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Hushing of Cochran Client Makes Waves

Picketing Couple Wanted $10 Million to Stop Demonstrating

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SAN FRANCISCO — A lot of lawyers wish their disgruntled ex-clients would just shut up and go away.

Johnnie L. Cochran Jr. did something about it: He won a court order forbidding a former client from ever speaking about him in public.

This is the saga of one of the nation's most flamboyant attorneys, famous for his defense of O.J. Simpson, persuading a judge to forever silence a poor, elderly couple who went too far while marching outside his downtown Los Angeles office with signs and bullhorns.

Cochran insists his adversaries, who had no lawyer of their own, are loudmouths who got exactly what they deserved for trying to bully him through a years-long campaign of harassment, defamation and extortion.

"I'm a big free-speech guy and I don't want to cut people off," he said in an interview. "But when you become a victim of somebody who lies about you and tries to block the entrance to your building, sooner or later you have to take a stand."

Cochran's victory, barely noted by the news media, now has been quietly affirmed by the California Supreme Court. At the same time, it has made waves among First Amendment specialists who get nervous when courts muzzle criticism of public figures.

Which helps to explain why one of Cochran's old buddies, the prominent constitutional scholar Erwin Chemerinsky, is trying to haul him before the U.S. Supreme Court.

"I have the highest regard for Johnnie. We've long been friends," the University of Southern California law professor said.

HUGH WILLIAMS/Daily Journal

Attorney Jonathan Cole, left, helped fellow lawyer Johnnie L. Cochran win an injuction against a couple who frequently picketed the downtown courthouse and Cochran's Los Angeles office, often with profane signs.

"But I agreed to work on this case because I believe the court order is overly broad in violation of the First Amendment."

The nation's highest court hasn't shown much enthusiasm for gagging speech in advance. Prior restraint injunctions are so rare, in fact, that the Supreme Court has never upheld one, even when the justification was national security, as in the famous Pentagon Papers case.

That hasn't stopped lower courts in California from occasionally ordering someone to shut up under extraordinary circumstances — including, in some recent examples, defamation cases.

In 1999, for instance, a federal district judge in San Jose ordered two disgruntled employees to cease attacking their former employer after they had already posted more than 10,000 messages on Internet message boards. A federal appeal court later dismissed the injunction.

In another defamation case involving a feud between rival drunken driving defense attorneys, a Los Angeles Superior Court judge two years ago ordered one to delete critical comments about the other from his Web site and pay a $1 million judgment. That case is on appeal.

Neither of those cases involved public figures with the stature of Cochran, who is as close to a celebrity as trial lawyers get.

The 66-year-old senior partner of Cochran, Cherry, Givens & Smith is no stranger to criticism, whether it's other plaintiffs lawyers who've accused him of

Ruling Hushing Picketers Roils First-Amendment Lawyers

stealing their clients or the former girlfriend who claimed he'd promised her lifetime financial support.

On the lighter side, Cochran has become an icon for the American pastime of poking fun at lawyers. The popular 1990s television sitcom "Seinfeld" featured an overly ambitious black trial lawyer who parodied Cochran's speech mannerisms. On an episode of the satirical cartoon "South Park," Cochran is depicted heroically switching sides midway through trial.

But by all accounts, former client Ulysses Tory took Cochran-bashing to new heights in the late 1990s while venting his frustration over Cochran's handling of a civil rights suit some 15 years earlier.

Tory and his common-law wife, Ruth Craft, made a regular habit of picketing against Cochran for an hour or two each day on the sidewalk outside the downtown Los Angeles courthouse and outside the Wilshire Boulevard building that houses Cochran's firm.

Tory even rounded up strangers and bought them lunch so that they, too, would picket.

And not only did Tory cast Cochran as "a crook, a liar and a thief" — one of many colorful descriptions scrawled on Tory's placards, some of them R-rated — Tory also told a judge he wouldn't quit picketing unless Cochran paid him off.

Tory was unavailable for comment, and court records reveal few details about him. A 67-year-old father of five, Tory owned a Los Angeles fish market until the mid-1980s but has been out of work since then and lives on government assistance.

