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QUESTIONNAIRE/ORDER FORM

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EDITOR'S NOTE

We are pleased to publish below LDRC Bulletin No. 3. We hope you will find it to be of interest and assistance in your work. We again renew our standing request that you consider these LDRC Bulletins to be a forum for communications between you and the LDRC and among you and the many other publishers, journalists and libel defense counsel who read this Bulletin. Your responsiveness to our inquiries and questionnaires; your use of materials accumulated and offered by LDRC; your alerting of LDRC to additional items of interest are all indispensable to making LDRC the most effective possible source for its entire constituency.

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Henry R. Kaufman
General Counsel

LDRC TO UNDERTAKE ANNUAL
FIFTY-STATE SURVEY OF
LIBEL AND PRIVACY DEVELOPMENTS

Background

LDRC's Executive Committee has approved the preparation and publication of an annual fifty-state survey of libel and privacy law developments. A format for the annual LDRC legal survey is currently being refined by LDRC working with local law firms active in the libel defense field who have volunteered to spearhead this initial phase of the project. It is hoped that the annual legal survey will eventually involve the cooperation of one or more leading libel defense firms or attorneys in every one of the 50 states, plus the District of Columbia and possibly key U.S. territories and possessions as well. The annual survey will be published by LDRC, either as an ongoing feature of the quarterly LDRC Bulletin, or as a separate special report or reports, or some combination of the two.

A fifty-state survey was first proposed last November at the semi-annual Steering Committee meeting of LDRC's thirty-five supporting organizations. At that time, it was envisioned that the legal survey would be completed over a two year period
with six or eight state reports included in each LDRC quarterly Bulletin. Concern was expressed, however, that a two-year lag between each state report would limit the usefulness of the survey. As a result, in early February, an annual survey was approved by the LDRC Executive Committee.

The LDRC annual legal survey is intended to provide coverage of all important legal issues in libel and invasion of privacy, state by state. After the first year's reports have initially summarized each state's basic legal standards, subsequent annual reports will emphasize new developments, trends and significant unreported cases. The overall report is not intended to be a treatise on the minutiae of the law, but rather to reflect concisely the significant legal standards of, and particularly the practices peculiar to, each state. It is believed that the compilation of fifty state reports, on an annual basis, will represent an exceptionally useful reference tool that can assist nationally-oriented publishers and defense counsel by providing immediate access to key cases and developments in every state, while at the same time enabling local publishers and their counsel readily to compare their state's laws with those in other states nationwide. A final, but significant additional benefit of the annual legal survey project, from an institutional point of view, will be to expand and systematize the growing network of local counsel who are aware of LDRC and who are willing to keep LDRC informed of important legal developments in their states and localities, not only in the annual report but throughout the year.

Current Status of the Project

LDRC is currently working to develop a "model" topic outline and reporting format for the annual survey. To that end LDRC has consulted with a small number of local attorneys who have reviewed drafts of the reporting forms and topic outlines and two of whom have actually prepared draft state reports. These two reports, covering New Jersey and Washington State, are published below. It should be stressed that the New Jersey and Washington reports are drafts in two significant regards. First, they were prepared rapidly in order to meet the deadline for publication in this issue of the Bulletin. Second, they were prepared in large part to test the appropriateness and the usefulness, both of the various legal issues covered, as well as the format of the report itself. LDRC therefore urges its readers to review the two
reports that follow with this in mind and to inform LDRC, by means of the Questionnaire attached to this Bulletin, of their views as to both the substance and the format. Based upon these comments and criticisms, the two reports and the basic topic outline and format will be revised before the major work on the remaining state reports is commenced.

In addition to readers' views regarding the substance of the annual report project, LDRC is, of course, most interested in receiving expressions of interest from knowledgeable attorneys in the various states willing to work with LDRC, on a voluntary basis, in preparing the annual legal survey. Minimally, of course, LDRC will need the assistance of at least one knowledgeable attorney or firm in each state. If more than one firm or attorney expresses interest in a particular state, appropriate arrangements will be made possibly to divide up the work load; or to have one firm prepare, and another review and supplement, the state report; or to rotate responsibility for preparation or review of the report on some other equitable basis. Appropriate credit for all such assistance will of course be given in connection with publication of each state report. We urge all those interested in working on this project, or who know of or can suggest others who may be interested, to contact Henry Kaufman at the LDRC, by means of the Questionnaire or directly by mail or telephone. To the extent that sufficient volunteers do not immediately come forward as a result of this publication, it is envisioned that further efforts will be undertaken to alert knowledgeable local defense counsel around the country to the LDRC annual legal survey and to solicit support in that manner. Anyone willing to assist in that solicitation process is also urged to contact Henry Kaufman at LDRC.
The vast majority of New Jersey defamation cases were decided before the constitutionalization of the law by the decisions in New York Times Co. v. Sullivan and its progeny. The opportunity for an approach which respects First Amendment values will be presented by judicial or legislative consideration of such unresolved issues as the opinion/fair comment interface, the neutral reportage defense, the standard of conduct in private figure plaintiff cases and the right to protect confidential sources.

I. Substantive Law - Defamation

A. Defamatory Meaning


B. Opinion

(i) In General

No New Jersey decision has considered the Gertz opinion privilege.

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1 But see, Stuart v. Gambling Times, 8 Med. L. Rptr 1034 (D.C. N.J. 1982) where the District Court found that in context, the published statement that plaintiff's book was the "number one fraud ever perpetuated upon the gambling reader" was not libel per se but protected opinion/fair comment.
In cases involving public figure/official plaintiffs, New Jersey courts have found that the following conduct is insufficient to establish actual malice:

2. Motivation of ill will or desire to injure plaintiff; Pasculli; Marchiano v. Sandman, 178 N.J. Super. 171, 174 (App. Div. 1981);
3. Failure to read grand jury transcripts where defendant's client had given him his version of an arrest incident which resulted in the client's indictment; Marchiano v. Sandman, 178 N.J. Super 171 (App. Div. 1981), 428 A.2d 541;

(ii) **Gertz Private Figure Liability Standard**

The standard of conduct required in private figure plaintiff cases is still unsettled, although the Appellate Division has indicated a willingness to adopt the Rosenbloom actual malice standard in cases involving matters of public interest or concern. Barbetta Agency Inc. v. Evening News Publishing Co., 135 N.J. Super 214 (App. Div. 1975), 343 A.2d 105.

(iii) **Application of Gertz to Non-Media Defendants**


E. **Liability For Republication**

(i) **Letters to the Editor**

The Appellate Division of Superior Court has held that a newspaper's failure to verify factual allegations in a letter to the editor was insufficient to establish actual malice. Pasculli v. Jersey Journal, (N.J. App. Div., Dec. 16, 1981, A-931-8074-81) (unreported)

(ii) **Wire Service**

There are no reported decisions on this issue.
(ii) Editorials/Cartoons


(iii) Satire/Humor/Parody/Fiction/Hyperbole

The District Court of New Jersey has held that a rhetorical question is constitutionally protected opinion, Cibenko v. Worth Publishers, 7 Med. L. Rptr. 1298 (D.C.N.J. 1981), while works of parody and satire are not. Miss America Pageant v. Penthouse, 7 Med. L. Rptr. 2177 (D.C.N.J. 1981).

C. Truth/Falsity


D. Fault

(i) Public Figure/Official

Plaintiff's status as a private or public figure/official has recently been held a question of law to be resolved by the judge. Lawrence v. Bauer Publishing & Printing Ltd., 176 N.J. Super. 378, 395, 423 A.2d 655. In that case, the president of a taxpayers association was held to have attained a sufficient degree of recognition or notoriety to be considered a public figure, while a fellow officer was held to be a private figure.

The following persons have been held to be public officials:


2 Article I, para 6 of the New Jersey Constitution which permits the jury to consider evidence of truth but does not allocate the burden of proof thereon, reads as follows: "In all prosecutions or indictments for libel the truth may be given in evidence to the jury".
(ii) False Light Privacy

(iii) Intimate Facts
No New Jersey case discusses this tort.

