M e m o r a n d u m

To: Jenna Lee
From: Kenneth Berland
Date: November 18, 2002
Re: *Sowell v. Vacashon*, determination of limited purpose public figure and fact versus opinion regarding actionable words in a defamation action according to California law.

Following a radio broadcast of comments spoken by our client, Anita Vacashon, on the *Howie Sterno Show*, Dr. Theloneus Sowell filed suit for defamation. This memorandum will evaluate under California law (1) whether Sowell is a limited purpose public figure or a private individual and (2) whether any of Vacashon's on air comments are actionable statements of fact or will be construed by the court as opinion. For the purposes of this evaluation, the truthfulness of Vacashon's comments and whether they meet the malice standard will be ignored.

Questions Presented

I. Is Sowell a limited purpose public figure with respect to his involvement in Blubukenist scholarship?

II. Can any of Vacashon's statements from the *Howie Sterno Show* be categorized as fact rather than opinion?

Brief Answers

I. Probably not. Blubukenism seems too obscure to be a public controversy while the publicity seeking actions of Sowell and his media access seem lacking.

II. It seems likely. At least one of Vacashon's statements alleges enough fact to be proved false.

Statement of the Facts

On July 7th, 2002 Anita Vacashon publicly criticized both the scholarship and motives of Dr. Theloneus Sowell on the *Howie Sterno Radio Show*. Sowell believes that her comments have

tarnished his reputation and he has overheard them being discussed in public. He defended himself soon after when his phone call was broadcast on a different show, *The Riley Hour*. Earlier, he and Vacashon had debated religion and philosophy at a local college following a lecture on the history of the Blubuke, a disputed religious text. His comments at the lecture were elicited by requests from others in attendance. The Blubuke is the sacred text of Blubukenism, a new religion with few followers.

Both Sowell and Vacashon are Fellows at the Willebrandt Enterprise Institute, where he is a well-known philosopher. He has formerly been recorded in the press, including a 1997 speech at a local event, regarding his views on religion and moral decline. One of his supporters spoke directly to the press on that occasion about lobbying the legislature, but Sowell did not.

Discussion

I. Limited Purpose Public Figure

a. Public Controversy

A public controversy is an issue debated publicly that, when resolved, will have consequences foreseeable to affect nonparticipants. *Copp v. Paxton*, 52 Cal. Rptr. 2d 831, 844 (Ct. App. 1996). In *Copp*, the plaintiff dispensed contrary and arguably incorrect advice regarding earthquake safety in public schools. *Id.* at 835.

The debate over the Blubuke could be regarded as a public controversy. One of Sowell's followers has previously urged the passage of laws supporting the tenets of the religion. Like earthquake safety in *Copp*, the separation between church and state is an ongoing public debate with possible public policy consequences. More evidence of the public nature of the controversy can be found in the airing of two radio programs about it.

More likely, debate over the Blubuke should be construed as argument of an academic character, not likely to have ramifications outside academia. Unlike the public safety subject matter in *Copp*, Blubukenism is a philosophical topic with no real resolution. Local discussion of Vacashon's comments overheard by Sowell are more likely a reflection of the close Institute community than an indication of public discussion.

b. Voluntary Involvement

Limited purpose public figures (LPPF) have consented to risk of injury due to their voluntary involvement in a particular public controversy. *Copp*, 52 Cal. Rptr. 2d at 845-46. *See also Reader's Digest Ass'n, Inc. v. Superior Court*, 690 P.2d 610, 615 (Cal. 1984); *Vegod Corp. v. American Broad. Co., Inc.*, 603 P.2d 14, 16 (Cal. 1979). In *Rudnick v. McMillan*, 31 Cal. Rptr. 2d 193, 196-97 (Ct. App. 1994) a rancher is held to be a LPPF after promoting and editing newspaper articles critical of opposing views on land management. However, in *Khawar v. Globe Int'l,*

Inc., 965 P.2d 696, 703-04 (Cal. 1998) where the plaintiff is photographed with RFK moments before his assassination and subsequently defamed in a book, the court finds that mere association with a public issue does not confer LPPF status. *Accord, Franklin v. Benevolent & Protective Order of Elks, Lodge No. 1108*, 159 Cal. Rptr. 131 (Ct. App. 1979).

