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Memoirs of a Sore Winner *

On the morning of March 27, 1991, Dan Cohen and his wife took a cab to the U.S. Supreme Court to hear oral arguments in *Cohen v. Cowles Media*, a lawsuit he had waged for over eight years. In his account of the case, *Anonymous Source*, Cohen recalls his first impression of the Court: "Though I'd lived in Washington and done the usual tourist bit, I had never seen the United States Supreme Court building. When I got there I knew why. The building is small, tired, and in a bad part of town." It can be said with some degree of confidence that in the tens of thousands of articles and books about the Court, not one has a description of Cass Gilbert's Corinthian masterpiece quite like this.

There is a sneering quality in Cohen's writing that is not confined to courthouse architecture. He denigrates almost everyone who appears in his saga, even supporters. He views others through thick stereotypic lenses. The self-portrait that emerges is not flattering. Only rarely do we get a glimpse of what a terrific memoir this might have been.

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* Review of *Anonymous Source: At War Against the Media, A True Story* by Dan Cohen, published by The Oliver Press, Inc., in 2005. This review by Douglas A. Hedin appeared first on pages 24-26 of the January 2006 issue of *The Hennepin Lawyer*. Though reformatted, it is complete. It is posted on the MLHP with the permission of the Hennepin County Bar Association.

If trial lawyers have themes for their cases, Cohen has one for his book: it is the martyrdom of Dan Cohen. He wants us to understand that he sacrificed his professional life for a noble cause: to reaffirm the sanctity of a promise. He did this, he tells us, by winning a "landmark case." But every case decided by the Supreme Court does not deserve "landmark" status. It will take a few more years before we know whether *Cohen v. Cowles Media* is any more than a footnote in First Amendment jurisprudence.

The facts are not complex. In the fall of 1982, Rudy Perpich and Wheelock Whitney were locked in a tight race for governor. Perpich had chosen Marlene Johnson, a St. Paul businesswoman, to run for lieutenant governor. In late October, the Whitney campaign learned that Johnson had been convicted of shoplifting 12 years earlier. They enlisted Gary Flakne, a former Hennepin County Attorney, to get her criminal records. On October 26, Flakne checked out Johnson's file at the St. Paul Municipal Court archives (her conviction had since been vacated). That evening, at a meeting in Whitney headquarters, Flakne asked Cohen to distribute the records to the media. Cohen agreed to do so. The next day, he approached WCCO's Dave Nimmer, who scoffed, "This stuff has been kicking around a couple of days." Gerry Nelson of the Associated Press accepted the file after promising Cohen that he would not disclose his name when reporting the story (a pledge he kept). Lori Sturdevant of the *Minneapolis Star Tribune* and Bill Salisbury of the *St. Paul Pioneer Press* also promised Cohen that they would not disclose his identity before accepting the files. Within hours after she received the file from Cohen, Sturdevant independently learned that Flakne was the last person to have checked it out at the courthouse. The editors of both newspapers felt their readers should know that the source of their stories on Johnson's past was close to the Whitney campaign. On October 28, both papers ran stories on Johnson's conviction and, over the vehement objections of their reporters, named Cohen as the man who had circulated Johnson's records. Sturdevant was so incensed

that she refused to be listed on the story's byline. Cohen's employer, the Martin/Williams ad agency, fired him on the afternoon of the 28th, claiming that because of his notoriety his colleagues would not work with him. The next evening, Cohen's co-workers gave him a farewell party. On November 2, Perpich and Johnson were elected.

Three weeks after the election, Cohen hired Charles Hvass, a prominent Minneapolis personal injury lawyer, to sue the newspapers. From the outset, Cohen distrusted Hvass. He spends as many pages in his book settling old scores with Hvass as he does on the appeal of his case to the U.S. Supreme Court—four pages each. In December, Hvass filed a two-count suit against the newspapers: fraudulent misrepresentation and breach of contract. After three years of discovery, during which costs of about $2,300 were incurred, and perhaps wearying of Cohen as a client, Hvass negotiated a tentative settlement. The papers would pay $4,000 in cash but only on condition that the parties publicly deny that any money changed hands. Cohen understandably was upset that after paying attorneys' fees and costs his share would come to "less than what I would have been paid for three years' work if I'd been stamping out license plates at the state pen," but he was furious that the papers would not acknowledge that they broke their promises to him as well as the falsity of the denial that they paid money to settle. He rejected the settlement and Hvass withdrew. Cohen, in desperate need of a lawyer, found one who had never tried a case to a jury.

Practicing out of his house, Elliot Rothenberg was a loner in the profession. A cerebral man, he had run for attorney general in 1982, taking principled but unpopular positions on a variety of criminal justice issues. He was trounced by Skip Humphrey. According to Cohen, they shared a passion—they loathed the Minneapolis newspaper. Rothenberg agreed to represent Cohen against their common enemies.

To advance the theme of his book, Cohen portrays himself as an underdog, almost defenseless against a malevolent media. To that

end, Cohen highlights Rothenberg's occasional missteps in the courtroom. As the story unfolds, however, we come to see how resourceful and opportunistic Rothenberg was.

During the two-week trial in July 1988 in Hennepin County District Court, Judge Franklin Knoll gave the lawyers great latitude in examining witnesses. Taking full advantage of this opening, Rothenberg asked editors about articles they published years after the 1982 election in which anonymous sources were cited. He quizzed one *Strib* editor about an article on 40-year-old gambling records of the parents of Geraldine Ferraro who was running for vice president in 1984. Another time, he asked that newspaper's "readers' representative" about a recent article on an 18-year-old shoplifting conviction of Bess Myerson, who was Miss America in 1945. Rothenberg had 462 such articles ready to launch at a moment's notice. No defense witness could be adequately horseshedded for a cross under these circumstances.

