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LDRC BULLETIN No. 13

LDRC 50-State Survey 1984
KEY FINDINGS

The fully updated and expanded LDRC 50-State Survey 1984 has now been completed. (If you have not ordered your copy of the 1984 Survey you can do so by completing the Order Form that appears at the end of this Bulletin.) For most of the readers of this Bulletin the 1984 Survey's value (and the value of each annual edition) will lie primarily in its usefulness as a research and reference tool. Accordingly, conclusions as to the significance of the Survey results, in terms of what they reveal about the current status of, or current trends in, media libel and privacy law and litigation can to a great extent be left to each knowledgeable reader and user of the Survey.

However, publication of the results of the 1984 LDRC Survey is, to some extent at least, also a newsworthy event in its own right as are the trends it may identify. Therefore, subject to the important caveat noted immediately below, it is felt to be appropriate again this year, as in years past, to attempt briefly to summarize the key findings of the 1984 Survey for our Bulletin readers and for the general public as well. It is important to reiterate, however, as is noted in the 50-State Survey 1984, that the "key findings" which follow are, in effect, summaries of summaries of summaries.

Accordingly, just as each of the state survey reports must be understood as providing no more than an overview or outline of the law, this summary of the status summaries of those brief outlines must -- a fortiori -- be understood as no more than a shorthand description of general patterns in the law. In particular, the number and statistics provided below cannot be considered as more than approximations and general descriptions of basic trends. While we believe they provide generally reliable quantifications of our findings, based solely on the Survey reports received, they should not be considered or cited as precise and totally accurate measures of the exact state of the law in any or every jurisdiction. Similarly, neither this summary of key findings nor the status summaries should be used as a substitute for consulting the individual state reports in the 50-State Survey and, beyond them, the actual cases or statutes to which they refer.
APPELLATE STANDARD OF REVIEW. In 1983, the 50-State Survey was expanded to include post-trial and appellate review standards and procedures in each U.S. jurisdiction. Since that report was prepared, the Supreme Court in Bose v. Consumers Union reaffirmed "independent appellate review" as the appropriate standard for appellate courts reviewing cases tried under an actual malice standard. Nevertheless, the 1984 Survey reflects only a gradual shift away from more restrictive standards of review in jurisdictions that were undecided on the issue or that had previously conducted more searching review. According to this year's Survey, at least 23 jurisdictions now apply the independent review standard, with another four applying the arguably more restrictive "de novo" review standard. Eleven jurisdictions continue to apply the same standard of review in defamation actions as would usually be applied in any other civil case. In those states reported as undecided, at least two (Maine and Minnesota) have some precedent supporting special review (see LDRC Study #3, LDRC Bulletin No. 7 at 1-50). The 1984 Survey also reports the issue as pending before the Florida Supreme Court.

The two major developments in this area at the state court level were both positive. The "independent appellate review" standard was adopted by the New Jersey Supreme Court, and by a Colorado appellate court, in 1984 decisions.

BROADCASTERS SPECIAL PRIVILEGE. The 1983 Survey revealed that as many as 35 jurisdictions had adopted statutes providing special privileges to broadcasters, primarily where the law required that political candidates or other individuals be given coverage or access for equal time, fairness or other purposes, without the possibility of review or control by the broadcaster. A number of these privileges apply, or also apply to cablecasters. In 1984 there were apparently no significant new developments on this issue.

* LDRC gratefully acknowledges the invaluable assistance of Andrew C. Alter, third-year student at the New York University School of Law, in the preparation of this section of the 50-State Survey key findings report. Mr. Alter was also substantially responsible for preparation of the revised tables and charts which appear in the 1984 Survey Report.
BURDEN OF PROOF. The Supreme Court appeared to be prepared to decide the important issue of the burden of proof of truth or falsity in a libel action in Wilson v. Scripps-Howard but the case was settled after certiorari had been granted (see LDRC Bulletin No. 2 at 27-28 and Bulletin No. 3 at 26.) According to the 1983 Survey at least 31 jurisdictions imposed the burden of proof of falsity upon the plaintiff in a libel action, nearly all in reliance upon their interpretation of constitutional requirements. There were, however, 12 jurisdictions that continued to impose at least the initial burden of proof of falsity upon the defendant.

The 1984 Survey reflects little additional development in this area. However, the Illinois Supreme Court did specifically rule for the first time that the burden of proof on the issue of falsity rests with the plaintiff. The Supreme Court of Pennsylvania is expected to follow suit in a case currently pending. Overall, there would appear to be a steady, if gradual movement toward placing the burden of proving falsity on the plaintiff in conformity with constitutional principles.

COMMON LAW PRIVILEGES. Fair report, fair comment, and other common law privileges have proven to be useful to the media in its coverage of events of significant public concern, especially in states where post-Sullivan constitutional principles have not been fully developed. According to the 1984 Survey at least 43 jurisdictions recognize some form of fair report privilege, 20 by statute and the remainder under common law. At least 24 jurisdictions recognize a qualified privilege for fair comment, although only three do so by statute. At least 12 additional jurisdictions recognize, under the common law, a qualified privilege to report on matters of public interest or concern.

In 1984, as might be expected, the status of longstanding common law privileges did not dramatically change. In New York, an appellate court addressed the reach of the state's statutory fair report privilege. New cases in Hawaii and Oregon on absolute privilege were reported this year, as were Maryland and District of Columbia cases on fair report. Finally, the Massachusetts Supreme Court addressed the issue of a conditional privilege for legitimate business communications.
CONSTITUTIONAL OPINION PRIVILEGE UNDER GERTZ. Despite the questions raised in 1982 by Justices White and Rehnquist in a dissent from denial of certiorari, the constitutional opinion privilege has continued to gain momentum over the past two years. The 1983 Survey reported that as many as eight states had adopted the privilege in reliance upon Gertz in the previous year. In 1984, four additional jurisdictions were listed as having adopted the privilege. Only 12 jurisdictions have not yet addressed the impact of Gertz on statements of opinion. Of course, a number of these jurisdictions, as well as many jurisdictions in which Gertz is followed, have long recognized the closely related common law privilege for fair comment.

In perhaps the most noteworthy development on this issue during the past year, the D.C. Circuit issued a highly significant and elaborate en banc decision on the opinion privilege in 1984. New decisions in Florida and Illinois reinforced the general trend toward restricting the availability of the privilege to statements of opinion based upon disclosed facts. Other new cases in the opinion area were reported in California, Colorado, Connecticut, Oregon, South Dakota (federal case) and Washington. Judging from the volume of new cases reported in 1984, it appears that a steadily increasing number of courts, both at the state and federal levels, will be confronting the issues posed by Gertz's constitutionalization of protection for opinion.

DAMAGES. Huge damage awards are still being imposed at the trial level by juries, while the awards surviving post-trial motions and appeals continue to be relatively small, and even appear on average to be decreasing. Nevertheless, multi-million dollar verdicts and excessive punitive damage awards continue to be worrisome features of current libel litigation. (See LDRC Study #5, reprinted in LDRC Bulletin No. 11 at 1-38).

The 1984 Survey reflects few changes from last year with respect to state law governing damage awards in libel actions. Nine jurisdictions still bar punitive damage awards entirely, whether generally in all civil actions or specifically in libel actions. Twenty-nine jurisdictions recognize constitutional limitations on the availability of punitive damages in libel actions, and 33 jurisdictions also limit the availability of punitive damages either under a retraction law, other common law provisions, or both. In 1984, the Connecticut Supreme Court, in an action for invasion of privacy with possible ramifications in the libel context, imposed strict limitations for the recovery of punitive damages.
With regard to actual damages, roughly 29 jurisdictions have recognized Gertz limitations on recoverable actual damages although three of those restrict Gertz benefits to public figure or media actions. Unfortunately, according to the 1984 Survey, the number of jurisdictions in which damages may still be "presumed" in certain libel actions apparently increased from three to four, as a result of a North Carolina Supreme Court case which did not address Gertz.

DEFENDANTS' REMEDIES. At a time when the cost of defending even frivolous claims is ever increasing, more and more media libel defendants have given serious consideration to pursuing their own counterclaims against libel plaintiffs for malicious prosecution, abuse of process or similar violations, or at the least are seeking to secure costs and attorney's fees against unsuccessful libel plaintiffs. The 1984 Survey indicates that some 35 jurisdictions may provide potentially meaningful remedies for such meritless libel claims. As many as 10 jurisdictions have already specifically recognized such remedies in the libel context. Only two jurisdictions provide no remedies to the libel defendant.

Since the Nemoroff v. Abelson case was decided by the Second Circuit in 1983, a number of libel defendants have gone to court seeking affirmative remedies. Widely publicized countersuits are now pending in California and West Virginia, and in federal court in Nevada, but as yet few of these cases had resulted in decisions with significant precedential value.

DISCOVERY OF EDITORIAL MATTER AND THE EDITORIAL PROCESS. At least since Herbert v. Lando, potentially intensive discovery into the journalistic editorial process has become a controversial issue in libel litigation, with a number of widely publicized decisions ordering discovery of editorial matter which the media defendant had vigorously sought to protect. No significant new developments in this area were reported in the 1984 Survey. Essentially, the Survey confirmed last year's findings that relatively few jurisdictions have considered the issue. Of the 11 jurisdictions that had considered this discovery issue, only two had denied discovery (New Jersey and Pennsylvania (editorial matter only)), with three permitting such discovery and another six permitting discovery but with certain limitations.
INVASION OF PRIVACY

Last year's Survey for the first time included detailed information covering the four traditional branches of the tort of invasion of privacy: false light; intimate facts; intrusion; and misappropriation/right of publicity. The Survey inquired into the extent to which these four torts had been recognized under common law, and by statutory and constitutional provisions in the jurisdictions surveyed. The primary focus, of course, was on the use of the privacy cause of action in actions against the media, based upon editorial content.

According to the 1984 Survey, at least 41 jurisdictions now recognize one or more of the four common law torts, with 21 of these recognizing all four branches. In at least 22 of these jurisdictions, some form of privacy right is provided for by statute or constitutional provision or both; explicit constitutional protection exists in 13 of these jurisdictions. Only one state (Minnesota) appears to have expressly declined to recognize the privacy tort in any form, while two others, (New York and Virginia), have narrowly confined recognition to a statutory casue of action for misappropriation.

The false light tort has been explicitly recognized in at least 25 jurisdictions. Seven jurisdictions have declined to adopt false light; in 21 others the issue is unsettled, or else undeveloped in the media context. The West Virginia Supreme Court recognized false light in 1984 for the first time, and the issue is pending in Mississippi's highest court as well. Additional case law development on false light was reported in Connecticut, Oregon and Texas.

At least 29 jurisdictions provide some right of action for the unauthorized publication of private facts, with only 5 clearly declining to do so. The private facts tort was addressed and refined last year in California and Louisiana. With regard to both false light and intimate facts, the plaintiff's right to recover is limited in a few jurisdictions by a requirement that actual malice be proven, or that the invasion be shown to be "highly offensive." In addition, a "newsworthiness defense" is recognized in at least six other jurisdictions.

The 1984 Survey reports the tort of intrusion as recognized in at least 32 jurisdictions, not recognized in three, and unsettled in 17.
As to right of publicity, the 1984 Survey indicates that 31 jurisdictions recognize the tort in some form, although recognition is limited in 11 jurisdictions to common law or statutory misappropriation. New cases in the area were reported in Oregon and California. Although the Survey also sought data on the survivability and descendability of right of publicity claims, too few responses were received on the issue to permit a generalized finding.

NEUTRAL REPORTAGE. A new, constitutionally based privilege for neutral reportage has been seen by some observers as at least a partial solution to the chilling effect of libel actions on the media -- see LDRC Bulletin No. 5 at 12-13. In seven jurisdictions, according to the 1983 Survey, at least one court had specifically recognized a First Amendment privilege for neutral reportage; another 16 jurisdictions recognized related principles that might lead to adoption of neutral reportage or yield similar protection under the common law. Only three jurisdictions had definitively rejected the neutral reportage privilege.

The only new developments in this area in 1984 were both positive. The neutral reportage privilege was recognized by a Florida appellate court for the first time, and the New Jersey appellate division appears to have adopted the privilege in dicta which, according to the LDRC Survey, will no doubt raise interesting questions in future litigation. Finally, the 1984 report mentions a federal case recently filed in South Dakota, posing the issue.

NON-MEDIA DEFENDANTS UNDER GERTZ. One not insignificant issue left open by Gertz is the question of the availability of constitutional privileges, particularly in actions brought by private figure plaintiffs, in favor of non-media defendants. The 1983 Survey revealed that some 21 jurisdictions applied (expressly or implicitly) Gertz rules to non-media defendants. On the other hand, six jurisdictions expressly refused to apply Gertz in the non-media context while another had not applied Gertz but without clear or complete resolution of the issue. In 18 jurisdictions the issue did not appear to have yet been considered, and in five other jurisdictions there was divided authority on the matter.
Early in the 1984-85 term, the Supreme Court heard reargument in Dun & Bradstreet v. Greenmoss, a case that may resolve this issue once and for all. (See LDRC Bulletin No. 12 at 38-43). To date, the case is still sub judice. In related developments, the 1984 Survey indicates that at least two jurisdictions (Illinois and Louisiana) which were reported last year as having insufficient or divided authority on the issue have now applied Gertz limitations in cases involving non-media defendants. The Florida Supreme Court may address the issue in the near future. The precise status of non-media defendants in the libel context remains largely uncertain, however, due to the relatively small number of jurisdictions which have faced the issue squarely.

