OREGON
CIVIL RIGHTS
NEWSLETTER

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The Homeland Security Act: Civil Rights Implications

"True patriotism hates injustice in its own land more than anywhere else." —Clarence Darrow

Kyle B. Dukelow

Background

The Homeland Security Act (HSA) was first proposed as a 35-page document by Senator Joe Lieberman, D-Conn., and Senator Arlen Specter, R-Pa.,[1] in which they outlined the formation of a department of homeland security. Initially, this proposal was opposed by President George W. Bush. However, after much criticism from both parties for his seeming inaction, and after seeing the bill's potential, the president finally signed a 484-page version of the act.[2]

The HSA encompasses the largest federal reorganization since the Department of Defense was created after World War II. When all is done, the new Department of Homeland Security (DHS) will have a budget of more than $38 billion and will employ over 170,000 people, including over 74,000 armed agents, from 22 separate agencies. Agencies whose functions have been or will be absorbed into the DHS include the Secret Service, Customs Service, Coast Guard, Federal Emergency Management Agency, and former Immigration and Naturalization Service (INS). The department's first task is to insulate the United States from terrorist attacks. If an attack occurs, the DHS will facilitate the emergency response to aid the victims.

Because the DHS has so many employees and potentially could pry into every aspect of the lives of U.S. citizens and visitors, it is imperative that controls over the DHS be maintained. This article briefly summarizes some aspects of the HSA that concern civil libertarians on both the left and the right. This article does not address the civil rights implications of the USA Patriot Act.

Total Information Awareness[3] and Information Gathering

The most controversial portion of the HSA is Title II, which condones extensive data collection and analysis, like that envisioned by the Total Information Awareness system (TIA). TIA was originally developed by the Defense Advanced Research Projects Agency (DARPA) before September 11, 2001. DARPA is the agency that was instrumental in creating the Internet. TIA is now headed by John Poindexter, who is most renowned as the highest official under President Ronald Reagan to be convicted of lying to Congress about the Iran-Contra affair. That conviction was later overturned on appeal because Admiral Poindexter had been given Congressional immunity in return for his Congressional testimony concerning the Iran-Contra scandal.

From the beginning, TIA has been widely criticized. In response, its logo and motto were quickly changed. Initially the logo depicted the dollar bill pyramid with a beam of light coming out of the eye at the top of the pyramid. The beam of light covered the globe. Tied to the logo was the motto "Scientia Est Potentia," or "Knowledge Is Power."

Theoretically, TIA would create a national database that could track the credit card use, email correspondence, website visits, hotel reservations, medical prescriptions, telephone calls, and banking transactions of any person in the United States. The massive database would then be subjected to "data-mining" programs that would theoretically detect "obscure behavioral patterns" of terrorists. I have been unable to discover any real explanation of what constitutes "obscure behavioral patterns." Nonetheless, when the program detected those patterns, the person would be red-flagged for further observation or investigation, or both.

TIA has been roundly criticized by such diverse groups as the ACLU, the Eagle Forum, and the American Conservative Union. Individual conservatives such as Phyllis Schlafly, William Safire, and former House Majority Leader Dick Armey have also spoken out against these unnecessary intrusions into our privacy.

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Recent Ninth Circuit Decisions

Richard F. Liebman
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***Buss v. Weyerhaeuser Co.,* CV 00-6141-AA (9th Cir Jan 23, 2003)**

Former employees alleged claims under federal and Oregon law that the employer's reduction in force (RIF) was a mere pretext for age discrimination. The court granted the defendant's motion for summary judgment, finding that the plaintiffs failed to establish a prima facie case. Specifically, the plaintiffs failed to produce "circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to age discrimination." Furthermore, the court found sufficient evidence that the employer had bona fide reasons for the RIF and had legitimate, nondiscriminatory reasons for the plaintiffs' terminations. The court also rejected the plaintiffs' reliance on statistics that tended to show that the RIF affected older workers more significantly because the affected positions were primarily filled with older workers.

