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In this issue

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Communications Lawyer is aimed at attorneys and other communications specialists. It provides current practical information, public policy, and scholarly articles of professional and academic interest to its members and other readers.

Katrina: Reporting on the Storm While Living Through It

JIM AMOSS

In her probing autobiographical book about the year her husband and daughter died, author Joan Didion distilled the essence of human reaction to catastrophe: "Confronted with sudden disaster," she wrote, "we all focus on how unremarkable the circumstances were in which the unthinkable occurred."[1]

For us in New Orleans, the unthinkable occurred— a city ravaged as no other American city in modern times, its urban landscape and human vibrancy drowned in acres of water and muck, its commerce choked off, its spirit almost suffocated. In the course of a single day, our way of life and sense of order were wiped out.

Photo: C-SPAN used by permission

For us at *The Times-Picayune*, the catastrophe ushered in a story that will not end, that has taxed us to the breaking point. At times, it has exhilarated us professionally but it has also plunged each of us into despair. And it has framed a journalistic quandary we are usually able to avoid: We are the people writing the story but, like our readers, we're also the ones to whom the events happened, at once narrator and subject. The intersection of these two roles has been excruciating.

Friday, August 26

Looking back, I remember vividly, as Didion suggests, the unremarkable prelude.

Friday, August 26, was a typical late summer day in our city—hot, humid, and relatively placid. Though it was the height of hurricane season, my colleagues and I have been through so many false hurricane alarms that we barely took notice of Tropical Depression #12 in the Atlantic. Even after it blossomed into Hurricane Katrina and crossed Florida, it stayed tucked inside *The Times-Picayune*'s A section, reflecting a fair measure of our nonchalance. Katrina to us was just one of many storms of the unusually active 2005 season. It seemed on a firm course toward the Florida panhandle, well to the east of us.

Returning from a lunch that day, I could sense: that the newsroom was coasting. Most of the Saturday/Sunday copy was flowing in uneventfully. One of the last school vacation weekends lay ahead. That night the Saints would

(Continued on page 19)

Jim Amoss is editor of The Times-Picayune *in New Orleans. This article is based on his keynote luncheon address at the Forum's 11th Annual Conference, January 14, 2006, in La Quinta, California.*

FROM THE CHAIR

Reflections on La Quinta

JERRY BIRENZ

Jerry Birenz

The Forum's 11th Annual Conference, held in La Quinta, California, January 12–14, was a potpourri of ideas and insights, practical advice, laughs, and camaraderie, as our conferences always are. I have been inundated with "best ever" comments. It seems to me that all of our Annual Conferences are the "best ever," and the La Quinta conference certainly lived up to that track record; and the sterling, ever-present sunshine certainly added to the good aura.

Another Successful Advocacy Workshop

The conference began, as it has for the past eight years, with our Media Advocacy Workshop, conducted by the Forum's Training and Development Committee. This is the second year that I actually observed the sessions, and I continue to be awestruck by how valuable an experience this workshop is, for the "students" as well as the judges/clients. Not only do the students get to argue substantive matters to a very hot bench of well-prepared, knowledgeable judges, being tested by fire, so to speak, but they receive on-the-spot, substantive, very constructive feedback about all aspects of their presentations. In their feedback, the judges comment on the students' performance, one by one, and also give very specific, practical, useful advice about how to handle different kinds of situations and judges.

Kudos to Jill Vollman, Pilar Johnson, Laurie Michelson, and their committee members for organizing and conducting such a tremendously successful workshop. The amount of work that goes into soliciting judges, preparing materials, handling issues, and keeping everything on schedule is all worth it when you see the end results.

Pentagon Papers Revisited

The conference program for the entire Forum membership proved to be equally as successful. Our three plenary sessions were informative and engaging. Our first session, on the thirty-fifth anniversary of the Pentagon Papers case, was filmed by and has been broadcast on C-SPAN. Although we lost two of the planned panelists literally at the last minute (Professor Erwin Chermerinsky because he was called to testify in the Senate Judiciary Committee hearing on the proposed appointment of Judge Samuel Alito to the U.S. Supreme Court, and Michael Hess owing to a family emergency), our four panelists, moderated by George Freeman, had a chance to expound their views and experiences, as well as discuss in detail how the principles of the case might be applied today.

Ellsberg Warns of Present Danger

For example, Daniel Ellsberg took the opportunity to use the panel discussion as a platform for warning the audience that American speech and press freedoms are very much under attack. He also predicted that another major terrorist attack in America could be the death knell of any expansive reading of free speech/free press principles as applied to learning about government wrongdoing. Ellsberg backed his opinions by citing the fact that most lawyers in the audience were not aware that leaking government information to the press is not, in fact, a violation of the Espionage Act and by noting that he was one of the only two persons ever charged with Espionage Act violations for disclosures to the media. Ellsberg also cited the informal prior self-restraint that some news organizations engage in, noting *The New York Times*'s withholding of the NSA domestic eavesdropping story before the last presidential election, and government attacks on and investigations of leakers.

Particularly interesting on this panel was hearing the inside story of the day-to-day reality of the case, the sort of stuff that humanizes a case and that allows each of us to chuckle with varying degrees of recognition in our own experiences and practices. Cardozo Law School Dean David Rudenstein described what was happening on the government side in the action. He told how Michael Hess, the assistant U.S. attorney handling the case, first learned of the matter at 7:30 in the morning of the day the government went to court to ask Judge Gurfein to issue an injunction against *The New York Times.* The lawyers had to move so fast that they forgot to acquire an index number for the case, and the clerk of the court told Judge Gurfein, who had just been appointed to the bench, that he could not proceed until an index number was assigned. Faced with his clerk's instructions on the one hand and the government's claim that *The New York Times*

Photo: Hal Fuson

Daniel Ellsberg with AP's Linda Chadwick

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Photo: Hal Fuson

James Goodale (*l.*) and Daniel Ellsberg (*r.*)

was about to endanger national security on the other, Judge Gurfein deferred to his clerk. It was a good thing for the government that he did so because the four-hour recess that the judge declared (to get an index number) gave Hess an opportunity to learn about the case and formulate the government's theories. It was also amusing to learn that the government attorneys, in prepping the government's witnesses, were not permitted to hear from the witnesses the basis of the government's contention that national security was endangered because the attorneys did not have a sufficiently high security-clearance level.

Even more interesting, Jim Goodale described the conflicts among the various lawyers for *The New York Times* and how Lord Day & Lord's longtime representation of the *Times* ended because of the firm's refusal to represent the *Times* in the case. Goodale explained that there really was no "First Amendment bar" in 1971 as we know it today, something of a revelation to many of us younger folk in the crowd.

Who Owns the News?

The second plenary session, moderated by Barbara Wall, explored how sports organizations, entertainers, and citizen journalists are challenging the traditional control of news organizations over how news information is presented. We heard descriptions of limitations imposed by football, golf, baseball, and other sports organizations over what media may do with photographs and information gathered at sporting events, particularly on the Internet and other new technologies, such as cell phones. The limitations, meant to protect the sports organizations' ability to exploit the information and intellectual property for compensation, are based not on legal rights such as copyright or right of publicity, but rather on the organizations' ability to grant or withhold credentials and enforce restrictions. Then we heard celebrity attorney Martin Singer explain how in negotiating with magazines and other media that want to interview or photograph his celebrity clients, he is often able to obtain for his clients rights of approval or sometimes even copyright ownership of the resulting product and to impose various requirements on the media.

But the kicker came when journalist and book author Dan Gillmor described how in the near future much of this may not matter any more because citizen journalists, i.e., all of the rest of us, will be the greatest sources of and disseminators of information. Echoing Jeff Jarvis's (he was not able to attend because of a conflict) oft-quoted jibe that "anyone can commit an act of journalism," Gillmor described how, for example, fans may sit in stadiums that for some reason have unlimited free wireless Internet access and transmit to the public, through their blogs or websites or more established entities, photographs, video, and play-by-play details about what they are watching.

"May It Please the Committee . . ."

The third plenary session, our reenactment of the Senate Judiciary Committee hearing on a federal shield law, featured four witnesses who had actually testified before the Senate Judiciary Committee in 2005 and four "senators" questioning them. Although Floyd Abrams, one of the witnesses, remarked sarcastically about the "balance" on the witness side (all four witnesses vigorously support a federal shield law), they met their match and then some in the four senators. To me, one of the most telling remarks by the senators was Slade Gorton's remark that in listening to the witnesses explain why journalists need a shield law and how it would work, he wondered whether they were in fact talking themselves out of the shield law. Also telling was Ted Olson's question to the witnesses, especially Judy Miller: If they got the shield law that was proposed, which provided for a qualified privilege, and a judge, after conducting the required inquiry, ordered the reporter to reveal confidential source information, would the reporter do so? It was a question deserving an answer, but unfortunately no good answer was forthcoming. Nor did Senator Robin Bierstedt get an answer to her question about whether al-Jazeera, under the proposed law, could withhold source information, presumably about where the latest Osama bin Laden tape came from.

Also particularly interesting was the notion propounded by a few of the senators that given the willingness of the witnesses to abandon, at least for now, application of the shield law to the millions of bloggers on the Web, the witnesses seem to be accepting the idea that the government could either "license" journalists, at least for this purpose, or (if they objected to the term *license* as offensive, as they did) determine different classes of journalists, i.e., who is a "real" journalist and who is not.

I suspect that our senators, including our "Senator from Hampshire" Mark Stephens, who was selected from the audience, probably did a better job questioning the witnesses than did the real senators in Washington. And I was

Photo: Hal Fuson

Nicole Wong

quite impressed to learn after the session, from moderator Dick Goehler, that the witnesses did not know what questions the senators would ask them.

Surviving Katrina

Our guest speaker at lunch on Saturday was Jim Amoss, editor of the *New Orleans Times-Picayune*, who riveted the audience with his very personal tale of his and his staff's experiences in the days before and during Hurricane Katrina and since. Rather than excerpt or summarize Jim's incredible and poignant narrative of heroism, commitment, and tragedy, he has agreed to allow us to publish his remarks, in full, on these pages. I strongly encourage those of you who were not fortunate enough to hear Jim's speech to read it; it is a truly amazing and inspiring piece of journalism in its own right.

Breakout Sessions Inspire Discussion and Thought

We also had our usual workshops on the hot issues in libel and privacy, newsgathering, and the Internet, and all stimulated active discussion. My own practice in recent years has been to try to attend new workshops and workshops on topics I know little about.

This year, we had for the first time a workshop on legislative advocacy, i.e., how to further our clients' interests by means of lobbying. For many of us, and among the general public, the term *lobbying* contains connotations of financial incentives to legislators to do your bidding and, thus, is often considered dirty work. As those of us in the workshop learned, however, lobbying does not mean that at all. Rather, it simply means attempting to persuade legislators or, more often, their staffs to see your side of an issue. Although it may sometimes involve campaign contributions, that is only one of the lobbying techniques. More common are grassroots or organized letter-writing/telephone campaigns; personal relationships; and face-to-face meetings in Washington, a state capital, or the home district of a legislator.

Our four workshop facilitators, pictured on this page, conducted an excellent discussion. Perhaps because this workshop was an alternative workshop in the first time slot, it did not get nearly the attendance that it deserved. It taught me much about lobbying and debunked many myths that I, and I believe others, had about lobbying, and I think this is a topic that is worth returning to at future conferences.

We also for the first time had Hot Issues in Insurance as one of our workshops. It may sound a bit dry, but the tips about negotiating media liability insurance policies, the information given about how the insurance market works, the insights into the meaning of insurance speak, and the opportunity to ask questions of our friendly insurance facilitators (who were not trying to sell us something!) was a rare and invaluable experience.

Psychology of Litigation

Our Psychology for the Litigator workshop provided great insights into the varying ways that different people process information and react to events and gave an analytical framework for understanding the differences. All of us workshop attendees had taken the Briggs-Myers test beforehand and scored ourselves. Based on our scores, we were each assigned four types of preference categories, and then we discussed the characteristics of each type. It was funny to see how many of the people in the room really did fit their type; for example, one attorney was diligently writing down much of what Mary Ellen Carter, the workshop facilitator, was saying, until Carter stated that people of a certain type, which included this particular attorney, were undoubtedly writing down every word Carter had to say. The attorney laughed out loud, recognizing herself and the tendency being discussed by Carter.

Photo: Hal Fuson

From left to right: Tom Newton, Calif. Newspaper Publishers Ass'n; Stan Statham, Calif. Broadcasters Ass'n; Paul Boyle, Newspaper Ass'n of America; and Mark Allen, Wash. State Ass'n of Broadcasters .

Photo: Hal Fuson

Sherree Smith

On the other hand, it was also interesting to see how many of us had characteristics that crossed over the various types, leading to some confusion and discussion about how to make use of what the Briggs-Myer test shows and our recognition of various characteristics in people we deal with in our practices and our lives.

The Pipeline Project to Increase Diversity

Our diversity workshop this year was entitled Diversity Hits the Road and was devoted to launching the Forum's Pipeline Project for diversifying the pipeline to the media bar. The plan is to create a session for minority high school students in the Chicago area to hear and participate in a discussion among media attorneys about freedom of speech and media law practice. We will also send Forum members from ten or so geographic areas around the country to attend that session. The session will be filmed, and each of the Forum representatives will set up discussions in his or her home area at which the Chicago session will be screened and the local students will discuss with media attorneys media law issues and possible careers in media law in a general way. It's a very exciting project that the Governing Committee of the Forum has decided to fund and support wholeheartedly. Anyone interested in participating should contact Paulette Dodson or Tom Kelley.

The group also discussed various other ways of bringing minority students into the pipeline to media law careers, including affiliating this program with the Forum on Entertainment and Sports Law, "adopting" schools, engaging with schools that conduct moot court–type programs, and the like.

Impressive Scholarship Winners Show Great Promise

Guylyn Cummins, who runs the Forum's scholarship program for the Annual Conference, introduced our three scholarship winners to the conference attendees. The winners were Amanda Grover and Jasmine McNealy, both of the University of Florida Levin College of Law, and Hanson Li of Boston University School of Law. Each winner was provided with round-trip transportation, a hotel stay, and registration (including meals) for the Media Advocacy Workshop and the conference itself. All three scholarship winners are extremely impressive persons who exhibit a lot of promise. There is no space here to go into each of their accomplishments, but we are hopeful that one or more of them may become immediately involved with a Forum project.