(iv) Intrusion
Invasion of privacy will be found where a party's physical solitude is interfered with by an illegal search, eavesdropping or prying into personal affairs. Canessa v. Kislak, Inc., 97 N.J. Super. 327, 334 (Law. Div. 1967), 235 A.2d 62.

(v) Right of Publicity
The right to be free of unwarranted appropriation or exploitation of one's personality is recognized in New Jersey. Palmer et als v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72 (Ch. Div. 1967), 232 A.2d 458.

(vi) Statutory
Invasion of privacy has not received legislative consideration.

B. Intentional Infliction of Emotional Distress/Outrage


C. Trade Libel/Product Disparagement

(i) Against Media Defendants
No case discusses this tort in the media context.

(ii) Other

D. Group Libel

To maintain a cause of action based upon a group libel, plaintiff must show that he is a member of the defamed class and must establish some reasonable application of the words to himself. Mick v. American Dental Assn., 49 N.J. Super. 262, 285 (App. Div. 1958), 139 A.2d 570.
G. Trial

(i) Jury Instructions
No reported decision deals with jury instructions in the libel context.

(ii) Expert Witnesses
The admissibility of expert testimony in libel cases is presently an unresolved issue.

H. Remedies or Counterclaims for Costs, Attorneys Fees, Malicious Prosecution

Counterclaims in malicious prosecution and abuse of process may be asserted by libel defendants. The abuse of process counterclaim is generally easier to prove since it only requires a showing of an ulterior motive and some act which perverts the legitimate use of process, while malicious prosecution requires a showing that a previous lawsuit brought with malice was terminated in the complainant's favor. Penwag Property Company, Inc. v. Landau, 76 N.J. 595 (1978), 388 A.2d 1265.

I. Prior Restraint

(i) Libel
No reported case discusses the availability of prior restraints in the libel context.

(ii) Privacy
No reported case discusses the availability of prior restraints in the privacy context.

J. Jurisdiction/Venue/Choice of Law

No reported case discusses jurisdiction or venue requirements in the libel context. Where both parties were New Jersey residents, the author and publisher were served in New Jersey and the book was distributed from a state warehouse and advertised in New Jersey newspapers, New Jersey law was found applicable. Barres v. Holt, Rinehart & Winston, Inc., 131 N.J. Super. 371, 377 (Law. Div. 1974), 378 A.2d 1148.

III. Related Causes of Action

A. Privacy

(i) In General
the news media in civil discovery. The issues arose in Resorts International, Inc. v. NJM Associates, 180 N.J. Super. 459 (Law Div. 1981), 435 A.2d 572, 7 Med. L. Rptr. 2025 and Maressa v. New Jersey Monthly. New Jersey Monthly argued that where exercise of the privilege does not collide with a criminal defendant's Sixth Amendment rights or the State's interest in effective law enforcement that the privilege is absolute in scope and not subject to involuntary waiver.

Two pre-New York Times Co. v. Sullivan State court decisions on civil discovery are under reconsideration in the Resorts and Maressa cases: Beecroft v. Point Pleasant Printing and Publ. Co, 82 N.J. Super. 269 (Law Div. 1964), 197 A.2d 416 and Brogan v. Passaic Daily News, 22 N.J. 139 (1956), 123 A.2d 473. In Brogan, the New Jersey Supreme Court found it inherently unfair to allow the defendant to give testimony on privileged information, withheld from the plaintiff in discovery, in order to prove publication in good faith. The Court also based its decision upon the defendant's "waiver of the privilege at trial". Beecroft, which purports to be a logical application of Brogan held that "the voluntary interjection" in an Answer to plaintiff's Complaint "of the defenses of fair comment, good faith, truth, and lack of malice" constituted an "effective waiver" of the source privilege.

The N.J. Shield Law (N.J.S.A. 2A:84A-21) has been amended several times since Brogan and currently contains some of the most unequivocally pro-media language of any state Shield Law.

E. Summary Judgment


F. Burden of Proof

(i) Falsity or Truth

Defendants bear the burden of proof on truth and must overcome the presumption that a defamatory statement is false. Rogozinski v. Airstream By Angell, 152 N.J. Super. 147. (Law Div. 1977), 377 A.2d 807.

(ii) Fault

See preceding discussion of Fault under ID., supra.

(iii) Privilege

H. Broadcast/Slander

Cable television companies are absolutely privileged to broadcast statements by persons to whom facilities must be extended in accordance with State of federal law. N.J.S.A. 48:5A-50. No special rules apply to slander.

II. Procedural Issues

A. Retraction

The general rule is that an effective retraction must be a full and unequivocal statement which does not contain lurking insinuations or hesitant withdrawals and must be an honest endeavor to repair the wrong done by the defamation. Brogan v Passiac Daily News, 22 N.J. 139 (1956).

B. Statute of Limitations/Single Publication Rule


C. Motion To Dismiss

The motion to dismiss standard has not been considered in the libel context.

D. Discovery

(i) In General

The Rules of Civil Procedure have been evenly applied in defamation cases.

(ii) Shield Law Privilege

On January 11, 1982, the New Jersey Supreme Court heard argument on the scope of constitutional and statutory protections accorded to


(ii) Statutory
Legislately created privileges cover:
1. Publications in any newspaper of official statements issued by police department heads and county prosecutors in investigations in progress or completed by them which are accepted in good faith by the publisher (N.J.S.A. 2A:43-1);

2. Good faith statements by insurance agency personnel in reports or communications concerning insurance risks (N.J.S.A. 17:37A-14);
3. Broadcasts by cable television companies under state or federal law mandating public access (N.J.S.A. 48:5A-50);
4. Statements by members or employees of the State Commission of Investigation which are relevant to proceedings or investigations (N.J.S.A. 52:9M-15b.).

(iii) Neutral Reportage
The neutral reportage defense has not been considered as a matter of state law.

G. Damages
(i) Actual

(ii) Punitive
The right to recover punitive damages is limited to those cases where plaintiff proves either "malice in fact" or defendant's failure to retract after a reasonable request for retraction has been communicated, N.J.S.A. 2A:43-2. Thus, libel plaintiffs arguably must prove constitutional "actual malice" and common law malice or failure to retract to gain an award of punitive damages although no case has expressly suggested this principle.
(iii) Advertisements
There are no reported decisions on this issue.

(iv) Publisher/Author/Reporter (respondeat superior)
There are no reported decisions on this issue.

F. Privileges
(i) Common Law
It is a basic principle of New Jersey defamation law that words which constitute fair comment are not defamatory. Leers v. Green, 24 N.J. 239 (1957), 131 A.2d 781; LaRocca v. New York News, 156 N.J. Super. 59 (App. Div. 1978), 383 A.2d 451, 3 Med. L. Rptr. 2048. The burden is on the libel defendant to establish that the statements at issue are on matters of public interest or concern and are statements of opinion rather than fact. Mick v. American Dental Association, 49 N.J. Super. 262, 284, 139 A.2d 570. (App. Div. 1978). Defendant must also establish the following elements of the privilege:

1. That the fair comment is based on facts truly stated;
2. That the fair comment does not contain imputations of corrupt or dishonorable motives on the part of the person whose conduct or work is criticized, save in so far as such imputations are warranted by the facts;
3. That the fair comment is an honest expression of the writer's real opinion. Leers v. Green, 24 N.J. 239 (1957), 131 A.2d 781.

Once defendant has proved that the privilege applies, the burden of proof is on plaintiff to show actual malice, or (perhaps) an improper purpose by way of avoidance of the defense. Rogozinski v. Air Stream By Angeil, 152 N.J. Super. 133 (Law Div. 1977), 377 A.2d 807.