***Denny v. Union Pacific Railroad,* Civil No. 00-1301-HU (9th Cir Oct 31, 2002)**

The court held that there is no OFLA cause of action for retaliation under the language of the statute. An OAR providing such a cause of action cannot expand the statute's coverage.

***Kaplan v. City of North Las Vegas,* 2003 WL 1701900 (9th Cir April 1, 2003)**

The plaintiff was a peace officer who suffered an injury during a training session. Thereafter, the plaintiff could no longer hold a gun or grasp objects with his right hand. The plaintiff's continued pain and slow recovery were attributed to rheumatoid arthritis, a conclusion later determined to be a misdiagnosis. Based on the misdiagnosis, however, the defendant believed that the plaintiff's injury was permanent, and the plaintiff was terminated. The plaintiff filed a lawsuit under the Americans with Disabilities Act (ADA).

The Ninth Circuit addressed, as an issue of first impression, whether "regarded as" plaintiffs are entitled to a reasonable accommodation under the ADA. In its analysis, the court noted that the weight of circuit authority disfavors interpreting the ADA to require an accommodation for "regarded as" plaintiffs. The Ninth Circuit conducted a thorough analysis of the language of the ADA, and held that there is no duty to accommodate an employee in a "regarded as" case. The court noted that if it were to conclude that "regarded as" plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not. This would be a perverse and troubling result under a statute aimed at decreasing "stereotypic assumptions not truly indicative of the individual ability of people with disabilities." Also, to require accommodation for those not truly disabled would compel employers to waste resources unnecessarily, when the employers' limited resources would be better spent assisting people who are actually disabled and in genuine need of an accommodation to perform to their potential.

***Leonard v. St. Rose Dominican Hospital,* 310 F3d 653 (9th Cir 2002)**

The employee (and debtor in bankruptcy) failed to pay money owed for medical expenses incurred at the same hospital where the employee worked. The employee informed the hospital of his intentions to file bankruptcy, and the hospital terminated him. The bankruptcy trustee filed an adversary complaint against the hospital claiming that the termination violated 11 USC §525(b), which prohibits a private employer from terminating an employee "solely because" the individual "is or has been" a debtor in bankruptcy.

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OREGON CIVIL RIGHTS NEWSLETTER

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Supreme Court Update

Cases Decided

***Breuer v. Jim's Concrete of Brevard, Inc.,* No. 02-337 (April 21, 2003)**

In a unanimous decision, the Court held that the Fair Labor Standards Act (FLSA) does not prohibit removal of a suit from state to federal court.

***Brown v. Legal Foundation of Washington,* No. 01-1325 (March 26, 2003)**

By a 5–4 vote, the Court upheld a Washington state law requiring the deposit of all client funds that cannot earn the client net interest in an interest-bearing trust account. Although transferring interest to a different owner was a per se taking requiring the payment of just compensation, none was due because there was no net loss by the property owner.

***Clackamas Gastroenterology Assoc. v. Wells,* No. 01-1435 (April 22, 2003)**

The Court reversed a Ninth Circuit decision originating in the District of Oregon, and held that the common-law element of control should determine whether partners, officers, board of directors' members, and major shareholders qualify as employees under the Americans with Disabilities Act (ADA) for purposes of determining whether an employer is covered by the act.

***Connecticut Dept. of Public Safety v. Doe,* No. 01-1231 (March 5, 2003)**

The Court unanimously upheld the state's "Megan's Law," which requires convicted sexual offenders to register with a state agency upon their release and requires the agency to make publicly available an Internet registry containing the offenders' names, addresses, photos, and physical descriptions. The Court held that an offender does not have a procedural due process right to the opportunity to prove a fact—that he or she is not currently dangerous—that is not material under the law, and that even defamatory in-

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jury to reputation does not constitute deprivation of a liberty interest.

