PENNSYLVANIA
MEDIA LAW NEWS
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
Vol. 2, 2008 A NEWSLETTER HIGHLIGHTING MEDIA LAW ISSUES IN PENNSYLVANIA www.lskslaw.com

SUPREME COURT: STATE SHIELD LAW IS ABSOLUTE

The Pennsylvania Supreme Court ruled at the end of September that the Pennsylvania Shield Law absolutely protects confidential sources in civil cases, even where it has been alleged that the confidential source has leaked secret grand jury information. LSKS filed an amicus brief with the Supreme Court on behalf of Pennsylvania and national media and in support of the defendant in *Castellani v. Scranton Times Tribune*, a defamation case in which two Lackawanna County commissioners claim that the newspaper falsely stated that they "stonewalled" a grand jury before whom they testified and were "considerably less than cooperative." The description was based on information provided by a confidential source.

After filing suit, the commissioners, represented by Richard Sprague, sought the identity of the confidential source, which the newspaper and its reporter refused to divulge. The trial judge in Lackawanna County ruled that, despite the Shield Law's clear language protecting confidential sources, the Shield Law's protection must give way to grand jury secrecy.

In a 25-page opinion written by Chief Justice Castille, the Supreme Court concluded that the Pennsylvania Shield Law absolutely protects confidential sources and that, even in the context of purported criminal grand jury leaks, there can be no exception. The Court based its opinion on the plain language of the statute and the Court's repeated holdings that the statute absolutely protects confidential sources. The Court also noted that, despite the commisioners' argument that other jurisdictions with absolute shield laws allowed an exception for grand jury leaks, they provided no support for that assertion; the Court instead credited LSKS's citation of 15 jurisdictions with absolute laws to which no such exception had ever been applied in a civil case. The Court also rejected plaintiffs' attempt to apply the crime-fraud exception

Continued on Page 2

Pennsylvania Judge Quashes Subpoenas to Reporters in High Profile Inquiry into Alleged Grand Jury Leaks

LSKS attorneys recently won a significant ruling in which a Harrisburg judge quashed wide-ranging subpoenas to reporters for The Associated Press and The Morning Call in a high profile inquiry into alleged grand jury leaks. The inquiry was ordered by the Pennsylvania Supreme Court after Mt. Airy casino owner, Louis A. DeNaples, and two co-defendants, all of whom had been charged with perjury, complained that press reports about the grand jury's investigation included secret grand jury information. The Supreme Court required the judge presiding over the criminal case, Judge Todd A. Hoover, to hold a hearing and issue an opinion recommending whether to appoint a special prosecutor to investigate the alleged leaks.

Prior to the hearing, the defendants subpoenaed The Associated Press, The Morning Call, four other Pennsylvania newspapers, and more than a dozen reporters. The subpoenas called for the reporters to testify at the hearing and produce extensive evidence about their reporting.

The reporters quickly moved to quash the subpoenas. They argued, first, that the First Amendment reporter's privilege protected their unpublished materials, whether those materials would reveal confidential sources or not. According to the motions, the defendants' subpoenas impermissibly threatened the freedom of the press, when not a single person sworn to grand jury secrecy had been called to testify, and despite the fact that the only grand jury information the newspapers published was publicly available or lawfully provided by witnesses and their attorneys.

The reporters also contended that their confidential sources were absolutely protected by Pennsylvania's shield law. Indeed, no Pennsylvania court has ever required a reporter to identify a confidential source, even when the reporter has received information that is subject to grand jury secrecy rules.

Judge Hoover conducted the evidentiary hearing behind closed doors without the reporters being called to testify and without requiring them to produce any evidence. Ultimately, on July 17, Judge Hoover granted the reporters' motions and quashed the subpoenas.

In early August, Judge Hoover filed his opinion with the Supreme Court on whether to recommend a special prose-

Continued on Page 2

Federal Court Overturns FCC Indecency Fine

FCC Focus

It has been more than four years since nearly 90 million television viewers saw Janet Jackson's "wardrobe malfunction" during the Super Bowl halftime show and over two years since the FCC ruled that the fleeting image was indecent and fined CBS $550,000 for the incident. In July, the U.S. Court of Appeals for the Third Circuit vacated the FCC's ruling and invalidated the fine.