Other currently recognized common law privileges cover:
1. Defamatory statements made by participants in judicial proceedings, Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552 (1955), 117 A.2d 889;
3. Certain statements made in the course of quasi-judicial administrative proceedings, J.D. Const. Corp. v. Isaacs, 51 N.J. 263 (1968), 239 A.2d 657;
4. Statements by state legislators made while acting within the scope of their authority; Cole v. Richards, 108 N.J.L. 356 (1932), 158 A. 466;
6. Good faith communications regarding the fitness of candidates for office; State v. Fish, 91 N.J.L. 228 (E & A 1917), 102 A. 378.
7. Communications by state officials with the media pertaining to matters within the scope of their responsibilities, Sinderbrand v. Schuster, 170 N.J. Super. 506 (Law Div. 1979), 406 A.2d 1344;
SURVEY OF DEVELOPMENTS IN LIBEL AND INVASION OF PRIVACY IN WASHINGTON STATE IN RESPONSE TO LDRC QUESTIONNAIRE

(i) Name of State. Washington State.


(iii) Covers Developments through 2/28/82.

(iv) Other General Comments or Caveats. This is a preliminary outline which will be revised to discuss some additional cases.

I. Substantive Law - Defamation.

A. Defamatory Meaning (innocent construction). Washington does not have an "innocent construction" rule. The judge first determines if statements are capable of defamatory meaning; the issue then becomes one for the trier of the fact. See Tilton v. Cowles Publishing Co., 76 Wn.2d 707, 722, 459 P.2d 8 (1967).

B. Opinion.

(i) In General. Washington courts have not expressly addressed this issue, but would appear to follow the approach enunciated by the United States Supreme Court in Gertz and subsequent decisions.

(ii) Editorials/Cartoons

(iii) Satire/Humor/Parody/Fiction/Hyperbole. Washington appellate courts have not addressed this issue.


D. Fault.

(i) Public Figure.
Clawson v. Longview Publishing Co., 91 Wn.2d 408, 589 P.2d 1223, 4 Mea. L. Rptr. 2163 (1979), discussed in detail the standards for determining whether a plaintiff was a public official and whether the allegedly defamatory comments were within the scope of the public official/"actual malice" protection. The scope of protection varies according to (1) the importance of the position held, and (2) the nexus between that position and the allegedly defamatory information. The plaintiff there, supervisor of a county motor pool, was a public official, in part, because the article related directly to his actions on the job.

Generally, the Washington courts have followed the rules enunciated by the United States Supreme Court in defining public figures. Exner v. American Medical Association, 12 Wn. App. 215, 529 P.2d 863 (1974), relied heavily upon the "vortex" notion of public figure definition. The plaintiff, a self-proclaimed authority on fluoridation, was found to be a public figure.


- corporate public figure. No Washington cases have considered this issue.

(ii) Gertz, Private Figure Liability Standard. Taskett v. KING Broadcasting Co., 86 Wn.2d 439, 546 P.2d 81, 1 Med. L. Rptr. 1716, established a limited negligence standard for private individual plaintiffs in the wake of Gertz. A private individual plaintiff may recover actual damages for a defamatory falsehood, concerning a matter of general or public interest, where the substance makes substantial danger to reputation apparent, and on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect.

86 Wn.2d at 445.

(iii) Application of Gertz to non-media Defendants. No Washington courts have addressed this issue, but the standards of Gertz probably would be applied.

(i) letters to editor.

(ii) wire service.

(iii) advertisements.

(iv) publisher/author-reporter (respondeat superior). Washington courts have not discussed the issue of publishers' versus authors' responsibility.

F. Privileges.

(i) Common law. Washington courts have adopted a broad privilege to report on official proceedings, particularly judicial proceedings. See Mark v. Seattle Times, 96 Wn.2d 473, 7 Med. L. Rptr. 2209 (1981), and cases cited therein. The court need not have taken action on the pleadings for the privilege to attach. Washington State also generally follows the other recognized common law privileges. See, e.g., Gem Trading Co., Inc. v. Cudahy Corp., 92 Wn.2d 956, 603 P.2d 828 (1979) (qualified privilege where publisher acts to protect own interest). The ordinary rules apply to require the plaintiff to show abuse of any qualified privilege, although there is some confusion as to the standards for showing abuse. See Mark v. Seattle Times, supra.

(ii) Statutory. The statutory privileges appear in the criminal libel statute and thus may be of questionable help. RCW 9.58.020.


G. Damages. Washington State follows the general rules on damages in defamation actions.

(i) Actual.


(iii) Other.

II. Procedural Matters

A. Retraction. There is no retraction statute in Washington State, but under the common law rules, evidence of retraction may be used to mitigate damages.


C. Motion to Dismiss (Demurrers). The principles favoring an early testing of the plaintiff's case would be applicable to motions to dismiss as well as summary judgment motions. See Mark v. Seattle Times, 96 Wn.2d 473, 7 Med. L. Rptr. 2209 (1981).

D. Discovery.

(i) In general. No case has previously discussed this issue, but Rhinehart v. Seattle Times, currently before the State Supreme Court, will substantially affect discovery in libel litigation in Washington State. Rhinehart addresses the issue of protective orders enjoining publication by the defamation defendant, and the scope of discovery into the affairs of a plaintiff who claims an associational privacy interest.

(ii) Shield privilege. In Senear v. Daily Journal American, (1982) (to be reported shortly in Media Law Reporter), the State Supreme Court adopted a common law privilege to maintain confidential sources in civil actions. The court adopted a three-part test requiring the trial court to find the action was not brought solely for harassment, that the information sought was "critical," and that "reasonable" alternatives had been exhausted. Before this test applies, the media must show that nondisclosure is necessary to preserve the confidential relationship.

E. Summary Judgment. The Washington courts have adopted a strong rule requiring defamation plaintiffs, both "public" and "private," to establish a "prima facie case" with "convincing clarity" in response to a defendant's motion for summary judgment. Mark v. Seattle Times, 96 Wn.2d 473, 7 Med. L. Rptr. 2209 (1981), is the most recent and most emphatic statement of this principle.
To make out a prima facie case for purposes of avoiding a summary judgment . . . [plaintiff] would have to allege as to each element facts which would raise a genuine issue of fact for the jury.

96 Wn.2d at 486.

F. Burden of Proof. Mark v. Seattle Times, 96 Wn.2d 473, 7 Med. L. Rptr. 2209 (1981), has squarely placed the burden of proof on the plaintiff. "Under our cases, a defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault, and damages." 96 Wn.2d at 486.

(i) Falsity or Truth
(ii) Fault.
(iii) Privilege.
(iv) Other.

G. Trial.

(i) Jury instructions.
(ii) Expert witnesses.
(iii) Other.

H. Remedies or Counterclaims for costs, attorneys' fees, malicious prosecution. Washington State has a statute allowing a malicious prosecution counterclaim to be alleged, but the Washington Supreme Court has severely limited the applicability of such a counterclaim to situations where the "seizure of person or property" has occurred. See, Gem Trading Co., Inc. v. Cudahy Corp., 92 Wn.2d 956, 603 P.2d 828 (1979).

I. Prior Restraint. No Washington cases have expressly addressed the availability of injunctive relief in defamation or privacy actions.

(i) Libel.
(ii) Privacy.

J. Jurisdiction/Venue/Choice of Law.
III. Related Causes of Action.

A. Privacy.

(i) In General.

(ii) False Light. Moloney v. Tribune Publishing, 26 Wn. App. 336 (1980), rejects a privacy claim that is best characterized as a "false light" claim. Because the article was a substantially accurate summary of an official report, no liability was found. See also Brink v. Griffith, 65 Wn.2d 253 (1964) (no separate recovery on a false light claim where same damages recovered in defamation claim).


(iv) Intrusion. Mark v. Seattle Times, 96 Wn.2d 473, 7 Med. L. Rptr. 2209 (1981), did not allow recovery where a film was taken of the interior of a closed store from a privately owned, but publicly used, sidewalk.

(v) Right of Publicity. No case has yet been decided under this category, but in light of their other holdings, the Washington courts probably would adopt the Restatement definition.

(vi) Statutory. There is no statutory privacy action.


C. Trade Libel/Product Disparagement.

(i) Against media defendants. No such actions have been brought against media defendants.

(ii) Other.

D. Group Libel.
IV. Narrative Comments on Trends and Other Pertinent Developments

The Washington courts generally have provided substantial protection for media defendants in defamation actions. Mark v. Seattle Times, 96 Wn.2d 473, 7 Med. L. Rptr. 2209 (1981), is the most important recent development showing the continued support of the State Supreme Court for such protection, even in the wake of Hutchinson. As a result, the general practice in this state is to obtain summary judgments, rather than having to endure trials of defamation actions.

