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KEY FINDINGS OF LDRC's 1995–96 50-STATE SURVEYS

INTRODUCTION

This year, as most readers of the BULLETIN are aware, LDRC has published not one — but two — volumes of its 50-STATE SURVEY. In June, the first edition of the new LDRC 50-STATE SURVEY: MEDIA PRIVACY AND RELATED LAW was released. And this month the twelfth annual edition of the original SURVEY, now entitled the LDRC 50-STATE SURVEY: MEDIA LIBEL LAW, was published.

What follows is a summary of the key findings of both SURVEYS published by LDRC in 1995. The findings are organized by topic and generally follow the outline of each SURVEY volume. The presentations are limited, with regard to the 1995–96 LIBEL SURVEY, to developments since publication of the prior volume, and with regard to the 1995–96 PRIVACY AND RELATED LAW SURVEY, to cases not previously cited in the original SURVEY volume and decided in either 1994 or 1995.

I. FINDINGS OF THE 1995–96 MEDIA LIBEL SURVEY

A. SUBSTANTIVE LAW

1. Defamatory Meaning

Defamation by Implication/Innuendo

In a decision newly reported in the 1995–96 LIBEL SURVEY, the New York Court of Appeals held that a statement that could be reasonably read as asserting that plaintiff attorney had prepared a false affidavit on behalf of client was capable of a defamatory meaning. *Armstrong v. Simon & Schuster Inc.*, 85 N.Y.2d 373, 625 N.Y.S.2d 477, 649 N.E.2d 825, 23 Media L. Rep. 1532 (1995). Upon finding an explicit defamatory statement, the New York Court of Appeals refused to adopt a standard for allowing or disallowing libel by implication.

In another newly reported decision, a New Mexico appellate court recognized a cause of action for defamation based on implication. *Moore v. Sun Publishing Corp.*, 118 N.M. 375, 881 P.2d 735, 23 Media L. Rep. 1072 (Ct. App. 1994). The suit involved a letter from a newspaper’s advertising director stating that the newspaper had lost business and the former publisher had been discharged because of his decision to charge a fee for affidavits of publication. The test of defamatory implication set forth by the court required an examination of the defamatory inferences that “might reasonably be drawn from a materially true communication,” followed by an evaluation of whether the defendant “has done something beyond the mere reporting of true facts to suggest that the [defendant] intends or endorses the inference.”
In a case involving a television broadcast that strongly suggested that the plaintiff had murdered his wife, the First Circuit Court of Appeals acknowledged that “defamation can occur by innuendo as well as by explicit assertion,” although it ultimately upheld a grant of summary judgment on the grounds that the plaintiff had failed to establish evidence of negligence and because there was “substantial circumstantial evidence” that pointed to the plaintiff as the only suspect. Brown v. Hearst Corp., 54 F.3d 21, 23 Media L. Rep. 1984 (1st Cir. 1995).

Finally, the Seventh Circuit recently held that although plaintiffs were not specifically identified as having tampered with medical equipment in order to make it appear that elderly patients required eye surgery, the implication that they were involved with these practices was sufficient to allow them to withstand a motion to dismiss. Desnick v. American Broadcasting Companies, Inc., 44 F.3d 1345, 23 Media L. Rep. 1161 (7th Cir. 1995).

**Incremental Harm**

During the past year, without citing the incremental harm doctrine, the Nevada Supreme Court appeared to apply it to the claim that the plaintiff animal trainer had beaten his orangutans with a steel rod: “Once we all know (and see on television) that Berosini strikes his animals with some kind of black rod, it is unlikely that we would change our opinion or have a more ‘derogatory opinion against him’ based on the rods’ being steel rather than wood.” People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 111 Nev. 615, 895 P.2d 1269, 23 Media L. Rep. 1961, 1967 (1995).

A Delaware court applied the incremental harm doctrine in dismissing an action based on statements made to a newspaper reporter that had previously been published and that merely reiterated what the reporter had previously read in court files. Barker v. Huang, 1994 WL 682566, C.A. No. 90C-05-250 (Del. Super. July 26, 1994).

The incremental harm doctrine was also involved in two suits considered by federal appellate courts during the past year. Without specifically invoking the doctrine, the First Circuit appeared to apply it in Brown v. Hearst Corp., supra, holding that the suggestion that the plaintiff had disposed of his wife’s body “in some insidious fashion” was “not an act that adds measurably to the taint of deliberate murder.” 54 F.3d at 26, 23 Media L. Rep. at 1987. By contrast, although the Seventh Circuit recognized the incremental harm doctrine in Desnick, supra, it reversed the district court’s dismissal of a libel claim, holding that the record was insufficiently developed on a motion to dismiss to rule on the issue. 44 F.3d at 1351, 23 Media L. Rep. at 1164–65.

**Of and Concerning**

According to the 1995–96 LIBEL SURVEY, a number of cases were decided in the last year on the basis of whether the allegedly defamatory statement was “of and concerning” the plaintiff. A Georgia appellate court reversed a grant of summary judgment to defendants in a suit brought by 9 of 29 discharged hospital employees based on an editorial in a hospital newsletter characterizing those
discharged as “criminals or suspected criminals.” *Davis v. Copelan*, 215 Ga. App. 754, 452 S.E.2d 194 (1994). The court held that there was a genuine issue of fact as to whether the average reader would identify plaintiffs as members of the group. 215 Ga. App. at 763–64, 452 S.E.2d at 202. And a New Jersey appellate court held that comments critical of a professional’s business activities were “of and concerning” her wholly owned business. *Graves v. Ryan*, et al. (No. A-4203-93T5, App. Div., April 18, 1995).

An appellate court in Ohio dismissed an action on the grounds that statements made generally about a tax department and not the tax administrator himself were not actionable. *Stow v. Coville*, 96 Ohio App. 3d 70, 644 N.E.2d 673, appeal dismissed, 71 Ohio St.3d 1412, 641 N.E.2d 1110 (1994). And an appellate court in New Mexico held that if criticism can be interpreted as criticism of a government entity, rather than a government official, the First Amendment requires adoption of the former interpretation. *Andrews v. Stallings*, 119 N.M. 478, 892 P.2d 611 (Ct. App. 1995).

Two federal courts in New York dismissed libel suits on the grounds that the allegedly defamatory statements were not of and concerning the plaintiffs. See *Cardone v. Empire Blue Cross & Blue Shield*, 884 F. Supp. 838, 847 (S.D.N.Y. 1995) (plaintiff not mentioned by name in any press releases and no reasonable person could conclude that the statements referred to plaintiff); *Anyamu v. Columbia Broadcasting System, Inc.*, 887 F. Supp. 690 (S.D.N.Y. 1995) (“Nigerians engaged in international business with United States citizens” comprises a group of more than 500 individuals);

In another case dismissed on the grounds that it was not “of and concerning” the plaintiffs, the Third Circuit looked beyond the mere size of the group (25 individuals) to the nature of the group (which it characterized as “amorphous and ill-defined”) to determine that readers would not ascribe the allegedly defamatory statement to any individual member. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), cert. denied, 115 S. Ct. 1691 (1995).

In a suit brought in response to an investigative report on practices at an eye care center, the Seventh Circuit reversed the district court’s dismissal on the grounds that the report was not “of and concerning” two of the plaintiff physicians. *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 23 Media L. Rep. 1161 (7th Cir. 1995). Specifically, the district court held that the plaintiffs had failed to establish that viewers would believe they were being accused of tampering with “eye glare” machines in order to create signs of cataracts in elderly patients. While conceding that the report did not specifically name the two doctors, both were shown questioning patients about glare, and that part of the broadcast discussing the tampering with the glare machines immediately followed one of these examinations. The court concluded that although the inference that both plaintiffs were mixed up in the tampering “is not inevitable,” it was “sufficiently probable” to survive a motion to dismiss.” Id. at 1349, 23 Media L. Rep. at 1163.

Finally, a federal court in the D.C. Circuit held that statements made about the plaintiff’s client, which could have implied that plaintiff was not adequately prepared, were not “of and concerning” the plaintiff. *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 23 Media L. Rep. 1695 (D. D.C. 1995), appeal docketed, No. 95-7105 (D.C. Cir. May 2, 1995).
2. Opinion

Despite the Supreme Court’s rejection, in *Milkovich v. Lorain Journal*, of a “wholesale exemption” for anything that might be considered “opinion,” during the past year courts have continued to protect opinionated statements in a variety of ways. Currently 11 states reject *Milkovich* and independently protect opinion under state law,1 3 states have concluded that *Milkovich* did not alter the protections available to opinion under prior multifactor contextual tests,2 and 14 states have applied *Milkovich* without addressing the issue.3

For example, a number of recent cases were dismissed by Florida appellate courts as involving nonactionable “rhetorical hyperbole” or “vigorous epithet.” *Seropian v. Forman*, 652 So.2d 490 (Fla. 4th DCA 1995) (“influence peddling”); *Davis v. La Verdad*, ___ So.2d ___ (Fla. 3rd DCA 1995) (“pro-Castro”); *Pullum v. Johnson*, 647 So.2d 254 (Fla. 1st DCA 1994) (“drug pusher”). In *Pullum*, the court reached its determination after examining the full context in which the statement had been made. And in a recent case from the D.C. Circuit, a federal court characterized the assertion that plaintiff was “guilty of misleading the American public” as an “ideal prototype” of the type of statement protected under *Milkovich*: “It is rhetorical hyperbole; it does not state actual facts about an individual; it cannot be proven true or false.” *Lane v. Random House Inc.*, 23 Media L. Rep. 1385, 1391 (D.D.C. 1995).

Also during the past year, the Ninth Circuit looked to context in affirming a dismissal on summary judgment, holding that the context in which allegedly defamatory statements were made negated the impression that they implied false assertions of fact. *Partington v. Bugliosi*, 56 F.3d 1147, 23 Media L. Rep. 1929 (9th Cir. 1995). In applying the Ninth Circuit’s three-part test for determining whether a statement implies an assertion of objective fact, which had been established in *Unelko v. Rooney*, the circuit’s first decision construing *Milkovich*, Judge Reinhardt expressly noted the court’s intent to “flesh out the Unelko framework.” Id. at 1933. Thus, although *Partington* also rested on a conclusion that the statements in question were incapable of being proven true or false, the court emphasized the need to “examine the work as a whole, the specific context in which the statements were made, and the statements themselves to determine whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact.” Id. According to the LIBEL SURVEY reporter, the approach in *Partington*, while different analytically from pre-*Milkovich* decisions, is likely to yield the same results.4

In other recent cases dismissed for failure to establish the requisite defamatory assertion of

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1Iowa, Massachusetts, Michigan, Nebraska, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Virginia.

2California, Colorado, and West Virginia.


4See 1995–96 LIBEL SURVEY, at 124.

One Florida case was dismissed as involving “pure opinion,” that is, opinion based upon fully disclosed nondefamatory facts. *Stembridge v. Mintz*, 652 So.2d 444 (Fla. 3d DCA 1995). In reversing a libel plaintiff’s summary judgment, the court ruled that a client’s bar complaint to the effect that his attorney “misquoted Florida law” and which inquired “whether that is a bar violation” was based on fully disclosed facts, undisputed by the plaintiff, and thus constituted nonactionable “pure opinion.”

During the past year, the Nevada Supreme Court employed a similar analysis in reversing a $4.2 million jury verdict based on statements made by defendants regarding a backstage videotaping of an animal trainer’s treatment of his orangutans. *People for the Ethical Treatment of Animals v. Bobby Berosini*, Ltd., 111 Nev. 615, 895 P.2d 1269, 23 Media L. Rep. 1961 (1995). The statement that plaintiff “regularly abuses his orangutans” was held to be merely an “evaluative opinion” based on fully disclosed facts, in this case the videotape of the plaintiff hitting the animals with rods. *Id.* at 1966. In addition to the common law protection afforded to such evaluative opinions, the court identified a separate state constitutional privilege, under Article 1, § 9 of the Nevada Constitution, which provides that “every citizen may freely speak, write and publish his sentiments on all subjects. . .” *Id.* at 1966–67.

Although it is unclear from the Nevada Supreme Court's decision in *Berosini* whether the court intended to establish additional protection for opinionated statements beyond that provided under *Milkovich*, in a decision newly reported in the 1995–96 *LIBEL* SURVEY the Ohio Supreme Court explicitly rejected *Milkovich* as too narrow. *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St. 3d 279, 649 N.E.2d 182 (1995). The court reaffirmed its pre-*Milkovich* holding in *Scott v. News-Herald*, which had adopted the four-part *Oilman* test for differentiating fact from opinion, basing its reading of the opinion privilege on the Ohio State Constitution.


3. Truth/Falsity

Although truth is normally held to be an absolute defense to an action for defamation, in a nonmedia case newly reported in the 1995–96 *LIBEL* SURVEY, the Rhode Island Supreme Court held

According to the 1995–96 *LIBEL SURVEY*, nearly all the other newly reported decisions on this subject have dismissed cases in which the defendant established either the literal or substantial truth of an allegedly defamatory statement. *See Schaefer v. Newton*, 868 F. Supp. 246, 252 (S.D. Ind. 1994) (statements about double-murderer who bragged about being a serial killer found to be true); *Dulgarian v. Stone*, 420 Mass. 843, 848 (1995) (technically inaccurate statement counterbalanced by accompanying video, so that “[v]iewed as a whole, the tenor of the report was accurate”); *Wesav Financial Corp. v. Lingefelt*, 450 S.E.2d 580 (S.C. 1994) (accurate statements transmitted from a creditor to a credit agency cannot support defamation claim); *Randall's Food Market, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) (“literally true” statement a “complete defense” to slander); *Washington v. Naylor Industrial Services, Inc.*, 893 S.W.2d 309 (Tex. App.—Houston [1st Dist.] 1995, no writ) (statements made by employer to employee’s supervisor that employee had failed his drug screening test were literally true, even though employee subsequently passed a confirmatory test); but see *Carr v. Mobile Video Tapes*, 893 S.W.2d 613 (Tex. App.—Corpus Christi 1994, n.w.h.) (material fact issue as to substantial truth of television broadcast regarding warrant for arrest of horse owner on charge of cruelty to animals when broadcast may have incorrectly suggested that owner had avoided arrest).

**Burden of Proof of Falsity**

Although it is well settled as a matter of constitutional law under *Philadelphia Newspapers v. Hepps* that the plaintiff bears the burden of proof in all cases involving either public official/figure plaintiffs or issues of public concern, there is a paucity of law on the requisite quantum of proof. During the past year, the Ninth Circuit held that plaintiffs need establish falsity by only a preponderance of the evidence, and not — as defendants had argued, and is the case for actual malice — by clear and convincing evidence. *Rattray v. City of National City*, 51 F.3d 793, 801 (9th Cir. 1994), cert. denied, 64 U.S.L.W. 3240. By contrast, several appellate level decisions in Maryland held that public figures must prove falsity and defamatory meaning as well as actual malice by clear and convincing evidence. *See Williams v. Chesapeake Publishing Corp.*, 101 Md. App. 263, 267, 646 A.2d 1031, 1032-33 (1994), cert. granted, 337 Md. 180, 652 A.2d 124 (1995); *Shapiro v. Massengill*, 105 Md.App. 743, 661 A.2d 202 (Md. App. July 6, 1995) (as to fault and damages); *Arroyo v. Rosen*, 102 Md. App. 101, 111, 648 A.2d 1074, 1078 (1994) (fault). In addition to these cases, of those jurisdictions that have considered this issue, the Second Circuit requires only a preponderance of evidence while the Fifth Circuit requires clear and convincing evidence of falsity.3

Also unsettled is the burden of proof of falsity in cases not involving speech of public concern. Although none of the newly reported cases in the 1995–96 *LIBEL SURVEY* have addressed this issue,

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3*See Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970); *Firestone v. Time Inc.*, 460 F.2d 712 (5th Cir.), cert. denied, 409 U.S. 875 (1972). Note, however, that both these decisions are pre-*Hepps*. 

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previously reported decisions in Vermont and Virginia require private figure plaintiffs to prove falsity in all instances. Maine and Wisconsin have explicitly rejected such an extension of *Hepps,* however, and according to the LIBEL SURVEY reporters, Idaho and New Hampshire would be likely to do so, although courts in these states have not yet been presented with the issue post-*Hepps.*


4. Fault

**Determination of Public Figure Status under Gertz**


In an ongoing litigation arising from a docudrama about a highly publicized custody battle that

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4 See *Lent v. Huntoon,* 143 Vt. 539, 470 A.2d 1162 (Vt. 1983); *Gazette v. Harris,* 229 Va. 1, 325 S.E.2d 713, 11 Med. L. Rep. 1609 (Va. 1985). Note, however, that both these decisions are pre-*Hepps.*


involved charges of child molestation, the Fourth Circuit recently rejected defendants’ argument that because of their numerous public statements and appearances, the grandparents of the child should be held to be limited purpose public figures. *Foresich v. Capital Cities/ABC Inc.*, 37 F.3d 1541, 22 Media L. Rep. 2353 (4th Cir. 1994). The court concluded that the grandparents’ activities, which included an appearance on the Phil Donahue Show, were merely defensive responses to the mother’s charges and that they had not voluntarily injected themselves into the controversy.

In a nonmedia case reported during the past year involving a contractual dispute between two pharmaceutical companies, the Fourth Circuit reversed the district court’s holding that the plaintiff, American Cyanamid, a major pharmaceutical manufacturer and distributor, was a limited purpose public figure. *McKnight v. American Cyanamid Co.*, unpublished (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3248. The court ruled that the defendants had failed to meet the Fourth Circuit’s initial requirement for limited purpose public figure status, namely a preexisting public controversy about the allegedly defamatory statement, holding that the dispute, which concerned one firm’s efforts to market a drug developed by the other company, did not involve an issue that would potentially affect the public.

Finally, in a divided opinion in a nonmedia suit, Massachusetts Supreme Judicial Court ruled that a public employee who was a candidate for office in a union election was not a limited purpose. *Bowman v. Heller*, 420 Mass. 517, 651 N.E.2d 369 (1995). The dissenting judges argued that the court had previously held that candidates for union elections were limited purpose public figures as a matter of law. 420 Mass. at 528, 651 N.E.2d at 376 (Nolan, J., dissenting) (*citing Materia v. Huff*, 394 Mass. 328, 331, 475 N.E.2d 1212 (1985)). Although the majority sought to distinguish the two cases on the basis that, in *Bowman*, there was no claim that the union election had received public attention, 420 Mass. at 524, 651 N.E.2d at 374, the dissent argued that “an election [such as a union election] is the absolute paradigm of a public controversy” and that the plaintiff should therefore have been considered a limited purpose public figure. *Bowman*, 420 Mass. at 529, 651 N.E.2d at 377 (Nolan, J., dissenting).