***Cuyahoga Falls v. Buckeye Community Hope Foundation,* No. 01-1269 (March 25, 2003)**

After the city council passed an ordinance authorizing construction of a low-income housing complex, citizens requested a referendum, which passed and thus repealed the ordinance. The Court held that submitting the ordinance to a referendum was not proof of racially discriminatory intent as prohibited by the equal protection clause or arbitrary government conduct in violation of substantive due process.

***Ewing v. California,* No. 01-6978 (March 5, 2003)**

By a 5–4 vote, the Court upheld California's "three strikes" law, which imposes a mandatory life sentence with the possibility of parole for any felony conviction of a defendant with at least two previous serious or violent felony convictions. The Court held that the law does not violate the Eighth Amendment's protections against cruel and unusual punishment because it is not grossly disproportionate, but rather reflects a rational legislative choice to protect society from repeat offenders.

***Inyo County v. Paiute-Shoshone Indians,* No. 02-281 (May 19, 2003)**

The Court held unanimously that the Bishop Paiute Tribe could not sue under §1983 for an unlawful search and seizure because the tribe was not a "person" under §1983, which was designed to secure private rights against government encroachment.

***Lockyer v. Andrade,* No. 01-1127 (March 5, 2003)**

In another case under California's "three strikes" law, the Court upheld a sentence of two consecutive terms of 25 years to life for two felony petty theft convictions, each of which triggered a separate application of the "three strikes" law because the jury found that the defendant had three prior serious or violent felony convictions.

***Madigan v. Telemarketing Associates, Inc.,* No. 01-1806 (May 5, 2003)**

The Court held unanimously that under the First Amendment, states may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used.

***Nevada Dept. of Human Resources v. Hibbs,* No. 01-1368 (May 27, 2003)**

In 6–3 decision, the Court held that state employees have the right to pursue claims under the Family Medical Leave Act (FMLA) and have a right to 12 weeks of unpaid leave under that statute. Chief Justice Rehnquist departed from prior rulings that have limited the application of civil rights statutes to public employees.

***Smith v. Doe,* No. 01-729 (March 5, 2003)**

The Court held 6–3 that retroactive application of Alaska's "Megan's Law" does not violate the ex post facto clause, because it is nonpunitive. The statute requires sex offenders and child kidnapers incarcerated in the state to register their names, addresses, and other information within 30 days of release, and to verify that information regularly for 15 years to life depending on the nature of the offense.

***Virginia v. Black,* No. 01-1107 (April 7, 2003)**

The Court held 5–4 that, under the First Amendment, a state may ban cross burning carried out with the intent to intimidate because cross burning is a particularly virulent form of intimidation. However, the Court also held that such a law is unconstitutional

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In February, Congress barred the use of TIA against U.S. citizens without specific authorization from Congress.[4] Our own Senator Ron Wyden proposed the legislation, which was an amendment to an appropriations bill. It also required, as a condition of further TIA development, that the Department of Defense submit a detailed report to Congress outlining the impact of the program on the civil rights of U.S. citizens.

The Pentagon recently issued the report, which announced that "TIA" would now stand for "Terrorism Information Awareness." The report describes the Genisys Privacy Protection Program, which "aims to create new technologies to ensure personal privacy in the context of improving data analysis for detecting, identifying and tracking terrorist threats."[5] However, Senator Wyden and others believe that the report does not come close to setting forth the privacy protection most of us would expect.[6]

TIA is not the only project being developed by federal agencies to mine vast databases of personal information.[7]

Nuala O'Connor Kelly was recently appointed privacy officer for the DHS. Her job is to try to balance security interests and privacy concerns in developing DHS policies.[8] Before this appointment, Ms. O'Connor Kelly worked at the Commerce Department, and before that, she represented DoubleClick, an Internet advertising company that compiled data on users in an attempt to target specific pop-up ads to likely customers.[9]

President Bush, for legitimate reasons, wants information shared among the FBI, CIA, and DHS. Under the DHS, intelligence units from the Secret Service, Customs Service, Border Patrol, and Coast Guard will be combined. This merging tends to blur the formerly clear differences between intelligence gathering for law enforcement and intelligence gathering for military purposes.[10] For the time being, at least, the DHS receives only summaries of intelligence reports.[11]