OTHER TORTS. In addition to defamation and invasion of privacy, the Survey covers eight related torts which have been, or could conceivably be, asserted against the media in actions based on editorial content. They are intentional infliction of emotional distress, trade libel (or product disparagement), negligent infliction of emotional distress, simple negligence, prima facie tort, conspiracy, interference with contract, and product (or strict) liability. Generally speaking, the 1984 Survey reconfirms last year's finding that these alternative causes of action have not been asserted with great success against media defendants. Although one or more of these torts are recognized as independently viable in a majority of jurisdictions, only a few have had occasion to consider them in a media context. In many of these cases the claims have been dismissed or otherwise rejected on the theory that a plaintiff should not be allowed to recover on a cause of action that is in essence for defamation, where one or more elements of a successful defamation claim are lacking. In the remainder, where courts have allowed an independent claim for one or another of these torts, the claims have been subjected to the same privileges and defenses that are available in an action for defamation.

The 1984 Survey reports some limited developments in these areas over the past year. Recent cases in Florida, reported for the first time in the 1984 Survey, involved claims against media defendants for negligent infliction, trade libel, conspiracy and product liability. Unsuccessful claims were brought in California for intentional infliction, in the
District of Columbia for conspiracy, and in Illinois for intentional interference with contract. Finally, a case involving trade libel was reported in Minnesota. As of this year's Survey, the torts that have been considered in a media context by the largest number of jurisdictions include intentional and/or negligent infliction of emotional distress (eight jurisdictions), trade libel (eight jurisdictions), conspiracy (six jurisdictions), and interference with contract (eight jurisdictions).

PRIVATE FIGURE UNDER GERTZ. Since 1974 lower state and federal courts have slowly but steadily begun to implement the Gertz mandate to define state defamation law applicable to private figure plaintiffs. According to the 1983 Survey, 24 jurisdictions had adopted a standard of mere negligence, while only five had adopted actual malice or some other standard more demanding than simple negligence.

Unfortunately, 1984 has seen a continuation of the trend in state courts toward a mere negligence standard under Gertz. Of the 25 jurisdictions in which the fault standard for private figure liability had not been considered or was otherwise open or unsettled as of the date of last year's Survey, at least one highest state court (Florida) has adopted a negligence standard, while an intermediate appellate court in Oregon adopted the "professional negligence" standard. Since the 1984 reports were prepared, Virginia has also adopted a negligence standard. Finally, the issue is leaning toward negligence and pending on appeal before the highest state court in Minnesota.

RECOGNITION OF THE SHIELD PRIVILEGE IN THE LIBEL CONTEXT. In 1984, the already substantial number of jurisdictions recognizing some form of shield privilege rose from at least 36 to at least 38. However, only a minority of these jurisdictions have specifically recognized a claim for protection of confidential sources or information in the context of a libel or privacy action, and five jurisdictions, Illinois among them, have statutes still in force denying shield protection in the libel context.

Positive developments in the shield privilege area include new cases in Oregon and the District of Columbia, refining and expanding the scope of shield protection in libel cases, and the recognition in Maryland and Missouri of a
qualified privilege under the First Amendment as a viable alternative to statutory shield protection. New York's highest court, however, restricted the use of the shield privilege in a defamation case.

**RETRACTION.** Although some of them may not have the protective capacity they once had prior to the constitutionalization of libel law, retraction laws remained broadly in effect according to the 1983 Survey. Some 31 jurisdictions provided for retraction by statute while another 12 jurisdictions were reported to recognize the effects of retraction under common law.

In 1984, according to the LDRC Survey, there were no landmark developments or discernable new trends in the law on retractions. New developments, or information, were indicated in only two reporting jurisdictions (Florida and the District of Columbia).

**STATUTES OF LIMITATIONS.** According to the 1983 Survey, 29 jurisdictions provided a one-year statute of limitations for libel, 18 a two-year statute, 5 a three-year and 2 a four-year statute. In three jurisdictions, the statute for slander was different (shorter) than for libel. In 22 jurisdictions the single publication rule had been expressly recognized, 14 of them under common law and eight by statute (generally the Uniform Single Publication Act). Only two jurisdictions expressly adhered to a multiple publication rule.

The most significant development in 1984 was the Supreme Court's decision in Keeton v. Hustler holding, inter alia, that the single publication rule is desirable in order to adjudicate libel claims arising out of a multistate distribution in a single proceeding. Based upon, or perhaps in anticipation of, this ruling, a Texas court expressly adopted the single publication rule in 1984. In another decision, the Pennsylvania Supreme Court construed the single publication rule.

**SUMMARY JUDGMENT.** LDRC's two-year update of summary judgment motions in libel actions (see LDRC Bulletin 012 at 1-37) indicated a continuation of the trend toward summary judgment as the favored remedy in libel actions against the media. The study, which examined 136 summary judgment motions made during the period 1982-1984, revealed that defendants' motions for summary judgment continued to be granted in just
under three out of four cases overall, notwithstanding the cautionary language of Hutchinson v. Proxmire and, more recently, Calder v. Jones.

These findings are generally confirmed by the 1984 Survey reports, which reflect an equal, if not slightly greater, willingness on the part of state courts to grant summary judgment than was indicated by last year's Survey. Twenty-one jurisdictions, an increase of three over last year, appear to favor summary judgment motions. New cases granting summary judgment were reported from several states, including California, where an appellate court expressed a preference for summary judgment in invasion of privacy cases. Only eight states appear to explicitly disfavor summary judgment in the libel context, as compared with nine in 1983. A significant number of jurisdictions -- 16 by this year's count -- continue to apply a neutral standard. It should also be noted that the status of the summary judgment remedy remains unclear in at least nine jurisdictions. Among these states are Florida, where there is a sizable body of authority on both sides of the issue, and Mississippi, where summary judgment motions in libel cases are on appeal before the state supreme court for the first time.

The 1984 Survey would also support the view that in the now almost six years since Hutchinson was decided, that case has not had the major impact feared on the tendency of state courts to protect First Amendment interests by granting summary judgment motions in libel cases. As in the 1983 Survey, only two jurisdictions reported a tendency to disfavor summary judgment motions based on the language of Hutchinson.

SURVIVABILITY AND DESCENDABILITY OF LIBEL AND PRIVACY CLAIMS. It has been universally understood that the dead do not have a cause of action for libel and it has been generally assumed that such a cause dies with the person allegedly defamed. However, at least one widely reported recent libel case held that a claim will survive and a minority of jurisdictions have previously so held. Also, the issue of the survivability and descendability of privacy claims -- particularly right of publicity claims -- has recently been the subject of a growing body of divided case law. The 1984 Survey, while not fully definitive due to some lack of Survey response and also due to the fact that the issues are open and
undecided in a number of jurisdictions, generally confirms the
given wisdom, but does indicate some variety of approach among
jurisdictions. Thus, with regard to libel claims, according to
the LDRC Survey, at least 23 jurisdictions do not allow for
survival or descent, while 6 apparently do to some extent
(Florida, Michigan, New Jersey (new case cited in 1984 Survey),
Pennsylvania, Rhode Island (under very limited circumstances)
and South Dakota). In another 23 jurisdictions the matter is
unclear or there is no law on the point.

Regarding privacy, the situation is less definitive. In a majority of jurisdictions (42) there is no law on point or the Survey report does not address the issue. Only seven jurisdictions were reported as recognizing survival or descent (not necessarily as to all branches of the privacy tort) (Georgia, Kentucky, Michigan, New Jersey, New Mexico, South Dakota and Wisconsin), with another two divided on the issue (Tennessee and Texas). Arizona was the only jurisdiction indicated as expressly not recognizing survival or descent of privacy claims.
Special Report on the Federal Circuits

The newest feature of this year's 50-State Survey is a series of special reports, encompassing in excess of 110 pages of text, on media libel and invasion of privacy law in each of the federal circuits. Libel standards are often creatures of state or common law and LDRC's state surveys also report on federal court developments within each state. Accordingly, the circuit reports represent not so much systematic news of the new or unreported developments but rather present new perspectives on developments from the point of view of the practice and procedure, and the judicial attitudes within each circuit. Likewise, this brief summary of the newly published circuit reports, will not systematically report every legal issue covered in the circuit reports, but instead will simply provide a narrative overview of certain of the key observations and insights provided in the reports. Beyond this brief summary, users of the LDRC 50-State Survey will be able to consult the new circuit reports, which are indexed along with the state surveys in the 1984 volume, as the occasion demands.

First Circuit

According the the First Circuit report, prepared by Thomas J. Dougherty of the Boston office of Skadden, Arps, Slate, Meagher & Flom, the First Circuit is perhaps most notable for its size -- it is the smallest of the Circuit Courts -- and for its inclination to act by consensus. Thus, in the 282 published opinions, decided by the Court's four circuit Judges, one senior judge and almost 30 other judges sitting by designation, between July, 1983 and July, 1984, there were only 14 dissenting opinions and 5 concurring opinions. In the libel and privacy area the Circuit has decided ony a relative handful of cases, with our reporter noting a tradition of judicial restraint in the First Amendment area.

One of the most important recent libel decisions of the First Circuit was, of course, Bose Corp. v. Consumers Union of U.S. Inc., U.S. ____, 104 S. Ct. 1949, 52 U.S.L.W. 4513 (1984), aff'g, 692 F.2d 189 (1st Cir. 1982). The Supreme Court's affirmance in Bose upheld the First Circuit's reversal of the trial court's judgment, an action that rigorously applied the doctrine of "independent appellate review" and that strongly reaffirmed First Amendment protections for the press. The First Circuit decision in Bose was, however, also notable.
for what it did not decide, according to the Circuit report. The Court expressly declined to pass upon the "public figure" status of the plaintiff and left unanswered, and thus "murky," important questions about the fact/opinion distinction.

In the area of privacy, the First Circuit has not made any significant rulings, according to the circuit report. However, in the broader areas of First Amendment law, the First Circuit "is well aware that a higher standard of process is due" to a public figure libel defendant. This was recognized not only in Bose, but also in Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980), and Keeton v. Hustler Magazine, Inc., U.S., 104 S.Ct. 1473, 52 U.S.L.W. 4346 (1984), rev'd, 682 F.2d 33 (1st Cir. 1982). But other cases demonstrate that Keeton may have been an exception to [the First Circuit's] restrained approach to developing procedural protection for free speech," citing Mitchell Russo v. John Geagan, No. 83-1656 (Oct. 18, 1983) (denying stay on the production of broadcast out-takes in a third-party non-libel action).

Second Circuit

According to Richard Winfield, David Schulz and Peter Kimm of Rogers & Wells in New York City, LDRC's Second Circuit reporter, the Circuit produces "unsurprisingly," a "flourishing jurisprudence" in the libel and privacy fields. According to the report, the Circuit's "reputation of sensitivity to First Amendment concerns blossomed" under the leadership of Chief Judge Irving Kaufman, between 1973 and 1980. The effect of four relatively recent Reagan appointees to the Circuit "remains unclear," but no "dramatic shift in the court's judicial philosophy is expected."

According the report, the Second Circuit has decided 14 libel and 5 privacy cases since Sullivan. A very recent decision, Lerman v. Flynt Distribution Co., 10 Med.L.Rptr. 2497 (2d Cir. 1984), defined the Second Circuit's approach to the definition of public figures and most of the court's important decisions have found public plaintiff status. However, in another recent decision, Bufalino v. Associated Press, 692 F.2d 266 (2d Cir. 1982), cert. denied, 103 S. Ct. 2463 (1983), the Circuit applied a novel doctrine, precluding reliance on a plaintiff's public official status, where the publication "did not identify the [plaintiff] as the holder of a public office." 692 F.2d at 273.
The Second Circuit has also handed down a number of important opinions recognizing and applying the rule of constitutional malice and extending it into a variety of helpful contexts from the libel defendant's point of view, according to the circuit report, citing Hotchner v. Castillo-Puche, 551 F. 2d 910 (2d Cir.), cert. denied, 434 U.S. 834 (1977); Edwards v. National Audonbon Society, 556 F.2d 113, (2d Cir.) cert. denied, 434 U.S. 1002 (1977); Buckley v. Littel, 539 F.2d 882, 896 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977); Lerman, supra; Yiamouyiannis v. Consumers Union, 610 F.2d 932, 940 (2d Cir.), cert. denied, 400 U.S. 839 (1980) (affirming judgment in favor of defendant on issue of actual malice); and Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 397 U.S. 978 (1970) (affirming jury verdict where evidence showed a "predetermined" plan to malign plaintiff).

Perhaps one of the most notable "path-breaking" decisions of the Second Circuit, according to the LDRC report, was Judge Kaufman's opinion in Edwards, supra, recognizing the doctrine of "neutral reportage." However, a later opinion by another panel of the Second Circuit, in Cianci v. New Times Publishing Co., 639 F.2d 54, pet. for reh'g en banc denied, 639 F.2d 71 (2d Cir. 1980), "leaves open" the question of how far the neutral reportage doctrine will be extended. But Judge Kaufman concurred in the denial of rehearing en banc in Cianci, perhaps suggesting that the two opinions are not fundamentally in conflict.

The Second Circuit report also notes and discusses at some length important opinions on a variety of other issues. On the "official reports" privilege, a possible split among panels is noted in contrasting the restrictive reading in Bufalino, supra, with a "willingness to view [the privilege] more broadly" in Reeves v. American Broadcasting Co., 719 F.2d 602 (2d Cir. 1983). In the area of opinion, two important decisions, Buckley, supra, and Cianci are noted and discussed.*

* N.B. A more recent and important decision on the opinion issue, in the context of a libel suit involving a restaurant review, was handed down recently by the Supreme Court, but after the Circuit report was completed. See Mr. Chow v. Ste. Jour Azur, et al., No. 84-7198, March 28, 1985.
Regarding damages, the Second Circuit's refusal to preclude the award of punitive damages in appropriate cases is noted, but a recent case has "warned against 'megaverdicts.'"

With regard to summary judgment the Second Circuit has, according to the report, expressly adopted a "neutral" standard, relying on Hutchinson v. Proxmire, treating summary judgment motions in defamation actions "no differently from other actions; any 'chilling effect' . . . is simply to be disregarded." Yiamouyiannis, supra, 619 F.2d at 940.