Conference Sponsors

The Forum on Communications Law gratefully acknowledges the following 2006 Annual Conference Sponsors:

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Women in Communications Law

I attended the annual meeting of the Women in Communications Law (WICL) committee. Co-chairs Elizabeth Ritvo and Patricia Clark moderated a panel discussion, featuring Robin Bierstedt of Time and Barbara Wall of Gannett, about the choices and challenges of in-house counsel. The sixty members attending the meeting engaged in a lively and insightful discussion about the differences in representing media clients as in-house and as outside attorneys and shared various advice on how to excel in your chosen career path.

It was also announced that Stephanie Abrutyn will replace Liz Ritvo as co-chair of WICL. A hearty "thank you" to Liz for her contributions to WICL. WICL will next meet the morning of the Representing Your Local Broadcaster seminar in Las Vegas.

Journalism Jeopardy

George Freeman, ably assisted by his son, conducted our annual Journalism Jeopardy game, testing our knowledge in a variety of journalism- and media law-related fields, including names and facts of cases, famous newscasters, and various other trivia, as well as our ability to hold our tongue (or not) when we don't really know the answer.

Forum Governing Board Election

We also conducted our Annual Meeting, at which we elected four new members of the Governing Committee for the three-year terms commencing in August 2006: Seth Berlin of Levine Sullivan Koch & Schulz in Washington, D.C.; Natalie Spears of Sonnenschein Nath & Rosenthal in Chicago, Illinois; S. Jenell Trigg of Leventhal Senter & Lerman in Washington, D.C.; and Steve Zansberg of Faegre & Benson in Denver, Colorado. They will replace Jonathan Avila, Guylyn Cummins, Henry Hoberman, and Laura Prather, who we hope will stay involved in Forum activities.

Thanks for the Support and the Thoughtful Planning

As always, we must be very thankful to our sponsors. Seventeen law firms and insurance companies sponsored the 11th Annual Conference, and they are listed in the sidebar to this column. The donations of our sponsors enable us to present the high-quality conference that Forum members have come to expect, and to do so at an extremely low price to attendees. And the goodies that the sponsors hand out at the conference are a nice bonus! Thank you so much to each and every one of you.

I must also point out the indispensable role play by George Freeman, Kelli Sager, and Barbara Wall, the real brains behind this conference. They consistently come up with great ideas and have an incredible amount of contacts, as well as the energy to plan and carry out this conference in addition to their real jobs. Teresa Ucok, the Forum's administrator, also keeps things running behind the scenes, making sure that everything and everyone are where they should be at the right time. Working with these folks is a true pleasure, and we should all be appreciative of their efforts.

Upcoming Programs . . .

The Forum has a few upcoming programs to bear in mind. On Tuesday, March 28, the Forum will be conducting, in conjunction with the Federal Communications Bar Association, a half-day seminar on privacy and data security in Washington, D.C. Jennell Trigg and Jon Avila are organizing the conference.

And on Sunday, April 23, the Forum is pleased and honored to present the twenty-fifth anniversary edition of its Representing Your Local Broadcaster seminar in conjunction with the annual National Association of Broadcasters Conference. Jerry Fritz and Guylyn Cummins are organizing the program. This is always an excellent, practical, and fascinating program.

Practice Pointers for New (and Not-So-New) Media Lawyers

The editorial board of *Communications Lawyer* asked five seasoned practitioners of media law to share the "secrets" of their professional success. The selection of the five veterans was strictly arbitrary, and they are listed below in random order.

Photo: Sam Kittner

Lee Levine

1. Adjectives and adverbs don't win cases; facts and legal reasoning do.

Let's be honest: Most of us are attracted to this practice because we are "true believers" who, somewhere along the line, got goose bumps reading the stirring dissents of Holmes and Brandeis in First Amendment cases. Most new lawyers, when they finally get their chance to write a brief, can't resist the urge to mimic such eloquence. Trust me, no judge (or law clerk) will be moved by it. When they read your briefs, they are interested in learning the relevant facts and the applicable law. That's it. Save the rhetoric for when you are appointed to the bench.

2. Confront the weaknesses in your case; they will still be there even if you ignore them.

When writing briefs and preparing for hearings, new lawyers often argue the case they wish they had, rather than the one they are stuck with. The judge is going to know about the soft spots in your argument because your opponent is going to make sure to point them out. You serve your client best when you confront your problem areas head-on and give the court a reason to resolve them in your favor.

3. Your job is to help your client solve a problem, not to secure another notch on your victory belt.

Litigation is an adversarial process to be sure, but many new lawyers don't appreciate that it is primarily a method of dispute resolution (and an expensive, inefficient one at that). Your job, first and foremost, is to help your client resolve the problem that has landed him in a court in the first place. In other words, except in those cases in which the client's overriding purpose is to vindicate an abstract legal principle (and there are such cases, especially in this practice), it is generally more important to focus on achieving your client's concrete goal (e.g., protecting the identity of a confidential source, gaining access to a closed hearing) as quickly and efficiently as possible.

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Floyd Abrams

1. Limit reference to chilling effect.

Sometimes a metaphor is so apt that it becomes a cliché. This is particularly true with respect to the use of the words *chilling effect* to describe the impact of a statute/court order or the like on free expression. Judges hate it. It is equivalent to saying something like "It never rains but it pours" and expecting a Noble Prize for it, as if you had just made a contribution to human knowledge.

It can also backfire. As a young lawyer, I appeared in front of a New York State court judge on behalf of *The New York Times* and told him that if he entered a prior restraint, it would have a chilling effect. . . . He called me up to the bench, told the court reporter not to copy what he was about to say, and then said to me, "Chilling effect? I'm the only one chilled in this courtroom. I've got to run for reelection."

2. Refer to other areas of law when possible.

Media lawyers are so steeped in their craft that they sometimes forget that many judges (including good ones) are not experts in First Amendment law. It is therefore important, particularly in oral argument, to be prepared to refer to other areas of law with which the judges are conversant. If you are arguing, say, for some sort of privilege for journalists, don't make it sound as if it's the first one ever established.

In that respect, I sometimes find it useful to let judges know that I know who my client's confidential sources are but that, of course, no one would ever think of asking me to reveal that information because of the attorney-client privilege. Like every argument, that one has risks: Lawyers are licensed; journalists not. Lawyers don't gather confidential information for the public; journalists do. I could go on. Even so, the impact on a judge of showing that we don't always opt in favor of disclosure can be extremely positive.

3. Be humble.

Judges often think the press is not only irresponsible but arrogant. Don't be.

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Kelli L. Sager

1. Sweat the small stuff.
Contrary to the popular book series, the "small stuff" really does matter—to lawyers in general, but especially to those in specialized practices like media law. One of the biggest mistakes I think new media lawyers can make is to get so consumed by the importance of the overriding constitutional issues (which, granted, are interesting, important, and fun) that they forget the details. The best legal argument is not going to succeed if you've screwed up procedurally so that the court never considers it; and the most media-friendly judge is going to turn hostile if court rules aren't followed, citations are sloppy, or cases are miscited or overstated. On the flip side, when you are as careful with all the details as you are with the persuasive prose, you build a reputation for being someone whom judges can trust, and most judges are looking to experienced media lawyers as the experts on issues that they rarely have to adjudicate. When I debated in college, it was called *rep*, i.e., the favorable presumption that comes to someone who has built a reputation for doing it well and doing it right. Especially in a close case, that kind of presumption that you are the trusted expert can be priceless.

2. There is no substitute for hard work.
I've met and worked with brilliant media lawyers over the last twenty years, and also with some of the nicest people you would ever want to meet (some of these are even the same people, in fact). But the successful media lawyers I've been privileged to meet and work with overwhelmingly share one trait, and it isn't necessarily brilliance or personality (although there are some triple-crown winners): they all are willing to work very hard to make sure that the client gets high-quality legal service. It's not a popular subject these days with the heavy focus on "lifestyle" and "balance," but it is undeniable. Being a successful media attorney is not a nine-to-five job. That is partly true because, unlike some other practices, media litigation is not predictable and often involves sudden court appearances, late-night brief writing, and other fire drills that play havoc with a nine-to-five schedule. It doesn't mean that you can't have a life, or have balance in it, if you are a media lawyer. But it does mean, for those who are serious about this practice, that some amount of flexibility in your schedule is important. On the positive side, that's part of the excitement that comes with this practice: the urgent phone call, the rush to court, the anxiety-ladden jotting of notes in the hallway as you try to think of a way to convince the judge not to close a hearing or issue a gag order or force a reporter to testify. One of my favorite moments as a lawyer involved rushing to court at 10:00 p.m. when the Catholic Archdiocese in Los Angeles tried to get a last-minute restraining order against *The Los Angeles Times*—and the exhilarated feeling as we left the courthouse at midnight after convincing the judge that such an order would be unconstitutional. Coincidentally, I was in the office when the call came in at 9:45 p.m.; I was working on another TRO brief. I'm glad I was; I wouldn't have missed the experience.

3. Pick your battles.
One of the things that I think comes hardest for inexperienced media attorneys is realizing that not every First Amendment battle is one you want to fight, even if you're right. Even for those of us who have done this for a long time, it's hard to restrain the impulse to fight every ill-conceived sealing order or to challenge every government refusal to disclose records that should be public. It is often said that bad cases make bad law, and, unfortunately, some of the bad First Amendment–media law cases with which we are currently stuck have resulted from strategic decisions that, in hindsight, may not have focused on the bigger legal picture and instead were heavily influenced by the injustice of one particular judge's or agency's action. Most of the time, the fight may be worth fighting, even if it's just for the sake of making the government defend its conduct. But it's always important to think about the long-term or broader implications before making that decision.

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Charles L. Babcock

1. Every case proceeds on two different levels: the law level and the jury level.
I did not appreciate early in my career that cases can be decided and won (or lost) on two different levels. The first is the law level, that is, what the judge should do in applying the law. As a young lawyer, I focused exclusively on this level and believed that, because the jury was being instructed by the judge, it would decide the case on this level as well. Thus, if it was an actual malice issue, the jury was properly instructed on actual malice, and we tried a good actual malice case, we would win.

The statistics bear out the fallacy of this thinking. Many plaintiffs' jury verdicts in actual malice cases were overturned on appeal because there was no evidence of actual malice. What went wrong? In thinking about this over the years and talking to literally hundreds of jurors (mock and real), I now believe that most jurors come into court with certain problem-solving tools and certain preconceived notions about the press and the plaintiff. You must develop your case with this framework in mind and try to meet the jury members as close as possible to where they are when they come into court. For example, actual malice doesn't have anything to do with fairness. Frankly, neither does the issue of falsity; the press can print something truthful and yet be totally unfair to the plaintiff. I used to ignore or, at best, slight the fairness issue, but I have come to believe that it is essential to the presentation of a case at the jury level.

The jury doesn't want to vote for you if it doesn't think you've been fair. One of my recent cases had exactly this dynamic. It was a weak case of actual malice, but the plaintiff tried the case on the basis of fairness. Rather than ignore that basic issue, we met it head-on in opening statement and throughout the trial, repeatedly arguing every way we could that defendant and its reporters had treated the plaintiff fairly. We obtained a defense verdict only because we tried the case at both the law level and the jury level.

2. To become a good media lawyer, you must first become a good trial lawyer.

I talk to a fair number of law students who have set their sights on practicing media law, that is, defending the media in court (I recognize the term encompasses many more things). I tell them what I believe to be true: very few lawyers can become good media lawyers by focusing exclusively on media law (the other contributing authors here would, of course, be the exception although I suspect all of them have vibrant litigation practices outside the media arena) because there are today and have always been limited opportunities to go to court on media cases. Early in my career, my major client was *The Dallas Times Herald*; but after three trials, all of which we won, the newspaper wasn't sued for three years. I had developed some trial skills in advance of those media trials by doing insurance defense and handling Jackson Walker's parking lot docket, which consisted of trying cases in justice of the peace and municipal court against motorists who claimed their cars had been improperly towed from our client's lot. I strained for many years to figure out the free speech angle to those cases but never could. They did, however, help me get comfortable in the courtroom, which has inured to the benefit of all my clients, especially the media. Very few of us can develop those skills by relying exclusively on media cases.

3. Recognize that most people are visual, linear learners.

Lawyers tend to go to court and say a bunch of stuff and think that everyone is getting everything they are saying. Many studies say this isn't so. The level of understanding and rate of retention goes through the roof when an oral presentation is supplemented by good visuals (not necessarily PowerPoint), including a linear presentation of the facts. In almost every case I try now, I use a graphic time line laying out the events that are important to the litigation, as well as many other graphics throughout trial. This is not limited to jury trials. I recently handled an important, multiparty business case for a media client where every party had an extensive graphics presentation at summary judgment. The judge said it helped him understand the issues better. Over twenty years ago, I tried a one-month oil field fraud case before a jury and made limited use of graphics. We achieved a verdict, but much more modest than our client had hoped. We won the areas where we had used graphics. The jury didn't understand the rest even though to our minds the fraud damages should have been astronomical.

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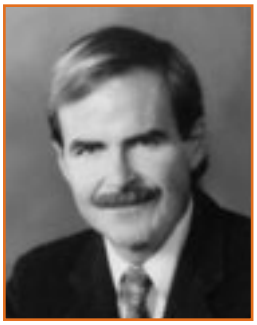

Thomas B. Kelley

1. Don't overreach to a jury.

We have a good sense of when we are close to the line when arguing to judges, but it is all too easy for media lawyers to overreach when attempting to persuade juries. So it is, even after we have seen that overreaching by plaintiffs' lawyers will cause their clients to lose. We seem to lack the real-time connection with real people that one needs to avoid overreaching to juries.

Don't ask a jury to find that a publication is true when it is untrue in any way that matters in the least. As First Amendment advocates, informed by such cases as *Pape, Bose,* and *Masson,* we tend to think that any loose connection between what our clients have published and the truth will do. It's so hard to let go of that issue, particularly when the client wants to hold on. But the reality is that jurors expect our clients and us to be truthful in every way that matters at all. If we urge upon them the truth of something that appears false or misleading in any significant part, then they not only will find falsity but also will take our apparent disingenuousness as an indication of our client's attitude at the time of publication.

So too, don't urge that your client's publication conveyed an innocent meaning when a pejorative meaning is anywhere near equally possible. The reason is the same. Jurors expect professional publicists to apply their craft to expurgate any meaningful falsity or unwarranted pejorative meaning, and your failure to own up to shortcomings in either category can result in a jury finding of actual malice.

So, listen to your focus groups and mock juries. For nuances of this advice, gleaned from ore than thirty years of experience of trying and watching trials of media libel cases, check Tom Kelley, "The Libel Defendant's Dilemma: Unpicking the Trial Theme," available at www.faegre.com/articles/article_1807. aspx.

