

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

Privacy and Protective Orders in High-Profile Litigation

One of the pitfalls of modern-day high-profile litigation is the risk of substantial embarrassment when discovery probes into highly personal matters.

Although the well-counseled plaintiff in such cases is generally forewarned concerning this loss of privacy and initiates a lawsuit only after determining that the potential benefits of litigation outweigh the disadvantages, the defendant's privacy interests may be similarly compromised with no countervailing reward and little if any ability to control the existence or scope of the litigation.

'Condit v. Dunne'

Two recent decisions issued by Judge Peter K. Leisure in *Condit v. Dunne*,¹ the defamation action brought in the U.S. District Court for the Southern District of New York by former Congressman Gary Condit against author and commentator Dominick Dunne, explore the extent to which litigants' privacy interests must give way to the overriding demands for disclosure imposed by the Federal Rules of Civil Procedure.

In that lawsuit, Mr. Condit alleged



that Mr. Dunne had slandered him in a number of statements implicating Mr. Condit in the disappearance and death of Chandra Levy, a Washington intern with whom Mr. Condit had an acknowledged friendship, and whose disappearance in May 2001 resulted in widespread press coverage, characterized by Judge Leisure as a "media frenzy." These statements included Mr. Dunne's repeating of a "horse whisperer's" account of what an Arab "procurer" had told him concerning Ms. Levy's disappearance, namely, that Mr. Condit had made statements at Middle Eastern embassies that created the environment that led to her disappearance and to her being thrown from a wealthy Arab's plane into the Atlantic Ocean. When Ms. Levy's body was discovered in a Washington, D.C., park in May 2002, rendering that account impossible, Mr. Dunne continued to maintain that Mr. Condit may have been linked in some way to her death. The allegedly defamatory statements were made by Mr. Dunne on both radio and television talk shows, to various Internet and print columnists and at private dinner parties.

Scope of Discovery

Judge Leisure's first discovery opinion was written in response to cross-motions to compel and for a protective order brought after plaintiff Condit refused to answer questions at his deposition relating to his sexual history and financial status.² Mr. Condit sought to assert an evidentiary privilege recognized under California law based on his right to privacy. Although Judge Leisure had previously held that California substantive law governed the underlying defamation claims,³ he held that questions of evidentiary privilege required application of New York law. He noted that Mr. Condit could not reasonably have expected that his conduct of his personal affairs would be protected by California's privacy privilege, inasmuch as the conduct in question took place in the Washington D.C., area. Moreover, Judge Leisure reasoned that having sued Mr. Dunne in federal court in New York, Mr. Condit should have anticipated that his deposition would be taken in New York, and that the evidence would be admitted in New York under New York's conflict of law rules. Finally, Judge Leisure observed that New York has a compelling interest in ensuring that its citizens (Mr. Dunne is a New York resident), sued in New York, are allowed full and accurate discovery.

Judge Leisure noted that New York recognizes a constitutional right to privacy, but that New York courts have not extended that right to create an

Edward M. Spiro is a principal of Morvillo, Abramowitz, Grand, Iason & Silberberg and the co-author of "Civil Practice in the Southern District of New York, 2d Ed." (Thomson West 2004). **Judith L. Mogul** assisted in the preparation of this article.

evidentiary privilege.⁴ He also stressed that courts in the Southern District of New York have “adamantly refused to allow a litigant to invoke privilege to protect discovery of information relating to the matter the litigant [has] put directly at issue.”⁵

Having determined that no privilege applied, Judge Leisure went on to assess whether the lines of inquiry to which plaintiff objected satisfied the relevancy requirement of Federal Rule 26. He rejected Mr. Condit’s argument that because his defamation claim was based on the criminal, rather than the sexual implications of Mr. Dunne’s statements concerning his relationship with Ms. Levy, Mr. Dunne should not be permitted to delve into Mr. Condit’s sexual relationships, and the court should “draw the line of discovery at the bedroom door” Judge Leisure stated that having opened that door by filing the lawsuit, “the Court cannot allow plaintiff to walk through freely while holding defendant in check at the gate.”

