*, 86 A.D.3d at 32; *see also Konig v. WordPress.com*, 112 A.D.3d 936, 937 (2d Dep't Dec. 26, 2013) (reversing Supreme Court's granting of public office candidates' CPLR §3102(c) petition against blog website to obtain pseudonymous blogger's identity, and holding that one of the challenged statements "was merely conveying [the blogger's] opinion").

Whether they believe they are legitimately entitled to redress, or they are merely attempting to silence or intimidate online critics, defamation plaintiffs will continue to seek the identities of anonymous bloggers and posters under CPLR §3102(c). As the *Seeking Alpha* Court acknowledged, "[d]istinguishing between assertions of fact and non-actionable expressions of opinion has often proved a difficult task"; not every threshold matter of law will be so straightforward, and inevitably, a court will have to perform a more exhaustive review of a plaintiff's evidentiary showing.

The *Dendrite* line of authorities could prove to complement CPLR §3102(c) jurisprudence in cases involving anonymous internet speech; alternatively, in the same way that "the New York State Constitution provides broader speech protections than does the United States Constitution," New York's courts could find that the strictures of CPLR §3102(c) in cases against anonymous online speakers should encompass, if not surpass, a *Dendrite* standard of scrutiny.

Either way, guidance from New York's appellate courts, even in dictum, on the "quantum of proof" that should be required of plaintiffs in such proceedings would greatly benefit litigants and lower courts alike.

Terence P. Keegan of Miller Korzenik Sommers LLP, along with David S. Korzenik and Louise Sommers of Miller Korzenik Sommers LLP, represents Seeking Alpha, Inc. NanoViricides, Inc. is represented by Peter Campitiello, Jeffrey H. Daichman, and Gerard Schiano-Strain of Kane Kessler, P.C.

RETURN TO TABLE OF CONTENTS

Legal Databases' Use of Publicly Filed Briefs Is Fair, District Court Rules

Transformative Nature of Use Weighs Heavily in Decision

A New York federal court held that the republication of legal briefs by legal database producers West Publishing ("West") and Reed Elsevier, Inc. ("Lexis") is fair use. *White v. West Publishing*, 12 Civ. 1340 (S.D.N.Y. July 3, 2014) (Rakoff, J.). The court applied Section 107 of the Copyright Act and found that three of the four statutory factors for fair use favored the defendants, with one factor neutral.

Background

Beginning in 2009, attorney Edward L. White was serving as class counsel in a class action suit in the Western District of Oklahoma. In the middle of the litigation, the judge in that case removed White as class counsel and decertified the class. In an attempt to prevent the use of his work product by other attorneys, White registered copyrights on two of his briefs, "Plaintiffs' Combined Motion for Summary Judgment, Beer and Ramsey, and Brief in Support" and "Plaintiffs' Motion in Limine." Prior to registering copyrights on the two documents, White had filed the briefs using PACER. Filing a document in PACER makes it publicly available.

Even though the defendants use the entirety of plaintiff's work, "such copying was necessary to make the briefs comprehensively text searchable."

West and Lexis retrieved the briefs from PACER. After retrieving a document from PACER, West and Lexis convert it into a text-searchable file and save it in each's proprietary format. Additional alterations include: an editor redacting any sensitive or private information; the categorization of the document by key characteristics such as jurisdiction or practice area; and the insertion of links to cited authorities.

On February 22, 2012, White and Kenneth Elan filed a putative class action against West and Lexis for copyright infringement. In June 2012, after the court had dismissed Elan's claimed and those of the subclass of plaintiffs who had not registered for copyrights, White filed an amended, non-class action complaint for copyright infringement based on the inclusion of his copyrighted briefs in West's and Lexis' databases. In an order dated February 11, 2013, the court granted defendants' motion for summary judgment. The July memorandum and order explains that decision and directs the entry of final judgment.

Fair Use

Judge Rakoff examined the four factors of Section 107 of the Copyright Act in determining that the republication of the briefs in West's and Lexis' online databases was fair use.

For the first factor, "purpose and character of the use," the court found the defendants' use to be transformative for two reasons. First, Judge Rakoff noted the difference between White's use of the brief – to provide legal services to his clients and secure specific legal outcomes in litigation – and the defendants' use – creating an interactive legal research database. Rakoff also found that the defendants' "processes of reviewing, selecting, converting, coding, linking, and identifying the documents" add something to the point of altering the character of the original briefs. Further, while the use was commercial, the court found that the transformative nature of the use was enough to outweigh commercialism.

The second factor, "the nature of the copyrighted work," also cut towards a finding of fair use. The briefs are "functional presentations of fact and law," making their use more likely to be fair. Additionally, though the briefs were unpublished in some sense, the fact that they were intentionally made available to the public by filing them with the court diminished the relevance of any rationales for protecting unpublished works.

(Continued on page 33)

RETURN TO TABLE OF CONTENTS

(Continued from page 32)

Judge Rakoff found the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," to be neutral. Even though the defendants use the entirety of plaintiff's work, "such copying was necessary to make the briefs comprehensively text searchable." Therefore, the court found that the defendants had "only copied what was reasonably necessary for their transformative use."

The fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," weighed in favor of fair use because "West's and Lexis's usage of the briefs is in no way economically a substitute for the use of the briefs in their original market: the provision of legal service for an attorney's clients." Additionally, no one had offered to license or buy plaintiff's briefs or motions, and plaintiff had not sought to license or sell them.

Plaintiffs were represented by Gregory A. Blue of Dilworth Paxson LLP, New York, NY, and Raymond A. Bragar of Brager, Wexler Eagel & Squires, P.C., New York, NY. West Publishing was represented by Benjamin Ely Marks, R. Bruce Rich, John Gerba, and Jonathan Bloom, of Weil, Gotshal & Manges, LLP. Reed Elsevier Inc. was represented by James Edward Hough, Cindy Paige Abramson, Craig Brian Whitney, of Morrison & Foerster LLP, New York, NY.

Google Spain: A Judgment Which Deserves To Be Forgotten

Right to Be Forgotten Judgment Not Working in Practice

By Anya Proops

There is no question but that in our modern networked age, the internet has become central to the shaping of our personal identities and biographies. Nowadays if you want to build a picture of a particular individual, you will invariably start with what is said about them online. What is said may range from the very serious to the entirely trivial. It may relate to recent events or events which, but for the internet, would almost certainly have been lost in the mists of time.