**Application of Actual Malice Rule**

As reported in 1995–96 LIBEL SURVEY, during the past year summary judgment was granted in several cases on the issue of actual malice. In affirming a trial court’s grant of summary judgment, a Georgia appellate court noted that a failure to investigate the mayor’s statement regarding money found in the safe of the police chief did not constitute actual malice despite a reporter’s knowledge that the two men were allegedly “political enemies.” *Terrell v. Georgia Television Co.*, 215 Ga. App. 150, 449 S.E.2d 897, 23 Media L. Rep. 1092 (1995). In *Davis v. Big Horn Basin Newspapers, Inc.*, 884 P.2d 979, 23 Media L. Rep. 1345 (Wyo. 1994), the Wyoming Supreme Court affirmed the trial court’s grant of summary judgment, holding that a showing of “actual malice” will not be satisfied by the plaintiff’s “subjective interpretation” of the defamatory meaning of a statement but requires proof that the defendant made the statement with knowledge of its falsity or with reckless disregard of whether it was false or not.
In three recent cases in Louisiana, appellate courts emphasized the distinction between actual malice and ill will or negligence. In *Turpley v. Colfax Chronicle*, 650 So. 2d 738, 740 (La. 1995), the Louisiana Supreme Court held that “actual malice may not be inferred from evidence of personal spite, an intention to injure, or a bad motive.” In *Henderson v. Richardson*, 649 So. 2d 134 (La. App. 2d Cir. 1995), an intermediate appellate court distinguished between a defendant’s subjective belief in the truth of the information provided by the source at the time of publication and subsequently obtained evidence of the unreliability of that source. And in *Davis v. Borskey*, 643 So. 2d 179 (La. App. 1st Cir. 1994), *writ granted*, 648 So. 2d 398 (La. 1994), another appellate court overturned a substantial jury award on the ground that the evidence of motive and negligence that had been offered was insufficient to demonstrate actual malice.

By contrast, despite remanding for a new trial on punitive damages unless the plaintiff accepted a remittitur, a Pennsylvania Superior Court affirmed a trial court’s admission into evidence of a reporter’s expressions of ill-will against the plaintiff, holding that juries may be allowed to hear such proof as evidence of actual malice in appropriate circumstances. *Sprague v. Walter*, 656 A.2d 890 (Pa. Super. 1994) (“Sprague II”), *petition for appeal pending*. In so ruling, according to the Pennsylvania LIBEL SURVEY reporter, the court appeared without explanation to contradict its conclusion on the identical issue in *Sprague I*, 357 Pa. Super. 570, 516 A.2d 706 n.18 (1987), *aff’d*, 518 Pa. 425, 543 A.2d 1078, *appeal dismissed*, 488 U.S. 988 (1988). There the court had held that evidence of the reporter’s motive was irrelevant because the record disclosed no proof that the reporter had expressed an intention to harm the plaintiff through false publications, and that in such circumstances mere proof of ill-will “would not transform itself into actual malice.”


Finally, in *St. Surin v. Virgin Islands Daily News*, 21 F.3d 1309, 22 Media L. Rep. 1545 (3d Cir. 1994), the Third Circuit reversed a grant of summary judgment, finding that there existed a genuine issue of material fact as to an editor’s knowledge at the time a reporter’s article was rewritten. The original draft had quoted a federal prosecutor as acknowledging that an investigation was ongoing but refusing to state whether charges would be filed whereas the published article stated that the government expected to file charges.

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*1995–96 LIBEL SURVEY, at 731.*
Private Figure Fault Standard under Gertz

According to the 1995-96 LIBEL SURVEY, a decisive majority of jurisdictions that have determined the applicable fault standard under Gertz v. Robert Welch, Inc. do not impose a fault standard more demanding than the minimum required under federal constitutional law — that is, 42 jurisdictions permit liability upon a showing of mere negligence,¹⁰ with only three requiring plaintiffs to establish actual malice,¹¹ and one applying a standard more demanding than negligence but less demanding than actual malice.¹²

Notably, however, in all three cases reported during the last year in which the applicable Gertz standard has been considered, courts have adopted a more demanding standard than negligence in cases in which the allegedly defamatory statement involves a matter of public concern. The most explicit holding was the adoption of an actual malice standard by the Alaska Supreme Court. Mount Juneau Enterprises, Inc. v. Juneau Empire, 891 P.2d 829, 23 Media L. Rep. 1684 (Alaska 1995).

In New Jersey, the Supreme Court adopted a bifurcated Gertz standard. Turf Lawnmower Repair v. Bergen Record Corp., 139 N.J. 392, 655 A.2d 417, 23 Media L. Rep. 1609 (1995). Under the new standard, actual malice is applied to businesses concerned with matters of public health and safety, businesses subject to substantial government regulation, and/or businesses that have been charged with criminal fraud, a substantial regulatory violation, or consumer fraud that raises a matter of legitimate public concern, including actions that if true would violate New Jersey’s Consumer Fraud Act. In all other cases, a negligence standard is applied. According to the New Jersey LIBEL SURVEY reporter, the new standard substantially narrowed the Appellate Division’s ruling that the sale and servicing of lawnmowers was by itself a matter of public interest.¹³

Finally, according to the Louisiana LIBEL SURVEY reporter, the Louisiana Supreme Court’s recent decision in Palmer v. Hebert, — So. 2d — (La. 1995), may be read as establishing an actual malice standard in private figure cases involving issues of public concern where defamation per se is not at issue.

Among cases dismissed during the past year for failure to meet the applicable Gertz fault standard, the producer and distributor of the GERALD0 show were held by a New Hampshire state court to have not been negligent in a broadcast claiming that plaintiff had sexually abused his children,


¹¹Alaska, Colorado, and Indiana.

¹²New York (gross irresponsibility).

¹³1995–96 LIBEL SURVEY, at 621.
used them in child pornography, and engaged in satanic practices with them, and was involved in an international child pornography and molestation ring. *Middleton v. Elizabeth Sutton, et al.*, Civil No. 92-589-B (N.H. 1995). Although the defendants knew that the plaintiff had passed a lie detector test and that some of those accusing plaintiff were biased against him, and had failed to discover that an investigator working for the state of Georgia had concluded that plaintiff had not abused his children, the court concluded that "it was not unreasonable for the defendants to publish the allegedly defamatory statements."

**Standard for Nonmedia Versus Media Defendants**

Whether nonmedia defendants may assert the same constitutional privileges available to media defendants remains — at least technically — an open question in the U.S. Supreme Court. Overall, however, according to the 1995–96 *LIBEL SURVEY*, the great majority of jurisdictions that have considered the issue do *not* distinguish between media and nonmedia defendants in applying the rules announced in *Gertz*.

Thus, 26 jurisdictions, either explicitly or implicitly, require private-figure plaintiffs to prove some level of fault as a prerequisite to the recovery of compensatory damages, regardless of the status of the defendant.14 By contrast, only six jurisdictions have either explicitly or implicitly refused to extend such protection to nonmedia defendants,15 with the remainder either having not yet addressed the issue or having divided authority in their lower courts.

In addition to the 26 jurisdictions that decline to distinguish between media and nonmedia defendants in all cases involving speech of public concern, another 13 jurisdictions refuse to distinguish between media and nonmedia defendants on the application of actual malice, which may arise either when the plaintiff is a public figure/official or when a private-figure plaintiff seeks presumed damages or punitive damages in a case involving speech of public concern.16


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15 Arkansas, Kentucky, Minnesota, Oregon, Vermont, and Wisconsin.

16 Georgia, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, North Carolina, Oregon, Pennsylvania, Rhode Island, Texas, and Wyoming.
1609 (1995). Finally, a Wisconsin trial court, reviewing conflicting cases at both the state and federal court level, concluded that the Wisconsin Supreme Court would not impose a higher burden on nonmedia defendants in a case involving a public figure. American Family Mut. Ins. Co. v. Edgar, 23 Media L. Rep. 1555, 1561 (Waukesha Cty. Cir. Ct. 1995).

**Standard for Issues of Public Concern versus Private Concern under Gertz**

During the past year the Alaska Supreme Court held that an article concerning the presence of hazardous materials on the site of a proposed tramway project involved an issue of public concern. Mount Juneau Enterprises, Inc. v. Juneau Empire, 891 P.2d 829, 23 Media L. Rep. 1684 (Alaska 1995). Similarly, in a nonmedia decision a federal court in New Jersey held that a publication involving the storage of chemicals was an issue of public concern because it addressed health and environmental risks. Container Mfg. Co. v. Ciba-Geigy Corp., 870 F. Supp. 1625 (D. N.J. 1994). In an unpublished nonmedia decision, the New Jersey Appellate Division held that the questions involving public expenditures on waste disposal operations were also matters of public concern. Graves v. Ryan et al. (No. A-4203-93T5, N.J. App. Div. April 18, 1995). Finally, the New Jersey Supreme Court held that accusations that a business had violated the state's Consumer Fraud Act involved a matter of public concern. Turf Lawnmower Repair v. Bergen Record Corp., 139 N.J. 392, 655 A.2d 417, 23 Media L. Rep. 1609 (1995).

5. Privileges

Fair report, fair comment, neutral reportage, and other common law privileges have proven to be of continuing utility to the media in its coverage of events of significant public concern. According to the 1995–96 LIBEL SURVEY, 50 jurisdictions (46 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) recognize a fair report privilege, 12 by statute,17 31 by common law,18 and seven by both statute and common law.19 Thirty-nine jurisdictions recognize a qualified privilege for fair comment, four by statute20 and 35 by common law.21 Finally, in 15

17Alabama, Georgia, Guam, Idaho, Michigan, Montana, New York, Puerto Rico, South Dakota, Texas, Utah, and Wyoming.


19Arizona, California, Louisiana, Kentucky, Ohio, Virgin Islands, and Wisconsin.

20California, North Dakota, Oklahoma, and Texas.

21Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Puerto Rico, South Carolina, Tennessee, Virgin Islands, Virginia,
jurisdictions at least one court has recognized the doctrine of neutral reportage, ten jurisdictions have recognized related principles that might lead to adoption of neutral reportage or provide similar protection under the common law, there is split authority in two jurisdictions; and only four jurisdictions have explicitly rejected the privilege.

**Fair Report Privilege**

In a newly reported case from a federal court in the D.C. Circuit, a hearing before the Taxi Commission was held to be the type of official proceeding that is meant to be covered by the “fair report” privilege. *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 23 Med. L. Rep. 1695 (D.D.C. 1995) (where statement in an article was a verbatim account of the Taxi Commission Chairman’s comments on plaintiff’s attire, there can be no dispute as to the accuracy of the account); *see also Foretich v. Chung*, 23 Media L. Rep. 1414 (D.D.C. 1995) (defendants’ broadcast a privileged report of a judicial proceeding).


Finally, in a recent federal case applying Tennessee law, the court applied the fair report privilege to an article based on allegations made in an affidavit in a proceeding to which plaintiff was not a party. *Stem v. Gannett Satellite Info. Network, Inc.*, 866 F. Supp. 355 (W.D. Tenn. 1994).

**Fair Comment Privilege**

In a nonmedia case during the past year a federal court in Pennsylvania applied what it termed a “fair comment” privilege to the fair and accurate report of statements and pleadings that have not yet been filed, but that will at an appropriate point be filed in the litigation. *Doe v. Kohn, Nast & Graf, P.C.*, 866 F. Supp. 190 (E.D. Pa. 1994).

Washington, West Virginia, Wisconsin, and Wyoming.


23 Arkansas, Colorado, Hawaii, Iowa, Louisiana, Michigan, Missouri, Nebraska, Rhode Island, and South Carolina.

24 Illinois and Texas.

25 Kentucky, New York, South Dakota, and Virgin Islands.
Judicial and Official Proceedings Privilege

In cases recently reported in the 1995-96 LIBEL SURVEY, a Connecticut court held that notification by a plaintiff's attorney to a legal malpractice carrier that an action had been commenced against a defendant/insured was absolutely privileged as a statement rendered in connection with a judicial proceeding. Field v. Kearns, 14 Conn. L. Rptr. No. 1, 35 (1995). Similarly, a New York appellate court recently held that statements made at a zoning board public hearing were absolutely privileged. Allan and Allan Arts Ltd. v. Rosenbloom, 615 N.Y.S.2d 410, 22 Media L. Rep. 2214 (2d Dep't 1994), cert. denied, 64 U.S.L.W. 3265 (1995).


An Ohio appellate court applied the judicial proceedings privilege to witnesses testifying in judicial proceedings, even if they are not subpoenaed. North Coast Cable L.P. v. Hanneman, 98 Ohio App. 3d 434, 648 N.E.2d 875 (1994). In a decision construing the scope of Indiana's official proceedings privilege, the Seventh Circuit recently held that the absolute privilege for statements made in pleadings and other judicial proceedings does not extend to trial preparation material such as a survey questionnaire. Raybestos Products Co. v. Younger, 54 F.3d 1234 (7th Cir. 1995).


The Montana Supreme Court held that a citizen's unsolicited report to the police was not covered by the official proceeding privilege. Sacco v. High Country Independent Press, 896 P.2d 411 (1995). The same court found, however, that a police chief's response to the request for information about plaintiff's employment history was covered by a public official privilege under the same statute. Wolf v. Williamson, 889 P.2d 1177 (1995).

In a closely divided opinion, the New Jersey Supreme Court held that statements by an investigator to potential witnesses on behalf of attorneys and insurers in connection with a pending personal injury action and which allegedly defamed the plaintiff in the action were absolutely privileged if the statements had some relation to the nature of the proceedings. Hawkins v. Harris, 141 N.J. 207, 661 A.2d 284 (1995). Statements by the investigator regarding plaintiff's possible insurance and subornation of perjury were held clearly pertinent to the pending proceeding, although other statements regarding possible sexual infidelity were remanded for further consideration as to
The dissenters argued for a qualified privilege, suggesting that granting an absolute privilege to a non-attorney, non-witness, non-party participant in the litigation was granting a license to defame.

Neutral Reportage Privilege


Other Common Law Privileges

In the nonmedia context, during the past year two Florida courts have held that statements made during labor disputes are absolutely privileged if relevant to a labor proceeding. Hope v. National Alliance, 649 So.2d 897 (Fla. 1st DCA 1995) (collective bargaining grievance proceeding); Weitzner v. U.S. Precast Corp., 645 So.2d 180 (Fla. 3d DCA 1994) (unfair labor practices complaint to NLRB).

In another recently reported nonmedia decision, a Maryland appellate court held that statements made to a university committee investigating possible scientific misconduct were entitled to a qualified but not an absolute privilege. Arroyo v. Rosen, 102 Md. App. 101, 648 A.2d 1074 (Md. Ct. App. 1994).

In other nonmedia cases, a Florida appellate court granted absolute immunity to statements made by a consultant for a physicians’ impaired practitioner program because the statements related to his position as a “governmental official.” Goetz v. Noble, 652 So.2d 1203 (Fla. 4th DCA 1995). Similarly, a school principal’s comments to the media on the termination of a basketball coach were held to be within the scope of his executive duties and absolutely privileged, Cameli v. O’Neal, 1995 WL 398893 (N.D. Ill. July 2, 1995), as were statements made by a village board president about a village administrator’s job performance to other trustees, the media and the public. Drillis-Eizis v. Village of Orland Hills, 1995 WL 88800, at *9 (N.D. Ill. Mar. 1, 1995).

A Texas appellate court held that defamatory comments made by the Texas Attorney General were in the performance of his official duties and absolutely privileged. Salazar v. Morales, 1995 WL 372112 (Tex. App.—Austin, no writ).

And in Wisconsin, it was held that a company did not abuse a privilege to communicate on matters of common interest by publicizing to the community the results of its investigation of allegations of sexual harassment among its employees. Olson v. 3M Company, 188 Wis.2d 25, 46, 523 N.W.2d 578, 586 (Ct. App.), review denied, 527 N.W.2d 335 (Wis. 1994). In another decision, a Wisconsin appellate court held that the mere allegation that a party has abused a conditional privilege, absent evidentiary material of record to support such a claim, is not sufficient to defeat a
summary judgment motion based on conditional privilege. *Shannon v. Alliance for the Mentally Ill*, 189 Wis.2d 17, 525 N.W.2d 299, 304 (Ct. App. 1994).

Several recent federal court decisions dismissed cases based upon plaintiff's failure to overcome a common law privilege. See, e.g., *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308 (5th Cir. 1995) (employee who was terminated due to incidents of alleged sexual harassment failed to establish actual malice so as to overcome employer's qualified privilege); *Gulf South Medical and Surgical Inst. v. Aetna Life Ins. Co.*, 39 F.3d 520 (5th Cir. 1994) (affirming summary judgment based on failure of doctor who sued employee benefit plan administrator for disallowing claims for the doctor's services on failure to establish evidence of actual malice); *Halbert v. City of Sherman*, Texas, 33 F.3d 526, 529-30 (5th Cir. 1994) (affirming grant of summary judgment based on security guard's qualified privilege to report to police that plaintiff was intoxicated and plaintiff's failure to establish requisite actual malice to overcome privilege).

**Application of Defamation Privileges to Other Torts**

In several cases during the past year reported in the 1995–96 LIBEL SURVEY, courts have rejected attempts by plaintiffs to make "end runs" around the constitutional protections available under defamation law. In Georgia, a state appellate court held a plaintiff to the standards of a defamation action despite plaintiff's attempts to cast his claim as one for fraudulent inducement. *Raskin v. Swann*, 216 Ga. App. 478, 454 S.E.2d 809 (1995). Similarly, after affirming the trial court's grant of summary judgment on a defamation count, the First Circuit characterized plaintiff's false light privacy claim as "simply a restatement of [plaintiff's] defamation claim under a different heading" and therefore subject to the constitutional requirements of falsity and negligence. *Brown v. Hearst Corp.*, 54 F.3d 21, 27, 23 Media L. Rep. 1984, 1988 (1st Cir. 1995). As to the plaintiff's claim for emotional distress, after noting that "many of the legitimate news stories that appear in the media involve foreseeable distress for the subject of the story," the court concluded that the "generally accurate coverage" did not remotely approach the requisite conduct needed to establish a claim for intentional infliction of emotional distress. *Id.* at 1988, 23 Media L. Rep. at 27. And in dismissing an action for negligence based upon defendants' failure to prevent purported dissemination of defamatory materials, a New York court held that because the facts alleged by the plaintiff were inseparable from the tort of defamation, "plaintiff is relegated to any remedy that would have been available on that basis." *Butler v. Delaware Otsego Corp.*, 203 A.D.2d 783, 610 N.Y.S.2d 664 (3d Dep't 1994).