He held that inquiry into Mr. Condit’s relationship with Ms. Levy was relevant to Mr. Dunne’s defense of substantial truth,⁶ and that inquiry into his relationships with other women might provide impeachment evidence in light of Mr. Condit’s contradictory accounts of those relationships. Further, Judge Leisure ruled that questions regarding Mr. Condit’s sexual relationships may be relevant concerning mitigation of reputation damages. Despite Judge Leisure’s assurance that the relevancy requirement would “quell” any “overly salacious questioning,” he concluded that the broad standard for discoverable evidence under Rule 26 prevented plaintiff from blocking defendant’s inquiry into these areas. He did, however, caution against defendant engaging in “fishing expeditions.” Judge Leisure similarly held that Mr. Condit’s claim that he was entitled to special damages because Mr. Dunne’s statements had permanently impaired his ability to obtain or maintain gainful employment,

entitled Mr. Dunne to inquire into his finances.

Observing that “the parties would benefit from on-hand Court supervision of their depositions,” Judge Leisure referred supervision to Magistrate Judge Ellis. He also tempered the potential impact of his denial of Mr. Condit’s request for a protective order by reminding the parties that they could designate all or part of the information revealed during discovery as confidential pursuant to a consent protective order previously entered in the case.

While sound bites are an Achilles heel of videotaped depositions, the fact that the media may edit a tape does not warrant barring dissemination of videotape.

Much of Judge Leisure’s reasoning in the decision discussed above turned on the fact that plaintiff had chosen both the forum and the scope of the litigation and should not be permitted to unfairly limit the defendant’s access to discovery having availed himself of those choices. But, as the second discovery decision in that case makes clear, the defendant in high profile litigation is not necessarily better situated to shield his own privacy, notwithstanding the fact that he is not the architect of the lawsuit. In that motion, while not objecting to release of the written transcript of his own deposition, Mr. Dunne sought, unsuccessfully, to prevent public dissemination of the videotape of that deposition.⁷

Mr. Dunne contended that comments made by plaintiff’s counsel and reported in the press that Mr. Dunne was in “deep, deep, trouble” as a result of the deposition and that the “transcript will be interesting, but the video will be even more interesting,” constituted a threat to improperly disseminate the videotape transcript and that a protective order

was necessary to prevent use of the video to embarrass Mr. Dunne, deprive him of a fair trial and taint the jury pool.

Judge Leisure acknowledged that he found it “challenging to harmonize the case law” addressing the movant’s burden in establishing good cause necessary to obtain a protective order to protect a party from annoyance, embarrassment or oppression under Rule 26(c). He noted that some decisions require the moving party to point to specific examples in support of such an order, while others have held that specific examples are not necessary so long as the party seeking the protective order has alleged sufficient good cause.⁸ He concluded that under either approach, the defendant’s motion must fail because he had not shown good cause, “with specificity or otherwise,” for sealing the deposition videotape.

First, Judge Leisure rejected Mr. Dunne’s assertion that plaintiff’s attorney’s statements to the press constituted a threat to use the deposition to “further private spite or public scandal.” He found that the threat alleged did not constitute sufficient good cause to justify barring public dissemination of the videotaped deposition. He distinguished this case from *Paisley Park Enterprises, Inc. v. Uptown Productions*,⁹ where Judge Lewis A. Kaplan imposed significant restrictions on the use of the deposition videotape of the recording artist Prince, after concluding that the defendants intended to use that video to generate notoriety for themselves and content for a business venture that included a website on which defendants had posted other matters related to the litigation.

Judge Leisure also observed that this was not an instance where the danger of intimidation would inhibit a party’s ability to pursue his rights, such as where defendants’ efforts to discover a plaintiff’s immigration status might effectively bar the plaintiff from bringing her claims.¹⁰ Judge Leisure found that all that was at stake in this

case was the potential that Mr. Dunne might be embarrassed if the media misrepresented his deposition by broadcasting excerpts of his taped testimony. He concluded that “[w]hile sound bites are a recognized Achilles heel of videotaped depositions ..., the fact that the media may edit a tape ... does not warrant a protective order barring all public dissemination of the videotape in this case.” He found unpersuasive defendant’s suggestion that the jury pool would somehow be tainted by selective, misleading editing of the tape, noting that any media interest in the tape was likely to be short-lived and that even in the most high-profile cases, publicity well in advance of the trial is unlikely to color a juror’s views.¹¹

Public Interest

Judge Leisure was also persuaded that the public interest in the case militated against imposing a protective order. He recognized that the deposition transcript was not a “judicial record” which, under common law, carries with it a presumptive right of public access.¹² But even though the transcript was only tangential to the court’s Article III functions, he concluded that the substance of the case, as well as the videotape transcript itself, were matters of sufficient public concern to tip the balance against any limitation on the tape’s disclosure. Specifically, he noted that statements made by Mr. Dunne that formed the basis of Mr. Condit’s claim were made about a then-sitting public official, directly addressing the propriety of Mr. Condit’s service as a U.S. Congressman. Stressing that more than mere celebrity interest was involved in this case, Judge Leisure observed that the “underlying litigation directly addresses a matter of public interest regarding a Congressman’s performance of his official duties.”