It is part of the folklore of the bar that all corporate employees read the same script. At this trial, every reporter and most editors broke ranks and read Rothenberg's script. Bill Salisbury of the St. Paul paper testified that he opposed his editor's decision to disclose Cohen's name. Ditto Lori Sturdevant. The executive publisher of the *Pioneer Press* was confronted with a passage from a manual on media law he had co-authored with the *Star Tribune's* house counsel (who also was Rothenberg's ex-wife) on the importance of confidential sources. In his summation Rothenberg read from a textbook written by David Anderson, a *Strib* editor, on how investigative reporters use "deceptive methods to gather information." It was a plaintiff 's lawyers dream.

Cohen makes the trial out to be a cliffhanger. In fact, it was never close. Within hours after beginning deliberations, the jury sent the first of a series of questions to Judge Knoll about the standards for punitive damages. The jury awarded Cohen $200,000 for breach of contract and $250,000 in punitive damages on the misrepresentation

count against each newspaper. Five of the six jurors voted for Cohen, a division that probably reflected public opinion. Regardless of their political affiliation, most Minnesotans who were aware of the case—including this reviewer—rooted for Cohen.

A split panel of the Court of Appeals reversed the tort award, holding there was no misrepresentation; but it affirmed the breach of contract finding. The majority rejected the papers' argument that they were constitutionally immune from a damage award for an editorial decision to disclose the source of a true political story. Judge Gary Crippen, who served on the appeals court from 1984 to 2002, dissented. How Cohen treats Crippen is indicative of the pattern of petty vindictiveness running throughout his book. Cohen conducted a personal background search of Crippen; he cites the population of Worthington, Crippen's hometown, and even the circulation of the local newspaper (13,250), apparently to show his lack of sophistication to judge the appeal. (By any measure, Crippen's dissent and the majority opinion by Judge Marianne Short are high-quality judicial writings.)

When the case reached the Minnesota Supreme Court, it took an unexpected turn. For many lawyers, this act in the drama is the most unusual because of that court's disregard of two rules of appellate court behavior: that such a court will consider only issues or claims raised in the trial court, and that it will avoid deciding constitutional questions if the appeal can be decided on another basis. To understand what happened at this stage, we must turn to Rothenberg's memoir of the case, *The Taming of the Press*, published in 1999; in it he is insightful, frank, self-deprecatory, and, unlike his client, frequently generous to the opposition.

A majority, over acerbic dissents of Justices Lawrence Yetka and Richard Kelley, held that the facts did not warrant a finding that a contract had been formed. "The parties understood that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract," wrote

Justice John Simonett. That should have ended the case. But suddenly and uncharacteristically, Simonett, the consummate stylist of the Court in that era, lurched into an analysis of a claim never pled, tried, briefed, or argued: promissory estoppel. As Simonett reread the record, Cohen acted in detrimental reliance on the reporters' promises; but when it came to the final element of promissory estoppel—that a promise under these circumstances will be enforced only to avoid "injustice"—he accepted the papers' constitutional defense, holding that the First Amendment barred that claim as well. It was this ruling that led the U.S. Supreme Court to grant certiorari.

While Simonett cites case authority for the court's peculiar behavior, Rothenberg repeats Court gossip—one of the justices refused to agree to the majority opinion unless the papers' First Amendment defense was addressed. There are other indications that this appeal placed considerable stress on the Court. In a lengthy footnote to his dissent, Justice Kelley described how the newspapers successfully employed an unnamed "attorney-lobbyist" to push the Legislature to enact a Reporter's Shield Act in 1973. In his book, Rothenberg discloses that the unnamed lobbyist was Chief Justice Peter Popovich, who recused himself from *Cohen* at the delicate, behind-the-scenes suggestion of Rothenberg because he once represented the *Pioneer Press*.

On June 25, 1991, the U.S. Supreme Court, in a 5-4 ruling, held that the First Amendment did not protect the media from common law claims by sources promised anonymity by reporters. When the case returned to the Minnesota Supreme Court, the court-created promissory estoppel claim was all that remained—a situation even Simonett called "novel." On Jan. 24, 1992, proclaiming that it had to take extraordinary steps to "prevent an injustice," the Court unanimously affirmed Cohen's judgment on a claim he never made. And so, after almost 10 years of litigation, Dan Cohen received $200,000 plus $131,000 in interest.

Cohen devotes only a few pages to the Minnesota Supreme Court's rulings. He cannot be faulted for this because he has written a memoir not a law review note. But so much else is missing. Cohen relishes giving the editors of the *Pioneer Press* bloody noses and the editors of the *Star Tribune* black eyes but, curiously, he does not land a glove on the image makers in the ad world, from which he was ostracized. He tells us little about himself and nothing about the support he received from his family. We wonder, how did a man so sensitive to personal slights become active in the rough world of politics? And what made him receptive—or vulnerable—to Flakne's entreaty? Unlike Rothenberg, he seems unable to engage in introspection, the type of self-revelation whereby we see him reflecting on and even being changed by the conflict—what he melodramatically calls "a switchblade fight"—and as a regrettable result he comes across as shallow and revengeful.

Dan Cohen will never regret writing a memoir of his great case, but someday he will regret writing this particular memoir in this particular way. Or, to put it another way, Dan Cohen, tenacious litigant, deserved better than what he got from Dan Cohen, embittered autobiographer. ■

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