"Top Ten Statements You Don't Want to Hear from Your News Director"

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"We have an audio tape of a telephone conversation of two people in Maryland that we got from our reporter's roommate. It discloses plans to vandalize the Washington Monument. We're going to run with it on the 11 o'clock news."

This hypothetical telephone call from a television's news director to the station's lawyer was the opening salvo in "Top Ten Statements You Don't Want to Hear from Your News Director," the session on newsgathering at this year's "Representing Your Local Broadcaster." Sponsored by the Forum on Communications Law, the National Association of Broadcasters (NAB), and the Federal Communications Bar Association, the program was held April 6, 2003, in conjunction with the NAB annual meeting in Las Vegas. Guylyn Cummins of Gray Cary Ware & Freidenrich, LLP, in San Diego, moderated the panel.

The hypothetical, according to panelist Lee Levine of Levine, Sullivan & Koch, L.L.P., in Washington, D.C., closely parallels the facts of *Bartnicki v. Vopper*,[1] in which a radio station received the tape of an unlawfully recorded telephone conversation that mysteriously appeared in a third party's mail box. Although the U.S. Supreme Court in *Bartnicki* answered several important questions about the rights of the press to broadcast such information, the decision left some critical issues unanswered, said Levine.

Nevertheless, he continued, *Bartnicki* provides a useful set of questions for the hypothetical news director who is about to disclose the secret plot to spray paint the Washington Monument. Among the most important are:

Was the Recording Lawful in the First Place?

The federal government and nearly all states have wiretap statutes that prohibit the interception of certain communications. Most of these laws authorize criminal prosecution as well as civil lawsuits seeking monetary damages by the aggrieved parties. The statutes differ in several respects, warned Levine, any one of which may make a particular recording or interception unlawful. Perhaps most significant to this case, the federal statute and most state laws require the consent of only one party for an interception to be lawful. Some states, however, including Maryland, require the consent of all parties.

Has the Station Violated the Wiretap Statute?

Most state wiretap statutes make it illegal not only to intercept or record a telephone conversation, but also to disseminate its contents. In *Bartnicki*, however, the U.S. Supreme Court held that in some circumstances the First Amendment protects the dissemination of the contents of an unlawfully recorded conversation. To determine whether the First Amendment applies in the hypothetical, said Levine, the station's lawyer must consider several factors, including:

The station's involvement. The First Amendment may not protect the station if its personnel played any role, no matter how indirect, in obtaining the tape. This includes encouraging a third party to intercept the call and maybe even buying a copy of the recording.

The accuracy of information and whether it addresses a matter of public concern. In the hypothetical scenario, the subject is of paramount public concern. If the report's accuracy can be confirmed, *Bartnicki* would very likely protect any decision by the station to broadcast its contents (assuming that the station played no role in the interception itself). However, Levine said, *Bartnicki* does not entirely resolve whether the First Amendment would shield the broadcast of a recording containing a matter of less obvious public concern, and the dissemination of purely private information may well fall outside the First Amendment's protections.

The degree of governmental interest and the enforceability of wiretap laws. The First Amendment may presumptively protect the station from liability or criminal prosecution under the Maryland wiretap law. However, added Levine, the presumption might be overcome by a judicial determination that the statute's enforcement in a particular case served a competing governmental interest of the "highest order."

Levine also discussed a hypothetical statement from the beleaguered news director that has likely been made at least once in 2003: "We have sensitive and confidential information on some military attack plans. We're going with it at 5:00."

"Assuming that the station is confident about the accuracy of the information," he said, "and has made an independent journalistic judgment that it is newsworthy and should be broadcast, the station's lawyers should consider the potential consequences. These may include prior restraint, subsequent punishment, and compelled disclosure."