As for the control which the individual exerts over their online persona, this has historically been very limited. An individual may have been able to go to the owners of a particular source web-page and require the offending content to be taken down, for example because it was defamatory. However, they were otherwise forced to live with whatever e-portrait of themselves was painted through the application of the internet search engine's complex indexing algorithms. In practical terms, this meant that the public right's to know was king within the online environment.

Google owes the individuals identified in the various web-pages which it indexes a range of legal duties, including a duty to process their data fairly and a duty to ensure that their data is not processed for longer than is necessary.

However, all this has now changed following the judgment of the Court of Justice of the European Union in *Google Spain v González* (Case C-131/12). Now it is the public's right to know which must routinely bend its knee to the right of the individual to protect their privacy in the online world. But is this brave new approach to the management of data online normatively and practically tenable? Experience and reason would suggest that it is not. Indeed, there are good grounds for supposing that, in the name of protecting individual privacy, the Court has forced a fundamental change to the architecture of the information society which is as precarious as it is unprincipled.

Before looking at the difficulties with the judgment, one has first to understand precisely what conclusions the Court arrived at in the case. These can be summarised as follows.

First, Google (and indeed all other search engines), despite ostensibly being a conduit for data rather than a data creator per se, can properly be characterised a 'data controller' for the purposes of the EU Data Protection Directive. What this means is that Google owes the individuals identified in the various web-pages which it indexes a range of legal duties, including a duty to process their data fairly and a duty to ensure that their data is not processed for longer than is necessary.

Second, in terms of protecting the privacy rights of data-subjects, the general rule is that the individual's right to be forgotten trumps the public's right to know. Thus, in general, where a person objects on privacy grounds to Google indexing a particular source web-page, Google must de-index that page, with the intended result that the web-page is effectively consigned to e-oblivion. Importantly, this principle applies not only to data which is unlawfully present on the web but also to information which is lawfully present on the internet and, moreover, information which is true.

Third, the general rule will only be disapplied where there is a stronger counter-veiling interest in the public being able to access the web-page using the Google search function.

There are a number of fundamental difficulties with this judgment. First, looked at from a normative perspective, the judgment plainly gives privacy rights pride of place in the analysis. To the extent that freedom of expression (which incorporates the right to receive information) is mentioned at all, it appears very much as an after-thought. There is scant reference to the right to freedom of expression afforded under Article 10 of the European Convention and the Court does not even trouble itself to refer to the right to freedom of expression provided for under Article 11 of the EU's own Charter of Fundamental Rights.

(Continued on page 35)

(Continued from page 34)

Perhaps more importantly, the Court entirely fails to recognise that, when it comes to a competition between privacy rights and the right to freedom of expression, there is no right which can be treated as generally pre-eminent. Certainly, from the perspective of Convention jurisprudence, the suggestion that the right to freedom of expression must generally play second fiddle to the privacy Stradivarius is complete heresy. Of course, protection of the privacy of the individual is fundamental to the well-ordered democratic society. However, so too is it fundamentally important that the public is able to use the immense power of the internet to inform and educate itself. If there is to be a systematic shift in the weight to be afforded to these two fundamental rights then surely that is a shift which should result from a democratic mandate, rather than being the product of mere judicial fiat.

Second, looked at from a practical perspective, the judgment simply does not work. So far as protecting privacy rights is concerned, the lessons we have learned to date is that in practice exercising your right to be forgotten is likely to be largely ineffective. This is because, even if relevant web-pages are de-indexed on Google's European browsers (e.g. google.co.uk), they are still available for all to see on google.com. Still worse, the net effect of exercising your right to privacy may be that you only increase your notoriety. Thus, as we have seen in various cases, a request to Google to de-index a particular newspaper article may itself result in the newspaper simply republishing the page so as to give it new currency.

Looked at from a practical perspective, the judgment simply does not work.

What this means is that a request to be forgotten can readily end up having something of a Spycatcher effect: if you seek to injunct indexation, rather than consigning your data to e-oblivion, you simply increase its profile.

Perhaps even more importantly, it is illogical to suppose that a commercial search engine could ever be the proper body to make an assessment as to whether, in individual cases, particular data should be remembered or forgotten. The reason for this is obvious: unlike a newspaper which may be challenged to take down a story by a disgruntled data subject, a search engine is for all practical purposes a stranger to the data in issue and a stranger to the context in which that data was created.

The notion that it is the right sort of body to make the highly value-laden decisions as to whether such data should be de-indexed offends against common sense. Inevitably, the results of such a system are likely to be highly arbitrary and chaotic. This is itself inimical to the rule of law.

Added to this there is the difficulty that, as yet, there appears to be no obvious means of ensuring that the Article 10 rights are safeguarded within the system. Even if in principle Google permits the owners of the source web-page to object to de-indexation after the event, which is the model currently adopted by Google, in a case where Google has for whatever reason refused to re-index, there is no obvious legal mechanism which would enable individuals to enforce their right to know as against Google. Thus, once again the system has a troubling structural bias in favour of privacy rights.

The really unfortunate aspect of the judgment is that, rather than enhancing the debate around the important issue of privacy in the online world, it simply tethers us to a mechanism which is as inefficient as it is normatively unsound. One can only hope that the lessons learned from this highly problematic judgment may yet go on to inform the approach taken to the 'right of erasure' currently being debated in respect of the new draft EU General Data Protection Regulation.

Anya Proops is a barrister specialising in information rights at 11KBW Chambers. She is a co-founder of the highly regarded information law blog: panopticon.com and sits on the editorial board of the information law reports.

Federal FOIA Reform Bill to Narrow Deliberative Process Privilege Introduced

Bipartisan legislation has been introduced in the U.S. Senate to curb the alleged abuse of the exemption to the Freedom of Information Act for documents that are exempt from discovery in civil and criminal litigation. Freedom-of-information advocates have called the 5 U.S.C. § 552(b)(5) exemption the "withhold it because you want to" exemption.

Senator Patrick Leahy, D-Vermont, along with Senator Jon Cornyn, R-Texas, have introduced the "FOIA Improvement Act of 2014." The senators' proposal would create a public-interest balancing test for information agencies want to exclude from disclosure under Exemption 5. The test would mandate disclosure when the public interest in disclosure outweighs the agency's interest in protecting records governed by the deliberative process privilege or the attorney work-product privilege. The balancing test would be more stringent for information protected by the attorney-client privilege: a compelling public interest in disclosure would have to outweigh the agency's interest in nondisclosure.