2. Never pass an opportunity to parachute out of a libel jury trial.

As an associate, I was arguing motions for a directed verdict (now an obsolete term in most courts) in a newspaper libel case in which I thought we were well ahead on the evidence. The judge interrupted and said, "Mr. Kelley, I tend to agree with you, but I'm inclined to deny your motions until after the verdict comes in so that we reduce the odds of having to retry this case." I was tempted to go with a jury verdict; the bailiff and the court reporter, both experienced jury watchers, agreed with me that our side was cleaning up. But the appropriately senior partner trying the case with me passed a note that even I could quickly decipher. It read "No." I told the judge I would urge the court put an end to any case that challenges First Amendment freedoms as soon as possible when the law requires it; I also noted that the case had been expeditiously tried and was not one in which a court should disregard the requirements of

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Trial Q&A: *Turnbull v. ABC*

In October 2004, a Los Angeles jury found in favor of the ABC television network in *Turnbull v. American Broadcasting Companies*, 32 Media L. Rep. 2442 (C.D. Cal. 2004). *Turnbull* arose from an *ABC News* report on the controversy surrounding so-called casting workshops, which the California Department of Labor accused of violating the California Labor Code by charging participants to perform a reading of a scene for a casting director while providing little or no training or educational benefit. An ABC associate producer equipped with a hidden camera and microphone attended one such workshop undercover and recorded what she saw. After portions of the resulting footage were broadcast on ABC's newsmagazine *20/20*, several participants in that casting workshop, as well as its operator, sued ABC for invasion of privacy by intrusion into seclusion, a violation of section 632 of the California Penal Code, and trespass.

Communications Lawyer recently spoke with Steven Perry, a partner in the Los Angeles office of Munger, Tolles & Olson LLP, who was lead trial counsel for ABC and shared some of his thoughts on the trial.

CL: The *Turnbull* trial occurred in the aftermath of the Jayson Blair scandal at the *New York Times,* as well as the controversy surrounding CBS's reporting on documents regarding President Bush's service in the National Guard. As a trial lawyer representing a media defendant, were you concerned about the jurors' preexisting perceptions of the media?

PERRY: I think that perception of bias on the part of the media is largely an "inside the Beltway" issue that doesn't impact most jurors. When you put six, nine, or twelve people in a box, jurors focus on the question in front of them: Were [the media defendants] doing their jobs, or were they trying to hurt people? The biggest problem in representing a media defendant at trial can be if reporters' notes or other internal documents show a lack of respect for the subjects of a report. We had none of that in our case. The evidence showed concern by ABC that people attending these acting workshops were being ripped off and that these places were ripping people off by inflating their dreams.

CL: You tried the *Turnbull* case in a jurisdiction that, after the California Supreme Court's decisions in the *Shulman* and *Sanders* cases, is considered unfavorable for media organizations using hidden cameras and undercover reporting techniques. What steps did you take to set the facts of *Turnbull* apart from those of *Shulman* and *Sanders*?

PERRY: One of our strongest themes was to show that ABC had cared about the privacy of the people who attended these workshops. I emphasized in opening statement that ABC wasn't trying to get any personal information, that the jury would see that [ABC's undercover reporter] Yoruba Richen had taken steps to avoid personal contact—she came in as a stranger, went out as a stranger, and her camera captured only that which plaintiffs were prepared to share with a perfect stranger. We emphasized that [Richen] was a perfect stranger; she wasn't a co-worker, a nurse or a doctor, or even anyone pretending to be a patient. The place where the recording took place was a conference room where people who were waiting for their chance to read for a casting director would sit down and chat as strangers.

[*ABC News* chief investigative correspondent] Brian Ross explained that his job is to find truth and report it to the public in as neutral a way as possible and show the public the evidence. If the State of California was correct [in its allegations against the casting workshops], there were millions of dollars changing hands each year. . . .You could report it as "he said, she said," or you could use a camera to find out the truth. Brian wasn't going to do that if it would invade privacy; and to guard against that, he first sent two producers in without cameras to look at the location [of the acting workshop]. They reported it was strangers milling around.

CL: All but one of the thirteen plaintiffs in *Turnbull* were people who paid to participate in an acting workshop and were the victims of the alleged scam that the *ABC News* report exposed. How were you able to counteract a jury's natural sympathy for plaintiffs who had been victimized to begin with?

PERRY: One of the plaintiffs was the operator of the acting workshop, and we used that to our advantage. He admitted that he organized the lawsuit and that he had recruited plaintiffs, and he admitted to a declaration of war on Brian Ross. It might have been a more difficult case to try had it been just the victims as plaintiffs.

One of our strongest themes was that ABC cared about the privacy of people who attended the workshops.

We also were helped by the fact that a number of the plaintiffs were not private people at all. One of the plaintiffs had been shown [on the ABC's hidden-camera footage] doing a chicken imitation, and he claimed that he was mortified by that. As it turns out, he had done his imitation of a chicken on *Wheel of Fortune.* We obtained a copy of the show, and the jury got to see him voluntarily doing a chicken imitation on national television.

Another plaintiff testified that he didn't have his toupee on [when he was videotaped] and that he was embarrassed to be outed. But it turned out

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The First Amendment in the Military Courts: A Primer for the Civilian Attorney

STEVEN D. ZANSBERG, MATTHEW S. FREEDUS, AND EUGENE R. FIDELL

Scenario #1: At 4:30 p.m. on a Friday afternoon, your client, the local newspaper, faxes you a subpoena it received. The subpoena, issued at the request of a criminal defendant, commands one of the newspaper's reporters to testify at a hearing and to produce the complete notes of her conversation with a woman named Jessica Brakey, an alleged rape victim. Most of the interview was not published in the newspaper. This is all good; you've been down this road before. When you examine the subpoena, however, you realize that it was issued by the U.S. Air Force and relates to a court-martial proceeding at a military base hundreds of miles away in another state. Gulp.

Scenario #2: It's 10:00 a.m., and your phone rings. On the other end of the line is the news director at your local television station. She tells you that an Article 32 proceeding concerning Army soldiers accused of abusing a Iraqi prisoner is set to begin at the local Army base within the hour. Here's the catch: Because classified information may be discussed at the hearing, the officer presiding over the hearing has announced that he will close the hearing to the public. The news director wants you to go to the Army base immediately and convince the investigating officer to keep the proceeding open to the public and the press.

The two scenarios above should give any civilian practitioner at least a moment of pause. As Operation Iraqi Freedom continues and the U.S. Air Force Academy deals with cadets who have been accused of committing sexual assaults against other cadets, these scenarios are becoming less hypothetical and more real for media attorneys across the nation.

This article is intended to assist civilian attorneys otherwise unfamiliar with the parallel universe of the U.S. military court system in navigating their way through that system. The military justice system exists alongside the civilian court system and operates in many of the same ways but has its own logic and structure. This article is intended as a cursory overview, not an exhaustive study, of that parallel universe.

After a brief introduction, the article provides an overview of the structure and procedures of the American military justice system. It next surveys the precedents that provide a presumption of public access to court-martial proceedings, including Article 32 hearings. Finally, the article explores the extent to which the military courts historically have recognized a First Amendment–based reporter's privilege and also reviews the more recent treatment of press subpoenas by trial counsel in one branch of the military.

Military Justice in Brief

America's military courts comprise a separate and unique system of justice. Although criminal charges are adjudicated and punishment meted out, the military justice system operates outside Title 18 of the U.S. Code and Article III of the Constitution. It is governed by a separate series of federal statutory provisions, the Uniform Code of Military Justice (UCMJ),[1] federal regulations, and executive orders.[2] The U.S. Supreme Court has fostered the notion that the "military is, by necessity, a specialized society separate from the civilian society."[3] Moreover, the Court has stated that "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[4]

Cognizant of the unique context that military service presents, Congress designed the military justice system as an efficient, self-contained system of rules intended to maintain good order and discipline within the Armed Forces. The system includes a comprehensive list of offenses defined in the punitive articles of the UCMJ.[5] Other offenses can be punished under the so-called general articles,[6] which employ such malleable concepts as "conduct to the prejudice of good order and discipline,"[7] conduct to the discredit of the service, and the ever-popular "conduct unbecoming an officer and a gentleman."[8] The punitive articles do not classify offenses as felonies, misdemeanors, or petty offenses and, as a general rule, do not mandate a particular level of court-martial for particular offenses. The sole exception to this rule is for the offense of spying in wartime, for which Congress has required trial by general court-martial or military commission and mandatory death sentence upon conviction.[9]

Convening Authority Has Broad Discretion

The military justice system vests unusually broad powers in military and naval commanders to make key prosecutorial decisions such as who shall be prosecuted, what offense should be charged, and what level of court-martial, if any, a charge should be referred to for trial.

Unlike a federal district court, a court-martial is not a standing body. It exists only if called by a convening authority, who typically is an extremely senior officer with significant experience commanding personnel and a sensitive awareness of the needs of the service.[10] The convening authority has virtually unbridled discretion to dispose of cases involving alleged criminal misconduct, including the authority "to take no action on an offense" at all.[11] If charges have been preferred (i.e., sworn), the convening authority has the

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power to dismiss them. The convening authority may also take administrative action, such as ordering counseling, separation proceedings (by which military service members are asked or compelled to leave military service), or nonjudicial punishment.

The *Manual for Courts-Martial*[12] endows the convening authority with broad discretion to select a forum to dispose of allegations of misconduct. The convening authority may make a "completely ad hoc determination . . . concerning whether, under the particular circumstances, an individual's crime is serious or petty."[13] The level of court-martial selected by the convening authority, not the statutory elements of an offense, defines the gravity of the matter. In other words, each forum has its own jurisdictional sentencing limitations. This is a system that, theoretically, allows for highly personalized justice.

Rules of Procedure and Evidence

Although military justice operates in a separate, largely self-contained system, Congress has provided that courts-martial should mirror the federal criminal justice system and, as far as practicable, apply "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . ."[14] Exercising the authority of commander-in-chief and the power vested by Congress, presidents have promulgated and amended the *Manual for Courts-Martial* over time; it includes, among other things, pretrial, trial, and post-trial rules of procedure, embodied in the Rules for Courts-Martial (RCM), and rules of evidence, i.e., the Military Rules of Evidence (MRE).[15] Although some of these rules are unique or tailored to fit the military, most are derived from the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. As a result, military courts often look to federal court decisions for guidance on procedural and evidentiary issues.[16]

A service member facing criminal charges has several substantive and procedural rights grounded in the RCM, the UCMJ, and the Constitution. Among these rights is the right to have an investigating officer review the government's evidence supporting the charges and recommend to the convening authority an appropriate disposition that would not require a general court-martial.[17]

Article 32 Investigations

If the convening authority orders an Article 32 investigation, which is similar in some respects to a grand jury investigation and a preliminary hearing in the civilian court system,[18] the government presents evidence to support the charges and the accused has the right to cross-examine the government's witnesses and to present his own witnesses and evidence. At the end of the Article 32 hearing, the investigating officer issues a recommendation to the convening authority regarding the existence of probable cause to believe the accused committed the charged offenses and the appropriate method for disposing of the charges (e.g., dismissal of the charges; referral of the charges to a summary, special, or general court-martial; or referral of the charges to an administrative forum).

Once the case is set for court-martial, the accused is entitled to a full panoply of discovery to prepare his defense.[19] Unlike the civilian system, however, the defendant (and his counsel) in the military justice system does not have the authority to issue compulsory process for production of documentary or testimonial evidence; instead, the accused may serve a request for the production of witnesses and evidence on the trial counsel (prosecution), who is the only party authorized to issue subpoenas. If the government declines to produce the witness or evidence, the accused may make a motion to the military judge to compel production.[20] The trial counsel or military judge may order a person to appear from anywhere in the United States.[21] Failure to appear in response to a subpoena, without proper excuse, subjects a civilian witness to the risk of prosecution by a U.S. attorney in U.S. district court.

The defendant also enjoys the right to a speedy trial, which, unless waived by the defendant, requires the court-martial to begin within 120 days of the charges being preferred.[22] The defendant enjoys the right to a public trial[23] and to a jury of service members.[24] The defendant may request a bench (judge-alone) trial, but it is within the judge's discretion to approve or disapprove the request.[25] Judge-alone trials are permissible for any type of case except those referred to as capital.[26] The defendant may present witnesses subpoenaed by trial counsel or the military judge. In a jury trial, a conviction for any offense other than spying in wartime requires two-thirds of the jury to find guilt.[27] Spying in wartime requires a unanimous verdict because of the mandatory death sentence. Sentencing is performed by the judge in judge-alone trials and by jury members in jury trials.

"Military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."

Appellate Review of Court-Martial Convictions

If a defendant is convicted, the convening authority who referred the case reviews the results. He or she has the power to set aside or mitigate the findings and sentence.[28] If the sentence, as approved by the convening authority, includes death, a punitive discharge (i.e., bad-conduct discharge, dishonorable discharge, or the dismissal of an officer), or confinement for one year or more, the accused has a right to appeal to a court of criminal appeals[29] (each branch of the service has its own)[30] to review for legal error, factual sufficiency, and sentence appropriateness.[31] A convicted defendant who receives a lesser sentence does not have a right to appellate review but may seek an administrative review of his case by a judge advocate pursuant to service regulations.[32] Thereafter, the judge advocate general for each military branch may refer the case to the appropriate court of criminal appeals for appellate review.

Each service's appellate court has its own rules of procedure that govern issues such as the admission of attorneys

to practice, scope of review, the format and deadlines for various pleadings, and the process for obtaining extensions.

The highest military court is the U.S. Court of Appeals for the Armed Forces (CAAF), which is comprised of five civilian judges appointed by the president for fifteen-year terms. Except in capital cases, appellate review is discretionary and the court is limited to questions of law. If it determines that a legal conclusion or sentence is contrary to law, it may direct the judge advocate general to dismiss the charges or order a rehearing. The court's rules are published in volume 44 of the *Military Justice Reporter* and appear on the court's website.[33]

CAAF is the highest court within the military justice system, but not the court of last resort. Either party may petition the U.S. Supreme Court for certiorari review of CAAF decisions, but, as in the civilian judicial system, the Court rarely grants review.