In perhaps the best-known case dealing with prior restraint, the so-called Pentagon Papers decision, the U.S. Supreme Court held that the First Amendment creates a "heavy presumption" against prior restraints on publication or broadcasting.[2] But Levine said that the freedom from prior restraint is not absolute. If the government can show that a broadcast will cause serious and imminent harm to a compelling governmental interest, such as national security, it is likely that an injunction prohibiting the broadcast will issue.[3]

Damn the Torpedoes, Full Speed Ahead

Some cases suggest that the press may ignore an injunction issued by a lower court if it obviously violates the First Amendment and reasonable efforts to secure prompt appellate review have proven futile. Nevertheless, as CNN learned in *Cable News Network v. Noriega*,[4] such a course is fraught with risk. In *Noriega*, in which a court held that CNN violated an injunction by broadcasting recorded conversations between General Manuel Noriega and his lawyers, the cable network was held in

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contempt of court and ordered both to apologize on the air and to pay a fine.

Even if the government has no advance notice about the broadcast or otherwise ignores its initial dissemination, the station and its personnel may face criminal prosecution. Although the U.S. Code does not contain a general statute regarding the unauthorized disclosure of classified information, Congress has enacted a patchwork of legislation to protect the nation's strategic and military secrets.[5]

The government may also have an independent interest in identifying and prosecuting the station's source and anyone else responsible for the unlawful acquisition of the information—even if the tape is not broadcast. Thus, a grand jury may subpoena information from the station compelling disclosure of the identities of its sources as well as related documents, outtakes, or other information. "The press enjoys a privilege," said Levine, "grounded in the First Amendment to refuse to disclose the identities of confidential sources or produce outtakes or other nonbroadcast material." He cautioned that the protections afforded by the First Amendment are comparatively thin if the subpoena emanates from a federal grand jury.[6]

Subpoenas and High Tech

Continuing with the hypothetical, panelist Bob Nelon, of Hall, Estill, Hardwick, Gable, Golden & Nelson in Oklahoma City, laid the groundwork for handling the news director, who calls the station's lawyer to announce: "We just got a subpoena for tape but our station is now all digital with no tape to archive so I'm going to blow it off."

The lawyer's immediate response, said Nelon, should be "not so fast." Rule 34 of the Federal Rules of Civil Procedure lays out a comprehensive definition of subpoenable documents, including "writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."[7]

The station's lawyer can also turn to Rule 1001 of the Federal Rules of Evidence that defines "writings" and "recordings" as "letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or any other form of data compilation."[8] If the material can be retrieved, Nelon cautioned, it can be subpoenaed.

The difficult issue, he added, is whether digital information is protected under various state shield laws once the information comes to reside in a video server or other type of computer server.

How Does the Privacy Rule Affect the News?

Unfazed, the news director in the hypothetical calls a week later, this time with the information that "we have hospital records from a former hospital employee disclosing major malpractice, and we are going to use names."

According to Nelon, the release of "individually identifiable health information," no matter how newsworthy, is the quickest way to run afoul of the Health Insurance Portability and Accountability Act (HIPAA) of 1996.[9] HIPAA calls for severe civil and criminal penalties, including fines of up to $25,000 for multiple violations of the same standards in a calendar year and fines of up to $250,000, imprisonment for up to ten years, or both.

Known as the Kennedy-Kassebaum Act, HIPAA calls for standardization of electronic patient health, administrative, and financial data, as well as unique identifiers for individuals, employers, health plans, and health care providers. Concerned that the electronic exchange of data could violate patient privacy, Congress mandated the adoption of rules to protect records from disclosure. The U.S. Department of Health and Human Services published the so-called Privacy Rule in December 2000; it took effect for most health care organizations on April 14, 2003.[10]

Although HIPAA directly affects all health care organizations and personnel, said Nelon, it arguably impacts anyone who might disclose such information, including the hypothetical news director anxious to broadcast a report on malpractice at a local hospital.

When Promises Become Contracts

A broken promise to a confidential source may be the basis for a valid lawsuit, according to panelist Charles D. Tobin, a partner with Holland & Knight's Washington, D.C., office. Tobin framed an answer to another situation, in which the hypothetical news director called the station's lawyer to report that "we're revealing a confidential source at 6:00—anything to worry about?"