The critical issue before the court was whether the FCC's ruling departed from its long-standing policy of exempting fleeting material from its prohibition of indecency on the airwaves. For nearly three decades, the FCC followed a restrained approach, declining to find broadcasts indecent except when the indecency was "so pervasive as to amount to 'shock treatment' for the audience." And, in the past, the FCC expressly rejected the notion that it would punish the broadcast of a single expletive.

The FCC adopted a new approach in March 2004 when it issued the *Golden Globes* decision, which arose after Bono cursed in his acceptance speech during a live broadcast of the Golden Globe Awards. In that decision, the FCC announced that broadcasts of even isolated or fleeting expletives could be punished in the future, but that it would not sanction broadcasters for past incidents. Still, as the Third Circuit observed, the FCC punished CBS despite the fact that the Super Bowl broadcast predated the FCC's new policy. So how did the FCC explain this?

According to the FCC, its unprecedented approach to regulating "isolated" or "fleeting" material was limited to fleeting *expletives* and did not encompass fleeting *images*. In the FCC's view, the *Golden Globes* decision addressed only fleeting expletives, and thus its sanction against CBS for broadcasting a fleeting image could not constitute a retroactive application of that decision.

The Third Circuit rejected these assertions, describing them as "untenable," "unsubstantiated," and "implausible." The court concluded that even if the *Golden Globes* decision only addressed expletives, the decision constituted the first time the FCC carved out a specific category of material – expletives – from its long-standing policy with respect to fleeting material generally. So, the FCC's restrained policy with respect to other material, such as images, was still intact when the FCC fined CBS. Consequently, the FCC's decision to punish CBS for broadcasting a "glimpse" of Janet Jackson's bare breast "constituted the announcement of a policy change." Because the FCC did not acknowledge this policy change, let alone provide a reasoned explanation for it, the new policy could not be applied to CBS. The court also concluded that CBS could not be held liable for the halftime show performers' unscripted actions.

The FCC's indecency rules will continue to receive attention in the coming months. The FCC has appealed another court's ruling that the FCC's new fleeting expletives policy is arbitrary and capricious. The U.S. Supreme Court will hear oral argument in that appeal in November.

State Shield Law

Continued from Page 1

to the attorney-client privilege to the Shield Law. The following language may be oft repeated:

> As for [the] alleged "criminal communication," because only the individual swearing the oath can violate grand jury secrecy, it is the speaker in [this] scenario, and not the listener, who has the capacity to commit a crime. …[The newspaper] may indeed have been on the receiving end of a criminal communication, but it was the opening of the speaker's mouth which violated the Grand Jury Act, not the attentiveness of the listener's ears. … [T]**he news media have a right to report news, regardless of how the information was received.** The exception crafted by the trial court penalizes the news media for another's crime and is in direct tension with our decision in *Taylor*, which recognized that the Shield Law protects a journalist's source information from disclosure, even if such protection would conceal or cover-up a crime.

The Court in a footnote observed that this resolution does not mean that the outcome would be the same if the source had been sought by the Commonwealth in a criminal case, leaving that question "for another day." That footnote has special meaning in light of the DeNaples subpoena battle (described on Page One), but it is safe to say that even in such circumstances, the Commonwealth would at least face an uphill battle in attempting to distinguish the rationale on which *Castellani* is based.

The lone dissenter was Justice McCaffrey, one of our newest justices. He would overturn the Supreme Court's precedent holding the Shield Law's protection absolute.

Quashed Subpoenas

Continued from Page 1

cutor. That opinion – as well all of the filings, transcripts, evidence, and nearly all of Judge Hoover's orders – remain under seal. On August 13, LSKS filed a motion on behalf of The Associated Press asking Judge Hoover to unseal the proceedings, including all of the cases' docket entries, pleadings, and transcripts. That motion is still pending.