The bill also would limit the application of the Exemption 5 to documents created more than 25 years ago. Federal agencies have used the exemption to withhold records created over 40 years ago or more, Politico reports.

The bill also would codify a presumption of openness for government information, mandating that agencies only withhold information if the law prohibits disclosure or if it is reasonably foreseeable that disclosure would cause specific identifiable harm to an interest protected by a FOIA exemption.

The bill also clarifies that federal agencies are barred from charging search or duplication fees when they have not met the time limits for responding to FOIA requests or met the notice requirements of FOIA.

Open-government advocates hope the legislation will be passed in the Senate and could be reconciled in conference with FOIA reform legislation that was passed by the House of Representatives this past winter.

MLRC UPCOMING EVENTS

MLRC/NAA/NAB Media Law Conference
September 17-19, 2014 | Reston, VA

MLRC Annual Dinner
November 12, 2014 | New York, NY

DCS Annual Lunch & Meeting
November 13, 2014 | New York, NY

MLRC/Southwestern Entertainment and Media Law Conference
January 15, 2015 | Los Angeles, CA

RETURN TO TABLE OF CONTENTS

Detroit Free Press Continues Mug Shot Battle in Sixth Circuit

DoJ Seeks En Banc Review to Overturn Circuit Precedent

By Herschel P. Fink and Paul R. McAdoo

The long-running battle in the Sixth Circuit for access to mug shots under federal FOIA moved forward in July, with briefing being completed on whether the issue is of sufficient importance to warrant initial en banc consideration. *See, e.g.,* *Detroit Free Press, Inc. v. U.S. Dept. Justice,* No. 14-1670 (brief in opposition to rehearing en banc). The availability of mug shots under federal FOIA has been hotly contested in the Sixth Circuit for 20 years, with the Detroit Free Press having won repeated skirmishes against the U.S. Department of Justice and its Marshals Service.

In 1996 the Free Press won a decision in the Sixth Circuit affirming a district court opinion in a 1994 case, which held that persons currently charged with federal crimes, who had already appeared in court, had no privacy interest under federal FOIA in the release of their mug shots. Following contrary decisions in the 10th and 11th circuits in 2011 and 2012, the DOJ unilaterally decided in December, 2012 that it was free to ignore the Free Press precedent in the Sixth Circuit. The paper sued again last year, and won summary judgment in the Eastern District of Michigan earlier this year. The district court held that the 1996 appellate decision continued to control in the Sixth Circuit.

The availability of mug shots under federal FOIA has been hotly contested in the Sixth Circuit for 20 years.

The DOJ appealed, and in June filed a petition for initial en banc consideration, notwithstanding that the Sixth Circuit had rejected en banc rehearing in 1996. On July 1, the Sixth Circuit requested a response from the Free Press, which it filed on July 12. In its response, the newspaper argued that the issue of whether any privacy interest attached to mug shots of persons currently being prosecuted, while of importance to the newspaper, nonetheless failed to rise to the level of "a question of exceptional importance" under the high bar set by FRAP 35, such that it would merit initial en banc review, and that the mere fact that two circuits had recently disagreed with long-standing Sixth Circuit precedent was also insufficient reason.

The issue remains under consideration, and merits briefing has been suspended pending a decision.

This was not the first time that the DOJ had unilaterally refused to honor the Sixth Circuit precedent. In 2005 it claimed that an off-point Supreme Court ruling on the FOIA privacy exception was new justification to stop honoring mug shot FOIA requests. The Free Press sued again in the Eastern District, and the DOJ, in response, abruptly withdrew its newly revised mug shot policy, and declared that it would again honor requests in the districts of the Sixth Circuit. It also claimed that the Free Press' suit should be dismissed as moot. The district court agreed that it was moot, but nonetheless found that the suit had caused the change of policy, and awarded the newspaper its attorney fees. A similar suit was also filed at that time by the Akron Beacon Journal in the Northern District of Ohio. The judge there refused to dismiss that suit, and awarded summary judgment to the newspaper, as well as attorney fees. There was no appeal by the DOJ back in 2005.

The pending Sixth Circuit appeal is being closely followed by news organization, as the DOJ has declared that it intends to carry its battle to the Supreme Court, should the Sixth Circuit decide not to disturb its precedent. The DOJ chose in 1996 not to challenge the Sixth Circuit's en banc refusal in the Supreme Court. It also actively opposed certiorari review by the Supreme Court to resolve the Circuit split in the recent 11th Circuit case of *Karantsalis v. Dep't of Justice*, 635 F.3d 497 (11th Cir. 2011).

Detroit Free Press is being represented by Herschel P. Fink, its Legal Counsel, of Detroit, who also represented the paper in the 1994 and 2005 cases, and Paul R. McAdoo,

RETURN TO TABLE OF CONTENTS

Presidential Privacy, CIA Records and Other Access Cases of Note

Former President George W. Bush and Vice President Dick Cheney have a privacy interest in their personal-research requests for archived Administration materials that outweighs the public interest in disclosure, the Second Circuit has ruled. *Cook v. National Archives & Records Admin.*, No. 13-1228-cv (2d Cir. July 8, 2014) (Leval, Pooler, Chin, JJ.)

Background

Reporter John Cook filed a FOIA suit against the National Archives & Records Administration to obtain Bush and Cheney's own record requests for their archived materials during the time those records were not yet publicly available.

Judge Denny Chin, writing for the panel, applied Exemption 6 to the Freedom of Information Act for personnel, medical and similar files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The revelation of Bush's and Cheney's requests for archived materials would "reveal personal details—what they were thinking, considering, and planning as they transitioned back to private life after their years of service to the country ... The former officials have a significant interest in developing their ideas privately, free from unwanted public scrutiny," Chin wrote.

The former officials have a significant interest in developing their ideas privately, free from unwanted public scrutiny," Chin wrote.

Chin also noted that archivists and librarians tend to have a policy against disclosing which materials requesting parties have sought, and that all 50 states and the District of Columbia protect the confidentiality of borrowers' use of public library materials.