Freedom of Information Act

One of the major tools used ensure government accountability has been the Freedom of Information Act (FOIA), which allows private citizens to request information from the government. If the information is deemed a threat to national security, the government has the ability to redact it, subject to judicial review.[12]

Section 214 of the HSA creates an exemption to FOIA for information that is voluntarily submitted to the DHS by a business that believes the information relates to a perceived threat to national security. When submitting the information to the DHS, the company can fill out a form identifying the information as "critical infrastructure information"(CII).[13]

The HSA provides a blanket exemption from FOIA requests for CII. Arguably, this information is exempt whether or not it is, in fact, vital to national security. The HSA does not authorize any judicial review of classification decisions. Therefore, it is conceivable that simply classifying the information as CII will be enough to invoke the blanket exemption.

The blanket exemption would be beneficial to companies because §214 also guarantees that information provided may not be used against the company in civil lawsuits brought against it by any federal or state agency or by a private party.[14] Of additional concern to civil libertarians is the fact that a government employee who leaks the information will be subject to criminal prosecution as well as the loss of his or her job.[15]

Civil Rights Violations by DHS Agencies or Employees

It would seem obvious that to protect civil rights, a procedure must be established to allow complaints to be filed and investigated. The HSA does establish an officer for complaints of civil rights and civil liberties violations.[16] The officer is to submit a yearly report to the president of the Senate and speaker of the House on any allegations of abuse.[17] That officer, however, has no authority to conduct investigations into the complaints. At least one human rights group[18] has promoted establishing a deputy inspector general for civil rights to work within the Department of Homeland Security to ensure that our government does not violate civil rights, even in the name of national security.

Warrantless Arrests

The HSA authorizes assistants and agents of inspectors general to make arrests without warrants for federal felonies when they have "reasonable grounds" to believe that the crime has been, or will be, committed.[19] To President Bush's credit, when signing the act, he made it clear that under the Supreme Court's rulings, "reasonable grounds" means "probable cause."[20] Although it is highly unlikely that the Supreme Court will overturn 200 years of established law on warrantless arrests,[21] one still wonders why Congress, if it meant "probable cause," did not use that term in the statute.

Immigration

The INS has been abolished. The enforcement functions of the INS, and those of the Border Patrol, have been subsumed under the DHS Bureau of Border and Transportation Security.[22] The immigration functions of the INS have been transferred to the Bureau of Citizenship and Immigration Services.[23] The American Immigration Lawyers Association has expressed concern that Title IV of the HSA, as well as Title XI, fails "to provide for a high-level official who is focused on our nation's immigration policy, relegates immigration services to a bureau that lacks its own Under-Secretary, provides little or no coordination between immigration enforcement and services, and fails to adequately protect the important role of immigration courts."[24]

In addition, provisions in previous versions of the bill set forth standards regarding immigrant children who had been detained.[25] These standards

would have dictated time frames for hearings and mandated that the children be represented by counsel. In the final version of the HSA, such safeguards were not included.

Civil Service Rules

By amending Title 5 of the United States Code, the HSA gave the DHS the ability to disregard many of the civil service rules by which many other federal departments and agencies must abide.[26] These rules concern collective bargaining, performance appraisals, job classification, discipline, and firing. The collective bargaining issue alone caused many Democrats to seek to delay passage of the bill until after the midterm Republican victories of November 2002.