The proceedings before Judge Hoover included one other twist involving the defendants' efforts to show that law enforcement officials spoke with the subpoenaed reporters. It has been reported that, prior to the hearing, the defense obtained certain law enforcement officials' telephone records by subpoenaing their cell phone providers. After these public reports, law enforcement officials around the state called for a new law to provide greater protection for cell phone records. In late September the Pennsylvania House of Representatives passed a bill, HB 2216, that would permit telephone companies to disclose a subscriber's phone records only if: (1) the subscriber consents; (2) a court orders the disclosure after the subscriber is given notice and an opportunity to object (except in criminal investigations conducted by law enforcement authorities); (3) the government or a grand jury issues a subpoena; or (4) the government obtains a search warrant. This measure would close a significant loophole in the law and help to shield reporters' confidential sources by protecting their phone records in many cases. The bill has been referred to the Senate Judiciary Committee and is now awaiting further action.

Open Courts

Federal Constitutional Right to Access Juror Names

Ever since a federal grand jury indicted famed forensic pathologist Cyril Wecht, the public and press have closely followed his prosecution. In light of this public scrutiny and in an effort to control publicity, the Pittsburgh judge presiding over the case ordered that the names of all jurors be kept secret. In August, the Court of Appeals reversed that order, holding that the public possesses a First Amendment right to learn the names of people serving on juries.

The appellate ruling in *Wecht* comes after three Pittsburgh-based media companies – WPXI, *Pittsburgh Tribune-Review*, and *Pittsburgh Post-Gazette* – challenged the trial judge's order. Before considering the order, however, the court first had to determine whether the press could file an appeal prior to trial. It ruled that the press has the right to appeal immediately because "it would be impossible for us to vindicate the public's asserted right of access if we foreclosed appeal" until after the trial. Indeed, the court emphasized that "the value of the right of access would be seriously undermined" if the press could not file an immediate appeal.

The court then turned to the public's right to learn the names of the people in the jury pool and on the jury, concluding that the right to this information was supported by both history and logic. It explained that "public knowledge of juror's names is a well-established part of American judicial tradition" and that disclosure of jurors' names allows the public to "verify the impartiality of key participants in the administration of justice and thereby ensures fairness, the appearance of fairness, and public confidence in the system." Nevertheless, the court recognized that the right to jurors' names may be overcome if anonymity is essential to preserve a compelling government interest. In the *Wecht* case, the trial judge's reasons for refusing to release the jurors' names – the possibility that the press might publish news reports about the jurors or that outsiders might attempt to influence the jury – did not meet this high standard.

The *Wecht* decision stands as a ringing endorsement of the public's right to access court proceedings and provides important procedural safeguards for the public and the press. It also reinforces the press's critical role in ensuring that the public's right of access is honored.

Legal Update

How to Respond to Subpoenas Seeking to Unmask Anonymous Internet Posters

Across the country, courts are struggling to strike the proper balance between the First Amendment right to anonymous speech and the rights of those who claim to be injured by anonymous speech on the Internet. Caught in the middle are many media companies that have received subpoenas seeking identifying information about subscribers, posters, and bloggers. Although the appropriate response to a subpoena varies from case to case, these common-sense tips may help bring about a successful outcome and help you avoid some typical snares.

Preserve the Evidence. Once a company receives a subpoena demanding information that would identify an anonymous speaker, it must preserve all information called for in the subpoena, even if it plans to challenge the subpoena in court. This means that appropriate employees must be familiar with the basic workings of the company's IT systems, including back-up systems, and must implement effective document retention policies even before a subpoena is served.

If You Talk the Talk, Walk the Walk. When a company has privacy policies, terms of service, or any other policy or agreement that governs the disclosure of information that could identify its subscribers or posters, it should comply with those policies – or face serious and costly legal risks. Recently, for example, the Perez Hilton celebrity gossip blog published an anonymous poster's name and work email address, along with the poster's previously anonymous comments, in violation of the blog's privacy notice. The poster claimed she was fired from her job after being unmasked and sued Hilton for $25 million. Although this action was subsequently dismissed on jurisdictional grounds, complying with stated policies and agreements is a simple method to avoid the cost and headache of such lawsuits.

