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Representing the Media at Trial

by Richard M. Goehler, Joseph A. Tomain, and Amanda G. Main

More than most types of litigants, the media faces bias the moment it walks into a courtroom. Nearly everyone these days holds a strong opinion—and generally, it's negative—about the people who produce newspaper copy and television programming. While many other varieties of cases attract little attention, the media becomes news whenever it goes on trial. Thus, when media clients are parties in litigation, public attitudes toward the press have a significant impact on the litigation strategy. Successful strategies of media counsel must include evidentiary, procedural, and substantive legal considerations, as well as a plan for delivering a theme that overcomes negative opinions held by the most important members of the public at that time: the judge and jury.

Over the past 20 years, public opinion of the media has continually declined. Americans seem to think journalists are sloppier, less professional, less moral, more slanted, and generally more harmful to democracy than they were in the 1980s. The State of the News Media 2004, an annual report on American journalism available at www.journalism.org, reflects that between 1985 and 2002:

- The percentage of Americans who think news organizations are highly professional declined from 72 to 49 percent.
- Those who think news organizations are moral declined from 54 to 39 percent, while those who think they are immoral rose from 13 to 36 percent.
- People who believe news organizations try to cover up their mistakes rose from 13 to 67 percent, and Americans who think news organizations accurately report facts declined from 55 to 35 percent.

- Those who feel news organizations care about the people they report on declined from 41 to 30 percent.
- Those who think news organizations are politically biased rose from 45 to 59 percent.

Clearly, media defense counsel have their work cut out for them in court. Given the public's inherent distrust of the media—and judges of course read the papers and watch TV news, too—cases involving media clients often hinge not just on legal arguments but on popular opinion about the media's conduct and motives. From our standpoint, the media clients we serve answer a noble calling. They ferret out facts, help us recognize and celebrate great events, and expose and explain reprehensible conduct. They tell us what we all need to know to remain informed and enlightened, and provide entertainment. Sometimes they even provide information and entertainment simultaneously, like *The Colbert Report*.

Every profession, however, has room for improvement. A gross generalization, but one based on experience, is that some journalists and other people working in the media fail to articulate the importance of getting news and information out the door quickly, and the chaotic process that it sometimes entails. In 2005, for example, the *Boston Herald* faced the blowback of public skepticism in a defamation case brought against it by Massachusetts Superior Court Judge Ernest Murphy. In *Murphy v. Boston Herald*, the newspaper went to trial to defend an allegedly false report that Judge Murphy gave lenient treatment to criminal defendants and had made an insensitive comment to a teenage rape victim. Counsel for the *Boston Herald* faced the huge challenge of overcoming its own reporter's deposition testimony. In one exchange, Judge Murphy's counsel asked journalist David Wedge if he had thought about the consequences of his articles.

Q: Mr. Wedge, did you consider the impact that your stories on Judge Murphy would have on him before you published them?

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A: No.

Q: Did you consider the impact that your stories would have on his family, his wife, and five children before you published them?

A: No.

Q: Have you ever considered either of those things?

A: No.

Q: Do you know the impact your stories have had on Judge Murphy and his five children?

A: No.

Q: Do you care?

A: No.

A Massachusetts jury found in favor of Judge Murphy, saddling the *Herald* with a \$2 million libel verdict. The *Herald* has filed post-trial motions and is considering an appeal.

The Media Law Resource Center (MLRC), a nonprofit media industry organization, maintains statistics about libel and privacy verdicts involving the media. The mixed results perhaps reflect society's declining attitude toward the media. In its report *Trials Against the Media, 1980-2004*, the MLRC tracked 527 cases that had reached trial, involving libel, privacy, and related claims against media defendants. Of those cases, the plaintiffs prevailed in nine by default, and mistrials were declared in 12. Of the 506 remaining cases in which trial verdicts were rendered, the media defendants won only 39.3 percent. Statistics like these naturally do not bode well for media clients and their trial counsel. Therefore, developing strategies to overcome the common hurdle of antimedia bias is crucial when these cases go to trial.