Third Circuit

Third Circuit defamation decisions, according to Jerome Shestack and Carl Solano of the Philadelphia firm of Schnader, Harrison, Segal & Lewis, "have generally advanced free speech," despite the fact that the Circuit adheres to "a conservative institutional tendency" to avoid, where possible, constitutional decisionmaking. While a number of Third Circuit constitutional cases "have led to significant Supreme Court developments" [e.g., Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3d Cir. 1969)], "it is in the area of common law libel privileges that the court may have made its most significant contributions to defamation law." According to the LDRC report "[b]ecause the state courts often look to the Third Circuit's decision for guidance, the Court has influenced the development of state law [particularly Pennsylvania law] and [has] fostered First Amendment principles as part of that process."

In the area of common law adjudication, the circuit report discusses at some length Pierce v. Capital Cities Communications, Inc., 576 F.2d 495 (3d Cir.), cert. denied, 439 U.S. 861 (1978) and Chu v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979), two cases each of which was decided under Pennsylvania law, but in each of which the Court interpreted the publications at issue "with a degree of deference derived from First Amendment principles." Third Circuit cases dealing with applications of common law privileges include Petty v. General Accident Fire & Life Assurance Corp., 365 F.2d 419 (3d Cir. 1966) and Lowenschuss v. West Publishing Corp., 542 F.2d 180 (3d Cir. 1976). In both cases the court upheld a claim of absolute privilege. In two other decisions, the Court upheld the assertion of common law privileges, Lai v. CBS, Inc., 726 F.2d 97 (3d Cir. 1984) and
Medico v. Time, Inc., 643 F.2d 134 (3d Cir.), cert. denied, 454 U.S. 836 (1981). Once again, in each case, the court accepted the assertion of privilege, and indeed, in the Medico case the Court was strongly influenced by related constitutional factors. In fact, in Medico, the Third Circuit panel appeared to cite with approval the "neutral reportage" privilege first suggested in the Second Circuit by Judge Kaufman in the Edwards case, despite the fact that an earlier panel of the Third Circuit, in Dickey v. CBS Inc., 583 F.2d 1221 (3d Cir. 1978), had rejected the constitutional rule of Edwards. Because the Third Circuit has a stringent policy against conflicts between panels, the Medico court, even though it was "in apparent disagreement with Dickey," avoided the conflict by recognizing a privilege similar to that adopted in Edwards but "engraft[ing] it onto the common law fair report privilege of Pennsylvania."

With regard to constitutional issues, the Third Circuit has not dealt with any major public official issue, but in three cases has dealt with the public figure requirement. In all three cases, Chuy, supra; Steaks Unlimited v. Deaner, 623 F.2d 264 (3d Cir. 1980) and Avins v. White, 627 F.2d 637 (3d Cir.), cert. denied, 449 U.S. 982 (1980), the Court found the plaintiff to be a public figure. The Third Circuit has also, according to the circuit report, addressed the question of the nature of the defendant and the constitutional privileges applicable to particular defendants. In Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir.), cert. denied, 404 U.S. 898 (1971), the Court held that constitutional privileges would not be applied to private, contractual credit reports. However, in Avins, supra, the Court did apply constitutional privileges to a private, non-media defendant holding that a contrary rule would create a "dangerous disequilibrium between the First Amendment guarantees of freedom of speech and the press." Id. at 649, distinguishing the Grove decision as "dicta" and "limited to the situation of commercial credit reports."

On the issue of actual malice, the Circuit has, in a number of cases, been willing to apply the New York Times standard and review its application on appeal "with great care to assure that the [constitutional standard] has been met." The Third Circuit has also been a "leading enforcer," according to the LDRC report, of state protections against disclosure of confidential sources and unpublished materials. See Steaks Unlimited, supra, and Lal v. CBS, Inc., 726 F.2d 97, 100-01 (3d Cir. 1984).
In the area of invasion of privacy, according to the LDRC report, the Third Circuit has not had occasion to decide any major cases. The circuit report concludes by indicating that, in the area of defamation law, the Third Circuit has managed to retain a "working unity" of its judges that "generally favor free speech." Whether that unity will remain "may be tested in cases now pending before the court."

Fourth Circuit

According Richard Ellis and Sam Byassee of Smith Moore Smith Schell & Hunter, the Fourth Circuit is "generally regarded as a conservative court." In the area of defamation and privacy law the court has "confirmed this [conservative] reputation" in the 15 cases it has decided since Sullivan, demonstrating that "it would rather apply clear precedent," from the Supreme Court or the five state courts within its boundaries, "than create new principles of recovery or defense." Nonetheless, according the the circuit report, to the extent that any pattern is revealed in the Fourth Circuit's defamation and privacy cases, one must conclude that the circuit "is relatively sympathetic to and protective of First Amendment concerns." In only one of its decided cases did the court reach a result clearly favorable to a plaintiff's recovery, Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976). On the other hand, according to the LDRC report, a number of cases have articulated favorable constitutional standards protective of the press, citing Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980), National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc., 705 F.2d 98 (4th Cir. 1983) and Time Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971). The Fourth Circuit has also decided cases favorably to media defendants on the issue of the single publication rule, in Morrissey v. William Morrow & Co., Inc., 739 F.2d 962 (4th Cir. 1984); granting "a margin of safety to authors in creating a fictional character," in Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969), and granting protection for "paraphrasing source material," in Ryan, supra; and Anderson v. Stanco Sports Library, Inc., 539 F.2d 1026 (4th Cir. 1976). However, the Fourth Circuit has not always decided cases in favor of the media defendant. In two cases the court reversed summary judgment or dismissals that had favored the libel defendant on

In the area of constitutional rule-making the Fourth Circuit has decided a number of cases on the classification of plaintiffs. In two, Jenoff v. Hearst Corp., 644 F.2d 1004 (4th Cir. 1980) and Arctic Co. v. Loudoun Times Mirror, 624 F.2d 518 (4th Cir. 1980), the Court refused to apply the public official standard to minor officials or government contractors. However, in three other cases, National Foundation for Cancer Research, Inc., supra; Fitzgerald, supra; and Time Inc., supra, the Court did find public figure status as to plaintiffs "with varying but substantial degrees of celebrity." With regard to the issue of actual malice, in Ryan, supra, a "well-reasoned opinion" reversed a jury verdict on the issue of actual malice. However, another Fourth Circuit opinion, Appleyard, supra, affirmed a jury verdict for plaintiff under the actual malice standard, a case which also approved a punitive damage award and rejected the contention that punitive damages were unconstitutional under the First Amendment. And, in Fitzgerald v. Penthouse International, Ltd., 691 F.2d 666 (4th Cir. 1982), the Fourth Circuit reversed a grant of summary judgment that had favored the defendant finding that plaintiff had presented sufficient factual questions as to the reliability of sources and the defendants' "obvious reasons to doubt" the veracity of their informant so as to preclude summary judgment on the issue of actual malice.

In the area of invasion of privacy, according to the LDRC report, "little case law exists in the Fourth Circuit that discusses in any detail the law of privacy."

Fifth Circuit

The Fifth Circuit, according to Thomas Leatherbury and John McElhaney of Locke, Purnell, Boren, Laney & Neely and Charles Babcock of Jackson, Walker, Winstead, Cantwell & Miller, both of Dallas, currently reflects "divergent views regarding the media in defamation and privacy actions." The LDRC report compares the views of Judges Jolly and Davis, two of the court's newest members, upholding a substantial libel verdict in Levine v. CMP Publications, Inc., 738 F.2d 660 (5th Cir. 1980) (pet. for reh'g en banc pending), with the view of Judge Tate in dissent in Levine and Judge Patrick Higginbotham in Wehling v. Columbia Broadcasting System, 721 F.2d 506 (5th
The Fifth Circuit, according to the LDRC report, decided approximately 40 defamation and privacy cases since New York Times, with 15 of those 40 decided in the past 5 years, indicating an apparent increase in the volume of defamation and privacy litigation in the Fifth Circuit. The Fifth Circuit remains a large and diverse court, despite the creation of the new Eleventh Circuit, with 14 active judges and 6 senior judges.

In the area of constitutional libel rulings, the Fifth Circuit's decisions do not reflect any singular pattern, approach or result, according to the circuit report. With regard to proof of constitutional malice, "historically libel plaintiff's have had a difficult time in convincing the Fifth Circuit that they introduced sufficient evidence . . . to prevail," citing Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980), cert. denied, 452 U.S. 962 (1981); Vandenberg v. Newsweek, Inc., 441 F.2d 378 (5th Cir.), cert. denied, 404 U.S. 864 (1971), subsequent appeal, 507 F.2d 1024 (5th Cir. 1975); Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980), cert. denied, 449 U.S. 1083 (1981), and other cases. However, the most recent Fifth Circuit cases have "reflected a somewhat more relaxed view regarding proof of actual malice," citing Golden Bear Distribution Systems of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983) and Levine, supra, in which the court affirmed jury verdicts and damage awards based on findings of actual malice. Fifth Circuit decisions dealing with the definition of public figures and public officials, also according to the circuit report, "defy ready analysis... the court has approached public figure determinations by both laborious analysis and by 'I know it when I see it' analysis."

The court has designated as public figures a former friend and advisor of President Nixon, Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir. 1981); an entertainer who was Elvis Presley's former girlfriend and her husband, Brewer v. Memphis Publishing Co., supra; a high union official, Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir.), modified on rehearing, 628 F.2d 932 (5th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); a plaintiff who had received prior publicity in articles about organized crime, Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861 (5th Cir. 1978); a track coach at a state university, Vandenburg, supra; and the author of a 'how-to' book, Dacey v. Florida Bar, Inc., 427 F.2d 1292 (5th Cir. 1970). On the other hand, the Fifth Circuit has deemed to be private such plaintiffs as a businessman involved...
in trade secrets litigation, Levine, supra; an entertainer who performed a novelty act with a diving pig, Braun v. Flynt 726 F.2d 245 (5th Cir.), cert. denied sub nom Chic Magazine v. Braun, 105 S.Ct. 252 (1984); a corporation, Golden Bear, supra; and a lawyer for individuals allegedly involved with organized crime, Time, Inc. v. Ragano, 427 F.2d (5th Cir. 1970).

As to other, non-constitutional issues, the Fifth Circuit has decided a substantial number of cases considering the issue of defamatory meaning, according to the circuit report, with the court demonstrating "a tendency to defer to jury verdicts on the issue of defamatory meaning" citing Levine, supra; Braun, supra; Golden Bear, supra; and Manale v. New Orleans Police Department, 673 F.2d 122 (5th Cir. 1982). The Court, depending on the particular facts and circumstances has found defamatory meaning in cases such as Makofsky v. Cunningham, 576 F.2d 1223 (5th Cir. 1978), Brewer, supra; Diplomat Publishing Inc., v. Westinghouse Electric Supply Co., 378 F.2d 377 (5th Cir. 1967); Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1967) cert. denied, 393 U.S. 825. On the other hand, in at least 5 opinions the Fifth Circuit "has held or has affirmed trial court holdings that particular language was not defamatory as a matter of law," citing Church of Scientology v. Cazares, 638 F.2d 1272, 1289 (5th Cir.), cert. denied, 454 U.S. 964 (1981); Raymer v. Doubleday & Co., 615 F.2d 241 (5th Cir.), cert. denied, 449 U.S. 838 (1980); Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832 (1979); Breuggemeyer v. Associated Press, 609 F.2d 825 (5th Cir. 1980) and Curtis Publishing Co. v. Birdsong, 360 F.2d 348 (5th Cir.).

On the issue of truth or falsity, an important recent case, Wehling, supra, overturned a finding of falsity, according to the circuit report. However, a divided panel in Levine, supra, refused to disturb a jury finding of substantial falsity, despite an "eloquent dissent" by Judge Tate. But Golden Bear, supra, "improperly placed the burden of proof on the issue of truth or falsity on the defendant publisher." According to the report, this language "is simply an aberration and an erroneous statement of Texas and federal law."

On other libel issues, the LDRC report makes note of the Fifth Circuit's several opinions demonstrating "extraordinary sensitivity to First Amendment concerns" in the area of personal jurisdiction. However, the Fifth Circuit has
not yet dealt with the personal jurisdiction issue "in the wake of Calder v. Jones, 104 S.Ct. 1482 (1984) and Keeton v. Hustler Magazine, Inc., 104 S.Ct. 1473 (1984)." However, according to the report, "it is probable that the Fifth Circuit's historical solicitude for out of state libel defendants will not remain intact in light of these recent [Supreme Court] cases."

Finally, in the area of invasion of privacy, the LDRC report indicates that "[u]ntil recently, privacy litigation has been relatively rare in the Fifth Circuit." However, in two recent cases, Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984), cert. denied, 53 U.S.L.W. 3483 (U.S. Jan. 7, 1985) (No. 84-645) and in Braun, supra, privacy issues have been addressed. In Wood, a panel of the Fifth Circuit affirmed in part and reversed in part a non-jury damage award for invasion of privacy, holding, perhaps incorrectly, that Texas courts would apply a two-year statute of limitations to invasion of privacy claims and suggesting that a publisher "could be liable for negligently placing a private person in a false light." In Braun, the Court upheld a finding of liability with regard to a claim of false light invasion of privacy, finding adequate proof of actual malice, but reversed and remanded for a new trial on the damages issue. In two other important privacy cases, Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980) and Breuggemeyer, supra, the Court upheld grants of summary judgment. In Campbell, the Court held that, in a public disclosure of private facts case, the details of plaintiff's marriage were logically connected to . . . newsworthy events which were matters of legitimate public interest." In Breuggemeyer, the Court found that "[t]here was . . . no invasion of privacy in the accurate reporting of a newsworthy event."