Senear v. Longview Publishing Co., 27 Wn. App. 454, 618 P.2d 536, 6 Med. L. Rptr. 2070 (1980), was a strong statement by the Court of Appeals in favor of a clearly enunciated, constitutionally based reporter's privilege. The decision by the Washington Supreme Court (to be reported shortly in the Media Law Reporter) in affirming Senear still provides substantial protection, but the common law basis for the opinion may prove troublesome.

The Washington appellate courts have not yet affirmed a recovery in a privacy action. As a result, the tort of privacy remains largely undeveloped in Washington.

* * * * *

INQUIRY #1 -- Libel or Slander Actions Arising Out of Newsgathering Activities

LDRC has received a number of reports recently regarding claims, litigations, settlements or judgments arising not out of materials actually published, but out of alleged spoken or written defamation by reporters or others, prior to publication, in the course of newsgathering activities.*

* We exclude from consideration for these purposes, libel or slander actions that might arise from activities subsequent to publication—for example, during author—publicity tours or press conferences where allegedly defamatory statements, first published in a book or magazine, may be repeated or embellished. See, e.g., Church of Scientology v. Siegelman, 5 Med. L. Rptr. 2021 (S.D. N.Y. 1979) (talk show and magazine interview); Phillips v. Freed, Civil Action No. 81-1407 (D.D.C.) (press conference).
The dangers to the media involved in a proliferation of such claims, which could chill legitimate, good faith newsgathering activities, are apparent. Clearly, journalists require some reasonable latitude to check leads and to test potentially defamatory rumors in private so as to verify or discredit them prior to publication. Moreover, without some protection for pre-publication newsgathering even the most scrupulous pre-publication legal review may not detect or preclude a claim of underlying libel or slander in the newsgathering process since the defamatory statement may well not be included in the final publication. Nonetheless, LDRC is not currently aware of any precedent that clearly provides express protection to such pre-publication newsgathering activities. And at least one court has expressly rejected the argument that alleged libel or slander in the course of newsgathering should be accorded a special First Amendment privilege. Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975) ("absolute" privilege rejected).

The dangers of pre-publication defamation actions are nowhere more graphically demonstrated than in Green v. Alton Telegraph, the Illinois defamation action in which a $9.2 million dollar judgment was entered based not upon a published story, but upon an allegedly libelous memorandum to government officials prepared by two of the newspaper's reporters in the course of an investigation into alleged local corruption. (See LDRC Bulletin No. 1 at 19.) In Green, which is currently on appeal, defendants argued, not that pre-publication newsgathering is inherently or absolutely protected, but instead, that the special nature of the communication there at issue suggested that the reporters' pre-publication memorandum was itself privileged under common and federal law as a report of possible criminal activities to prosecuting officials.

Since Green, LDRC has become aware of three additional pre-publication slander actions brought against media defendants. In Rifkin v. Esquire, plaintiff sought both injunctive relief and damages in connection with pre-publication activities by two free-lance journalist-authors, and others allegedly agents of the publisher, which allegedly slandered plaintiff and invaded his privacy. Defendants had been preparing an article about plaintiff's federal conviction for a multi-million dollar computer wire fraud. No claim was made with respect to the actual content or publication of the article. At the outset of the litigation the Ninth Circuit refused to enjoin publication based upon such claims, 7 Med. L. Rptr. 1231 (9th Cir. 1981). Very recently, the California Federal District Court.
granted defendant's motion to dismiss, 8 Med. L. Rptr. ___ (C.D. Cal. 2/24/82, No. CV-81-1424-MML). On the invasion of privacy counts, the Court held that plaintiff had failed to state a claim under California law for intrusion. It found that defendant's activities in attempting to gather information about plaintiff from third parties, "even if pursued using subterfuge or fraud...in no way, (physically or otherwise) intruded upon plaintiff's solitude or seclusion." The Court dismissed the slander claims without reaching the contention -- only tangentially raised by defendant -- that to enforce such claims would have a chilling effect on First Amendment newsgathering activities. The Court simply held that the slander claims, alleging that defendant and its authors falsely suggested defendant was cooperating in the preparation of the magazine article, failed adequately to allege either a slanderous publication or the special damages required under California's rather narrow slander statute.

Two other recent California slander actions have not yet been terminated so successfully. Indeed, one of the cases, Mansdoerfer v. Trumbo, No. 25418 (Superior Ct. Nevada Co.) is reported to have been settled for $27,000 in order to avoid the expense of litigation. See Los Angeles Daily Journal, 2/11/82 at 1, Col. 4; The Western Law Journal, January/February 1982, at 8, Col. 1. In the Mansdoerfer case a reporter for the Grass Valley Union, in the course of investigating allegations that a local evangelical minister had embezzled funds from a church academy and a church collection plate, was alleged to have stated in the course of interviews that the plaintiff had, in fact, embezzled the money, was addicted to a drug and to have made other allegedly slanderous statements. It is reported that the defendant would have denied making the alleged statements had the case not been settled.

In yet another California slander action, Lafayette Morehouse, Inc. v. Contra Costa Times, it is alleged that defendant's reporter made defamatory remarks instead of posing objective questions in the course of interviews concerning the activities of a controversial "free-love" commune and school. It is reported, however, that the Contra Costa Times will fight the claim and that the newspaper pursued its investigation by publishing a series of follow-up articles less than a week after the filing of the slander action.

Action Requested: LDRC is asking readers of this Bulletin to advise LDRC of any other similar newsgathering defamation claims that may have been asserted or litigated around the country. If you have such information, please so indicate on the accompanying Questionnaire, and/or otherwise contact LDRC.
The trend toward the assertion by libel defendants of counterclaims or counter-actions or other remedies against bad faith or harassing libel actions has already been widely reported. See, e.g., The News Media & The Law, June/July 1981, at 22-25; The National Law Journal, 3/17/80 at 8 (motion for sanctions and attorneys fees against Synanon for "abuse of the judicial process"); The National Law Journal, 11/17/80, at 11 ("prima facie tort" action against Church of Scientology; malicious prosecution claim discontinued). While certainly not always appropriate, it is clear that numerous baseless libel actions are prime candidates for such counter-actions or counterclaims and libel defense counsel, it is reported, are asserting such claims and seeking such affirmative remedies from abuse or harassment with ever greater frequency. Such defense claims -- unfortunately -- often cannot be litigated, or at least will not be entertained by the court, until after the plaintiff's action has been defeated. Nonetheless, defense counter-claims can and oftentimes are asserted or threatened from the very initial pleading stages of the litigation.

While defensive counterclaims or counter-actions of this kind have merit in many circumstances and may also be useful from a tactical point of view, thus far the new defense aggressiveness has not, to LDRC's knowledge, yielded any clear-cut victories for media defendants. In perhaps the leading case, Nemeroff v. Abelson, a federal district judge granted defendant Dow Jones and its author and editor a judgment of $50,000 in attorneys fees and expenses, taxed against both the plaintiff and its counsel, based upon a finding that the libel litigation had been commenced "in bad faith" in order "to silence or discredit the press." 469 F. Supp. 630, 4 Med. L. Rptr. 2505 (S.D.N.Y. 1979). Unfortunately, this stunning victory was reversed in part on appeal, because the Second Circuit disagreed with the finding of the district court that the litigation had been commenced in bad faith. It therefore reversed the award of attorneys fees although it affirmed an award of costs to defendants as the prevailing party. The Court did, however, remand for a determination whether, although not commenced in bad
faith, the remaining litigation was conducted in bad faith, the court indicating that proof of bad faith during the litigation might justify an award of "reasonable expenses," citing 28 U.S.C. §1927 (counsel's liability for excessive costs), 620 F.2d 339, 6 Med. L. Rptr. 1075 (2d Cir. 1980). See also Church of Scientology v. Siegelman, 475 F. Supp. 950, 5 Med. L. Rptr. 2021 (S.D.N.Y. 1979) and 481 F. Supp. 866, 5 Med. L. Rptr. 2370 (S.D.N.Y. 1979) (dismissing defendants' counterclaim for abuse of process, on the ground that defendant's proper remedy is in a separate and subsequent malicious prosecution action, and also dismissing their counterclaim for a civil rights class action conspiracy, but denying the motion to dismiss as to a counterclaim for prima facie tort and noting that "should it ultimately be determined that this suit was brought without cause, or for the purpose of harassment, the court will not hesitate to order the imposition of counsel fees upon the plaintiff, citing the district court decision in Nemeroff, prior to the Second Circuit reversal in that case, 5 Med. L. Rptr. at 2371 n.2).*

Action Requested:

LDRC requests that readers of this Bulletin advise LDRC of any such counterclaims, counter-actions or other remedies that they have sought or secured in defending frivolous, harassing or meritless libel actions. In particular, LDRC wishes to secure for its files, and for use by its constituency, any pleadings, briefs or opinions that bear upon this issue. If you have such information or materials please so indicate on the accompanying Questionnaire or otherwise communicate with LDRC.

