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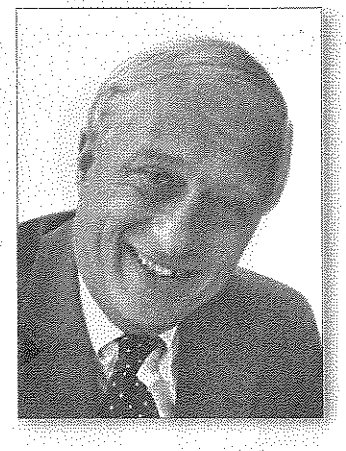
BY JAMES C. GOODALE

Kobe Bryant's First Amendment Legacy

Kobe Bryant will have a place in First Amendment history — a notorious one. His case will forever be known for the first permanent censorship order ever entered against the press.



Because of this order, there are seven media entities that cannot publish information in their possession about Mr. Bryant's accuser. They are Associated Press, CBS, Los Angeles Times, ESPN, Fox, the Denver Post and Time-Warner's Celebrity Justice.

In Mr. Bryant's case, there was a secret hearing involving the sexual history of his accuser. By mistake the court clerk e-mailed the transcript of this hearing to the media entities.

Censorship Upheld

This transcript disclosed that the accuser had sex with another man following her sexual encounter with Mr. Bryant and also disclosed other information about the accuser. When the judge found out what happened, he immediately ordered the companies not to print anything from the transcript and required deletion from their computers.

The companies appealed to the Colorado Supreme Court which upheld the censorship (prior restraint) order.

But the Colorado Supreme Court also said, if the trial court believed the information about the subsequent sex encounter could be considered by the jury, then that information could be published by the newspapers.

The media companies appealed to the U.S. Supreme Court. Justice Stephen G. Breyer, who oversees Colorado courts and others in the mountain states, considered the appeal. He declined to act.

He said he believed that the trial court was about to release some part of the transcript as the Colorado Supreme Court had suggested in its opinion. He said further, that he "recognize[d] the importance of the constitutional interests at issue," and the media companies could come back to him and argue about material not released by the trial judge.

The trial court released 99 percent of the transcript, but not all. A small part of the transcript is still censored and will forever be. Although Justice Breyer invited the media companies to come back to him to dispute the judge's failure to release the full transcript, they declined.

They concluded, understandably, since they had won 99 percent of the case, it was not worth the other 1 percent; particularly when they had no stated interest in using the material still subject to the censorship order.

There is, however, no reason in the world for the censorship order to continue. Nor, by the way, was there any reason for the censorship order to begin with.

The U.S. Supreme Court has made that clear. Once secret material is "public" (i.e., in the hands of the press) it cannot be made secret again even if the material was made public by mistake.

The Colorado clerk, who screwed up, is not the only clerk to have done so.

In 1972 a Georgia clerk did the same thing: disclosing the name of a rape victim by leaving his files open. (*Cox Broadcasting Corp. v. Cohn*) The publishing newspaper was sued but the U.S. Supreme Court said effectively, "too bad" — once public, no lawsuit.

The same answer was given by the U.S. Supreme Court to a mistaken release of rape information by a Florida clerk (*Florida Star v. BJF*).

When a Virginia newspaper published the name of a judge being investigated in secret proceedings (*Landmark Communications Inc. v. Virginia*), it upheld the publication and, in another case, it upheld the publication of a private phone conversation overheard by chance (*Bartnicki v. Vopper*).

Finally, as is well-known, the publication of leaked secret information in the Pentagon Papers case was held by the Court to be protected by the First Amendment. (*New York Times Co. v. U.S.*).

There the Court decided that a censorship order could not be entered unless the publication caused "direct, immediate and irreparable damage to our Nation or its people." This is virtually an impossible test to meet.

In high publicity cases such as Kobe Bryant's, before the court can consider a censorship order it must examine the case carefully to ensure there is no other way to provide a fair trial for a defendant or a rape victim.

Since, however, jurors are always asked before trial begins (voir dire) whether they have been influenced by pretrial publicity, voir dire always provides an effective way to protect defendants and rape victims from the publication of prejudicial information. And so censorship orders are never necessary in these type of cases.

With the rules so clear, it is hard to imagine what was going through the mind of the Colorado Supreme Court when it approved the censorship of material already in the hands of the press. It should never have enjoined the media companies.

Indeed, there is a strong argument that after exhausting its appeals, the media companies should have published the transcript anyway. Among other things, it was already known the victim had additional sex.

'Split the Difference'

The approach of the Colorado Supreme Court was to "split the difference" between publishing some of the transcript or none of it. It permitted publication of material of sexual acts following sex with Kobe and prohibited publication of everything else.

This, the court thought, was a "narrowly tailored" approach. It was better than stopping all publication.

But the First Amendment requires more than "splitting the difference." It permits a censorship order in high publicity cases only as a last resort if it is the least restrictive alternative. Since, however, voir dire is always a better alternative than censorship, censorship should never be permitted.

No one is sure what is left in the one percent not freed for publication, except the court and the media companies who have it and cannot publish it.

And so there sits the "Kobe Bryant injunction." The first ever, and a total insult to the First Amendment.

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