Notify the Anonymous Speaker. The speaker has the greatest interest in protecting her right to anonymity, and notifying the speaker of the subpoena and requesting additional response time on her behalf will give her the opportunity to respond directly. Two of the country's leading cases on this issue mandate that the plaintiff attempt to notify the anonymous speaker of its efforts to uncover her identity, and a growing number of courts and one state legislature require the recipient of the subpoena to assist in this process.

Challenge the Subpoena? Under certain circumstances, media companies can challenge a subpoena seeking identifying information. For example, companies might ask a court to quash a subpoena based on the speaker's constitutional rights, federal and state statutory law, the reporter's privilege, or the court's lack of jurisdiction.

Public Relations Count. Legal considerations aside, it is also important to consider how the public may perceive the release of the information sought. Some media companies have faced a backlash when their compliance with a subpoena was publicized. Others have fought to withhold information regarding anonymous posters in an effort to bolster their positions as staunch advocates of the right to speak anonymously.

Pennsylvania Media Law News

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
2112 WALNUT STREET, THIRD FLOOR
PHILADELPHIA, PA 19103

RETURN SERVICE REQUESTED

Philadelphia Office

2112 Walnut Street, Third Floor
Philadelphia, PA 19103
Phone: (215) 988-9778
Fax: (215) 988-9750

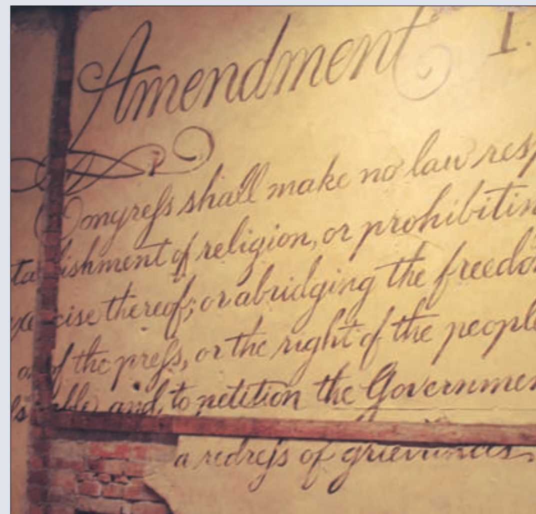
To learn more about LSKS and its Pennsylvania practice, please contact Gayle C. Sproul at gsproul@lskslaw.com or (215) 988-9782.

This edition of Pennsylvania Media Law News was written and edited by:

Gayle C. Sproul
Jeanette Melendez Bead
Michael Berry
Katharine Larsen

Other offices:
Washington, DC
New York, NY
Denver, CO

About Us



Levine Sullivan Koch & Schulz, L.L.P. is a trial and appellate practice that focuses on representing news and entertainment media in First Amendment and intellectual property matters.

LSKS has litigated numerous matters in Pennsylvania's state and federal trial and appellate courts. Our clients include large and small broadcasters, publishers, and other content providers, whom we defend in defamation, privacy and related First Amendment litigation.

We assist news organizations in gaining access to government records and proceedings, defend journalists against subpoenas, prosecute and defend copyright and trademark infringement claims and represent media clients in general litigation matters. A substantial portion of our practice involves providing prepublication and prebroadcast advice and other counseling services.

Consistent with the focus of our practice, the lawyers of LSKS often undertake pro bono representation of individuals and organizations whose freedom of expression has been infringed and who do not otherwise have the resources to vindicate their rights.

These materials are made available by LSKS for general informational purposes only and are not intended to be relied upon for legal advice. Nothing in these materials is, or is intended to be, legal advice, nor intended to create a lawyer-client relationship. If you have a legal question, you should consult an attorney licensed in your jurisdiction for legal advice regarding your specific situation and circumstances.