Extraordinary Writs in Military Appellate Courts

The courts of criminal appeals and CAAF also have jurisdiction under the All Writs Act[34] to review petitions for extraordinary relief. Military courts have recognized writ petitions for habeas corpus, mandamus, prohibition, coram nobis, and certiorari. Military appellate courts apply the corresponding federal standards to decide whether any such writ should be issued. As in civilian courts, the military appellate courts view extraordinary writs as drastic remedies that should be reserved for extraordinary cases. Accordingly, a petitioner bears a heavy burden to show that an alleged error amounts to a gross error and a judicial usurpation of power.[35]

Among the criteria considered by military appellate courts in addressing petitions for extraordinary relief are (1) the likelihood that the issue will recur and lead to error in other cases, (2) the novelty or importance of the issue of law, (3) the likelihood that requiring the petitioner to wait for direct appeal will lead to uncorrectable harm, and (4) whether the conduct addressed by the petition is erroneous as a matter of law.[36] Of particular relevance here, military appellate courts routinely exercise All Writs Act jurisdiction to protect defendants' Sixth Amendment rights to public proceedings and to protect the public's and the press's First Amendment right to access those proceedings.[37]

Unfortunately, however, military officials have been known to make reflexive, arbitrary decisions that infringe on these rights, particularly in cases involving national security. Accordingly, lawyers representing news organizations must become familiar with the rules and procedures governing military appeals and extraordinary writ litigation in order to represent their clients effectively.

Public Access

Public Access in the Civilian System

In 1980, in *Richmond Newspapers, Inc. v. Virginia,*[38] the Supreme Court first recognized that the First Amendment protects the public's right to attend criminal proceedings in state and federal courts.[39] This right applies to the trial itself as well as to those pretrial proceedings that traditionally have been open to the public and are enhanced by public scrutiny.[40] When this right of access applies and a party seeks a partial or full closure of the proceedings or judicial records, the court must determine on a case-specific basis whether the requested sealing or closure is necessary to further a compelling governmental interest and cannot be satisfied by a reasonable alternative.[41]

Military Justice System

The First Amendment applies not only to Congress and the judiciary, but to all federal agencies within the executive branch.[42] Thus, the court system created by the UCMJ for the armed services, as part of the executive branch, is theoretically on the same footing as the Article III courts. Not surprisingly, then, military courts have held that the First Amendment right of public access applies with equal force to analogs in the military justice system[43] and indeed had done so even before the *Richmond Newspapers* decision.[44]

Shortly after *Richmond Newspapers,* however, the Court of Military Appeals (as CAAF was then named) reaffirmed that the right of public access extends to courts-martial.[45] As eloquently explained by the Army Court of Criminal Appeals,

> public access to courts-martial is critical: "we believe that public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public." . . . Public scrutiny of the courts-martial "reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process."[46]

As with civilian trials, however, the right of public access to courts-martial is not absolute. The issue arises most often when issues of national security, implicated by reference to classified information, are discussed.[47] The Court of Military Appeals first addressed this question in *United States v. Grunden.*[48] That court set forth a cogent, detailed explication of how to balance the interests of public access and transparency against the interests of national security and secrecy:

> The prosecution must delineate which witnesses will testify on classified matters, and what portion of each witness' testimony will actually be devoted to this area. Clearly . . . any witness whose testimony does not contain references to classified material will testify in open court. The witness whose testimony is only partially concerned with this area should testify in open court on all other matters. For even assuming a valid underlying basis for the exclusion of the public, it is error of "constitutional magnitude" [footnote omitted] to exclude the public from all of a given witness' testimony when only a portion is devoted to classified material. The remaining portion of his testimony will be presented to the [investigating officer] in closed session. This bifurcated presentation of a given witness' testimony is the most satisfactory resolution of the competing needs for secrecy by the government, and [the need for a public proceeding] by the accused. [footnote omitted][49]

Questions regarding the right of public access also arise in military proceedings that have no civilian analog, such as Article 32 hearings. As discussed above, Article 32 proceedings, unless waived by a defendant, are a necessary prelude to a general court-martial. Such a proceeding resembles both a civilian grand jury (traditionally closed to the public)[50] and a civilian preliminary hearing (traditionally open to the public). CAAF issued a seminal opinion addressing this

particular proceeding and arguably providing a framework for addressing the right of the public to access other military-specific proceedings.

ABC, Inc. v. Powell

In *ABC, Inc. v. Powell*,[51] Sergeant Major of the Army (SMA) Gene C. McKinney, the highest-ranking enlisted man in the Army, had been charged with sexual harassment. The case was high profile. Colonel Owen C. Powell, the special court-martial convening authority, closed McKinney's Article 32 hearing in its entirety, citing the following reasons:

> (1) to maintain the integrity of the military justice system and ensure due process to SMA McKinney; (2) to prevent dissemination of evidence or testimony that would be admissible at an Article 32 investigation, but might not be admissible at trial, in order to prevent contamination of the "potential pool of panel members"; and (3) to protect the alleged victims who would be testifying as witnesses against SMA McKinney, specifically to shield the alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history.[52]

McKinney and ABC News (joined by others in the media) filed pretrial extraordinary writ petitions challenging this decision. CAAF found that Article 32 hearings more closely resemble preliminary hearings than grand jury proceedings, and the tradition of openness and logic therefore weigh in favor of strict scrutiny of any closure of an Article 32 hearing.[53] Citing the commentary to RCM 405(h)(3) for the proposition that "[o]rdinarily, the proceedings of a pretrial investigation should be open to spectators,"[54] the court expressly extended the Sixth Amendment right to a public trial to Article 32 proceedings and found that, absent compelling reasons justifying closure, such proceedings should be open to the public.[55]

An Ax Instead of a Scalpel

The court went on to find that Powell's blanket closure was not supported by compelling reasons and was not narrowly tailored to the specific concerns of the government at issue. Indeed, the court noted that in "excising the public from the trial, the [convening authority] employed an ax in place of a constitutionally required scalpel."[56]

This scalpel approach to closure, first announced in *Grunden* in the context of a court-martial trial, recently was applied to an Article 32 hearing investigating allegations of prisoner abuse and homicide during Operation Iraqi Freedom. In November 2004, the Army charged four soldiers at Fort Carson, Colorado, with torturing and murdering Abed Mowhoush, a major general of the Iraqi Air Force and one of the highest-ranking members of Saddam Hussein's military command.[57] The Department of Defense (DoD) originally issued an official press release stating that Mowhoush had died of natural causes.[58] According to the Army's Criminal Investigation Division report, however, General Mowhoush died during interrogation in Iraq.[59] He had been placed headfirst into a sleeping bag by Army officers and repeatedly rolled on the ground from his back to his stomach while the officers employed chest compressions, i.e., sitting on his back and chest, ultimately suffocating General Mowhoush.[60] It was later disclosed that General Mowhoush had also been restrained with an electrical cord wrapped around the sleeping bag in which he suffocated.[61]

The Denver Post Seeks Access

An Article 32 hearing for three of the four accused soldiers was scheduled for December 2, 2004, at Fort Carson. The morning of the hearing, the investigating officer announced that he intended to close the entire proceeding because classified information would be discussed. Arguing against the proposed closure, *The Denver Post* urged the investigating officer to follow *Powell* and decide whether closure was justified on a witness-by-witness basis. The investigating officer found that it would be "difficult if not impossible to separate the classified information from the non-classified information" and ordered the Article 32 proceeding closed in its entirety.

The next day, *The Denver Post* filed an emergency petition with the Army Court of Criminal Appeals seeking a stay of the Article 32 proceedings and an order directing the investigating officer to open all portions of the hearing not concerning classified information. The Army court immediately stayed any further closed proceedings.[62] After full briefing,[63] the court granted *The Denver Post*'s petition and ordered the investigating officer to release a redacted transcript of the closed hearing and to open to the public all portions of the resumed hearing not involving classified evidence:

> The rule of law requires that the [investigating officer] engage in the necessary analysis as to each witness' expected testimony and to understand in advance how and why it could touch on a classified matter before excluding the public. . . . [W]here, as here, the defense counsel have willingly gone along with the government's desire to close the proceedings, doubtless to facilitate the broadest possible discovery of matters, classified or not, to be used at any trial in defense of their clients, the [investigating officer] alone is left to act impartially to safeguard the integrity of the military justice system by only authorizing the most limited necessary degree of closure.[64]

Although the military appellate courts consistently have issued rulings such as those above that provide strong protection for the rights of the public (and press) to attend courts-martial and pretrial proceedings, investigating officers continue to disregard or ignore these precedents. For example, in November 2005, a Navy investigating officer in Naples, Italy, ordered the closure of an entire Article 32 hearing in a case involving alleged indecent acts with a minor, citing concerns for the rights of the accused and of the minor witness.[65] After *Stars and Stripes*, a DoD-authorized daily newspaper, filed a writ petition with the Navy-Marine Corps Court of Criminal Appeals challenging the blanket closure order, the Navy set aside the original hearing and ordered a new one.[66]

Lawyers representing news organizations must become familiar with the procedures governing military appeals and extraordinary writ litigation.

The Navy then sought to dismiss the *Stars and Stripes*'s petition as moot. *Stars and Stripes* resisted on the theory that the issue is "capable of repetition, yet evading review."[67] The Navy court held the petition moot because "[t]here is no longer a proceeding for us to stay" and there are no pending "charges preferred against an accused." That court's decision, however, rests on a mistaken assumption because the government had already repreferred the same charges against the accused and ordered another Article 32 investigation while this matter was pending in the Navy court.[68] The court denied a motion for reconsideration filed by *Stars and Stripes*, claiming that the government's dismissal of charges effectively terminated its standing.

Reporter's Privilege

Also at issue for media practitioners is the extent to which military courts recognize the reporter's privilege. As a starting point, the MRE recognize and honor the privileges arising under the Constitution,[69] as well as those recognized by civilian courts under federal law.[70] Thus, practitioners may generally rely on federal case law that bears on the reporter's privilege. Decisions of the military appellate courts are authoritative, however, and must be addressed. To date, no military appellate court has formally (in a published decision) recognized a reporter's privilege grounded in the First Amendment. As discussed below, however, one military court has remanded a case for consideration of whether such privilege should be applied, and two military trial judges have quashed subpoenas to reporters based on a First Amendment privilege.[71] And, in one published opinion, CAAF appeared to recognize, in dicta, the existence of a First Amendment reporter's privilege, but did not apply it because the defendant's motion to compel production of outtakes was resolved on other, nonconstitutional grounds.[72]

Reporter's Privilege in Civilian Courts

Most civilian federal circuit courts recognize a qualified First Amendment privilege against compelled disclosure of unreported or confidential information and materials.[73] However, a recent string of high-profile federal court rulings has cast some doubt on the very existence and scope of a First Amendment–based privilege, at least with respect to subpoenas seeking grand jury testimony from reporters in their capacity as eyewitnesses to crimes under investigation.[74]

The reporter's privilege can be traced to Justice Powell's concurring opinion in *Branzburg v. Hayes*,[75] in which he cast the fifth and deciding vote. Although the Court's opinion in *Branzburg* acknowledged the existence of some First Amendment protection for "newsgathering,"[76] it declined to recognize a blanket First Amendment privilege protecting journalists' refusal to testify before a grand jury about the identification of confidential sources whom they witnessed engaging in criminal activity.[77] Justice Powell's separate concurring opinion reasoned that a privilege existed but that it should be adjudicated on a case-by-case basis using an appropriate balancing test:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[78]

In *Shoen v. Shoen*,[79] the Ninth Circuit surveyed the case law since *Branzburg* and noted that the First, Second, Third, Fourth, Fifth, Eighth, Tenth, and District of Columbia Circuits have held that journalists have a qualified privilege under the First Amendment to resist compelled discovery.[80] Although the privilege is not absolute, courts generally have held that compelled disclosure of newsgathering materials should occur only in exceptional cases.[81]

The constitutional privilege afforded to journalists has particular force when applied to litigants' efforts to compel disclosure of the identity of, or information provided by, a confidential source.[82] Such an infringement on the trust between interviewer and interviewee "has the potential to offset the vitality of the free exchange of information between journalist and interviewee which form the basis of the reporter's privilege."[83] Thus, most federal courts of appeals recognize that the First Amendment provides a news reporter with a qualified privilege to refuse to disclose confidential information obtained from a source.[84] In several circuits, the conditional privilege may yield only if (1) the information is relevant to the inquiry at hand, (2) the information is unavailable by alternative means, and (3) there is a compelling need for the information.[85]

Although the reporter's privilege initially developed as a protection only against compelled disclosure of confidential source information, numerous courts have extended it to protect nonconfidential newsgathering materials as well, in both the civil and criminal contexts.[86] The qualified newsgathering privilege for nonconfidential news information has been applied to both prosecution and defense subpoenas.[87]

Reporter's Privilege Within the Military Justice System

Perhaps ironically, at a time that the civilian courts appear to be backing away from their prior precedents recognizing a First Amendment–based privilege for reporters,[88] the military is moving toward extending greater protections to members of the press from subpoenas issued in the military justice system. There is little (if any) binding precedent for a media lawyer to cite to a military judge in responding to a subpoena in a court-martial. Unreported decisions from prior courts martial exist, however, and provide strong, persuasive authority for recognizing and applying a qualified privilege for the press.

At least two military judges at the trial level have recognized and applied a First Amendment–based privilege to shield a journalist's nonconfidential but unreported information (video interview outtakes) from compelled production. In both cases, the judges quashed subpoenas issued to television news organizations to produce nonbroadcast video footage, on the grounds that the party on whose behalf the subpoenas had been issued had failed to make the showing required to overcome the privilege.[89]

In *United States v. Ashby*, the U.S. Marine Corps convened a court-martial against two Camp Lejeune pilots charged with causing a fatal ski gondo-

la accident in the Italian Alps that killed twenty people.[90] The prosecutors served subpoenas on the news program *60 Minutes* and on *Rolling Stone* magazine, both seeking outtakes and audiotapes of interviews given by the accused. Both news organizations offered to provide recordings of the published portions of the interview but resisted producing unpublished portions, asserting their rights under the First Amendment. The military judge rejected the government's position that *Branzburg* held no First Amendment privilege for journalists to refuse to provide evidence in aid of criminal prosecution and ruled "there is a First Amendment media privilege."[91]

Ashby Court Quashes Sweeping Subpoenas

Applying the three-part test generally articulated by federal courts for confidential sources, the judge quashed both subpoenas seeking nonconfidential information on the grounds that the material sought was "not case dispositive."[92] The court further reasoned that the evidence sought was "not a percipient witness' evidence of a crime being committed . . ." and that the interview outtakes had been sought solely for their potential impeachment value. The court stated, "[F]rankly, I do find the government is on a bit of a fishing expedition. [It] is nice to have information possible for impeachment. It's not something necessary for the prosecution of the case and I'm unwilling to find no First Amendment protections."[93]

Similarly, in *United States v. Bennett,*[94] subpoenas were served on the news program *Dateline NBC* for outtakes of interviews with Marine Corps Staff Sergeant Arthur G. Bennett and others. In 1994, the U.S. Marine Corps had charged Bennett with rape and molestation. While his court-martial was pending, his commanding officer approved a leave request for Bennett. A few days later, authorities found a body inside Bennett's trailer that, although burned beyond recognition, was identified by dental records as Bennett. State and military authorities concluded that he had committed suicide by fire and closed the case. A couple of years later, a man named Joe Benson was arrested in Utah on charges of molesting and raping his daughter. Benson's fingerprints revealed that he in fact was the supposedly deceased Bennett, who apparently had been living in Utah with his wife and two daughters.

