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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through December 20, 2013

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New York High Court: Don't Send Journalists to Testify In States with Weak Shield Laws

Subpoena to Jana Winter Rejected

By Dori Ann Hanswirth and Patsy Wilson

New York-based journalists received good news last week when the State's highest court reversed a lower court order requiring FoxNews.com investigative reporter Jana Winter to appear for testimony in Colorado because of the substantial likelihood that she would be compelled to identify confidential sources there. *Holmes v. Winter*, No. 245 (N.Y. Dec. 10, 2013).

Demonstrating New York's leadership in protecting newsgathering, the Court held that New York's policy against compelled disclosure of confidential sources – grounded in the State's Constitution and embodied in its statutory shield law – was violated when the lower court did not consider Winter's rights under New York law before issuing a subpoena calling for her appearance and testimony in Colorado. This is because New York law "provides a mantle of protection for those who gather and report the news – and their confidential sources – that has been recognized as the strongest in the nation."

In states with less robust shield laws, like Colorado, a reporter could be jailed for the same conduct that is absolutely protected in New York. The decision protects New York journalists from this quandary, and holds squarely that New York journalists can rely on their "mantle of protection" when they conduct out-of-state reporting: "The outcome of this case does not (and should not) turn on whether Winter received the information while she was in Colorado or obtained it over the telephone or via computer while sitting in her New York office." The ruling dissolves Winter's obligation to appear in Colorado, along with the attendant prospect of incarceration for her anticipated refusal to testify.

Background

Winter was haled into court by accused mass murderer James Holmes, who killed and wounded dozens of people in a Colorado movie theater on July 20, 2012. Fox News assigned New York-based Winter to cover the story. On July 23, 2012, the Colorado court issued what would become the first of three gag orders prohibiting law enforcement from speaking about the case. On July 25, 2012, Fox News published Winter's report about a notebook that Holmes sent to a psychiatrist before the massacre. Winter cited two unnamed law enforcement sources in her report.

Arguing that those sources violated the gag orders, Holmes sought sanctions against the prosecution. On December 10, 2012, he questioned 14 law enforcement personnel under oath; all denied any knowledge of the alleged leak. Holmes then obtained a certificate from the Colorado court pursuant to the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, which stated that Winter's testimony was material and necessary to his sanctions motion and that Holmes' fair trial rights had been violated. Certificate in hand, Holmes petitioned a New York court to issue a subpoena compelling Winter to appear and testify in Colorado. Over Winter's objection, on March 7, 2013, the Supreme Court issued the subpoena. Winter immediately appealed.

Both the trial court and Appellate Division refused to stay enforcement of the subpoena pending appeal, so on March 29, Winter moved to quash the subpoena in Colorado under that state's shield law. She would eventually appear in Colorado under protest on four occasions in the next seven months, but she was never called to the witness stand. On August 20, the Appellate Division affirmed the decision to issue the subpoena, but with two of the five justices in dissent. Winter immediately appealed as of right under CPLR § 5601(a) to the New York Court of Appeals. On September 3, the Colorado court granted Winter's motion to postpone her next appearance date to January 3, 2014 so that New York's highest court could consider her case. Her motion to quash the subpoena was to be heard on that date.

On appeal, Winter argued that it would impermissibly violate New York public policy to issue a subpoena mandating her to testify in another state's proceeding, where

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she would be subject to contempt for refusal to disclose confidential sources. Winter also explained that the subpoena constituted an undue hardship under the Uniform Act, because its existence, and the appearance and testimony it called for, would effectively end her career as an investigative journalist.

Court of Appeal Ruling

On December 10, 2013, the Court reversed the lower court's issuance of the subpoena. Citing New York's constitutional, statutory, and common law tradition, the Court held that "there is no principle more fundamental or well-established than the right of a reporter to refuse to divulge a confidential source." The Court reiterated the history behind the journalists' shield, stating that New York's Legislature "intended the [Shield Law] to provide the highest level of protection in the nation" and recognized that the protections provided by the Shield Law were "essential to maintenance of our free and democratic society." The Court also reminded readers that the New York Constitution guaranteed a free press in 1831, even before the First Amendment applied to the states. As for New York's common law tradition, the Court harkened back to the seditious libel trial of John Peter Zenger, in which a jury of colonial New Yorkers acquitted Zenger after he refused to name his anonymous sources.

"Protection of the anonymity of confidential sources is a core – if not the central – concern underlying New York's journalist privilege, with roots that can be traced back to the inception of the press in New York."

These considerations spurred the Court to elevate lofty language from earlier concurrences into its majority opinion, including Judge Wachtler's observations regarding the historical importance of the Zenger incident (*Beach v. Shanley*) and Judge Bellacosa's admonition that "[j]ournalists should be spending their time in newsrooms, not in courtrooms as participants in the litigation process" (*O'Neill v. Oakgrove Construction, Inc.*). Those considerations also led the Court to conclude that "protection of the anonymity of confidential sources is a core – if not the central – concern underlying New York's journalist privilege, with roots that can be traced back to the inception of the press in New York."

The majority rejected the dissent's view that the location of Winter's conversations with her source was crucial to determining the strength of New York's policy interest. Rather, the Court found that the realities of modern newsgathering require reporters to cross state lines to report on global stories, and New York's public policy was sufficiently strong to protect confidential sources obtained without the State.

Accordingly, the Court found that "as a New York reporter, Winter was aware of – and was entitled to rely on – the absolute protection embodied in our Shield Law when she made the promises of confidentiality that she now seeks to honor."

The Court warned that this "is precisely the harm sought to be avoided under our Shield Law for it is fear of reprisal of this type that closes mouths, causing news sources to dry up and inhibiting the future investigative efforts of reporters."

The Court did suggest, though, that New York's policy would not be offended by forcing a reporter to testify in a state with absolute or even robust protection for confidential sources similar to those in New York.

In setting forth the broad reach of New York's policy, the Court also limited a prior decision, *Matter of Codey*, where it held that a New York court should not determine under the Uniform Act whether the testimony sought from a New York reporter would actually be admissible in the other jurisdiction.

Winter relied upon a footnote in *Codey* positing a future case in which a strong New York public policy would justify refusing to help a sister state obtain testimony. The Court held that this was indeed such a future case and distinguished *Codey* on several grounds, including the "most important" fact that the source in *Codey* was no longer confidential by the time the subpoena issued.

Christopher Handman of Hogan Lovells argued the appeal for Winter, with Dori Ann Hanswirth, Theresa House, Nathaniel Boyer, Benjamin Fleming, and Sean Marotta on the briefs. Daniel Arshack of Arshack, Hajek & Lehrman represented Holmes.

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Judge Again Gives Boost to Detroit Reporter's 10 Year Fight to Protect Source

By Herschel P. Fink

While much attention recently focused on Fox News reporter Jana Winter's New York Court of Appeals victory in her effort to protect her anonymous source for a story involving the Aurora, Colorado, theater shooting, retired Detroit Free Press reporter David Ashenfelter chalked up another win in his 10 year long fight to protect the confidential source for a 2004 terrorism story.

Eastern District of Michigan Judge Robert Cleland ruled, for the third time, that Ashenfelter can claim Fifth Amendment protection against divulging the name of his source in an article about former assistant U.S. Attorney Richard Convertino. *Convertino v. U.S. Dept. Justice*, (E.D. Mich. Nov. 25, 2013).

Background

Ashenfelter, a Pulitzer Prize winner who recently retired from the Free Press, reported in February, 2004 that Convertino, who worked in Detroit, was under internal investigation for his handling of a discredited terrorism trial. Convertino was, in fact, later indicted and tried on obstruction of justice charges, but was acquitted.

Convertino sued the Department of Justice and several DOJ employees over the leak in a D.C. District Court Privacy Act lawsuit. His subpoena directed at Ashenfelter to identify his source was contested by the reporter and the Detroit Free Press in the Detroit federal court.

After failing in 2008 to persuade the Detroit federal judge that the First Amendment protected Ashenfelter, the reporter invoked the Fifth Amendment, citing the fact that Convertino had accused Ashenfelter in his Privacy Act complaint of being in a criminal conspiracy with the leaker to damage his reputation.

Free Press editors said Ashenfelter did nothing wrong, but had to invoke the Fifth Amendment because Convertino claimed the leak of information was illegal.

Retired Detroit Free Press reporter David Ashenfelter chalked up another win in his 10 year long fight to protect the confidential source for a 2004 terrorism story.

In a 2009 deposition, Ashenfelter declined to answer questions about his source, claiming the Fifth Amendment right against self-incrimination.

Judge Cleland ruled that the privilege could be asserted. Convertino, claiming Ashenfelter was not entitled to assert the privilege, moved for reconsideration, which was denied.

More recently, Convertino, whose Privacy Act action is still pending in D.C. before District Judge Royce Lamberth, asked Judge Cleland, yet again, to reconsider.

This time, Convertino cited comments made by U.S. Attorney General Eric Holder before a congressional committee saying he would not prosecute reporters who are doing their jobs. Convertino claimed that this statement showed that Ashenfelter's fears of possible prosecution were unfounded.

Latest Decision

Judge Cleland – perhaps with an eye to news stories earlier in 2013 about Justice Department claims to a federal court in support of a search warrant for emails that Fox News reporter James Rosen was a prosecution target, as well as search warrants for Associated Press emails – was unimpressed. He wrote in his opinion:

> General Holder's testimony offers Ashenfelter no protection from future prosecution. Intervening changes in the law rarely constitute extraordinary circumstances for relief under Rule 60 (b)(6). *** A statement by a beleaguered political appointee at a congressional subcommittee hearing may be many things, but it is not a change in the law.

Judge Cleland also chastised Convertino for undue delay in bringing his reconsideration motion.

Meanwhile, the Justice Department's second summary judgment motion in the principal Privacy Act action has been fully briefed, and is awaiting either a hearing, or a decision

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without hearing by Judge Lamberth. An earlier summary judgment for the government was reversed by the D.C. Circuit, because the court said that Convertino had not had sufficient time to discover Ashenfelter's source. The government's current motion claims that, regardless of the identity of the source, Convertino did not suffer the pecuniary harm required by the Privacy Act.

Although the final chapter may yet be written, a successful end to the threat against Ashenfelter, at least, seems closer.

Herschel P. Fink, Detroit Free Press legal counsel, has represented David Ashenfelter throughout the case.

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Web Gripe Site Not Covered by New Jersey's Newsroom Search Statute

Court Puts Burden on Newsgatherers to Invoke Statute

By Bruce S. Rosen

In a rare ruling interpreting the New Jersey's version of the federal Privacy Protection Act (PPA) – designed to hold law enforcement accountable for illegal newsroom searches – a New Jersey Appellate Court has required persons who claim protection under the law "to assert that claim as early as practicable," placing the burden of knowledge of this obscure law squarely on those protected by the law. *J.O. v. Township of Bedminster et al*, 433 N.J. Super 199 (October 31, 2013).

The three judge panel ruled that a Rutgers University graduate student who had created a web gripe site concerning a school administrator – and who had his computers seized as part of a harassment prosecution – waived the law's protection. The court then said that even if the plaintiff, who claimed to be an Internet publisher, had properly informed police of his claim, the materials on the gripe site were not obtained as part of newsgathering activity, despite the fact that they were protected speech.

The appellate panel said that because plaintiff was never employed as a journalist and his ties to journalism were tenuous, that additional scrutiny was required.

The appellate panel found that "freedom of the press is not compromised by requiring persons who claim protection under the Act to assert that claim as early as practicable," in this case when officers arrived at his residence and announced they had a warrant. The court noted that "not only did plaintiff fail to assert his claim, he demanded to see the warrant as a condition of admission, an act that ratified the officers' belief that they were acting in full compliance with the law," and deprive them of the opportunity to comply with the law.

"No purpose identified by the Legislature is served by permitting a suspect in a criminal investigation to evade the application of the suspect exemption by concealing his claim to protected status under the act," the court said, in determining that J.O. (who is named Joseph Oettinger on the slip opinion but only by initials on the published decision) waived any right to pursue a civil action under the Act.

The New Jersey statute NJSA 2A:84A-21.9 is called the "Subpoena First Act," and was described in one New Jersey case as "narrowly circumscribing the situations in which the State can properly search and seize materials acquired in the course of newsgathering." It allows a civil action for limited damages but does not provide for the suppression of evidence seized in violation of the statute.