*In a non-media action, Mayor Moses Winfield of Ft. Wayne, Indiana, who had been made a defendant in a libel action prosecuted by the local utility, Indiana & Michigan Electric Company, and who successfully had the utility's action dismissed on the merits, thereafter secured a substantial five-figure settlement from the utility on his counterclaims under Indiana law for malicious prosecution and malicious abuse of process. (Reported in the N.Y. Times, 11/16/80.)
NEW MATERIALS
IN THE LDRC INFORMATION BANK

Corporate Public Figures

A draft of a very useful and innovative article discussing the application of the Gertz public figure standard to corporate plaintiffs is now available at LDRC. The Article, written by third year Boston University Law student Glenn Siegel, summarizes all important recent corporate public figure cases, explains various theories courts have used to find corporations public figures and concludes that corporations ought to be considered per se public figures.

The Article proceeds from the premise that the underlying purpose of the Gertz standard is to recognize the state's legitimate interest in compensating individuals for emotional harms and invasions of personal reputation and privacy. The history of libel is reviewed to document the very different treatment, under the common law, of corporations and individuals and to show that the common law has traditionally provided lesser protection for purely financial losses such as those allegedly suffered by corporations.

Most corporate plaintiff cases, the Article notes, are more correctly viewed either as individual libel suits which ought to be brought by corporate executives in their own name, or as product disparagement actions which would be prosecuted in the name of the corporation. When the party defamed is the corporate executive, his claim can be judged by the normal principles applicable in individual libel actions. However, to allow the corporation to recover under identical standards would be to compensate shareholders for personal harm they did not suffer. This would be true even in the case of small, closely held businesses. If the identification with the stockholders is so close that they feel emotional distress, the innuendo in the statement ought to be great enough to provide a direct cause of action to that individual stockholder. If the innuendo is not great enough to implicate the shareholder specifically, the corporation should recover only for purely pecuniary loss and only upon proof of actual malice.
Similarly, product disparagement, also known as "trade libel", "slander of title", or "injurious falsehood", is an intentional tort and recovery should be allowable only upon proof of constitutional malice. According to Harper and James, such product disparagement claims are "maintained for words which adversely affect the plaintiff's goods or business although they may imply no lack of integrity whatever in its conduct." According to the Article, Corporate Defamation cases, properly viewed, fit almost exclusively into this category. When they do not, most often some other form of privilege, such as that for credit reporting, will force plaintiffs to prove some sort of malice. Mr. Siegel is currently revising his Article for possible publication and will make subsequent drafts available to LDRC. Copies of this article are available from LDRC. Use the ORDER FORM appended to this Bulletin.

Electronic Publishing -- Defamation and Privacy Issues

A brief but useful memorandum, prepared in connection with a seminar on electronic publishing sponsored by the American Newspaper Publishers Association, was recently received by the LDRC. The memorandum, while proposing no easy solutions, identifies and suggests a number of libel and related problems that may arise in the context of electronic publishing -- e.g., videotext, data bases, interactive data services, computer storage and retrieval, etc. According to the memorandum, no reports of libel actions based upon statements distributed electronically have yet surfaced. However, the memorandum suggests, as the number and popularity of these services grow, the risk of libel claims will also grow. The memorandum notes that electronic publishers generally should be subject to the same standards of liability, but that the speed of, and unique demands on, electronic publishing could result in an inability to check facts or sources, or to edit, or to control the timing and release of data, with the same amount of care as in other, slower media. The memorandum also points up other, more specialized potential problems in this context. Is "retrieval" the same as "publication?" Are various individual uses of interactive data services mass distribution for purposes of the single publication rule? How will data retrieval "publication," where no record is kept of what was published, affect the problem of proof in a libel action? Is electronic publishing subject to libel or to slander laws? When does the statute of limitations begin to run on computer-stored defamatory information? Finally, the memorandum notes the importance of recognizing the potential risks and liabilities in electronic publishing and, as in other contexts, of making prudent decisions regarding libel insurance coverage and indemnifications, particularly from third-party suppliers.
of information, computer services and storage. Copies of this memorandum may be obtained from LDRC by using the ORDER FORM appended to this Bulletin.

SUPREME COURT LOSES
TWO LIBEL ACTIONS --
TAKES NO OTHERS* 

In LDRC Bulletin No. 2 we reported (at 24-28) upon the then-significant news that, after two full terms without action in the field, the Supreme Court had decided to hear two libel cases, both of which represented appeals from lower court rulings favorable to the media defendants. The major Supreme Court development since that last report is that, in a remarkable turn of events, both cases were settled subsequent to the grants of certiorari, thereby ousting the Supreme Court of its jurisdiction to hear the two appeals. See Street v. NBC, 645 F.2d 1227, 7 Med. L. Rptr. 1001 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3245 (10/5/81), dismissed under Rule 53, 50 U.S.L.W. 3477 (12/4/81); Wilson v. Scripps-Howard Broadcasting Co., 7 Med.L. Rptr. 1169 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3351 (11/2/81), dismissed under Rule 53, 50 U.S.L.W. 3505 (12/18/81).

In other Supreme Court actions since Bulletin No. 2, the Court denied certiorari in two cases -- (i) Anderson v. Low Rent Housing Commission, 304 N.W. 2d 239, 7 Med. L. Rptr. 1726 (Iowa 1981), cert. denied, 50 U.S.L.W. 3447 (11/30/81) (non-media action -- Iowa Supreme Court had reversed libel verdict in favor of plaintiff, holding that public figure must prove all elements of Sullivan standard against non-media defendants; and (ii) Maple Properties v. Superior Court of Los Angeles County (Harris, real party in interest), 29 Cal.3d 442, 175 Cal. Rptr. 157, 629 P.2d 369, cert. denied, 50 U.S.L.W. 3465 (12/7/81). (The California Supreme Court had dismissed this non-media defamation and slander action, although it allowed plaintiff leave to amend one cause of action for "conspiracy to slander"). Reports of cases recently filed in U.S. Law Week, through issue No. 35, 3/16/82, do not reveal that any other libel cases have been docketed since Bulletin No. 2.

* Covers developments as reported in U.S. Law Week through March 16, 1982 covering Supreme Court proceedings through March 8, 1982. The Court is in recess through March 22.
LITIGIOUS GROUPS --  SYNANON

In Bulletin No. 2 we began a series of reports on the phenomenon of "litigious" groups, corporations or individuals prone to commence libel litigation at the drop of a derogatory comment in the media. We reviewed in that issue (at 28-31) some of the activities of the Church of Scientology, a group well-known for its litigiousness. We also reported on a relatively new group of ex-CIA officials which had formed a "legal action fund" and whose leader had already commenced three libel actions against various publishers and authors. Subsequent to that issue, we have been alerted to some of the litigation and related activities of another group -- Synanon -- an organization also well-known for its alleged aggressive actions against opponents, critics, and the media.