The military charged Bennett with desertion and sex offenses. During Bennett's pretrial confinement, *Dateline* interviewed Bennett and others and broadcast portions of those interviews in its report, including a portion of Bennett's interview in which he claimed that he had not molested, raped, or killed anyone.

The prosecution sought the outtakes of Bennett's interviews. Bennett in turn sought outtakes of interviews with witnesses from Bennett's Article 32 proceeding who were expected to testify at trial (including two alleged victims and the parents of several of the alleged child victims). NBC challenged the subpoenas, arguing that both the prosecution and the defense had failed to demonstrate that the information sought was essential to their case and otherwise unavailable.

Impact of *Branzburg*

The military trial judge applied the familiar three-part test derived from Justice Powell's concurrence in *Branzburg* and ruled that the defense had shown only a speculative need for the outtakes for potential impeachment purposes. He also found that adequate impeachment information was available from other sources, including the witnesses' sworn testimony during the Article 32 proceeding. The trial judge further found that the government's subpoena did not satisfy the "highly material and relevant" prong of the three-part test because the government could not "specify what the statements may be. Absent this articulation, the court would couch these requests as being speculative at best." As a result, the court concluded "that neither the government nor the defense [had] established a sufficient basis to override Dateline NBC's qualified privilege to withhold this videotape outtake[s] under the First Amendment."[95]

In another significant decision, the U.S. District Court for the District of Columbia recognized the applicability of the qualified journalist's privilege to a *Stars and Stripes* reporter's newsgathering and granted a motion for a protective order barring discovery of the reporter's notes, sources, and other materials, both confidential and nonconfidential.[96] Notably, prior to this motion (filed by DoD on behalf of *Stars and Stripes*), DoD had invoked the reporter's privilege to object to discovery of information expressly concerning the reporter's sources for the *Stars and Stripes* article.[97]

The military trial judge used the familiar three-part test derived from Justice Powell's concurrence in *Branzburg.*

Recently, Air Force authorities issued a number of subpoenas to reporters in cases involving rape charges against service members. For example, in November 2004, a *Denver Post* reporter was served with a subpoena commanding him to produce notes of his interviews with the alleged victim of a gang rape at Sheppard Air Force Base in Texas. The reporter and *The Denver Post* filed a motion to quash the subpoena and respectfully declined the trial judge's invitation to voluntarily submit the reporter's notes for in-camera inspection.[98] No decision resulted from the dispute, however, as the alleged victim decided not to pursue her case in the interim. The charges were ultimately dropped.

Air Force Academy Scandal

In December 2004, the Air Force served subpoenas on fourteen news organizations in connection with a rape case involving two cadets at the Air Force Academy in Colorado Springs. The case involved allegations leveled by Jessica Brakey, the Air Force cadet who first went public with allegations that the Air Force had ignored or not punished a series of sexual assaults against female cadets within the academy. Brakey had given on-camera interviews to the news program *20/20,* Oprah Winfrey, CNN, and others in which she described her alleged attack and the Air Force's response to her allegations. The subpoenas served at the request of one of the

defendants called for the reporters to turn over their notes of interviews with Brakey, unaired outtakes, and all other unpublished material relating to the cases.

In addition, the defense requested discovery of Brakey's records of her postrape counseling and treatment by a civilian social worker. Applying a provision of the MRE that permits constitutional rights of the accused to trump other claims of privilege, the military judge ordered the records produced, but the social worker refused to turn them over. Brakey also objected to disclosure of her psychological treatment records. When Brakey's therapist refused to comply with the trial court's subpoena for an in-camera inspection, the military judge issued an arrest warrant for the therapist.[99]

The therapist unsuccessfully sought injunctive relief in the federal civil courts but was never arrested. In the interim, the military judge abated the defendant's rape prosecution because the alleged victim's psychological treatment records (deemed to be necessary to the defense) were unavailable. Thus, the military court has not resolved whether the numerous subpoenas issued to news media outlets should be quashed or enforced. Nevertheless, the plight of the alleged rape victim's therapist is instructive: it demonstrates that it is difficult to predict when military courts will find that an accused's constitutional rights trump a particular (nonconstitutional) privilege.

Air Force Rethinks Policy

It appears that fallout from the sexual assault cases discussed above has prompted the Air Force to rethink its policy concerning serving subpoenas on the news media. On February 2, 2005, the judge advocate general, Major General Jack Rives, issued a memorandum to the entire Air Force JAG Corps, asking them to consult with senior attorneys at the headquarters level and to negotiate with media outlets before issuing subpoenas to reporters.[100] Rives's memorandum emphasized the importance of striving for "the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement." Although the memorandum is not a binding order or regulation, it mirrors the Department of Justice's policy on issuing subpoenas to the news media and signals an effort to restrict the future use of Air Force subpoenas against reporters.[101] It remains to be seen how much effect, if any, this memorandum will have on the practices of trial counsel and trial judges within the Air Force and other military branches.

Into the Great Beyond

As the above overview demonstrates, the American military justice system in many respects resembles and mirrors the structure and procedures of the Article III civilian courts. In other respects, however, military courts present civilian lawyers with new and different sets of procedural anomalies; alternative policy objectives; and an entirely different set of precedents to draw upon, distinguish, or both. As stated at the outset of this article, the intent of this survey was to provide a general overview of that system and to highlight some of the major signposts in the constellation of First Amendment case law relevant to media attorneys who find themselves dealing with military courts.

Endnotes

1. 10 U.S.C. §§ 801–946.
2. For copies of the executive orders, see MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 25 (GPO 2000, *as amended* 2002, 2005). The *Manual for Courts-Martial* was promulgated by the president of the United States, acting in his role as commander in chief. An online version of the 2005 is available at www.nimj.org.
3. Parker v. Levy, 417 U.S. 733, 743 (1974); *see also* United States v. Weiss, 510 U.S. 163, 174 (1994).
4. Burns v. Wilson, 346 U.S. 137, 140 (1953).
5. 10 U.S.C. §§ 877–934.
6. 10 U.S.C. §§ 933–934.
7. *Id.*
8. 10 U.S.C. § 933.
9. 10 U.S.C. § 906.
10. "A court-martial is a temporary court, [created by a convening order,] and dissolved when its purpose is accomplished." United States v. Weiss, 36 M.J. 224, 228 (C.M.A. 1992), *aff'd,* 510 U.S. 163 (1994).
11. R.C.M. 306 (c)(1), MANUAL FOR COURTS-MARTIAL, *supra* note 2.
12. MANUAL FOR COURTS-MARTIAL, *supra* note 2.
13. United States v. Fretwell, 11 U.S.C.M.A. 377 (1960).
14. UCMJ art. 36.
15. *See supra* note 11.
16. United States v. Grant, 56 M.J. 410, 414 (C.A.A.F. 2002).
17. UCMJ art. 32.
18. *See infra* note 51.
19. R.C.M. 701, MANUAL FOR COURTS-MARTIAL, *supra* note 2, at II 56–59; 10 U.S.C. § 846. *See* United States v. Kinney, 56 M.J. 156, 156–57 (C.A.A.F. 2001):

> One of the hallmarks of the military justice system is that it provides an accused with a broader right of discovery than required by the Constitution, see, e.g., Brady v. Maryland, 373 U.S. 83 (1963), or otherwise available to federal defendants in civilian trials under Fed. R.Crim. P. 12 and 16. (citations omitted).

Kinney, 56 M.J. at 156–57.

20. R.C.M. 701, MANUAL FOR COURTS-MARTIAL, *supra* note 2, at II 62–66.
21. *See supra* note 19.
22. R.C.M. 701, MANUAL FOR COURTS-MARTIAL, *supra* note 2, at II 71. *See also* UCMJ art. 10; 10 U.S.C. § 810 (providing an additional speedy-trial right to accused in pretrial confinement).
23. R.C.M. 806, MANUAL FOR COURTS-MARTIAL, *supra* note 2, at II 79–80; United States v. Grunden, 2 M.J. 116 (C.M.A. 1977) (recognizing military accused's Sixth Amendment right to a public trial).
24. R.C.M. 503, MANUAL FOR COURTS-MARTIAL, *supra* note 2, at II 46–47; 10 U.S.C. § 825.
25. R.C.M. 903, MANUAL FOR COURTS-MARTIAL, *supra* note 2, at II 89–90.
26. 18 U.S.C. § 818.
27. R.C.M. 921(c)(2)(B), MANUAL FOR COURTS-MARTIAL, *supra* note 2.
28. R.C.M. 1107, MANUAL FOR COURTS-MARTIAL, *supra* note 2, at II 148–54; 10 U.S.C. § 860.
29. The service courts are comprised of judges who, with rare exceptions, are uniformed, active-duty members of the respective service. It is interesting to note, however, that the trial judge and appellate judges of the Army and Coast Guard have fixed terms of office, but the Navy, Marine Corps, and Air Force judges do not. This disparity lacks any rational basis and therefore violates the equal protection component of the Due Process Clause of the Fifth Amendment. The Navy court has rejected this argument, e.g., United States v. Forney, No. 200200462 (N.M.C.C.A. 2005); United States v. Beyer, No. 200201128 (N.M.C.C.A. 2005), but the court of appeals has yet to rule on it. The issue is the subject of a pending petition for grant of review in *United States v. Forney,* No. 05–0647/NA, 61 M.J. 461 (C.A.A.F., filed Aug. 1, 2005).
30. Each court of criminal appeals has its own website with links to its decisions, rules, and contact information. *See* http://www.jagcnet.army.mil/acca; http://www.jag.navy.mil/ FieldOffices/NMCCA.htm; http://afcca.law.af.mil/index.php; http://www.uscg.mil/legal/cca/.
31. UCMJ art. 66. It should also be noted

that the courts of criminal appeals also have jurisdiction to consider interlocutory appeals by the United States of certain trial level rulings. Art. 62, UCMJ.

32. UCMJ art. 69a; 10 U.S.C. § 869(a).

33. *See also* EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES (11th ed. 2003). This guide is published by the National Institute of Military Justice. A link can be found at http://www.nimj.org/home.asp.

34. 28 U.S.C. § 1651(a). *See also* Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979).

35. United States v. Labella, 15 M.J. 228 (C.M.A. 1983).

36. United States v. Harper, 729 F.2d 1216, 1221–22 (9th Cir. 1984).

37. *E.g.,* ABC, Inc. v. Powell, 47 M.J. 363 (1997); Ayers v. Denver Post, ARMY MISC 2004 1215 (C.M.A. Feb. 23, 2005) (*available at* www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ACCA1.nsf/MOD/F1FF13F985C4862685256FB2004D947A/$FILE/mo-Denver%20Post%20v%20USA%20&%20Ayers,r.doc. The authors represented the *Denver Post* in this case.

38. 448 U.S. 55 (1980),

39. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 55 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

40. Press Enter. Co. v. Superior Court, 464 U.S. 501 (1984) (First Amendment right of access applies to voir dire proceedings); Press Enter. Co. v. Superior Court, 478 U.S. 1 (1986) (same as to preliminary hearings).

41. *Globe Newspaper Co*., 457 U.S. at 606-07. To justify closing a judicial proceeding or withholding information concerning judicial proceedings, the court must make specific factual findings, on the record, that suppression of the information "is essential to preserve higher values and is narrowly tailored to serve that interest" (that there are no less-restrictive means to accomplish the same objective). *Press Enter. Co.*, 478 U.S. at 13-14.

42. *See, e.g.,* Greer v. Spock, 424 U.S. 828 (1976).

43. *See* United States v. Grunden, 2 M.J. 116 (1977).

44. *Id.*

45. United States v. Hershey, 20 M.J. 433 (C.M.A. 1985).

46. United States v. Anderson, 46 M.J. 728, 731 (A.C.C.A. 1997) (footnotes and citation omitted). The court further stated:

> Absent extraordinary circumstances set forth clearly on the record, courts-martial of the United States Army are public proceedings "where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place."

Id. at 732 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 501, 578 (1980)).

47. MIL. R. EVID. 505(a) provides for the automatic closing of courts-martial whenever classified information is presented or discussed. Thus, within the military courts, judges do not examine the original rationale for the classification decision of the classifying agency to determine whether it may be overbroad or otherwise unjustified. *Compare In re* Wash. Post Co. (United States v. Soussoudis), 807 F.2d 383, 393–94 (4th Cir. 1986) (requiring trial court to independently assess whether closure of trial is necessitated by presentation of classified evidence, and expressly rejecting a blind acceptance of agency's classification decision as equivalent to compelling need to close proceeding).

48. 2 M.J. 116 (1977).

49. *Id.* at 123.

50. *Id.*

51. ABC, Inc. v Powell, 47 M.J. 363 (1997).

52. *Id* at 364.

53. *Id.*

54. *Id.* at 365 (quoting Discussion to RCM 405(h)(3)).

55. *Id.* at 366.

56. *Id.*

57. Miles Moffeit & Art Kane, *Army Charges Four in Death*, DENVER POST, Oct. 5, 2004, at B1.

58. *See* Press Release No. 031127a, Department of Defense, Iraqi General Dies of Natural Causes, *available at* www.cjtf7.army.media-information/november2003/031127a.htm>.

59. *Id.*

60. Miles Moffeit & Art Kane, *Lawmakers Push for Probe of Iraq Prisoner Abuse*, DENVER POST, June 10, 2004.

61. Moffeit & Kane, *supra* note 57.

62. Arthur Kane, *Post Challenges Secret Ft. Carson Hearing on Iraq General's Death*," DENVER POST, Dec. 3, 2004; Robert Weller, *Access Questions Stop Army Court Hearing*, ASSOCIATED PRESS WIRE, Dec. 3, 2004.