The New Jersey law is based on the federal Privacy Protection Act, which itself was a legislative response to the U.S. Supreme Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), denying a civil rights claim for police seizure of negatives and photographs taken by the campus newspaper that may have assisted in identifying demonstrators who allegedly assaulted officers during a violent 1971 protest at the university's hospital. No one at Stanford Daily was suspected of any criminal activity.

While the *Zurcher* Court said the Fourth Amendment did not impose a constitutional bar to warrants for newsroom searches, it also said there was nothing to prevent Congress and legislatures from passing laws creating additional non-constitutional protections for search warrant abuses. Aside from the federal law and New Jersey's law, Oregon, Washington, Wisconsin, Connecticut, Texas and Illinois all enacted similar laws.

Oettinger was found guilty of petty harassment in municipal court over a website he created regarding a Rutgers University administrator and a restraining order was issued. While he was in the process of an appeal, which was ultimately successful, the alleged victim complained to police of contact and a new website being created with extensive personal information. Armed with a warrant that said they were seeking information regarding identity theft, forgery,

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and trafficking in personal identifying information, prosecutors seized his computers.

He later lost a suppression motion, which he did not appeal. He then filed a civil action against the officers and municipalities involved, alleging for the first time that the search warrant was in violation of the Subpoena First Act. The trial court dismissed the action and he appealed.

Using a restrictive interpretation of who is a journalist derived from the New Jersey Supreme Court's leading shield law case, *Too Much Media v. Hale*, 206 N.J. 209, (2011), the appellate panel said that because plaintiff was never employed as a journalist and his ties to journalism were tenuous, that additional scrutiny was required. The panel quoted from a detective's testimony that he had no reason to believe Oettinger was a journalist based upon what he read of Oettinger's postings.

The court rejected Oetttinger's claim that he had no obligation to identify himself as a newsperson, and prosecutors had an obligation to investigate before the seizure.

Bruce S. Rosen is a partner at McCusker, Anselmi, Rosen & Carvelli, P.C. in Florham Park, NJ. A full list of counsel for the case is available in the hyperlinked opinion.

UPCOMING EVENTS

MLRC/Southwestern
Entertainment and Media Law Conference
January 16, 2014 | Los Angeles, CA

Legal Issues Concerning
Hispanic and Latin American Media
March 10, 2014 | Miami, FL

Legal Frontiers in Digital Media
May 15-16, 2014 | Mountain View, CA

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

More information at medialaw.org or medialaw@medialaw.org.

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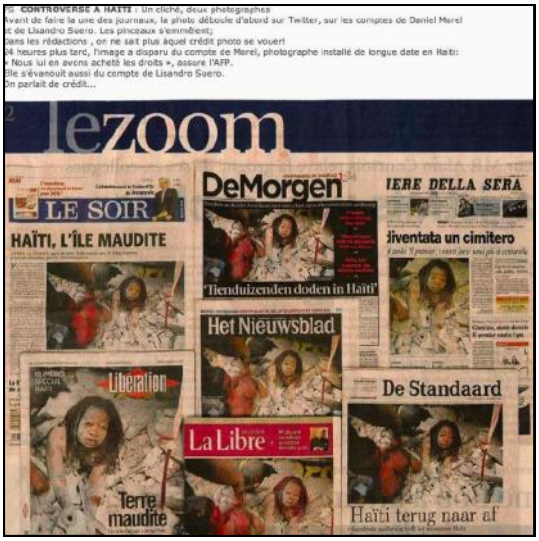
Photojournalist Wins $1.22 Million Judgment Over Images Taken From Twitter

By Itai Maytal

After a seven-day trial on damages, a federal jury found that Agence France-Presse and Getty Images willfully infringed upon eight "twitpics" posted by photographer Daniel Morel that he took of the 2010 Haiti earthquake and awarded him $1.22 million. *Morel v. AFP and Getty Images*, No. 10 Civ. 2730 (S.D.N.Y. jury verdict Dec. 6, 2013).

The Manhattan jury awarded Morel the maximum statutory damages permitted for copyright infringement for the 8 photographs at issue — $1.2 million. Morel also received $20,000 for statutory damages stemming from the jury's finding of 16 counts of non-innocent violations by the defendants of sections 1202(a) and (b) of the Digital Millennium Copyright Act ("DMCA"). (The jury also awarded Morel $303,889.77 in actual damages and infringers' profits, which Morel declined in favor of statutory damages.)



From Morel's Answer and Counterclaim

The trial occurred after (1) AFP lost its motion to dismiss the case, claiming then that Twitter/Twitpic's Terms of Service conferred upon it a non-exclusive license to use the photographs and (2) the court granted Morel's motion for summary judgment, finding that AFP, Getty and the Washington Post were liable for copyright infringement. *See Agence France Presse v. Morel*, 934 F. Supp. 2d 547, reconsideration granted in part, 934 F. Supp. 2d 584 (S.D.N.Y. 2013); *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 308 (S.D.N.Y. 2011). Morel settled his claims against the Washington Post and other named defendants prior to trial.

Factual History

[The following summary is based on Judge Alison J. Nathan's January 14, 2013 decision on summary judgment]

On January 12, 2010, photographer Daniel Morel captured images of the immediate aftermath of the Haiti earthquake and uploaded 15 of them, in high resolution, on Twitter.com's picture sharing service, Twitpic. He also posted on Twitter that he had "exclusive earthquake photos," and linked his Twitter page to his Twitpic page. There were no copyright notices on the images themselves, but Morel's Twitpic page included the attributions "Morel," "by photomorel" and the copyright notice "©2010 Twitpic Inc., All Rights Reserved."

Shortly after Morel posted his photographs, another Twitpic user, Lisandro Suero reposted them on his Twitpic page and, without crediting Morel, tweeted that he had "exclusive photographs of the catastrophe for credit and copyright." In the wake of the disaster, AFP found Morel's photographs on Twitter, credited to Suero, and sent them to Getty through their feed. The eight images were captioned AFP/Lisandro Suero.

The following day, AFP issued a caption correction that went out to Image Forum, AFP's wire and archive, crediting Morel for the Photos over Suero. The caption correction was sent to Getty through AFP's feed to Getty and was distributed to Getty's customers. It was not displayed on Getty's website. AFP did not remove photos credited to Suero from Getty's systems. The corrected images were captioned AFP/Daniel Morel. Getty's name was added to the credit when downloaded by licenses like the Washington Post.

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Once Morel learned about the unauthorized use of photographs, he permitted Corbis Inc., then his exclusive worldwide licensing agent, to alert Getty of his objections. Upon notice from Corbis, Getty claims that it searched for and removed all earthquake related images attributed to Morel on its customer-facing website. It did not at that time remove the Suero images. Getty then alerted AFP of the problem, which led the company to issue a Kill Notice through its wire and its ImageForum. AFP also removed from its archive all photos credited to Morel. One month later, Corbis alerted Getty to the Morel images still on the site that were credited to Suero. They were then removed.

Morel subsequently claimed that the activities of AFP, Getty and its licensees amounted to copyright infringement and violations of the DMCA. AFP responded by filing a complaint seeking (1) a declaration that AFP had not infringed upon Morel's rights, based on its belief that he granted the company a non-exclusive license to use his photographs on Twitter, and (2) damages for commercial disparagement. Morel counterclaimed for copyright infringement and other claims against AFP, Getty and others. Following discovery and pre-trial motion practice, Judge Nathan ruled that the defendants were liable for copyright infringement and that there were genuine issues of fact as to whether Getty and AFP violated the DMCA with the required intent.

This case illustrates the serious copyright-related risks involved in using images found on social media, assuming a fair use defense does not apply.

Trial Summary

Over the course of seven days, the jury heard testimony from Morel, AFP's photo editor Vincent Amalvy and deputy photo editor Eva Hambach, Getty's Images Manager Andreas Gebhard, Senior Director of Photography News and Sports Francisco Bernasconi, Senior Paralegal Heather Cameron and North American Senior Sales Director Katherine Calhoun. At stake was as follows:

8 awards for copyright infringement (if statutory, $750 to $30,000, or with willfulness, $750 to $150,000);

16 awards for DMCA violations (2 for each image based on the defendants' removal of copyright management information and their addition of false copyright management information, where damages range from $2,500 to $25,000)

Attorneys fees

The jury was not allowed to know, as a result of a successful *in limine* motion, that AFP commenced this lawsuit.

Based on opening and closing statements by the parties, it would appear their key arguments to the jury were as follows:

Morel: The evidence shows that (1) as a result of AFP and Getty's actions, countless people around the world believed that Morel's photographs were taken by someone else and that the defendants had a right to sell or give the photos away; (2) the defendants licensed and sold Morel's pictures even though they knew they were not made by the third party Suero; and (3) the defendants were "indifferent, lackadaisical, dismissive and inexcusably ineffective" in taking down Morel's pictures and preventing further licensing of his work.

AFP: The evidence shows that (1) AFP acted on the best information it had at the time about the origin of Morel's images and was not acting to harm Morel; (2) AFP never tried to hide its actions, but tried to correct its innocent mistakes promptly and to compensate Morel for his works; (3) AFP is a not-for-profit organization made up of honest, straightforward and hardworking photojournalists and journalists that had no interest in hurting Morel; (4) AFP did not kill the photographs before it had a chance to make Morel an offer since doing so would have killed the opportunity for both of them; and (5) Morel contributed to the confusion by (a) posting his photographs on high resolution on TwitPic with no restrictions and exposing them to people like Suero, (b) charging unreasonable rates and (c) cutting out his agent Corbis from negotiations in order to make more money for himself.

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Getty: The evidence shows that (1) Getty relied on AFP (which originally provided the images to Getty under a joint distribution agreement) to get the captions correct in its photographs; (2) Getty killed Morel's photos after it was notified about the problem; (3) Morel's agent Corbis delayed for six weeks in alerting Getty about additional Morel photographs in Getty's archive; (4) Morel was asking for an unfair compensation, far and above his actual damages (he was asking the jury "to make him the best paid news photographer on the planet ever") and (5) Getty has no interest in hurting photojournalists like Morel, particularly since the company is made up of photographers and photojournalists.

Following argument and testimony, the jury returned on November 22, 2013 the special verdict to Morel for the maximum statutory damages allowed under the Copyright Act for willful infringement of the eight photographs at issue, plus damages for violation of the DMCA. No determination on attorneys' fees has yet been made.

The defendants have already indicated to the Court that post-trial motions are pending.

Conclusion

Regardless of the outcome of post-trial motions or appeals, this case illustrates the serious copyright-related risks involved in using images found on social media, assuming a fair use defense does not apply. It also may point to risks that may exist even when images are properly licensed from stock photo services. In either case, it would seem prudent to confirm, where practicable, the provenance of questionable images and that the rights to use those images have in fact been fully secured before using them.

Itai Maytal is an associate attorney at Miller Korzenik Sommers LLP. Joseph T. Baio of Willkie Farr & Gallagher LLP represented the Plaintiff. Defendant AFP was represented by Joshua J. Kaufman of Venable LLP and Defendant Getty Images, Inc. was represented by Marcia Paul and James Rosenfeld of Davis Wright Tremaine LLP.

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Google's Digital Book Program Passes Fair Use Test

Index and Snippets a "Transformative Use"

By Judy Endejan

On November 14, Judge Denny Chin ruled that Google's digitization of more than twenty million books was a fair use under Section 107 of the Copyright Act, 17 U.S.C. § 107. *Authors Guild, Inc., and Betty Miles, Joseph Goulden, and Jim Bouton v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y.).

Background

Judge Chin's decision was the latest development in this case, which began in 2005 when the plaintiffs filed a copyright infringement suit for its Google Books project that scanned copyrighted books without permission of the copyright holders. In 2011, Judge Chin rejected a proposed settlement between Google and the plaintiffs to resolve all claims on a cross-wide basis. After that, the parties were unable to reach another settlement and the case proceeded towards class certification. Plaintiffs sought class certification in 2012, which was granted by Judge Chin. At that time he denied a Google motion to dismiss the *Authors Guild* claims. Google appealed the decision granting class certification. On July 1, 2013, the Second Circuit vacated the class certification decision and remanded the case for resolution of whether Google's fair use defense was valid, which led to the latest ruling granting Google's motion for summary judgment.

Because the Google Books project is designed for research and preservation and not for wholesale, unauthorized copying or downloading of entire books, Google Books passes copyright muster.

Google has two digital book programs. The first, the "Partner Program," involves the hosting and display of material provided by book publishers or other rights holders who give their permission for the display of their works. The second, the "Library Project," was at the core of the litigation. For the Library Project, Google scanned more than twenty million books from the collections of several major research libraries. Google would then deliver a digital copy to participating libraries, create an electronic database, and make text available for online searching through the use of "snippets."