Finally, although the Seventh Circuit reversed a grant of summary judgment on a defamation claim resulting from an episode of ABC's "Prime Time Live," which investigated practices at an eye care clinic, Judge Posner was notably unsympathetic to the various other common law claims asserted: "[Defendant] is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort, and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast. If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it . . . then the target has no legal remedy even if the
investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly." Desnick v. American Broadcasting Companies, Inc., 44 F.3d 1345, 23 Media L. Rep. 1161 (7th Cir. 1995).

6. Damages

Actual Damages

As noted in last year's LDRC BULLETIN reporting on new developments, damages remains an intractable issue in defamation.26 In large part this is due to the fact that, although in Gertz v. Robert Welch Inc. the Supreme Court limited plaintiffs in suits involving matters of public concern to "actual damages," it defined this category as encompassing not only economic loss but such nebulous and open-ended categories of recovery as "injury to reputation" and "emotional distress." Moreover, in Time v. Firestone the Court declined to hold as a matter of federal constitutional law that proof of reputational loss is a prerequisite to recovery for emotional distress, leaving this issue to the states to determine. According to the 1995-96 LIBEL SURVEY, of jurisdictions that have addressed the question, courts in six jurisdictions allow plaintiffs to recover damages for "emotional distress" without first establishing a loss of reputation,27 with two jurisdictions conditioning recovery for emotional distress on a showing of loss of reputation.28

In damages cases discussed in the 1995-96 LIBEL SURVEY, a federal jury in Louisiana returned a verdict of $2 million for the plaintiff, which was later reduced by remittitur to $500,000. DiLeo v. Davis, 1995 U.S. Dist. LEXIS 70, 23 Media L. Rep. 1242 (E.D. La. 1995). In two nonmedia decisions by the West Virginia Supreme Court reported during the past year, jury verdicts for plaintiffs were upheld. Estep v. Brewer, 453 S.E.2d 345 (W. Va. 1994); Schnupp v. Smith, 249 Va. 353, 457 S.E.2d 42, 50 (1995). Finally, in another nonmedia case, the South Carolina Supreme Court upheld jury damage awards as not grossly excessive. Constant v. Spartanburg Steel Products, Inc., 447 S.E.2d 194 (S.C. 1994).

In an important recent decision involving a variety of newsgathering torts based on an investigative report of food practices at a supermarket, a federal court in North Carolina held that

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plaintiff's failure to allege that the broadcast was false limited its recovery to nonreputational damages. *Food Lion, Inc., v. Capital Cities/ABC, Inc.* 887 F. Supp. 811, 823–24 (M.D. N.C. 1995). The court held that the plaintiff was constitutionally barred from recovering reputational damages without first meeting the First Amendment requirements of falsity and actual malice. *Id.* at 823.

**Presumed Damages**

In cases not controlled by *Gertz*, states are of course free to allow presumed damages without proof of actual malice. According to the 1995–96 *LIBEL SURVEY*, 26 jurisdictions continue to allow presumed damages in such instances.29

In a nonmedia decision recently reported in the 1995–96 *LIBEL SURVEY*, a South Carolina appellate court held that a plaintiff is not required to prove general damages in an action for slander per se, as damages are presumed in such cases. *Constant v. Spartanburg Steel Products, Inc.*, 447 S.E.2d 194 (S.C. 1994). In another recent case, a Minnesota appellate court held that even in a case governed by *Gertz*, it was not necessary for the plaintiffs to establish harm to their reputations in order to withstand a motion for summary judgment. *Richie v. Paramount Pictures Corp.*, 523 N.W.2d 235 (Minn. Ct. App. 1995). It is not clear, however, that the court would permit a damage award absent an eventual showing of reputational loss: “If, at [the close of the appellant’s case in chief or the close of evidence], appellants have not shown their reputations have suffered — either through direct evidence of harm or evidence supporting an inference of harm — then they should not recover damages under their claims for defamation.” *Id.* at 240.

**Special Damages**

Where the allegedly defamatory statement is not held to be defamatory per se, the plaintiff is often required to establish special damages as a precondition to suit. The 1995–96 *LIBEL SURVEY* reports dismissals of suits based upon plaintiff’s failure to establish special damages in two nonmedia cases involving statements that were not held to be defamatory per se. *Webster v. Wilkins*, 217 Ga. App. 194, 456 S.E.2d 699, 23 Media L. Rep. 1979 (1995) (en banc), *cert. denied* (Ga. Ct. App. 1995) (plaintiff failed to financial or economic loss resulting from allegation that she was unfit parent); *Bauer v. Murphy*, 191 Wis.2d 518, 530 N.W.2d 1, 5 (Ct. App. 1995) (special damages not sufficiently alleged by claims of lost “athletic opportunities” and emotional distress, and loss of reputation).

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Punitive Damages

According to the 1995-96 Libel Survey, seven states do not permit punitive damages in defamation cases. In addition, 34 states impose some type of limitation on the availability of punitive damages through their common law, and 15 states limit punitive damages by operation of their retraction statutes.

Recent decisions reported in the 1995-96 Libel Survey involving punitive damages continue to be troubling, however, both at the trial court and appellate level. Thus, although a Pennsylvania Superior Court characterized a $31.5 million punitive damages verdict as "shocking to the court's sense of justice," it left standing $21.5 million of the punitive damages award. Sprague v. Walter, 656 A.2d 890 (Pa. Super. 1995), appeal pending. And in a case involving a matter of private concern, an intermediate Illinois appellate court held that when a statement is slanderous per se, punitive damages may be awarded on the basis of implied simple malice — as opposed to New York Times actual malice. Mullen v. Solber, 648 N.E.2d 950 (Ill. Ct. App. 1995).

In other recent nonmedia decisions, in one case the West Virginia Supreme Court upheld a $50,000 punitive damages award because the defendants acted maliciously by filing grievances and writing letters accusing the assistant principal of the high school which their children attended of violating civil rights laws, being emotionally immature, being totally without ethics, and acting cruelly toward students. Estep v. Brewer, 453 S.E.2d 345 (W. Va. 1994). In another case, following a cursory "independent appellate review," the same court upheld a $100,000 punitive damages award. Schnupp v. Smith, 249 Va. 353, 457 S.E.2d 42 (1995).

In another nonmedia decision, however, the Rhode Island Supreme Court overturned a punitive damages award as failing to meet the rigorous standard set for punitive damages in Rhode Island, under which plaintiffs are required to establish "evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amount[s] to criminality, which for the good of society and warning to the individual, ought to be punished." Johnson v. Johnson, 654 A.2d 1212,

30Massachusetts and Oregon prohibit punitive damages in cases involving the First Amendment; Louisiana, Nebraska, Puerto Rico, and Washington do not allow punitive damages in any cases; and New Hampshire proscribes punitive damages but allows an enhanced recovery in tort cases in which the defendant has acted with malice or wanton disregard for the plaintiff's rights.


According to the 1995–96 LIBEL SURVEY, no judicial decisions during the past year limited the availability of punitive damages in defamation cases, although several states have recently either enacted or amended statutes limiting the availability of punitive damages. See infra, Statutes.

7. Broadcasts and Broadcasters' Liability

According to the 1995–96 LIBEL SURVEY, in a question of first impression in Delaware, a court held that statements broadcast over the radio constitute libel rather than slander, due to the extensive reach of radio airwaves. *Q-Tone Broadcasting, Co. v. Music Radio of Maryland, Inc.*, C.A. No. 93C-09-021 (Del. Super. August 22, 1994).

During the past year, a New York trial court held as a matter of law that by holding itself out to the public as such, Prodigy Services Company, an on-line service, was a publisher for purposes of a libel suit. *Stratton Oakmont Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794, 1797 (Sup. Ct. Nassau Co. 1995). After the defendants moved for reconsideration, the parties reached a settlement, with the plaintiff agreeing not to challenge the defendant's motion. It is unclear at this point, however, whether the trial court will rule on this motion.

B. PROCEDURAL ISSUES

1. Statute of Limitations

New cases reported in the 1995–96 LIBEL SURVEY during the past year include the holding that the adoption of the "single publication rule" by Puerto Rico does not mean that the one year limitations period commences on the publication date even if the plaintiff is unaware of the publication. *Ojeda v. El Vocero*, 94 JTS 131 (1994). Although a rebuttable presumption to that effect exists, appropriate evidence may be produced by plaintiff that he became cognizant of the publication or its effect at some later date, rather than the newspaper's date of publication.

In *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995), the Utah Supreme Court affirmed the dismissal of the plaintiff's defamation claim on statute of limitations grounds, holding that the alleged defamatory statements were "reasonably discoverable," as a matter of law, on the date when they were first published. The court concluded that publication in a widely disseminated newspaper is reasonably discoverable at the time of first publication, reasoning that "[a]ny other rule would unduly prolong the exposure of the media to libel suits by rewarding the inattentive plaintiff."

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33However, it upheld the compensatory damage award on the ground that the statement, although essentially true, had been uttered in spite. *Id.* at 1215. See *supra*, at 5, under Truth/Falsity.
2. Discovery

Reporters Shield Privilege

Currently, according to the 1995-96 LIBEL SURVEY, only North Carolina, Puerto Rico, South Dakota, and Wyoming lack shield protections of one kind or another in either their statutory or common law. Although the Supreme Judicial Court of Massachusetts has declined to promulgate rules that would establish a qualified shield privilege, trial courts in Massachusetts have applied the privilege in certain circumstances.34

According to the 1995-96 LIBEL SURVEY, 26 of the 51 jurisdictions with shield protections have considered their application, either by statute or case law, in the libel context,35 although in at least nine of these jurisdictions courts have refused to apply the shield when a defense in a libel action is based on the source sought to be shielded.36 In a decision recently reported in the 1995-96 LIBEL SURVEY, for example, a New York appellate court upheld an order that a newspaper that invoked the New York shield law to preserve the confidentiality of its three sources for an allegedly defamatory article could not rely on the existence of the sources to establish lack of actual malice. Collins v. Troy Publ. Co., 623 N.Y.S.2d 663, 23 Media L. Rep. 2150 (3d Dep’t 1995).

Two other newly reported cases interpreted the application of the Minnesota shield law to a criminal prosecution. In one, an appellate court held that the shield privilege could not be asserted by a reporter who had witnessed a crime while covering a story, at least where no confidential news source is revealed. State v. Knutson, 523 N.W.2d 909 (Minn. App. 1994). In the other, the court quashed a subpoena of reporters on the grounds that to require reporters to disclose source would be oppressive and undermine the reporters’ ability to utilize confidential sources. State v. Ross, No. KO-94-70, 22 Media L. Rep. 2509 (2d Dist. Oct. 11, 1994) (citing MINN. R. CRIM. P. 22.02, which bars subpoena in criminal case from imposing “unreasonable or oppressive” burden on witness).

Finally, during the past year, the both the Alaska and South Carolina legislatures enacted reporters shield laws. ALASKA Stat. §§ 09.25.300–09.25.390; S.C. CODE ANN. § 19-11-100 (Supp. 1994).

34See 1995-96 LIBEL SURVEY, at 519.


**Discovery of Editorial Matter**

Overall, according to the 1995-96 LIBEL SURVEY, four jurisdictions refuse to permit discovery of editorial matter or process in libel cases and ten others impose limitations on such discovery. Of the remainder of jurisdictions that have addressed the issue, three impose no limitations on discovery of editorial matter and three others are reported as likely to follow *Herbert v. Lando* in permitting such discovery.

No new cases on the scope of the discovery privilege were reported in the 1995-96 LIBEL SURVEY.

3. Summary Judgment

According to the 1995-96 LIBEL SURVEY, the majority of jurisdictions continue to endorse the application of summary judgment in defamation cases: 30 jurisdictions favor summary judgment, 19 have yet to address the question, and only 5 disfavor summary judgment in the libel context.

During the past year, two district courts in the D.C. Circuit took markedly different approaches to the desirability of summary judgment in defamation actions. After noting "the threat to the First Amendment posed by nonmeritorious defamation actions," one court concluded that "it is particularly appropriate for courts to scrutinize such actions at an early stage of the proceedings to determine whether dismissal is warranted.") *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 23 Media L. Rep. 1695 (D.D.C. 1995), appeal docketed, No. 95-7105 (D.C. Cir. May 2, 1995).


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37Illinois, New Jersey, Oregon, and Wisconsin.

38District of Columbia, Idaho, Iowa, Louisiana, Maine, Maryland, Massachusetts, Ohio, Oklahoma, and Texas.

39Connecticut, New Mexico, and New York (federal court).

40Colorado, New Hampshire, and Wyoming.


42Delaware, Florida, Guam, Kansas, Kentucky, Missouri, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virgin Islands, and Virginia.

43Alaska, Maryland, Michigan, New Hampshire, and New Mexico.
standard does not require a court to denigrate the role of the jury when ruling on a motion for summary judgment in a public figure libel case. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." (quoting Anderson v. Liberty Lobby, 477 U.S. at 255).

4. Independent Appellate Review

In cases newly reported in the 1995–96 LIBEL SURVEY, after an independent review of the record, the Arkansas Supreme Court reversed a jury verdict in favor of plaintiff, holding that he had failed to prove actual malice by clear and convincing evidence. Thomson Newspaper Publishing Inc. v. Coody, 320 Ark. 455, 896 S.W.2d 897, 23 Media L. Rep. 2270 (Ark. 1995). Similarly, after reversing a substantial jury verdict for plaintiff because the jury had not been properly instructed as to the burden of proof of actual malice, a Louisiana appellate court engaged in independent appellate review of the record and concluded that the evidence was insufficient to establish actual malice by clear and convincing evidence. Davis v. Borskey, 643 So. 2d 179 (La. App. 1st Cir. 1994), writ granted, 648 So. 2d 398 (La. 1994).

Although a Maryland appellate court conducted an independent review of the evidence of actual malice in a case involving charges of scientific misconduct, the court noted that the heightened standard of review did not apply to credibility determinations or determinations of historical fact. Arroyo v. Rosen, 102 Md. App. 101, 648 A.2d 1074 (Md. Ct. App. 1994). In another nonmedia decision, a Florida appellate court adopted the same deferential standard to the jury's finding of underlying facts, "assuming all of the facts that could be found in favor of the plaintiff were found in favor of the plaintiff," and independently reviewed only whether, taken together, those facts presented clear and convincing evidence of actual malice. Seropian v. Forman, 652 So.2d 490, 494 (Fla. 4th DCA 1995).

Finally, the Supreme Court of West Virginia gave deference not only to issues of witness credibility but also "to the presumption of correctness that attaches to factual findings." Schnupp v. Smith, 249 Va. 353, 457 S.E.2d 42, 50 (1995). The court's "independent appellate review" was then limited to a single sentence: "Having made the independent examination with such deference in mind, we hold that the record fully supports a finding of New York Times malice by clear and convincing evidence." Id.

5. Defendants' Remedies

As the cost of defending even meritless suits continues to increase, the issue of pursuing counterclaims or other types of sanctions against unsuccessful libel plaintiffs has become increasingly relevant. Despite the theoretical availability of remedies for aggrieved libel defendants, as a practical matter such sanctions are not always effective. Thus, although according to the 1995–96 LIBEL
SURVEY, 49 jurisdictions provide some type of remedy for a wrongful civil suit, and 15 jurisdictions have specifically applied such remedies in the libel context, the reporters in eight jurisdictions felt that the remedy provided under their state law is either severely limited or of questionable utility.

Nevertheless in cases newly reported in the 1995-96 LIBEL SURVEY, a number of courts have sanctioned both plaintiffs and their attorneys for the filing of frivolous claims. For example, a federal court in Pennsylvania imposed sanctions exceeding $250,000 on a libel plaintiff and exceeding $13,000 on his attorney for misconduct, including perjured testimony by the plaintiff and what the court characterized as his attorney’s “flagrant violations of the professional standards governing the trial of cases.” Rogal v. Amer. Broadcasting Co., Inc., 23 Media L. Rep. 1001 (1994). The sanctions covered both attorneys' fees and trial costs and were based on the court’s “inherent power to impose sanctions upon parties and their attorneys where they engage in bad faith conduct which abuses the judicial process.” See also Boykin v. Bloomsburg University of Pa., et al., 893 F. Supp. 378 (M.D. Pa. 1995) (applying 28 U.S.C. §1927 to sanction plaintiff’s counsel for vexatious and harassing litigation).

In another case decided during the past year, the D.C. Circuit held that a federal district court had not abused its discretion by awarding $149,000 in sanctions under Rule 11 against a plaintiff with a “litigious history” who had failed to respond to the defendant’s motion for sanctions. Geller v. Randi, 40 F.3d 1300, 23 Media L. Rep. 1401 (D.C. Cir. 1994). Also in the D.C. Circuit, a federal district court sanctioned the plaintiff’s counsel in a case in which the plaintiff later stated under oath that “nobody in the world” had ever told him that [defendant had] defamed him in any way.” Del Canto v. ITT Sheraton, 865 F. Supp. 934, 938 (D. D.C.), appeal docketed, No. 94-7229 (D.C. Cir. 1994). Attorneys’ fees were also awarded by an Idaho court for a suit based upon statements made during a judicial proceeding. Malmin v. Engler, 124 Idaho 733, 864 P.2d 179 (Ida. Ct. App. 1993).

Finally, in a nonmedia case, an Arizona appellate court rejected a claim for malicious prosecution on the grounds that there had been probable cause for the underlying suit. Expressing concern for “a party’s First Amendment right to petition the government,” the court held that “[it] must first conclude that a claim is objectively baseless before it may inquire into the party’s subjective beliefs.” Hess v. Aetna Life Ins. Co., 182 Ariz. Adv. Rep. 24, 26 (Ct. App. Jan. 24, 1995).

4Only Guam, Montana, New Jersey, and Wyoming are reported as having no relevant provisions. The statute in New Mexico is limited to criminal prosecutions.


4District of Columbia, Hawaii, Ohio, South Carolina, Tennessee, Texas, Utah, and Virginia.

In a case recently reported in the 1995-96 LIBEL SURVEY, a federal district court refused to enforce a British libel judgment on the grounds that British libel standards "are repugnant to the public policies of the State of Maryland and the United States [and] would deprive the [defendant in the British suit] of his First and Fourteenth Amendment rights." *Matusевич v. Telnikoff*, 877 F. Supp. 1, 23 Media L. Rep. 1367 (D.D.C.), appeal docketed, No. 95-7138 (D.C. Cir. June 1, 1995). The court identified numerous distinctions between British and U.S. libel law, most notably the absence in Britain of any requirement that libel plaintiffs prove both falsity and fault with respect to statements involving issues of public concern, and prove actual malice with respect to statements regarding public figures.