After the elections, the lame duck session of Congress approved the HSA without much further debate. Among other things, President Bush was granted the authority to reassign personnel without difficulty.[27]

Conclusion

In response to the terrorist attacks of September 11, the DHS was created to ensure that we are able to fight terrorism on our own soil. However, in their zeal to fight terrorism, the politicians have forgotten the values that have made the United States unique. Congress has given the DHS the capacity to destroy much of what is unique about life in this country. The act infringes on the right to privacy, the right to question your government, and the right to have civil rights complaints investigated. ❖

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Endnotes

1. National Homeland Security and Combating Terrorism Act of 2002, S 2452.

2. Homeland Security Act, Pub L No. 107-296, 116 Stat 2135, signed by President Bush on Nov 25, 2002.

3. Most of the information for this section was obtained from one or more of the following sources: Chaddock, *Security Act to Pervade Daily Lives,* Christian Science Monitor (Nov 21, 2002), retrieved from www.csmonitor.com/2002/1121/p01s03-usju.html; Frazer, *The Homeland Rebels Against the Security Act,* The Hightower Lowdown (Jan 2003); and Mintz, *Homeland Agency Launched: Bush Signs Bill to Combine Federal Security Functions,* Washington Post (Nov 26, 2002), at A1.

4. Pub L 108-7, Div M, §111 (b).

5. Report to Congress Regarding the Terrorism Information Awareness Program: In Response to Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Division M, §111(b) (May 20, 2003), at 6–7. Retrieved from http:// wyden.senate.gov/leg_issues/reports/darpa_tia.pdf.

6. Sniffen, *Wyden Still Critical of Anti-Terror Plan,* Oregonian (May 21, 2003), at A3; Clymer, *New Name of Pentagon Data Sweep Focuses on Terror,* New York Times, (May 21, 2003), at A15.

7. Markoff, *Experts Say Technology Is Widely Disseminated Inside and Outside Military,* New York Times (May 21, 2003), at A15.

8. Homeland Security Act §222.

9. *All Things Considered: Nuala O'Connor Kelly Named Privacy Officer for the New Department of Homeland Security* (NPR Radio Broadcast, April 16, 2003) (transcript on file at Law Office of Kyle B. Dukelow, PC).

10. David Johnston, *Threats and Responses: The Law; Administration Begins to Rewrite Decades-Old Spying Restrictions,* New York Times (Nov 30, 2002), at A1.

11. Dan Eggen and John Mintz, *Homeland Security Won't have a Diet of Raw Intelligence; Rules Being Drafted to Preclude Interagency Conflict,* Washington Post, (Dec 6, 2002), at A43.

12. 5 USC §552 (b).

13. Homeland Security Act §201(f)(2).

14. Homeland Security Act §214(a)(1)(C).

15. Homeland Security Act §214(f).

16. Homeland Security Act §705.

17. Homeland Security Act §705(b).

18. Human Rights Watch.

19. Homeland Security Act §812(a).

20. November 25, 2002, Statement by President George W. Bush. Retrieved from http://foi.missouri.edu/homelandsecurity/hsact2002.html.

21. See *Ex parte Burford,* 7 US (3 Cr) 448 (1806); *Giordenello v. United States,* 357 US 480 (1958); *United States v. Watson,* 423 US 411 (1976).

22. Homeland Security Act §471.

23. Retrieved from www.immigration.gov/graphics/aboutus/index.htm.

24. Retrieved from www.aila.org/contentViewer.aspx?bc=10,911,594,2074.

25. Retrieved from www.hrw.org/press/2002/homeland1121.htm.

26. Homeland Security Act §1302 et seq.

27. *Homeland Department May Take a Year to Take Shape,* Washington Post (Nov 21, 2002), at A8.

SUPREME COURT UPDATE CONTINUED FROM PAGE 3

if it treats all cross burning as prima facie evidence of intent to intimidate.

Certiorari Granted

***General Dynamics Land Systems, Inc. v. Cline,* No. 02-1080 (April 21, 2003)**

The Court will decide whether an employer violates the Age Discrimination in Employment Act (ADEA) by providing health benefits to employees over age 50, but not to employees age 40–49, who are also protected by the ADEA. The Sixth Circuit held that the ADEA provides a cause of action to protected employees who are discriminated against because of their age when the employer treats older employees more favorably.