"Plenty," said Tobin, who briefly discussed the implications of *Cohen v. Cowles Media Co.*,[11] in which the U.S. Supreme Court ruled that a newspaper publisher enjoys no special immunity from application of the general laws. The publisher in *Cohen* was therefore liable for breach of a promise based on promissory estoppel law. In *Cohen*, reporters from the *Minneapolis Star & Tribune* and the *St. Paul Pioneer Press Dispatch* promised not to reveal a confidential source. The editors, however, decided that the source's name was as newsworthy as his information, and his identity was revealed, or "burned." Tobin contrasted the facts of *Tobin* with those of *Veilleux v. National Broadcasting Co.*,[12] in which the court held that an alleged promise of a "positive" story, in *Veilleux* about the trucking industry, was not actionable.

"Clear and definite promises, when used to induce the source to talk, can form the basis of a valid lawsuit," Tobin cautioned. "On the other hand, a vague aspirational statement that is too hard to define probably will not be enforced."

Ride-Alongs and Other Deals with Cops

Q: "The local cops are letting us in on a drug sting if we supply the video. Can we?"

A: "If you act like the police, the courts may treat you like police."

Turning from confidential sources to ride-alongs, Tobin warned that "once a station or its reporters accompany police onto private property, take pictures, and agree to turn over the material to the police," the demarcation between journalism and law enforcement becomes blurred, and it will be hard for reporters to convince a judge that they were "just covering a story."

In *Hanlon v. Berger*,[13] for example, the U.S. Supreme Court held that police officers went beyond the bounds of their warrant and violated a Montana property owner's right to privacy when they brought journalists onto his property to conduct a search for evidence of poisoned wildlife.

In most circumstances, only the government and not the press is liable for alleged violations of someone's constitutional rights. But in *Berger*, said Tobin, "the journalists agreed to let prosecutors control the air date. The agents agreed to wear recording de-

vices, let journalists attend planning meetings, and bring the news team onto the property." The Court held that this cooperation transformed the network into a "state actor," and, like governmental agencies, it could be sued for constitutional violations.

In the wake of *Berger* and similar rulings, according to Tobin, "many police agencies are now asking journalists to sign releases, indemnifying the agency from any legal fees for claims brought as a result of the decision to permit ride-alongs." In any case, he added, "the risk is great courts will conclude that where journalists have agreed to act as photographers for law enforcement, they waive their rights under federal and state law to turn over all their material and testify about their newsgathering activities."

If the Reporter Breaks the Law

Q: "Our producer 'inadvertently' bought an eight-ball of crack cocaine. Can we use the video?"

A: "No problem. We've got tons of bail money in our sweeps budget."

Wrong, said Tobin, adding that "few lines are brighter in this area of law—journalists cannot commit crimes to gather the news and expect the courts to approve."

After discussing a few notable cases, such as the Maryland radio journalist who was arrested and convicted in 1996 on charges of exchanging child pornography over the Internet, Tobin offered the following practical suggestions where a station has learned that a reporter broke a law to get a story:

Call the station's lawyer immediately, and be prepared to discuss retaining separate lawyers for every person involved in the story.

Stop all conversation among station personnel about the matter. Everyone involved has a Fifth Amendment right against making self-incriminating statements. But each person who hears another's statement can be compelled to repeat it to the authorities.

Save all notes, documents, footage, and any other tangible items, and do not destroy any potential evidence.

I'd Rather Do It Myself!

NBC's Vice President of Media Law, Maya Windholz, addressed the issues raised by a hypothetical news director who tells her "we're comparing the effectiveness of some over-the-counter drugs . . . on our own." The two primary issues, she told the newsgathering session, are how to ensure the fairness and reliability of the sampling and testing procedures, and how to protect the station against liability if the product is found to be unsafe.

The first consideration, Windholz continued, should always be: is testing really necessary for the news report, and is the station prepared to commit the resources required to ensure that appropriate testing procedures are followed? Some recommendations for testing procedures are outlined in the sidebar on page 23.

In addition, she cautioned that specific safety concerns should be addressed when volunteers are taking over-the-counter (OTC) drugs, including:

- Research the products to determine all possible side effects and contraindications.
- Take all reasonable measures to ensure participants are in no danger.
- Be sure that volunteers must understand all the risks and have consulted with their personal physicians before taking the medications.

"Of paramount importance," Windholz said, "is getting releases from all volunteers." Volunteer releases should include representations that:

- Volunteers have been advised of all risks regarding the drug.
- They have consulted with their own physicians.
- They are in good health.
- They agree to follow their physicians' advice.
- They hold the station harmless from any and all possible injury or liability.

