REPORT FROM BOCA

Edwards v. Audubon Society Twenty-Five Years Later: Whatever Happened to Neutral Reportage?

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Vice President Dick Cheney was on the take from Enron.

President Bush makes that startling allegation at a news conference and announces that, as a consequence, he is asking the vice president to resign. But before the assembled reporters can run for the phones, President Bush confides, "I'm planting this to get rid of Cheney. The allegations aren't true. I'm just tired of having him around."

If the reporters publish President Bush's accusation knowing that it is false, the malice standard articulated in *New York Times v. Sullivan*[1] would leave them exposed to a defamation action by the vice president. So should President Bush's allegation go unreported?

That hypothetical was posed by Alan H. Fein during the seventh annual conference of the American Bar Association's Forum on Communications Law, February 14–16, 2002, in Boca Raton, Florida. Fein, a shareholder at Miami-based Stearns Weaver Miller Weissler Alhadeff & Sitterson, was on a panel of six experts discussing the little-used constitutional privilege of neutral reportage.

Chief Judge Irving R. Kaufman of the Second Circuit first articulated the neutral reportage doctrine twenty-five years ago in *Edwards v. National Audubon Society, Inc.*[2] At issue in *Edwards* was whether a libel judgment could stand against the *New York Times* after the newspaper published an article that accurately reported potentially defamatory accusations by the National Audubon Society against certain scientists, including a Nobel laureate, who disagreed with environmentalists over the impact of DDT on wildlife. An editorial preface in an Audubon Society magazine had charged that "anytime you hear a 'scientist' say [that large numbers of birds are not dying as a result of DDT], you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."[3] The *Times* article, by nature writer John Devlin, republished the accusation and named five scientists whom Audubon Society officials told Devlin that they had had in mind when writing the preface. Devlin included denials from three of the scientists, but he could not reach the other two for comment.

In reversing the judgment against the *Times*, Judge Kaufman wrote

> Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.[4]

Floyd Abrams, who was among the panelists at the Forum's conference, represented the *Times* in *Edwards*. Abrams told the session that the absolute privilege—not a defense—protects defamatory allegations, even if false, if they are (1) made by a responsible party (2) about a public figure involved in a newsworthy situation and (3) were accurately reported in a neutral, dispassionate way.

Abrams, a partner at Cahill Gordon & Reindel in New York, said that he found himself arguing for the privilege that came to be known as neutral reportage because "we had a reporter who couldn't say whether the allegations were true or false. All he could say was, 'I have no idea, but I think that it was newsworthy.' " Abrams added, however, that there are strong policy reasons for such a standard: "If a journalist has to be in a position to believe in the charge, Watergate wouldn't have been reported."

Since its genesis in *Edwards*, the neutral reportage doctrine has not been widely used by First Amendment defense lawyers. A search of Westlaw finds that *Edwards* has been cited both positively and negatively only 153 times, and just seventeen times in the past five years. Panelist Judge Marilyn Patel of the U.S. District Court for the Northern District of California attributed the case's meager history to the markedly mixed reaction that neutral reportage has generated in courts around the country.

Judge Patel made the same point in her opinion in *Barry v. Time, Inc.*,[5] in which she wrote that "American courts have traditionally refused to distinguish between publishers and republishers of defamatory statements, on the theory that 'tale bearers are as bad as tale makers.' "[6] In *Barry*, a former head basketball coach at the University of San Francisco (USF) sued the parent company of *Sports Illustrated* for libel for republishing allegations by Quintin Dailey, an All-American player at USF who went on to play for the Chicago Bulls, that the coach had helped a wealthy USF supporter bribe Dailey to attend the university. Judge Patel ultimately adopted a refinement of the *Edwards* standard in *Barry*, but she wrote that

> [t]he court is well aware that, since *Edwards*, many courts have declined to adopt the privilege of neutral reportage, or have severely cir-

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cumscribed its application. The rationale most commonly advanced for rejection of the privilege is that the "newsworthiness" element in *Edwards* conflicts with the Supreme Court's rejection in *Gertz* of the *Rosenbloom* "newsworthiness" test.[7]

The panelists at the Forum's conference voiced many of those same reservations. Professor Randall P. Bezanson of the University of Iowa Law School in Iowa City said that "[t]his privilege does not contribute anything to the bottom line in actual-malice cases because 'I don't know whether it's true or false' is good enough to get around actual malice."