C. STATUTES

There have been numerous legislative developments of interest during the past year, according to the 1995-96 LIBEL SURVEY.

In 1995 North Dakota became the first state to enact the Uniform Correction or Clarification of Defamation Act. N.D. CENT. CODE §§ 32-43-01 through 32-43-10 (1995).

During their 1995 sessions, several new states passed agricultural disparagement acts, bringing the total of such enactments since 1993 to ten. In Arizona, the "Agricultural Protection Act," A.R.S. § 3-113, gives an action to any "producer, shipper, or association that represents producers or shippers, of perishable agricultural food products that suffers damages as a result of malicious public dissemination of false information that the food product is not safe for human consumption." The Act defines "false information" as "information that is not based on reliable scientific facts and reliable scientific data and that the disseminator knows or should have known to be false." Under the statute a court may award compensatory and punitive damages, treble damages, and "any other appropriate relief," including attorneys' fees to the prevailing party. During the past year, the Oklahoma legislature also enacted an agricultural product disparagement statute. 2 OKLA. STAT. § 3012 (1995).

According to the 1995-96 LIBEL SURVEY, several states enacted statutes to limit punitive damages during the past year. Although not targeted at defamation suits alone, Oklahoma adopted a punitive damages statute that requires "clear and convincing proof that the defendant recklessly disregarded the rights of another" as a prerequisite to recovery of punitive damages and limits punitive damages in such instances to the greater of actual damages or $100,000, unless the plaintiff provides clear and convincing of intentional and malicious conduct, in which case the punitive damages are limited to the greater of twice actual damages, $500,000, or the increased financial benefit derived by the defendant from the misconduct. OKLA. STAT. TIT. 23, § 9.1 (1995).

*Alabama, Arizona, Florida, Georgia, Idaho, Louisiana, Mississippi, Oklahoma, South Dakota, and Texas.*
Texas enacted legislation that would limit punitive damages for most actions to the greater of $200,000 or two times economic loss plus up to $750,000 of noneconomic damages awarded by the jury. TEX. CIV. PRAC. & REM. CODE § 41.008. Additionally, prejudgment interest is not available on an award of punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.007. Indiana has also passed a tort reform statute, HB 1741 (April 27, 1995) which limits punitive damages to three times compensatory damages or $50,000, whichever is less. Finally, during the past year, North Dakota amended its punitive damages statute to allow recovery of punitive damages only upon proof of actual malice rather than, as previously, upon proof of either actual or presumed malice. N.D.CENT. CODE §32-03.2-11.

Texas has also recently enacted legislation with the potential for limiting liability as well as damages in defamation cases by including intentional torts in its proportionate responsibility statute. TEX. CIV. PRAC. & REM. CODE, Chapter 33 (West 1995). Where plaintiff’s percentage of responsibility is determined to be greater than 50%, a defamation claim is barred; and where plaintiff is assigned a percentage less than or equal to 50%, any damages are reduced by a percentage equal to the plaintiff’s percentage of responsibility.

II. FINDINGS OF THE 1995-96 PRIVACY AND RELATED LAW SURVEY

A. FALSE LIGHT

Although no cases reported in the 1995-96 PRIVACY AND RELATED LAW SURVEY involved either the recognition or a refusal to recognize the false light tort, a number of recent false light claims were dismissed for failure to meet one of the requisite elements of the tort. See, e.g., Fratarolli v. Bill Communications, 3 Mass. L. Rprr. 84 (Mass. Super. 1994) (distribution of photo only among food distributors and not to general public insufficient to meet publication requirement); Lane v. Random House, Inc., 23 Media L. Rep. 1385 (D. D.C. 1995) (characterizing a well-known researcher’s views as “misleading” is not highly offensive; dismissed also on ground that statement was constitutionally protected rhetorical hyperbole); Bruenell v. Harte-Hanks Communications, Inc., 3 Mass. L. Rprr. 127, 129 (Mass. Super. 1995) (internal report questioning the propriety of a former municipal employee collecting workers compensation benefits is of legitimate public concern); Doe v. Roe, 638 So.2d 826, 22 Media L. Rep. 1427 (Ala. 1994) (work presented as fiction cannot be basis for false light claim).

In a nonmedia case reported in the 1995-96 PRIVACY AND RELATED LAW SURVEY, a Connecticut court refused to dismiss a false light action, holding that the publication element does not require publication to the general public but is satisfied by publication “to another,” making the extent of publication a question of fact and precluding summary judgment. Baptista v. Hexacomb Corp., No. CV93 0352137 (Super. Ct. J.D. New Haven, June 17, 1994).

According to the 1995-96 PRIVACY AND RELATED LAW SURVEY, a number of courts applied common law defamation privileges to false light actions. Smith v. Arkansas Louisiana Gas Co., 645


In cases reported during the past year, courts have differed as to whether a claim for false light is viable separately when the gravamen of the complaint is a false statement of fact. Compare Goehring v. Wright, 858 F. Supp. 989, 1004-1005 (N.D. Cal. 1994) (only the defamation cause of action can stand and other causes of action, regardless of label, must be dismissed; applying California law), with Q-Tone Broadcasting Co. v. Musicradio of Maryland, Del. Super., C.A. 93C-09-21 (August 22, 1994) (permitting both a slander action and false light action).

In another decision from the past year, a district court in the D.C. Circuit rejected the argument that an advertisement for a book constituted commercial speech, unworthy of the highest level of protection, noting that the “critical question is whether the promotional material relates to a speech product that is itself protected.” Lane v. Random House Inc., 23 Media L. Rep. 1385, 1391 (D.D.C. 1995).

B. PRIVATE FACTS

In cases newly reported in the 1995-96 PRIVACY AND RELATED LAW SURVEY, the Florida Supreme Court held unconstitutional a Florida statute that makes it a second degree misdemeanor to publish the name of an alleged rape victim. State v. Globe Communications Corp., 648 So.2d 110, 23 Media L. Rep. 1116 (Fla. 1994). And in a nonmedia case the Tenth Circuit held that “[a]n expunged arrest and/or conviction is never truly removed from the public record and thus is not entitled to privacy protection.” Nilson v. Layton City, 45 F.3d 369, 372, 23 Media L. Rep. 1375 (10th Cir. 1995) (§ 1983 suit by public school teacher against city and a police officer for officer's disclosure on television news of the teacher's expunged criminal record).

In several other cases decided during the past year, courts have dismissed private facts claims

In a recent nonmedia decision, the Kentucky Supreme Court held that the Kentucky open records law, which exempts from disclosure records of a personal nature where disclosure would clearly be an invasion of privacy, creates an action in favor of the person whose records were disclosed. *Beckman v. Board of Education of Jefferson County*, 873 S.W.2d 575 (Ky. 1994).

Finally, two nonmedia cases were brought in federal court in New York during the past year under 42 U.S.C. § 1983 alleging that disclosure of plaintiff's HIV status by defendant state officials was a violation of one's constitutional right of privacy. *Doe v. New York City*, 15 F.3d 264, 22 Media L. Rep. 1246 (2d Cir. 1994); *Incitti v. Skinner*, 1994 WL 532527 (N.D.N.Y. 1994). These cases are discussed under the section on § 1983, *supra*, p. 37.

C. **Intrusion**

In a case newly reported in the 1995–96 PRIVACY AND RELATED LAW SURVEY, a California appellate court held that a videotaped (but not broadcast) interview of minors on the doorstep of their home, with no adult consent, about murdered friends stated a claim for intrusion as well as intentional infliction of emotional distress. *KOVR-TV Inc. v. Superior Court*, 31 Cal. App. 4th 1023, 37 Cal. Rptr. 2d 431, 23 Media L. Rep. 1371 (1995); *see also infra*, under Intentional Infliction of Emotional Distress, p. 34.

In another recent decision, a California court held that the use of hidden cameras was potentially actionable both as common law intrusion and under the California eavesdropping statute. *Kersis v. Capital Cities/ABC Inc.*, 22 Media L. Rep. 2321 (Sup. Ct. L.A. Co. 1994) (unpublished); *see also infra*, under Eavesdropping, p. 29. By contrast, in a media case a Minnesota appellate court held that Minnesota does not recognize the tort of intrusion and that the Minnesota eavesdropping statute may not be interpreted as creating a cause of action for intrusion. *Copeland v. Hubbard Broadcasting*, 526 N.W.2d 402, 23 Media L. Rep. 1441 (Minn. Ct. App. 1995), review denied; *see also infra*, under Intentional Infliction of Emotional Distress, p. 34. In a nonmedia case reported during the past year, a Massachusetts appellate court held that private employer drug testing program did not violate the state's privacy statute. *Folmsbee v. Tech Tool Grinding & Supply*, 417 Mass. 388, 630 N.E.2d 586 (1994).

Two nonmedia cases decided by Connecticut courts during the past year reached different conclusions as to the offensiveness of the intrusion. In one, the court denied defendant's motion for summary judgment, holding that it was a question of fact whether or not an inventory search of plaintiff's clothing, conducted while plaintiff was an inpatient at the defendant hospital, was highly offensive. *Flowers v. New Britain Gen. Hosp.*, 9 CSCR 699 (June 10, 1994). In the other, however, the court determined as a matter of law that defendant's actions — conducting searches of plaintiff's
office and briefcase, examining company phone records to identify parties called by the plaintiff, and
intrusively surveilling his home in Vermont, undertaken pursuant to a security investigation for
legitimate purposes — were not offensive. *Sorrentino v. Textron Lycoming*, No. 93CV02262 (D.
Conn., March 24, 1995).

1. Eavesdropping/Hidden Cameras/Other Forms of Surveillance

Although eavesdropping statutes have been applied primarily in the area of criminal
prosecutions and in nonmedia cases, three newly reported decisions in the 1995–96 PRIVACY AND
RELATED LAW SURVEY have addressed the application of eavesdropping statutes in civil complaints
against media defendants.

The first was brought by two counselors in a company that offered psychic advice to the
public by means of “900” telephone numbers who were surreptitiously filmed as part of an
Ct. L.A. Co. 1994) (unpublished). They alleged violation of California’s eavesdropping statute,
which requires all-party consent to recording of any “confidential communication” unless the
communication occurs in circumstances under which the parties have no reasonable expectation of
privacy. The court rejected defendants’ argument that the filming had not involved a “confidential
communication” within the meaning of the statute, holding that factual issues existed both as to
plaintiffs’ desire to keep the conversation confidential and the reasonableness of their expectation that
the communication would not be overheard or recorded. 22 Media L. Rep. at 2324.

In the other two cases reported in the 1995–96 PRIVACY AND RELATED LAW SURVEY, both
of which also involved the use of hidden cameras in investigative reports, defendants’ were granted
1161, 1165 (7th Cir. 1995) (Wisconsin and Indiana eavesdropping statutes); *Copeland v. Hubbard
In *Desnick*, which investigated the practices at an eye clinic, individuals cooperating with ABC News
and posing as patients filmed their examinations; and in *Copeland*, which involved an investigative
report on the practices of veterinarians, an employee of a television station who was also a part-time
student accompanied a veterinarian on a visit to a private home.

Unlike the California statute, however, the eavesdropping statutes at issue in both *Desnick*
and *Copeland* required only one-party consent, unless the recording was for a criminal or tortious
purpose. Although in both cases other of the plaintiffs’ claims had survived summary judgment,4
both courts declined to treat the remaining claim as a “tortious purpose” that would trigger liability
under the statute, emphasizing that the statute focuses on the defendant’s purpose in making the
recording and not on any incidental liability that might have thereby resulted. *Desnick*, 44 F.3d at

*Copeland* held that there was a fact question on the trespass claim, see infra, under Trespass, p. 31, and *Desnick*
held that there was a fact question on the libel claim, see supra, under Of and Concerning, p. 3.
1353, 23 Media L. Rep. at 1167 ("Maybe the program as it was eventually broadcast was tortious, for we have said that the defamation count was dismissed prematurely. But there is no suggestion that the defendants sent the testers in to the [plaintiffs'] offices for the purpose of defaming the plaintiffs"); Copeland, 526 N.W.2d at 406, 23 Media L. Rep. at 1444 ("the statute requires that the communication be intercepted for the purpose of committing a tortious act. The evidence is undisputed that KSTP intercepted the communication for commercial purposes and not for the purpose of committing trespass.")

In a newly reported nonmedia case arising from defendant's placement of a tap on his girlfriend's phone, the Montana Supreme Court dismissed the plaintiff's invasion of privacy claim for failure to file timely. Rucinsky v. Hentchel, 266 Mont 502, 881 P.2d 616 (1994). Although, according to the Survey reporter for Montana, the eavesdropping statute does not provide a civil cause of action, the court would apparently have allowed the intrusion claim to proceed, but for the late filing. 266 Mont. at 505, 881 P.2d at 618 ("Phone taping of private, confidential conversations constitutes a wrongful intrusion into one's private activities in a manner likely to cause outrage, mental suffering, shame, or humiliation to an ordinary person.")

New cases applying eavesdropping statutes in the criminal context have involved plaintiff's expectation of privacy in the communication. See, e.g., State v. Duran, 901 P.2d 1197 (Ariz. Ct. App. 1995) (criminal defendant had no reasonable expectation of privacy in contents of a cordless telephone communication); State v. Smith, 641 So.2d 849 (Fla. 1994) (motorist asked to sit in rear of police car had no reasonable expectation of privacy in contents of conversation).

In another criminal case decided in the past year, a Missouri appellate court held that the Missouri eavesdropping statute does not apply to cordless telephones. State v. King, 873 S.W.2d 905 (Mo. App. 1994) (radio broadcasts from a cordless telephone do not constitute wire communications).


2. Related Newsgathering Torts

Creative plaintiffs' lawyers have sought to impose liability on media newsgathering activities in a variety of ways beyond such traditional formulations as defamation and invasion of privacy, framing their claims as actions for fraud, misrepresentation, and breach of contract. For example, in a case newly reported in the 1995-96 Privacy and Related Law Survey, an inmate who alleged that a reporter had "fraudulently induced" a jailhouse interview and left out information concerning the victim in the resulting article, thus allegedly portraying the inmate as a "crazy killer," brought an action for breach of contract and fraud. Raskin v. Swann, No. A94A2109 (Ga. Ct. App. March 3, 1995). Looking beyond the language of the complaint, the court held that claims brought
against the media will be treated as defamation claims if that is the gravamen of the claim. It then affirmed the grant of summary judgment to the defendant because the inmate failed to allege that the publication was false, and omission of information from an admittedly truthful publication cannot support a claim for libel.

In addition to claims for libel, intrusion, trespass, and eavesdropping, the plaintiffs in Desnick v. ABC alleged that defendants had fraudulently procured consent to enter plaintiff’s clinic and interview staff by promising not to use “‘ambush’ interviews or undercover surveillance tactics.” 44 F.3d at 1354, 22 Media L. Rep. at 1161. The Seventh Circuit held that to state an action for promissory fraud plaintiffs were required to establish fraud that is “particularly egregious or . . . is embedded in a larger pattern of deceptions or enticements.” Id. The court then dismissed the claim, finding neither the requisite degree or pattern of fraud: “An elaborate artifice of fraud is the central meaning of a scheme to defraud through false promises. The only scheme here was a scheme to expose publicly any bad practices that the investigation team discovered, and that is not a fraudulent scheme. Id at 1355, 23 Media L. Rep. at 1168.

Two recent appellate decisions by Minnesota courts in recent nonmedia cases have held that a sufficiently “clear and definite” statement is required in order to state a claim for promissory estoppel. Ruud v. Great Plains Supply, Inc., 526 N.W.2d 369, 372 (Minn. 1995); Geraci v. Eckanker, 526 N.W.2d 391 (Minn. Ct. App. 1995). In another recently reported case, a federal court in Nevada dismissed a claim for breach of contract based on the broadcast of an unblurred version of a program, despite the producer’s assurance that plaintiffs they would appear digitized. Does v. KTNV-Channel 13, 863 F. Supp. 1259, 22 Media L. Rep. 2403 (D. Nev. 1994). The court held that there was no action against station for breach of contract because there was no evidence that in making the promise the producer had acted with authority from the media defendant. Compare St. Charles v. Kender, 38 Mass. App. Ct. 155, 159, 646 N.E.2d 411, 413 (1995) (dicta in nonmedia case stating that breach of contract theory would entitle plaintiffs to emotional distress damages where persons agreed to be filmed for television program on promise to obscure their faces).

3. Trespass

In a recent case arising from an undercover investigation of sanitary practices at a supermarket chain, a federal court in North Carolina refused to dismiss plaintiff’s trespass claim, holding that there were factual issues as to whether defendant’s allegedly fraudulent conduct had negated the consent. Food Lion, Inc., v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (1995). In order to obtain footage for the program, ABC employees obtained jobs at Food Lion by means of false resumes and false employment histories. While employed by Food Lion, they obtained over 50 hours of hidden camera footage, six minutes of which was later broadcast on ABC’s program Prime Time Live. In addition to the trespass claim, Food Lion alleged, inter alia, fraud, civil conspiracy, RICO, violation of federal wiretapping statutes, fraud, and unfair and deceptive trade practices. The court dismissed the RICO and wiretapping claims, allowing all other claims to proceed. Nevertheless it held that any recovery for these claims would be limited to nonreputational damages because plaintiff had failed to allege that the broadcast was false. Food Lion, Inc., v. Capital Cities/ABC, Inc. 887 F. Supp. 811, 823–24
In another recently reported case involving the use of hidden cameras in an investigative report, the Minnesota Court of Appeals reversed the trial court's grant of summary judgment to the defendant on a trespass claim, holding that there were factual issues as to whether defendants had exceeded the bounds of the plaintiffs' consent. *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402, 23 Media L. Rep. 1441 (Minn. App. 1995). Although the plaintiffs had granted permission for their veterinarian and a student to enter their home, they were unaware that the student, a part-time employee of the media defendant, was videotaping the visit for the later broadcast, which included two brief video shots of the plaintiff's home. Even though the defendant had not exceeded the geographic or temporal boundaries of the invitation, the court held that there were factual issues as to whether the plaintiff's consent to enter was limited to educational purposes.

