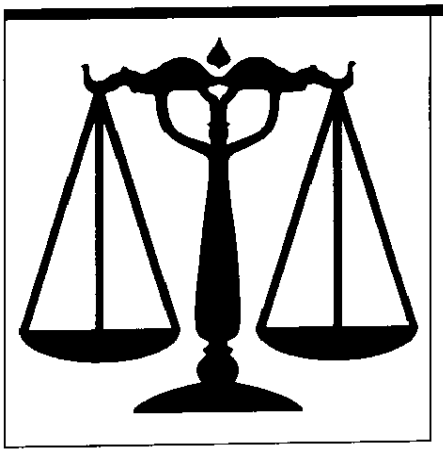

LEGALLY SPEAKING

by Lawrence Savell

Cover yourself when you 'mask' sources

Perhaps the most striking image emanating from the current offerings on Broadway is the partially concealed visage of the Phantom of the Opera.

His mask is an incomplete one, showing some features and concealing the rest, enticing our imagination to complete the picture.

But such devices are not limited to the theater. In journalism, the technique of "masking" increasingly is in vogue. Reporters are trying to give readers a more complete picture of their confidential sources — helping readers assess the sources' authority and credibility — rather than merely attributing information to totally non-described entities.

The danger is that too much of the mask may be removed, rendering the unnamed sources identifiable based on information disclosed in the article.

Apart from damaging reporters' relationships with their sources, the question is whether such disclosure may make reporters (and their publishers) liable to sources who required that they not be identified or identifiable.

A recent federal appellate court decision provided an affirmative answer. In its Aug. 9 opinion in *Jill Ruzicka vs. Conde Nast Publications Inc. and Claudia Dreifus*, the 8th Circuit Court of Appeals ruled that under Minnesota law, journalists (and their publishers) who promise but effectively fail to "mask" or conceal identities of confidential sources may be held liable for breaking their promises.

Ruzicka said Dreifus, a writer, breached her oral promise that Ruzicka would not be "identified or identifiable" in an article published in *Glamour* magazine about therapist-patient sexual abuse. (Dreifus denied agreeing to that, saying she vaguely promised only to do some masking. For purposes of its review, the appeals court considered the promise to be as Ruzicka said.)

During an interview with Dreifus, Ruzicka described incest committed by her father against her when she was a child and sexual exploitation by her therapist. She told Dreifus that she had sued the therapist, obtained a settlement and gone to law school. Some time after the interview, Dreifus called Ruzicka and read her a draft of the article. Ruzicka said the draft did not attribute the story to any person by name, describing her only as a Midwestern attorney. She approved the draft.

Ruzicka said the article in *Glamour* contained additional descriptive elements, including a reference to her as "Jill Lundquist, a Minneapolis attorney" and a statement that she had served on a state task force that helped write the law making therapist-patient sex a crime.

She said these added elements were identifying because she was the only female law student or lawyer serving on the Minnesota Task Force Against Sexual Abuse. She said she had not discussed her participation in the task force with Dreifus.

The case went through the appeals process twice. The lower court originally granted Conde Nast and Dreifus summary judgment on Ruzicka's breach of contract and other state law claims. In its first examination of the case, the appeals court affirmed that judgment. However, it sent the case back to the district court to consider Ruzicka's suit for promissory estoppel in light of the Supreme Court's 1991 ruling in *Cohen vs. Cowles Media Co.* that the First Amendment does not bar such a claim against the news media. Promissory estoppel is enforcement by a court of a binding promise between parties.

Under Minnesota law, a plaintiff seeking promissory estoppel must prove (1) the promise was clear and definite; (2) the person making the promise (the promisor) intended to induce the other person (the promisee) to rely on it, which the latter did to his or her detriment; and (3) the promise must be enforced to prevent injustice.

In its second disposition of the case, the lower court ruled that although Ruzicka showed that she had reasonably relied to her detriment upon Dreifus' promise to mask her identity, she had not established a sufficiently clear and definite promise.

The trial court judge observed that without specific instructions regarding what information can and cannot be published, reporters and editors cannot know what information will make a source identifiable; only with the benefit of hindsight can it be determined what information made the source identifiable to particular people and what publication constituted a breach of the promise.

The lower court also ruled that because the promise was indefinite, Ruzicka failed to show that enforcement of it was necessary to prevent injustice.

In its Aug. 9 decision, the appeals court reversed that ruling and sent the case back to the lower court for trial.

The appeals court noted that under Minnesota law, a promisor can be subject to promissory estoppel "if it can be

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shown that the promisor should reasonably have expected its promise to induce another's detrimental action."

It said that to be enforceable under promissory estoppel, promises need not be as definite as those forming conventional contracts. Nevertheless, the court found that the promise that Ruzicka said Dreifus made was more distinct and specific than an enforceable oral contract must be.