63. In its brief to the Army Court of Criminal Appeals, *The Denver Post* stated:

> The allegations concerning the "interrogation techniques" employed by the accused officers that resulted in the death of MG Mowhoush, combined with the assertion by an "Other Government Agency" (which has been identified as the CIA), as the "non-military classified evidence equity holder" in this proceeding, places this Article 32 investigation at the epicenter of the national and international debate over whether U.S. Armed Forces in Iraq were authorized to engage in conduct that plainly violates the Geneva Convention.

64. The court's opinion is available at http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ACCA1.nsf/MOD/F1FF13F985C4862685256FB2004D947A/$FILE/mo-Denver%20Post%20v%20USA%20&%20Ayers,r.doc.

65. *See* Sandra Jontz, *Public, Media Barred from Article 32 Hearing in Naples*, STARS AND STRIPES (Eur. ed.), Nov. 16, 2005, *available at* www.stripes.com/article.asp?section = 104&article = 32222&archive = true>; *Pretrial Hearing in Naples Still Closed to the Media*, STARS AND STRIPES (Eur. ed.), Nov. 17, 2005, *available at* www.stripes.com/articleprint.asp&section = 32240&archive = true>; *Article 32 Hearing for Naples Sailor Wraps Up*, STARS AND STRIPES (Eur. ed.), Nov. 20, 2005, *available at* www.stripes.com/article.asp? section = 104&article = 32298&archive = true>; *Stripes Files Petition After Navy Bars Media from Article 32 Hearing*, STARS AND STRIPES (Eur. ed.), Dec. 9, 2005, *available at* www.stripes.com/article.asp?section = 104&article = 32734&archive = true>; *Naples Article 32 Dismissed, Termed 'Procedurally Defective,'* STARS AND STRIPES, Dec. 16, 2005, *available at* www.stripes.com/article.asp?section = 104&article = 32912&archive = true>; *Stars and Stripes Seeking Explanation on Article 32 Ruling*, STARS AND STRIPES (Eur. ed.), Dec. 21, 2005, *available at* www.stripes. com/article.asp?section = 104&article = 33850>.

66. Stars and Stripes v. United States, NMCCA Case No. 200501631.

67. Press-Enter. Co. v. Superior Ct., 478 U.S. 1, 6 (1986) (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982); Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 377–78 (1979).

68. Sandra Jontz, *Navy Orders New Article 32 for Naples NCO,* STARS AND STRIPES (Eur. ed.), Dec. 21, 2005, *available at* www.stripes.com/article.asp?article = 33872&section = 104).

69. MIL. R. EVID. 501(a)(l).

70. MIL. R. EVID. 501(a)(4).

71. *See* United States v. Ashby, U.S.M.C., Piedmont Jud. Dist., Feb. 4, 1999 (quashing subpoena for outtakes from television and print interviews with the accused); United States v. Bennett, U.S.M.C., Sierra Jud. Dist., Apr. 6, 1999 (Lt. Col. F. Blanche quashing defendant's subpoena for unbroadcast portions of interviews with rape victims and other witnesses).

72. *See* United States v. Rodriguez, 60 M.J. 239 (C.A.A.F. 2004) (affirming the trial court's finding that the defendant had not met his burden of demonstrating the existence of the outtakes videotape he sought to have NBC News produce).

73. Silkwood v. Kerr-McGee, Corp., 563 F.2d 433, 437 (10th Cir. 1977) (stating that the existence of a qualified reporter's privilege under the First Amendment "is no longer in doubt"); Bruno & Stillman, Inc. v. Globe Newspaper Corp., 633 F.2d 583 (1st Cir. 1980); Larouche v. NBC, 780 F.2d 1134 (4th Cir. 1986); Miller v. Transam. Press, 621 F.2d 721 (5th Cir. 1980); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993).

74. *See In re:* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *reh'g denied*, 405 F.3d 17 (D.C. Cir. April 19, 2005), *cert. denied*, Miller v. United States, 125 S. Ct. 2977 (Jun. 27, 2005); Lee v. Dep't of Justice, 401 F.Supp. 2d 123 (D.D.C. Nov. 16, 2005).

75. 408 U.S. 665 (1972).

76. *Id.* at 707.

77. *Id.* at 690.
78. *Id.* at 710.
79. 5 F.3d 1289 (9th Cir. 1993).
80. *Id.* at 1292 & n.5 (citations omitted).
81. *See, e.g.,* Mark v. Shoen, 48 F.3d 412,416 (9th Cir. 1995) ("The test we adopt must therefore ensure that compelled disclosure is the exception, not the rule."); Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981) ("[I]f the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished.").
82. *Zerilli,* 656 F.2d at 711; Southwell v. S. Law Poverty Law Ctr., 949 F. Supp. 1303, 1312 (W.D. Mich. 1996); Altemose Construction Co. v. Bldg. & Construction Trades Council, 443 F. Supp. 489 (E.D. Pa. 1977).
83. Damiano v. Sony Music Entm't, 168 F.R.D. 485,496 (D.N.J. 1996); *see also* Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979).
84. Miller v. Transam. Press, Inc., 621 F.2d 721 (5th Cir. 1980); Southwell v. Southern Poverty Law Ctr., 949 F. Supp. 1303 (W.D. Mich. 1996); *Damiano*, 168 F.R.D. at 485.
85. *Miller,* 621 F.2d at 726; *see also* United States v. LaRouche Campaign, 841 F.2d 1176, 1179 (1st Cir. 1988) ("movant must prove [1] relevance, [2] admissibility, and [3] specificity").
86. *See* Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 35 (2d Cir. 1999) ("the qualified privilege for journalists applies to non-confidential, as well as to confidential, information"); Shoen v. Shoen, 5 F.3d 1289, 1295 ("[W]e hold that the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality."); Church of Scientology Int'l v. Daniels, 992 F.2d 1329,1335 (4th Cir. 1993) (extending application of three-part test to nonconfidential newsgathering materials); *LaRouche Campaign*, 841 F.2d at 1182 (recognizing legitimacy of First Amendment interests in protection of nonconfidential newsgathering materials); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (holding same in criminal case); Re/Max Int'l v. Century 21 Real Estate Group, 846 F. Supp. 910, 911 (D. Colo. 1994) ("'The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants.'").
87. *See, e.g.,* United States v. Hendron, 820 F. Supp. 715, 717–18 (E.D.N.Y. 1993); United States v. McGoldrick, 796 F. Supp. 178, 179 (E.D. Pa. 1992); United States v. Vastola, 685 F. Supp. 917, 924–25 (D.N.J. 1988); United States v. Blanton, 534 F. Supp. 295, 297 (S.D. Fla. 1982).
88. *See In re:* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *reh'g denied*, 405 F.3d 17 (D.C. Cir. April 19, 2005), *cert. denied*, Miller v. United States, 125 S. Ct. 2977 (Jun. 27, 2005); Lee v. Dep't of Justice, 401 F.Supp. 2d 123 (D.D.C. Nov. 16, 2005).
89. *See* United States v. Bennett, U.S.M.C., Sierra Jud. Cir., Apr. 6, 1999 (Bennett Order) (subpoena for unedited videotape of *Dateline NBC* interviews with accused's alleged victims and other witnesses in sexual assault case); United States v. Ashby, U.S.M.C., Piedmont Jud. Cir., Feb. 4, 1999 (Ashby Order) (prosecution subpoena for outtakes from television and print interviews with the accused).
90. *See Eyewitness describes Italian gondola's deadly plunge* (Feb. 12, 1999), *available at* www.cnn.com/US/9902/12/marine.cable.car.
91. *Ashby Order* at 1.
92. *See id.* at 1.
93. *Id.* at 3.
94. *Id.*
95. *Bennett Order* at 38–39.
96. *See* Tripp v. Dep't of Def., 2003 U.S. Dist. LEXIS 17074, at *1 (D.D.C. Sept. 30, 2003).
97. *Id.* at *5–6.
98. *See Paper Refuses Military Court's Subpoena*, *available at* abcnews.go.com/US/wireStory?id = 286408&CMP = OTC-RSSFeeds0312>; *SPJ Condemns Military Subpoena in Air Force Rape Story*, *available at* www.spj.org/news.asp?ref = 402>.
99. Miles Moffeit, *Lawmakers oppose therapist subpoena*, DENVER POST, Apr. 1, 2005, available at http://www.ncdsv.org/images/DenverPost_comAFASexAssaults.htm.
100. *Air Force May Revise Subpoena Policy: JAG Memo Follows Meeting with Dart Society Members* (Feb, 18, 2005), *available at* http://www.dartcenter.org/articles/headlines/2005/2005_02_18.html; for members of the Air Force JAG, the point paper is available at https://aflsa.jag.af.mil/AF/JAZ/ons_items/media_subpoenas.pdf.
101. 28 C.F.R. § 50.10.

Trial Q&A

(Continued from page 9)

that he had a website where he described his hair loss and also showed photos of his bedroom. He also had invited Home and Garden Television to do a makeover on his apartment. ABC hadn't brought a camera into his home.

CL: Were there any particularly significant evidentiary issues that shaped the trial?

PERRY: A couple of evidentiary rulings were fairly significant. In discovery, ABC had turned over all hidden-camera footage Richen recorded, and there was a lot that didn't show the plaintiffs but did show other people at the workshop. We were concerned about the jurors' ability to find their way through that, and we were successful in getting an order that only footage showing the plaintiffs could be admitted. Also, at the Rule 26 stage, the plaintiffs had declined to give any estimate of their damages in their initial disclosures. When [plaintiffs' counsel] Neville Johnson asked the first plaintiff how much money she believed it would take to compensate her for her damages, I objected. The judge sustained the objection, and Neville never asked that question again.

CL: Did the nature of the claims in the case impact your strategy in selecting the jury?

PERRY: To some degree they did because the jurors' notions of privacy can shape their view of a case like this. My sense is that, especially in California, you have some people who live in a bubble, who spend every day going from their private house to their own car to their office, and that can impact their expectation of privacy. You need to think about that when you're selecting a jury.

CL: What lessons do you think *Turnbull* offers for media organizations considering the use of a hidden camera as a newsgathering tool?

PERRY: Let me give you my personal opinion. I think that a producer considering the use of the hidden camera should try to make sure that there are important questions that can best be answered through the use of undercover journalism. If you do need to be undercover, is there some important benefit to the reporter being equipped by audio or video technology? In addition to the target of the investigation, who else will you capture on tape? From a liability point of view, it's always those people who will have the claim; they're not the bad guys.

Here, ABC made an effort to investigate the surroundings and gave careful consideration of the information that could best be obtained through the use of a hidden camera.

Reporting on Katrina

(Continued from page 1)

be hosting Baltimore at the Superdome for their third preseason game. Thank God we didn't have to worry about another hurricane. Thank God it was Friday. That's all anyone in our newsroom wanted to know.

All but one. Standing next to our hurricane reporter Mark Schleifstein, I mentioned the uneventful weekend ahead. "Jim, I need to show you something," he said, motioning me to his computer.

Mark is the co-author of a series we had published three years ago entitled "Washing Away." He was the one who described in graphic terms how a strong hurricane might someday approach New Orleans from the southeast, pushing Gulf of Mexico water into Lake Pontchartrain and driving it over the levees into the city. All power would be lost. The giant pumps that drain our low lying city would sit idle while the lake, swollen with the surging Gulf, slurped into the bowl that is New Orleans.

Over the years, Mark's colleagues had grown numb to his warnings of the swamped bowl scenario. But that afternoon his voice and his pallor made me listen. Katrina, Mark said, had become a Category 3 hurricane and had veered to the east. The National Hurricane Center webpage on Mark's computer screen showed the projected path threatening New Orleans.

The Weekend

We continued our Katrina vigil on Saturday. The projected cone on Mark's computer now pointed directly at our city. Still, we had seen these menacing cones before, had lived through many a hurricane scare. At the last minute, the eye of the storm always seemed to veer east or west.

Saturday afternoon, Mark told me something that erased that last shred of comfort. He had just received a call from one of his sources, Max Mayfield, director of the National Hurricane Center. Mayfield had asked Mark about the structural integrity of *The Times-Picayune* building and urged him to leave New Orleans. That a veteran storm observer like Mayfield would go so far as to worry aloud to a veteran storm reporter like Mark made an impression on me.

Like any newspaper potentially in the path of a hurricane, we had rehearsed for The Big One many times. Heeding the warnings of our own series, we had prepared ourselves by creating a special storm room in the fortified core of our building. There, rows of computers were ready to be powered by generators with enough fuel to last us a week. We would write, edit, and design the paper in our improvised bunker, and then transmit the electronic pages to another paper's press for printing and trucking back to our readers.

Staff Photo: John McCusker, *The Times-Picayune*

Times-Picayune delivery trucks carry employees and family members after they were evacuated from the paper's Howard Ave. plant on August 30.

Like many New Orleans households, my family and I spent all Saturday evening debating whether to evacuate. I planned to stay at *The Times-Picayune*, where I've weathered past hurricanes in a sleeping bag. I wanted my wife and son wanted to get out of town but they insisted that our 100-year-old house was as good a haven as any. We argued well into the night. At about 1 a.m. Sunday morning, they agreed to leave. We packed two cars with photo albums, art, jewelry, and clothing for what we thought would be their two-day trek to safety and back.

Late Sunday, we printed the paper early, knowing that we might not be able to turn on the presses later. Sunday night, I placed my camping mattress in an inner corridor of the newsroom, alongside 140 other editors, reporters, and photographers—safely away from the building's outer perimeter of floor-to-ceiling glass windows. The storm began howling at 2 a.m. The young reporter bunking next to me, new to the city and terrified, paced the corridor. At 4 a.m. we lost power. The howling outside, no longer masked by the white noise of air conditioning, scared even the veterans among us. There was a loud crash in the executive office area. Several of us shot up from our sleeping bags. One of the floor-to-ceiling windows in the general manager's office had been blown across the room into the opposite wall.

Monday, August 29

We awakened Monday morning to the full force of Katrina: Sheets of rain blew horizontally, interrupted every few minutes by an opaque curtain of water poured as though from a huge bucket in the sky. If we stood at the top of our main entrance escalator and peered through the lobby windows, we could see the wind snapping trees, smashing billboards, peeling roofs from houses. Standing in our building's lobby, we could hear the oddly peaceful melody of the wind whistling past the entrance cavity—three sad, flute-like notes played over and over. At times, the wind would shriek to a high-pitched wail before returning to the three-note dirge.