Fein, who has represented both plaintiffs and defendants in defamation cases, expressed concern about the policy implications of the doctrine. "The problem with the *Edwards* test," he said, "is that it protects the reporter who *knowingly* publishes false allegations." A greater danger is that it could play into the hands of demagogues. "It would protect someone like Joe McCarthy," Fein said, "because it allows people to make false allegations as long as they're 'newsworthy.' "

The lone journalist on the panel, Frank Sutherland, editor of *The Tennessean*, worried about the applicability of *Edwards* in the trenches. "At what point are the determinations of newsworthiness and reasonableness to be made?" Sutherland asked. "The journalist is not equipped to make those determinations as the story is unfolding. Those are hindsight determinations."

Bezanson stated that one advantage of the neutral reportage doctrine over actual malice is that *Edwards* offers an objective standard "so you don't have to get into the mind of the reporter and editor." The downside, he added, is, "Who will be deciding what responsible journalism is—judges. We can't forget that judges are government officials. So we're putting that decision in the hands of the government."

Judge Patel, feigning umbrage, responded with a quip, "I never thought of myself as part of the government," and went on to point out other practical advantages of the *Edwards* standard. "It allows the defendant to move for summary judgment early on—before discovery, and it's not as messy as the issue of actual malice." She also saw some downsides. "But even with neutral reportage, you face the issue of what is newsworthy, and actual malice, though messy, is better defined in the case law. There's not much case law on neutral reportage so defendants may be leery of employing it," she added.

The circuits are split on neutral reportage and the U.S. Supreme Court has not offered any guidance. Justice Brennan, in a concurrence in *Harte-Hanks Communications, Inc. v. Connaughton*,[8] however, signaled that he at least was ready to address the issue:

> [P]etitioner has eschewed any reliance on the "neutral reportage" defense [sic]. This strategic decision appears to have been unwise in light of the facts of this case. . . . Were this Court to adopt the neutral reportage theory, the facts of this case arguably might fit within it. That question, however, has . . . not been squarely presented.[9]

Panel moderator Kelli L. Sager, a partner at Davis Wright Tremaine in Los Angeles, pointed out that not only is the case law divergent, but it also contains a gaping hole: "What if the reporter doesn't believe the allegation, but the source hasn't said it's false?" Sager was involved, as attorney for the *Los Angeles Times*, in its amicus curiae brief in a relatively recent, high-profile case that raised the question of whether neutral reportage should be expanded to actions in which plaintiffs are private figures. In *Khawar v. Globe International, Inc.*,[10] the California Supreme Court answered that question with a unanimous no.

Khawar grew out of an article in the *Globe*, a weekly tabloid, with the headline "*Former CIA Agent Claims:* IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA." The *Globe* article gave an "abbreviated, uncritical summary"[11] of allegations contained in a book entitled *The Senator Must Die: The Murder of Robert Kennedy* by Robert Morrow. The book alleged that the Iranian secret police successfully conspired with the Mafia to assassinate U.S. senator and presidential candidate Robert F. Kennedy in 1968. According to Morrow's book, Kennedy's assassin was not Sirhan Sirhan, who was convicted of the killing, but a Pakistani-American named Ali Ahmand. In August 1989, four months after the *Globe* article ran, Khalid Iqbal Khawar brought a defamation action, alleging that he was the man identified in the Morrow book as Ali Ahmand. Khawar, a freelance photographer-turned-farmer, was awarded $1,175,000, a judgment that was upheld by the intermediate appeals court after it rejected the *Globe*'s neutral reportage argument. The California Supreme Court affirmed.[12]

That holding raised questions among the panelists at the conference.