Fair Use Analysis

In his ruling Judge Chin analyzed the four elements necessary for fair use. For the first factor (the purpose and character of the use) Judge Chin found that Google's use of the copyrighted works was highly transformative because Google digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers and others find books. The other feature of the program, searching through the display of snippets, is also transformative. Judge Chin said that the display of snippets of text is similar to the display of thumbnail images of photographs for searching. Google Books does not supersede or supplant books because it cannot be used to read books, a factor which also suggests fair use. The fact that Google's use is commercial does not negate a fair use finding because the commercialization is not direct and Google Books serves several important educational purposes.

Regarding the second factor (the nature of the copyrighted work) Judge Chin said that the works or books are largely nonfiction published books, which favors a finding of fair use. The third factor (amount and substantiality of portion used) was met even though Google scans the entire book. Because Google Books offers full text search capabilities, digitizing an entire book is critical to its functioning and therefore necessary to make fair use of the work .

Finally, the fourth factor (effect of use upon potential market or value) was satisfied because Google Books, if

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anything, only enhances the sales of books to the benefit of copyright holders. Google does not sell its scans and they do not replace the books.

Google Books allows individual and out-of-print titles to be discovered, enhancing the possibility that these books might be purchased.

Finally, Judge Chin found that Google Books provides significant public benefits and outlined several ways in which a finding of fair use would be consistent with the underlying purpose of the Copyright Act, which is to promote the progress of science and the useful arts.

Because the Google Books project is designed for research and preservation and not for wholesale, unauthorized copying or downloading of entire books, Google Books passes copyright muster. The judge was clearly impressed by Google's factual declarations that outlined the significant and varied research capabilities that Google Books offered with attendant public benefits because Google Books helps to preserve books, give them new life, and ultimately help researchers, authors, and publishers.

Judy Endejan is a partner at Garvey Schubert Barer in Seattle, WA. The plaintiffs were represented by Michael J. Boni, Boni & Zack LLC, Bala Cynwyd, PA; Edward H. Rosenthal and Frankfurt Kurnit Klein & Selz P.C., New York; and Sanford P. Dumain, Milberg LLP, New York. Google was represented by Daralyn J. Durie, Durie Tangri LLP, San Franciso.

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Circuit Declines to Reconsider Applicability of Anti-SLAPP Statute in Federal Court

Judge Kozinski Urged Colleagues to Revisit and Reject Precedent

By Thomas R. Burke and Ambika K. Doran

Six months after Ninth Circuit Chief Judge Alex Kozinski opined in dicta that his Circuit made a "mistake" in allowing the California anti-SLAPP statute to be raised in federal court, the Circuit declined to take up his suggestion that it reverse and abandon more than a decade of precedent. *Makaeff v. Trump University, LLC*, No. 11-55016, 2013 U.S. App. LEXIS 23901 (9th Cir. Nov. 27, 2013) (denying motion for reconsideration).

Background

In April 2013, a three-judge panel in *Makaeff v. Trump University, LLC* 715 F.3d 254, affirmed the district court's application of the law to a counterclaim that the plaintiff defamed "Trump University" in comments on websites and letters to the Better Business Bureau. In a harshly worded concurrence, however, Chief Judge Alex Kozinski urged the court to hear the case *en banc* and reverse its holding in *Newsham v. Lockheed Missiles & Space Co*., 190 F.3d 963, 973 (9th Cir.1999) that the anti-SLAPP statute, Cal. Civ. Code § 425.16, applies in federal court.

Judge Richard A. Paez wrote a separate concurrence, pressing the court to reconsider its decision in *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir.2003), that orders denying anti-SLAPP motions are appealable under the collateral order doctrine. (Notably, the parties did not brief these issues nor did they come up during oral argument in either the district court or before the Ninth Circuit panel.)

Judge Kozinski premised his argument on two points. First, he suggested that the anti-SLAPP law "creates no substantive rights" and "merely provides a procedural mechanism for vindicating existing rights," and thus does not apply in federal court. 715 F.3d at 272. Second, he contended that even if the law does create substantive rights, it conflicts with Federal Rules of Civil Procedure 8, 12, and 56, which, along with other rules, create an "integrated program of pre-trial, trial and post-trial procedures," an "orderly process" into which the anti-SLAPP law "cuts an ugly gash." *Id.* at 274.

He concluded: "Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof." *Id.*

After fourteen years of Ninth Circuit precedent applying the anti-SLAPP statutes of California, Oregon, Washington and Nevada, the prospect that the Ninth Circuit might decide that these state statutes were unavailable in federal court created a wave of uncertainty that this decision resolves. A majority of the court refused to hear the question of whether anti-SLAPP statutes should remain available within the Circuit.

In a concurrence, four judges, Kim McLane Wardlaw, Consuelo M. Callahan, William A. Fletcher and Ronald M. Gould, undertook a detailed analysis of United States Supreme Court precedent to conclude that such state statutes should remain available in federal court, and that orders denying anti-SLAPP motions should be reviewable by way of immediate interlocutory appeal. *Id.* at *3-25. They wrote that "refusing to recognize" the limitations placed on SLAPPs by seven state legislatures "is bad policy." *Id.* at *22.

They concluded: "If we ignore how states have limited actions under their own laws, we not only flush away state legislatures' considered decisions on matters of state law, but we also put the federal courts at risk of being swept away in a rising tide of frivolous state actions that would be filed in our circuit's federal courts." *Id.* at *22-23.

The decision resolves any lingering doubt about the availability of anti-SLAPP statutes within the Ninth Circuit.

Thomas R. Burke is a partner in the San Francisco office of Davis Wright Tremaine LLP and author of Anti-SLAPP Litigation (The Rutter Group, 2013). Ambika K. Doran is a partner in the firm's Seattle office.

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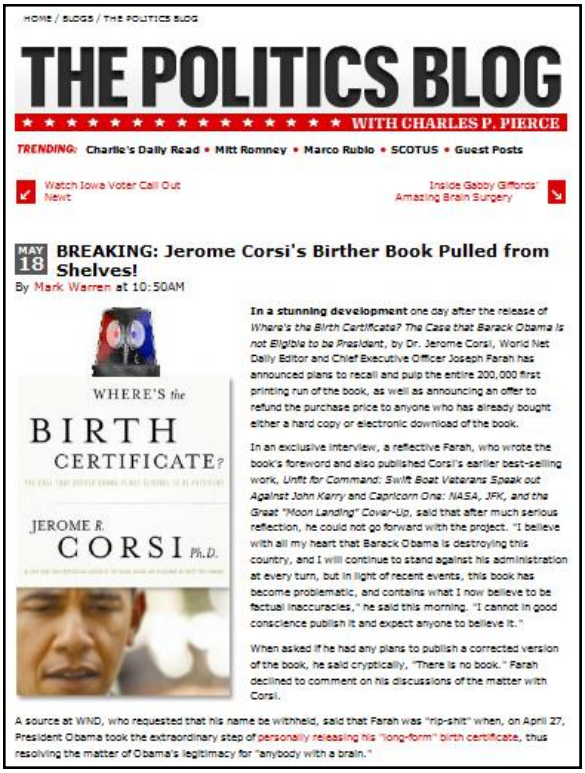
Magazine Blog Post About "Birther" Conspiracy Book Is Protected Opinion

Court Declines to Address Whether D.C. SLAPP Law Applies in Federal Court

In a ringing endorsement of the protection of political satire and parody from defamation claims, the D.C. Circuit Court of Appeals affirmed dismissal of a complaint against Esquire magazine over a blog post making fun of the publisher and author of a "birther" conspiracy book. *Farah et al. v. Esquire Magazine*, No. 12–7055 (D.C. Cir. Nov. 26, 2013) (Rogers, Brown, Williams, JJ.).

The blog post stated that the publisher was going to pulp the book and offer refunds to buyers. Affirming dismissal, the Court wrote "almost everything about the story and the nature of the issue itself showed it was political speech aimed at critiquing [plaintiffs'] public position on the issue of President Obama's eligibility to hold office."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Inside Gabby Giffords' Amazing Brain Surgery

MAY 18 BREAKING: Jerome Corsi's Birther Book Pulled from Shelves!

By Mark Warren at 10:50AM

WHERE'S the BIRTH CERTIFICATE?

JEROME R. CORSI Ph.D.

In a stunning development one day after the release of *Where's the Birth Certificate? The Case that Barack Obama is not Eligible to be President*, by Dr. Jerome Corsi, World Net Daily Editor and Chief Executive Officer Joseph Farah has announced plans to recall and pulp the entire 200,000 first printing run of the book, as well as announcing an offer to refund the purchase price to anyone who has already bought either a hard copy or electronic download of the book.

In an exclusive interview, a reflective Farah, who wrote the book's foreword and also published Corsi's earlier best-selling work, *Unfit for Command: Swift Boat Veterans Speak out Against John Kerry* and *Capricorn One: NASA, JFK, and the Great "Moon Landing" Cover-Up*, said that after much serious reflection, he could not go forward with the project. "I believe with all my heart that Barack Obama is destroying this country, and I will continue to stand against his administration at every turn, but in light of recent events, this book has become problematic, and contains what I now believe to be factual inaccuracies," he said this morning. "I cannot in good conscience publish it and expect anyone to believe it."

When asked if he had any plans to publish a corrected version of the book, he said cryptically, "There is no book." Farah declined to comment on his discussions of the matter with Corsi.

A source at WND, who requested that his name be withheld, said that Farah was "rip-shit" when, on April 27, President Obama took the extraordinary step of personally releasing his "long-form" birth certificate, thus resolving the matter of Obama's legitimacy for "anybody with a brain."

Background

The plaintiffs are the author and publisher of a book entitled "*Where's the Birth Certificate? The Case that Barack Obama is not Eligible to Be President.*" The launch of the book was dampened when at roughly the same time President Obama responded to "birther" conspiracy theories by releasing his long-form birth certificate showing that he was born in Hawaii. To poke fun at plaintiffs, the Esquire blog post stated:

> "BREAKING: Jerome Corsi's Birther Book Pulled from Shelves!" "In a stunning development one day after the release of [the Corsi book], [Farah] has announced plans to recall and pulp the entire 200,000 first printing run of the book, as well as announcing an offer to refund the purchase price to anyone who has already bought ... the book."

About 90 minutes after the parody was posted, *Esquire* published an "update" on its blog "for those who didn't figure it out," stating that the post was "satire"; the "update" clarified that the article was untrue and referenced other "serious" *Esquire* articles on the birth certificate issue. In a separate interview on another news website, the author called plaintiffs "liars" and other choice words, such as "execrable piece of shit."

Last year the district court dismissed plaintiffs' breadbasket of libel and privacy claims against the magazine, holding the post was satire and the complaint failed under the D.C. anti-SLAPP statute and/or Rule 12(b)(6) standards. *See* Farah v. Esquire Magazine, Inc., 11-cv-1179 (D.D.C. June 4, 2012) (Collyer, J.). As to the anti-SLAPP law, the district court held it was substantive and therefore applied in federal court. Earlier that year, another D.C federal court judge ruled the opposite, holding that the anti-SLAPP law cannot be used in federal court because it restricts federal procedural rights. *See* 3M Co. v. Boulter.

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The anti-SLAPP issue was briefed to the D.C. Circuit but the Court affirmed solely on Rule 12(b)(6) grounds, mooting any consideration of the application of the anti-SLAPP Act in federal court.

Appellate Court Decision

In a detailed examination of the protection for satire and parody, the Court outlined the relevant legal principles. First, "Despite its literal falsity, satirical speech enjoys First Amendment protection." Second, "it is the nature of satire that not everyone 'gets it' immediately." Third, "the test, however, is not whether some actual readers were misled, but whether the hypothetical reasonable reader could be (after time for reflection)."

Applying these principles, the Court concluded that reasonable readers of the blog post would recognize it as satire based on the context of the controversy, the humorous and outlandish details in the blog post, and its stylistic elements, such as a sensationalist headline and alarm bell. Reasonable readers would understand it as political satire – not hard news. In addition, the author's description of plaintiff s as "liars" and worse was protected opinion in the context of a polarizing political discussion of President Obama.

All of plaintiffs' related claims failed on the same grounds, including a Lanham Act claim. The court noted that "the mere fact that the parties may compete in the *marketplace of ideas* is not sufficient to invoke the Lanham Act."

Plaintiffs were represented by Larry Klayman. Esquire Magazine was represented by Hearst in-house lawyers Jonathan Donnellan and Kristina Findikyan; with Laura Handman, Micah J. Ratner, and John R. Eastburg, Davis Wright Tremaine, LLP.