All through the night and into the morning, a core group of reporters and editors, sheltered from the chaos outside, had busied themselves in the computer bunker, blogging reports that came in. It felt right to be engaged in a journalistic task. We clung to the hope that once the eye of Katrina passed, normalcy would gradually return, and we could make another day's newspaper.

That afternoon, as the winds finally died down, James O'Byrne, our features editor, and Doug MacCash, our art critic, went on a bike trip. Mark Schleifstein had told them of his conversation with a source, who said the levee of the 17th Street Canal, which funnels rainwater out of the city and into Lake Pontchartrain, had breached. Like good reporters, they needed to see it with their own eyes.

James had an added motive: His house, from which his family had evacuated the day before, lay only a few blocks from the canal. The two knew that they would be incommunicado as all cell phones were dead.

O'Byrne and MacCash headed toward Lake Pontchartrain. There was water in the street, not unusual for New Orleans after a storm, so they opted for the high ground of a railroad track. As they crossed the train bridge over Canal Boulevard, a main artery leading from the lake to downtown New Orleans, they stopped dead. The street beneath them had turned into a torrent of rushing water. They saw the first waves of the swollen, brackish lake rolling south toward the city's business district. Just as Schleifstein had predicted three years ago, the lake was inundating the city, submerging houses, and covering whole neighborhoods.

Both James and Doug had been jotting down their observations. At this point, James put down his notebook. He stood frozen on the bridge for several minutes, as it dawned on him that his house was drowning, that there would be no coming home when this was over. Then he shook himself back into reporter mode, grabbed his pad, and continued writing.

As the two approached the Filmore Avenue Bridge at the eastern edge of the sinking neighborhood of Lakeview, they had an astonishing encounter. People who had fled their underwater houses were huddled on the bridge, the only high ground in the neighborhood. O'Byrne described the scene: "I was struck by how incredibly happy people were to see us, the newspaper arriving at the edge of their destroyed homes, wanting to tell their story. We were welcomed as their salvation, even though we weren't taking them off the bridge or off their rooftops. It never felt more important to be journalists."

9th Ward Under Water

Earlier that day, photographer Ted Jackson had driven in the opposite direction to the city's eastern neighborhoods. He made it through flooded streets across the Industrial Canal Bridge. There he stood, unable to drive further, at the edge of the Lower 9th Ward, a scene of horrific devastation. The water from a levee breach along the canal had reached the eaves of the houses. People had broken through their attics. Ted could hear them calling to him from their roof perches.

But what caught his eye was just across the street from the bridge. Three women and three small children were standing on the handrail of their raised front porch. Even at that elevation, the water was up to the women's chests. One of the women held two of the smallest children in her arms. She shouted to Ted, "Can you help us?," gesturing for him to swim over and rescue the children. He estimated that the channel between him and the porch was fourteen feet deep. The current, originating from the breached Industrial Canal levee to the north, was swift. If he managed to swim across this churning river, swimming back with even one child was an impossible feat. They would both drown.

There were no boats to be seen. Now the woman was motioning with one of the children, appearing to want to launch the child toward Ted on a log she was clinging to. Ted screamed for her not to. The journalist in him wanted to keep shooting pictures. But he couldn't bear to be a mere observer, as the water engulfed the people on the porch. He put down his camera. He told himself, "I'm not shooting another picture until I rescue someone." He knew he couldn't do it alone. He got into his truck and drove back toward the newsroom to get help. When he and a colleague returned an hour-and-a-half later with an inflatable boat, the water had risen still higher, and there was no sign of the people on the front porch across the street. Ted left, deeply shaken, fearing that they had all perished.

"The lake is pouring into the city"

After a seven-hour bike ride, O'Byrne and MacCash returned to *The Times-Picayune* at about 9:30 Monday night. Our building, devoid of electricity, was hot and clammy. The only light emanated from the computer bunker and the glow of flashlights where we had assembled for a news meeting. At that moment in the French Quarter, national TV reporters were leaning playfully into the wind, proclaiming that New Orleans had once again "dodged the bullet."

O'Byrne and MacCash burst into our huddle with their report. "Listen, you guys, the lake is pouring into the city. This is the news!" Mark Schleifstein, meanwhile, had confirmed the canal breach with a Corps of Engineers source. That night, page one of our paper, published online as PDFs, carried the headline: "CATASTROPHIC/ Storm surge swamps 9th Ward, St. Bernard/Lakeview levee breach threatens to inundate city." The lead story described how the brackish waters "flooded huge swaths of the city in a process that appeared to be spreading even as night fell."

If we doubted that statement, we had only to step out of our own main entrance. By the time we were ready once again to turn in to our sleeping bags, water had reached the parking lot in front of our main entrance and had crept up the first step to our building.

Staff Photo: Ted Jackson, *The Times-Picayune*

A family of women and children cling to posts on their front porch waiting to be rescued in the lower 9th ward on August 29.

Staff Photo: Kathy Anderson, *The Times-Picayune*

Times-Picayune employees, including Jim Amoss (second from *l.*), Dan Shea, and David Meeks, evacuate in newspaper delivery trucks on August 30.

Tuesday, August 30

Hoping for good news, we woke up just before dawn on Tuesday. The sky outside my window was cloudless. The trees barely rustled. But the sight at our entrance was sickening. The water had reached the third step and was rising more rapidly. By our estimate, it was gaining an inch every seven minutes.

At 9:30 a.m. Tuesday, I met with a group of editors in my office. The tide outside was still coming in. Even our high-riding delivery trucks were having trouble fording the moat surrounding our building. In my office, the six of us were reaching a conclusion: We must evacuate while our trucks were still able to leave. Just then, the publisher stuck his head in my office, announcing that he had reached the same conclusion.

We ran through the building, shouting "Leave! Leave now! Go to the loading dock!," evicting journalists from the newsroom and late breakfast eaters from the cafeteria. We needed to herd scores of people, including a six-month-old baby, three-year-old twins, and some elderly relatives of staffers, to the loading dock. We ordered everyone to take only whatever they could fit on their lap. All queued up to board the dozen blue newspaper delivery trucks that had pulled up. They filed in and sat on the trucks' wood floor or, if lucky, a cushioning bundle of newspapers.

Truck by truck, we pulled away from the loading dock into the paper's flooded parking lot, a royal blue caravan, the sides of each vehicle festooned with a cheery sign touting one of the paper's columnists. We didn't know if the trucks would make it through a half-mile stretch of service road, covered with four feet of water, in front of our building to the dry Interstate. We didn't know where we were headed. Most upsetting of all: We were violating one of the deepest instincts of newspapering—always to be at work feverishly on the next day's edition. Having torn ourselves away from the newsroom, the presses, the computer bunker and its generators, we left with the queasy fear that, for the first time since the Civil War, we might not produce a newspaper for tomorrow.

"Water in Fuel"

A quarter mile down the watery road, a pickup truck had stalled, blocking much of our path. Driving around it meant entering still deeper water. I was seated in the front of a truck, next to the driver. An emergency light on my truck's dashboard was flashing the message, "Water in fuel." Ahead of us, one of our trucks ploughed the wrong way down the I-10 exit ramp, reached dry pavement, and made a U-turn on the deserted highway. The journalists crouching in the back cheered. One by one, the rest of our convoy gained the highway. We rumbled past people who were carrying suitcases and babies, and then headed to the downtown bridge across the Mississippi, through Algiers and Gretna to our West Bank bureau.

As we stretched our legs at the deserted and powerless building, we realized that in order to publish that night we needed to send a team back into the city, an obvious but, under the circumstances, perverse notion. About a dozen people—reporters, photographers; and some improbable candidates, including the sports editor, the editorial page editor, the art critic, the pop music critic—volunteered instantly. We gave them one of our trucks and back across the bridge they drove.

The rest of us piled back into our convoy, bound for Houma, Louisiana, home of the *Courier*, which is owned by the *New York Times*. The *Courier* people welcomed us with warm Cajun hospitality and assurances that we could run our paper on their presses. We left a production, design, and circulation team there. The rest of us piled back into our trucks and headed north along Bayou Lafourche. The newsroom needed to be based temporarily in the closest sizable Louisiana city, Baton Rouge. But where in Baton Rouge should we direct the trucks and their human load?

I started working my cell phone. It took about twenty calls to make a successful connection. Just north of Thibodaux, I reached my friend Jack Hamilton, dean of the LSU's Manship School of Mass Communication. By now, it was late afternoon, and Jack was about to head home. "Jack!" I shouted above the din of the truck's cargo hold, "I'm headed to your town with a bunch of *Times-Picayune* people. Can you help us?" Jack didn't hesitate. "Come to the journalism school. I'll meet you there. The students haven't arrived yet so your folks can use our classrooms and our computers." We felt relief for the first time since Friday.

It was getting dark when our caravan pulled up on the LSU campus. Jack Hamilton was waiting. He turned the school and several members of his staff over to us. We sat down at his computers and started making the next day's newspaper.

"Find a Dry Street Uptown"

The volunteers who headed back to New Orleans from our West Bank had crossed the downtown bridge over the Mississippi with one goal: find a dry street Uptown, establish a base, and start reporting. They headed toward the house of Editorial Page Editor Terri Troncale to see if it met their needs and perhaps had a working land line.

A crowd, including New Orleans police officers and fire fighters, had gathered at the new Wal-Mart near the river in the Lower Garden District. The store's doors were open. Sports editor David Meeks, a natural leader, assumed this was the beginning of some post-hurricane relief effort. They parked the

truck and headed into the store, looking for water and food. Then it dawned on them that they had stumbled onto a scene of mass looting. People were jostling to get in and out of the store, shouting, and standing on counter tops.

"There seemed to be two kinds of looters," recalled Meeks, "people carrying water and food and the others—with DVD players and plasma TVs in their arms." The police were making no apparent effort to control the bedlam. Some had joined in the looting. Photographer John McCusker shot a photo of two police officers walking out of the store carrying a stack of DVDs. Reporter Mike Perlstein tried to interview a female NOPD officer pushing a shopping cart full of goods. "Why are you singling me out?," she shot back.

Several of our people had already grabbed bottled water and some food. Our group stood in the parking lot, debating the right thing to do. Three options emerged: Simply take the supplies on the theory that survival might depend on them and the action was thus justified; take the supplies but make a note of the cost for later restitution to Wal-Mart; or put the stuff back and leave without taking anything.

Journalism Ethics in the Trenches

While a traffic jam of looters blocked Tchoupitoulas Street, our debate raged, a mini-seminar in journalistic ethics, a hands-on workshop. The talk coalesced around option two—take now, pay later; and option three—put it all back. Meeks championed the putting back option. "We'll have to write about this," he reasoned, "and if we take anything, we'll have to make ourselves part of the story." His view prevailed. The goods went back to the shelves and on they drove, empty-handed.

Terri's house was dry but the phone was dead. Cell phones weren't operating. But miraculously for a town virtually without communications, an elderly couple across the street had ended up with a working BellSouth line. They offered use of it in exchange of the occasional news flash. Meeks and several reporters then drove downtown, interviewing dazed survivors along the way. Perlstein wanted to see his house Uptown near St. Charles Avenue. To his surprise, the street was inundated. They reached Mark Schleifstein in Baton Rouge, who gave this grim verdict: "The bowl's filling up." They went back to the elderly couple's house and dictated to editors in Baton Rouge. With their stories and powerful images from Ted Jackson and eight other photographers in the New Orleans area, we put out sixteen PDF pages of *The Times-Picayune* on our affiliated web site (www.nola.com). The main headline of our page one that night: "Underwater/ Levee breach swamps city from lake to river."

The Aftermath

We stayed at the LSU journalism school for two weeks, with Hamilton and his staff supporting us in every possible way. Eventually, we all moved into leased office space in Baton Rouge. For three days, *The Times-Picayune* published a PDF-only version of the paper available on nola.com. Soon nola was receiving more than thirty million page views a day from our readers and from others around the world. Our stories and photos, blogs from our journalists, and postings about missing people created a vital link for our readers to their hometown. We were being showered with e-mails from readers, giving us their news and thanking us for the newspaper on the web and its many online adjuncts, including the blogs, forums, and electronic bulletin boards.

On Friday, September 2, thanks to the ingenuity of production and circulation staffs, we were back in print, although continuing our nola.com output. Our sixteen-page newspaper rolled off the *Houma Courier*'s presses and was trucked to shelters, hotels, and the scattered readers in our area. When a group of reporters and editors showed up at the New Orleans Convention Center with a bundle of those first papers, people grabbed for it as if the newsprint was food.

Two weeks later, we moved to the larger capacity of our sister paper, the *Mobile Register*. Both papers had proved inexhaustibly generous.

Coming Home

Many of our readers, especially the suburban ones, have now returned to their homes. Still, a diaspora of New Orleanians remains scattered across the United States and continue to deluge the website. After a six-week absence, we returned to our New Orleans offices and presses on October 10. Our building had suffered remarkably little damage. The October 11 edition was once again produced on our own presses.

The city still felt like a frontier town, brimming with relief workers and insurance adjusters. In the few reopened restaurants, gumbo and jambalaya were served on paper plates, with plastic utensils.

Today, that description already sounds dated. The suburbs of New Orleans have been quick to recover. New Orleans itself, for now, is two cities: The streets of the French Quarter and Uptown New Orleans, spared the flooding, are again buzzing with the traffic of returnees. More and more restaurants and coffee shops have reopened. But there is a shadow city, stretching toward Lake Pontchartrain. The lake's swollen waters, breaching the floodwalls, inundated this area. Though now drained of the floodwater, these neighborhoods are still largely powerless and comatose.

Many of my colleagues returned to

Staff Photo: John McCusker, *The Times-Picayune*

Reporter Brian Thevenot, *l.*, and others, work in the generator-powered bunker on August 29 after Katrina hit New Orleans.

New Orleans with no house to live in. James O'Byrne will have to demolish his Lakeview house, a one-story structure that took eight feet of water. Still, he wants to return to his neighborhood. Mark Schleifstein, too, came back homeless. The house of David Meeks, who remained the impromptu bureau chief of our makeshift New Orleans bureau for six weeks, was also inundated. A few days after the storm, he kayaked to his neighborhood, swam into his living room, and rescued his dog from a landing on the stairs.

Ted Jackson could not stop thinking about the woman with the children on the front porch. Haunted by the fear that they had died and that he might have rescued them, he returned weeks later after the Lower Ninth Ward had been pumped dry. The house still stood, the front door had crumbled. He entered. Rummaging around the muck, he found a letter sent to a name at that address. He sent out a message with that name to our staff. One of our reporters covering an evacuation shelter located the woman. She told our reporter how, shortly after the man with the camera left the scene of the flooding, a rescue boat had come by and scooped up the adults and the children, ferrying them all to safety. The woman had always wondered whether that photographer across the water was simply indifferent to her family's fate. Ted was finally able to tell her his story.