In addition, disclosure of Bush and Cheney's record requests would not shed much light on how the National Archives responds to special access requests from former high ranking officials, Chin added. Thus Bush's and Cheney's privacy interests outweigh the public interest in disclosure.

Deliberate Process Privilege Protects CIA History

A divided D.C. Court of Appeals, 2-1, ruled this spring that the deliberative process privilege shields from public disclosure the fifth volume of the CIA's internal history of the Bay of Pigs fiasco and failed effort to oust Fidel Castro in the 1960's. *National Security Archive v. Central Intelligence Agency*, No. 12-5201 (D.C. Cir. May 2014). Exemption 5 to FOIA protects the privileges the government could assert in civil litigation, including the deliberative process privilege for pre-decisional communications.

Even though four previous volumes authored by CIA Staff Historian Jack B. Pfeiffer have been released, Circuit Court Judge Brett M. Kavanaugh, writing the majority opinion, said that the draft of the fifth volume "is still a draft and thus still pre-decision and deliberative."

Among other things, the majority rejected the argument that the passage of time renders the due process privilege inapplicable to the Bay of Pigs history. "Premature release of privileged information would risk embarrassment of individuals who had put forth certain ideas on the understanding and assurance that the communications would remain confidential," Kavanaugh said.

In dissent, Circuit Judge Judith W. Rogers said there should not be a per se rule of Exemption 5 protection for draft agency histories. Instead, Rogers would have remanded for further proceedings requiring the CIA to demonstrate the deliberative process privilege would shield from disclosure a draft history about events that occurred fifty years ago. Rogers also wanted consideration of whether the passage of time affects the application of the exemption.

California: Personal Devices & Public Records

The California Supreme Court has granted a petition for review on an issue of first impression: does the California

(Continued on page 39)

(Continued from page 38)

Public Records Act apply to "written communications pertaining to city business, including email and text messages, which (a) are sent or received by public officials and employees on their private electronic devices using their private accounts, (b) are not stored on city servers, and (c) are not directly accessible by the city"? *City of San Jose v. Superior Court*, S218066 (Cal. June 23, 2014).

The plaintiff sought to obtain all voicemails, emails or text messages sent or received on private electronic devices owned by the city of San Jose's elected officials from a former mayor involved in downtown development.

The Court of Appeal, Sixth Appellate District, found that the state Records Act cannot be construed to impose the duty on a governmental agency to produce governmental-related information stored on personal electronic devices and accounts of elected officials and public-sector employees.

The lawyers for the plaintiff said in their petition for review that the intermediate appellate court "has provided a roadmap for government officials to keep significant or controversial documents hidden from the public eye. If it remains unchallenged, this roadmap will have statewide impact on the public's constitutionally protected right to receive information about government activities." Also at issue, for example, is a lobbyist attempting to influence votes on legislation.

A business improvement district is a governmental agency subject to the New Jersey Open Public Records Act.

California: Access to On-Duty Police Officer Shootings

The California Supreme Court, 6-1, has ruled that the names of Long Beach police officers involved in shootings while on duty can be disclosed to the *Los Angeles Times*. *Long Beach Police Officers Association v. Long Beach*, No. S200872 (Ca. May 29, 2014). The city and the union for the city's police officers argued the officers' names should not be disclosed because the officers and their families could face threats of violence.

The majority drew a distinction between disclosing the names of officers if linked to information in personnel records, including records generated from internal investigations, and from disclosing the names of officers if linked to records of factual information about an incident. "The particularized showing necessary to outweigh the public's interest in disclosure was not made here, where the union and the city relied on only a few vaguely worded declarations making only general assertions about the risks officers face after a shooting," Retired Associate Justice Joyce L. Kennard wrote for the majority.

The court added that the names of officers do not have to be disclosed in every case and that further proceedings might show that the officers' privacy and safety interests outweigh the public's interest in access to public records.

Colorado

Parties who prevail on their appeals after being denied access to public records are mandatorily entitled to costs and reasonable attorney fees, the Colorado Supreme Court, 5-2, ruled. *Benefield v. Colorado Republican Party*, No. 11SC935 (Colo. June 30, 2014). The Colorado Republican Party sought access to surveys conducted by members of the Colorado House of Representatives of constituents.

The Colorado District Court interpreted "prevailing applicant" to mean a requester who prevails in litigation as a whole, while the Colorado Court of Appeals interpreted it to mean "any applicant who succeeds in acquiring, as the result of filing an application with the district court," access to a record to which a records custodian denied access.

The majority of the Supreme Court agreed that an award of costs and attorney fees is mandated "in favor of any person" who obtains a district court order requiring access to public records. District courts, however, should only award the proportion of attorney fees and costs that are related to the records to which requesters actually win access, the majority said.

In dissent, Chief Justice Nancy E. Rice said she would hold trial courts have the discretion to consider whether requesters have prevailed on a "significant issue." Otherwise, government agencies will be forced to litigate court costs and attorney fees any time access is denied to "a single record, regardless of how many records were requested and properly denied."

Connecticut

In a case of first impression, the Connecticut Supreme Court has ruled that state's Freedom of Information Act does

(Continued on page 40)

(Continued from page 39)

not compel law enforcement agencies to release full arrest reports while prosecutions are pending. *Commissioner of Public Safety v. Freedom of Information Commission*, SC 19047 (Conn. July 15, 2014). Instead, law enforcement agencies are only obliged to release the name and address of the arrestee, the date, time and place of the arrest, the offense for which the person was arrested and one other piece of information: the arrest report, incident report, news release or other "similar report" of the arrest.

Justice Richard A. Robinson, writing for the court, said the freedom of information law is ambiguous but the history of the legislative debate showed the law was amended specifically to allow law enforcement agencies to utilize alternatives means of providing narratives of arrests besides full arrest reports.

New Jersey

A business improvement district is a governmental agency subject to the New Jersey Open Public Records Act, the New Jersey Superior Court, Appellate Division, found in an unpublished decision. *Kennedy v. Montclair Center Corporation Business Improvement District*, 2014 N.J. Super. Unpub. LEXIS 1654 (N.J. Super. App. Div. June 24, 2014).

Autopsy reports are "medical records" outside the scope of the state's Freedom of Information Act.

The Montclair Center Corporation, a non-profit formed to manage the Montclair Center Special Improvement district, argued it is not a public agency because it was created by private individuals. But the appellate court disagreed, finding that the Montclair Township Council adopted an ordinance in 2002 to create the MCC.