***Jones v. R.R. Donnelly & Sons Co.,* No. 01-1205 (May 19, 2003)**

The Court will decide whether in a race discrimination suit brought under §1981, the proper statute of limitations is the "catch-all" four-year period or the forum state's personal injury statute of limitations. ❖

Fisher & Phillips LLP is one of the oldest and largest national law firms in the country representing employers in labor and employment law matters. Portland-based law firm Gordon & Meneghello, P.C., merged with Fisher & Phillips in September 2002, and now serves as the firm's Pacific Northwest office.

Busse & Hunt represents employees in employment cases, including civil rights, discrimination, sexual harassment, wrongful discharge, and fraud.

BOLI Final Orders
December 2002 – April 2003

Dan Grinfas
Oregon Bureau of Labor
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The Oregon Bureau of Labor and Industries (BOLI) investigates complaints and conducts administrative hearings in civil rights and wage and hour cases. This regular column summarizes final orders that BOLI has issued recently in civil rights cases. Recent BOLI final orders can be accessed through www.boli.state.or.us, the BOLI website. The full text of all BOLI final orders is available for purchase in 24 volumes. This set is also available at most local law libraries.

***Entrada Lodge, Inc., dba Best Western Entrada Lodge,* 24 BOLI 126 (2003)**

BOLI Commissioner Jack Roberts issued a final order in this case in 2000, finding that the respondent violated the Oregon Family Leave Act (OFLA) by failing to restore the complainant to her former housekeeper position at the conclusion of her OFLA parental leave. The commissioner found that workers the respondent hired during the complainant's absence were replacement workers who performed work that the complainant would have performed had she not been on leave. Therefore, the order found, at the time the complainant gave notice that she was ready to return, the respondent should have offered her the work hours assigned to the replacement workers.

On appeal, the Oregon Court of Appeals reversed and remanded the order for reconsideration, holding that it erroneously focused on the status of the replacement workers rather than on "the employment advantages" the complainant would have enjoyed had she not taken OFLA leave. *Entrada Lodge v. Bureau of Labor and Industries,* 184 Or App 315, 56 P3d 444 (2002). The order on remand, issued by Commissioner Dan Gardner, found that the "advantages" the complainant enjoyed were limited to the number of hours she was scheduled to work, as she had no other job benefits.

Although the complainant's work hours varied before her leave, she had worked continuously for a six-month period and, on average, worked about one-fifth of the total hours available for the housekeepers on staff. Because the respondent offered the complainant no work hours at all at the time she gave notice that she was ready to return to work, the order found that the respondent did not restore the complainant to her position as OFLA requires. The commissioner awarded the complainant $262.50 in lost wages and $15,000 for mental suffering. ✦

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RECENT NINTH CIRCUIT DECISIONS CONTINUED FROM PAGE 2

The Ninth Circuit found the language of this statute to be clear, interpreted it according to its plain terms, and affirmed the lower court's grant of the employer's motion to dismiss. The court reasoned that because the employee was not and had not been a debtor in bankruptcy at the time the hospital fired him, he did not come within the scope of the antiretaliation provision and the bankruptcy statutes did not preclude the hospital from discharging him.

***Ponce v. General Motors Corp.,* CV 01-56-ST (9th Cir Findings and Recommendation, Nov 13, 2002; adopted Jan 2003)**

The employee brought an action against the employer alleging, in part, violations of state disability discrimination law. The employee suffered from nearsightedness and congenital photophobia, which required him to wear tinted prescription glasses. GM had a policy that prohibited the use of dark glasses such as those as a bona fide safety measure. With his corrective lenses, the employee had 20/20 vision and did not suffer from any symptoms of photophobia. In accordance with *Sutton v. United Airlines, Inc.,* 527 US 471, 119 S Ct 2139, 144 L Ed 2d 450 (1999), the court held that the employee's correctable impairment was not a "disability." Likewise, the court rejected the employee's "regarded as" disabled claim because the record was void of any evidence that GM regarded the employee as having a vision impairment that significantly limited his eyesight for purposes of his daily life activities. The court entered summary judgment for the employer on those claims.