Synanon was founded as a drug rehabilitation organization by Charles E. Dederich. However, among its other activities seems to have been an elaborate, organized effort aggressively to detect and respond to media articles about Synanon, that the group apparently viewed as presenting widespread misrepresentation of the organization. As a result of a 1979 complaint brought before the National News Council against Synanon by United Press International, extensive information has been revealed about what Synanon called its "Retraction Project" -- a systematic letter writing campaign seeking "correction" and demanding "retraction" of news reports concerning the organization. According to the National News Council's report of its investigation (see Columbia Journalism Review, May/June 1980, at 89-100, in 1978 and 1979 alone Synanon wrote some 960 form letters to print and broadcast organizations demanding such corrections and retractions. Of course, Synanon did not simply stop there, since it also actually commenced numerous libel actions, some of them against the country's leading publishers and broadcasters, including Time Incorporated, The American Broadcasting Company, the Hearst Corporation and Readers' Digest, although Synanon has not declined to sue as small a paper as the Point Reyes Light, a California weekly (circulation: 2700). The National News Council's investigation and report detailed the unfortunate chilling effects of Synanon's elaborate
"Retraction Project," but the Council concluded that Synanon was acting "in conformity with the [California retraction] law in sending out its demands..." and urged the press to "have the courage to stand up for its freedom." Recent reports (see, e.g., N.Y. Times, 3/9/82 at A17, col. 5) indicate that the press continues to have costly opportunities to do just that regarding libel actions by Synanon. Currently KGO-TV, an ABC affiliate is, after several weeks of trial, somewhere in the middle of what could be a marathon judicial proceeding, only one of two Synanon libel suits pending against KGO. According to the N.Y. Times, other currently pending Synanon suits that seek a total of more than $400 million in damages have been filed against Jack Anderson, Readers Digest Magazine and David Mitchell of the Point Reyes Light.

LDRC renews its standing request for further information about libel litigation by litigious groups. Please respond to the appended Questionnaire or otherwise communicate with LDRC.

MEGA-JUDGMENTS REVERSED; BUT NEW MEGA-JUDGMENTS ENTERED

The phenomenon of massive damage awards in libel (and privacy) cases continues at the trial court level, while at the same time appellate courts seem to be having little trouble reversing such large awards, often by ruling, that the underlying finding of liability was itself erroneous.

I. New Large Damage Awards

1. Hunt v. Liberty Lobby, Inc., Case No. 80-1121-CIV-JWK (S.D. Fla.). In December, a jury verdict of $100,000 in compensatory damages and $550,000 in punitive damages was awarded in favor of E. Howard Hunt in connection with an article written by Victor Marchetti and published in defendant's weekly newspaper THE SPOTLIGHT. On December 24, 1981 District Judge James W. Kehoe entered final judgment on the jury's verdict and denied all of defendant's post-trial motions on February 18, 1982. On March 8, Liberty Lobby's Notice of Appeal was filed with the new Eleventh Circuit Court of Appeals in Atlanta.
2. Rayzor v. A.H. Belo Corporation, No. 79-3356-A (Dist. Ct. 16th Dist., Denton Co. Tex.). Not to be outdone by their Florida counterparts, a Texas jury in this private figure case handed down a massive damage award of $1,000,000 in compensatory and $1,000,000 in exemplary damages against the publisher of the Dallas Morning News. Needless to say, defense counsel report that an appropriate appeal is in process.

3. Dombey v. Phoenix Newspapers, Inc. (Ariz. Super. Ct. Maricopa Co.). An Arizona jury, precluded from awarding punitive damages when the trial court ruled, as a matter of law, that defendants had not published with actual malice, nonetheless awarded the private figure plaintiffs a total of $600,000 in compensatory damages ($100,000 to the individual plaintiff; $500,000 to the corporate plaintiff) under Arizona's mere negligence standard of liability.

4. Cher v. Forum International, 7 Med.L. Rptr. 2593 (C.D. Cal., 1/15/82). In this misappropriation-privacy action, a federal district judge in California, sitting as the trier of fact, awarded well-known entertainer, Cher, a total of $663,234 in general, special and exemplary damages for the allegedly unauthorized use of her name and likeness against Penthouse International, publisher of Forum Magazine; News Group Publications, publisher of the weekly "tabloid", the Star and a freelance writer. The basis for the massive award was what the court found to be the "willful and intentional" use by the author and the two publishers of an interview with Cher, and related use of her name and photograph, falsely suggesting that Cher had given an "exclusive" interview to the two publishers for publication in their magazines.

II. Two Large Damage Awards Reversed on Appeal

1. Miskovsky v. Oklahoma Publishing Co., 7 Med. L. Rptr. 2607 (Okla. Sup. Ct., 1/12/82). This action by a candidate for the United States Senate in Oklahoma against the publisher of The Daily Oklahoman and The Oklahoma City Times sought damages in defamation for five publications related to plaintiff's senate campaign -- three news articles, and an editorial cartoon. The case was permitted to go to a jury and, although this is not reported in the Oklahoma Supreme Court's recent opinion, the jury awarded plaintiff $1 million in damages! Despite this massive damage award, and despite
Oklahoma's unfortunate previous track record as one of the nine "worst" jurisdictions for libel defendants (see LDRC Bulletin No. 1 at 4), the Oklahoma high court had little apparent trouble concluding not only that the jury's huge award should be overturned, but that the case should never have been submitted to the jury in the first place. According to the Court the five publications were either not false, not defamatory, not published with actual malice, or were absolutely privileged statements of opinion. As noted, the Oklahoma Supreme Court did not even mention the $1 million jury verdict, nor deign to comment upon how such meritless claims could have led the jury to impose such a massive award.

2. The Times-Mirror Company v. Harden, 8 Med. L. Rptr. (Texas Court of Civil Appeals, No. 11-81-058 CV, 2/24/82). In an opinion just recently issued, and not yet published in the Media Law Reporter, a Texas appeals court has reversed a $385,000 jury award -- $135,000 in actual damages; $250,000 in punitive damages -- that had been entered against the publisher of the Dallas Times Herald in favor of a Texas state undercover narcotics agent stipulated to be a public official for purposes of his defamation action. Relying upon the Texas Supreme Court's most recent opinion in Foster v. Upchurch, 624 S.W. 2d 564 (Tex. 1981), which in turn had relied upon New York Times v. Sullivan and its leading progeny in defining what a public official must establish in Texas to recover in a defamation case, the Texas appeals court had little trouble finding, despite the jury's finding of liability and large award, that plaintiff had failed to prove actual malice by clear and convincing evidence.

AMICUS CURIAE ACTIVITY

LDRC continues to be available to report upon and alert its supporters to amicus curiae activity in significant libel and privacy cases. The following are cases in which such activity is currently occurring or has been sought.

court ruled that plaintiff corporation was a public figure but, nonetheless, found defendant liable for its engineer's statement that certain sounds from plaintiff's loudspeaker "tended to wander about the room," holding that this statement was false, defamatory and published with actual malice. As to damages, a second judge awarded plaintiff more than $115,000 for "lost sales," based upon a lower than expected increase in rate of sales and with no apportionment for six other derogatory statements that had been found to be non-actionable. With interest, the judgment amounts to around a quarter million dollars. With assistance from LDRC, a group of amici is forming and plans to file a brief in CU's behalf. As currently envisioned, the amicus will represent the interests of publishers of business, corporate and consumer product information and will urge the First Circuit to recognize the vital public and constitutional interest in the broad availability of such business and consumer information. Among the organizations currently planning to join together in the Bose amicus are Dow Jones & Co., Dun & Bradstreet, Meredith Corporation and the Magazine Publishers Association. If you or the organization you represent are interested in possibly joining these other leading publishers, as an amicus, please contact Henry Kaufman, at LDRC, who is helping to coordinate the Bose briefing effort. The brief is currently being drafted and is expected to be due around the end of April.