By contrast, in dismissing trespass claims in a case involving the use of hidden cameras in an investigative report on practices at an eye clinic, the Seventh Circuit noted that "some cases... deem consent effective even though it was procured by fraud." *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1351, 23 Media L. Rep. 1161, 1165 (7th Cir. 1995). In distinguishing cases in which fraud might be held to revoke previously given consent, the court noted that even though the defendants had gained entry by posing as patients, the clinic offices were held open to the public, the activities of the office had not been disrupted, and there was no invasion of a person's private space. In short, Judge Posner concluded, "the entry was not invasive in the sense of infringing the kind of interest... that the law of trespass protects; it was not an interference with the ownership or possession of land." *Id.* at 1355, 23 Media L. Rep. at 1166.

4. **Ride-Alongs**

Two cases reported in the 1995–96 PRIVACY AND RELATED LAW SURVEY addressed claims resulting from media filming of official investigations. *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 22 Media L. Rep. 1466 (E.D.N.Y.), aff'd, 35 F.3d 680, 22 Media L. Rep. 2225 (2d Cir. 1994) (videotaping of search of private home by federal agents); *Carr v. Mobile Video Tapes, Inc.*, 893 S.W.2d 613 (Tex. App.-- Corpus Christi 1994, n.w.h.) (videotaping and broadcast of investigation by humane society of possible animal mistreatment raised fact issue as to whether defendants' presence on property was "authorized or otherwise privileged").

In *Ayeni*, plaintiffs brought an action under 42 U.S.C. § 1983 after broadcasters accompanied federal agents on their search of their home for evidence of credit card fraud. This case is discussed under § 1983, *supra*, p. 37. In *Carr*, the broadcasters accompanied members of the humane society, who were investigating charges of cruelty to animals. The court rejected all theories of consent offered by defendants, holding that there were factual issues as to whether plaintiff's invitation to the humane society one year earlier to investigate possible water contamination on the property had been unlimited in duration and as to the scope of authority possessed by the employee of the plaintiff whom all defendants claimed had invited them onto the property. 893 S.W.2d at 623.
D. MISAPPROPRIATION/RIGHT OF PUBLICITY

In a newly reported case, a federal court in the D.C. Circuit applied the "incidental use" exception to a suit brought by the author of a book espousing a conspiracy theory of the Kennedy assassination after his picture and quotations from his book were placed in an advertisement for defendant's book, which was highly critical of plaintiff's theory. *Lane v. Random House*, 23 Media L. Rep. 1385, 1391 (D.D.C. 1995).

In a separate case, brought by another of the "conspiracy theorists" who was pictured and quoted in the advertisement for defendant's book, the Second Circuit affirmed the dismissal of plaintiff's claims for misappropriation under New York Civil Rights Law §§ 50, 51 and violation of the Lanham Act. *Groden v. Random House*, Inc., 61 F.3d 1043, 22 Media L. Rep. 2203 (2d Cir. 1995). After holding that the use fell within the "incidental use" exception, the Second Circuit concluded that its conclusion "implies, and might even be required by, First Amendment considerations," namely "the First Amendment interest in protecting the ability of news disseminators to publicize, to make public, their own communications."

In another recent decision involving the New York Civil Rights statute, a state trial court held that an online Internet service provider was a disseminator of the news in the same sense as a newspaper or magazine and thus protected under the incidental use exception. *Stern v. Delphi*, 626 N.Y.S.2d 694, 23 Media L. Rep. 1789 (Sup. Ct. N.Y. Co. 1995). The plaintiff, a well-know radio personality who was running for governor of New York, brought suit after the defendant used his photo in an advertisement for an electronic bulletin board established to invite comments on the merits of his candidacy. In concluding that the incidental use exception covered the defendant's use of the plaintiff's photo to inform the public about the content of its new bulletin board, the court also noted that "what drives the 'incidental use' exception is the First Amendment interest in protecting the ability of news disseminators to publicize . . . their own communications." 626 N.Y.S.2d at 700, 23 Media L. Rep. at 1793.

A number of other cases reported in the 1995-96 PRIVACY AND RELATED LAW SURVEY applied the incidental use exception to dismiss claims for misappropriation. See, e.g., *Newton v. Thomason*, 22 F.3d 1455, 22 Media L. Rep. 1609 (9th Cir. 1994) (no misappropriation of plaintiff's name by using it in television series because plaintiff consented and no evidence name used for commercial purposes); *Aligo v. Time-Life Books, Inc.*, 23 Media L. Rep. 1315 (1994) (no misappropriation in use, in television commercial promoting rock music anthology, of magazine cover depicting plaintiff responding to student protest); *Fratarolli v. Bill Communications, Inc.*, 3 Mass. L. Rptr. 84 (1994) (use of plaintiff's picture in a collage on magazine cover and accompanying article, without identifying the plaintiff and not used in connection with advertising or to solicit business, held "incidental" and therefore not actionable); *Alvarado v. K-III*, 22 Media L. Rep. 2095 (1st Dept. 1994) (photo illustrated general theme of article).

Without mentioning the incidental use exception, in a recent decision a California appellate court dismissed a misappropriation claim, holding that the defendant newspaper had a First
Amendment right to reproduce and sell, in poster form, newspaper pages containing a photograph of a star athlete, both because the posters were themselves newsworthy and also because the paper had a constitutional right to promote itself using its own articles or pictures. *Montana v. San Jose Mercury News*, 34 Cal. App.4th 790-, 40 Cal. Rptr.2d 639, 23 Media L. Rep. 1920 (Cal. Ct. App. 1995).


Finally, in *Taylor v. National Broadcasting Co.*, 22 Media L. Rep. 2433 (Cal. Sup. Ct. L.A Co. 1994), a district court held that an injunction against the network's use of plaintiff's name, image, or trademark would be an unconstitutional prior restraint.

E. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

Among the newly reported cases in the 1995-96 PRIVACY AND RELATED LAW SURVEY, during the past year a California appellate court affirmed the denial of summary judgment on a intentional infliction of emotional distress claim arising from a television news crew's gratuitous disclosure to minor children that a neighbor had killed her children and then committed suicide. *KOVR-TV, Inc. v. Superior Court*, 31 Cal. App. 4th 1023, 34 Cal. Rptr. 2d 431 (1995). The court held that an absence of intent to produce an emotional did not foreclose a jury from concluding that the reporter had acted with reckless disregard. Nor was the fact that the interview was not broadcast of any aid, as the court held that the tort was completed upon the disclosure. In strongly pejorative language, the court concluded that a jury could find the requisite element of intentional infliction of emotional distress had been satisfied. 31 Cal. App. 4th at 1030 (“a jury could find that a television reporter who attempts deliberately to manipulate the emotions of young children for some perceived journalistic advantage has engaged in conduct ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.’”)

In the nonmedia context, in a decision reported during the past year, a District of Columbia court held that a rape victim had an action for intentional infliction of emotional distress against a police officer who ridiculed her during investigation immediately following the incident. *Drejza v. Vaccaro*, 650 A.2d 1308, 1315 (D.C. 1994).

On balance, however, most of the decisions reported in the 1995-96 PRIVACY AND RELATED LAW SURVEY confirm the difficulties facing plaintiffs who bring actions for intentional infliction of emotional distress against the media, both because of the stringent requirements of the tort itself and the constitutional constraints against its recognition in the media context. For example, in assessing whether a media defendant's conduct was sufficiently "outrageous and extreme" to state a claim, a Texas appellate court observed that it was required to "consider the societal interest in protecting freedom of the press." *Carr v. Mobile Video Tapes, Inc., d/b/a KRGV-TV5*, 893 S.W.2d 613 (Tex. App.—Corpus Christi 1994, n.w.h.). And even in the nonmedia context, a Louisiana appellate court...
emphasized that the requirements of extreme and outrageous conduct and severe distress should be strictly construed. Deus v. Allstate Ins. Co., 15 F.3d 506, 414 (5th Cir. 1994), cert. denied, 115 S.Ct. 573 (1995).

Thus the vast majority of cases reported in the 1995-96 PRIVACY AND RELATED LAW SURVEY involved dismissals based upon failure to satisfy the elements of the tort. See, e.g., Chizmar v. Mackie, — P.2d — (Alaska 1995) (allegation of erroneous AIDS diagnosis, failure to acquire informed consent for HIV test, alleged breach of doctor's duty of confidentiality, and a failure to emphasize that a positive test result did not prove anything without further testing and interpretation was insufficient to go to jury); Stewart v. Matthews Industries, Inc., 644 So.2d 915 (Ala. 1994) (to prove outrageous conduct, a plaintiff must show that conduct is so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency as to be regarded as atrocious and intolerable in a civilized society); Brown v. Hearst Corp., 54 F. 3d 21, 23 Media L. Rep. 1984 (1st Cir. 1995) (defendants' conduct had not been negligent and thus could not have been “extreme and outrageous”; “generally accurate coverage in such a case is [not] even remotely close to conduct ‘beyond all possible bounds of decency’ and ‘utterly intolerable in a civilized community.’”); Nelson v. Phoenix Resort Corp., 173 Ariz. Adv. Rptr. 10 (Ct. App. 1994) (humiliating termination of employment photographed by media insufficient to state claim); Clevy v. News Corp., 30 F.3d 1255 (9th Cir. 1994) (omission of plaintiff's name in title credits of 1990 edition of Robert's Rules of Order insufficiently outrageous, and did not produce emotional distress severe enough to support intentional infliction of emotional distress claim); but see Cameron v. Beard, 864 P.2d 538, 548 (Alaska 1994) (supervisor's threats that plaintiff would never be promoted, coupled with his behind-the-scenes efforts to collect evidence of disruptive activity, sufficient to go to jury).

In a recent case reported in the 1995-96 PRIVACY AND RELATED LAW SURVEY, an Arizona appellate court held that where the underlying conduct is defamation-related, both constitutional and common law privileges applicable to defamation may be asserted in a suit for intentional infliction of emotional distress. Lewis v. Oliver, 178 Ariz. 330, 873 P.2d 668 (Ct. App. 1994), cert. denied, 115 S. Ct. 319 (1994). Similarly, in dismissing a claim for intentional infliction of emotional distress, a California court held that the public figure plaintiff had failed to show falsity and actual malice where statement at issue was constitutionally protected expression of opinion. Sagan v. Apple Computer, Inc., 22 Med. L. Rep. 2141 (C.D. Cal. 1994).

Finally, a Georgia court held that a separable claim for intentional infliction of emotional distress is not separately viable when the only basis of the complaint sounds in defamation. Raskin v. Swann, Case No. A94A2109 (Ga. Ct. App. March 3, 1995). By contrast, an Arizona appellate court held that Arizona law permits simultaneous claims for defamation and intentional infliction of emotional distress, although all common law and constitutional privileges appropriate to the defamation law also apply to the claim for intentional infliction of emotional distress. Lewis v. Oliver, 178 Ariz. 330, 873 P.2d 668 (Ct. App. 1994), cert. denied, 115 S. Ct. 319 (1994).
F. Negligent Infliction of Emotional Distress

In cases decided during the past year, the Alabama Supreme Court expressly held that no cause of action for negligent infliction of emotional distress exists in Alabama. *Giddeon v. Norfolk-Southern Corp.*, 633 So.2d 453 (Ala. 1994). Also during the past year the Supreme Court of Iowa held that Iowa does not recognize negligent infliction of emotional distress as an independent ground for liability, but rather as an element of damages which may accompany another tort. *Doe v. Cherwitz*, 518 N.W.2d 362 (Iowa 1994). And a federal court in Nevada rejected a claim for negligent infliction of emotional distress against a media defendant, holding that Nevada does not recognize an independent cause of action for negligent infliction of emotional distress, except in bystander cases. *Does v. KTNV-Channel 13*, 863 F. Supp. 1259, 1264 (D. Nev. 1994).

In a newly reported nonmedia case, the Alaska Supreme Court reversed a grant of summary judgment for the defendant on a claim for negligent infliction of emotional distress that arose from a physician’s misdiagnosis of the plaintiff as HIV positive. *Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995). (The court affirmed the grant of summary judgment to defendant on the intentional infliction of emotional distress claim, however. See supra, p. 35) On the question of whether the plaintiff could recover for negligent infliction of emotional distress absent proof of physical injury, the court declined to join the jurisdictions that had completely dispensed with the requirement, limiting recovery in such instances to cases in which the defendant owed the plaintiff a preexisting duty. The court held that it was a jury question as to whether the plaintiff’s emotional distress was sufficiently severe to meet the requirements of the tort. Finally the court concluded that although the plaintiff’s emotional anxiety was presumptively no longer reasonable after she learned that she was not HIV positive, this did not foreclose the possibility that she could establish, through “appropriate expert testimony,” long-term emotional trauma proximately related to the defendant’s negligent conduct to enlarge “the reasonable window of anxiety.”

By contrast, in another recent case based upon a physician’s negligent misdiagnosis that a patient was HIV positive, the Ohio Supreme Court refused to recognize an action for negligent infliction of emotional distress, limiting recovery to “instances where the plaintiff has either witnessed or experienced a dangerous accident or appreciated the actual physical peril.” *Heiner v. Moretzso*, 73 Ohio St.3d 80, 652 N.E.2d 664, 669 (Ohio 1995). No action will lie, held the court, “where the distress is caused by the plaintiff’s fear of a nonexistent physical peril.” 652 N.E.2d at 670.

G. Prima Facie Tort

In the only case reported in the 1995–96 PRIVACY AND RELATED LAW SURVEY on prima facie tort, a New York appellate court held that a plaintiff capable of alleging a traditional tort may not rely upon prima facie tort to avoid the one-year statute of limitations for intentional torts. *Drury v. Tucker*, 1994 N.Y. App. Div. LEXIS 13348 (4th Dep’t, Dec. 23, 1994).
H. CONSPIRACY

In a recent suit arising from newsgathering practices related to an investigative report of food practices at a supermarket, a federal court in North Carolina refused to dismiss plaintiff's claim for civil conspiracy, adopting the magistrate judge's recommendation without discussion. Food Lion, Inc., v. Capital Cities/ABC, Inc. 887 F. Supp. 811, 823–24 (M.D. N.C. 1995). Plaintiff's numerous other claims, including trespass, fraud, violation of federal wiretapping statutes, RICO violations, and unfair and deceptive trade practices, are discussed under the relevant section. As to all claims, however, the court held that plaintiff's failure to allege falsity limited any recovery to nonreputational damages. Id. at 823.

1. Section 1983

In a case newly reported in the 1995–96 Privacy and Related Law Survey, broadcasters who accompanied federal agents during a search of a private home were sued, along with the agents, under 42 U.S.C. § 1983. Ayeni v. CBS, Inc., 848 F. Supp. 362, 22 Media L. Rep. 1466 (E.D.N.Y.), aff'd, 35 F.3d 680, 22 Media L. Rep. 2225 (2d Cir. 1994). Plaintiffs, who were not under investigation, alleged violation of their constitutional right of privacy. In a strongly pejorative opinion, the district court denied defendants' motions to dismiss, holding that the broadcasters "had no greater right than that of a thief to be in the home" and that it was "grossly unreasonable for the agent not to have known that the presence of private persons he invited in so that they could titillate and entertain others was beyond the scope of what was lawfully authorized by the warrant." 848 F. Supp. at 368.

In two nonmedia cases brought during the past year, federal courts in New York were called upon to determine whether disclosure of an individual's HIV status by state officials was actionable under § 1983 as a violation of one's constitutional right of privacy. Doe v. New York City, 15 F.3d 264 (2d Cir. 1994); Incitti v. Skinner, 1994 WL. 532527 (N.D.N.Y. 1994). In Doe, the Second Circuit held first that the plaintiff had a constitutional right to keep his HIV status private, and second that he had not waived that right by filing a claim for discrimination with the Commission on Human Rights. Doe v. New York City, 15 F.3d 264 (2d Cir. 1994). In Incitti, the court identified a conditional "right of privacy in one's medical history," but dismissed the claim on the grounds that there was "no evidence to link any of the state defendants with the disclosure of plaintiff's medical information to the press."

In nonmedia cases brought under § 1983 in Texas, two courts have held that there is no independent cause of action for monetary damages for the violation of constitutional rights under the Texas Constitution. City of Beaumont et al., v. Bouillion, et al., 896 S.W.2d 143 (Tex. 1995); City of Alamo, et al. v. Montes, 904 S.W.2d 727 (Ct. App. 1995).

In dismissing a § 1983 suit against a municipality and a police officer for the officer's disclosure on television of the teacher's expunged criminal record, the Tenth Circuit recently held that "[a]n expunged arrest and/or conviction is never truly removed from the public record and thus is not

2. **RICO**

In a recent case alleging a variety of claims related to defendant’s newsgathering activities, a federal court granted defendant’s motion to dismiss the claims brought under RICO. *Food Lion, Inc., v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 823–24 (M.D. N.C. 1995). Although the court identified potential racketeering activity in mail and wire fraud in connection with defendants’ submission of false resumes, it held that there was insufficient evidence of a pattern of such activity to support a RICO claim.

Similarly, a federal court in Texas dismissed a RICO claim brought by a televangelist based upon a television broadcast, holding that the broadcast did not involve or threaten long-term criminal activity. *Word of Faith World Outreach Center Church, et al., v. Diane Sawyer et al.*, No. 3:93-CV-2310-T (N.D. Tex. 1995).

**I. INTERFERENCE WITH CONTRACT**

According to the 1995–96 PRIVACY AND RELATED LAW SURVEY, no media cases involving interference with contract were decided in the past year. However, in several nonmedia interference with contract cases, courts have applied common law and constitutional privileges applicable to defamation law. See, e.g., *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994) (all privileges applicable in libel and slander actions are applicable in intentional tort actions that are based upon the publication of false and defamatory statements [applying privilege to publish defamatory statements in judicial proceedings]); accord *Lewis v. Oliver*, 873 P.2d 668 (Ariz. Ct. App. 1994).

1. **Lanham Act/State Unfair Competition Law**

In a recent case arising from an investigative report of food practices at a supermarket, a federal court allowed plaintiff’s claims under the North Carolina unfair and deceptive trade practices statute to proceed, but held that plaintiff’s failure to allege that the broadcast was false limited its recovery in the action to nonreputational damages. *Food Lion, Inc., v. Capital Cities/ABC, Inc.* 887 F. Supp. 811, 823–24 (M.D. N.C. 1995).