The court cited several more reasons for why the MCC is a public agency: the MCC also is funded by more than $460,000 in special assessments imposed on property owners in the central business district and the Township Council may approve or disapprove the MCC's budget. The Township Council has the power to terminate the MCC and the MCC provides traditional public functions such as sanitation and security.

Pennsylvania

In a case of first impression, the Pennsylvania Commonwealth Court has ruled that the frontline agency for open-records appeals, the Office of Open Records, has the implied authority to conduct in camera reviews of documents to determine if they are exempt from disclosure because of the attorney-client privilege or the attorney work-product doctrine. *Commonwealth of Pennsylvania v. Center Township*, No. 522 M.D. 2013 (Pa. Cmmw. June 24, 2014).

The township, which redacted portions of four month's of attorney invoices that allegedly reference litigation services, argued that the Office of Open Records does not have jurisdiction to determine whether the attorney-client privilege or work-product doctrine applies to governmental records. Otherwise, the office would intrude upon the Pennsylvania Supreme Court's exclusive power to regulate the practice of law.

The appellate court drew a distinction between having the authority to order the disclosure of government documents that implicate the practice of law and having the power to review whether requested governmental documents are covered by the attorney-client privilege, the work-product doctrine, or the ethics-based rule of confidentiality.

The court also held that the agency has the implied authority to conduct in camera reviews of records to determine whether evidentiary privileges apply to them. "In some instances, in camera review may be the only way that an appeal officer can assess, in a meaningful fashion, whether an agency has met its burden of proving that a document is privileged by a preponderance of the evidence," Judge Patricia A. McCullough wrote for the court.

South Carolina

The South Carolina Supreme Court held that autopsy reports are "medical records" outside the scope of the state's Freedom of Information Act. *Perry and Osteen Publishing v. Bullock*, No. 2012-212669 (July 16, 2014). A reporter had sought the autopsy report issued in connection with a police shooting. The state FOI Act exempts from disclosure "medical records" but does not define the term. The Court held that "autopsy reports fit neatly with the general understanding of medical records."

This result was consist with long standing policy of the state Attorney General's office that autopsy reports were

(Continued on page 41)

(Continued from page 40)

exempt medical records. A dissenting judge argued that autopsy reports should not be categorically exempt from disclosure, but could be released subject to redaction if necessary.

In a case of first impression, the South Carolina Supreme Court held that state's Freedom of Information Act is not violated by governmental meeting agendas being amended during the middle of meetings. Lambries v. Saluda City Council, No 27400 (S.C. June 18, 2014).

South Carolina's FOIA does not require agendas for regularly scheduled meetings nor prohibit the amendment of agendas for a regularly schedule meeting, Acting Justice James E. Moore said. "We find this is also the better public policy in light of the fact that a violation of FOIA can carry a criminal penalty," Moore added.

MLRC UPCOMING EVENTS

MLRC/NAA/NAB Media Law Conference
September 17-19, 2014 | Reston, VA

MLRC Annual Dinner
November 12, 2014 | New York, NY

DCS Annual Lunch & Meeting
November 13, 2014 | New York, NY

MLRC/Southwestern Entertainment and Media Law Conference
January 15, 2015 | Los Angeles, CA

Legal Frontiers in Digital Media
May 14-15, 2015 | Palo Alto, CA

MLRC London Conference
September 28-29, 2015 | London England

RETURN TO TABLE OF CONTENTS

Supreme Court Solidifies Privacy Protections for Cellphone Data

Holding Warrantless Searches Incident to Arrest Unconstitutional

By Ronald G. London and Robert Corn-Revere

At the end of this year's term, the U.S. Supreme Court took a major step forward in unanimously extending individual protections from police intrusion into the realm of digital privacy.

In a consolidated decision in *Riley v. California* and *United States v. Wurie*, the Court held that a warrantless search of a suspect's cellphone data incident to arrest is unconstitutional. As the opinion by Chief Judge Roberts succinctly put it in closing: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is [] simple— get a warrant." The ruling recognizes the weighty privacy interests implicated by the vast storage capacity of modern cell phones, and the sweeping window into their owners' lives offered by the data they contain. Or, as the Court put it: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'"

The ruling recognizes the weighty privacy interests implicated by the vast storage capacity of modern cell phones, and the sweeping window into their owners' lives offered by the data they contain.

Background

In *Riley*, police searched the contents of the defendant's smartphone without a warrant both during and following his arrest, including contact listings and videos. Both the trial court and California Court of Appeal rejected Riley's contention that crucial evidence found during the searches violated the Fourth Amendment. In *Wurie*, police took possession of the defendant's "flip-phone" after his arrest and accessed its call logs and wallpaper without a warrant. The U.S. Court of Appeals for the First Circuit vacated Wurie's conviction, stating that the warrantless inspection, which led investigators to incriminating evidence against Wurie, was improper.

Supreme Court Decision

Chief Justice Roberts' opinion repeatedly highlighted the fact that many of the Court's prior decisions permitting searches of *physical* objects incident to arrest hold little logic in the digital age. For example, the Court held that the original justifications for the doctrine – potential harm to officers and destruction of evidence – have "no comparable risks when the search is of digital data." The Court recognized that "[o]nce an officer has secured a phone and eliminated any potential physical threats, . . . data on the phone can endanger no one." It thus held that "search of the information on a cell phone bears little resemblance to the type of brief physical search" considered in previous cases involving, for example, a container in a coat pocket that contained contraband. "Modern cellphones . . . implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse," given their data capacity and multifaceted functions.

Chief Justice Roberts wrote that comparing physical items to a cell phone "is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justified lumping them together."

The Court's opinion prominently underscored how cellphones are pervasive in the daily lives of most Americans, noting "the proverbial visitor from Mars might conclude they were an important feature of human anatomy." It observed that modern phones are mini-computers that perform multiple functions and hold immense amount of personal data, and were themselves inconceivable when the Court had originally

(Continued on page 43)

(Continued from page 42)

permitted police to search individuals incident to arrest. Indeed, impositions on a person's privacy through a physical search were relatively narrow before the digital era; however, "the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones." The Court noted that the 1926 observation by noted jurist Learned Hand, "that it is a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him" is simply "no longer true" if "his pockets contain a cell phone."