In a deposition, he claims to have had success picketing a major oil company and two banks that crossed him, but he refused to divulge details of what he said were confidential settlements with those businesses.

Cochran's lawyers refer to Tory as a "professional picketer," but Tory says he's exercising his civil rights.

"I have no other way," Tory said, according to a transcript. "I have no choice but to do what I'm doing to get something solved."

As exceptional as the basic facts are in *Cochran v. Tory*, BC 239 405, the case took an even stranger turn when it went to trial.

The central claims against Tory were defamation and invasion of privacy. Typically, successful legal actions involving an injury to reputation are resolved with an award of monetary damages.

But the judge who heard Cochran's complaint decided that slapping Tory with damages would be useless because it wouldn't stop him from picketing.

Instead, Los Angeles Superior Court Judge Ronald Sohigian justified the decision to issue a prior restraint injunction by likening Tory's behavior to extortion — a criminal offense that was not even formally alleged in Cochran's suit.

'This was a form of extortion. It wasn't protected free speech.'

Jonathan Cole,
Attorney

In March 2002, Sohigian ordered Tory and Craft (who wasn't a party to the litigation) to permanently stay at least 300 yards away from Cochran.

Sohigian also enjoined the couple and "their agents" from any further picketing of Cochran and from "orally uttering statements about Cochran" in any public forum, "including, but not limited to, the Los Angeles Superior Court and any other place at which Cochran appears for the purpose of practicing law."

Now that the state's higher courts have refused to lift the injunction, Tory's pro bono appellate attorneys contend it's the broadest restriction on speech about a public figure ever upheld on appeal in U.S. history.

"Mr. Tory and Ms. Craft are forever prohibited from mentioning one of America's most famous attorneys, regardless of the context, content or purpose of their speech," said Jean-Paul Jassey, formerly of Loeb & Loeb in Los Angeles.

Jassey said the fact that his clients are indigent and could not afford a lawyer only highlights the travesty of the injunction.

"What is ultimately being proposed is a two-tiered system — one for the rich and one for the poor," he said.

Cochran's attorneys maintain it's not the content of Tory's speech that got him into trouble, but his purpose. At various points in their briefs, Cochran's team describes Tory and Craft as "bizarre" and "outrageous" individuals who were trying to interfere with Cochran's ability to make a living.

"This was a form of extortion," said Jonathan Cole, of Nemecek & Cole in Sherman Oaks. "It wasn't protected free speech. Tory was out of control. Unless he was restrained, he would continue to do this until he was paid money by Cochran."

Like many free speech disputes, this one started with an ugly spat.

Back in 1983, Tory and another man signed up Cochran, then a fast-rising star, to represent them in a personal injury suit against the city after police shot at them.

Eighteen months passed. Unhappy that his attorney had not reached a quick settlement, Tory wrote to Cochran accusing him of conspiring with the city. Tory offered to "refrain from any public discussions of conspiracy or scandal" if Cochran quickly paid him $10 million "or very close to it."

Looking back, Cochran said he has no idea why Tory became so upset with him in the first place.

"We did everything we could to try to help him," he said. "The other guy [in the 1983 lawsuit] we got a nice settlement. This guy was just hard to work with."

Cochran promptly withdrew as Tory's lawyer after receiving the angry letter. The city ultimately paid $500,000 to Tory's co-plaintiff, Javier Gutierrez, who had been slightly injured in the police shooting incident, but Tory, who was not physically hurt, was offered only $6,000, which he rejected.

Cochran didn't hear any more from Tory until July 1995. By then, Cochran had become a household name as one of the lawyers defending Simpson in his double-murder trial.

This time, Tory wrote to complain about another lawyer, Earl Evans, who had worked part time interviewing clients, including Tory, for Cochran in the

mid-1980s. In his letter, Tory claimed Evans had failed to return money that Tory and Craft allegedly paid to him while he represented them in a subsequent family law matter unconnected to Cochran's practice.