Another recently reported suit alleging a violation of the Lanham Act was brought by the author of a book espousing a conspiracy theory of the Kennedy assassination after his picture and quotations from his book were placed in an advertisement for defendant’s book, which was highly critical of plaintiff’s theory. *Groden v. Random House, Inc.*, 61 F.3d 1045, 22 Media L. Rep. 2203
(2d Cir. 1995). The Second Circuit affirmed the dismissal of the claim, holding that subjective statements such as "guilty of misleading the American public" were incapable of factual verification and thus could not constitute the requisite false statement of fact under the Lanham Act. Other statements, such as "one man, one gun, one inescapable conclusion," were neither misleading nor false within the meaning of the Lanham Act (regardless of their ultimate verifiability), as they accurately summarized the thesis of defendants' book. Significantly, the court also noted that "any attempt to apply the Lanham Act to appellees' ad would raise substantial free speech issues."

J. NEGLIGENT MEDIA PUBLICATION

In a recently reported case, a federal district court in Massachusetts recently granted summary judgment to a publisher on a claim of negligent misrepresentation. *Barden v. HarperCollins Publishers, Inc.*, 863 F. Supp. 41, 43, 22 Media L. Rep. 2343, 2346 (D. Mass. 1994). The plaintiff, an adult victim of child sexual abuse, alleged that she contacted an attorney listed in a book published by the defendant, but the attorney took her retainer without performing legal services. She claimed the attorney's qualifications listed in the book were false. The court granted defendant's motion on the grounds that it had assumed no duty to investigate the accuracy of the book's contents; "[t]he burden placed upon publishers to check every fact in the books they publish is both impractical and outside the realm of their contemplated legal duties." 863 F. Supp. at 45, 22 Media L. Rep. at 2346.

In another recently reported decision, a Texas court dismissed a claim for negligent media publication brought after a newspaper published the street address of a gang murder suspect and unknown assailants fired through the window of his home, killing his sister and wounding a child. *Orozco v. The Dallas Morning News* (No. 94-5705, 95th Dist., Dallas County, 1995). The court held that the newspaper owed no legal duty to the victim's family.

Finally, a California appellate court recently held that where a publisher undertakes a duty to investigate the quality of a product and represents it meets certain standards, a claim for negligent publishing will lie. *FNS Mortgage Service Corp. v. Pacific General Group, Inc.*, 24 Cal. App. 4th 1564, 1567, 1573-74, 29 Cal. Rptr. 2d 916 (1994) (reversing summary judgment for defendant nonprofit association that tested and, if approved as purportedly meeting certain standards, listed plumbing pipe in its Uniform Plumbing Code publication).

K. SLAPP STATUTES

(granting § 425.16 motion to strike of *Examiner* reporter and freelance reporter) (Contra Costa County); *Lafayette Morehouse, Inc. et al., v. The Chronicle Publishing Co., et al.*, No. 952459 (Cal. Ct. App. 1st Dist., August 9, 1995) (affirming trial court dismissal of a libel suit on a motion to strike brought under the California anti-SLAPP suit law).

I. STATISTICAL ANALYSIS OF CERT. PETITIONS FOR THE 1994 TERM

Last year LDRC published statistical tables charting libel, privacy and related cert. petitions filed in the Supreme Court during its 1985 through 1993 Terms. See 1994 LDRC BULLETIN, Issue No. 3 at 7-16 (July 31, 1994). Those data were compared to data for the 1980-1984 Terms developed by Professor Marc Franklin of Stanford Law School and previously published by LDRC. See Marc A. Franklin, “Five Years of Libel Cases at the Supreme Court Door,” in 1985-86 LDRC 50-STATE SURVEY, at xiv. In total, the disposition of 328 petitions for certiorari were tracked and compared over a period of fourteen Terms of the Court.

In the tables that follow, LDRC's statistical cert. petition data in the Supreme Court are updated now to cover all pertinent actions for the fifteen Terms dating back through the 1980 Term, including the twenty-one cert. petitions that were filed and disposed of during the 1994 Term, for a total of 349 petitions during that entire period. LDRC's statistical tables are updated now to cover the past ten Terms of the Court, including a total of 210 petitions for certiorari. The key findings of this updated presentation can be briefly summarized.

1. For the fourth consecutive Term (dating back to October of 1991), the Supreme Court granted none of the libel, privacy or related petitions filed and disposed of in the 1994 Term.

2. Overall, the number of libel and related petitions filed in the 1994 Term was up by three but the number of petitions in media cases remained at seven — the same number as last Term, tied for the lowest number of media petitions over the ten years covered, and the lowest since six media petitions were filed during the 1981 Term.

3. The number of petitions filed by losing defendants remained at three, the same as last Term — the lowest since three were also filed in the 1981 Term. But there were no petitions filed by losing defendants in media cases — the first Term that has seen a complete absence of media defense filings since LDRC began tracking cert. petitions in 1980.

4. The number of petitions filed by losing plaintiffs was up to eighteen from fifteen the year before, with eighteen being the highest number of plaintiffs' petitions since the twenty-three petitions filed in the 1988 Term. The seven plaintiffs' petitions in media actions was up two from last Term but, with the exception of last Term, was the lowest number of plaintiffs' media petitions since the 1988 Term.

5. Nine of the petitions filed were from federal court determinations — the most federal petitions since fifteen in the 1988 Term. By contrast, twelve petitions were from state courts — the same number as last year and continuing a very stable trend that has seen an average of 12.5 state petitions each Term since 1989.
6. In terms of the finality of judgments appealed, eighteen of the twenty-one petitions were from final judgments, continuing a several year trend that has seen relatively few attempts at petitions from nonfinal judgments in these cases, notwithstanding LDRC's finding that the Court has granted petitions from nonfinal judgments with equal if not greater frequency than from final judgments over the fifteen Terms tracked by LDRC.

7. Finally, in terms of legal issues presented for review, consistent with prior experience the two most frequently presented issues during the 1994 Term were actual malice (5 cases) and opinion (also 5 cases). Other issues presented in more than one petition were: damages (2 cases), discovery (2 cases), jurisdiction (3 cases), plaintiff status (2 cases), and substantial truth (2 cases). Rounding out the issues presented in a single case were: attorneys fees, defamatory meaning, government immunity (under the Federal Tort Claims Act), independent appellate review, privilege (constitutional), and privilege (legislative).


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**Petition Filed by Plaintiff**

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### TABLE 3
CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM AND FINALITY OF JUDGMENT: 1985–1994 TERMS

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*Schiavone Construction Co. v. Time Inc., 477 U.S. 21 (1986).*


*Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).*

*Florida Star v. B.J.F., 491 U.S. 524 (1989).*


*Anderson v. Liberty Lobby, 477 U.S. 242 (1986).*
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II. SUMMARY OF ACTIONS ON CERTIORARI PETITIONS IN LIBEL, PRIVACY AND RELATED CASES DURING THE 1994 TERM

A. LIBEL AND PRIVACY CASES

During its 1994 term the Supreme Court granted no libel, privacy or related cert. petitions. The term proved to be a successful one for the media, however, as the Court denied review of every plaintiffs' petition challenging lower court rulings that had favored media defendants and, with the sole exception of a case in which a radio station had sued another station for libel, the Court was not presented with any petitions by the media from unfavorable rulings in libel or privacy actions. By contrast, in the 1993 term, while the Court let stand five decisions favorable to the media, it also let stand two decisions that were unfavorable to the media, including a $1.5 million judgment against Globe International in the Peoples Bank case.

Non-media defendants in the 1994 term also saw the Court refuse to grant cert. in any libel or privacy cases. Both the results in nine cases favoring non-media defendants (one less than in the 1993 term), and the results unfavorable to non-media defendants in three cases (up from one case last term), were left standing.

With regard to significant issues presented to the Court on cert. petitions in the term just ended, of particular interest are cases arising in the area of opinion in the post-Milkovich era. Of the twenty-one petitions in libel, privacy, and related areas summarized in this report, five cases sought certiorari on interpretations of the opinion issue, three in media cases and two in non-media. Perhaps most troubling, or at least most indicative of the difficulties encountered by courts when wrestling with the notion of opinion, were the two petitions coming out of Colorado cases with disparate results. In the non-media case of Stewart v. Keohane, the Colorado Supreme Court had upheld a damage award, denying to the defendant the protection of opinion, in an action based on "off-the-cuff" remarks made by a city councilman to a reporter, who then repeated the statement to the plaintiff. In the media case of Living Will Center v. NBC Subsidiary, the same court had granted full constitutional protection for opinion to a news report which alleged plaintiffs living will kit was a "scam."

In another area of contention this term, three petitions for review presented jurisdictional issues. Of particular interest to readers of this Bulletin is Wilson v. Belin, in which the United States Court of Appeals for the Fifth Circuit had denied an attempt by the plaintiff to gain Texas jurisdiction over an Illinois resident who merely served as a source for an allegedly defamatory publication appearing in a Dallas newspaper.

*This report has been revised and updated from a previous version included with the September LDRC LibelLetter. LDRC would like to thank summer interns Sarah Edenbaum and John Maltbie for their contribution to this report.

**See 1994 LDRC Bulletin No. 3 (July 31, 1994) at 1.
What follows is a summary of the Supreme Court's actions in libel, editorial privacy and related cases during the 1994 term and covers all actions on petitions filed between the beginning of July 1994 and the end of June 1995, as recorded in 63 U.S.L.W., issues 1-49. Of the 21 libel/privacy petitions for certiorari filed and acted upon during the term, 9 involved media (or media-related) cases and 12 involved non-media cases. Four additional libel/privacy petitions filed last term were carried over to the 1995 term. Finally, also summarized below are noteworthy petitions for certiorari filed during the 1994 term in the areas of newsroom and access issues, commercial speech, obscenity, picketing, trade regulation and more general First Amendment and free speech issues.

1. Media and Media-Related Cases

a. Favorable Libel/Privacy Decisions Left Standing — 9

Benigni v. Cowles Media Co., 22 Media L. Rep. 2120 (Minn. Ct. App. 1994), cert. denied, 63 U.S.L.W. 3369 (1/8/94, No. 94-485). The Minnesota Court of Appeals in a defamation case had affirmed grant of defendant's motion for summary judgment, ruling that plaintiff's subjective opinion of article concerning himself in defendant's newspaper was not enough to make the article defamatory but must, rather, harm plaintiff's reputation in the community. The court also held that plaintiff's displeasure with the article is unwarranted, as, while it is unflattering in some respects in its portrayal of him as a loud and opinionated individual, it does not reasonably suggest that plaintiff is mentally ill. The questions presented by the petition were: (1) May media use its First Amendment right to freedom of press to suppress citizen's First Amendment right to freedom of speech without losing protection of privilege of New York Times Co. v. Sullivan, 376 U.S. 254 (1964)? (2) If media defendants have lost protection of New York Times privilege through abuse of purpose for which that privilege was given, does action become subject to common law standards whereby burden of proof shifts to defendants to prove truth of their defamatory statements, rather than it being on plaintiff to prove falsity of defamatory statements? (3) May plaintiff, claiming to be private figure, be held to public figure standards of proof without court ever ruling on its status? (4) Did lower courts err, or violate petitioner's rights, by denying him equal protection of laws by: (a) holding that article was not defamatory when record showed ample evidence to contrary and article was capable of defamatory interpretation? (b) simply ignoring petitioner's motion to compel discovery whereby media defendant's escaped without producing documents and evaded answering interrogatories? (c) granting defendants' motions for summary judgment when there were several genuine issues of material fact precluding summary judgment; and (d) granting defendants' motions for summary judgment before petitioner had adequate time for discovery?


Note that all of the four petitions carried over were denied on the first day of the new term. See 64 U.S.L.W. 3240, 3248.
clear and convincing evidence that defendant's alleged misstatement in book of the plaintiff's remarks at a meeting was made with actual malice. Evidence that one of the author's sources said the statements were an accurate reflection of what plaintiff said and that another source could not remember did not establish a significant conflict to create doubt as to accuracy of the statement. The questions presented by the petition were: (1) Should the court establish legal obligations for media when reporter has inconsistent information from that which he plans to publish but avoids inquiring of known accessible sources with knowledge so as to ascertain truth of information? (2) In the "purposeful avoidance of the truth" analysis set forth in Harte-Hanks Communications Inc. v. Connaughton, 491 U.S. 657 (1989), is the threshold level of "doubt" in the "obvious reason to doubt" test, which is necessary to trigger reporter's responsibility to check with known accessible sources, lower than "serious doubt" required by New York Court of Appeals? (3) In the "purposeful avoidance of the truth" analysis, is threshold level of "doubt" in "obvious reason to doubt" test, which is necessary to trigger reporter's responsibility to check with known accessible sources, lower than high degree of awareness of probable falsity that is equivalent to entertaining serious doubt?

Living Will Center v. NBC Subsidiary (KCNC-TV) Inc., 879 P. 2d 6, 23 Media L. Rep. 1417 (Colo. 1994), cert. denied, 63 U.S.L.W. 3689 (3/21/95, No. 94-990). In affirming the trial court's grant of defendant television station's motion for summary judgment (reversing intermediate appellate court's reversal of the grant), the Colorado Supreme Court had held that medical ethicist's statements that plaintiff company's living will package was a "scam" were opinion and constitutionally privileged. The context the statement was made in, and the imaginative and hyperbolic substance of the statement itself, neither contain nor imply a verifiable statement of fact and cannot be reasonably understood as anything but subjective opinion. Furthermore, the gist of the broadcast was constitutionally privileged as it did not contain a verifiable assertion of fact nor could it be reasonably understood to do so. The worth of a given service is inherently subjective, turning on personal considerations and judgments. The questions presented by the petition were: (1) Did statements broadcast during investigative television news report on regularly scheduled news program that private business is a "scam" and that the customers of business are being "taken . . . totally taken" contain, or imply, verifiable fact, or can they reasonably be understood as assertions of fact about conduct of business, so that statements or implications are not protected against libel claim by First Amendment under "verifiability test" announced by this court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)? (2) Must a court take into account the broad social context of a defamatory statement (i.e., whether statement occurs in "hard news" format as opposed to opinion forum such as critic's review or editorial commentary), when determining if statement, or its implications, is actionable under "verifiability test" announced in Milkovich? (3) Was statement broadcast during investigative television news report on regularly scheduled news program that private business' product is "unnecessary—certainly not worth paying for," "inherently subjective," and did it contain or imply verifiable factual assertion so that the statement, or its implication, was protected against libel claim by First Amendment under "verifiability test" announced in Milkovich?

of author's book are not actionable because the context in which they appear is one in which readers would expect to find statements that can be rationally interpreted as opinion, and which do not present verifiable issues of fact. A book reviewer's criticism and commentary are only actionable if their interpretations cannot be rationally supported by reference to the book itself. Questions presented by the petition were: (1) Does the First Amendment require application of "broader context" factor when challenged statements appear in certain formats or genres, such as book reviews, thereby permitting finding that statements, which are otherwise verifiable under Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), are nonactionable based solely upon effect of that factor? (2) Does the First Amendment require application of a "supportable interpretation" standard whenever defamatory statements appear in certain formats or genres, such as book reviews, regardless of whether the book in question is an ambiguous source? (3) Does the First Amendment require application of different procedural principles in deciding issues of verifiability and falsity on motion for summary judgment brought by media defendant, whereby non-moving libel plaintiff is derived of benefit of all favorable inferences and favorable weighing of the evidence, which benefits Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505 (1986), held were required in deciding issues of malice?

Rhinehart v. Seattle Times, Inc., 798 P.2d 1155, 59 Wash. App. 332 (Wash. Ct. App. 1990), cert. denied, 63 U.S.L.W. 3420 (11/29/94, No. 94-599). On appeal by plaintiff religious organization from a decision dismissing their libel action for failure to produce requested documents, the Washington State Court of Appeals had held that there was no error in forcing disclosure of membership lists, donation records and a videotape of a performance to be used by newspaper in defending against plaintiff's libel action. A protective order indicating that the documents could only be used for purposes of the litigation is adequate to protect plaintiff's constitutional rights, and rendered unnecessary any balancing of plaintiff's First Amendment rights and defendant's interests. The questions presented by the petition were: (1) Are First Amendment rights to privacy and association denied when court imposes protective order and orders discovery, in lieu of performing balancing test to determine whether membership lists of spiritualist religion should be produced? (2) Is it a denial of due process and equal protection when fee statute is interpreted to award fees without requiring party to segregate fees unrelated to action dismissed for lack of merit? (3) Is it a denial of due process and equal protection when the subjective criterion, "possibility of success," is used in finding case frivolous and awarding costs and attorneys' fees?

Romero v. Thomson Newspapers (Wisc.) Inc., 648 So.2d 866, 23 Media L. Rep. 1528 (La. Sup. Ct. 1994), cert. denied, 63 U.S.L.W. 3873 (6/13/95, No. 94-1712). In a decision reversing the trial court's denial of summary judgment for the defendant, the Supreme Court of Louisiana had held that statements in defendant's newspaper concerning the high rates of Caesarean section births were not defamatory of plaintiff obstetrician, and were constitutionally protected speech on a matter of public interest. Statement that women were being "butchered" by unnecessarily high rates of C-sections was general opinion that did not imply any false or defamatory fact about plaintiff and statement that plaintiff was near retirement was made without actual malice and was substantially true. The question presented by the petition was: Did the Louisiana Supreme Court violate constitutional law in its interpretation of the First Amendment?
Woodcock v. Journal Publishing Co., 230 Conn. 525, 646 A.2d 92 (Conn. 1994), cert. denied, 63 U.S.L.W. 3625 (2/21/95, No. 94-1023). Upon making an independent examination of the record, the Supreme Court of Connecticut had reversed a libel judgment for the plaintiff, finding that the defendant newspaper did not act with the necessary actual malice when it published articles accusing plaintiff, a zoning board member, of "urg[ing]" a subdivision application in order to benefit a business associate. The court found that there was no evidence which, with the requisite "convincing clarity," showed that defendants had any serious doubts concerning the truth of the articles and that at most the defendants were negligent and were willing to correct any specific errors. Additionally, the court held where language chosen is "one of a number of possible rational interpretations" of an ambiguous event, the choice of such language is protected by the First Amendment. The questions presented by the petition were: (1) Does proper standard of review in public official libel action mandate that reviewing court conduct de novo review of entire record, making independent assessment of whether facts it found demonstrate clear and convincing evidence of actual malice, or that reviewing court first determine whether jury's findings of fact supportive of actual malice are clearly erroneous, and if not, then independently assess whether those facts establish actual malice by clear and convincing proof? (2) By conducting de novo review of entire record and making its own findings of fact, did Connecticut Supreme Court apply incorrect standard of appellate review when it reversed judgment for plaintiff?