Sixth Circuit

According to the Sixth Circuit report, prepared by Richard Rassel and James Stewart of Butzel Long Gust Klein & Van Zile in Detroit, since 1966 the Circuit has handed down 15 major libel or privacy decisions. However, the Sixth Circuit's attitudes can "best [be] gauged by reviewing just two cases," citing Clark v. American Broadcasting Cos., 684 F.2d 1208 (6th Cir. 1982), cert. denied, 460 U.S. 1040 (1983) and Bichler v. Union Bank & Trust Co., 745 F.2d 1006 (6th Cir. 1984) (en banc). In Clark, according to the LDRC report, a majority of a
divided panel rendered an opinion "that can be viewed as reflecting a somewhat restrictive view of publishers' or broadcasters' rights." In Bichler, an en banc opinion, "[F]ive members of the court disapproved of the restrictive views advanced in Clark . . .; however, separate dissenting opinions were filed by five of the Circuit's judges." In sum, according to the circuit report, "it would seem that five members of the Sixth Circuit bench are generally receptive to the unique concerns of [media defendants] in libel or privacy actions. The other five members seem less favorably disposed." In addition, an earlier panel of the Sixth Circuit had included in their opinion "policy language that is very supportive of press freedoms and could well be useful to any attorney handling the defense of a libel action in the Sixth Circuit." Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978) cert. denied 440 U.S. 960 (1979).

In the area of constitutional defamation litigation, the Sixth Circuit has dealt with the public figure concept in approximately seven cases, four of which held the plaintiff to be a public figure and three of which held him to be not a public figure. See Orr, supra (criminal defendant who sought publicity is public figure); Henderson v. Van Buren Public School Superintendent, 644 F.2d 885 (6th Cir. 1981) (president of a high school student senate is public figure); Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir.), cert. dismissed per stipulation, 454 U.S. 1095 (1981) (figure in the historical Scottsboro case held public at the time of the case and fifty years later); Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir.), cert. dismissed per stipulation, 454 U.S. 1130 (1981) (successful cattleman held not a public figure); Clark, supra (woman walking on the street not a public figure); Bichler, supra, (manager and owner of a theatre not a public figure); Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976) (convicted murderer had conceded he was a public figure).

With regard to the standards for constitutional malice, the Sixth Circuit has rendered a number of important decisions, recognizing and applying the standard. Relatedly, several opinions have interpreted Michigan's common law privilege regarding matters of public interest and concern which is subject to an actual malice standard. See Orr, supra; Schultz, supra; Clark, supra; and Street, supra. The Sixth Circuit also held in Wilson, supra, that the First Amendment requires that falsity be considered an element of fault in a defamation case.
and that the burden of proving falsity must be placed on the plaintiff. The court has also recognized, in Orr, supra, that the Constitution requires absolute protection for statements of opinion. See also, Street, supra. In regard to procedural matters, the Sixth Circuit conducted an independent appellate review of the record in Orr, supra, in reversing a jury verdict and in Street, supra, in affirming a directed verdict for the defendant. Regarding the standard for summary judgment, in Schultz, supra, the court agreed with the Second Circuit that a "neutral" standard should be applied, neither favoring nor disfavoring the grant or denial of summary judgment in defamation cases; but in Schultz, the district court's grant of summary judgment was upheld. Indeed, according to the circuit report, the en banc decision of the Sixth Circuit in Bichler, supra, affirming a grant of summary judgment, "seems to indicate that the Sixth Circuit is not an inhospitable forum for media defendants seeking summary judgment. Indeed, the two to one decision in Clark [,supra,] is the only recent case in which the Sixth Circuit has overturned a summary judgment for a media defendant and that decision was effectively negated by the en banc decision in Bichler," according to the LDRC report.

With regard to invasion of privacy, the Sixth Circuit has decided two "appropriation" privacy cases, Memphis Development v. Factors, Etc., 616 F.2d 956 (6th Cir. 1980) and Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983). In Memphis Development the court denied the appropriation claim on the ground that the right of publicity does not survive death. In Carson, it held that the living Johnny Carson could enforce his "publicity" right in the term "Here's Johnny," with Judge Cornelia Kennedy dissenting. The Sixth Circuit has also decided two "private fact" cases, according to the circuit report, Cordell v. Detective Publications, Inc., 419 F.2d 989 (6th Cir. 1969) and Bichler, supra. In Cordell, summary judgment for the defendant was affirmed on the ground that references to plaintiff did not cast her in public disrepute and were not offensive to ordinary sensibilities. In Bichler, an en banc decision held that a report dealing with a matter of public interest and concern is qualifiedly privileged under state law, requiring plaintiff to prove constitutional malice. Finally, according to the circuit report, the Sixth Circuit has decided three false light invasion of privacy cases, Street, supra; Boddie, v. American Broadcasting Cos., 731 F.2d 333 (6th Cir. 1984); and Cantrell v. Forest City Publishing Co., 484 F.2d 450 (6th Cir. 1973), rev'd, 419 U.S.
425 (1974). In Street, plaintiff's false light claim was held to fail because of failure to demonstrate constitutional malice with regard to the defamation claim. In Boddie, the jury found for defendants on the false light claim and this ruling was not appealed. In Cantrell, the Sixth Circuit had held that proof of constitutional malice would be required to support a false light privacy claim involving a report on matters of public interest and found no proof of constitutional malice. The Supreme Court upheld the constitutional malice standard, but reversed, holding that proof of constitutional malice was sufficient on the record of that case.

Seventh Circuit

According to the Seventh Circuit report, prepared by James Klenk, Mark Sableman and Julie Kane-Ritsch of Reuben & Proctor in Chicago, the circuit "has generally followed, rather than anticipated, changes in libel law," citing as examples Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972), rev'd, 418 U.S. 323 (1974) and Time, Inc. v. Pape, 419 F.2d 980 (7th Cir.), rev'd, 401 U.S. 279 (1971) [See also two earlier decisions of the Seventh Circuit in Pape, both reversing grants of dismissals for the defendant, 318 F.2d 652 (7th Cir.) and 354 F.2d 558 (7th Cir.). In both cases the Seventh Circuit decision was reversed and standards for libel law were developed, not by the Seventh Circuit, but by the Supreme Court. There are, according to the LDRC report, nine judges on the Seventh Circuit with several additional seats expected to be filled shortly. Reference to a "Practitioner's Handbook," prepared by the Seventh Circuit and with its "imprimatur," would be of benefit, according to the report, to any lawyer who practices before the Seventh Circuit.

With regard to constitutional issues, according to the LDRC report, the Seventh Circuit has generally followed a "literalist interpretation of the Supreme Court's public figure or official test; few hard cases have been presented to the Court in this area." Generally, the Seventh Circuit has found most plaintiffs before it to be public officials or public figures. Simonson v. United Press International, Inc., 654 F.2d 478 (7th Cir. 1981) (judges); Meiners v. Moriarity, 563 F.2d 343 (7th Cir. 1977) (FBI agents); Padell v. Minneapolis Star & Tribune Co., 557 F.2d 107 (7th Cir. 1977), cert. denied 434 U.S. 966 (1977) (tax assessors); Grzelak v. Calumet 25
Publishing Co., 643 F.2d 579 (7th Cir. 1975) (secretary to a City Board member); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (national television celebrity and his wife); Perry v. Columbia Broadcasting Systems, Inc., 499 F.2d 797 (7th Cir. 1974), cert. denied, 419 U.S. 883 (1974) (1930's movie star). In one final case, the court observed in dictum that a large corporation would be best classified as a public person, Brown & Williamson Tobacco Co. v. Jacobson, 713 F.2d 262 (7th Cir. 1983). The only case cited in the circuit report, in which a plaintiff was found not to be a public official or public figure was Gertz, supra.

With regard to the actual malice standard, as noted, the Seventh Circuit in Pape, supra, had reversed a directed verdict for the defendant on the ground that actual malice in that case was a jury question; the Supreme Court reversed. In the area of private figure standards, most litigation in that field has been confined to the state courts within the Seventh Circuit. The one exception was in the Gertz case itself where on remand, the Seventh Circuit had occasion to construe the Illinois "reasonable grounds" standard, and held that plaintiff's proof of actual malice established that the lesser "reasonable grounds" standard had been met. In Gertz, on remand, the Seventh Circuit also had an opportunity to consider the question of damages in affirming one of the largest defamation damage awards in recorded history. The court held that, once actual malice is proven, presumed damages are not unconstitutional.

With regard to procedural matters, the Seventh Circuit has affirmed grants of summary judgment, according to the circuit report, based upon a summary judgment rule that would appear to be consistent with Hutchinson v. Proxmire, citing affirmances of summary judgments in Fadell, supra; Grzelak, supra; and Pruitt v. Chow, No. 83-3163 (7th Cir. Sept. 5, 1984). With regard to state common law doctrines, one of the important rules within Illinois has been the "innocent construction" doctrine and the Seventh Circuit has applied that doctrine on a number of occasions. Recently, in Pruitt, supra, the court affirmed a grant of summary judgment on the basis of the "innocent construction doctrine" demonstrating that the Seventh Circuit will continue to recognize the rule as recently modified by the Illinois Supreme Court in Chapsky v. Copley Press, Inc. 92 Ill.2d 344, 442 N.E.2d 195 (1982). In the area of libel per se and libel per quod, the Court, according to the
LDRC report, has gone further than required under state law in finding a statement about plaintiffs cigarettes to be libelous per se, Brown & Williamson, supra. With regard to privileges and defenses, the Seventh Circuit has recognized the substantial truth defense in Simonson, supra. No Seventh Circuit case, according to the LDRC report, has addressed the opinion/fair comment privilege although the issue may be addressed on appeal in Spelson v. Columbia Broadcasting System, Inc., 581 F. Supp. 1195 (N.D. Ill. 1984). Two Seventh Circuit cases have dealt with elements of the official report privilege, although the circuit report suggests that the two opinions may be inconsistent, therefore leaving "for future decisions to correct explicitly the mistaken notion [in Gertz] that actual malice can defeat the official report privilege," citing Brown & Williamson, supra. Finally, the circuit report cites a number of conditional privilege and absolute privilege cases, several involving non-media defendants.

With regard to invasion of privacy, the Seventh Circuit has, according to the LDRC report, addressed invasion of privacy claims based on commercial appropriation in three reported cases, Maritote v. Desilu Productions, Inc., 345 F.2d 418 (7th Cir. 1974), cert. denied, 421 U.S. 965 (1975); Wagner v. Fawcett Publications, 307 F.2d 18 (7th Cir.); Rohzon v. Triangle Publications, Inc. 230 F.2d 359 (7th Cir. 1956). In each case the invasion of privacy claim was rejected. The Seventh Circuit has also dismissed "private facts" claims in Bonn v. Pecaut, 561 F. Supp. 1037 (N.D. Ill. 1983), aff'd, 734 F.2d 409 (7th Cir. 1984) and Estill v. Hearst Publishing Company, Inc., 186 F.2d 1017 (7th Cir. 1951) Each of these two cases dismissed the privacy claims, in Bonn, based on absolute privilege and in Estill, based upon the "public interest" in the publication. Finally, the Seventh Circuit dismissed a false light privacy claim in Rohzon, supra, based upon what appears in the Circuit report to be lack of defamatory meaning.

**Eighth Circuit**

According to the Eighth Circuit report, prepared by John Borger of Faegre & Benson in Minneapolis, the Eighth Circuit's approximately 41 defamation and privacy decisions since New York Times generally "favor free expression". Most of the the Circuit's current sitting judges have participated in at least one, and a number have participated in several,

* Of the 41 cases, approximately 28 involved media defendants, with the rest involving non-media matters.
decisions in this area. The Eighth Circuit, according to the LDRC report, "lacks the sharp ideological splits of, for example, the Second and District of Columbia Circuits."

In the area of constitutional litigation, the Eighth Circuit, according to the LDRC report, "aggressively sought to expand the applicability of the New York Times privilege . . . in the 1960's." However, after Gertz, "caution replaced enthusiasm," citing Littlefield v. Fort Dodge Messenger, 614 F.2d 581, 584, 5 Med.L.Rptr. 2325 (8th Cir.) cert. denied, 455 U.S. 945 (1980), which held that a lawyer was not a public figure for purposes of the lawyer's license suspension hearing. However, the Eighth Circuit showed that it continued to favor media defendants in Littlefield, affirming dismissal of the complaint for failure to prove damages. In the area of constitutional actual malice, according to the LDRC report, the Eighth Circuit "takes seriously the [constitutional] standard; [however] [i]t is less concerned with sweeping policy generalizations than with careful, skeptical analysis of the particular facts alleged to demonstrate 'actual malice,'" citing a series of cases in which actual malice was not sufficiently established: Walker v. Pulitzer Pub. Co., 394 F.2d 800, (8th Cir. 1968); Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188 (8th Cir. 1966) (ill will insufficient); Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830, 834 (8th Cir. 1974); Hurley v. Northwest Pub., Inc., 398 F.2d 346 (8th Cir. 1968), aff'd based on district court's opinion, 273 F. Supp. 967 (D. Minn. 1967) (failure to investigate insufficient); Brown v. Herald Co., Inc., 698 F.2d 949, (8th Cir. 1983); Berry v. National Broadcasting Company, 480 F.2d 428 (8th Cir. 1973) (failure to report both sides insufficient). And media defendants have successfully defended against allegations of actual malice in the Eighth Circuit by "focus[ing] upon the use of reliable sources and employees, review of relevant documents and reasonable belief in the truth of the [publications]," citing Brown, supra; Drotzmanns, supra; Cervantes v. Time, Inc. 464 F.2d 986, (8th Cir. 1972); Hurley, supra; Walker, supra.

In the area of constitutional protection for opinion under Gertz, as well, the Eighth Circuit has, according to the LDRC report, "forcefully applied the Gertz rule that statements of pure opinion are absolutely protected by the First Amendment." Lauderback v. American Broadcasting Companies, 741 F.2d 193, (8th Cir. 1984). Moreover, that same case continued to suggest that summary judgment may be "particular
appropriate" in actions for defamation. See also in this regard Schuster v. U.S. News and World Report, Inc. 602 F.2d 850 (8th Cir. 1979). In a related but important area, the Eighth Circuit's sensitivity to press concerns was once again evidenced in the area of protection of confidential sources. See Cervantes, supra, a leading pro-confidentiality case. The Circuit report notes, however, that the "utility of Cervantes was undermined in Gialde v. Time, Inc., 480 F.2d 1295 (8th Cir. 1973), in which 2-1 panel refused to hear an [immediate] appeal" from a trial court disclosure order, with one judge dissenting. That judge, however, is the only judge of the three-judge Gialde panel who still sits on the Eighth Circuit, the LDRC report notes.