When Cochran did not respond, Tory broke the silence. He began to hold demonstrations outside Cochran's office and the downtown courthouse, alleging that Cochran was unfit to practice and owed him money.

Among the messages on display:

"You've been a BAD BAD boy, Johnnie L. Cochran"

"Attorney Cochran, don't we deserve at the least the same justice as O.J.?"

"Hey Johnnie, how much did they pay $$ you to fuck me?"

There were at least a dozen other placards, although it remains in dispute whether any of the protesters other than Tory and Craft had a personal connection to Cochran.

In October 2000, while the picketing continued, Tory wrote to Cochran to demand the return of $6,500 from Evans — plus an additional $15,000 to compensate Tory for his time and "bring this entire matter to closure."

When Cochran then sued Tory, the picketers became even more vocal and started chanting obscene statements, according to court records.

After granting a preliminary injunction, Sohigian conducted a full-blown trial that lasted two days. At one point, Tory acknowledged that nothing short of judicial intervention would stop him from continuing to picket.

"I'm quite sure, your honor, I will protest against Mr. Cochran," he said, adding, "Unless you order us not to."

Sohigian concluded he had no choice but to issue the injunction because Tory's obvious goal was "to force Cochran to pay him money."

The 2nd District Court of Appeal affirmed in October.

Writing for the three-judge panel, Justice Miriam Vogel flatly rejected Tory's claim that the injunction was an unconstitutional prior restraint, noting that this was a purely private dispute, not a matter of public concern.

She also rejected Tory's contention that his placards were merely conveying opinions and thus immune from defamation claims. Moreover, Vogel said, it was obvious that Tory acted with malice.

"Uncontroverted evidence establishes that Cochran did not owe any money to Tory, that Tory knew his statements were all false, and that he nevertheless set out to harass Cochran by hiring picketers to carry outrageous placards," Vogel wrote.

Vogel's opinion was unpublished, meaning it cannot be cited as a precedent. But she grounded her decision in the California Supreme Court's controversial 1999 holding that a court order suppressing further communication is constitutional if the speech in question is "unprotected" under the First Amendment.

In that case, the high court ruled 4-3 that the employees of a rental car office were entitled to a prior restraint injunction under the state's anti-discrimination law to stop their supervisor's persistent use of racial epithets. *Aguilar v. Avis Rent a Car System, Inc.*, 21 Cal.4th 121.

When Tory's case reached the California Supreme Court, only two of the seven justices, Janice Rogers Brown and Joyce L. Kennard, voted to grant review, leaving Tory two votes short. *Cochran v. Tory*, S121121. Brown and Kennard had filed sharp dissents in *Aguilar*, blasting the majority's endorsement of prior restraint as a watering down of the First Amendment.

Tory's supporters claim his treatment doesn't comport with a deep-rooted tolerance in the courts for criticism of lawyers.

According to past California rulings, calling a public defender an "unethical" attorney who used "sleazy tactics" is fair game, and so is characterizing a lawyer's performance during trial as "incompetent."

In 1999, the same appellate district that came down so hard on Tory came to the opposite conclusion about an author accused of impliedly defaming an attorney who was not named but described in a book about Hollywood movie-making.

Plaintiff Thomas Ferlauto had complained that his professional reputation suffered from being referred to as "loser wannabe lawyer," "creepazoid attorney," and "Kmart Johnnie Cochran." But the court found these descriptions were rhetorical hyperbole rather than assertions of fact. *Ferlauto v. Hamsher*, 74 Cal.App.4th 1394.

Cochran himself earned an entry in the annals of defamation case law in 1997 when he sued a New York Post columnist for writing that "he will say or do just about anything to win, typically at the expense of the truth."

Cochran's suit contended the comment made him out to be an unethical liar, but the 9th U.S. Circuit Court of Appeals said it was nothing more than an opinion. *Cochran v. NYP Holdings Inc.*, 210 F.3d 1036 (2000).

Among a score of other lawyer-bashing precedents cited by Tory's lawyers is a 1978 case from Pennsylvania that is strikingly similar to *Cochran v. Tory*.