UPCOMING MLRC EVENTS

MLRC/Southwestern Entertainment and Media Law Conference
January 16, 2014 | Los Angeles, CA

Legal Issues Concerning Hispanic and Latin American Media
March 10, 2014 | Miami, FL

Legal Frontiers in Digital Media
May 15-16, 2014 | Mountain View, CA

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

More information at medialaw.org or medialaw@medialaw.org.

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Video Excerpts of Unsealed Deposition Transcripts Not Covered by Protective Order

Court Rejects Procedural Bars to Media Intervention

By Gayle C. Sproul

Videotaped excerpts of depositions, once marked confidential, are no longer covered by a protective order when the corresponding transcripts of those depositions have been filed and unsealed. *Fairfax Financial Holdings Limited v. S.A.C. Capital Management, L.L.C.*, No. MRS-L-2032-06 (N.J. Super. Nov. 15, 2013). The court also ruled that a host of procedural challenges intended to block access to the excerpts was meritless.

Background

WGBH Educational Foundation, producer of the 30-year-old award-winning documentary series Frontline, sought videotaped excerpts of the deposition of publicity-shy billionaire Steven A. Cohen and other prominent witnesses to be used in a documentary regarding insider trading. Cohen, the owner of S.A.C. Capital Management, LLC, had testified over two days in connection with a commercial disparagement lawsuit filed by Fairfax Financial Holdings Limited and related parties against S.A.C. and other hedge funds in New Jersey state court, alleging that the defendants conducted a "bear raid" on Fairfax Financial, which is a deliberate attempt to disparage a company in the hope of decreasing its stock price to benefit short positions in the stock.

Videotaped excerpts of depositions, once marked confidential, are no longer covered by a protective order when the corresponding transcripts of those depositions have been filed and unsealed.

In the course of the litigation, the parties agreed to a protective order that was initially approved by the court, and then amended when members of the media intervened and objected to its broad terms.

Most deposition transcripts and the corresponding videotape of the depositions, including Cohen's, were initially marked "Confidential" pursuant to the protective order and many of the transcripts were filed with the court under seal. The filed deposition transcripts were eventually unsealed, but the videotape was never filed in court. The defendants ultimately sought summary judgment, which was granted and the plaintiffs appealed.

While the matter was on appeal, Frontline sought the video excerpts corresponding to the unsealed deposition transcripts from plaintiff's counsel, who was willing to provide them, but only if Frontline was able to procure from the court a declaration that the excerpts were not confidential under the protective order, as he expected defense counsel to assert that providing the excerpts would violate the protective order -- a prediction that later came true.

Frontline therefore moved to intervene in the action and sought clarification that the protective order did not bar disclosure of the video excerpts of any unsealed, publicly filed deposition transcripts.

In response to Frontline's motion, various defendants, including S.A.C., resorted to a number of procedural challenges, perhaps demonstrating their appreciation of the weakness of their substantive position. They claimed that intervention was improper because (1) the court did not have jurisdiction because the matter was on appeal; (2) Frontline did not have standing to intervene and was in any event "collaterally estopped" from intervening now in light of the previous intervention of other media to modify the protective order; and (3) intervention was "untimely."

The defendants also attempted to recast Frontline's request for clarification of the protective order as a motion for access to unfiled discovery material. Finally, the defendants made a half-hearted attempted, via a footnote, to argue that the plaintiff had agreed in the protective order not to provide

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any "Discovery Material," confidential or not, to any third party.

Superior Court's Decision

In its decision, the trial court rejected each of the defendants' arguments. It held, first, that, notwithstanding the appeal, it retained jurisdiction over the construction of the protective order, which the court concluded was a collateral issue. The court also concluded that the New Jersey rules clearly conferred standing on Frontline to seek the relief at issue, citing N.J. Rule 1:38-12.

It also ruled that the earlier interventions of other media entities did not preclude Frontline's later intervention, as the earlier intervention did not seek the same relief requested by Frontline. It further held that there was no time limitation provided by any rule, statute or precedent for seeking intervention.

Finally, the court rejected the defendants' characterization of Frontline's motion as an attempt to gain access to unfiled discovery materials and concluded in its Order that "videotaped excerpts of unsealed deposition transcripts are not subject to the restrictions stated in the Protective Order." (Citing provisions of protective order stating that only discovery materials containing "confidential information" are protected by the order and that the order did not protect material that "becomes public.").

The defendants have not indicated whether they intend to appeal.

WGBH was represented by Gayle C. Sproul of the Philadelphia office of Levine Sullivan Koch & Schulz, LLP, working together with Chad Bowman of the firm's Washington, D. C. office and Eric Brass and Dale Cohen of WGBH. S.A.C. Capital Partners, LLC and Steven A. Cohen were represented by Vincent Gentile of the Princeton office of Drinker Biddle & Reath and Martin Klotz and Scott S. Rose of the New York office of Wilkie Farr & Gallagher.

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Maine Supreme Court Orders Release of 911 Calls in Double Murder Case

By Sigmund D. Schutz

The *Portland Press Herald / Maine Sunday Telegram* recently took on and defeated the Maine Office of the Attorney General's longstanding policy of keeping 911 calls confidential in ongoing criminal investigations. In *MaineToday Media, Inc. v. State of Maine*, 2013 ME 100 (Nov. 14, 2013), a unanimous Maine Supreme Judicial Court rejected the Maine Attorney General's claim that 911 calls made before and immediately after a double homicide would, if disclosed, present a "reasonable possibility" of interfering with prosecution of the case. In doing so, the Court rejected the Attorney General's categorical assertion of confidentiality, but left the door open to future assertions of confidentiality – provided that such assertions are substantiated on a case-by-case basis.

The Court provided some guidance concerning how the balance should be struck in the future, suggesting that the balance tilts in favor of public access once the perpetrator of a crime has been charged and formally enters the criminal justice system.

Background

The Court summarized the landlord-tenant-dispute-turned-double-homicide that gave rise to the 911 calls at issue this way:

> During 2012, Derrick Thompson, his mother Susan Johnson, and his girlfriend Alivia Welch were renting an apartment in Biddeford from landlord James Earl Pak. On December 29, 2012, at 6:07 p.m., Thompson placed a call to E-9-1-1 regarding an altercation with Pak. Biddeford police responded to the call and left after speaking with Thompson and Pak. Three minutes after police left the scene, and forty-seven minutes after Thompson's initial E-9-1-1 call, Johnson placed a second call to E-9-1-1 to report that Pak had shot her, Thompson, and Welch. Eight minutes after that, Pak's wife, Armit Pak, placed a third call to E-9-1-1. All three calls were recorded and transcripts for each have been prepared.

MaineToday, ¶ 2. Mr. Pak was quickly arrested and charged with murder. Under Maine law, transcripts – but not recordings – of 911 calls are public records unless declared confidential by other law. The *Press Herald* asked for copies of the transcripts.

The Attorney General denied the *Press Herald's* request, asserting that 911 calls in criminal matters are confidential under other law – a statute that makes intelligence and investigative information compiled by law enforcement confidential if its release would present a "reasonable possibility" of causing any of several enumerated harms. Exemption 7 of the FOIA, 5 U.S.C. § 552(b)(7), is similar to the Maine statute except that the FOIA standard is whether release "could reasonably be expected to" cause harm while Maine's standard is whether there is a "reasonable possibility" of harm.

Supreme Court Decision

The Court defined "reasonable possibility" as "synonymous with a 'reasonable likelihood'" (*id.* ¶ 27), and required a showing of a "particularized possibility of harm[]" (*id.* ¶ 31), a standard that the Court found had not been met. The Attorney General had urged the Court instead to accept a "blanket rule that in any active homicide investigation (including unsolved cases) and/or prosecutions, any E-911 recording and transcript constitutes intelligence and investigative information" to which confidentially attaches. *Id.* ¶ 29 (quotation marks omitted).

The Court rejected the Attorney General's "universal" approach, interpreting the statute to require a particularized showing "based on the circumstances surrounding each

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record at issue." *Id*. ¶ 30. This was a showing that the Attorney General had not made, and evidently could not have made given the facts of the case.

While the Court did not accept a categorical assertion of confidentiality by the Attorney General, neither did it establish a categorical rule in favor of disclosure. The Court left open room for the Attorney General to successfully assert confidentiality, but only if the necessary particularized showing of harm is made. The Court provided some guidance concerning how the balance should be struck in the future, suggesting that the balance tilts in favor of public access once the perpetrator of a crime has been charged and formally enters the criminal justice system. The Court observed that Pak had been arrested on murder charges by the time the *Press Herald* requested the 911 transcripts, and that this reduced the possibility of harm. *Id*. ¶ 29. The Court emphasized this point by referring to "the presumptive right of public access to criminal court proceedings" *Id*. ¶ 31.

The State had asserted that its investigation remained ongoing even though Pak had been arrested, but the court found that the State had not identified "any particular investigation yet to be completed" or how any portions of the investigation could be affected by the availability of the 911 transcripts. *Id*.

The Court emphasized the connection between public records laws, transparency in government, and a functional democracy.

The Court also determined that "surgical redaction" of 911 records would be required regardless of "difficult[y]" or the "onerousness of the task," unless public information is "too integrated with confidential information to redact." *MaineToday* ¶ 15 n. 11. The Court rejected arguments advanced by the State that redaction should be excused as too costly and time-consuming.

The Court also clarified that the burden of proof in public records cases falls on government to establish just and proper cause for the denial of a request for public records; it is the government's evidentiary burden in denying a request "to show that some exception . . . applies." *MaineToday*, ¶ 9 n.8.

Last, the Court emphasized the connection between public records laws, transparency in government, and a functional democracy. The Maine court quoted the U.S. Supreme Court for the proposition that the "basic purpose" of public records law is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *MaineToday* at ¶ 8 (*quoting John Doe Agency v. John Doe Corp*., 493 U.S. 146, 152 (1989) (quotation marks omitted).

The Court also quoted the U.S. Supreme Court for the following, "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to*." *Id*. (emphasis in original) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989) (quotation marks omitted). This sort of language had not found its way into prior Maine decisions.

In the wake of *MaineToday Media, Inc. v. State of Maine* citizens and news organizations should generally have access to at least some portions of Maine 911 transcripts, regardless of their relevance to a pending criminal matter. The Court suggested that in most instances 911 transcripts should be made public not later than once a perpetrator has been charged with a crime. The decision endorsed access to 911 information as within the core purposes of public records laws, and stands against the tide of rising confidentiality when it comes to 911 calls -- a controversial issue in many states.

Sigmund D. Schutz of Preti Flaherty, LLP in Portland, ME represented MaineToday Media, Inc., publisher of the Portland Press Herald / Maine Sunday Telegram. Deputy Attorney General William R. Stokes, Chief of the Criminal Division at the Maine Office of the Attorney General represented the State of Maine. Patrick Strawbridge of Bingham McCutchen, LLP in Boston, MA filed an amicus brief on behalf of the Reporters Committee for Freedom of the Press, the New England First Amendment Center, the Maine Association of Broadcasters, the Maine Freedom of Information Coalition, and the Maine Press Association.

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Across the Pond: Updates on UK and European Media Law Developments

By David Hooper

Open Justice: Naming Acquitted Defendants Who Might Be At Risk from Terrorists

The recent decision given on 17 December 2013 in the Court of Appeal by the Lord Chief Justice in *R v Marines A, B, C, D and E and Guardian and other Media* 2013 EWCA 2367 raised an interesting question of open justice. The facts were that a number of British soldiers in September 2011 had come across a severely wounded but heavily armed Afghan rebel. One of the Marines had told the rebel that it was time for him to shuffle off his mortal coil and made some jocular remarks about the Geneva Convention. Unhappily for him, his helmet microphone recorded this for posterity. Marine A was convicted but Marines B–E were acquitted. There had been reporting restrictions preventing their being named during the trial. The question was what happened at the end of the trial.

There was little difficulty in deciding that the convicted Marine A should be named. More problematical was what should happen in respect of those who were acquitted, bearing in mind that publication of their names could place their lives at risk from reprisals. Matters were complicated in that the trial judge had initially decided that their names could be published, but was then subsequently persuaded that he should make an Order prohibiting their publication.

The Court concluded "It would require an overwhelming case if a person convicted of murder in the course of an armed conflict were to remain anonymous."