There is some evidence of Sowell's voluntary participation in public debate over the Blubuke. The strongest is his presence and participation at the college event. The fact that a single Sowell follower announced that he was going to lobby the state legislature after a speech might also indicate Sowell's complicity. Like the plaintiff in *Rudnick* who attempted to sway public opinion through other authors, Sowell's effort through a third person would be a purposeful act calculated to sway public opinion.

More likely, Sowell's involvement is involuntary and he has taken only enough action to defend himself. His links to the effort calling for legislation seem tenuous and the particular supporter is unnamed. Also, his 1997 comments seem too limited to qualify him for LPPF status. Like the plaintiffs in *Khawar* and *Franklin* who were swept into a controversy, Sowell attempts to remain silent at the history lecture, speaking only when asked. Additionally, Sowell is not scheduled to speak at the college event, nor is there evidence that he invited the press to the 1997 event.

c. Media Access

Public figures have access to broadcast communications to defend themselves effectively. *Vegod*, 603 P.2d at 16; *Khawar*, 965 P.2d at 701. In *Reader's Digest*, a self-styled church conducted a letter writing campaign and supplied thousands of articles in an attempt to stem previously unfavorable news coverage. 690 P.2d at 617. The court held the church a LPPF through this type of "self-help" activity and its access to the media. *Id.* In contrast, the plaintiff in *Khawar* was held to be a private individual due to his lack of media access. 965 P.2d at 704

Sowell's media access may be sufficient to categorize him as a public figure. Mainly, his association with the Institute gives him some status to express his views. That his call is taken by *The Riley Hour* may be some indication of this. Like the church in *Reader's Digest* that was able directly to contact the media, his status may have allowed him to take sufficient action to vindicate himself.

It is more likely that Sowell has not enough media access to be judged a LPPF. There are indications that he had to wait for a chance opportunity to clear his name by calling in like any other private individual. This seems to show his lack of spontaneous access to the media. A true public figure could have called for a press conference. Like the plaintiff in *Khawar*, who was never contacted by the media for an interview, Sowell had no

ready outlet to clear his name. Further, his use of a local forum like the 1997 event for airing his views indicates that his powers to access the media are comparable to those of a private individual.

In sum, it does not seem that Sowell can be easily categorized as a LPPF. On the facts presented, he has been reluctant to engage the press or debate the matter publicly. His access to the media is limited and the classification of the debate over the Blubuke as a public controversy is uncertain. An exhaustive analysis would further investigate all of Sowell's interactions with the media. As it stands, it seems likely the court would classify him as a private individual.

II. **Statements of Fact.**

Statements of fact must contain an assertion that is provably false. *Copp*, 52 Cal. Rptr. 2d at 837. Judges also consider the "totality of the circumstances" in their evaluation of alleged defamatory statements. *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87, 90 (Cal. 1986). Statements containing non-specific language and hyperbolic rhetoric are less likely to be factual. *Copp*, 52 Cal. Rptr. 2d at 837-38; *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425, 428 (Cal. 1976). Also, evaluating the communication within the context of the debate and the understanding of the average receiver of the communication is decisive. *Rudnick*, 31 Cal. Rptr. 2d at 198; *Baker*, 721 P.2d at 91

Broad or metaphoric language that does not impute specific fact is considered opinion. *Copp*, 52 Cal. Rptr. 2d at 838. In *Copp*, the court evaluated a letter by a government official critical of plaintiff's views on public earthquake safety techniques. *Id.* at 837-38. The court was able to sift through most of the alleged defamatory communication by eliminating unfocused words such as "nonsense" and "booby." *Id.* Further, metaphoric utterances were found to lack enough specifics to qualify as factual. *Id.* However, in *Vegod*, an accusation of deception was held to be actionable. 603 P.2d at 15.