Hidden Cameras and Going Undercover

"We've got hidden camera video of a quack doctor, who's found that the patient (our reporter) has pernicious anemia. She's just had a checkup with her own physician and there's nothing wrong with her."

What should the station's lawyer tell the news director who poses this question?

"Leaving aside the obvious concerns about libel issues," Windholz said, "the use of a clandestine recording device in this circumstance raises a number of issues. " They include:

Did the hidden camera record both video and audio? Was the use of a hidden camera legal? Can the tape be aired?

Will the station face liability for trespass, fraud, or intrusion?

"These claims are largely creatures of state law," said Windholz, who recommended that "lawyers review state and local trespass statutes and know the common law in their states regarding the elements of fraud and intrusion

KEEP YOUR PROMISE TO CONFIDENTIAL SOURCES

In dealing with potential confidential sources, panelist Chuck Tobin recommends that lawyers advise stations and news directors to:

- Be specific and avoid jargon such as "off the record" and "on background." Interviewers should clearly outline what they will do by stating, for example, "I will not use your name," "I will not use your information without confirmation by another source," or "I will quote you as a 'high administration official.'"
- Not guarantee results ("No one will ever know who you are."). Instead, the interviewer should make assurances about the process ("I will only show your hands and feet," "I will only film the back of your head," or "I will disguise your voice"). Such promises are easier to keep and demonstrate if they end up in litigation.
- Define the limits of the newsgatherer's authority. Once a reporter makes a promise, the station may be bound by it.
- To avoid inadvertent disclosure, make sure that everyone in the production chain is aware what promises have been made to sources.
- Record the terms of the promise wherever possible. "Casually reciting the promise while shooting reverse angle," said Tobin, "can eliminate a lot of uncertainty if the source remembers things differently once the story airs."

claims." Media lawyers should also become familiar with a number of significant media cases involving newsgathering claims, she added.[14]

Turning to the use of hidden cameras, Windholz said that federal law generally permits surreptitious audio taping if one party to the conversation has consented to the taping—unless the recording is done for a criminal or tortious purpose.[15] In addition, FCC regulations prohibit the use of wireless microphones to record or overhear "private conversations of others" without the consent of all parties to the conversation.[16] Even if these two criteria are satisfied, she added, many states ban recording conversations without the consent of all parties to the conversation,[17] and violation of these statutes may carry criminal as well as civil penalties.

As to whether the tape can be aired, Windholz said that most eavesdropping statutes provide that "if the recording of a conversation is prohibited, then so is disclosure." The U.S. Supreme Court recently held in *Bartnicki*, however, that the broadcast of an illegally intercepted cell phone call was protected by the First Amendment in a case where the media defendant did not participate in the illegal taping and the subject of the recording was a matter of public interest.[18]

Privacy and Children's Consent

"We have a great story on fifth-grade students selling Meth that they got at home to their friends. The kids were great on camera and the story is riveting."

The news director's proposed story may be engrossing but it should be handled very carefully, cautioned Windholz, who noted the dearth of case law and legal scholarship on the subject of children's privacy and the heightened sensitivity of the public when it comes to protecting children. Putting aside the potential libel issues, the station's lawyer and its news director should consider the following issues: How old are the kids involved? Where were they interviewed? What exactly did they say? Will their parents consider the content of their remarks to be personal or private? What was the emotional state of the children during the interview?

As for legal principles, consider :

- What is your state law concerning invasion of privacy by intrusion or by publication of private facts? Is there room for a parent to argue on behalf of a child that the child was legally incapable of consenting to the interview and that the interview itself violated the child's rights. "The strength of this argument," according to Windholz, "should depend largely on the subject matter (for example, intimate family issues) and the age and maturity of the child. In general, the younger the child and the more controversial the subject, the greater the risk."
- Does your state have a doctrine recognizing that "mature minors" are capable of making certain decisions on their own, such as decisions concerning medical treatment? If so, then the same standards should arguably apply to a child's decision to speak to the media, especially if the child is a teenager and apparently capable of understanding the consequences of a decision to give an interview.
- Be wary of conducting interviews on school grounds and check to see if the applicable jurisdiction has any specific statutes or local laws governing access to school property.