Voir dire is the first opportunity to discover and overcome bias. Direct questions such as "Are you biased against the media?" are generally ineffective in learning what prospective jurors actually think. A more successful strategy may be to ask about their experiences with the media.

In a libel and privacy case we tried last year, Darcie Divita, a television personality in Louisville, Kentucky, sued her former boyfriend, John Ziegler, based on comments he made about her on the air. Ziegler was a very controversial figure on morning radio in the Louisville market. Listeners of his show heard a shock-jock-style format somewhere between Rush Limbaugh and Howard Stern, layered with Ziegler's own unique personality. His topics varied from conservative political discussions with a libertarian bent, to his personal life, to irreverent topics like the Michael Jackson saga.

In his first few weeks on air, Ziegler received reams of letters and phone calls from angry listeners and sponsors after questioning the Catholic faith's practice of receiving communion. Ziegler, a former seminary student, described how Catholics believe their communion host and wine actually turn into the body and blood of Christ at the time it is consumed. He wondered why people would honor their god by eating him and then passing him through their digestive systems. A bachelor, Ziegler often would discuss the Louisville dating scene—or the lack thereof. He frequently discussed his relationships with women, and he would elicit listener feedback on whether they thought he had had a good or bad date. Once he had callers vote on whether he should have sex with an ex-girlfriend when she came to town. He never mentioned her or other love interests by name unless they were in

the public eye. So when Ziegler dated Divita, her public figure status and the public nature of their relationship allowed him to share juicy particulars with his listening audience.

Divita had moved to Louisville in early winter 2003 to begin her new position as a morning television co-anchor. At that time, Ziegler was Louisville's number-one-rated radio talk-show host. Before Divita even moved to Louisville, a talk-show host at Ziegler's radio station suggested on the air that she go on a date with Ziegler. They did. Additionally, Divita appeared on Ziegler's show a few times, took a compatibility quiz on the air, and discussed their first date on another radio show; and he appeared on her local television morning show. They dated for several months. In short, Divita and Ziegler voluntarily participated in a unique "reality relationship" that had a public element to it from day one.

In August 2003, Divita's employment with the television station ended. That same day, Ziegler offered strongly opinionated comments about her on the air. He also answered callers' questions concerning intimate details about Divita—including statements regarding Divita's breast augmentation, grooming habits, and sexual behavior, as well as his opinion that she might be a pathological liar.

Divita sued Ziegler and the radio station in a Kentucky state court, alleging claims of defamation, portraying her in a false light, public disclosure of private facts, and intentional infliction of emotional distress. Ken Sales represented

We asked prospective jurors about watching reality television.

Ziegler. We represented 84-WHAS, the radio station that employed Ziegler. With television cameras in the courtroom every day, the eyes of Louisville watched two former local celebrities provide an encore to their reality relationship. Our trial was the top story most of the week on the local news, even though a high-profile murder trial was going on at the same time in another courtroom in the building. Most nights, the murder trial was the second story.

During voir dire in *Divita v. Ziegler*, both media defendants wanted to learn what prospective jurors thought about Ziegler, his show, and his political viewpoints, and also their general feelings about and exposure to the shock-jock format. We believed that the jurors did not need to like Ziegler's show, but we wanted a jury that at least had exposure to his in-your-face format. For example, if a person listened to only religious programming or no radio at all, we feared that they might not be able to get past the strongly opinionated nature of Ziegler's comments; jurors aware of shock-jock radio, however, would not be surprised that shows like Ziegler's were on the air and would understand that his comments were commonplace on American airwaves. In addition to learning about jurors' exposure to and attitudes toward such programming, we began to set our reality-relationship theme by inquiring about jurors' interest in reality television, asking prospective jurors questions such as the following:

- Do you listen to talk radio?
- Ever listen to Rush Limbaugh or Howard Stern? What do you think of those shows?
- Do you ever call in to talk-radio shows? What do you think of people who do?
- Does any one of you watch reality television?
- What are some of the reality shows that you watch?
- Has anyone watched *Survivor*? *Date My Dad*? *The Bachelor*?
- How about *My Big Fat Obnoxious Fiancé*?
- What do you think about the people who thrust themselves into the public eye by volunteering to participate on these reality shows?