"Shouldn't neutral reportage apply to private citizens because so many spurious suits are brought?" Judge Patel asked. Sutherland wondered, "At what point does a private figure become a public figure *because* of the allegations?" Bezanson saw a policy justification for limiting the neutral reportage privilege to cases brought by public figures. A false allegation against a private figure is potentially more harmful than an allegation against a public figure, he said, because "with a private figure, readers don't have the context to know that the allegation is outlandish, as they would with Bush, for example."

Moderator Sager brought the discussion around to the ethical questions that *Khawar* raises. "Is this kind of reporting defensible?" she asked. The panelists agreed that the answer to that question depends on how the writer frames the story. "In the *Khawar* case," Abrams said, "the press should be able to report allegations against Khawar in a book review, for example, without additional reporting. But the *Globe* didn't report it that way—the *Globe* pointed the finger at Khawar."

Bezanson added: "If you don't know the facts, all you should report is the confusion about the truth or falsity, and place it in the reader's hands. The reporter should provide the reader with the same information that the reporter has that casts doubt on the allegations. If the reporter has substantial doubt, the reporter shouldn't publish it."

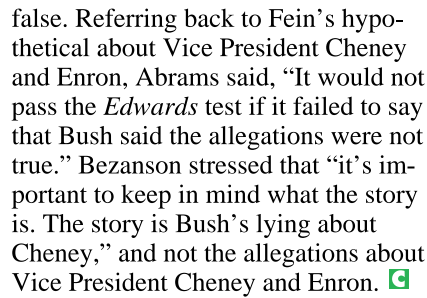
Fein agreed: "They had to have had substantial doubt about that story, because it was ridiculous, outlandish. The problem is when you publish outlandish allegations without giving enough facts to show that it's outlandish."

Several panelists wondered whether *Edwards* could, or should, apply to republication of allegations made on the Internet. Judge Patel said that the Internet, where "the pace is so fast and the volume is so great," starkly illustrates the gravity of the question of whether a false rumor becomes news simply because it is widespread. "Is it newsworthy to report that a particular outlandish allegation is all over the Web?" she asked.

Sutherland said that the issue predates the Internet in small towns, where local gossips can broadcast rumors

nearly as fast as fiber-optic cables can. He illustrated his point with an anecdote about a rumor that a chain restaurant in a small town in *The Tennessean*'s coverage area was serving hamburgers containing worms. Even though the rumors were rampant, he decided not to run the story. He said that the potential legal ramifications of running such a story can, for papers with limited resources, be a factor in what ought to be a news decision. "There's a real chilling effect at small papers that can't afford to get into these battles," Sutherland said.

Abrams said that when the media report a false accusation, they have an ethical obligation and a legal obligation to make it clear that the allegation is false. Referring back to Fein's hypothetical about Vice President Cheney and Enron, Abrams said, "It would not pass the *Edwards* test if it failed to say that Bush said the allegations were not true." Bezanson stressed that "it's important to keep in mind what the story is. The story is Bush's lying about Cheney," and not the allegations about Vice President Cheney and Enron.



Endnotes

1. 376 U.S. 254 (1964).
2. 556 F.2d 113 (2d Cir. 1977).
3. *Id.* at 117.
4. *Id.* at 120.
5. 584 F. Supp. 1110 (N.D. Cal. 1984).
6. *Id.* at 1122. *See generally* McDonald v. Glitsch, Inc., 589 S.W.2d 554, 556 (Tex. Civ. App.1979), quoting Houston Chron. Publ'g Co. v. Wegner, 182 S.W. 45, 48 (Tex. Civ. App. 1915); RESTATEMENT (SECOND) OF TORTS § 578 (1977); Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853 (1983).
7. *Barry*, 584 F. Supp. at 1124 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); St. Amant v. Thompson, 390 U.S. 727 (1968)). *See also* Dickey v. CBS, Inc., 583 F.2d 1221, 1226 n.5 (3d Cir.1978); Newell v. Field Enter., Inc., 415 N.E.2d 434, 451–52 (1980); Postill v. Booth Newspapers, Inc., 325 N.W.2d 511, 517–18 (1982).
8. 491 U.S. 657 (1989).
9. *Id.* at 694–95.
10. 79 Cal. Rptr. 2d 178 (Cal. 1998).
11. *Id.* at 181.
12. *Id.* at 188.