The Court upheld the observation of Lord Diplock in *A-G v Leveller Magazine* [1979] AC 440 "*If the way the Courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the Court itself it requires that they should be held in open Court to which the press and public are admitted and that in criminal cases at any rate all evidence communicated to the Court is communicated publicly.*"

They also upheld the observation of Lord Steyn in *Re S (A Child)* [2005] 1 AC 593, "*The ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. The duty of the court is to examine with great care each application for a departure from the role by reason of rights under Article 8 … The full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.*"

As regards Marine A, who was convicted, the Court concluded "*It would require an overwhelming case if a person convicted of murder in the course of an armed conflict were to remain anonymous.*" The Court appreciated that this might place the Marine at risk while serving his sentence, but that was something that the prison authorities were equipped to deal with. So far as the acquitted soldiers were concerned, they had returned to military service. There was some evidence that their identity was already known to a number of journalists.

The Court concluded that "*The risk was not immediate and that it would not be reasonable (on the facts of the case) to make so substantial a derogation from open justice as to prohibit the identification of (those soldiers)* …." Attempts are being made to appeal this ruling to the Supreme Court and pending the final resolution of the case the names of the acquitted soldiers have not yet been published, however, on 19 December 2013, the court decided that the names of two of the four acquitted soldiers could be published leaving the issue of publication of the names of the other two over for further argument..

Flood v. Times Newspapers Limited

The last act in the case which had gone to the Supreme Court (Flood v Times Newspapers Limited (2012) UK SC 11) was reported on 19 December 2013. This was an assessment of damages, which was heard before Mrs Justice

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Nicola Davies. The primary decision was that the article entitled "*Detective accused of taking bribes from Russia*" was protected by Reynolds privilege when it originally appeared in The Times newspaper and the TimesOnline website.

The case concerned possible improper or corrupt conduct between a serving police officer and a Russian oligarch. This led to a police investigation as a result of which the police officer was cleared of the allegations against him. Flood had been exonerated by the investigating police officer and this had been upheld by the Independent Police Complaints Commission. The way that the investigation had been reported and the matter had been investigated by The Times journalist Michael Gillard resulted in the court finding that notwithstanding the ultimate exoneration of the police officer the original report that he was being investigated was covered by Reynolds privilege as was the fact that he had been named as the officer under investigation.

The article was published on June 2006 and Flood was officially notified that he had been exonerated in September 2007. The result of the decision of the Supreme Court was that the publication between June and September 2007 was covered by Reynolds privilege. The problem was that The Times did not update their website until October 2009 to record the fact that he had been exonerated.

The case concerned possible improper or corrupt conduct between a serving police officer and a Russian oligarch. This led to a police investigation as a result of which the police officer was cleared of the allegations against him.

Flood's claim failed in respect of the period June 2006 and September 2007 but he sued in respect of the publication between the period September 2007 and October 2009 when the fact that he had been exonerated was incorporated into the online report. There was no defence in respect of this period of publication and the judge awarded Flood £45,000 libel damages plus £15,000 aggravated damages. The case demonstrates the need to update websites when it is drawn to the attention of the publishers that the facts have changed and that what may have been originally justified is no longer justifiable. The Internet lends itself to such updating or modification and the lesson of this case is that it may well prove to be costly if the original story is not updated or modified. It does not necessarily mean that there is a continuing obligation to keep updated the reporting of a particular case, but if new facts are drawn to the attention of the newspaper, it may very well be incumbent on the paper to update the story.

The judge felt that there was a balancing exercise to be carried out. She stated "*it is possible to pursue journalism which is said to be in the public interest and demonstrate consideration for the subject, whose reputation may suffer in the event of publication. The need for such consideration is particularly acute given the subject's lack of redress. Once it is known that there is material which exonerates, in whole or in part, the subject of the journalistic investigation, consideration should be shown for the position of the subject by publishing exculpatory material*". The judge was critical of the failure on the part of the newspaper to update the story and to link it with the settlement of the action and indeed she concluded that the correspondence and aggressive and hostile tone had increased the distress and hurt to the Claimant. The judge accordingly awarded damages of £45,000 to reflect the distress, anxiety and suffering and damage to his reputation the claimant had sustained in the period 5 September 2007 to 21 October 2009 in order to mark his vindication. She also awarded a further £15,000 to represent the aggravation of those damages by reason of the conduct of the defendants and "*to serve as a deterrent to those who embark upon public interest journalism but thereafter refused to publish material which in whole, or in part, exculpated the subject of the investigation*".

Media defendants in such circumstances have to consider carefully whether some modification to the original story is required when exculpatory facts are drawn to their attention. That has to be considered on its own, as there are perils in trying to tie the modification of the story to a settlement of the case, tempting as that may be in commercial terms.

A Claim against the Media Struck Out

19 December 2013 also saw a decision in the case of *Kneafsey v Independent Television News and Channel 4* (2013) EWHC 4046 by Mr Justice Tugendhat. This was also a claim involving the police, but it could perhaps be said that

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the claim was rather more ambitious than the Flood claim. At the heart of the case was whether a number of police officers had used excessive force in arresting a man who was later convicted of handling stolen goods. A disciplinary enquiry led to the officers being reprimanded but they remained in the police force. This was the subject of some criticism in the news report. The claim was based on a somewhat elaborate meaning spelled-out of the words that there was a conspiracy on the part of the claimants to mislead the disciplinary tribunal.

What was interesting in the decision, which was to strike the claim out was the judge's willingness not only to doubt whether the words bore that meaning but to be willing, even on a strikeout application to conclude that no useful purpose would be served by the action proceeding as there was no real prospect of the officers being awarded any more than nominal damages. The judge was also prepared to look at the prospect of a Reynolds defence, even though at that stage it had not been pleaded as a strike-out application took place before the service of the defence. However, the judge was prepared to look at the overall circumstances and concluded that the claimants had no real prospect of defeating a Reynolds defence and he therefore concluded that the case for summary judgement should be decided in favour of the defendants. The case is a good illustration of the robust approach that the courts are willing to take inappropriate circumstances at a very early stage in proceedings which they conclude are without merit, rather than letting the case proceed with the consequent cost involved on the basis that there might be some arguable points which could merit a full trial.

Media organizations would be liable to contempt if they did not take down the offending material during the period during which the relevant proceedings were "active."

Contempt of Court:
Jurors and the Internet

On 28 November 2013 the Law Commission published a report on the consultation which had taken place and, in fact, ended on 28 February 2013, on how to deal with jurors who were conducting their own research on the Internet and social media in breach of their duties as jurors. This is a matter about which I have written earlier.

One of the points which was considered was what liability there should be in respect of material which might seriously prejudice a trial –one case – *R v Tomlinson* -had involved material which was available on the Internet in the form of highly prejudicial evidence of previous disciplinary action for violent conduct against a policeman who was subsequently put on trial for manslaughter – when it was perfectly legitimate to publish the original material and before the criminal proceedings had become "active," so as to trigger the strict liability rules relating to contempt of court – namely that one can, irrespective of your state of mind, be guilty of contempt of court if one publishes material which gives rise to a substantial risk of serious prejudice to a trial.

The recommendation is that in relation to such publications, no liability would arise until the Attorney General had put the media on formal notice that the relevant proceedings have become active since the date of the original publication and drawing the attention of the media to the offending contents of the publication. They also recommend that prosecution, defense or the Attorney General should be able to apply for an injunction to prevent the continuing publication of the material, with the permission of the Attorney General no longer being a prerequisite.

The effect of this is that media organizations would be liable to contempt if they did not take down the offending material during the period during which the relevant proceedings were "active." That was what could have happened in the *Tomlinson* case where the media were ordered to take down the originally permissible material during the currency of the trial.

If effect is given to these proposals by the Law Commission, which would require amending legislation which it seems quite likely, the media would face an increasing number of applications to remove potentially prejudicial material from their archives. The likelihood also is that it would be a fairly fruitless task trying to persuade a criminal court that such material was not prejudicial, or that

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the interests of freedom of speech outweighed fear about prejudice to the trial.

The Law Commission also recommend the creation of a new statutory criminal offence for a juror deliberately searching for extraneous information relating to the case which he or she is trying. This brings the law into line with the practice in Australia. At present, jurors should be given very clear directions by the judge not to do their own research and to try the case on the evidence presented in court. There have been a number of cases where jurors who have disobeyed such directions have been jailed. In such circumstances, it does seem to make sense for there to be a specific criminal law prohibiting such activity with it being made abundantly clear to jurors that they would themselves be committing a crime if they did their own Internet research during the trial.

The Law Commission does, however, recommend that the absolute prohibition on any disclosure of jury deliberations under Section 8 Contempt of Court Act 1981 should be amended. There should be exemptions for a juror who discloses deliberations to the appropriate authorities, where he or she believes there has been a miscarriage of justice, or where it is necessary for the purpose of allowing approved academic research into jury deliberations.

Mitchell admitted that he had been less than polite to the police but denied calling them plebs, a term really only used by toffs who had benefited from a private education involving learning Latin.

Plebgate – A Cautionary Tale on Costs

Plebgate could really have only have happened in England. The Chief Whip of the Conservative Party was leaving a Cabinet meeting at 10 Downing Street and wanted to bicycle through the main gates which required the Police to open them. They refused to do so and insisted that he pass through the side gate. He became irate, but the matter at issue was whether he called the Police "*f...ing plebs*" – something he denied. However, he lost his job.

It subsequently appeared that the Police were not telling the truth and one of the Police officers faces criminal charges. This was too good a story for The Sun newspaper to miss. They reported the plebs remark, only to find themselves sued for libel by Mr Mitchell, who benefited from a conditional fee agreement with the claimant lawyers, Atkins Thomson. Mitchell admitted that he had been less than polite to the police but denied calling them plebs, a term really only used by toffs who had benefited from a private education involving learning Latin.

So far so good and lots of employment for the legal profession. The Sun's lawyers anticipated their costs in the libel action would be £589,558. The Claimant's lawyers proposed to charge a bargain basement £506,425. Unhappily, the Claimant's solicitors failed to comply with CPR PD51D Defamation Proceedings Cost Management Scheme, in which paragraph 4 provided that not less than seven days before the hearing of the case management and costs budget hearing, they should lodge their costs budget.

The hearing had been originally scheduled for 10 June, but it was relisted for 18 June. Unfortunately, the Claimant solicitors arrived at Court without a budget. The procedural judge, Master Victoria McCloud, refused to grant relief against the consequences of this omission, which were to limit the recoverable fees to the applicable Court fees totalling no more than £2,000. This was something less than cheering news for Atkins Thomson, who were doing the case on a conditional fee agreement.

The default was relatively trivial and arose out of pressure of work at the firm. However, with the case being argued by leading specialist counsel in costs matters, the Court of Appeal, presided over by the Master of the Roles, Lord Dyson, had no sympathy. *Mitchell v. News Group Newspapers*, (Nov. 27, 2013)

The litigation must be conducted efficiently and at a proportionate cost and the enforcement of compliance with Rules of Practice and Court Orders was of paramount importance and should be given great weight. A court was likely only to grant relief against these draconian consequences, which are the product of the attempts by the proposals by Lord Justice Jackson for cases to be run efficiently and at less cost, in extreme cases, such as accident or debilitating illness, rather than for administrative reasons such as overwork and the general vicissitudes of life.

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As Lord Dyson stated "*In the result, we hope our decision will send out a clear message. If it does, we are confident that in time, legal representatives will become more efficient and will routinely comply with Rules, practice directions and Orders. If this happens, then we would expect that satellite litigation of this kind which is so expensive and damaging to the Civil Justice System will become a thing of the past.*"

Cases must, therefore, be run efficiently and within budgets and administrative slip-ups will receive no mercy from the courts. (It should be said that Atkins Thomson have stated that they will conduct the case pro bono so Andrew Mitchell will not be a loser. The Sun is at risk of having to pay damages if they lose the libel action, but not the costs of over £500,000.)

Implementation of the Defamation Act 2013

I summarized the principal provisions of the Defamation Act of 2013 in an earlier article. *See* *The New Defamation Act: What Difference Will it Really Make*, MediaLawLetter May 2013.

The Act itself was passed back in April 2013 and it was far from clear why it was taking so long for the legislation to be implemented. The delay having taken place, it seemed likely that the legislation would not be brought into effect until the spring of 2014, when it seemed likely that the counter-balancing protection for Claimants from a stronger independent regulator and possibly with an arbitration scheme might come into effect to offset the changes in the Defamation Act 2013, which favoured Defendants.

The Act itself was passed back in April 2013 and it was far from clear why it was taking so long for the legislation to be implemented.