Prospective jurors tended to freely discuss their media habits in general. It proved to be an excellent way to learn their opinions of talk radio and to set our reality-relationship theme, before zeroing in on their perceptions of the defendants. Interestingly, one potential juror admitted her inability to be fair and impartial because she did not like Ziegler. Judge Geoffrey P. Morris struck her for cause. She seemed sincere and not simply trying to get out of jury duty. This potential juror's honesty reminded us that although we had to ask discreet questions to learn information and set a theme, direct questions should not be overlooked.

Fights over a media defendant's alleged bad character are always worth waging.

Voir dire can provide other opportunities to root out and reduce biases against the media in the courtroom. When there is an audio or video recording of the broadcast at issue, the media defendant should consider seeking the court's approval to play the recording for the prospective jurors. This can be especially important to accomplish at least two goals. First, it begins desensitizing the prospective jurors to the statements if they are shocking in nature. By publishing the broadcast to the jury early, we hoped, the emotional reactions to the statements would have subsided by the time deliberations begin. Second, airing the recording provides an opportunity to strike a juror for cause if the juror becomes instantly offended and expresses an inability to overcome a negative emotional reaction to the statements. Not every judge, however, will allow the statements at issue to be played during voir dire. In *Divita*, the judge denied our request to play or read the statements during voir dire, citing the potential of busting the jury panel, because so many prospective jurors might be excused for cause that not enough would remain to try the case.

If the court will not allow the statements to be played during voir dire, the trial attorney should consider playing the broadcast during opening statements. *Divita's* attorney did not do this. We did. Not only did this strategy begin the desensitization process, but it also allowed us to soften the impact of the broadcast by framing it within our theme of the case—John and Darcie voluntarily participated in a reality relationship. The broadcast was played a few more times throughout the

trial. Indeed, the broadcast was played so often that were it played one more time, the attorney responsible would risk upsetting the jury by forcing them to listen to it yet again. Thus, by playing the broadcast early, we created space and time between deliberations and the jurors' first exposure to the broadcast, and effectively closed the door to the impact of having the broadcast played late in the trial.

Just as voir dire provides an opportunity to minimize negative opinions jurors may hold toward the media, motions in limine permit the media lawyer to educate the judge and prevent harmful evidence from being introduced at trial, or to at least preserve the record for appeal. We sought to exclude a variety of evidence that had no bearing on *Divita's* claims but did paint Ziegler in a negative light. In an attempt to paint Ziegler as a vindictive hothead, *Divita* listed several witnesses who had seen him angry and others who had been at the receiving end of Ziegler's ire. Other people identified as possible witnesses had been blasted on Ziegler's show, including the former governor of Kentucky. *Divita* argued that this evidence showed Ziegler had a propensity to lash out at people on the air if they made him mad and that his quick temper made this commonplace. *Divita* also tried to introduce letters from listeners who complained about Ziegler's show, concerning everything from the content to how his voice sounded on the air.

When it comes to evidence, the issue of a media defendant's character can be the trickiest for counsel. If the case involves a controversial personality such as Ziegler, there is a potential that the plaintiff will attempt to exploit the defendant's style by introducing evidence of alleged prior bad acts or bad character to convince the jury that the defendant deserves punishment. A primary danger in permitting this type of irrelevant evidence is that a jury will confuse it with proof of actual malice, usually the key element in a public-figure defamation case. Because public officials and public figures receive benefits from being in the public eye, First Amendment jurisprudence requires a higher standard of proof when they claim that someone said something bad about them. As a matter of constitutional law, actual malice has nothing to do with "malice" as that term is commonly understood. To prove actual malice, a plaintiff must prove by clear and convincing evidence that the defendant made a statement with knowledge that it was false or with reckless disregard as to its truth. As long as the statement is true, a public figure cannot recover against a defendant even if the statement was made with ill will, hatred, or spite. Even a false statement about a public figure is protected speech as long as it was not made intentionally or recklessly with regard to the truth. If it is likely that character evidence may be an issue, it should be addressed in a pretrial motion in limine.