2. Delan v. CBS, Inc., 7 Med. L. Rptr. 2453 (Sp. T. Queens Co., 12/30/81). CBS plans to appeal from the grant of summary judgment for plaintiff in this statutory invasion of privacy action arising out of a Bill Moyers - CBS Report news documentary about conditions in a New York mental hospital. The court ruled that plaintiff, a patient at the hospital, was incapable of granting written consent to the broadcast in which he incidentally appeared. It then held that defendant's licensing of certain non-broadcast distributions of the film containing plaintiff's image violated New York's commercial misappropriation statute. A number of amicus briefs will be filed, if the amici's motions for leave are granted, in support of CBS' appeal. Interested amici include the Authors League, the New York Civil Liberties Union, NBC, ABC and Time Incorporated. Amicus motions, with or without briefs, would be due by on or about April 2. Although substantial amicus support has already been secured, any additional interested amici should call Diane E. Rowley at Coudert Brothers, (212) 880-4400.
3. Nevada Independent Broadcasting v. Allen, No. 13469 (Nev. Sup. Ct.). This public figure broadcast slander action arose out of comments made by the station's then-owner, also a defendant in the case, on a live, televised political talk show during an interview with the plaintiff who was then running for governor. The jury declined to award exemplary damages for failure to demonstrate common law hatred or ill will under Nevada law. It nonetheless awarded plaintiff $675,000 in "general" damages. Defendant's appeal is currently being briefed before the Nevada Supreme Court, but may not actually be heard for another year or more due to the large case backlog in that court. Defendants are requesting amicus curiae assistance and although there are numerous significant issues being raised on appeal, including the huge damage award, defendant's counsel feels that the key amicus issue arises out of the trial judge's erroneous charge on the issue of actual malice. The trial judge told the jury that "evidence...of negligence...may be considered for the purpose of establishing, by cumulative and appropriate inferences, the fact of...recklessness" (emphasis added). Anyone interested in considering this request for amicus curiae assistance should contact Professor Henry Mark Holzer at the Brooklyn Law School, (212) 625-2200.

4. Phillips v. Freed, Civ. Action No. 81-1407 (D.D.C.). This public official slander, libel and invasion of privacy action brought by a retired officer of the CIA against several individuals and a committee has previously been mentioned in connection with LDRC's coverage of "litigious" groups. (LDRC Bulletin No. 2 at 30-31). Defendants are currently pressing their motion to compel discovery of matters pertinent to their defense of truth. These matters, however, are asserted by plaintiff to be subject to secrecy obligations under his contract with, and related fiduciary obligations to, the CIA. Defendants are contending that a libel plaintiff must choose between observing such requirements and pursuing such a lawsuit. In this regard, and also to support their defense generally, defendants are seeking amicus curiae support and assistance. Anyone interested should contact Melvin L. Wulf, (212) 475-3232.

5. Hunt v. Liberty Lobby. See page 28, supra, in the item on recent large damage awards. Anyone interested in providing amicus assistance in this case should contact Fleming Lee, (202) 546-5611.
The idea that ultimately led to the formation of the LDRC had its genesis several years ago with the informal meetings and discussions of the "Ad Hoc Libel Group," several attorneys representing media organizations concerned about adverse developments in the libel field. Later, in 1979 and early 1980, there came proposals to formalize such meetings under the umbrella of a "Joint Media Coordinating Council." Finally, in late 1980, these efforts by a number of organizations culminated in the formation of a Steering Committee, the election of a Chairman and the retention of a General Counsel for a new entity, renamed to reflect its more carefully-defined role, the "Libel Defense Resource Center."

In 1981, we are pleased to report, the LDRC moved rapidly from theory to reality. Substantial funding was provided by an impressive array of leading trade groups, professional organizations and media entities. An information bank and clearing house system was established and increasingly utilized by libel defendants and their attorneys. The availability of LDRC's activities and services was given wide coverage in association publications, trade journals and the general media as well. Several useful special projects and studies were formulated and undertaken.

In the report that follows the particulars of LDRC's impressive development during its first year of operations are presented. We would simply add our thanks to all those who gave their time and support to LDRC in 1981. We look forward to continued, and we hope expanded, support as LDRC enters its second year with an ambitious agenda for useful action.

New York City
December 31, 1981

Harry M. Johnston, III, Chairman
Henry R. Kaufman, General Counsel
Organization

LDRC was formed in 1981 as an unincorporated, not-for-profit, tax-exempt (501(c)(6)) entity governed by a Steering Committee comprised of one representative from each of LDRC's supporting organizations. Under its by-laws, LDRC's day to day operations are supervised by an Executive Committee of between 9 and 13 individuals, chosen from the larger Steering Committee, headed by a Chairman selected by the Executive Committee, and administered by a retained General Counsel and one or more salaried, part-time staff assistants. LDRC has its headquarters at the offices of its General Counsel. Members of LDRC's Executive and Steering Committees include a number of the nation's most knowledgeable libel defense attorneys.

Finances*

In 1981, LDRC obtained voluntary contributions from twenty-three of its supporting organizations totalling more than $40,000. With the addition of interest on these contributions and modest payments from users for the costs of photocopying, LDRC was able to operate in the black while incurring expenditures of approximately $42,500. For this money LDRC was able to pay for legal fees, fees for paralegal staff, the stipend for a law student extern and fees for other legal research, rent for office space, a separate telephone line, design, printing and distribution of letterhead, brochures and two quarterly bulletins, the development of a libel brief bank and information clearinghouse, the implementation of several substantive projects and studies, as summarized in this report, and all other day to day operations of the Center.

LDRC Supporters

The thirty-three organizations supporting LDRC in 1981 represent a broad spectrum of leading media groups, publishers, broadcasters, journalists, editors, authors and libel insurance carriers, some of whom may never have previously worked together in a formal way but all of whom share a common interest in responding effectively to continuing problems in the libel field. They are: Alabama Press Association, American Association for the Advancement of Science, American Newspaper Publishers Association, American Society of Newspaper Editors, American Society of Journalists and Authors, Association of American University Presses, Association of

* A summary financial report, reflecting actual 1981, and proposed 1982, expenditures is appended to this report.

Brief Bank and Other Information Services

The development of a clearinghouse of information was given high priority during LDRC's first several months of activity. For without rapid and comprehensive access to the most current information LDRC could not be fully effective as a backup resource to libel defendants and their counsel. And once such information is received it must be properly analyzed and indexed and then made known and available to those who need it.

(i) Information Gathering

In 1981, LDRC developed a number of important sources for rapid and comprehensive access to information about developments in the libel and privacy field.

-- Special arrangements were made with the Bureau of National Affairs to receive advance copies of court opinions, gathered through the BNA network, several weeks before their publication in the Media Law Reporter. This enables LDRC to alert supporters to important developments that may require responsive actions. It also enables LDRC to obtain briefs and other pertinent litigation materials in such cases and to have them on hand at or around the time that the opinions are actually published in the Media Law Reporter.

-- Special arrangements have been made with certain LDRC supporters, who maintain lobbying networks at the federal, state and local levels, to provide LDRC with information regarding pertinent legislative developments.

-- Mailing lists and other formal and informal contacts have been developed with the leading libel insurance carriers, individual publishers and broadcasters, and leading libel defense attorneys around the country, to alert LDRC to important judicial opinions or other pertinent developments in libel and privacy cases from the earliest stages of

* New LDRC supporters since January 1, 1982 are Newhouse Newspapers and Warner Communications, Inc.
litigation. A special "case survey form" is provided to such contacts who in turn are asked to alert LDRC to the pendency of such cases. A system of follow-up inquiries is then implemented to keep LDRC current as to future developments in these cases.

-- Systematic surveys and inquiries are also made, for the purpose of gathering information on developments or issues of general interest, by means of items or questionnaires published in the LDRC Bulletin. In this manner LDRC has addressed inquiries to LDRC's entire constituency regarding the liability of "mere" printers and distributors of allegedly libellous materials, the use of expert witnesses in libel litigation, the activities of litigious groups in the libel field, and recent developments, post-Gertz, regarding state standards of fault in "private-figure" libel actions. In addition, informal inquiries have and can be made by LDRC, regarding issues of interest to particular LDRC users, through the network of contacts and supporters that LDRC has developed over its first year of operations.