Crucially, the Court recognized, searching a cell phone can potentially expose more information to the government than a search of an individual's house, given the amount of data typical phones can store. The fact "that technology now allows an individual to carry such information in his hand does not make the information any less worthy of . . . protection."

The Court acknowledged that its decision will "have an impact on the ability of law enforcement to combat crime." However, it also recognized that "Privacy comes at a cost," and that the warrant requirement is "an important working part of our machinery of government" that must be respected. And as the Court noted, it expects "the gulf between physical practicability and digital capacity [to] only continue to widen in the future."

The effects of the *Riley* decision could well be felt beyond traditional law enforcement activities, and may add a new dimension to the ongoing debate over how much governments should be able to intrude into individuals' lives via their own electronic devices. For instance, *Riley* should add fuel to the already contentious debate surrounding warrantless searches of computers, smartphones and other electronic devices at U.S. border crossings, which privacy groups contend violates the Fourth Amendment protections against unreasonable searches and seizures.

Ronald G. London and Robert Corn-Revere are lawyers with Davis Wright Tremaine LLP. Together with colleagues Thomas Burke and Lisa Zycherman they filed an amicus brief with the Supreme Court in Riley and Wurie on behalf of the National Press Photographers Association, the Reporters Committee for Freedom of the Press, the New York Times Company, and eleven other leading news organizations.

Settlement of Cameraman's Civil Rights Suit Protects the Public's Right to Film Police Activity

By Alison Schary & Robert Balin

For local videographer Philip Datz, July 29, 2011, was proceeding like any other day on the job. A credentialed freelance photojournalist and a longtime fixture of the local newsgathering scene in Long Island, New York, Mr. Datz is often one of the first to arrive at the scene of arrests, fires, accidents, and other local happenings, capturing the scene on video for various local news outlets. Learning from his police scanner that a car chase of drug suspects was taking place in Bohemia, New York, he grabbed his camera and headed to the scene.

By the time Mr. Datz arrived, the chase itself was over, the suspects were apprehended, and multiple police cars were on the scene. Wearing his press credentials, Mr. Datz hoisted his video camera and began filming the aftermath of the chase from the public sidewalk across the street, standing amidst other bystanders and onlookers. The street was open to traffic, and there was no crime scene tape. Nevertheless, within a few seconds, a Suffolk County police sergeant strode over to Mr. Datz and angrily demanded that he stop filming and "go away." Mr. Datz moved a block away and continued to film from afar. When the sergeant noticed Mr. Datz filming from this new location, he placed him under arrest, handcuffed him, and seized his video camera. After being held at the precinct for several hours, Mr. Datz was released with his camera and charged with "obstructing governmental authority." And what was captured on Mr. Datz's camera? A video of the entire encounter with the arresting officer.

Within a few seconds, a Suffolk County police sergeant strode over to Mr. Datz and angrily demanded that he stop filming and "go away."

The video – which quickly went viral after being posted online – shows the officer repeatedly, and with increasing forcefulness, ordering Mr. Datz to "go away"; insisting that there is no alternate location where Mr. Datz can continue to film; and threatening to arrest him (before ultimately doing so). The response was swift and sharp. Local media wrote letters of protest, as did advocacy groups including the National Press Photographers Association and the New York Civil Liberties Union. Faced with this public outcry, the charges against Mr. Datz were quickly dropped, and the Suffolk County Police Department revised its rules and procedures to instruct its officers that "members of the media cannot be restricted from entering and/or producing recorded media from areas that are open to the public, regardless of subject matter."

Federal Lawsuit

But the story wasn't over. In April 2012, Mr. Datz brought a federal lawsuit in the Eastern District of New York against the arresting officer and Suffolk County, alleging federal civil rights violations and related state-law claims. Mr. Datz alleged that his arrest was without probable cause and in violation of his First and Fourth Amendment rights. Mr. Datz also alleged that the seizure of his camera and newsgathering materials without probable cause violated the Privacy Protection Act, 42 U.S.C. § 2000aa. Last, Mr. Datz alleged a series of prior and subsequent incidents in which other Suffolk County police officers had interfered with the right of the press to record police activity taking place in public view, arguing that Suffolk County itself was liable for the constitutional violations under the doctrine of municipal liability set forth in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

After a lengthy period of discovery, and just before the court-ordered deadline for filing summary-judgment motions,

(Continued on page 45)

RETURN TO TABLE OF CONTENTS

(Continued from page 44)

the parties entered into a settlement agreement, which was finalized and so-ordered by the court on July 22, 2014. In accordance with that agreement, the Suffolk County Police Department agreed to train and test all active police officers on an annual basis on the First Amendment right of the public and the press to observe, photograph, and record police activity in public locations.

The police department also revised its written policies concerning recording of police scenes by members of the public and press. The department further agreed to create a police-media relations committee to address on an ongoing basis issues that arise between the press and police, and to institutionalize a channel of communication between the department's Public Information Office and a ranking sworn officer to ensure that press access issues are addressed and resolved in real time. Finally, the settlement also required Suffolk County to pay Mr. Datz $200,000.

Datz alleged that his arrest was without probable cause and in violation of his First and Fourth Amendment rights.

The new police policies and training materials explicitly recognize that the public and press have a First Amendment right to observe and record police activities from locations open to the public. The training materials instruct officers that "public access is media access," and members of the media are not required to display a press pass in areas open to the public. The training materials further clarify that police officers may not expand crime scene perimeters for the sole purpose of interfering with the right of the media and the public to observe and record police activity – a practice that Mr. Datz alleged had occurred on multiple other occasions when he attempted to film a police scene. Officers are also reminded that the presence of a plainclothes or undercover officer on the scene is not a reason to prevent observers from filming – if bystanders can see them from a public place, they can also be filmed.

The Datz settlement represents another victory in a groundswell of lawsuits aimed at clarifying that there is a First Amendment right to record police activity in public locations. With the ubiquity of mobile devices, and an increasing social tendency to record and document rather than just passively observe, it is becoming more and more common for police officers to carry out their duties under the scrutiny of onlookers with cameras – and many officers do not appreciate the publicity.