In the area of state law issues, a number of Eighth Circuit cases (mostly non-media), deal with absolute privilege in the context of judicial or quasi-judicial proceedings with a divergence of results difficult to reconcile. In the area of the media's qualified privilege, in connection with a fair report of judicial proceedings, the court has "liberally construed" the privilege in Schuster, supra and Hurley, supra. On the state law issues of truth, falsity and defamatory meaning, the Eighth Circuit has had occasion, according to the circuit report, to recognize the rule of substantial truth, and has strictly construed "the traditional categories" of defamatory meaning, see e.g., Littlefield, supra; Glover v. National Broadcasting Co., Inc. 594 F.2d 715 (8th Cir. 1979) and Treutler v. Meredith Corp., 455 F.2d 255 (8th Cir. 1972). With regard to damages the Eighth Circuit has adopted a "divergent approach" to the issue. In two cases involving media defendants, the Eighth Circuit "has applied a strict, even disbelieving, analysis of damages claims." See Littlefield, supra (affirming a district court judgment holding that plaintiff had failed to prove actual damages under Gertz); and Drotzmanns, supra (reversing a $245,000 judgment against a magazine publisher). On the other hand, it has affirmed at least two non-media damage awards, in Luster v. Retail Credit Co., 575 F.2d 609 (8th Cir. 1978) and Mid-America Food Service v. ARA Services, Inc., 578 F.2d 691, 698 (8th Cir. 1978).
Finally, with regard to invasion of privacy, the Eighth Circuit has decided, according to the LDRC report, three significant privacy cases. Holman v. Central Arkansas Broadcasting Co., 610 F.2d 542 (8th Cir. 1979) affirmed summary judgment in connection with defendant-broadcaster's coverage of plaintiff-attorney (and former municipal judge) who allegedly created a commotion upon being arrested for drunken driving. In McNally v. Pulitzer Publishing Co., 532 F.2d 69 (8th Cir. 1976), the court rejected a private fact claim regarding a publication based substantially on matters of public record involving matters of legitimate public concern. Finally, in Berry, supra, the Eighth Circuit, according to the LDRC report, "firmly rejected" in a false light privacy case, the "the notion that a 'plaintiff can, by suing for invasion of privacy, by-pass the various safeguards and limitations of... defamation.'"

**Ninth Circuit**

According to the Ninth Circuit report, prepared by Neil Shapiro of Cooper, White & Cooper in San Francisco, it is difficult to characterize the court's libel and privacy actions primarily because of the "diversity of the geographic area covered, the size of the court itself and the relative paucity of published opinions in the... field." There are at present 23 circuit judges and eight senior judges. Moreover, to accomodate its enormous caseload, district court judges also frequently sit by designation. Few Ninth Circuit judges, therefore, have participated in any libel or privacy cases, and "even fewer have faced more than one such case." Finally, despite the Ninth Circuit's size, since New York Times it has only decided by published opinion approximately 15 defamation and two invasion of privacy actions. Accordingly, it is difficult "to locate, much less to articulate, discernable trends or biases [in this field] on a Court-wide basis," or even with regard to particular judges whose few opinions often seem "irreconcilable." What can be said is that "the Court attempts more to accomplish justice... in each case in isolation, than to establish policy or precedent... ."

In the area of constitutional litigation, the Court has, according to the LDRC report, decided only five cases involving public officials or public figures, with only one of those cases meaningfully bearing upon the court's view of the
public figure standard, citing Arnheiter v. Random House, Inc., 578 F.2d 804 (9th Cir. 1978) (commander of navy warship during Vietnam War held both a public official and a public figure). The other four cases cited involved the Mayor of San Francisco (two cases); a famous baseball player and a plaintiff who stipulated to public figure status. On the issue of constitutional malice, only one decision "has addressed substantively the issue," citing Alioto v. Cowles Communications, Inc., 623 F.2d 616 (9th Cir. 1980). Five other cases, cited in the report, touched upon the issue but either relied on other privileges, stipulated to the existence of constitutional malice, or only briefly discussed the issue without significantly articulating broad principles. In Alioto, the panel "demonstrated a viewpoint unfavorable and restrictive of the rights of the press," focusing on "what [the defendants'] state of mind should have been" rather than their "actual state of mind" as required by St. Amant v. Thompson, 390 U.S. 727 (1968). In the area of constitutional protection for opinion, according to the circuit report, two recent Ninth Circuit opinions have held that "no recovery can be had for statement of opinion," citing Information Control v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980) and Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983). In Information Control the Court appears to have relied, according to the LDRC report, on California law, in formulating a three-factor test for distinguishing protected statements of opinion from actionable statements of fact. In Lewis, the Court relied upon a constitutional protection for opinion under Gertz.

In the area of state and common law defamation standards, two relatively recent Ninth Circuit decisions have addressed "the proper application of publishing privileges . . . but neither case discussed First Amendment principles instead relying solely on principles of local law," citing Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir. 1981) (protection of the publication of an "accurate and contextually appropriate quotation" from a court opinion); and Porter v. Guam Publications, Inc., 643 F.2d 615 (9th Cir. 1981) (Interpreting and applying statutory absolute immunity "for a fair and true report"). In two cases cited, the Ninth Circuit has briefly addressed the question of truth or falsity but in both the Court did "little more than restate the California standards." The circuit report notes that "[a] fair proportion" of the Court's defamation rulings have involved miscellaneous and "rather unusual and somewhat obscure points of law . . . of
questionable guidance" in future cases. Finally, on a procedural issue, the LDRC report indicates that at least three Ninth Circuit cases have addressed the standards of appellate review in "unusual circumstances." In Maheu v. Hughes Tool Co., 569 F.2d 459 (9th Cir. 1977), the Court declined to exercise "independent review" as mandated by New York Times, holding that such review was unnecessary with respect to truth or falsehood." In Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438 (9th Cir. 1974), the Court, in reversing a directed verdict for the defendant, held that "the manner in which the evidence is to be examined . . . is the same as in all other cases." In Alioto, supra, the Circuit reversed judgments n.o.v. "on the authority of and in accordance with Guam . . . supra."

While the Ninth Circuit has rendered only two substantive invasion of privacy decisions in the last 20 years . . . each has proved to be of substantial significance." In Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) the Court recognized an intrusion claim, holding that First Amendment protection for news dissemination "does not constitute a license to trespass, to steal or to intrude by electronic means in the precincts of another's home or office." In Virgil v. Time, Inc., 557 F.2d 1122 (9th Cir. 1975), a disclosure of embarrassing facts case, the Ninth Circuit recognized a privilege to publish newsworthy information as a matter of constitutional law.

**Tenth Circuit**

The Tenth Circuit, according to Andrew Low of Davis, Graham & Stubbbs in Denver, because it is one of the smallest Courts of Appeals, "has been able to develop a reasonably consistent approach to defamation and privacy cases. . . That approach has been a careful application of Supreme Court precedents, with considerable sympathy for the First Amendment and the role of the media." As an overview, the circuit report indicates that all of the Court's decisions in this area "have produced outcomes favorable to the media," except two cases written by one particular circuit judge who is now on senior status. In contrast, the report quotes from the circuit's current chief judge who has expressed strong support for basic First Amendment principles in two important recent cases.
In the area of constitutional litigation, two of the Court's opinions on the issue of actual malice are contrasted in the circuit report. In Dixson v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977), the Court affirmed a jury verdict for the plaintiff based in part on the (at that time) Colorado rule of actual malice applicable to suits by private plaintiffs. The Dixson court also refused to grant a "de novo" review of the evidence, a position that the LDRC report notes is "no longer correct in view of Bose." The Circuit showed a markedly different approach to the issue of actual malice in Hardin v. Santa Fe Reporter, Inc., 11 Med.L.Rptr. 1026 (10th Cir. Oct. 11, 1984), where the Court refused to find actual malice based on mere "investigatory failures." In the area of opinion, the Court has issued two "significant opinions." In Pring v. Penthouse International, Ltd., 695 F.2d 438 (10th Cir. 1982), the Court reversed a multimillion dollar damage award on the basis that a story obviously based upon "pure fantasy and nothing else" could not reasonably be understood as an assertion of fact. In Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983), the Court relied upon the constitutional protection for opinion in affirming a grant of summary judgment. Finally, with the regard to the definition of public figures, in the one case cited by the circuit report, Lawrence v. Moss, 639 F.2d 634 (10th Cir.), cert. denied, 451 U.S. 1031 (1981), the Court adopted a rather restrictive definition of public figure, appearing to hold that a plaintiff is not a public figure with respect to events occurring in a state unless the plaintiff has thrust himself into public prominence in that state even when the plaintiff is nationally prominent. On the issue of qualified privilege, only one circuit case has addressed the question, according to the LDRC report, Anderson v. Dun & Bradstreet, Inc., 543 F.2d 732 (10th Cir. 1976). In that case the Circuit affirmed application of a qualified privilege in deference to state law.

With regard to state issues, in Rinsley, supra, the Court affirmed the grant of summary judgment based upon what appears to be a theory of substantial truth. And in Ando v. Great Western Sugar Co., 475 F.2d 531 (10th Cir. 1973), the Court also affirmed a grant of summary judgment on the ground that defendant had proven truth, the Court deeming the Wyoming state constitution, establishing truth as a defense rather than as an element of the plaintiff's case, to govern. With regard to procedural matters, although the Tenth Circuit has affirmed summary judgement for defendants in defamation or privacy
cases and has reversed only one summary judgment, the Court's "dicta" have "declin[ed] to place special emphasis on summary judgment as a way to end libel cases," citing Lawrence, supra and Ando, supra. On the issue of reporter's privilege the Tenth Circuit has decided one important case recognizing and defining four factors to be applied in protecting confidential sources, although the case involved a third-party civil action rather than a libel or privacy matter, Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977). On another procedural issue important to the media, although not a defamation case, the Tenth Circuit has decided two "access" cases, according to the LDRC report, citing Oklahoma Hospital Ass'n v. Oklahoma Publishing Co., Slip Op. (No. 84-1171, Nov. 27, 1984) and Combined Communications Corp. v. Finesilver, 672 F.2d 818 (10th Cir. 1982).

On the issue of invasion of privacy, the Tenth Circuit has decided one disclosure of private facts case, according to the circuit report. In Gilbert v. Medical Economics, Co., 665 F.2d 205 (10th Cir. 1981), the Court, following the Restatement, concluded that truthful personal facts and details are protected so long as they have "some substantial relevance to a matter of legitimate public interest." Id. at 308. The Tenth Circuit has also considered two false light invasion of privacy cases. In both cases, according to the circuit report, the Court dealt with the issues "as though they were libel cases," citing Pring and Rinsley, supra.

Eleventh Circuit

The Eleventh Circuit, according to George Rahdert and Patricia Anderson of Rahdert, Malone and Richardson in St. Petersburg, Florida, has issued "only a handful of defamation decisions" since its split from the Fifth Circuit in 1981. The decisions of the "former Fifth" Circuit have been adopted by the Eleventh Circuit as binding precedent; therefore, the Circuit "writes on a clean slate only to the extent that there is no controlling 'former Fifth' precedent prior to September 20, 1981." Not unexpectedly, the Eleventh Circuit's own "body of defamation law is sparse." Nonetheless, according to the LDRC report, those cases that have been decided by the new Court, "demonstrate careful appellate review, a proper concern for free speech and free press . . . and an inclination to superimpose state common law requirements . . . in addition to constitutionally mandated standards."
Among the few Eleventh Circuit defamation cases, only one has thus far involved a public official or public figure plaintiff and the issue of constitutional malice. In Hunt v. Liberty Lobby, 720 F.2d 631 (11th Cir. 1983), the Court exercised independent appellate review in defining its guidelines for actual malice based on "circumstantial proof." The Court there upheld a jury finding of actual malice based upon "the inherent improbability of the gist of the article." The Court also found that, under Florida law, proof of common law malice is required, in addition to actual malice, in order to support an award of punitive damages. Indeed, in another case cited by the circuit report, Litman v. Massachusetts Mutual Life Insurance Co., 739 F.2d 1549 (11th Cir. 1984), the Circuit again applied Florida law in reversing a substantial punitive damage award in a non-media action. The Litman case was decided on an issue of "consent" to publication. A "more traditional privilege" case, according to the LDRC report, was Stepanian v. Addis, 699 F.2d 1046 (11th Cir. 1983). Relying on a "former Fifth" Circuit case, the Eleventh Circuit affirmed denial of defendant's motion for summary judgment in order to develop the factual record necessary to determine whether an absolute immunity was available to the defendant federal prosecutor, under Barr v. Mateo. Two Eleventh Circuit cases have decided issues of defamatory meaning and in both cases the Court ruled that the complained-of statements were not defamatory as a matter of law, citing Hallmark Builders, Inc. v. Gaylord Broadcasting Co., 733 F.2d 1461 (11th Cir. 1984) and Valentine v. CBS, Inc., 698 F.2d 430 (11th Cir. 1983). The Court rejected "unreasonable" or "tortured and extreme" interpretations of allegedly defamatory publications in Valentine even though the Court noted in Hallmark Builders that statements "susceptible to two interpretations" should be decided by a jury. The Eleventh Circuit has touched upon the issues of burden of proof in Valentine, supra, where it is suggested that plaintiff has the burden of proof of falsity, and in Hunt, supra, where the Court expressly held that "one element of [plaintiff's] case required him to prove the falsity of the published statements." 720 F.2d at 51.