One recent case underscores the risks of talking to young kids. In *KOVR-TV, Inc. v. Superior Court*,[19] the California Court of Appeal refused to dismiss a claim for intentional infliction of emotional distress where a reporter informed three children (while taping) that their next-door neighbor had killed herself and her children, who were friends of the young kids.

Endnotes

1. 532 U.S. 514 (2001).
2. New York Times Co. v. United States, 403 U.S. 713 (1971).
3. *See* Near v. Minnesota, 283 U.S. 697 (1931) (prior restraint found to be appropriate if the press sought to publicize the movements of troop ships during hostilities).
4. 498 U.S. 976 (1990).
5. *See, e.g.*, 18 U.S.C. §§ 793–99; 42 U.S.C. §§ 2161–66, 2274–77; 50 U.S.C. §§ 421(a) and (b), 783(b); 50 U.S.C. App. § 781.

CHECKLIST FOR PRODUCT EVALUATION OR TESTING

A station that conducts its own product testing must establish protocols to ensure the validity and reliability of the testing, and must report the process and the results fairly and accurately. NBC's Maya Windholz made a number of recommendations as to testing procedures, including:

- ✔ Work with outside experts to determine a reliable, fair methodology that is generally accepted in the scientific community. Universities are a good source for most experts, but tread carefully with advocacy groups (including universities) that may have a stake in the results. Be sure to ask about who funds the expert's work, as corporate funding may undermine the expert's actual, or apparent, objectivity. If working with a lab, look for one that is state or federally certified, and has a good reputation and a strong track record with similar types of testing procedures.
- ✔ Get explicit instructions from the lab or expert about how samples should be collected and handled. If possible, have the samples collected by experts rather than by journalists, and record (with time code) all collection, handling, transportation, and storage of samples.
- ✔ Your expert should help you determine by what standard the product will be measured or evaluated, and how large a sample is needed for testing.
- ✔ Ask the expert and/or laboratory to provide a written statement that affirms its independence and objectivity, sets out the testing methodology, provides instructions for handling of samples, and promises delivery of a written report.
- ✔ Consider getting a second opinion from a well-regarded and neutral source (such as an academic or government scientist) regarding the efficacy and reliability of the entire testing process.
- ✔ Be prepared to get a response from the relevant parties if the results are damaging to a product or company. This may include giving the company an opportunity to examine the test results or to repeat the test.
- ✔ Do not overstate your conclusions in either the news reports or promotions.

6. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

7. FED. R. CIV. PROC. 34(a).

8. FED. R. EVID. 1001.

9. 42 U.S.C. § 130d (Supp. V 1999).

10. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160, 164).

11. 501 U.S. 663 (1991).

12. 206 F.3d 92 (1st Cir. 2000).

13. 526 U.S. 808 (1999).

14. *See* Med. Lab. Mgmt. v. ABC, Inc., 306 F.3d 806 (9th Cir. 2002) (hidden camera taping in medical lab offices not actionable intrusion, resulting in dismissal of trespass claim); Food Lion, Inc. v. Capital Cities/ ABC, Inc., 194 F.3d 505 (4th Cir. 1999) (no viable claim for fraud when journalists obtained jobs in supermarket to film unsanitary conditions; trespass claim upheld but only for nominal damages ($2)); Desnick v. Capital Cities/ABC, Inc., 44 F.3d 1345 (7th Cir. 1995) (secret recording by journalists posing as eye clinic patients not actionable as intrusion or trespass); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (secret recording in quack doctor's home office found to constitute intrusion); Sanders v. ABC, Inc., P.2d 67 (Cal. 1999) (secret taping by undercover journalist working at a telepsychic phone operation states a claim for intrusion of privacy of co-workers).

15. 18 U.S.C. § 2511(2)(d).

16. 47 C.F.R. § 15.9.

17. States that prohibit recording (in all or under many circumstances) without the consent of all parties include California, Connecticut, Delaware, Florida, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington.

18. Bartnicki v. Vopper, 532 U.S. 514 (2001).

19. 37 Cal. Rptr. 2d 431 (Cal. Ct. App. 1995).