The *Divita* trial provides a quintessential example of alleged bad-character evidence being used by the plaintiff in an attempt to confuse the jury's understanding of actual malice and malice as the term is commonly understood. From beginning to end, *Divita's* case centered on attacking Ziegler's alleged misogyny—particularly toward her—as well as buttressing her theme that Ziegler was an angry, mean-spirited man. Both Ziegler and the radio station defendant filed pretrial motions in limine to exclude this evidence, and we vigorously objected to its introduction throughout the trial.

Although Judge Morris presided with dignity and carefully listened to counsels' arguments, he permitted *Divita* to present this evidence to the jury. For example, *Divita's* counsel intro-

duced Ziegler's dispute with Big Brothers Big Sisters. Ziegler's little brother was a huge Kobe Bryant fan. When the story broke about Bryant's alleged rape, Ziegler—who volunteered as a Big Brother—asked his little brother on the air for his thoughts on the matter. By all accounts, both Ziegler and his little brother had a positive relationship. Nonetheless, Big Brothers Big Sisters decided this was an inappropriate topic and ended Ziegler's role as a Big Brother. Ziegler was upset by this decision. He responded to Big Brothers Big Sisters via telephone and on the air, expressing his displeasure. The court allowed witness testimony about this event even though it had nothing to do with the truth or falsity of Divita's claims, let alone Divita. Fortunately, this and similar evidence did not cost the media clients a jury verdict for the defense. Win or lose, fights over the introduction of evidence of a media defendant's alleged bad character are always worth waging.

Procedural and substantive legal considerations are important, but lawyers cannot win media cases without help from the client. A good corporate representative is invaluable, especially one who has a solid grasp of the facts, understands the central legal issues involved, is well spoken, and comes across as someone to whom the jury can relate. This person is the media's corporate face.

Kelly Carls, the radio station's program director and the person who had the job of overseeing Ziegler's day-to-day performance, served as the station's representative at the *Divita* trial. In addition to being in the courtroom every day, he attended every early-morning and late-night trial-strategy meeting. He listened and provided insight. He did not get in the way of lawyering, yet he did not sit idle, either. He not only complemented the trial team but was an essential part of it.

Because of Carls's close working relationship with Ziegler, he had detailed knowledge of the facts surrounding the case. Additionally, Carls had a strong understanding of the legal issues involved. As a bonus, Carls was funny at just the right time. One on-air comment Ziegler made about Divita was his belief that she might be a pathological liar. Divita's counsel seized on the term *pathological* numerous times throughout the trial. He grilled Ziegler as to whether he had any medical experience or qualifications such that he could diagnose someone as being a pathological liar. Carls endeared himself to the jury and exhibited his grasp of the issues when he offered the following responses to Ziegler's counsel during cross-examination:

Q: Isn't it true, as a matter of fact, that the thing that got John Ziegler in trouble the most was telling the truth and not knowing when maybe it would have been more discreet not to tell the truth?

A: Well, it's not a lie to be silent, and I think there were times when Mr. Ziegler could have benefited from being silent as opposed to plunging forward but, yes, his commitment to telling the truth did have a habit of getting him in trouble.

Q: And that commitment was almost—was incredibly intense, was it not?

A: I would call it almost pathological, yes, sir.

This exchange drew laughter from the jury, the gallery, and even the judge. Carls's simple play on words illustrated the absurdity of Divita's claim that Ziegler acted with actual malice, portraying him instead as a bluntly honest person. A lawyer cannot teach a corporate representative to give witty,

insightful responses at trial, but if you can find someone who is bright and well spoken, you will have an invaluable tool in overcoming the burdens faced by the media at trial.