In the area of invasion of privacy, although the Eleventh Circuit has not, according to the LDRC report, issued any decisions which "significantly address invasion of privacy issues involving media defendants" there are three decisions that do "touch upon privacy questions and might be helpful as a
starting point for assessing the Eleventh Circuit's attitudes in this area," citing Valentine, supra; Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 694 F.2d 674 (11th Cir. 1983) and Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983). In Valentine, the Court rejected a misappropriation claim under Florida law; in Martin Luther King, the Eleventh Circuit reversed the district court's partial denial of a preliminary injunction based upon the answers to three certified questions submitted to the Georgia Supreme Court in which the Georgia court held that the "right of publicity" does survive death; in Phillips, a non-media case, the Eleventh Circuit affirmed a jury damage award on a pendent privacy claim for intrusion, again based on the answers to certified questions from the Alabama State Supreme Court recognizing the intrusion branch of invasion of privacy law.

District of Columbia Circuit

According to Frank Wiggins of Cohn and Marks in Washington, the District of Columbia Circuit has produced two recent cases which "give a view of the philosophies animating various circuit judges in defamation cases" within the Circuit. In Ollman v. Evans, 11 Med.L.Rptr. 1433 (D.C. Cir. 1984), an en banc decision heard by 10 of the 11 circuit judges and one senior circuit judge, broad protections were extended by the majority to printed expressions of opinion. In addition, the case is "instructive in its display of considerable divergence among the Circuit's judges in their approach to [the opinion] issue." Judge Starr, writing for the majority, articulated a four-part test to distinguish between statements of fact and statements of opinion that, according to the LDRC report, "appears largely to have satisfied 8 of the 11 participating judges." First, to analyze the "common usage or meaning of the specific language;" second, to consider the statements' "verifiability;" third, to consider the "full context" of the statement within the entire article; and finally, to consider "the broader context or setting in which the statement appears." In Ollman, the majority found that "all of the challenged statements [in an editorial-type column by the political commentators Evans and Novack] giving rise to the litigation were opinion." Three dissenting judges did not take issue with the majority statement of the law, but disagreed on its application to the facts of the case. A
separate dissenting analysis by two other circuit judges focused on "whether the absolute privilege for opinion has been forfeited by culpable omissions or errors in the supporting facts." Finally, in an important concurring opinion by Judge Bork, a balancing test is proposed which would give great weight to, in effect, an assumption of the risk leading to what the Circuit report refers to as "[t]he provocative suggestion . . . that, at least in some circumstances, 'an unquestionable libel is permitted in the course of political polemics.'"

The second case of signal importance in the District of Columbia Circuit, according to the LDRC report, is Liberty Lobby, Inc., et al., v. Jack Anderson, et. al., 11 Med.L.Rptr. 1001 (D.C. Cir. 1984). In that case, a three-judge panel reversed the grant of summary judgment which had been granted variously based upon lack of defamatory meaning, constitutional protection for opinion and actual malice. With regard to defamatory meaning and opinion, the panel affirmed a grant of summary judgment. However, with regard to actual malice, the Court reversed and applied a summary judgment review standard that was, at least in its application in the Liberty Lobby case, according to the LDRC report, "not helpful to the media defendants." The Court rejected the notion that a finding of proof by "convincing clarity" is required at the summary judgment stage. The Liberty Lobby decision applied the New York Times actual malice standard in the summary judgment context. The D.C. Circuit has not, according to the LDRC report, had occasion to consider that standard on appeal from a full trial. However, the pending appeal in Tavoulareas v. Washington Post Co., 567 F.Supp. 651 (D.D.C. 1983), "should provide an important exposition on . . . the application of the constitutional malice standard at trial."

Also in the area of constitutional libel litigation, the D.C. Circuit has had a number of opportunities to consider the question of the distinction between "public" and "private" defamation plaintiffs, according to the circuit report, citing Ryder v. Time, Inc., 557 F.2d 824 (D.C. Cir. 1976); (reversing a finding of public figure status regarding an attorney who was formerly a member of the Virginia House of Delegates and an unsuccessful candidate for the Virginia state senate); Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980) (finding public figure status regarding a businessman); see also Wolston v. Readers Digest Association, Inc., 578 F.2d 427 (D.C. Cir. 1978), rev'd on

In the area of reporters privilege, the Circuit, according to the LDRC report, "recognized a conditional privilege to preclude compelled disclosure by a defendant journalist of his sources in the context of a defamation action," citing Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974). However, the Court will give strong consideration, the LDRC report warns, to the fact that it may be the reporter that is being sued for libel, see Zerilli v. Smith, 656 F.2d 705 (D.C. Cir 1981). However, "[e]ven where the centrality of source disclosure is established, the Carey case applies a rigorous requirement of exhaustion of alternative sources." As might be expected, the D.C. Circuit has had a number of occasions to consider privileges and immunities in the context of legislative and other official proceedings. See, e.g., Webster v. Sun Co., Inc., 731 F.2d 1 (D.C. Cir. 1984) (refusing to recognize a privilege in that case); Doe v. Macmillan, 566 F.2d 713 (D.C. Cir. 1977) (extending the congressional privilege to "limited distribution" of the alleged libel to various other governmental agencies). See also, Ray v. Proxmire, 581 F.2d 998 (D.C. Cir.), cert. denied, 439 U.S. 933 (1978). The D.C. Circuit has also recognized "a broader immunity" for the "discretionary acts of all federal employees," citing Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979), quoting Expedition Unlimited Aquatic Enterprises v. Smithsonian Institution, 566 F.2d 289 (D.C. Cir. 1977) (en banc), cert. denied, 438 U.S. 915 (1978). Finally, on the issue of damages, the Circuit has, according to the LDRC report, decided two significant cases. In Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966), the Court rejected an argument that the public interest in broad discussion of public issues mandated a stringent rule requiring proof of "special pecuniary damage." In Davis v. Schuchat, 510 F.2d 731, 736-38, the Court upheld the appropriateness of punitive damages in a defamation action where constitutional malice has been established.
Supreme Court Report:
At Mid-term Two Key Decisions Awaited

In the first quarter of 1985, the Supreme Court declined to hear any new libel cases. It denied certiorari in seven libel actions (five involving media defendants.)

However, two important non-media libel actions -- Dun & Bradstreet v. Greenmoss and McDonald v. Smith -- are still under consideration. On March 20, 1985, the Court heard the defendant in McDonald argue for an absolute privilege under the petition clause of the Constitution for statements made in good faith, requesting governmental action from a governmental official with the authority to take such action.

Last fall the Greenmoss case was argued for the second time. On reargument, the Court asked the parties to address whether or not the holding of Gertz v. Robert Welch Inc. with respect to presumed and punitive damages applies to non-media defendants, and whether or not that holding applies to commercial speech. For a full discussion of both these cases, see LDRC Bulletin No. 12 at 38.

The Supreme Court's actions from December 18, 1984 (53 U.S.L.W. No. 24) through March 26, 1984 (53 U.S.L.W. No. 37) are as follows:

I. ARGUMENTS HEARD - UNFAVORABLE DECISIONS BELOW (2)


II. MEDIA DEFENDANTS

UNFAVORABLE DECISIONS LEFT STANDING (2)

1. Gannett Co., Inc. v. De Robert, 10 Med.L.Rptr. 1898 (9th Cir. 1984), cert. denied., 53 U.S.L.W. 3507 (1/14/85 no. 84-772). (Ninth Circuit had reversed district court's dismissal of pacific island republic president's libel action against newspaper on grounds that suit was not barred of act by state doctrine.)

2. Hustler Magazine, Inc. v. Wood, 10 Med.L.Rptr. 2113 (5th Cir. 1984), cert. denied., 53 U.S.L.W. 3483 (1/7/85 no. 84-645). (Fifth Circuit had affirmed a trial court judgment for $150,000 in compensatory damages against the magazine, holding that negligence had been established and that such a standard of liability applied, under Texas law, in a false light invasion of privacy action brought by a private figure plaintiff seeking actual damages.)

III. MEDIA DEFENDANTS

FAVORABLE DECISIONS LEFT STANDING (3)

1. Lauderback v. American Broadcasting companies Inc., 10 Med.L.Rptr. 2241 (8th Cir. 1984), cert. denied., 53 U.S.L.W. 3528 (1/21/85 no. 84-787). (Eighth Circuit had reversed district court's denial of summary judgment in favor of broadcast libel defendant on grounds that defendant's broadcast on alleged fraudulent insurance sales presented constitutionally protected statements of opinion, based upon disclosed facts.)

2. McNabb v. Oregonian Publishing Co., 10 Med.L.Rptr. 2181 (Ore. Ct. App. 1984), cert. denied, 53 U.S.L.W. 3598 (2/19/85 no. 84-1064). (Oregon Court of Appeals had affirmed circuit court in grant of summary judgment on the ground that investigatory failure alone is not sufficient basis for inferring actual malice, nor can malice be inferred solely from fact that poorly investigated article was not "hot news". In addition, court had held Oregon shield law precludes disclosure in libel action of reporter's notes even though plaintiff had asserted that such disclosure was necessary to determine reporter's state of mind.)
3. Oak Beach Inn Corp. v. Babylon Beacon, Inc. 10
Med.L.Rptr. 1761 (NY Ct. App. 1984), cert. denied, 53 U.S.L.W. 3506 (1/14/85 no., 84-575) (New York Court of Appeals on a certified question affirmed the trial court and appellate division's holding that newspaper, under New York shield law, could not be held in contempt for refusing, in a libel action against it based upon a letter-to-the-editor, to divulge identity of letter's author.)

IV. PETITIONS FILED BUT NOT YET ACTED UPON (4)

1. Matchett v. Chicago Bar Association, 10

2. News Publishing Co. v. DeBerry, cert. filed., 53 U.S.L.W. 3530 (12/27/84 no. 84-1028). (Georgia Court of Appeals had affirmed finding that newspaper's failure to corroborate a statement that plaintiff had threatened to kill county commissioner constituted actual malice).

3. Renard v. CBS, 10 Med.L.Rptr. 2357 (Ill App. Ct. 2nd Div. 1984), cert. filed, 53 U.S.L.W. 3653 (3/1/85 no. 84-1378). (Illinois Appellate Court had affirmed lower court's finding that television broadcast which compared plaintiff's piano course with another piano course was not defamatory and that the Illinois innocent construction rule does not violate a plaintiff's due process and equal protection rights.)

4. Synanon Church v. Readers Digest Assoc. Inc., 690 P 2d 610 (Cal. Sup. Ct. 1984), cert. filed, 53 U.S.L.W. 3619 (2/14/85 no. 84-1304). (California Supreme Court had issued a writ of mandate to review the Superior Court's denial of summary judgment and held that failure to conduct a thorough and objective investigation is not enough to establish actual malice.)
V. NON-MEDIA ACTIONS (3)

1. Gibson v. Boeing Co., cert. denied, 53 U.S.L.W. 3484 (1/7/85 9th Cir. no. 84-811). (Ninth Circuit had affirmed district court's grant of summary judgment in this non-media defamation action by three members of an airline flight crew against airline manufacturer on grounds that statements of airline manufacturer to National Transportation Safety Board are privileged.)

2. Heinrich v. Illinois, 470 NE. 2d 966 (Ill. Sup. Ct. 1984) cert. filed, 53 U.S.L.W. 3636 (2/22/85 no. 84-1346). Illinois Supreme Court had reversed circuit court's determination in this non-media, criminal libel action that the Illinois criminal defamation statute was unconstitutionally overboard, holding that although criminal libel is subject to the same limitations as civil libel laws where criticism of public officials is concerned, the First and Fourteenth Amendments do not require that truth be an absolute defense in a prosecution for criminal defamation of a private person.

3. Smith v. Russell, 456 So. 2nd 462 (Fla. Sup. Ct. 1984), cert. denied, 53 U.S.L.W 3634 (3/4/85 no. 84-924). The Florida Supreme Court had upheld the district court's reversal of an award of compensatory and punitive damages on the ground that a policeman is a public official who, therefore, must establish actual malice or reckless disregard for the truth in order to recover for an alleged defamation.)
LDRC BULLETIN No. 13

LDRC DAMAGES WATCH:
MORE RECENT UPS AND DOWNS

LDRC continues to monitor closely developments in libel and privacy cases that have gone to trial with the possibility, too often realized, of findings of liability and the imposition of damage awards against the libel defendants. Since our last report LDRC has become aware of verdicts, judgments, post-trial rulings or appellate decisions in 17 cases not previously reported by LDRC. It should be noted that while most of these decisions were handed down recently, and since our last report, some of them occurred prior to our previous reports but did not come to our attention until now. With one exception, all took place in 1984 or 1985. One of the items reflects a new development in a previously reported case. Sixteen of the 17 cases involve media defendants.

The 17 cases probably do not represent a large enough sample to serve as the basis for any broad generalizations. Indeed, three of the cases (Tavoulereas, Sharon and LaRouche) were unique and extraordinary in their own right. Nevertheless, the cases do reflect a continuation of some of the favorable trends reported in the LDRC Trials and Damages Awards Study (Study #5, published in LDRC Bulletin No. 11). Jury verdicts against the defendant at trial occurred in only 64% of the cases, an improvement over the 83% figure reported in Study #5. On appeal, defendants prevailed in three out of five cases, a success rate comparable to the 64% reversal rate reported in the last study. However, only one of the appeals was taken from a judgment adverse to the defendant, and that appeal was unsuccessful. The size of damage awards remains unacceptably high, with four of the ten awards exceeding $500,000, and three of these exceeding one million dollars.

The new information received can be briefly summarized as follows:

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<thead>
<tr>
<th>JURY</th>
<th>NON-JURY</th>
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<td>14</td>
<td>3</td>
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**Plaintiff Wins at Trial:**

<table>
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<th>JURY</th>
<th>JUDGE</th>
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<td>9/14 (64%)</td>
<td>1/3 (33%)</td>
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**Defendant Wins at Trial**

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<th>JURY</th>
<th>JUDGE</th>
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<td>5/14 (36%)</td>
<td>2/3 (66%)*</td>
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* both were directed verdicts
VERDICTS AND JUDGMENTS
POST-TRIAL AND ON APPEAL

Post-Trial Rulings:

Number pending: 2
Number decided: 5
Plaintiff wins: 0
Defendant wins: 5*

* In one case, defendant's JNOV was reversed on appeal.