Other Cases

In 2007, a lawyer named Simon Glik was arrested for recording Boston police as they arrested a young man on Boston Common. He was charged with – and prosecuted for – illegal wiretapping. After the charges were dismissed, Glik filed a civil rights lawsuit against the officers and the City of Boston for violation of his First and Fourth Amendment rights. In response, the officers raised a qualified-immunity defense, claiming that there was no "clearly established" constitutional right to record police officers. The district court rejected that argument, and the First Circuit agreed. In a sweeping decision, the court declared that the "right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." *Glik v. Cuniffe*, 655 F.3d 78, 85 (1st Cir. 2011). The case settled shortly thereafter, with the City of Boston agreeing to pay Glik $170,000 in damages and legal fees.

Meanwhile, in Illinois, the American Civil Liberties Union was rolling out a program to record police officers openly in public. Anticipating prosecution under the Illinois wiretapping statute, in 2010 the ACLU brought a suit for declaratory and injunctive relief against the state's attorney. The case made its way to the Seventh Circuit, which held that the Illinois wiretapping statute could not constitutionally be applied to a citizen who openly records police officers with her or his cell phone in public. *ACLU of Illinois v. Alvarez*, 67 F.3d 583 (7th Cir. 2012).

While the *Glik* case was wending its way through the courts, a man named Christopher Sharp used his cell phone to record Baltimore Police Officers forcibly arresting a female friend of his at the 2010 Preakness Stakes. After the incident, Baltimore officers repeatedly demanded that he surrender the cell phone he had used for the recording; fearing arrest, he turned it over. The officers then proceeded to erase the video

(Continued on page 46)

(Continued from page 45)

of the arrest, along with all other videos on the phone – including videos of Sharp's young son.

Sharp brought a civil rights lawsuit against the Baltimore Police Department for violation of his First and Fourth Amendment rights, and the U.S. Department of Justice weighed in with a rare Statement of Interest that unequivocally voices support for the First Amendment right to record the police in public. The Department of Justice explained that "[t]he right to record police officers while performing duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution. They are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily." The case settled in March 2014, with the Baltimore Police Department agreeing to pay $250,000 in damages and legal fees; issuing a formal apology to Sharp; and implementing new training and policies recognizing the rights of individuals to record and photograph police activity in public.

The Datz settlement represents another victory in a groundswell of lawsuits aimed at clarifying that there is a First Amendment right to record police activity in public locations.

Other examples abound. In Newark, New Jersey, high school student Khaliah Fitchette was seized and detained for using her cellphone to record officers responding to an incident on a public bus. After the student brought a federal civil rights lawsuit in conjunction with the American Civil Liberties Union of New Jersey, the police department issued a training memorandum making clear that citizens have the constitutional right to record police officers performing their duties in public and that they cannot confiscate recorded materials without a warrant. (The case settled in November 2012.)

In Montgomery County, Maryland, freelance photographer Mannie Garcia was arrested and prosecuted for disorderly conduct when police apprehended him for recording an arrest in front of a local restaurant and allegedly pocketed the video card from his camera. After the charges were dismissed, Garcia brought a federal civil rights suit, and the Department of Justice weighed in once again in support of a First Amendment right to record police officers in the public discharge of their duties. (The case is ongoing.)

And in Austin, Texas, local activist Antonio Buehler brought a civil rights suit against the local police department for arresting him on multiple occasions as he attempted to film police activity in public. The federal district court for the Western District of Texas recently issued a strongly-worded opinion rejecting the officers' assertion of qualified immunity and allowing Buehler's constitutional claims to proceed against the individual officers and the police department. Noting that photographing and recording officers performing their official duties in public is simply a "more modern and efficient method of exercising a clearly established right" -- the right to assemble in public, receive information on matters of public concern, and make a record for purposes of dissemination -- the court concluded that Buehler's right to record the officers was "clearly established" at the time of his arrest. *Buehler v. City of Austin et al.*, Civ. No. 13-1100 (W.D. Tex. July 24, 2014).

As the number of court decisions recognizing a right to record police activity continues to grow, it will become increasingly difficult for officers to seek qualified immunity by claiming that such a right is not "clearly established." Currently, the right to record government officials and matters of public concern in public places has been explicitly recognized in the First, Seventh, Ninth and Eleventh Circuits, and by numerous federal district courts. Another recently filed lawsuit against the New York City police department aims to add the Second Circuit to this list. *See Goodman v. City of New York*, Civ. No. 14-5261 (S.D.N.Y. filed July 15, 2014).

At the same time, this spate of public-interest lawsuits – and the ensuing settlements – publicize model frameworks for best police department practices regarding recording of police scenes by the public and press. (The National Press Photographers Association has been a leading advocate in this area, developing model policies for police departments and providing resources and guidance to photographers.)

In addition to acknowledging the First Amendment right to record police officers in public, the settlement materials made public in cases such as *Datz* and *Sharp* provide models for police departments to translate those principles into practical training: instructing officers on such scenarios as

(Continued on page 47)

(Continued from page 46)

when a press pass is required, when a crime scene may be expanded, and how to handle concerns about undercover and plainclothes officers on a scene. Taken together, these First Amendment lawsuits are helping to instill awareness that every member of the public, journalist or not, has a constitutional right to observe and record the police publicly engaged in their official duties.

Robert Balin and Alison Schary are lawyers at Davis Wright Tremaine. Together with Sam Bayard and Eric Feder of Davis Wright Tremaine, Mickey Osterreicher, the General Counsel of the National Press Photographers Association, and Corey Stoughton, a senior staff attorney at the New York Civil Liberties Union, they represented Philip Datz in his civil rights lawsuit on a pro bono basis. Defendant Suffolk County was represented by Susan Flynn, Bureau Chief of the Torts Litigation Bureau at the Suffolk County Attorney's Office, and the defendant officer was represented by Brian J. Davis. Robert Corn-Revere, Ronald London, and Alison Schary of Davis Wright Tremaine are also representing Mannie Garcia in his federal lawsuit against the Montgomery County Police Department and individual officers.

MLRC UPCOMING EVENTS

MLRC/NAA/NAB Media Law Conference
September 17-19, 2014 | Reston, VA

MLRC Annual Dinner
November 12, 2014 | New York, NY

DCS Annual Lunch & Meeting
November 13, 2014 | New York, NY

MLRC/Southwestern Entertainment and Media Law Conference
January 15, 2015 | Los Angeles, CA

Legal Frontiers in Digital Media
May 14-15, 2015 | Palo Alto, CA

MLRC London Conference
September 28-29, 2015 | London England

RETURN TO TABLE OF CONTENTS

A View from the Inside:

Why Can't We Be Friends?