Another key for success in a media trial is turning perceived weaknesses into strengths, allowing your media personalities to be who they are rather than asking them to feign being someone they are not. Although traditional trial strategy calls for a respectful, toned-down approach on the witness stand, a media personality often calls for a different strategy. In our trial, Divita's counsel called Ziegler on direct during the plaintiff's case. A word artisan himself, Ziegler did what we instruct all of our clients to do but what so few learn to master: He listened to the questions asked, and he answered them precisely. (Except as indicated, the questioner is Mr. Clay.)

Q: Would you tell us your name, please, sir.

A: John Ziegler.

Q: Mr. Ziegler, are you aware that this trial has been receiving coverage in the media?

A: Yes, I am.

Q: And yesterday were you aware there was a television camera in here, right back where it is right now?

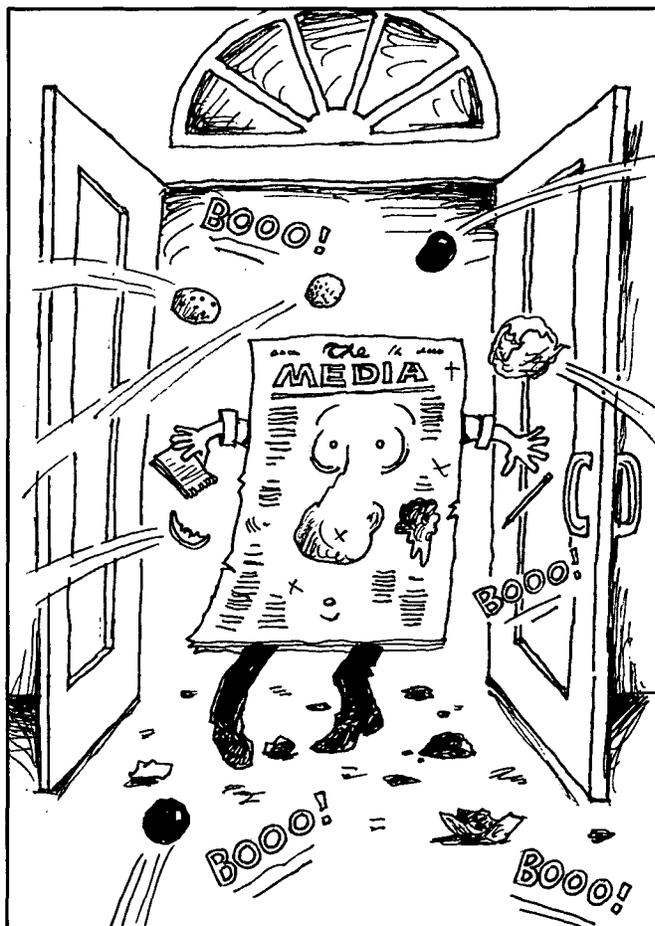
A: I saw a camera, yes.

Q: Did you make a statement to that camera, sir?

A: No, I did not.

Q: Did you mouth words to that camera?

A: No, I did not.



Q: You didn't say "this is ridiculous"[—] you didn't say that?
 A: No, I did not.
 Q: Or "this is hilarious"[—] you didn't say that?
 A: I did not say anything to that camera.
 Q: You didn't mouth any words?
 A: I did not say anything to that camera. Would you like to know what did happen?
 Q: I would like for you to answer my questions, sir. Did you mouth words—
 A: I said nothing.
 Q: May I finish the question. Did you mouth any words to the camera, sir?
 A: No, I did not.

* * *

Q: I want to go back just a second, Mr. Ziegler, to the activities that went on here yesterday, and I asked you if you made a statement to the [TV] camera [filming the trial] about moving your lips like that [silently mouthing an expression]?
 Mr. Goehler: Your Honor, I'm confused by what he's doing.
 Mr. Clay: If you'll just wait, I'm going to tell you.
 The Court: Just try to answer.