Appeals:

Number pending 2
Number decided 5
Plaintiff wins: 2 (40%)*
Defendant wins: 3 (60%)

* Includes one case in which a state supreme court declined to hear an appeal from an unfavorable judgment.

SIZE OF DAMAGE AWARDS
(Combined Compensatory and Punitive)

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<th>AWARDS</th>
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<tr>
<td>0</td>
<td>0</td>
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<td>10,000 - 24,999</td>
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<td>500,000 - 999,999</td>
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<td>1,000,000 -- up</td>
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* includes one award against plaintiff on counterclaim.
LDRC BULLETIN No. 13

DAMAGES WATCH CASE LIST

I. TRIALS

A. Plaintiff Wins

   
   Award (Judge): $450,000 actual
   $600,000 punitive
   $1,050,000 total

   Status: Verdict for county board member after finding that newspaper and editorial writer libeled the official by calling him a liar in an editorial. Appeal pending.

   
   Award (Jury): $350,000 compensatory
   $450,000 punitive
   $800,000 total

   Status: Verdict for former U.S. Attorney in libel action based upon article in defendant newspaper. Post trial motions and appeal pending.

   
   Award (Jury): $1 actual
   $7500 negligence
   $2500 to husband for loss of wife's services
   $10,001 total

   Status: High school newspaper story critical of cafeteria food found to libel school cook.
4. **Williams v. Pulitzer Broadcasting Co.** (Missouri Cir. Ct., August 6, 1984)

   Award (Jury): 
   - Verdict in favor of anchorman 
   - $100,000 actual 
   - $1,000,000 punitive (against publisher) 
   - $2,500 punitive (against reporter) 
   - $1,102,500 total

   Status: 
   - Private figure libeled by broadcasters imputing conviction for crime.

B. **Defendant Wins**

1. **Defalco v. Parade Magazine** (Sup. Ct., N.J., 1984)

   Award (Judge/directed verdict): 
   - Public figure failed to prove actual malice in action based on magazine story portraying him as a member of the Mafia.

2. **Hardy v. A.H. Belo Corporation** (Tx. 1985)

   Award (Jury): 
   - $290,000 (exemplary, recommended by jury under Texas' special issue practice.)

   Status: 
   - Former assistant warden at Texas Department of Corrections not libeled by newspaper account.
3. **Holding v. Muncie Newspapers** (Henry County, Indiana, No. 78 - C - 417, 1984)

Award (Jury): -0-

Status: Salvage yard owner not libeled by newspaper account of city patronage benefits enjoyed by his business.


Award (Jury): -0-

Status: Article suggesting plaintiff had role in Kennedy assassination not libelous.

5. **Sharon v. Time, Inc. 83 Civ. 4660 (S.D.N.Y. 1985)**

Award (Jury): -0-

Status: Verdict for defendant in action arising out of article on massacre in refugee camp.

II. POST-TRIAL MOTIONS AND APPEALS

A. Defendant Wins

1. **Falwell v. Hustler** (Dist. Ct., Roanoke, VA.)

Award (Jury) $200,000 (intentional infliction of emotional distress)*

(*$100,000 compensatory against Hustler & Flynt (jointly & severally); $50,000 against each: (punitive)).

Holding: JNOV for defendant. Statements too incredible to believe not actionable.
2. **LaRouche v. NBC** (Dist. Ct., E.D. Va. 1984)

Award (Jury):

- $2,000 actual
- $3,000,000 punitive
- $3,002,000 total (against plaintiff on counter-claim)

Holding: Public official defamation plaintiff found to have interfered with NBC's newsgathering process while the network was preparing stories on him.

Post trial ruling: Plaintiff's motion for JNOV denied; remittitur granted on counterclaim, punitives reduced to $200,000.


Award (Judge directed verdict): -0-

Holding: Private figure false light invasion of privacy action; grant of directed verdict affirmed.


Award (Jury):

- $15,000 actual

Holding: Candidate in local election claimed he was libeled by radio talk show host's caller. The trial court entered JNOV for plaintiff's failure to prove actual malice with convincing clarity. Appeals court affirmed.
(11 Med.L.Rptr. 1146 (W.D. Texas, 1984)

Award (Jury):
$34,000 actual
$86,000 punitive
$120,000 total

Holding: Mortician sued for libel in trade journal publication. Defendant was granted JNOV for insufficient evidence of actual injury and insufficient proof of actual malice.


Award (Jury):
$4500 compensatory
$5500 punitive
$10,000 total

Holding: Florida Supreme Court affirmed appellate court's reversal of verdict for plaintiff police officer, based upon trial courts' failure to instruct jury that plaintiff was public official.

Status: Petition for cert. denied by U.S. Supreme Court.

B. Plaintiff Wins

1. DeBerry v. News Publishing Company (see News Note No. 8; Med.L.Rptr. 1/29/85)

Award (Jury): $75,000 actual

Holding: Georgia Supreme Court declined to review appellate court's affirmation of verdict for plaintiff Deputy Warden.

Status: Petition for cert. filed.
   
   **Award (Jury):**  
   $250,000 compensatory  
   $1,800,000 punitive  
   $2,050,000 total  
   
   **Holding:**  
   Company executive libeled by newspaper's imputation of improper business practice and favoritism.  
   
   **Post Trial ruling:**  
   JNOV  
   
   **Results of appeal:**  
   Jury verdict reinstated  
   
   **Damages Update of Cases Previously Reported in LDRC Bulletin No. 11**  
   
   **Case List**  
   
   **Deloach v. Beaufort Gazette**  
   *cert. denied, 53 U.S.L.W. 3342*  
   
   **Douglas v. Hustler Magazine, Inc.**  
   damages against magazine reduced to 600,000.  
   
   **Embers Supper Club v. Scripps - Howard**  
   *cert. denied.*  
   
   **Harris, et. al v. The Gazette, Inc.**  
   plaintiff's verdict affirmed; see 11 Med.L.Rptr. 1609  
   
   **International Security Group, Inc. v. the Outlet Co.**  
   plaintiff's verdict affirmed.
Lerman v. Flynt Distributing Co.
plaintiff's verdict reversed, case dismissed. Petition for cert. filed; see 11 Med.L.Rptr. 3/19/85, "News Notes".

Levine v. CMP Publications, Inc.
rehearing en banc denied, damages award affirmed, cert. not sought.

Lewis v. Port Packet Corporation
actual damages award affirmed, punitive damages award reversed.

Lexington Herald Leader v. Graves
cert. denied.

Lipscomb v. Richmond News
arguments heard on appeal to State Supreme Court.

Matthews v. Charlottesville Newspaper, Inc.
plaintiff's verdict affirmed.

Sisler v. Gannett Company, Inc.
plaintiff's verdict affirmed by superior court; additional appeal expected.

Sprague v. Philadelphia Inquirer
post-trial motions denied by three-judge trial court; 1 dissent.
1984 saw the media again rocked by yet another upsurge in major libel actions. It was the year of General Westmoreland and General Sharon, of the CIA and Senator Laxalt, of Supreme Court Judges in Pennsylvania and a Governor in South Dakota, of the politicization and organizational support for libel actions as an ever more potent means of chilling or punishing the media. No amount of defense resources, of study or public information, can overnight put an end to such monumental developments. But LDRC, for its part, continued to pursue its important work in 1984, with renewed urgency in the face of these disquieting trends.

In addition to LDRC's basic information gathering, studies, publications and litigation support services, a very substantial amount of time and energy was spent educating the press and the public to the significance of current trends. LDRC's new findings on the media's improved performance at trial, and its findings on the media's continued pre-trial and post-trial successes, received widespread coverage and were again an important influence on the terms of the public debate over current libel issues and trends. LDRC also took an active part in that debate, in particular by means of the important statements made during the annual LDRC Steering Committee dinner. It was there that Mike Wallace brought attention to the troubling aims of political groups who use libel litigation as a weapon against the media. And it was there that New York Mayor Koch's simple but eloquent message -- that public officials should be answering their critics not in the libel courtroom but in the court of public opinion -- stood out as a clarion call to sanity and restraint against the tumult of public official libel actions, 1984-style.

In the report that follows, more particulars of LDRC's impressive range of projects during its fourth year of operations are presented. The picture that emerges, we believe you will agree, is one of continued accomplishment, on behalf of LDRC's now more than sixty supporting organizations, as well as on behalf of the even larger number of media organizations -- and the public at large -- who also share a common interest in LDRC's purposes and activities.

Finally, we would, as always, add our thanks to those many, many individuals and organizations who gave their time and support -- moral and financial -- to LDRC in 1984. We look forward gratefully to continued support as LDRC enters 1985, its fifth year, with the ambitious agenda for useful action outlined herein.

New York City
January 7, 1985

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

The idea that ultimately led to the formation of the LDRC had its genesis several years ago with the informal meetings and discussions of an "Ad Hoc Libel Group" -- several attorneys representing media organizations concerned about adverse developments in the libel field. Later, in 1979 and early 1980, proposals were entertained to formalize such efforts under the aegis of a new "umbrella" organization. Finally, in November, 1980, these activities culminated in the formation of a Steering Committee, the election of a Chairman and the retainer of a General Counsel for a new entity, the "Libel Defense Resource Center."

In its first years of operation LDRC moved rapidly from theory to reality, firmly establishing itself as a vital and creative organization operating effectively on behalf of the entire media community. Substantial funding was provided by an impressive array of leading trade groups, professional organizations and media entities. An information bank and clearinghouse system were established and utilized by libel defendants and their attorneys. Various special projects and studies were formulated and undertaken. LDRC was increasingly looked to as a source of useful and authoritative information by attorneys practicing in the field as well as by journalists, academics, government officials and others with an interest in libel and privacy developments.

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. LDRC maintains its headquarters and small staff 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 and representatives of most of the nation's leading media organizations.
Finances

In 1984, LDRC obtained voluntary contributions from 54 of its supporting organizations totalling more than $110,000. In addition, substantial revenues were also realized from interest on income; sales of LDRC materials, including the 50-State Survey, the quarterly Bulletin, the LDRC Libel Litigation Formbook, brief bank digests, jury instruction bank, LDRC administrative fees and proceeds from the LDRC annual dinner program. With this money, LDRC was able to fund a total budget (including all special projects and activities) that approached $200,000 to pay for legal fees; fees for administrative staff; stipends for law student interns; fees for other legal research; rent for office space including an additional office acquired in 1984 to accommodate LDRC's expanded operations; printing and distribution of the Bulletins; the computerization of more than 1000 records including contributors, subscribers, press contacts, and LDRC's brief bank digests; the publication of the LDRC 50-State Survey which was expanded in 1984 to include circuit by circuit reports in addition to the state reports on libel and invasion of privacy law; the publication of the major studies as summarized in this report and all other day-to-day operations of the Center.

LDRC Steering Committee

The sixty-two organizations represented on LDRC's Steering Committee in 1984 (up from fifty-one in 1983) 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: American Association for the Advancement of Science; American Broadcasting Companies, Inc.; American Newspaper Publishers Association; American Society of Journalists and Authors; American Society of Newspaper Editors; Association of American Publishers; Association of American University Presses; Authors League of America; Bantam Books, Inc.; Bergen Evening Record Corporation; CBS Inc.; CMP Publications, Inc.; CNA, Insurance; Capital Cities Communications, Inc.; Council of Writers Organizations; Cox Enterprises, Inc.; Doubleday & Company, Inc.; Dow Jones &
LDRC 50-State Survey

In 1984 LDRC's most ambitious single project continued to be the annual 50-State Survey of current developments in media libel and invasion of privacy law. The 900-plus page 1984 Survey was a revision and expansion of the 1983 edition (846 pages), again prepared by LDRC's state-by-state network of expert media defense firms. In 1984, the Survey was expanded further to include circuit by circuit reports on these issues, also prepared by expert media defense law firms in each of the twelve federal circuits. The circuit reports complement those of the states by offering a narrative overview of libel and privacy developments in each of the federal circuits, plus practice hints of assistance to the attorney or media defendant called upon to defend a libel or privacy action in any of the federal circuits. Sales of the 1983 Survey paid for the project and it is hoped that the 1984 Survey will be similarly self-funding.
LDRC Litigation Studies

During 1984 LDRC published two major studies on litigation trends, one on damages in libel actions and one a study of motions for summary judgment. Both are complete updates and companion documents to previous LDRC studies on these issues.

(i) Damages Update

LDRC's litigation studies in 1984 continued to be the authoritative point of departure for the ongoing discussion of recent trends in the libel field. LDRC's two-year update of "Defamation Trials, Damage Awards and Appeals," covered the period from 1982 through 1984 with a total of 63 cases analyzed. The initial study in 1982 had covered 54 cases between 1980 and 1982. The new data documented that, for the first time in the past several years, there has been an improvement in the rate of media defense success at trial. The Study found an overall media loss rate when libel cases go to trial of 54%, down from 89% in the prior two-year period. Before juries the loss figure cited was 62%, also down from 89%. With regard to damages, LDRC's study showed that the average initial award remained essentially unchanged from the previous study at slightly over $2 million dollars. However, the number and percentage of cases in which million-dollar awards were entered was up, as was the average size of punitive damages when awarded. LDRC's data further showed that the media's complete success in challenging the "megaverdicts" often awarded at trial continued between 1982 and 1984. Another two years had gone by, but still not a single million-dollar award has yet been finally affirmed on appeal. The LDRC damages study was widely cited in the trade and general press.