A Few Thoughts on Amicus Briefs, Amicus Pitches, and Why We Sometimes Say No

By David McCraw

Twenty years ago, when I was a clerk at the New York State Court of Appeals, the court found itself faced with a high-profile case about state funding for abortions. The amicus briefs came pouring in. Most of them, no matter how well written they were, read like little more than a vote of "present" by those you would expect to have a point of view. The Catholic Church? Check. NOW? Check. The Right to Life Party? Check.

But one stood out. It covered how the main issue before the court had been addressed in other states. While it had a point of view, it avoided the perennial problem of the amicus brief that simply serves to echo what the parties have already said, and usually said well. None of the cases the brief cited would dictate how New York should go. But it provided insight and substance (and, yes, made at least one clerk sound less clueless than he was when his judge began quizzing him on the case).

All of us who are in-house have seen a growing number of amicus requests in recent years.

Now that I sit at the other end of the process as an in-house lawyer getting requests to join amicus efforts, I think back to that brief regularly. The fact is, all of us who are in-house have seen a growing number of amicus requests in recent years. And as the number has grown, along with the demands of our jobs in these trying financial times, it has become harder for us to find the bandwidth to properly assess the merits of proposed briefs and provide meaningful and timely feedback on drafts. We end up doing triage in our jobs, getting to the most important things first and leaving others for later (or never). That can raise special issues when the thing getting pushed down the to-do list is an amicus request. When we end up not signing onto a brief, no matter what the reason, that fact – both who signed on and how many organizations – can itself be read as signaling something to the court.

I also think in-house lawyers have sometimes failed to get the message out to the drafters of amicus briefs that we are often not the deciders. (Ah, were it so…) Several years ago, The New York Times was asked to sign onto a very good media amicus brief when the Supreme Court took *Snyder v. Phelps*, the case dealing with the funeral protests of the Westboro Baptist Church. To those of us in the Legal Department, it seemed like a no-brainer. The case was going to the highest court in the land, and the lower courts' rulings suppressed the very sort of unpopular speech that the First Amendment was intended to protect. We were pulled up short when our management wanted to know why The Times was voluntarily aligning itself with a group of homophobic hate-mongers. We signed on, but not until the eleventh hour, and only after some internal deliberations that one might call – euphemistically – spirited.

All of us, whether we are writers of briefs or reviewers of them, want the same thing: to have our voices heard in cases of significance, to file briefs that truly matter, and to make sure that our submissions advance arguments that reflect our considerable collective expertise. But are there things that drafters of amicus briefs can do to make the review and sign-on process better?

This list, in no particular order, reflects some of things that I have come to appreciate and value when I am approached about putting The Times's name on a brief.

The "Why Bother?" Issue. I am easily fired up by First Amendment issues, and many solicitation emails from amicus drafters obviously aim for my sweet spot. They shouldn't – or at least they shouldn't stop there. It's not enough to point out that a decision is wrong or even that First Amendment values have been trampled upon. Tell me how the amicus brief will differ from the parties' briefs, explain what the brief will add to the argument before the court, and help me understand why the case is significant to my organization. Our touchstone for signing up as an amicus is that there should be a reason to do so, not that there is no reason not to.

(Continued on page 49)

RETURN TO TABLE OF CONTENTS

(Continued from page 48)

And if those questions can't be answered in a compelling way, the takeaway may be that no amicus brief is warranted.

The Echolalia Problem. We sometimes forget that, in most cases, the parties are actually doing a pretty good job. They have the basics covered. So I am looking for an amicus brief that doesn't just echo the parties but instead gives voice to something worth saying. In most cases, there's a lot of legal landscape left to be covered, whether that is highlighting the unanticipated consequences of a decision, spotlighting facts that may influence the judges' views, providing the broader policy context for the rule of law at issue, or drilling down on the law in other jurisdictions.

Overexposure Kills. When media industry amicus briefs become reflexive, we invite the courts to ignore us. At any given time, there are dozens of cases across the country that we should care about. But caring and filing are two different thing. Our collective reputational firepower should be employed strategically and sparingly, saved for precedential cases and appeals where important questions of law will be answered.

Are there things that drafters of amicus briefs can do to make the review and sign-on process better?

The "Why Me?" Issue. I used to live in Iowa. I love Iowa. But no matter how wrong the Wapello County courts get it, chances are that The New York Times will not be on the amicus brief. Amicus pitches should be targeted to those who truly have a stake. And there's a corollary here worth thinking about: We were once asked to be on a brief in South Dakota. We were then unasked. Counsel had decided, wisely, that our presence might actually hurt the cause.

The Wheels of an Organization. It's not just that I need time to consider whether to join a brief. It's also that my organization needs time. And typically we will also need a draft of the brief before we can commit. It would help us, too, to know whether we are almost alone or part of a huge crowd of media companies. All of us in-house are parts of complex organizations that do journalism but do many other things as well. How will this brief affect our company's reputation in the marketplace? Will this position undermine our interests as owners of intellectual property? Is there a consequence for our advertising department or other business units if we embrace this argument or that litigant? Those questions often have messy answers, but we don't have the luxury to ignore them.

No Potted Plants. Maybe I shouldn't feel this way, but sometimes I worry that we are seen as just a pretty signature block to be added at the end of a brief. In-house lawyers feel they can and should play a part in shaping the draft (and that they should be given ample time to do that). Many times I've been surprised – and disappointed – to learn that I have not been made aware by outside counsel of the concerns and editing suggestions coming in from other in-house lawyers who are reviewing the same brief. Yes, we can be a pain, but we're also part of the process.

The Drama Desk Award. Nothing creates force for a brief like framing a lower court's decision as a dramatic, unprecedented, doomsday change in the law. And it is sometimes alluring to tease out a worrisome free-expression issue that has slipped notice below. What sometimes seems to get lost in our First Amendment fervor is: What happens if we lose? Have we now just voluntarily signed onto an interpretation of a decision that will come back to haunt us in all the cases to come? An amicus brief needs to be built for the long term. In-house counsel know that with just about every issue we face, we will be having déjà vu all over again.

David McCraw is assistant general counsel at The New York Times Company.

RETURN TO TABLE OF CONTENTS