The appeals court said the oral promise in this case was to not identify Ruzicka in a manner that would make her identifiable. It said the plain meaning of the promise to not identify Ruzicka was that Dreifus would mask her identity so a reasonable reader could not identify her by the factual description.

Thus, the court reasoned, the term "identifiable" made the term "identify" more specific. Noting that these terms are commonly used and understood, the court cited a dictionary definition of "identifiable" as "subject to identification; capable of being identified."

It concluded that such a promise is not vague or ambiguous and there is no need to define further a term readily understandable by a reasonable person.

Thus, it found that the district court's concern about hindsight analysis did not undermine the promise.

The appeals court noted that Ruzicka obviously could not base a breach of promise claim on the writer's use of facts that Ruzicka consensually disclosed and approved for publication. This was true even if those facts might tend to make her identifiable to people who knew those facts. However, she made no such claim.

The court said the existence and scope of promises are questions of fact, requiring inquiry into the circumstances surrounding the making of the promise and the promisee's reliance.

The narrow question that it decided was that these issues should not, at least in this case given the evidence presented, be decided without a trial.

Comparing the case to identification issues in defamation and libel cases, the court said the jury must determine from the story as a whole whether the story relates to or identifies the plaintiff.

The test is not the author's intent nor the plaintiff's apprehension but the reasonable understanding of the recipient of the communication.

In defamation cases, the plaintiff need not be cited by name for the defamation to be "of and concerning the plaintiff."

The appeals court also set aside the district court's determination that failure to enforce the promise would not result in injustice.

Ruzicka, the court observed, had agreed to the interview only with the assurance that she would not be identified.

She had disclosed to Dreifus matters of utmost privacy.

The appeals court further concluded that enforcement of the promise would not be unjust to the media defendant.

It said that when the press believes disclosing the identity of a confidential source is valuable to the story and disregards its promise, the payment of compensatory damages is, as the Supreme Court stated in *Cohen*, simply "a cost of acquiring newsworthy material to be published at a profit."

The *Ruzicka* ruling indicates that at least under Minnesota law, as interpreted by the 8th Circuit, journalists (and their publishers) who fail to mask or effectively conceal the identity of a confidential source who required such "masking" or concealment may be liable for breaking their promise.

Note that the appeals court did not say the publisher and Dreifus are liable; it merely and narrowly ruled that Ruzicka's suit for promissory estoppel can be presented to a jury.

This decision is not binding on other state and federal courts. However, those courts could follow the 8th Circuit's lead.

The ruling may provide incentive for litigious sources to allege that similar promises were made to them and broken.

However, they would have to show (1) such a promise was made and (2) the manner of describing them in the resulting article made them identifiable. Although that may be hard to prove, it also may be hard to disprove (allowing, as here, such allegations to reach a jury) because such agreements usually are oral and have no witnesses.

So, what can reporters and publishers do to avoid such liability?

Clearly, writers need to discuss in advance with their sources the actual descriptions to be used and get the sources' approval — preferably in writing.

In the *Ruzicka* case, the court specifically said that if the sources are identifiable based on facts that they approved for publication, they would have no claim for breach of promise. Such advance, specific agreement — and then living up to that agreement — does more than avoid the risk of liability, it avoids the risk of alienating and losing valuable sources for future use.

Reporters and publishers can minimize such risks by agreeing only to not name sources, thus largely avoiding the "identifiability" issue.

If there is no promise to do more than not use the source's name, a plaintiff will be hard-pressed to argue that the promise was broken when the name was not used.

Apology for staged photos

TIME MAGAZINE HAS admitted that photographs that it identified as depicting boy prostitutes in Moscow were staged.

Published in June with a story about youngsters driven to prostitution by economic hardship as communism collapsed, the pictures immediately were questioned on a computer bulletin board for journalists by Richard Ellis, a Reuters photo editor in Moscow.

A *Time* spokesman said the Russian free-lance photographer who recorded the images, Aleksei Ostrovsky, would not be paid but no *Time* employee would be punished, the *New York Times* reported.

The photos purported to show 11-year-old boys, one dressed as a girl, with their pimp, Sasha, and sitting on a client's lap.

The *Washington Post* reported in September that Ostrovsky admitted paying the boys to pose.

In an October note to readers, *Time*, which reported the controversy in an August editor's note that questioned Ellis' credibility, apologized, explaining that one of the boys denied being a prostitute and that Ostrovsky admitted staging the scenes.

Had editors known the facts, the weekly newsmagazine said, they would not have printed the photos.

Meanwhile, Ellis quit Reuters after the news agency recalled him to London for challenging the claim.

Reuters spokesman Robert Crooke said, "As a policy, we do not like to criticize other media publicly."

—George Garneau