On 8 November 2013, the Consultation on Costs Protection and Defamation of Privacy Claims closed. The upshot of this is that the present costs regime, including conditional fee agreements and the ability of Claimants to recover After The Event Insurance premiums, will be abolished and replaced by a new acronym called QOCS which stands for "*Qualified Oneway Costs Shifting.*"

These changes had been implemented in other areas of the law, but there was belatedly a cut-out for defamation and privacy claims while the Leveson proposals and regulation of the Press were mooted. This in effect follows the recommendation of Lord Justice Leveson that costs protection should be extended to media related litigation (Recommendation 74, Executive Summary). Under the proposals, a judge would be able to impose a "one-way" costs order in a case where it is clear that one side would not otherwise be able to participate in proceedings because of the potential legal costs.

The poorer party would only be liable for its own legal costs, while the richer party would be liable for both sides costs if it lost the case. Theoretically that protection could extend to the defendant as well if they were being pursued by a wealthy serial litigant, like the late Sir James Goldsmith or Robert Maxwell.

These changes are likely to benefit Defendants in that the days of Claimants being able to recover double fees incurred by a Claimant, who is never himself going to have to pay those conditional fees with the consequence that they tended to get inflated in the absence of a paying client, plus the enormous After The Event Insurance premiums, which provided only very limited comfort for successful Defendants as the insurance was nearly always insufficient in the amount of cover, are being replaced by a preferable regime so far as Defendants are concerned, although that will provide a degree of protection for unsuccessful Claimants in that they may not have to pay the Defendant's costs, even if they lose.

That may encourage unmeritorious claims, but the financial risks in winning a questionable libel action are such, particularly as the Claimant is likely to have to pay his own legal costs, that libel Claimants are likely to be very cautious in bringing claims unless they are reasonably confident that they have a good prospect of success. We will have to await seeing how the Government strikes a balance between the interests of Claimants who consider they have been libelled and Defendants who feel they need protection against unsuccessful Claimants. In this instance, one imagines that the scales will tilt somewhat in favour of Claimants.

However, the Act and the Regulations under section 5 relate to the definition of operators of Websites Regulations 2013, which it will be recollected will govern the liability of

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Internet Service Providers and will lay down the procedure which an Internet Service Provider should follow when a notice is served upon them regarding material posted by a third party will on balance significantly favour defendants.

Privacy & Princess Caroline

There has been yet another decision from Strasbourg over publication of photographs of Princess Caroline on yet another holiday in a German magazine, which also contains details about the Von Hannovers. *Von Hannover v Germany* (no 3).

Caroline has provided a service in a further clarification of the European law on privacy and her resort to multiple privacy litigation – she has brought three such claims – seems to have negated her initial success. The Federal Court of Justice in Germany concluded that she was a public figure and that in consequence, although the article was of no particular public interest in the sense of concerning any real political topic of the day or matter of legitimate public debate it was however on balance the case where freedom of expression in the sense of the somewhat dubious ground that there was a general interest in a discussion about how public figures let out their holiday homes outweighed her right to private life. This decision was upheld in Strasbourg.

There seems to be likely to be more latitude for the publication of photographs and articles of general interest to readers about public figures and it seems that all she has achieved is to undermine her initial success in preventing the publication of photographs of herself in a restaurant. The threshold of public interest which was initially be fairly difficult hurdle of contributing to public debate does seem to have been lowered and this is a good decision for celebrity magazines- an example of the case too far.

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Judgment Against Austrian Newspaper Not a Violation of Article 10

Defamation, Privacy and Public Figures

By Conor McCarthy and Caoilfhionn Gallagher

Print Zeitungsverlag GmbH v. Austria is a somewhat surprising decision by the European Court of Human Rights, in which the Court, applying principles derived, in part, from its case law on privacy, rejected a newspaper's challenge to a defamation judgment against it in respect of its publication of a public interest story concerning a number of politicians.

Background

The applicant newspaper, Print Zeitungsverlag GmbH, publishes "the Bezirksblatt", a weekly newspaper in Tyrol, Austria. In January 2006 approximately 300 copies of an anonymous letter were sent out to individuals, including members of the supervisory board of the tourism association for two towns in Tyrol. These letters concerned two individuals, involved in local politics and public life, one of whom was standing for election to the post of chairman of the local tourist association, the other had been involved in politics for many years and was at the time of the letter the member of the city council in charge of public finance, (as well as holding a number of other public posts).

The Print Zeitungsverlag GmbH is not easily reconciled with certain elements of the ECHR's long established case law in this field. The decision may be an outlier, perhaps confined to its own facts. Time will tell.

In January 2006 about 300 copies of an anonymous letter were sent out in two local towns. The letters referred to two local politicians who were brothers and practicing lawyers. The letter was written in the form of a survey and contained the following question:

> 1. Would you buy a car from this man? 2. Would you stake your money on a promise made by this man? 3. Does this man have the necessary personal/ professional qualifications? 4. Has this man ever built anything properly? 5. Is this man honest with his own family? 6. Would you allow this man to execute your will? If you have answered one of these questions with 'no', please ask yourself why you want to leave this man in his current position.

The Bezirksblatt printed a story about the letter, which contained a full copy of it. The article contained the story of the anonymous letter and the politicians replies to the accusations made in it. It reported that both of them had stated that the letter had attempted to harm their political activities and had considered the accusations to be a personal insult.

The brothers sued Print Zeitungsverlag, claiming that the contents of the letter were defamatory. The domestic court in Austria held that the anonymous letter, which had been included in the article, fulfilled the requirements of defamation, as it accused the brothers of dishonesty and other disreputable character traits, relating to both their professional and private lives.

The brothers obtained a judgment against the company, which ordered it to pay them €2,000 each in damages and to publish the judgment. Print Zeitungsverlag appealed the decision, but its case was dismissed by the Innsbruck Court of Appeal in August 2006.

On 30 May 2007 Print Zeitungsverlag applied to the Court of Human Rights complaining that the judgment of the domestic court was a violation of its rights under Article 10.

ECHR's Approach to the Case

It was accepted by the Court (and the parties) that both Article 8, which encompasses the right to privacy and the protection of one's reputation as well as Article 10, the

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publisher's right to freedom of expression were engaged in the case. The overarching question for the Court was therefore whether the interference with the applicant's Article 10 rights was "neccessary in a democratic society" (in the terminology of the court) to protect the reputation of others, in view of the court's jurisprudence on this question in the context of journalism.

In answering this question the Court sought to apply principles developed in a number of its recent decisions, particularly *MGN Limited v. the United Kingdom*, *Von Hannover v. Germany (no. 2)* and *Axel Springer AG v. Germany*, the latter two of which were both cases decided by the Grand Chamber of the Court.

The Court noted that in cases of this type it was required to consider whether national authorities had struck a "fair balance" between two values guaranteed by the Convention, namely freedom of expression protected by Article 10, and the right to respect for private life enshrined in Article 8. The Court observed that "where the balancing exercise between the rights under Articles 8 and 10 of the Convention has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts".

The Court identified, from its previous case law, a number of criteria as being relevant where the right of freedom of expression is being balanced against the right to respect for private life and applied these to the case, finding as follows:

1. **The extent to which the report amounts to a contribution to a debate of general interest**: The Court accepted that the article contributed to a debate of general public importance, namely the election of a new chairman of the local tourism association.
2. **How well known is the person concerned and what is the subject of the report?** Again, the Court noted that domestic courts had taken into account that because of their respective functions as chairman of the tourism association and member of the City Council each complainant in the defamation case was already in the public eye. In addition, the Court also attached weight to the fact that the domestic court had taken into account that the article was objective in its style and content in reaching its decision.
3. **The prior conduct of the person concerned**: The Court observed that there was no indication that the politicians, although often in the local media, had sought the limelight or laid open any details regarding their professional lives as practicing lawyers or their private lives. They had not previously been the subject of misconduct allegations. Weight was attached to this.
4. **The method of obtaining the information and its veracity**: The Court considered that the applicant's journalist had given the politicians an opportunity to comment on the allegations prior to publication but had proceeded with publication of the letter despite objections. It was noted that the applicant company did not state that the insinuations in the letter were true or had any factual basis. Furthermore, the domestic courts, it was found, had properly placed emphasis on the anonymous nature of the allegations contained in the letter. The Court accepted that this was a relevant and important factor stating that the contents of the letter amounted to a "gratuitous attack" on the applicant's reputation, in view of which, "there were strong reasons for considering that the publication of the anonymous letter transgressed the limits of permissible reporting".
5. **The content, form and consequences of the publication**: The ECHR endorsed the domestic courts' point that the publication by the newspaper had resulted in the dissemination of the letter to a much wider public than had previously been the case. The applicants had, the court noted, in consequence of publication experienced negative repercussions in their personal and professional lives following publication.
6. **The severity of the sanction imposed**: The Court noted that the sanction, an award of 2000 Euros to each of the politicians, was not such as to render the interference with free expression disproportionate.

In view of all these factors, the European Court of Human Rights found that the domestic courts had considered the

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matter properly, identifying and taking account of the relevant factors. The Court found that domestic courts had given "relevant and sufficient" reasons for arriving at the conclusion that while the publication of the article itself contributed to a debate of general interest, reproduction of the anonymous letter amounted to defamation.

Analysis

Overall, the approach of the European Court of Human Rights in this decision is surprising. The statements in the impugned letter were posed as questions, raising issues clearly going to matters of political debate and public interest. Moreover, it is well established in the jurisprudence of the ECHR that political figures must, in the interests of robust debate in the democratic arena, be more tolerant of criticism than private individuals. In its judgment the court did not appear to pay particular regard to this long established principle, which might have been thought to be a very weighty consideration in a case such as this.

Moreover, the intensity of review adopted by the Court is also noteworthy. Traditionally in the jurisprudence of the ECHR, measures or decisions at the national level which interfere with public interest journalism on matters of general concern attract the most intense degree of scrutiny with regard to proportionality, given the importance of journalism and debate in a healthy democracy. The court, however, applied the "light touch" approach of determining whether domestic authorities had "relevant and sufficient" reasons for the balance they struck between free journalistic expression and the protection of a public figure's reputation. This approach is typical in other free expression contexts, for instance, restrictions on advertising but is unusual in the context of public interest journalism concerning politicians and matters of general public concern.

It does appear that the *Print Zeitungsverlag GmbH* is not easily reconciled with certain elements of the ECHR's long established case law in this field. The decision may be an outlier, perhaps confined to its own facts. Time will tell.

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Paid, Political and Issue Ads Remain Banned for Public Broadcasters

By Judy Endejan

First Amendment junkies must read the Ninth Circuit's opinion in *Minority Television Project, Inc. v. Federal Communications Commission*, No. 3:06-cv-02699, issued on December 2, 2013. An *en banc* panel reversed a panel decision that had upheld the ban on commercial advertisements but struck down the ban on political ads and issue ads in 47 USC § 339(b).

The *en banc* panel reversed the panel decision, upholding all portions of the ban in 47 USC § 339(b). The decision and dissent depict the current conflicting philosophies about public broadcasting. The first, more historic view, is represented in the majority opinion written by Judge Margaret McKeown: public broadcasting is a treasured unicorn to be protected from the evils of commercialism to remain pure.

The second, more modern, expansive view, is represented by the sarcastic dissent of Chief Justice Alex Kozinski: unicorn treatment is not only unnecessary for public broadcasting, but is harmful to it and to the First Amendment. The unicorn model prevailed. The pointed barbs between each opinion make *Minority Television Project v. FCC* a fascinating example of how two brilliant legal minds can so persuasively make a case for reaching diametrically opposite conclusions.

Judge Kozinski makes an impassioned plea to recognize that First Amendment analysis of broadcast speech should not be different because of the nature of the medium, at this point in history.

Ninth Circuit Decision

The majority first found that § 339(b) must be examined under an intermediate scrutiny analysis, rather than under a strict scrutiny standard, based on the 40 plus year view that federal regulation of the broadcast spectrum, a scarce public resource, is entitled to a more deferential First Amendment review than regulation of other types of media. Judge Kozinski says bunk to this, calling the intermediate scrutiny standard, "mushy and toothless." Judge Kozinski says it's time to reconsider whether the "scarcity of spectrum" rationale should be given any force due to the intervening developments in the communications world since the theory was adopted. Nonetheless, the majority refused to disregard long standing Supreme Court precedent calling for a more deferential review of content-based broadcast regulation.