In that dispute, a downtown Philadelphia law firm sued an ex-client after she picketed on the sidewalk wearing a sandwich board sign which said: "Law firm of Quinn Mazzocone stole money from me and sold me out to the insurance company."

(Like Tory, Helen Willing was eager for attention: While marching, she pushed a shopping cart bearing the American flag and continuously rang a cow bell and blew a whistle.)

The Pennsylvania Supreme Court said Willing was free to speak her opinion, "regardless of whether that opinion is based on fact or fantasy." The state high court chastised the trial judge who had enjoined her picketing, vehemently rejecting the notion that the law firm could bypass traditional money damages just because Willing was too poor to pay them. *Willing v. Mazzocone*, 393 A.2d 1155.

Cochran's lawyer plays down these cases in his briefing, saying they're irrelevant because they didn't involve attempted extortion.

Drawing on a different line of case authority, Cole makes the point that not all speech is protected, particularly if the speaker's motive or conduct is unlawful.

He makes numerous references to cases from the 1930s and '40s involving "extortionist tactics" on the part of unhappy auto dealership customers and union members picketing their employers.

In a Los Angeles case, the court concluded that the sole purpose of the picketers' "fraudulent" statements was to force a bowling alley owner to sign a labor agreement. *Magill Bros. v. Building Service Employees International Union*, 20 Cal.2d 506.

In a Sonoma County case, the court

issued an injunction after finding that workers angry with a lumber company were disrupting train schedules by marching on the tracks. *Northwestern Pacific Railroad Company v. Lumber & Sawmill Workers Union*, 31 Cal.2d 441.

Cole also compares Tory's behavior with that of a New York socialist arrested in the 1920s for advocating the violent overthrow of the government in a series of writings called the "Left Wing Manifesto."

Upholding the criminal statute that punished such behavior, the U.S. Supreme Court found that police acted properly in light of the defendant's "direct language of incitement." *Gitlow v. People of New York*, 268 U.S. 652.

Tory's actions, in Cole's words, were "designed to incite the public and potential clients of Cochran."

It could be several months before the U.S. Supreme Court decides whether to hear *Cochran v. Tory*. The high court accepts only a tiny fraction of the petitions it receives each year, and experts give this case even lower odds of being taken because the 2nd DCA's opinion was unpublished.

Either way, the case is bound to affect California jurisprudence because the same 2nd DCA division that sealed Tory's fate will soon rule on the defamation injunction in the battle of the rival DUI attorneys.

The defendant in that case, Edward "Fast Eddie" Kuwatch, was ordered to remove from his Web site comments that depicted Long Beach solo Lawrence Taylor's practice as a "dumptruck" firm staffed by inexperienced and unqualified associates who make high pressure sales pitches to solicit clients and then sell them out.

Kuwatch's appellate attorney, Jeremy Rosen of the prominent Encino firm Horvitz & Levy, filed an amicus brief to try to persuade the California Supreme Court that *Cochran v. Tory* was wrongly decided.

"It seems like courts traditionally bend over backwards to allow you to criticize lawyers, even more so than other professions," he said.

Rosen acknowledged that the injunction against Kuwatch is not nearly as broad as the restriction on Tory's speech.

"It's beyond offensive to have a public figure of such prominence go after this elderly couple," he said. "This case is shockingly wrong."

Cochran said it's puzzling that First Amendment experts from white-shoe appellate firms and the American Civil Liberties Union have fought to keep Tory's case alive even as one court after another has ruled against him.

"These are lawyers who I have respect for and they may think it's a good cause," he said. "But it's a little surprising because I would think they would want to at least look at the facts."

Asked whether he ever considered caving into Tory's demands for a payoff, Cochran said he had not, even though it would saved him a small fortune in attorney fees.

"The money I spent in this case was a lot more than this guy would ever be able to get," he said.

As for Tory, he's keeping a low pro-file, according to Jassey, who is moving to the firm of Sheppard, Mullin, Richter & Hampton and taking the case with him.

"He's got a lot on his mind, but he's trying very hard to abide by the law and not say anything," Jassey said. "His freedom of speech is very literally being suppressed."