***Snodgrass v. Lanphere Enterprise, Inc.,* 2001 WL 980281 (D Or 2001), *rev.'d,* 2003 WL 1793370 (9th Cir 2003)**

The Ninth Circuit determined that the district court erred in holding that the modification of an at-will employment contract extinguishes the original contract and any right to sue for its breach. Under Oregon law, a modification to an employment contract operates prospectively and does not extinguish a right that is earned or vests prior to modification. Thus, an employer cannot retroactively revoke benefits that have already vested in an employee at the time of modification. The Ninth Circuit remanded the case to the district court for a determination of whether any benefits actually accrued prior to modification and whether those benefits thus remain. ✦

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Interfacing with the Media

Mark Lansing

Journalists call themselves "the fourth estate," a reference to their function as the unofficial fourth branch of government, which oversees the other three by virtue of its access to the public ear. Many great Supreme Court opinions have been peppered with references to the "marketplace of ideas" that the First Amendment protects; in that context, mass media are the mall.

But lawyers tend to shy away from journalists. There is no doubt that an attorney's work product can be drawn and quartered by overzealous hacks looking to sell a few newspapers. With good reason, not a journalist around will take marching orders from an attorney. But some reporters take twisted pride in unearthing (and sometimes creating) the story behind the story an attorney tried to tell them.

Nonetheless, the hallowed marketplace of ideas in theory remains a lofty location. Civil rights lawyers in particular deal with issues that can often benefit from a good public airing. The process is a tricky one, though, especially for people more comfortable in a courtroom, where they retain a greater semblance of control. The following true-life case studies are illustrative.

Case 1

Angie claimed that her caseworker had seduced her, and then withheld vocational assistance when she broke off the sexual relationship. The subject was a sensitive one: Angie had since reunited with her husband. But she strongly believed that the state's employee had abused his position of trust when he instigated the affair and had violated her civil rights when he stopped helping her obtain and keep a job.

So she and Joe Attorney filed a complaint. The next day a four-column story appeared in the local newspaper. The headline read: "Gold Digger Sues After Sex Romp." Okay, this is an exaggeration, but the headline might as well have said that for all the embarrassment and trauma the story caused this poor woman. Her adultery (and the implication that she had been played for a fool) was exposed and broadcast throughout the small community in which she lived.

Lesson 1

Generally speaking, getting in front of foreseeable problems is a lawyer's job. Journalists won't prioritize personal privacy concerns over a good story. Lawsuit filings are public records regularly reviewed by the courthouse beat. If you want to conceal the identity of the plaintiff from media scrutiny, file the complaint in the name of Jane Doe, then go back and file an amended version a week later (before you serve the defendant).[1] Journalists (like their viewers) have short attention spans.

Case 2

The next time Joe Attorney caught a "hot" lawsuit, he called the newspaper before he filed it. The plaintiffs alleged that the defendant allowed coworkers to smoke tobacco in the company print shop and in fact forced the smoking inside by not allowing periodic ten-minute breaks as required by law.

The reporter then went behind Joe's back and called his clients direct; fortunately, the one he reached presented the plaintiffs' side better than any lawyer could. The plaintiffs' primary goal was to change the smoking policy. Within a week after the front-page story appeared, smoking inside the print shop stopped and workers were given breaks to go outside and light up or whatever.

But things went downhill from there. The defendant claimed that the front-page story was his first inkling of a pending suit, and he was not happy (to put it mildly) about the surprise. Without debating his version of prefiling events, Joe confirms that the defendant thereafter committed maximum resources toward pummeling the media darlings. They'd have settled for a fraction of what the defendant spent fighting the suit.

Suffice it to say that defense attorneys (of which there were several) earned going rates to erect any and every conceivable roadblock to the plaintiffs' success. That case nearly swallowed Joe's practice. Summary judgments to appeal after 500 hours of work—who needs that? Joe "resolved the matter" under a confidentiality clause that prohibits him from disclosing anything you haven't already read.