The majority then examined at length the record to support § 339(b) before Congress, finding that substantial evidence before Congress supported its adoption of the ban. The majority refutes the dissent's dismissal of the evidence before Congress, which Judge Kozinski characterized as "a bunch of talking heads bloviating about their angst." The majority rebutted "We are not abdicating to Congressional whim or succumbing to some notion that judges like public radio and television….. simply because we give credence to Congressional findings."

The majority recognized four concerns that Congress expressed in enacting § 339 (b). First, allowing commercial advertising would change the programming format, causing public broadcasting to use its unique character.

Second, allowing commercial advertising would impact public broadcasters' ability to raise money because subscribers and other non-commercial sources of funding would withdraw support. Third, commercial advertising would force public broadcasters to tailor their programming content to attract larger audiences and would no longer serve audiences with narrower, less popular taste. Finally, by becoming "commercial" public broadcasters would face increased costs, ranging from higher labor costs to higher royalty fees, to the loss of statutory benefits. Given the foregoing Congressional concerns, the majority found that there was a substantial governmental interest in adopting §339(b).

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The majority continued its intermediate scrutiny analysis, finding that § 339(b) was sufficiently and narrowly tailored to further [those] "substantial government interests." Section 339(b) prohibitions are specifically targeted at the real threat – the influence of paid advertising dollars. The statute prevents the commercialization of public broadcasting by prohibiting nearly all advertising but allows speech that does not undermine the goals of the statute. Specially, broadcasters can air promotional content for which consideration is not received and non-profit advertisements whether or not consideration is received. These do not pose the same risks to public broadcasters that for-profit, issue or political advertising would pose.

Finally, the majority found that the goals of § 339(b) could not be satisfied by using less restrictive means. This was proven by the history of the Advertising Demonstration Program, an experiment authorized by the Public Broadcasting Act of 1981 that allowed advertisements on some public broadcast stations with minor restrictions – that the ads not interrupt programming and be limited in length. The majority interpreted the experiment results to justify leaving § 339(b) prohibitions in place. (*Minority TV's* challenge to § 339(b) was a facial challenge and not an as-applied challenge. The appellant had initially challenged the FCC's orders and regulations at the District Court level, which was improper because jurisdiction over challenges to FCC orders arise exclusively in the Court of Appeals.)

The majority proclaimed that history proves that the statute succeeded in promoting Congress' purpose, because of the continuing differences between public and commercial broadcasting due to the ban on for- profit goods and service advertising, as well as political and issue advertising.

Judge Kozinski ripped into the alleged record before Congress in enacting § 339(b), particularly for a lack of evidence as to why political and issue ads are dangerous. He berated his colleagues for their lack of skepticism over a speech restriction on issue ads based upon an alleged non-existent record. "Issue ads can be quite important from a First Amendment perspective," he noted.

Judge Kozinski chastised his colleagues claiming that they had not applied intermediate scrutiny to the issue ad ban but "zero" scrutiny.

In Judge Kozinski's view, § 339(b) makes no sense and is unnecessary to protect public broadcasting from commercialization. He noted that the structure that governs public broadcasters by federal law will hold them to the task of serving the public interest. Given the structural legal differences between commercial and public broadcasting, Congress should have taken those differences into account rather than rely on "chicken littleisms" in enacting the advertising ban. Judge Kozinski's claims that the Adverting Program Demonstration experiment, "severely undermine the doomsday predictions made by witnesses before Congress and accepted as gospel truth by the majority today."

Judge Kozinski asserts that the majority failed to consider the serious adverse free speech consequences of the advertising ban in § 339(b). First, as the experiment showed, revenues from paid advertising can help stations acquire programs that would otherwise not be affordable. Thus, losing advertising revenues results in diminished speech. Second, additional non-governmental revenues would help public broadcast stations gain independence from the federal government. Currently, public broadcast stations are desperately dependent on federal subsidiaries. Third, advertisements are "speech" and their exclusion deprives viewers of an opportunity to obtain important information.

In sum, Judge Kozinski makes an impassioned plea to recognize that First Amendment analysis of broadcast speech should not be different because of the nature of the medium, at this point in history. Thus, restrictions in § 339(b) should be subject to a rigorous standard of review. He doesn't think a strict scrutiny standard of review would have mattered to the outcome in the case noting, "the restrictions on advertising by public broadcast stations fail any standard of review more rigorous than a straight-face test." He admits that the U.S. Supreme Court does not yet agree with him. This should not matter because "once the reason for a rule ceases, the rule should disappear" and the Supreme Court would expect courts to cease to apply such a rule. He concludes: "And I would set public television and radio free to pursue its public mission to its full potential. We'd all be better off for it."

Whether Judge Kozinski is right or wrong, he certainly advances a more realistic view of the media landscape today.

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The Ethics Nerd's Guide to the Media Lawyer's Ethics Library

By Lucian T. Pera

The ethics nerd. Every law office has, or should have, at least one. You know, the guy or gal that other lawyers frantically descend on when they need to sue a company they represented last year, or when they really want to contact that former CFO of an opposing party. Yes, I know, the politically correct term these days is "firm counsel" or "ethics counsel," or, in larger firms, even "general counsel." But we're still ethics nerds.

But what do you do when they're on vacation, or actually practicing law themselves? Well, when prayer fails, you can try to find the answer yourself. But that does require that you have some minimum level of resources at hand on legal ethics and related issues. Do you? Today, we're going to find out.

This article will sketch for you the most effective basic ethics tools you can and should have available to you, even if they are only beautifully arranged behind the glass door in the "Break-in-Case-of-Ethics-Emergency" box in your office.

Ask most ethics nerds about resources for media lawyers on ethics, and you will get a blank stare, unless they know about the work of the MLRC Defense Counsel Section's ethics committee.

The Rules in Your Jurisdiction(s)

First and foremost, you need to have a copy of the rules handy. Specifically, you need to have a current copy of the ethics rules in the jurisdictions in which you regularly practice within arm's reach. Usually, this is easy, but here are a few suggestions for those in doubt.

The high courts or bars of many jurisdictions publish handy paperbound or electronic compilations of their ethics rules, and many jurisdictions' rules are already hidden away in the pamphlets many trial lawyers have of their jurisdiction's court rules. These are often cheap or free in hard copy; sometimes, they're downloadable free.

Almost every jurisdiction's current ethics rules are also readily available on the web, sometimes in multiple locations. You should bookmark them right now. One central source that will get you to these sites is the American Bar Association's Center for Professional Responsibility website listing state web resources (http://www.abanet.org/cpr/links.html).

Which jurisdictions matter to you? For some, who never practice outside one state, it's easy, but, remember, you'd be well advised to have the rules handy from *every jurisdiction in which you practice regularly*. This includes federal and state agencies, a number of which (*e.g.*, the U.S. Patent and Trademark Office) have adopted their own ethics rules, and federal district courts, where the rules are usually borrowed from the state in which they sit. And these other agency and federal jurisdictions sometimes vary or add just one or two rules of their own to the ethics rules they borrow from another jurisdiction, so some care is appropriate.

A Secondary Source on Your Jurisdiction(s)

Many jurisdictions also have available one or more secondary sources that act essentially as treatises on ethics and lawyering. If your jurisdiction has one, and if it's any good at all, make sure it's within arm's reach

These range from a simple version of your jurisdiction's statutory code that includes a copy of your ethics rules annotated with cases and ethics opinions, to handbook of forms, to guidelines for trust accounting, to full-blown books on the law of ethics in your state. Some states even have multiple sources like this.

Because these secondary sources can be hard to find, you should ask around. Ask your ethics nerd, check your state bar's website for publications, or maybe even email the chair of your state bar's ethics committee. Money spent to buy this kid of resource could be the best money you ever spend on ethics resources.

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Ethics Opinions

Most jurisdictions have some source of written ethics guidance in the form of ethics opinions, often from a state or local bar ethics committee. The authority these carry varies widely, but their value often far outweighs any precedential authority established for them by rule or case law. As a practical matter, when the only available guidance on an issue comes from a state bar ethics committee, and where the opinion is at least moderately well-reasoned, an ethics opinion can have the weight of a supreme court opinion for many judges.

Where do you find them? Well, that can be a challenge. Before the internet ("Yes, Virginia, the phrase 'carbon copy' used to refer to something lawyers and their secretaries actually used."), it was almost impossible to find some states' ethics opinions. Today, your odds are very good of being able to find, available for free on the internet, the ethics opinions of almost all jurisdictions. Also, some jurisdictions collect and publish their ethics opinions.

Odds are, the organizations that publish ethics opinions in your jurisdiction will host on their websites – and, if you're lucky, index or allow searches of – their opinions. For pointers to these sites, see the ABA Center for Professional Responsibility listing of state ethics resources (http://www.abanet.org/cpr/links.html), and Cornell's American Legal Ethics Library's state links (http://www.law.cornell.edu/ethics/). LEXIS and WestLaw also make most existing ethics opinions available as part of their ethics offerings. Or you can just try Googling, "[Your jurisdiction's name] ethics opinions."

Got Enough Ethics?

OK, so now your emergency ethics kit includes your jurisdiction's rules, along with access to any available secondary source for your jurisdiction and access to available ethics opinions. With luck, you've been able to accomplish this at little or no expense, especially if your jurisdiction offers these resources on the web for free. Can you stop there?

Quite possibly so. For example, if you practice mainly in New York, resources available on the internet and Professor Roy Simon's *Simon's New York Code of Professional Responsibility Annotated* (Thomson Reuters 2013, updated annually; $238; http://store.westlaw.com/simons-new-york-rules-of-professional-conduct-annotated-2013/185145/14691598/productdetail) should give you as complete a state ethics library as any normal, non-ethics-nerd lawyer needs.

In some smaller states, however, having a copy of the state's ethics rules and access to a set of ethics opinions on the web is a complete state library in itself. In Mississippi, for example, the Mississippi Rules of Professional Conduct are fully available on the Mississippi Supreme Court's website (http://courts.ms.gov/rules/msrules.html), Mississippi State Bar ethics opinions are available in full text and searchable on the bar's website (http://msbar.org/ethics-discipline/ethics-opinions.aspx), and the bar also publishes several ethics-related pamphlets that it fully republishes on its website (available under "Ethics & Discipline" link at http://msbar.org/). Access to these resources is probably all that an ordinary Mississippi lawyer would need for most day-to-day ethics questions.

Please, Sir, I Want Some More

My advice, however, is to go just two steps further – investigate whether there are ethics resources that are specific to the area (or areas) in which you practice and consider getting a national, general ethics treatise.

In many practice areas, there are quite helpful resources that collect authorities and provide guidance that is specific to that particular area of practice. While they can be hard to find, the pursuit is often worth the effort.

Ask most ethics nerds about resources for media lawyers on ethics, and you will get a blank stare, *unless* they know about the work of the MLRC Defense Counsel Section's ethics committee. Although there are a few stray (and very good) articles elsewhere, the only place this writer knows of anywhere that has a collection of ethics guidance directed at media lawyers is the website of this MLRC ethics committee, which lives at http://medialaw.org/committees/ethics-committee. Posted there are dozens of practical and helpful articles and other materials prepared by committee members, almost all of which appeared in these pages first. Visit the site today and bookmark it.

Published ethics help is available in other practice areas, too, almost all of which is generated by practice-area-specific

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bar associations. For example, the ABA Section of Environment, Energy, and Resources has published Professor Irma S. Russell's *Issues of Legal Ethics in the Practice of Environmental Law* (ABA Section of Environment, Energy, and Resources; 2003; $79.95, for Section members, $64.95; http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5350097). Any environmental lawyer would be well-served by having this extremely helpful, almost-500-page, book on her desk.

The American Immigration Lawyers Association has several publications, including *Ethics in a Brave New World* (AILA; 2004; $59, but free for members; http://agora.aila.org/Product/Detail/643), and a section on its website devoted to legal ethics for immigration lawyers (http://www.aila.org/content/default.aspx?docid=15764), all of which provide practice-area-specific guidance on legal ethics. Some of these resources are available to anyone on the group's website; some are available only to members.

The prestigious American College of Trust and Estate Counsel (ACTEC) has published, both in hard copy and available free on the web, its Commentaries on the Model Rules of Professional Conduct (4th Ed. 2006; available at http://www.actec.org/public/CommentariesPublic.asp, and an annotated set of engagement letters for the trusts and estate lawyer (2nd ed. 2007; available at http://www.actec.org/public/EngagementLettersPublic.asp.

But this is just a sampling. Check with any national or state specialty bars in your practice area, ask around among practitioners, and, of course, ask your ethics nerd.

One-Stop National Resources

You might also think about trying to vacation-proof your ethics resources.