* * *

Q. "This is hilarious." You lippped that to someone in



this courtroom yesterday. Did you do that, Mr. Ziegler?
 A: Yes, I did do that.
 Q: To whom did you do that?
 A: I did that to John Yarmuth.
 Q: Is that your attitude toward this case; that it's hilarious?
 A: No, not at all. As a matter of fact, you have no idea why I said that, or what I was referring to when I said "this" [silently mouthing an expression]. You have no idea.

* * *

Q: O.K. Well, let's get back to the "this is hilarious." This is your lippping to Mr. Yarmuth. Go ahead and tell the jury what that was about.
 A: Well, it was a break in the proceedings, and you guys were all up here [bench conference], and I was frustrated by the fact that what was being debated at the time was whether or not Terry Meiners could be asked about a statement that he made in an e-mail to Darcie, in which he claimed to quote an unnamed former love interest who had allegedly told him something that my dead mother told me that I allegedly told this unnamed love interest that sounded nothing like my mother would have ever said. I'm sorry. I found that to be hilarious. And John is a very good friend of mine. He's in the courtroom today. And I turned and I said—[indicating], and that was all it was about. I found that to be an incredibly funny moment that my dead mother was being evoked in a trial that occurs 11 years after she died. I found that to be hilarious, especially when the comment wasn't real; especially when the comment was never made to me; it was never made to an unnamed love interest; it was never made to Terry Meiners. I found that to be hilarious. And I was blowing off steam to a friend.

For better or worse, Ziegler's approach on the air, in the courtroom, and in conversation is honest. In a defamation trial involving the actual malice standard, his approach was most certainly for the better. Thus, when dealing with media personalities, counsel should not be afraid to allow them to be true to themselves.

As in all trials, the effective use of jury instructions in a media trial is critical. Clearly explaining the distinction between ordinary malice and the counterintuitive definition of actual malice is a constant concern for media defendants at trial. An essential way to overcome this confusion is through effective use of jury instructions. The U.S. Supreme Court recognized the value of jury instructions for this purpose. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989). In *Harte-Hanks*, the Court held that an instruction on actual malice at the beginning and end of trial and at certain times during the course of the trial is appropriate. Lawyers representing media defendants should take full advantage of *Harte-Hanks* and request that the judge instruct the jury on the definition of actual malice before opening statements, and even periodically throughout the course of trial. Otherwise, a plaintiff may intentionally or unintentionally convey an impression to the jury that actual malice is established, by showing hatred, ill will, or spite.

The jury instructions should make clear that actual malice is an inquiry into the speaker's subjective belief as to the truth or falsity of the statements made, not the speaker's subjective attitude about the plaintiff. During closing arguments, lawyers for media defendants should again highlight the instruction on actual malice to ensure that the common misunderstanding as to the meaning of actual malice is dispelled.

Jury instructions may be used for other related purposes as well. In cases involving multiple allegedly defamatory statements, media counsel can request that a list of the specific statements upon which the plaintiff bases the lawsuit be presented to the jury. In *West v. Media General Operations*, 120 Fed. Appx. 601 (6th Cir. 2005), the Sixth Circuit made clear that a plaintiff required to prove actual malice has the burden to show that specific statements are false and that the jury should be provided with the specific statements. In *West*, a pre-trial order contained a list of specific statements, but the judge did not provide the list to the jury during deliberations. The Sixth Circuit suggested that the list of statements could easily have been made into jury instructions: "In essence, such a form would list the statements that Plaintiffs alleged the broadcast made about them and that were allegedly false and defamatory, and then ask the jury to indicate whether Plaintiffs met their burden of proof on each element of defamation as to each alleged statement."