Strong language that resembles hyperbole is viewed by the court as opinion. *Rudnick*, 31 Cal. Rptr. 2d at 197-98; *Gregory*, 552 P.2d at 428. In *Rudnick*, a dispute over the environmental management of grazing land and its condition before and after the alleged abuse is expressed in exaggerated terms. 31 Cal. Rptr. 2d at 198. The court held that idyllic, alarmist, and ornate language short of a specific criminal allegation, constituted not fact but opinion. *Id.*

The language surrounding allegedly defamatory communication as well as its forum are indications of factual content. *Baker*, 721 P.2d at 91. In *Baker*, defamatory language that led with "my impression is" was held to indicate to the average reader that the following statements were the opinion of the author. *Id.* The court in *Rudnick* looked to the forum of publication to determine that ordinary readers of letters to the editor

understand that communications contained there are opinion. 31 Cal. Rptr. 2d at 198.

In situations where advocates are attempting to sway public opinion, audiences do not assume the charges to be factual. *Gregory*, 552 P.2d at 429; *Okun v. Superior Court*, 629 P.2d 1369, 1376 (Cal. 1981). In *Gregory*, intense lobbying during a union led labor dispute sufficed to render statements imputing a breach of trust on the part of labor organizers as opinion. 552 P.2d at 429. In *Okun*, statements alleged to accuse public officials of deception on a hotly debated municipal issue are also held to be opinion. 629 P.2d at 1376.

On balance, much of Vacashon's communication contains mostly broad and unfocused statements. Phrases such as "cultish musings," "bizarre ideas," and "extolling blind faith" are substantially unprovable concepts. These statement are similar to those of the defendant in *Rudnick* who used the same broad language to accuse the plaintiff of land mismanagement. There, phrases like "alien tumbleweed" and "miracle rains" helped convince the court of the non factual nature of the statements.

Also, many of Vacashon's statements can be viewed as hyperbolic rhetoric. She accuses Sowell of undermining the Constitution, destroying modern society, and creating a generation incapable of thought. Like the imputations of dishonesty in *Gregory* and *Okun*, these statements would be

difficult to prove and are alarmist enough to be viewed as opinion.

Vacashon's communication contains some definite and specific statements. In responding to Sterno's request for "specifics", she makes a highly focused remark when she utters, "The Willebrandt Enterprise Institute is getting complaints from politicians, advocacy groups, and parents of high school students who are concerned about the seemingly anti-intellectual message inherent in Theloneus' research." Like the defendant found liable in *Vegod*, who accused the plaintiff of having "deceived the public," this charge seems to contain enough provably false factual information to be actionable.

There are also some signs that other Vacashon comments are factual. They are preceded by a prompting for "what happened out there today." This could indicate that what follows will be a recitation of the facts of the days occurrences. Vacashon's credentials as a research scholar with thirty year's experience, might give credence to the validity of her statements. Similar to the precipitating cause of action in *Copp* where the alleged defamatory statements are included in an official communication from an earthquake expert, the qualifications of Vacashon give a veneer of fact to her statements.

However, the context of Vacashon's communication is more easily regarded as opinion. Her comments are introduced by Sterno as "her thoughts." This would indicate that what follows

is her subjective interpretation of Sowell's scholarship. Additionally, the fact that Vacashon's comments air on a talk-radio show indicate that the average listener would construe them as opinion. Like the defendant in *Rudnick* whose statements appeared in a letters to the editor column, talk radio is a forum typically associated with airing opinions. Similarly, the average listener would probably not believe Vacashon's accusation that Sowell had not finished grade school.

Taken together, Vacashon's statements seem more like a personal attack than an attempt to sway public opinion. The fact that both she and Sowell work with the Institute might indicate an adversarial relationship that could work to her advantage. The fact that she cites all work authored by Sowell as suspect indicates that it is he, rather than the Blubuke controversy, that is the object of her criticism. Although the courts are highly cognizant of the need for free speech, an individual's reputation is historically deserving of protection.

Conclusions

The court will probably classify Sowell as a private individual because of the novelty of Blubukenism, his lack of access to the media and the uncertainty of his intentional involvement. In addition, the court will probably classify at least one of Vacashon's remarks as a factual assertion due to its specificity and ability to be tested as provably false.