A lawyer's ethics library does not really get a workout unless the question is tricky, or matters quite a lot to the lawyer or her client. With the abundance of national resources on ethics that have emerged over the last decade, and with more jurisdictions moving closer to the ABA Model Rules of Professional Conduct, there are several national treatises that can neatly supplement one jurisdiction's resources and get to help that may lie outside your home jurisdiction. Two come to mind immediately.

My personal favorite for the regular lawyer is a handy, nearly 2000-page paperback by Professors Ronald D. Rotunda and John S. Dzienkowski, called *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (West; 2012-2013 ed.; $142.80; http://store.westlaw.com/legal-ethics-lawyers-deskbook-on-professional-responsibility-2012-2013-aba/185367/17503733/productdetail). Published in conjunction with the ABA, the current 2012-2013 edition includes a pretty complete treatment of almost every ethics issue you will ever see, with short, but thorough, narrative sections about each, and appropriate and complete cites to all the relevant ABA opinions and many of the leading cases from across the country.

My other top candidate for a single-volume, reasonably-priced national resource is the ABA's *Annotated Model Rules of Professional Conduct* (ABA Center for Professional Responsibility; 7th ed. 2011.; $159.95 list price, with discounts down to $119.95 for members of the ABA Center for Professional Responsibility; http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=2170003). The *Annotated Model Rules* provides narrative summaries of many rules-related issues, organized by ABA Model Rule, with citations to and discussions of all relevant ABA opinions and much case law. Its coverage is not quite as broad as the Rotunda and Dzienkowski *Deskbook*, but it's a well-written alternative that gets you quickly to the most important opinions and other sources nationally.

Another viable substitute for such a national treatise is the set of loss prevention materials that some legal malpractice insurers make available to their insureds. For example, if your law firm is a member of Attorneys Liability Assurance Society (ALAS), be absolutely sure to have your loss prevention partner give you access, whether in hard copy or online, to their *Loss Prevention Manual* and related materials. Aon, which brokers legal malpractice insurance for many large law firms, also periodically provides some similarly excellent materials to its client law firms through its loss prevention counsel.

Don't Leave Home Without It

There are lots of free things on the web, many of them very useful, but there's one more absolutely indispensable site you need to bookmark: www.FreivogelOnConflicts.com.

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The site contains everything you need to know about conflicts of interest, period. It is authored entirely by William Freivogel of Chicago, whose background includes very productive stints in loss prevention at Aon Risk Services, Inc. and, before that, at ALAS. Freivogel scrupulously keeps it up to date on a weekly, if not daily, basis. Bookmark it. Now.

Ready to Splurge?

What if you want to go a little deeper, or if money is no object – what other valuable ethics resources could you buy? Well, here's an idiosyncratic list your office ethics nerd would almost certainly bless, even if he might have additions or snarky comments:

ABA/BNA Lawyers' Manual on Professional Conduct (ABA and BNA; print edition pricing starts at $1,826 and electronic edition pricing at $2,060 annually, with new-subscription discounts for ABA members of 10% and 15% for ABA Center for Professional Responsibility members; http://www.bna.com/lawyers-professional-conduct-p5995/). Still the "bible" of ethics and professional responsibility, this publication is a combination loose-leaf treatise and current awareness service, with solid coverage of pretty much any ethics topic out there.

The electronic version has truly excellent search capability and a nifty interface that makes it much easier to use than the print version. The bi-weekly *Current Reports* awareness service (available by email) is the gold standard for those who try to really keep up in this field. Pricey, yes, but worth it.

The Law of Lawyering (Wolters Kluwer Law & Business 3rd ed., with annual supplements; $550; http://www.aspenpublishers.com/Product.asp?catalog_name=Aspen&product_id=0735516081). Professors Geoffrey C. Hazard and W. William Hodes author this two-volume loose-leaf treatise, which remains the standard work in the field. Professor Hazard was the Reporter for the original 1983 ABA Model Rules of Professional Conduct and a member of the ABA Ethics 2000 Commission that revised them. Hazard and Hodes is probably still the ethics treatise most frequently cited by courts, and it provides really authoritative treatment on all ethics issues.

•*Restatement (Third) of the Law Governing Lawyers* (ALI; $195 for the 2-volume hardbound edition, $75 for the 1-volume paperback; http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=37). Approved by the American Law Institute in 1998 after many years of work, this Restatement was published in 2000 and has rapidly become a standard reference on almost all the issues it touches. Its coverage is broader than just ethics, including numerous malpractice, attorney-client privilege, and other topics, with the usual authoritative treatment and numerous, usually well-chosen citations. The paperback version is a little-known bargain, but you might need to buy the hardback's pocket part to supplement it.

Lawyer Disqualification (Banks and Jordan; 2003 with annual supplements; $249; http://www.banksandjordan.com/catalog.html). Richard E. Flamm's superb addition to the literature of conflicts of interest and other bases for lawyer disqualification covers substantive and procedural issue comprehensively, with cases from coast to coast. Combined with Bill Freivogel's site, www.FreivogelOnConflicts.com, a reader would have virtually complete and comprehensive coverage of conflicts of interest. Put another way, if you have a conflict of interest problem and you can't find an answer in Flamm or Freivogel, there isn't one.

Privilege and Work Product

Understandably, ethics nerds often are a great resource on issues of attorney-client privilege and the work product doctrine, so a word about resources in this challenging area is in order.

While there are always the old stalwarts, like *Wigmore on Evidence* and *Weinstein's Federal Evidence*, two relatively recent, very well-organized publications often provide quick and solid answers to these issues:

Attorney-Client Privilege in the United States (Thomson West, 2012 ed.; $418.60 for softbound version; $598 for e-book (or $45 monthly); http://store.westlaw.com/attorney-client-privilege-in-united-states-2012/179304/13507262/productdetail). In my experience, Professor Paul R. Rice's two-volume treatise is the single most accurate, authoritative, and helpful publication on privilege issues.

The Attorney-Client Privilege and the Work Product Doctrine (ABA Section of Litigation; 5th ed., with separate 2012 supplement; $220, and $185 for Section members; http://apps.americanbar.org/abastore/index.cfm?

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section=main&fm=Product.AddToCart&pid=5310415PKG). This ABA Section of Litigation handbook, authored by Chicago lawyer Edna Selan Epstein, is mostly in outline form, and contains quick, very effective treatments of what seem to be all the essential cases on all the important privilege and work product issues faced by trial lawyers.

Now that you've had the guided tour of essential ethics resources, be sure to check off these items from your to-do list:

1. Get the ethics rules of your jurisdiction (or jurisdictions) readily available to you.
2. Buy or bookmark any available secondary source on your jurisdiction's ethics law.
3. Get access to one decent national resource on ethics.
4. Tell your office ethics nerd to add an extra day to her vacation.

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A View from the Inside

What Do We, as Clients, Want to See and Not See from Our Outside Counsel?

By Stephanie S. Abrutyn

Welcome to the inaugural column of a new series to be written by a rotating group of in-house counsel – intermittently, of course, because none of the authors can predict their own schedules, except to say that some fire undoubtedly will erupt just as the deadline for the article approaches. Our hope is that this series will provide a forum for other readers to obtain answers to questions they have always wanted to ask but never found the right opportunity or that they should be asking but might not realize it.

If there is any topic which you would like to see us address, please reach out to Michael Berry or Russell Hickey, the co-chairs of the MediaLawLetter committee who are overseeing our motley crew of rotating columnists. Demonstrating that lawyers often do not take their own advice, they will promise confidentiality to anyone who requests it.

For the first column, we thought we should start with a basic, and oft- discussed subject that never gets old. What do we, as clients, want to see and not see from our outside counsel?

For the first column, we thought we should start with a basic, and oft-discussed subject that never gets old. What do we, as clients, want to see and not see from our outside counsel?

When we assembled our initial group of authors to discuss these issues, one primary theme emerged: know your client's business. Take the time to understand the challenges facing us as individual in-house lawyers, and the challenges facing our company as a whole.

For example, when an outside lawyer is asked to provide a budget for a particular case or matter, what is the in-house lawyer going to do with it? Over the course of my over fifteen years in-house, with three (or five, depending on how mergers are accounted for) different companies, the possible answers have included:

- Nothing, but our outside counsel guidelines require me to have one in the file.
- Forward it to an insurance carrier.
- Use it as a tool to control costs on the matter as it proceeds.
- Rely on it when deciding what strategy to pursue, including whether or not to pursue settlement.
- Show it to the client either as a lesson for the future or to help support my recommendation to settle or not to settle.
- Use it for purposes of preparing our department's budget or establishing a reserve.

Especially for litigation, budgets are more of an art than a science. In nearly every case, the outside counsel putting one together has to make a number of judgment calls and estimates. Knowing what the in-house counsel is going to do with that budget can guide those decisions towards a budget that is more accurate and more useful. And, yet, the last time I met with a group of associates at a law firm, a poll of the room found that nearly all of them had prepared a budget (or at least, a first draft) and not one of them had any idea what the client might possibly do with it, let alone what the specific client was going to do with the one being prepared.

Just as important is knowing where a particular matter fits within the business priorities of the company. What are our goals for this matter? How do we define success? What are the consequences if we lose? Fairly or not, that information is crucial to understanding how the client is going to look at outside counsel fees and costs. Much more so in many cases than the actual time expended or amount of work done. To draw on an example from my former life, if a news

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organization is subpoenaed for information that is non-confidential, often the company will fight the subpoena whether or not it truly cares if the information is disclosed. Both the principle, especially in a case where the shield law is clearly applicable, and the deterrent effect for potential future subpoenas make it important to fight. But unlike in a confidential source situation, there may be minimal or no practical consequences at all to losing. In those circumstances, going over budget or running up significant fees is frustrating and extremely difficult to justify to the business side of the organization. On the other hand, if the outside counsel recognizes the situation, appreciates that it provides a valuable training opportunity for an associate that also benefits the firm, and pro-actively writes off some of the fees incurred, it shows a level of understanding that will not go unnoticed by the in-house counsel. And it will lay the groundwork for a long-term relationship that ultimately will be more beneficial to both firm and client.

Along these same lines, a general understanding of the structure of the client's organization, including who the in-house counsel reports to (both in the corporate sense and on any particular matter), which itself may depend on the specific circumstances, is crucial. The most important thing from the standpoint of any in-house attorney is making sure that his or her internal clients and bosses are not surprised. Whatever the situation is and whatever the news may be on a matter I am working on, if things are working as they should, all of those folks will hear it from me first. Yet, often outside counsel is the first to get any information. Without understanding my organization, that outside lawyer is not in the best position to figure out what is urgent, what can wait, and if I am not available, when to call someone else and who the appropriate person would be.

Understanding the client's organization also is important to being able to provide good, substantive advice. I often describe one difference between the role of outside counsel and inside counsel as being that the outside counsel's primary job is to win the specific case at hand, while the inside counsel's primary job is to make sure that the arguments and positions taken in the current case are consistent with the company's overall interests. Each of them needs to do his or her primary job while also thinking about, and to some extent also doing, the other's. And, yet, in media companies these two objectives sometimes clash. One obvious example where this conflict often arises in companies that produce both news and entertainment content is when dealing with issues involving the fair use of copyrighted material. But there are many other, less obvious circumstances where a particular argument may be ideal for the facts in a specific situation but contrary to the company's interests in another. Understanding the client's organization and business allows outside counsel to anticipate and flag those scenarios. Doing that is one way for an outside lawyer to move from being someone who is retained to handle specific cases and matters within his or her area of expertise, to someone considered a valuable counselor whose views are regularly solicited in all sorts of circumstances.

Knowing a client's business not only positions outside counsel to understand the bigger picture when considering strategies for a particular matter, but it also allows the outside counsel to anticipate future issues. In-house counsel, by necessity and design, become immersed in their employer's business. So, what many in-house lawyers in media companies are talking about today is what their clients are talking about: a world where technology is changing the means of distribution. New modes and structures of distribution dominate the conversation. And, every new distribution method comes with its own set of legal issues and problems. Having outside counsel that knows the issues we are talking about, and looks at legal issues and problems through a lens that understands a company's current and future distribution models, and how their differences could change the legal calculus, is invaluable. Even more so if the outside lawyer has taken the time to pro-actively identify and learn about the different types of legal issues that arise from different types of new technology.

Many in-house counsel used to be outside counsel, but not nearly as many outside counsel have spent time as inside counsel. What in-house counsel really appreciate is when outside counsel take the time and make the effort to walk in the in-house lawyer's shoes. Spending just a little time getting to know the client's business and structure can go a long way towards building a lasting and mutually beneficial relationship.

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