Most importantly, Judge Leisure found that certain statements made by Mr. Dunne and his lawyers had resulted in generating public interest in the actual videotape transcript, separate and apart from the public interest in the substance of the litigation. Specifically, in an affidavit filed in support of his motion for a protective order, Mr. Dunne had publicly accused the plaintiff’s lawyer of bullying him. He claimed that “[t]o the extent any statements made during my deposition testimony tends in any way to contradict what I have set forth in this affidavit, it was because I was fatigued, confused by what counsel for plaintiff Gary Condit was asking me, and feeling bullied by Mr. Condit’s counsel and the manner by which he asked his questions.” Mr. Dunne’s counsel had similarly claimed in e-mail correspondence with Mr. Condit’s attorney that Mr. Dunne’s deposition testimony had resulted from fatigue and confusion.

Judge Leisure found that these statements implicated the reliability of discovery and the “seemliness of lawyers’ deposition tactics” and concluded that they rendered the videotape of concern to those monitoring the federal courts. He commented that he could see “no better way to assure that the reliability of Mr. Dunne’s deposition testimony is properly represented than to allow public scrutiny.” He also noted that there is both a public and a judicial interest in full disclosure of information that would shed light on allegations of improper conduct leveled against members of the bar.

Case Irony

It was thus Mr. Dunne’s own statements in support of his motion for a protective order that played a significant role in his loss of that motion, compounding the obvious irony in a member of the press seeking a protective order to prevent media access to his own taped testimony. The decisions in this case highlight how, increasingly,

litigation concerning public figures is conducted in plain view, and caution litigants that courts will find affirmative conduct — whether through the filing of a lawsuit or public dissemination of information concerning the litigation — to be a waiver of the litigants’ privacy interests.

.....●●.....

1. No. 02 Civ. 9910 (S.D.N.Y.).

2. 225 F.R.D. 100 (S.D.N.Y. 2004). Mr. Condit also refused to answer questions at that deposition unrelated to the privacy interests discussed in this article.

3. 317 F. Supp. 2d 344 (S.D.N.Y. 2004).

4. 225 F.R.D. at 107-08 (citing *Weinstein v. Friedman*, 1996 WL 137313 (S.D.N.Y. March 26, 1996) (Preska, J.); *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993)).

5. *Id.* at 108 (citing *Sanofi-Synthelabo v. Apotex Inc.*, 299 F. Supp. 2d 303 (S.D.N.Y. 2004) (Sweet, J.)).

6. The allegedly defamatory statements made by Mr. Dunne indicate that Mr. Condit had complained to others that he had had a sexual relationship with Ms. Levy which had ended, but that Ms. Levy would not let go and was threatening to go public with compromising information about him. Judge Leisure reasoned that Mr. Dunne should be permitted to inquire into the nature of Mr. Condit’s relationship with Ms. Levy to show that it may have been a strain on Mr. Condit causing him to complain to others who would “take matters into their own hands.”

7. 225 F.R.D. 113 (S.D.N.Y. 2004).

8. *Id.* at 116 (comparing, inter alia, *Loussier v. Universal Music Group, Inc.*, 214 F.R.D. 174 (S.D.N.Y. 2003) (Ellis, M.J.) (showing of specificity required) with *Topo v. Dhir*, 210 F.R.D. 76 (S.D.N.Y. 2002) (Ellis, M.J.) (no specificity required)).

9. 54 F. Supp. 2d 347 (S.D.N.Y. 1999).

10. See *Topo*, 210 F.R.D. 76.

11. 225 F.R.D. at 118 (citing *In re NBC, Inc.*, 635 F.2d 945 (2d Cir. 1980)).

12. *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995); *United States v. Amodeo*, 44 F.3d 141 (2d Cir. 1995).