Katrina and its aftermath consume most of our pages these days. We must cover the debate about the rebuilding of New Orleans and the controversial topic of whether the city's foot print must shrink and neighborhoods be abandoned. We must write about the intricate interplay of insurance questions, changing building codes, and the desire, or not, of New Orleanians to return. We must hold the city and state bureaucracies accountable, noting their sluggish pace, their bickering, their penchant for corruption. We devote considerable resources to investigating our levees and the slipshod work by the U.S. Army Corps of Engineers that appears to have caused the floodwalls to collapse and the city to be flooded.

For our readers, these stories have a lasting urgency. For us, whether our houses were destroyed or we merely suffered a few downed tree limbs, Katrina is and will be a defining moment of our lives, a story we'll be telling till the day we die. And the newspaper will be an integral part of the plot.

Being a part of the plot is both riveting and deeply unsettling. We don't yet know the end of this story. And, as you can see, for us the story line is more than some engrossing journalistic narrative of the kind we're trained to tell. It's the story of our lives, and we must both live and chronicle it.

Endnote

1. JOAN DIDION, THE YEAR OF MAGICAL THINKING (2005).

Practice Pointers

(Continued from page 8)

the law for the sake of judicial economy. After the directed verdict was granted, the jurors told us we were probably looking at a plaintiff's verdict. Had that happened, what do you bet our judge would have done? Never underestimate the inertia of the attitudes that weigh against us in ways we struggle to understand. Even if jurors don't resent the media (typically one to three people on every jury does), they are likely to have unrealistic expectations, incorrigible notions of fairness, fits of compassion, or other foibles of the human condition that are largely unfamiliar to the media lawyer. It is impossible to overemphasize the judge's vital gatekeeper role as guardian of First Amendment freedoms.

3. Develop a relationship of trust with your client.

Whether preparing for trial or an access or privilege hearing or in prepublication counseling on newsgathering or prepublication content issues, your input can be effective only if you have developed a relationship of trust with your client. In-house counsel who advise newsrooms learn this, of necessity, very quickly. Ideally, the relationship should embody the kind of exchanges of ideas and conductivity of energy that occur in creative departments in the publicity business.

To minimize risk and maximize the benefit of your counsel, you need to stay out of CYA mode. Things don't work very well when, during discussion of a proposed aggressive newsgathering activity, you give a lecture on how the ethics of your profession forbid you from counseling your clients to break the law. You sound pious and unwilling to get into the pit with your reporter and editor, roll up your sleeves, and help them achieve their goals. When you discuss ways to minimize risks, it will become clear enough to your reporters and editors that the choices and consequences are theirs and not yours.

So too, when counseling on content before publication, never simply declare any item of reporting to be contrary to your advice. Instead, invite discussion and offer suggestions of what can be done to move perceived risks from the unreasonable into the reasonable bracket. This will lead to more reporting and more information, not less. Nearly any report of facts or allegations can be made reasonably safe by a comment from the subject or other information that provides balance, public record attribution, information concerning the unproven nature of the charges, reporting of the absence of information that would support a negative inference or connotation, and other contextual data.

Finally, get used to having many of these conversations from home at night. You must avoid the temptation to leave your editor with anything but your best because you want to get back to the dinner table.

The bottom line is that you want to create an understanding that you and your client are in this thing together, both willing to share the risk of being wrong. When you hedge and avoid making tough judgment calls to avoid having approved content or newsgathering that results in a lawsuit, you will have failed to give your client what she really needs, deserves, and expects from you.

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Rethinking Confidentiality and Access in Civil Litigation

DAVID A. SCHULZ

An influential think tank based in Sedona, Arizona, has been rethinking the rules and procedures that govern protective orders, confidentiality, and public access to civil litigation.[1] The Sedona Conference's draft proposals, called simply the Sedona Guidelines (Guidelines), fill an important gap. They seek to harmonize the evolving constitutional and common law rights of access with preexisting procedural rules governing civil cases and, in so doing, give fresh meaning to the notion that a "trial is a public event" and "[w]hat transpires in the court room is public property."[2]

Released for public comment earlier this year, the Guidelines underscore that disputes brought before a public court are subject to "oversight and monitoring by the general public."[3] The Guidelines apply this presumption of openness to all phases of a lawsuit, from pleading through discovery, motion practice, trial, and settlement, presenting at each step a number of principles and best practices designed to address the inherent tensions between public access and private information. The Guidelines ambitiously propose a set of integrated practices that could more predictably define the scope of public access to litigation records and proceedings, in a manner that protects the legitimate confidentiality needs of litigants and reduces the expense of motion practice relating to confidential information.

What Is The Sedona Conference?

The Sedona Conference is an educational institute that addresses law and policy issues relating to complex litigation. It assembles groups of experienced practitioners, judges, and academics to formulate consensus positions on various recurring issues that confront the bench, the bar, and the public in the course of litigation. It has previously issued position papers on electronic document retention and electronic discovery and has working groups actively studying international issues in electronic information management as well as concerns unique to complex antitrust and patent litigation. The Sedona Conference promulgates guidelines for the public benefit but does not lobby any organization to embrace or adopt them; nevertheless, its earlier guidelines on electronic discovery have been cited by the drafting committee that forged the recently proposed amendments to the Federal Rules of Civil Procedure that address those topics.

Working Group

In 2003 the organization assembled a working group to take on issues concerning confidentiality, sealing orders, and public access in civil litigation. That group includes judges, academics, and attorneys. Its membership encompasses lawyers who regularly represent plaintiffs, defendants, government entities, media companies, and public interest organizations. This diverse working group was charged with developing a series of principles and best practices for confronting confidentiality issues in all types of civil litigation.

The working group approached this task from the ground up, reviewing the legal principles that control access issues and looking at a number of subsidiary issues such as the impact of technology on questions of confidentiality, ethical rules that bear upon requests for confidentiality, and the practices for handling confidentiality disputes currently being used by judges in a number of jurisdictions. The working group explored the dimensions of confidentiality concerns in class actions, the unique considerations about secrecy that are presented when a government agency is a party to civil litigation, and a number of circumstances where confidentiality obligations extend to extrajudicial communications.

The Sedona Guidelines[4] are the result of these wide-ranging deliberations. They present a series of seventeen principles followed by best practices for implementing them. The principles are organized functionally and address access issues that arise at various stages in civil litigation, from the initial pleadings through dismissal, trial, or settlement.

The Guidelines embrace the case law concerning constitutional access rights that has developed since the Supreme Court's 1980 watershed ruling in *Richmond Newspapers v. Virginia*[5] and attempt to clarify that the qualified right of access extends to pleadings, dockets, motions, and all other substantive papers filed with a court. The practices advocated in the Guidelines not only reinforce the public's right to notice and an opportunity to be heard whenever a request is made to restrict the right of access, but also propose steps, some controversial, that would promote the efficient handling of lawsuits involving sensitive matters, like trade secrets, business plans, and intensely personal information, within the framework of a presumptively open forum.

Grappling with Blanket Protective Orders

Among the Guidelines' proposals that have received the greatest attention are those relating to blanket protective orders. In a novel twist on prevailing practice, the Guidelines clearly differentiate the standards under which a court can impose limits on litigants regarding their disclosure and use of material obtained in the course of discovery, from the different standards under which a court can impose limits

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on public access to information submitted to the court. This approach of clearly distinguishing between orders that govern the exchange of discovery and orders that seal court records seeks to address the objections voiced in recent years by a number of courts of appeals to the practice of routinely entering blanket protective orders that allow documents unilaterally designated "confidential" by a party in the discovery process to then be filed in court under seal without any independent judicial review of the need for secrecy.[6]

Rule 26's Good-Cause Standard

Ever since the Supreme Court's observation in *Seattle Times Co. v. Rhinehart*[7] that discovery in a civil lawsuit is "conducted in private," there has been some degree of confusion about the application of the good-cause standard in Rule 26 of the Federal Rules of Civil Procedure when discovery materials are presented to the court. Rule 26 allows a court to order that confidential information "not be revealed" or "revealed only in a designated way" on a simple showing of "good cause." Does a finding of good cause under Rule 26 overcome the constitutional presumption of access to court records? What specific factual findings must a court make to support a good-cause determination simply to prevent a party's disclosure, outside of the litigation, of material obtained through discovery?

The Guidelines tackle these issues by recognizing the differing public interests that exist regarding access to unfiled discovery material and access to court records. Judicial restraints on public disclosure that extend only to a party's ability to disclose and use information obtained through the power of discovery do not restrict "a traditionally public source of information."[8] The Guidelines therefore recommend that the good-cause standard in Rule 26 "generally should be considered to be satisfied as long as the parties can articulate a legitimate need for privacy or confidentiality" and the resulting protective order applies only to the public disclosure of the unfiled fruits of discovery. Under this approach, a blanket order allowing discovery to be designated confidential could properly be entered upon a simple certification by the parties that the existence of confidential business information, personal privacy concerns, or other grounds warrants confidential treatment of elements of discovery.

Encourages Voluntary Exchange

The objective of this proposal is to facilitate the early, voluntary exchange of documents between the parties without requiring the court to become embroiled in reviewing documents and making detailed findings on the need for confidentiality before the materiality and relevance of discovery material are even developed. This does not mean, however, that discovery routinely becomes confidential. The Guidelines not only stress that a protective order restricting dissemination of discovery materials "should not be the default position" in litigation but also recognize the right of nonparties to challenge even a limited protective order restricting the disclosure of discovery. Orders entered under the relaxed good-cause standard contemplated by the Guidelines "should be considered to be provisional" and "subject to future challenge by any party, including an intervener, and subject to modification by the court."[9]

Under the Sedona approach, a party receiving information designated confidential can challenge that designation at any time by simply serving an objection to the producing party. Receipt of such an objection would shift the

burden to the party producing the information to either demonstrate promptly to the court why it qualifies for protection during discovery or waive the confidential designation.

Sealing of Records

The Guidelines recognize that an entirely different set of standards must necessarily apply when material obtained through discovery is submitted to the court. A routine finding of good cause under Rule 26 based on a certification by the parties cannot substitute for the individualized judicial determination necessary before public access to court records may be restricted.

In proposing to unhinge the good-cause standard of Rule 26 from the constitutional standard governing access to court records, the Guidelines also address how confidentiality is to be handled when ultimately brought to the court. Several appellate courts have rejected blanket protective orders that are not supported by detailed factual findings because the protective orders allowed a litigant to file under seal, without further order of the court, any document designated confidential. Consistent with those precedents, the Guidelines would require a court to make the necessary factual findings under the First Amendment access standard (sealing is essential to protect some compelling interest), or documents filed with the court would automatically become unsealed and available to the public.

The Guidelines suggest a number of mechanisms that could be used to allow the essential judicial review when court documents are to be sealed. For example, one approach would allow a confidential document to be "lodged" with the court under seal for a limited time while the need for sealing is addressed by the court. This could be accomplished by requiring the party who designated the material as confidential to file a motion to seal within a set time after the document is lodged with the court, or confidentiality would be waived. The court and opposing parties would have access to the document while the motion is under consideration, and the public would have notice of the pending motion to file under seal before any judicial determination authorizing the sealing is entered.

The net effect the Guidelines seek to produce is to defer disputes over confidentiality designations from the initial exchange of discovery to a later point in the litigation, thereby limiting disputes to just those documents that are actually important to the case. The public right of access would have to be addressed by the court upon the filing of materials in connection with any motion affecting the merits of the case.

Wide-Ranging Consideration of Open Courts

The Guidelines include principles dealing with a number of other issues that remain currently unsettled, such as the right of access to information about jurors and jury selection. The Guidelines strongly endorse the value of openness and access to jury information in most situations, notwithstanding some recent rulings restricting access to juror information, juror questionnaires, and post-verdict juror interviews: "[P]ersonal preferences of jurors, judge's unwillingness to expose jurors to press interviews, and the judge's fear that jurors may disclose what transpired during the deliberations do not, in themselves, warrant anonymous juries or restrictions on public access."[10]

The Guidelines take on another controversial topic in addressing confidentiality of settlement agreements. Resisting the widespread practice of freely sealing settlement agreements, the Guidelines recognize the significant public interest in information relating to the disposition of civil lawsuits. Although recognizing the need for settlement discussions with the court to generally be conducted in confidence, the Guidelines also recognize that the public has a legitimate interest in the outcome (at least when the court is involved in the settlement process). Identifying a number of ethical issues a lawyer may confront in advocating sealed settlements, the Guidelines recommend a standard that would preclude secret settlements unless specific findings of fact are made by the court to justify sealing a settlement agreement filed in the courthouse.

Finally, the Guidelines review the "emerging themes" governing the implementation of new technology that permits off-site, electronic access to court records. Although not proposing specific standards or best practices in this uncharted territory, the Guidelines summarize a number of ways that courts around the country are rethinking the conflict between access and confidentiality in cyberspace.

Soliciting Public Comment

The Guidelines are currently undergoing a public comment phase with meetings and conferences occurring around the country to promote public review and input. Public comments on the proposed Guidelines may be submitted to the working group before its next meeting in April. A complete copy of the working draft and a schedule of public conferences is available at http://www.thesedonaconference.org/content/miscFiles/wg2may05draft2. The Guidelines are expected to be finalized this spring.

Endnotes

1. The think tank is appropriately named The Sedona Conference (TSC). According to its mission statement, "TSC exists to allow leading jurists, lawyers, experts, academics, and others at the cutting edge of issues in the area of antitrust law, complex litigation, and intellectual property rights to come together in conferences and mini–think tanks (working groups) and engage in true dialogue, not debate, all in an effort to move the law forward in a reasoned and just way."
2. Craig v. Harney, 331 U.S. 367, 374 (1947).
3. The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases 33 (April 2005 Public Comment Draft) [hereinafter Guidelines]. The Guidelines are available for review or downloading at http://www.thesedonaconference.org/content/miscFiles/wg2may05draft2.
4. *Id*.
5. 448 U.S. 555 (1980).
6. E.g., Jepson Inc. v. Mahita Electric Works Ltd., 30 F.3d 854 (7th Cir. 1994) (parties cannot stipulate an order that allows confidential records to be sealed without a good-cause determination by the court); Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1989) (same).
7. 467 U.S. 20 (1984).
8. *Id*. at 33.
9. Guidelines at 17.
10. Guidelines at 28.

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