Underwager v. Salter, 22 F.3d 730, 22 Media L. Rep. 1852 (7th Cir. 1994), cert. denied, 63 U.S.L.W. 3294 (10/11/94, No. 94-314). The United States Court of Appeals for the Seventh Circuit had affirmed grant of defendants' motions for summary judgment, holding that the authors of two controversial books on child sexual abuse were limited purpose public figures for the purposes of their libel action against a psychologist who had prepared a monograph highly critical of their work. The court had also noted that nothing in the record suggested that the defendants acted with actual malice since one of the defendants had spent eighteen months reading all the papers that plaintiffs had cited in their books. In addition, the court found that there was no actual malice on the part of the defendant prosecutor for playing a tape of an Australian television program critical of plaintiffs' workshops for prosecutors. Further the court had held that continued publication by defendants does not establish actual malice. Questions presented by the petition were: (1) Are non-media defendants who are claimed to have defamed "limited purpose" public figure entitled to "actual malice" heightened protection of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny? (2) May federal court of appeals establish heretofore undetermined qualified privilege under state common law of defamation and require plaintiff to meet "actual malice" test set forth New York Times Co. v. Sullivan and its progeny in order to prove abuse of qualified privilege? (3) Does repetitious sale and presentation of defamatory videotape satisfy "actual malice" requirement of New York Times v. Sullivan and its progeny?

Wilson v. Belin, 20 F.3d 644, 22 Media L. Rep. 1748 (5th Cir. 1994), cert. denied, 63 U.S.L.W. 3292 (10/11/94, No. 94-302). In a defamation action brought by a Pennsylvania resident, the United States Court of Appeals for the Fifth Circuit had affirmed dismissal of the action for lack of personal jurisdiction over Illinois resident defendant or Indiana resident defendant on the ground that the foreseeability of media publication of these sources comments was not enough to support
jurisdiction when the defendants did not purposely direct their activities or opinions into the Texas forum, nor initiate any contact with the Texas forum. The defamation action arose from comments made by defendants in unsolicited telephone interviews by a Dallas newspaper reporter in reaction to a speech made by the plaintiff in Dallas concerning his theories of the Kennedy assassination. Question presented by the petition was: Are non-resident respondents subject to personal jurisdiction in Texas when they knew that their defamatory statements would be published in Texas while petitioner was appearing in Texas?

b. **Unfavorable Libel/Privacy Decisions Left Standing — 0**

c. **Libel/Privacy Petitions Filed But Not Yet Acted Upon — 1**

*Stolz v. KSFM* 102, 30 Cal. App.4th 195, 23 Media L. Rep. 1233 (Cal. App 1995), cert. filed, 63 U.S.L.W. 3908 (5/17/95, No. 94-2049). In a defamation action between two radio stations concerning derogatory statements made by defendant about the quality of journalism plaintiff practiced, the California Court of Appeal for the Third District had affirmed a jury verdict for the defendant, holding the plaintiff radio station to be an all-purpose figure because it occupies a position of general fame and has pervasive influence in the community through advertisements and charity work. For purposes of such a defamation suit, relating to station's operations, the court also held that the station owner and general manager are limited purpose public figures, and thus have the burden of proving actual malice. Comments concerning the station's irresponsible journalism or on-air comments are an issue of public concern and plaintiff has the additional burden of proving falsity. There was no mistake in jury instructions stating that to establish falsity of the alleged defamatory statements the "gist" of the information must be false and that minor inaccuracies are not sufficient to amount to falsity. The court also held that none of the statements made unambiguously asserted as fact that the plaintiff radio station took part in shoddy journalism and thus remarks were not slander per se. The questions presented by the petition were: (1) Does fact that plaintiff that is slandered per se is a radio station conclusively make it public figure shifting burden of proof on proving falsity and forcing it to prove actual malice merely because as broadcaster it has ability to rebut slanderous statement? (2) Does fact that plaintiff that is slandered per se is radio station make unrelated subject it is slandered about of public concern, thus shifting the burden of proving falsity of statement merely because responsibility in broadcasting is of public concern? (3) Is owner of radio station limited purpose public figure merely by his ownership thereof in absence of showing that he has interjected himself into particular public controversy?

2. **Non-Media Libel/Privacy Cases**

a. **Unfavorable Decisions Left Standing — 3**

*Nova Biomedical Corp. v. Rice*, 38 F.3d 909 (7th Cir. 1994), cert. denied, 63 U.S.L.W. 3817 (5/16/95, No. 94-1635). In a defamation action brought by an Illinois plaintiff, against his former employer, a Massachusetts based company, arising out of his discharge and his being compelled to
disclose the grounds of his discharge to other prospective employers, the United States Court of Appeals for the Seventh Circuit had affirmed a judgment for the plaintiff, applying Illinois law allowing punitive damages, which Massachusetts does not allow, on the ground that the tortious incident took place in Illinois. The court relied on the fact that the defamatory statements were originally made in Illinois, republished in Illinois by plaintiff himself to prospective employers, and thus caused injury in Illinois, or alternatively, because Illinois law applies law of plaintiff's domicile in multi-state defamation cases. Punitive damages were proper as there was sufficient evidence of actual malice. Additionally, defendants cannot object to inconsistency in the jury's awarding of punitive damages but not actual damages since they failed to object to confusing jury instructions which produced the inconsistent result and because ultimately, it would not have changed jury verdict or dollar amount awarded. Further defendants waived any objection to personal jurisdiction in failing to bring up the applicability of the "fiduciary shield" law to defendant at trial. The question presented by the petition was: Did Seventh Circuit violate Tenth, First and Fifth Amendments and relevant mandates of this court by failing to apply proper state law, by upholding defamation verdict contrary to petitioner's right to freedom of speech, and by depriving petitioners' due process rights under Fifth Amendment by upholding award of punitive damages against each of them?

*Oliver v. Lewis, 873 P.2d 668, 178 Ariz. 330 (Ariz. Ct. App. 1993), cert. denied, 63 U.S.L.W. 3292 (10/11/94, No. 94-241).* In reversing a grant of summary judgment, the Arizona Court of Appeals had held, in an action for defamation, intentional infliction of emotional distress, intentional interference with business relationships and conspiracy, that complaints made by defendant, the president of an air transportation provider, concerning plaintiff, a safety inspector for the Federal Aviation Administration, to his superiors concerning safety inspector's job performance after safety inspector turned in a negative report, were only protected by a qualified privilege. Abuse of such a privilege may be shown by either evidence of actual malice or excessive publication. A safety inspector for the FAA is a public official as his job performance has a direct effect on air transportation which is a matter of justified public interest. Questions of material fact regarding presence of actual malice are raised by the defendant's statements that he was out to get inspector, that defendant persisted in his accusations after plaintiff was exonerated, that defendant shows a pattern of defaming those who criticize him, and that defendant was aware that there were legitimate safety problems. The question presented by the petition was: Did Arizona Court of Appeals correctly decide that "actual malice", as defined by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, can be shown, in defamation action brought by public official, solely by evidence of spite or ill will alone?

*Stewart v. Keohane, 882 P.2d 1293, 22 Media L. Rep. 2545 (Colo. 1994), cert. denied, 63 U.S.L.W. 3563 (1/24/95, No. 94-1001).* The Colorado Supreme Court had upheld a damage award granted in favor of a judge in a suit for defamation against a city councilman. The action arose out of comments the councilman made to a reporter questioning whether the judge had been paid off with drugs or money following a controversial verdict in a highly publicized sexual assault bench trial over which the judge presided. The councilman's statements were held to be implied verifiable assertions of fact and could reasonably be understood as assertions of actual fact and not opinion because (1) the statements were not phrased in such a way as to be rhetorical but to imply that the judge had
taken a bribe, the only question was in what form, (2) the context of the remarks suggest that the statements were factual as they were made by a public official who would have knowledge of such facts concerning criminal activity and had previously been quoted as suspecting such criminal activity. Accordingly, damages awarded to plaintiff were upheld, despite absence of evidence of injury to reputation, based solely on evidence of the emotional distress suffered by the plaintiff upon hearing the remarks repeated by the reporter. The questions presented by the petition were: (1) Under circumstances of this case, was speech protected under First Amendment? (2) Does the First Amendment allow judge to recover emotional distress damages in defamation action in absence of harm to reputation?

b. **Favorable Decisions Left Standing — 9**

Asam v. Harwood, unpublished (11th Cir. 3/16/94), cert. denied, 63 U.S.L.W. 3258 (10/03/94, No. 93-2090). The United States Court of Appeals for the Eleventh Circuit had affirmed, without comment, the district court's grant of summary judgment for the defendant, plaintiff's opponent in judicial election, based on grounds of lack of evidence to support actual malice. Question presented by the petition: Did libel plaintiff prove that defendant's statements were made with actual malice?

B & A Marine Co. v. American Foreign Shipping Co., 23 F.3d 709 (2d Cir. 1994), cert. denied, 63 U.S.L.W. 3346 (11/01/94, No. 94-268). The United States Court of Appeals for the Second Circuit had affirmed a grant of summary judgment for the defendant, a government contractor, in a libel action brought by a subcontractor over a letter to the subcontractor's sureties which stated that the subcontractor was in default. The court reasoned that the contractor was a specifically appointed agent of the United States, and was thus a "government employee" within the meaning of the Federal Tort Claims Act, which bars actions against United States employees acting within the scope of their employment. The subcontractor's claim for libel was thus precluded. Questions presented by the petition were: (1) Does Federal Tort Claims Act, 28 U.S.C. 2671 et seq., exclude from its application a contractor with the United States, under general agency governing seagoing vessels, whose day-to-day activities are not supervised? (2) Should motion for summary judgment have been granted in favor of defendant, in whose sole possession facts rest, and who has refused to appear for deposition in face of motion in district court to compel such appearance, which motion remained undecided, despite plaintiff's requests, for several years and at time of decision on summary judgment? (3) Can determination that plaintiff was acting within scope of employment for purposes of Federal Tort Claims Act be made without opportunity given to opponent to participate in evidentiary hearing?

Biegeleisen v. Jacobson, 198 A.D.2d 57, 603 N.Y.S.2d 148 (N.Y. App. Div. 1993), cert. denied, 63 U.S.L.W. 3263 (10/03/94, No. 94-175). New York Appellate Division had affirmed grant of defendant's motion for summary judgment in physician's defamation case against another physician who testified against him as an expert witness in a medical malpractice action. Although the statements were blunt and negative, they were expressions of opinion and not statements of fact which were directly relevant to defendant's opinion as an expert on scleropathy in cosmetic surgery.
The statements also did not constitute falsehoods "so obviously irrelevant as to warrant an inference of actual malice." The question presented by the petition was: Is it lawful for New York State to refuse, without cause or explanation, to uphold legal precedent — specifically denying testamentary immunity to physician who testifies that another physician is "quack", when use of term is justified only by physicians' different schools of thought — that state itself set over 130 years ago, and that has been cited as case law as recently as 1975?

_Breedlove v. Phillips_, unpublished (Va. Cir. Ct., Fairfax Cty, 1993), _cert. denied_, 63 U.S.L.W. 3257 (10/3/94, No. 93-1910). The Virginia Circuit Court of Fairfax County had sustained a demurrer to counts alleging defamation of title stemming from the filing of a mechanics' lien and denied a motion for sanctions, without prejudice. The court had also granted a protective order and the court had not required defendants to respond to discovery until further order of the court or until the parties are at issue, whichever comes first. Questions presented by the petition: (1) Is Virginia judicial procedure for redress of libelous mechanic's liens repugnant to Fourteenth Amendment's Due Process and Equal Protection Clauses? (2) Are Virginia's mechanics' lien statutes, as applied in this case, repugnant to Fourteenth Amendment's Due Process Clause?

_Caputo v. Compuchem Labs, Inc._, unpublished (3d Cir., 08/17/94), _cert. denied_, 63 U.S.L.W. 3515 (1/9/95, No. 94-853). The United States Court of Appeals for the Third Circuit had affirmed grant of defendant's motion for summary judgment in action for negligence and defamation brought by plaintiff, a terminated employee, against an independent laboratory which accurately reported that employee's drug test showed evidence of low levels of morphine. Court found no justification to support claims because the report from the lab was absolutely accurate and was disclosed only to the client. Further, the court held that the lab owed no duty to explain that the report number was low and could be attributable to causes other than substance abuse as the report was transmitted to a doctor who it would be reasonable to assume could accurately interpret its results. The question presented by the petition was: Does employee who is subjected to mandatory drug test have claim against private laboratory in negligence or defamation for flagrant reporting error resulting in loss of employment because laboratory failed to follow federal standards?

_Jenkins v. Weis_, 868 P.2d 1374, 230 Utah Adv. Rep. 25 (Utah 1994), _cert. denied_, 63 U.S.L.W. 3642 (2/28/95, No. 94-1192). The Utah Court of Appeals had affirmed a jury finding and directed verdict for the defendant in a defamation, intentional infliction of emotional distress and invasion of privacy action based on remarks made by defendant psychologist alleging that plaintiff was "mentally deranged" and a "paranoid schizophrenic." The court held that even if ruling that plaintiff was a public figure for purposes of libel was in error, it was harmless error as the jury reasonably found that defendant's statements were true, an absolute defense to the defamation claim. Plaintiff failed to preserve for appeal claims that his causes of action for emotional distress and invasion of privacy were improperly dismissed by directed verdict after plaintiff presented his case, that the jury instructions were confusing, and that the trial court improperly allowed state Attorney General to represent defendant, and allowed members of Attorney General's staff to testify at trial. The questions presented by the petition were: (1) Did Utah appellate courts err in upholding trial court's determination that petitioner was public figure without appropriate findings or legal basis for
such determination? (2) Did Utah appellate courts err in upholding the trial court's dismissal of two of petitioner's three causes of action without motion by opposing party during trial on those matters and without affording petitioner opportunity to present evidence, memorandum, or argument thereon? (3) Did Utah appellate courts err in upholding trial court's jury instructions that required jury to make determinations and rulings as to matters of law? (4) Did Utah appellate courts err in upholding trial court's allowance of Utah Attorney General to represent respondent and in allowing members of Utah Attorney General's staff to testify at trial? (5) Did Utah appellate courts err in upholding trial court's allowance of untimely pretrial motions in derogation of rules of Utah Code of Judicial Administration?

Norris v. Oklahoma City University, unpublished (9th Cir., 4/12/94), cert. denied, 63 U.S.L.W. 3514 (1/10/95, No. 94-976). The United States Court of Appeals for the Ninth Circuit had dismissed a defamation claim based on transcripts sent by the defendant, an Oklahoma university, to California law schools at the request of the plaintiff, an Oklahoma resident, which allegedly contained libelous statements concerning plaintiff's grades and achievements. The court held that plaintiff failed to make prima facie case of personal jurisdiction. The defendant's actions were not "expressly directed" at California as the transcripts were sent at plaintiff's request and exclusively concerned and benefitted the plaintiff and that the brunt of the harm was suffered in Oklahoma not California. The questions presented by the petition were: (1) Is specific jurisdiction reasonable when based on libel in three transcripts that out-of-state schools purposefully directed into forum state? (2) Is specific jurisdiction over out-of-state schools reasonable when based on libel in transcripts they purposefully directed at state even though plaintiff student asked schools to send transcripts to forum state? (3) Is brunt of reputational injury by libel located in state where libel has its greatest circulation even though person whose reputation libel injures is not present when libel is circulated there?

Patterson v. State (Matanuska Maid), 880 P.2d 1038 (Alaska 1994), cert. denied, 63 U.S.L.W. 3562 (1/23/95, No. 94-979). In a wrongful discharge, breach of contract and defamation action, the Alaska Supreme Court had ruled that the claims were time-barred by the six month limitations period of the Labor Management Relations Act. In addition, the court had found allegedly defamatory letters concerning the plaintiff to be absolutely privileged following the Ninth Circuit rule that "statements made by parties during the course of grievance proceedings conducted pursuant to the provisions of a collective bargaining agreement subject to the Labor Management Relations Act are absolutely privileged." The questions presented by the petition were: (1) Did Alaska Supreme Court deny due process and equal protection in upholding dismissal of petitioner's claim for libel under state law on basis that claim was preempted by LMRA and publication of defamatory letter was absolutely privileged in labor controversy? (2) Did Alaska Supreme Court err in holding that petitioner's suits for defamation and wrongful discharge were time-barred?

Reynolds v. International Amateur Athletic Federation, 23 F.3d 1110 (6th Cir. 1994), cert. denied, 63 U.S.L.W. 3347 (10/31/94, No. 94-410). In a tortious interference with business relations, breach of contract, and defamation action brought by the world record holder in the 400 meters, based on publication of the runner's drug test, the United States Court of Appeals for the Sixth Circuit had ruled that Ohio lacked personal jurisdiction over defendant IAAF, or its agent TAC. The
court found that the IAAF did not purposefully direct its activities towards Ohio and thus did not establish the minimum contacts sufficient to permit Ohio to exercise personal jurisdiction consistent with IAAF's due process rights. IAAF is based in England and owns no business or property in Ohio. IAAF also does not train or supervise athletes in Ohio, nor does it transact business there, having only superficial contacts via mail and telephone. As to this specific set of claims the court based its conclusion on the following: (1) the organization did not publish the test results in Ohio, (2) while the IAAF could foresee possible results of their publication, the IAAF had no knowledge of or role in the Ohio-based product endorsements which were lost by the plaintiff, and (3) the plaintiff is an international athlete whose reputation is not based solely in Ohio. The question presented by the petition was: Does state's exercise of personal jurisdiction over non-resident defendant (with participating U.S. agent) who, acting abroad, intentionally directs tortious acts at resident plaintiff and promotes widest possible dissemination of defamatory statements, predictably causing devastating financial injury to plaintiff in forum state, comport with "traditional notions of fair play and substantial justice" as required by Due Process Clause?

c. Libel/Privacy Petitions Filed But Not Yet Acted Upon — 3

McKnight v. American Cyanamid Co., unpublished (4th Cir. 1995), cert. filed, 63 U.S.L.W. 3861 (5/26/95, No. 94-1942). The United States Court of Appeals for the Fourth Circuit had held that a contractual dispute between two pharmaceutical companies over American Cyanamid's (the larger firm) efforts to market a drug developed by the smaller company was not a public controversy since it is not an issue that would potentially affect the public. Therefore, the court held, the larger firm is not a public figure for purposes of the libel counterclaim against the smaller firm's executive officers. On this basis the court reinstated the counterclaim for additional proceedings under standards applicable to private individuals. Questions presented by petition: (1) Is respondent all-purpose public figure? (2) Is respondent limited-purpose public figure with respect to speech about its corporate conduct in marketing hypertension drug used by hundreds of thousands of people throughout the country?