In *Divita*, a list of specific statements benefited the media defendants because we could easily show that none of the statements was false. For example, Divita alleged falsity regarding Ziegler's statements about her breast surgery—yet she admitted that she had a breast augmentation—and she also claimed Ziegler defamed her by calling her "the devil," though the First Amendment and common law protect hyperbolic opinion that no reasonable person would construe as factual. Because we did not want the cumulative effect of several truthful statements and non-actionable statements of opinion to go to the jury in a lump—risking a verdict based not on the law but on the jurors' dislike of the totality of the comments—we requested and Judge Morris provided a list separately identifying the specific statements that Divita alleged were false and defamatory.

Another lesson from our trial, as well as from a recent defamation trial in Chicago, is that with an effective presentation, juries can understand and apply actual malice. Do not underestimate a jury's ability to apply the law even in the face of bad facts, or even in the face of materially false statements made without actual malice. Last year, the *Chicago Tribune* faced its first libel trial since 1968. A DuPage County prosecutor sued the newspaper for defamation based on 29 words in a 20,000-word, five-part series titled "Trial and Error: How Prosecutors Sacrifice Justice to Win." While the Cook County jury found that the statements at issue were materially false, it still rendered its verdict for the *Chicago Tribune* because the evidence showed that the newspaper did not act with knowledge of the falsity or with reckless disregard. This *Chicago Tribune* victory reminded media defense lawyers that the burden of actual malice is high, and that juries can get it.

Like the DuPage County prosecutor in the *Chicago Tribune* case, Divita lost because she was unable to prove actual malice to the jury. Despite a trial filled with evidence of Ziegler's alleged bad character, the jury correctly applied the law. Immediately after the trial, the foreperson was interviewed by a local television station. When asked what made the jury

reach its conclusion, he stated that it was the definition of actual malice and that he did not know what malice meant until defense counsel explained the definition during closing arguments. Thus, the defense verdict in *Divita* shows that a jury is capable of applying the standard of actual malice despite hearing the unsavory statements that formed the basis of the case and the plaintiff's tireless efforts to inject irrelevant bad character evidence in an attempt to muddle actual malice with malice.

When the actual malice standard is not involved, however, media defendants' risk of liability increases. For example, in *Aficial v. Mantra Films*, producers of the *Girls Gone Wild* videos lost a jury verdict of \$150 in compensatory damages and \$60,000 in punitive damages in Virginia state court in 2005. Unlike most states, Virginia's law requires written consent before a person's image may be used in a commercial production. Although the plaintiff gave oral consent for the fil-

We must protect speech even if we do not like the message.

ing, Mantra Films did not get her written consent. The low compensatory damages strongly suggest the jury's lack of sympathy for the plaintiff; she did give oral consent but took the case to trial anyway based on the state's written-consent law. The punitive damages amount represented a mere dollar for each copy of "Girls Gone Wild: The Seized Video" that was sold. This damages award probably reflects the jury's dislike of *Girls Gone Wild* films by imposing punitive damages but keeping them relatively low to avoid giving the plaintiff a windfall. *Aficial* is a prime example of how jurors' negative opinions of certain media defendants can affect the verdict. Additionally, it shows that the culpability of the plaintiff can counteract negative opinions jurors hold toward the media.

Divita illustrates the same point. Some or all of the jurors did not like what Ziegler said about Divita, but her actions probably helped counteract the negative opinions held against Ziegler and the media. When Divita moved to Louisville, she voluntarily participated in a unique reality relationship that had a public element to it from day one, which helped her gain exposure as she entered a new media market. Additionally, the jury did not relate to either Ziegler or Divita. As one juror noted after the trial, Divita and Ziegler "are not like us." This simple and insightful statement shows that when jurors do not relate to the plaintiff, they may discount their own negative opinions about the media because the media has not harmed one of "us."

Media attorneys have their work cut out for them at trial. From the moment they walk into the courtroom, they must continuously educate judges and juries of the value of such high standards as actual malice and of the need to protect speech even if we do not like the message or the style of its delivery. With careful planning, counsel can help jurors set aside their biases and recognize that protecting free expression, even where they find the speech distasteful, in the long run protects us all. □