(ii) Information Analysis and Indexing

Once judicial opinions or other pertinent documents are received by LDRC, they are reviewed by LDRC's General Counsel and then indexed and filed by an LDRC paralegal staff assistant in LDRC's growing brief and opinion library. Opinions and briefs are indexed by case name, state, and legal issue(s) presented. Requests for further information, briefs and other materials are then made regarding important cases and issues and periodic follow-ups are also scheduled. As of the end of 1981, LDRC had developed active files of such opinions, briefs and other materials in upwards of 150 cases pending in 35 states. In addition, an archival library of briefs, unreported opinions and materials in cases concluded prior to 1981 was also developed and incorporated into the LDRC information bank. Both open and closed cases and brief files are cross-indexed by legal issue. As of the end of 1981, LDRC had developed an active issue file covering some 50 key legal issues, closely paralleling libel and invasion of privacy issues identified in the Media Law Reporter's classification guide. Also, LDRC has developed several "special issue files," collecting materials in addition to those contained in the active case files or general archival materials, on high priority issues such as damages, burden of proof, reporters privilege in libel actions, state Gertz standards, statute of limitations, summary judgment, use of expert witnesses, counterclaims for malicious prosecution, definition of public figure, printer and distributor liability and venue in libel actions. Finally, special files for law review articles and a separate collection of jury instructions indexed by issue, are currently in the process of being developed.
(iii) Information Dissemination

The information and materials contained in LDRC's issues index, its open case files, its brief bank and its special issue, jury instructions, law review and other files were all made available in 1981, through various means, to LDRC supporters, libel defendants and their counsel, essentially without charge. (Only out-of-pocket expenses such as photocopying, and at times postage, are billed to users of LDRC).

-- LDRC Bulletin. The primary means of disseminating information about LDRC's resources and materials is the LDRC Bulletin. Published quarterly, the Bulletin provides news of recent developments and notices of available reports and materials which can be ordered (at cost) from LDRC. In 1981, two Bulletins were published. Over 350 copies of the twenty-seven page Bulletin No. 1, published July 31, were distributed. 750 copies of the thirty-seven page Bulletin No. 2, published November 15, were printed. More than 500 copies of No. 2 were immediately distributed to the 200-plus libel attorneys on LDRC's general mailing list, to local attorneys representing some of LDRC's larger supporting publishers and to the legal affairs and lawyers committees of a number of LDRC's leading association supporters. In addition, 150 copies of Bulletin No. 2 were distributed without charge to attorneys attending the Ninth Annual PLI Communications Law Institute in New York City.

-- Special Alert Memoranda. In 1981 LDRC distributed a number of "Special Alerts" to members of the LDRC Steering Committee, or others, to advise of developments of special interest, often requiring immediate action by LDRC supporters. For example, a number of special alerts were sent to alert supporters to requests for amicus curiae assistance in the cases of Pring v. Penthouse, Green v. Alton Telegraph and Burnett v. National Enquirer. Because LDRC's supporters include all or most of the major, active media interest groups, such alerts distributed by LDRC can short-circuit the otherwise ad hoc and somewhat cumbersome process of developing an appropriate amicus group in support of the libel defendants' position in particularly important cases.

-- Special reports. In 1981 LDRC prepared a number of special reports some of which were reproduced, in whole or in part, in the LDRC Bulletin, and some of which were made available specially to those wishing to obtain them. For example, a comprehensive LDRC report on recent damages awards in media and non-media libel cases, collected by Professor Mark Franklin of Stanford University, was prepared as a part of an
ongoing LDRC damages project. The seventeen-page report was reproduced in its entirety in LDRC Bulletin No. 2. In contrast, a fifteen-page preliminary analytical report on the issues of punitive and actual damages, initially prepared for the LDRC Steering Committee, was briefly summarized in Bulletin No. 2. The full report was then made available (at cost) to those wishing to order it from LDRC. Other reports or materials, summarized in the LDRC Bulletin, and available on a special order basis, have included special memoranda on key legal issues, such use of expert testimony and private plaintiff fault standards, appellate, trial and amicus briefs, advance judicial opinions of special interest, LDRC surveys, and surveys and studies prepared by other groups and made available directly or through LDRC.

--- Direct Inquiries to LDRC. In addition to providing general information through mass publication to LDRC's entire constituency, in 1981 LDRC counsel and staff were available to provide general information and to answer specific inquiries from libel defendants or their counsel or other interested organizations or individuals, who contacted LDRC, by telephone or by mail, for such special assistance. (It should be stressed, however, that LDRC is not a legal services organization, but merely provides backup assistance, primarily to the libel defendant's own counsel.) Such assistance, which is provided without fee, ranged from simply alerting the caller or correspondent to recent developments or legal opinions and providing available briefs or materials pertinent to the particular inquiry, to more extensive legal research or investigations initiated by LDRC counsel or staff, often utilizing LDRC's network of knowledgeable organizations, attorneys and other individuals. Such inquiries, which averaged at least one or two a week over the last several months of 1981, covered a broad range of issues and problems, including application of statute of limitations in the book publishing context, the availability of libel insurance for individual authors, the insurability of punitive damages, the activities of police benevolent associations as libel plaintiffs, retraction statutes, burden of proof, privileged opinion, prior restraint, confidential privilege, damages, intrusive news gathering, jury instructions on particular issues, statistics regarding the incidence and costs of libel litigation. Inquiries not involving specific litigations or legal issues, primarily from news media, scholars or researchers interested in general developments in the libel field, were also received and responded to. Finally, a small number of callers have sought assistance in securing knowledgeable libel counsel.
Publicity

In order to operate effectively -- both in securing information of current legal developments as well as in alerting libel defendants to the availability of LDRC's information resources and services -- it was important adequately to publicize establishment of LDRC. In 1981, by various means, the news of LDRC's existence and programs was effectively broadcast. More than two thousand copies of LDRC's basic descriptive brochure were distributed to libel defendants, potential LDRC supporters, to attorneys specializing in libel defense and to the trade and general media. LDRC brochures were distributed at four Practicing Law Institute Conferences -- Communications, Libel (NYC), Libel (LA), Book Publishing -- and at an ABA Communications Law Forum in Chicago. A number of LDRC's supporting organizations sent copies of the LDRC brochure, or its full text, to their individual association members. Copies of the brochure were also sent out with all mailings from LDRC. In May, a press release was directed to the trade press and resulted in widespread coverage of LDRC in publications such as AMPA's Presstime; NNA/Reporters Committee's Legal & Legislative News Media Update; AAP's Newsletter; the Authors Guild Bulletin; the Magazine Publishers Association's Update; the Media Law Reporter, Publishers Weekly, Folio Magazine and several state and regional press association newsletters. LDRC was also prominently mentioned in an important article on libel developments in the Columbia Journalism Review and in both an article and a follow-up editorial in The Washington Post. Also, lengthy special reports on libel developments and the LDRC appeared in Congressional Quarterly's Editorial Research Reports and in the Special Annual Freedom of Information Report of the Society of Professional Journalists which, we are told, was also picked up by the United Press International wire service.

All of this publicity, in one way or another, discernably prompted contact with and usage of LDRC by libel defendants and their attorneys and by trade organizations around the country. It also led to further publicity through a number of radio, newspaper and magazine interviews, in the United States, Canada, England and Europe.

1982 Budget and New Projects

In 1982 LDRC expects to continue to develop its support and information services and its capacity comprehensively to monitor current developments. Expansion of its various mailing lists and refinement of its indexing and follow-up systems will be administrative priorities. New
projects will include the possible development of an annual statistical survey of the incidence and outcomes of media libel cases and an annual 50-state survey of libel and privacy law developed through the establishment of a formal network of corresponding attorneys in every state. The LDRC Bulletin will continue to be published quarterly and other special reports and substantive publications are contemplated. Consideration is also currently being given to more frequent publication of bibliographic summaries of briefs and other materials available from LDRC. Work will also continue, with assistance from staff and law student externs and researchers, on the LDRC damages project, with the possible development of a litigation "kit" on damages issues. Also, additional work is contemplated in developing a bank of model jury instructions on damages and other issues. Finally, LDRC hopes to undertake a somewhat more active role in organizing or providing assistance to libel defendants in specific cases, including amicus curiae work, the development of model pleadings or briefs, or the preparation of other litigation support materials or data.
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