Lesson 2

Quit while you're ahead? No good deed goes unpunished? Don't go into solo practice? How about this: don't talk to a reporter unless you're prepared to raise the emotional and financial stakes.

CAVEAT: Take a look at DR 7-107 before speaking with media representatives—a lawyer can't say anything that "poses a serious and imminent threat to the fact-finding process." This rule is the only DR that directly refers to media contact, and is an obvious attempt to balance free speech rights against the potential for tainting the jury pool.[2]

Case 3

A state agency mistakenly issued Ray a permit to install a business entrance between his undeveloped land and a highway. In reliance on that permit, Ray spent a lot of money obtaining a zoning variance and site improvements to allow the land's sale as a commercial lot.

A year later the agency wrote Ray a letter explaining that the permit had been issued in error. He had no access rights to the highway—the state had procured those 50 years earlier.

Ray hired Joe Attorney, who asked

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for reimbursement of the money Ray spent in reliance on the mistakenly issued permit. Agency employees said he wasn't entitled: he should have seen that grant of access rights hidden in the chain of title, and he hadn't submitted a timely Tort Claims Notice.

Tired of the runaround, Joe called a newspaper reporter right after calling his state legislator, both of whom said they'd look into it. A story appeared the next week, and you have never seen such a hasty retreat: when the reporter contacted him, the state worker claimed he was "working with Ray to resolve the matter amicably."

Yeah, right. Well, the next day the cooperation started, and when the negotiation stalled, Joe dropped the magic words "second newspaper article" into the dialogue. The case settled shortly thereafter for most of what Ray wanted.

Lesson 3

Some cases are perfect for media exposure. Because government is (theoretically) accountable to the public, (a) citizens being unfairly treated by it make a good story, and (b) such publicity can send shock waves up the government rank and file. Just make sure your citizen client has his or her own ducks in a row.

Case 4

Feeling cocky when Joe's favorite reporter gave him another jingle, Joe was more than happy to chat about a new filing: Phoebe had suffered recriminations at her church (where she also worked) when she complained about being forced to "volunteer" time over and above the 40 hours weekly she was allowed to write on her time card.

This case is still pending, so Joe is reluctant to grant further interviews, but it would seem to be a matter of public record that the newspaper article misfired. Instead of focusing on the legally actionable misconduct alleged in the complaint, the story talked about how the long hours adversely affected Phoebe's family life. There is, of course, no law against being made to work long hours, and at least one reader pointed this out in a critical letter to the editor that was subsequently printed.

Lesson 4

Like I say, you can't control what a journalist is going to publish. Joe senses that the defendant is more upset about the newspaper article than the lawsuit itself (see Lesson 2), so his client gained no ground at some expense. (For the record, Joe says he was not hoping to sway potential jurors, nor would that be particularly feasible. Rather, the goal in speaking to the press was to shine some light on the problem and perhaps exert some pressure on the defendant to fairly address it—see Cases 2 and 3.)

Joe should have pounded the "work without pay" theme: sticking to short, simple "talking points" is important when interfacing with the media. If Joe had it to do over, he says he'd probably file this one as a "Jane Doe" (see Lesson 1). "Then I'd become fabulously wealthy and consider hiring a media consultant before I opened my big yap ever again," he adds. Not all ideas belong in the marketplace.

But as former Oregon State Bar President Angel Lopez has noted: "The bottom line is that the OSB has always maintained an open relationship with the press. That accessibility has been recognized by Oregon's media and is an important component of serving the broad interests of the bar."[3] ✦

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Endnotes

1. This practice should not create an ethical problem, given that "Jane Doe" connotes an alias being used to protect privacy. The initial filing is therefore accurate (as far as it goes) and the amended pleading solves any disclosure problem for the court and the defendant.

2. Regarding this topic, the author interviewed Sylvia Stevens, OSB general counsel, who said that allegations in a complaint (like anything in the public record) should be open for discussion. Where attorneys run risks is in making statements about specific evidence that may or may not be admitted at trial.

3. Oregon State Bar Bulletin (August/September 2002), at 19.

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