(ii) Summary Judgment Study

LDRC also completed a two-year followup study of motions for summary judgment in 1984. The new Study of 136 summary judgment motions involving media defendants, when combined with LDRC's earlier study of 110 motions, enabled LDRC to examine the results of almost 250 motions covering the four years since Hutchinson v. Proxmire cast some doubt on the availability of summary judgment. The new LDRC study,
confirming the results of the earlier study, documented that summary judgment continues to be the rule rather than the exception in libel litigation. Based upon this additional LDRC data, the hypothesis that Hutchinson might significantly reduce defendants' success in securing summary relief must therefore continue to be questioned, at least as a statistical matter. Overall, the LDRC data revealed that defendants' summary judgment motions prevailed in just under 74% of the cases studied during the 1982-84 period. This success rate was down only slightly from the 75% rate shown in LDRC's 1980-1982 study. At the trial court level there was also no significant change in the success rate of summary judgment. The current study revealed that defendants have been granted summary judgment in 80% of the cases at the trial level up fractionally from the earlier study which showed a success rate of 79%. On appeal, the success rate of summary judgment was down, but only by 4%, from the 70% success rate of the earlier period. Still, substantially more than 6 out of 10 defendants' summary judgments are granted after appeals have been completed.

LDRC Bulletin

In 1984 the primary means of disseminating information about LDRC's resources and materials continued to be the LDRC Bulletin. Published quarterly, Bulletin reports on LDRC special studies and other activities provide news of recent libel and privacy developments and list available reports and materials which can be ordered from LDRC. The LDRC Bulletin is available by subscription ($60 per year in 1984; $75 in 1985). LDRC sold 260 subscriptions this year. Income from Bulletin sales is used to support LDRC's general budget. In 1984, LDRC also published an index to Bulletins Nos. 1-10 which was distributed free to subscribers. A specially embossed Bulletin Binder was also made available in 1984. This volume holds ten Bulletins and the index. In 1985 LDRC hopes to increase its paid subscription base. When combined with sales of backissues, special studies excerpted from the Bulletins, indexes and embossed binders, it is estimated that LDRC will generate in excess of $20,000 in 1984 to support LDRC programs and expects to generate as much as $22,500 in Bulletin revenue to support programs and activities in 1985. 1984 Bulletins, in addition to publishing the special studies described above, covered the following key topics, among others: comprehensive listings of Supreme Court actions and developments; the texts of important speeches at the LDRC.
annual dinner; current news items of interest; the final part of a two-part LDRC analysis of private figure standards under Gertz; ongoing bibliographic lists of briefs available at LDRC, organized by case name and by legal issue; a preliminary report on "pattern jury instructions"; and a bibliographic listing of actual and requested jury instructions available at LDRC, organized by issue and case name.

Information Services

(i) LDRC/CBS Computer Brief Bank

In 1984 LDRC completed its computerization of the combined LDRC/CBS brief bank. Substantive and bibliographic information covered some 75 key legal issues in 125 cases and encompassed 250 legal points made in the digested briefs. Full digests and photocopies of any brief in the LDRC/CBS Brief Bank can be ordered through LDRC. More than 100 briefs and brief digests were completed and added to the computer bank in 1984.

(ii) LDRC Case Files

In 1984 LDRC continued to maintain, update and expand its state by state files of pending libel cases. When received by LDRC, generally in advance of publication, case opinions or litigation documents are indexed by case name, state and legal issues(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 1984, LDRC had developed active files of such opinions, briefs and other litigation materials in well over 575 cases pending in all U.S. jurisdictions.

(iii) Special Issue Files

In 1984 LDRC continued to maintain its active special issue files covering well over 100 key legal issues, closely paralleling libel and invasion of privacy issues identified in the Media Law Reporter's classification guide. These files collect materials, in addition to those contained in the active LDRC case files or general archival materials, on high priority issues such as media vs. non-media standards; absolute privilege; libel claims involving reviews and criticism; appellate review; discovery; burden of proof; motions to dismiss; punitive damages; reporter's privilege in libel
actions; state Gertz standards; statute of limitations; summary judgment; use of expert witnesses (see below); counterclaims for malicious prosecution; definition of actual malice and public figure; right of publicity; related editorial torts; bookseller, printer and distributor liability; invasion of privacy; venue in libel actions; and insurance, among many others. Finally, a special collection of law review articles and separate files for jury instructions and other litigation forms are maintained. A bibliographic listing of LDRC's growing law review library was published in LDRC Bulletin No. 10 and a listing of jury instructions on file at LDRC was published in Bulletin No. 11.

(iv) Expert Witness Project

In 1984 LDRC contacted more than 100 expert witnesses in 40 states. By means of a detailed questionnaire LDRC has culled a significant amount of information and now maintains files on more than 50 experts for both the defense and the prosecution of libel claims. Additional data on file includes general information about the use of such witnesses, the admissibility of expert testimony, transcripts of expert testimony and motions and briefs arguing for or against the use, or the limitation, of expert testimony. The Expert Witness Project will continue in 1985 as LDRC seeks to gather more data and to identify additional experts. This information will be made available only to media defendants and their counsel by specific request.

(v) Responding to Inquiries

In addition to providing general information through mass publication to LDRC's entire constituency, in 1984 LDRC counsel and staff continued to be available to answer specific inquiries from libel defendants or their counsel and other interested organizations or individuals who contacted LDRC, by telephone or by mail, for special assistance. Such assistance, which is provided either without fee or with the imposition of modest administrative fee ($7.50 per request), ranged from simply alerting the caller 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, at times utilizing LDRC's network of knowledgeable organizations, attorneys and other individuals. Such inquiries -- more than
225 in 1984 -- covered the gamut of issues and problems that can be presented in libel counselling or libel litigation. Inquiries not involving specific litigations or legal issues, primarily from scholars or researchers interested in general developments in the libel field also demanded the time and attention of LDRC staff. Finally, a number of callers have sought assistance in securing knowledgeable libel counsel or in alerting potential amici curiae to issues and appeals of interest to them.

Press Coverage

With the advent of the widely publicized Westmoreland and Sharon libel trials, LDRC has been virtually inundated with press requests for information and interviews. Such requests from more that 75 news organizations were responded to in 1984, most of them in the last three months of the year. As a result, LDRC has become highly visible, through the studies and data it has produced, and through the comments of its General Counsel, as an invaluable information source on the vital issues at stake in these actions.

(i) Broadcast Coverage

LDRC responded to numerous requests for information by broadcasters, radio and television. In addition, LDRC's Counsel was interviewed, taped or appeared live on several major news programs including the NBC Today Show, the CBS Evening News, ABC Niteline and a number of appearances, live and taped, on the Cable News Network, WCBS-TV in New York and WGN-TV in Chicago. In addition, numerous radio interviews were broadcast around the country on local stations, and overseas, on the Voice of America.

(ii) Print Coverage

LDRC's print coverage was equally impressive. Journalists from all over the country, particularly those covering the Westmoreland and Sharon trials, called continually for background information, general analyses and relevant comments from LDRC through its Counsel. Consequently, LDRC enjoyed wide coverage by the major wire services and in such newspapers and magazines as Business Week, Newsweek, Time, U.S. News and World Report, the Economist, The Washington Post, the New York Times, the Wall Street Journal, the Boston Globe, the
Philadelphia Inquirer, Newsday, the Gannett wire service, the London Sunday Times and the Los Angeles Times. Data released by LDRC was also covered in the New Yorker, the Christian Science Monitor, the Progressive, the Columbia Journalism Review and the Washington Journalism Review. In addition, LDRC continued to receive in 1984 much coverage in the trade press. All of LDRC's press releases, studies and publications were covered in the Media Law Reporter, the key publication reaching LDRC's legal constituency. Other specialized coverage was secured in U.S. Law Week, the National and New York Law Journals, the American Bar Association Journal and the Los Angeles Daily Journal. LDRC activities were also noted in 1984 in most of the key media trade publications, including Editor & Publisher, Presstime, Publishers Weekly, Broadcasting and Folio.

Annual Steering Committee Dinner

LDRC's annual Steering Committee dinner, traditionally scheduled to coincide with the PLI Communications Law Seminar, was held on November 7. The theme for this year's dinner program was "Libel, Public Officials, Journalism and the Public Interest." Speakers at the dinner, attended by more than 300 media attorneys and executives, were New York Mayor Edward I. Koch, and CBS Correspondent Mike Wallace. In this current litigious climate, the remarks from these two equally outspoken men were particularly relevant and provocative. Koch criticized the use of libel actions by public officials because such suits threaten to destroy the constitutional "balance," the "healthy tension that must exist between the press and public officials." He further said that "a free and open press is vital to this nation," and that "we must find ways to solve such problems without putting our essential freedoms on trial." The Mayor concluded by saying, "Let us rely not on the libel courts, but on the court of public opinion." To our knowledge, Mayor Koch is the first public official to speak out in this manner against public official libel actions. Mr. Wallace addressed the impact of libel suits by public officials on investigative journalism and decried the " politicization of libel actions", particularly those brought by public officials with the support of politically-oriented groups. Master of Ceremonies for the evening's program was E. Gabriel Perle, recently retired Corporate Vice President at Time Incorporated, who was honored with a brief presentation. LDRC's annual dinner program received coverage in at least three separate items in the New York Times, in a cover article in the New York Law Journal and was taped by the Cable News Network.
1985 Programs and Projects

In 1985, in addition to continuing its many current activities as outlined above, LDRC hopes to embark upon at least four additional major projects: the LDRC Jury Attitudes Research Project; the development of a Jury Instructions Manual; a Symposium on jury trial techniques (for defense counsel only); and the publication of a comprehensive, empirical study of defamation actions by public officials.

(i) Jury Attitudes Research Project

In 1985 LDRC hopes systematically to interview jurors who have actually served in recent libel trials in order better to understand how jurors respond to libel issues and journalistic practices in reaching their verdicts, so often highly unfavorable to the media defendant. LDRC has already received a grant to interview one jury which recently ruled against a major newspaper in a public official libel action and imposed a huge damage award. The planning for those initial interviews is well underway and they should be completed early in 1985. It is hoped, thereafter, that a series of additional juror interviews, in a representative sampling of other recent cases, can be funded and completed and that a report and analysis of LDRC's findings can serve as one of the planning documents for LDRC's jury trial Symposium later in the year.

(ii) Jury Instructions Manual

In 1984 LDRC undertook two preliminary studies of jury instructions in libel actions. A review of state "pattern" jury instructions was published in Bulletin No. 10 and a bibliographic listing of actual and requested jury charges, in specific recent cases, was published in Bulletin No. 11. In 1985, LDRC hopes to issue an even more comprehensive and useful compilation and analysis of jury instructions, probably as a separate publication. Included in that LDRC "Jury Instructions Manual" would be actual jury instructions organized by key legal issue; any judicial glosses on such instructions; briefing materials and citations in support of particular instructions; and, possibly, proposed "model" jury instructions representing the most favorable and effective language possible as to each key legal issue in a libel charge.
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(iii) Symposium on Trial and Jury Techniques for Media Defense Counsel

LDRC studies, covering the major stages of the libel litigation process from early motions to dismiss to final appeals, have forcefully documented that by far the weakest link in the media's defense of libel claims is the trial stage, particularly trials before juries. Clearly, therefore, the major challenge of these recent developments is to improve media defense performance in the trial of libel cases. In 1983 LDRC, in concert with the American Newspaper Publishers Association and the National Association of Broadcasters, mounted a highly successful libel workshop for media defense counsel only. That Workshop covered a wide range of issues, from pre-publication counselling and pre-litigation claims, to an overview of the entire gamut of litigation stages and techniques. In 1985 LDRC expects to mount, it is hoped again in conjunction with ANPA and NAB (and possibly other organizations), another defense-counsel only program, this time focusing more specifically and systematically on libel trials and jury practice. While final details must be agreed upon among the sponsoring organizations, it is preliminarily envisioned that the Libel Trial and Jury Practice Symposium would be a two or two-and-a-half day conference held in the late summer or fall of 1985. Prior to the Symposium a series of ambitious projects would be undertaken (to the extent they can be funded), including the jury attitudes surveys referred to above; the formulation and testing of model jury instructions; the possible videotaping of a mock jury trial for presentation at the Symposium in edited form; and the pre-program preparation of other Symposium materials and papers.

(iv) Public Official Watch

One of the most noticeable -- and troubling -- features of the libel landscape in 1984 was the apparent increase in the number and seriousness of libel actions by public officials. In 1985, LDRC plans to do a comprehensive empirical study of the frequency and incidence of such public official libel actions, currently and in the past. LDRC's "Public Official Watch" study will not only count and list these actions, but it will attempt authoritatively to assess their impact on journalism and the public interest.
1984 Budget

As LDRC entered its fifth full year of operations, the Steering Committee approved an interim budget for 1985 at its annual meeting on November 7. The interim budget was set at the level of 1984 expenditures pending a wide-ranging review by a special budget subcommittee. The budget review subcommittee will carefully assess the current administrative and financial structure of LDRC and make recommendations to the Executive Committee regarding LDRC's 1985 budget and any adjustments thereto and will report back to the Steering Committee in connection with the preparation of the 1986 budget. Consideration will be given by the subcommittee to what LDRC's supporters feel are the appropriate size and content of LDRC's programs.

During 1985, funding of LDRC's budget will continue to be based upon a combination of voluntary contributions from supporting organizations and self-generated revenues. LDRC's self-reliance should continue to increase as self-funding exceeds 50%. Despite this increased self-reliance, voluntary contributions will remain a vitally-important source of LDRC's revenues in 1985. Such contributions increased last year by more than 20%, with the loss of only one major contributor (out of more than four dozen) and the addition of almost a dozen new supporting organizations.

In 1985 it is again hoped that current contributors will renew, and possibly increase, their voluntary financial support. Several of LDRC's supporters have already renewed their contributions for 1985, with a few substantially increasing their levels of giving. Leading these early supporters in increasing their contribution was a pledge by CBS Inc. of $10,000.

In addition to the basic and 50-State Survey budgets, separate budgets will continue to be established for any special projects. Each of these would either be self-funding or specially-funded. Each special project will be subject to specific review and approval by the Executive Committee under the policy guidelines approved by the Steering Committee in November 1983. Specially-funded projects in 1985 are expected to include publication of the LDRC Jury Instructions Manual, the LDRC Jury Attitudes Surveys; and the LDRC Jury Trial Symposium.