National City, Calif. v. Rattray, 51 F.3d 793 (9th Cir. 1994), cert. filed, 63 U.S.L.W. 3908 (6/16/95, No. 94-2062). The United States Court of Appeals for the Ninth Circuit had affirmed in part and reversed in part verdicts for defendants in an action for discrimination, invasion of privacy and defamation. The action brought by plaintiff arose out of remarks made by the chief of police of the defendant city after the plaintiff resigned his position and filed an invasion of privacy action in response to being secretly taped as part of a sexual harassment investigation. The chief of police was quoted as saying that there was, "clear, convincing and strong information and evidence," that plaintiff lied. The court affirmed the jury verdict for the defendants on the discrimination claim. The court reversed the district court's directed verdict for the defendants on the invasion of privacy claim, holding that Cal. Penal Code Section 633 was intended only to permit law enforcement officials to use prohibited electronic listening devices for criminal investigations. Furthermore, the court affirmed the district court's original grant of a new trial on the defamation claim because the clear weight of the evidence was against the original jury finding of actual malice. In doing so, however, the court of appeals reversed the district court's subsequent grant of defendant's motions for summary
judgment, stating that it was error to hold the plaintiff to the "clear and convincing" standard of evidence on the issue of falsity. Falsity, the court held, unlike actual malice, need only be proved by a preponderance of the evidence. The question presented by the petition was: Did the Ninth Circuit err in holding that public official who brings defamation action need only prove falsity of allegedly defamatory statement at issue by preponderance of the evidence in light of this court's imposition of "convincing clarity" standard of proof in *New York Times Co. v. Sullivan*, and Second Circuit's view that falsity must be proven by clear and convincing evidence?

*Williams v. Garraghty*, 455 S.E.2d 209, 249 Va. 224 (Va. 1995), cert. filed, 63 U.S.L.W. 3874 (5/31/95, No. 94-1959). The Supreme Court of Virginia had upheld a $177,000 damage award in a defamation suit brought by a prison warden against a subordinate employee over a memorandum written by the employee alleging sexual harassment. The court held that while her statements regarding the fact that she was being sexually harassed may be characterized as mere opinion, "the statements supporting her opinions are factual in nature... [and] can form the basis of a defamation suit." Applying independent review the court also upheld the punitive damage award against the defendant finding that "the record supports a finding of actual malice with convincing clarity." Question presented by petition: Can protection afforded employees by opposition clause of Title VII of 1964 Civil Rights Act for voicing concerns about sexual harassment in workplace, recognized by federal circuit courts, be limited by more restrictive definition of qualified privilege under state defamation law adopted by highest court of state?

B. CERT. PETITIONS IN OTHER AREAS OF INTEREST

1. Newsroom Issues

a. Review Denied

*Pacific Gas and Electric Co. v. Savage*, 21 Cal. App.4th 434, 26 Cal. Rptr.2d 305 (Cal. App. 1993), cert. denied, 63 U.S.L.W. 3258 (10/03/94, No. 93-1999). The California Court of Appeal had ruled that a public utility violated state law when it refused to cooperate with a reporter in retaliation for the reporter's earlier published criticism of the utility. According to the court, the law, which provides that "no public utility shall, as to rates, charges, services, facilities, or in any other respect, make or grant preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage," precludes retaliation against journalists or newspapers based on content of their reporting on matters lying within the exercise of the utility's franchise. The refusal to cooperate with the newspaper's "stringer," who had been critical of the utility in past articles, was held to have no legitimate purpose and thus violated state law. The questions presented by the petition were: (1) Is public utility's conduct when dealing with the news media "state action"? (2) Does public utility have the First Amendment right not to assist in dissemination of views that are antithetical to its beliefs and interests?

*Sluys v. Grant*, unpublished (2d Cir. 9/29/94), cert. denied, 63 U.S.L.W. 3658 (3/6/95, No. 61
The United States Court of Appeals for the Second Circuit had affirmed the dismissal of a 42 U.S.C. 1983 action brought by newspaper publishers/editors seeking to enjoin the Rockland County district attorney from investigating whether the newspaper had committed any acts of commercial bribery relating to its editorial policy. The court ruled the action was properly dismissed as moot since the district attorney had announced that the investigation was terminated because "constitutional problems" made prosecution impossible. The questions presented by the petition were: Are newspaper publishers, reporters, and editors threatened with prosecution for decisions that are protected by the First Amendment entitled to a trial by jury on their complaint that the district attorney of Rockland County, N.Y., whose indictment is now pending before the United States District Court for the Southern District of New York, conspired and acted to deprive them of their rights protected under the United States Constitution?

2. Access to Criminal Proceedings
   a. Review Denied

   T.B. Butler Publishing Co. v. U.S. District Court for the Eastern District of Texas, ruling below, U.S. v. Restrepo, unpublished (5th Cir. 3/31/94), cert. denied, 63 U.S.L.W. 3312 (10/17/94, No. 94-300). The United States Court of Appeals for the Fifth Circuit had affirmed, without opinion, the district court's order denying reporter's motion to unseal the records of sentencing proceedings that were closed to the public. The questions presented by the petition were: (1) Did district court violate petitioner's First Amendment right of access to criminal trials when it excluded press and public from two sentencing hearings and sealed records of those hearings? (2) Does First Amendment right of access apply to sentencing hearings? (3) May trial court comply with procedural requirements for closure of criminal trial by making only sealed findings for appellate court review?

3. Commercial Speech
   a. Review Granted

   44 Liquormart v. Rhode Island, 39 F.3d 5, 22 Media L. Rep. 2409 (1st Cir. 1994), cert. granted, 63 U.S.L.W. 3786 (5/1/95, No. 94-1140). The Supreme Court has shown that it will remain active in the area of commercial speech by granting review in this case. Below, the United States Court of Appeals for the First Circuit had upheld Rhode Island laws which forbid liquor price advertising except at the point of sale, reasoning that under the four-part test of Central Hudson, the laws did not violate the First Amendment. The court distinguished its result from Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748 (1976), which struck down a law forbidding pharmaceutical price advertising, by stating that Rhode Island's "regulation is directed toward regulation of the intoxicants themselves, rather than speech." The Supreme Court granted the petition limited to the following question: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages?"
b. **Review Denied**

*Moser v. Federal Communications Commission*, 46 F.3d 970, 63 U.S.L.W. 2505 (9th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3906 (6/26/95, No. 94-1833). The United States Court of Appeals for the Ninth Circuit had upheld a decision ruling that 47 U.S.C. 227(b)(1) of the 1991 Telephone Consumer Protection Act, which banned automated, pre-recorded phone calls to residences, did not violate the First Amendment because it is content-neutral and narrowly tailored to achieve the state interest of protecting residential privacy while leaving open many alternative channels of communication. The question presented by the petition was: By prohibiting the use of automated dialing-announcing devices (ADADs) for commercial speech, while authorizing Federal Communications Commission to allow use of ADADs for non-commercial speech, does 1991 Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 2394-2402 (1991), violate petitioners' First Amendment right to engage in truthful commercial speech under the test set out in *Central Hudson Gas & Elec. Corp. v. Public Service Com'n*, 447 U.S. 557 (1980), or their right to equal protection of the laws protected by the Fifth Amendment?

*Naegele Outdoor Advertising Inc. v. Durham, N.C.*, unpublished (4th Cir. 5/1/94), *cert. denied*, 63 U.S.L.W. 3292 (10/11/94, No. 94-109). The United States Court of Appeals for the Fourth Circuit had affirmed the district court decision that a municipal ordinance which, after a five and a half year grace period, bars all commercial, off-premises advertising signs except those along interstate or federally aided primary highways, does not amount to a "taking" of private property under the Fifth and Fourteenth Amendments. The Court of Appeals had previously affirmed a district court decision which held that the ordinance did not violate the First Amendment. The questions presented by the petition were: (1) Is municipal ordinance that seeks to advance interests of safety and esthetics by prohibiting outdoor commercial advertising signs, while permitting physically identical non-commercial advertising signs and numerous other signs with other types of content, consistent with the First Amendment? (2) Is municipal ordinance that denies property owner all economically beneficial use of particular pieces of property a "taking" within the meaning of the Fifth Amendment even though owner has other similar property that is not affected by ordinance?

*Shaffer v. New York State Association of Realtors Inc.*, 27 F.3d 834, 63 U.S.L.W. 2021, (2d Cir. 1994), *cert. denied*, 63 U.S.L.W. 3386 (9/21/94, No. 94-530). In an action concerning advertising and solicitation by real estate agents, the United States Court of Appeals for the Second Circuit had held that a regulation which banned solicitation by real estate agents in particular geographic areas is an impermissible restriction of commercial speech and First Amendment rights because the restriction is not reasonably tailored to meet the substantial government interests of combating blockbusting. The question presented by the petition was: Did the court of appeals, in striking down non-solicitation orders aimed at preventing blockbusting, and limited both geographically and in duration, depart from decisions of this court by (a) refusing to defer to the judgment of state public officers who formulated the orders after holding extensive public hearings and finding evidence of oversolicitation and blockbusting activity, and (b) instead, effectively requiring state to demonstrate that restriction chosen is least severe that will achieve the desired end, notwithstanding evidence, based on experience, that cease and desist orders were an insufficient
alternative?

4. First Amendment/Free Speech Issues

a. Judgment Vacated

Harleston v. Jeffries, 21 F.3d 1238 (2d Cir. 1994), judg. vac., 63 U.S.L.W. 3385 (11/14/94, No. 94-112). The Supreme Court vacated a decision by the United States Court of Appeals for the Second Circuit which had held that a professor's First Amendment rights were violated when university administrators reduced his upcoming term as chairman of the black studies department to one year from the customary three year term, due to several "hateful and repugnant" comments made about Jews in a speech addressing bias in New York State's public school curriculum. The Second Circuit had ruled that absent disruption of educational operations, the university should have known that they could not sanction the department chairman for speaking on issues of social or political concern. The questions presented by the petition were: (1) Does the First Amendment require university administrators to retain, in position of leadership, person who has engaged in speech containing "hateful, poisonous and reprehensible" comments, reasonably believed by administrators to be harmful to the university? (2) For purposes of First Amendment analysis, may speech containing such comments be parsed or is "each and every sentence" constitutionally protected, even if speech touches only in part on matters of public concern? (3) Was it clearly established, as of March 23, 1992, that university administrators who reasonably believed that such speech would cause disruption were precluded by the First Amendment from removing the speaker from a leadership position?

b. Review Denied

Bongiovanni v. Filippo, 30 F.3d 424, 63 U.S.L.W. 2075 (3d Cir. 1994), cert. denied, 63 U.S.L.W. 3515 (01/09/95, No. 94-872) The United States Court of Appeals for the Third Circuit had reversed a grant of summary judgment for state university in an action brought by a dismissed professor for violation of his First Amendment rights under 42 U.S.C. 1983. The court held that the professor's non-sham grievance filed with the university is protected by the First Amendment's Petition Clause regardless of whether it involves a matter of public concern, and thus cannot be the basis of a discharge. Further, the court found genuine issues of material fact over whether the university acted with deliberate indifference in dismissing the professor were created by evidence pointing to a personal vendetta against the professor held by members of his department, that professor's prior First Amendment activities were well known to the university, and that other professors had engaged in similar activities without being disciplined. The questions presented by the petition were: (1) Must public employee's petition, like speech, involve a matter of public concern to invoke First Amendment protection against discharge from public employment? (2) Is failure to "tread with a certain amount of care" an insufficient degree of culpability to make government entity liable under 42 U.S.C. 1983 for an unconstitutional act of its non-decision-making subordinate? (3) Does First Amendment retaliatory discharge claim under 42 U.S.C. 1983 require public employee to show that public employer decision-maker acted with purposeful intent to retaliate against him for
his exercise of First Amendment rights?

Cabool, Mo. v. Casey, 12 F.3d 799 (8th Cir. 1994), cert. denied, 63 U.S.L.W. 3292 (10/11/94, No. 94-375). The United States Court of Appeals for the Eighth Circuit had upheld a decision holding defendant municipality liable for damages under 42 U.S.C. 1983 and awarding the plaintiff, a former city employee, attorneys' fees. The court ruled that the discharge of the employee for criticizing fire department policies and city officials violated the employee's right to free speech. The court held that the comments concerned a matter of public interest and, since the employee had a substantial interest in making the statements and the comments did not jeopardize the effectiveness of the city's operations or the employee's effectiveness at carrying out his duties, the employee's interests in free speech outweighed the interests of the city. The questions presented by the petition were: (1) Was the discharge of the police dispatcher (who earlier had resigned as fire chief and agreed to stay out of fire department operations, but who continued to disrupt the fire department, and confronted city administrator with false allegations of dishonesty against city clerk and mayor in an attempt to coerce petitioner to allow dispatcher to set fire department policies) for insubordination, breach of his agreement, breach of chain of command, and disruption, a violation of dispatcher's First Amendment free speech rights and actionable under 42 U.S.C. 1983? (2) Did federal courts below, under Connick v. Myers, 461 U.S. 138 (1983), and Waters v. Churchill, 62 U.S.L.W. 4397 (U.S. 1994) fail to defer to local government officials? (3) Is conversation to be divided into "public concern" and "private concern" categories, or must it be considered as whole to be either "public concern" or "private concern," an issue on which there is an acknowledged split among circuit courts as recognized in Saulmugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993)? (4) Did Eighth Circuit err in failing to consider, and find, under University of Tennessee v. Elliot, 478 U.S. 788 (1986), that discharge appeal hearing decision, in which dispatcher's free speech challenges were denied, constituted final decision, when not appealed under Missouri Administrative Procedure Act (RSMo. Sections 536.010 et seq.), and that such decision cannot be collaterally attacked under 42 U.S.C. 1983? (5) When dispatcher sued for $200,000 and received jury verdict and judgment for only $18,888 (less than 10 percent of amount claimed), did federal courts below err, under Farrar v. Hobby, 61 L.W. 4033 (U.S. Sup.Ct. 1992), in awarding more than $80,000 in attorneys' fees?

Schenck v. Oregon Commission on Judicial Fitness and Disability, unpublished (Ore. Sup. Ct. 3/10/94), cert. denied, 63 U.S.L.W. 3263 (10/3/94, No. 94-121). The Oregon Supreme Court had upheld an Oregon circuit court judge's 45 day suspension without pay for violations of Canons 1, 2A, and 3A(6) of the Oregon Code of Judicial Conduct. The court ruled that applying the Canons to public statements made by the judge, in a letter to the editor and in a guest editorial concerning pending or impending cases and the competence, training, experience and maturity of the district attorney for a county within the judge's district, did not violate the judge's free speech rights under either the Oregon or the United States constitutions. The questions presented by the petition were: (1) Does discipline of judge for his harsh criticism in local newspaper of the performance in office of the district attorney violate the First Amendment? (2) Are Canons 1A, 2A, and 3A(6) unconstitutionally vague as applied to judge's newspaper criticism in office of the district attorney?
5. **Obscenity**

   a. **Review Denied**

   *Illinois v. Page Books Inc.*, 235 Ill. App. 3d 765, 601 N.E. 2d 273, 175 Ill. Dec. 876 (Ill. 1994), cert. denied, 63 U.S.L.W. 3263 (10/3/94, No. 94-151). The Illinois Court of Appeals had reversed the defendant's conviction for state obscenity offenses holding that the lower court erred during defendant's obscenity prosecution by charging all three videos at issue in one count of the indictment, combining all 25 magazines at issue in the second count and by using general verdict forms. These errors constituted an unconstitutional prior restraint on the defendant's freedom of expression because it failed to provide the defendant with a precise judicial determination of which materials were obscene. The question presented by the petition was: Does the opinion of the court below undermine the authority of *Miller v. California*, 413 U.S. 15 (1973), by finding that failure to give special interrogatory verdict forms in obscenity case created a prior restraint by failing to instruct bookstore as to what materials it could offer in the future?

6. **Picketing**

   a. **Judgment Vacated**

   *Lawson v. Murray*, 136 N.J. 32, 642 A.2d 338, 63 U.S.L.W. 2647 (N.J. 1994), judg. vac., 63 U.S.L.W. 3256 (10/3/94, No. 94-45). The Supreme Court vacated an opinion of the New Jersey Supreme Court which had held that an injunction which bars anti-abortion picketing within three-hundred feet of the residence of a physician who performs abortions does not violate the First Amendment or a protester's right to free speech. The Supreme Court vacated the judgment for further consideration in light of its decision in *Madsen v. Women's Health Center Inc.*, 62 U.S.L.W. 4686 (U.S. 1994). The New Jersey court had reasoned that the injunction was a neutral time, place and manner restriction which was narrowly tailored to further the state interest in protecting residential privacy while leaving open alternative avenues of communication and expression. The questions presented by the petition were: (1) Should decision of court below be reversed as directly inconsistent with subsequent decision in *Madsen v. Women's Health Center Inc.*, 62 L.W. 4686 (U.S. 1994)? (2) Did court below err by holding that state courts have "inherent authority" to ban peaceful expressive activities in residential neighborhoods? (3) Did court below err by reviewing injunction banning peaceful expressive activity under test for "time, place and manner" restrictions instead of doctrine of prior restraints? (4) Did court below err by holding that injunction restricting only pro-life demonstrations is content neutral? (5) Do injunctive restrictions at issue violate rights to freedom of speech and freedom of assembly under the First Amendment?

   b. **Review Denied**

   *Williams v. Burnham Broadcasting Co.*, 629 So. 2d 1335 (La. Ct. App. 1993), cert. denied, 63 U.S.L.W. 3257 (10/3/94, No. 93-1914). The Louisiana Court of Appeals had ruled that a non-denominational church organization was properly enjoined from conducting boycotts targeting a
television station's advertisers. The court held that the boycotts, intended to force the station to give the organization free air time or news coverage of its activities, essentially amounted to extortion, which is a criminal activity not protected by the First Amendment. The questions presented by the petition were: (1) Is injunction issued by district court enjoining and prohibiting petitioner's protest of WVUE-TV 8 and boycott of its advertisers constitutionally infirm? (2) Do lower court's affirmance of injunction and denial of petitioner's writ application conflict with United States Supreme Court and Fifth Circuit precedent? (3) Was preliminary injunction issued by district court overbroad? (4) Is injunction issued by district court content based and insufficiently narrow to serve any compelling state interest?

7. **Trade Regulation**

   a. **Review Denied**

   *Anderson v. Nidorf*, 26 F.3d 100 (9th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3705 (3/27/95, No. 94-770). The United States Court of Appeals for the Ninth Circuit had ruled that a state statute making it unlawful to advertise, sell, or rent a sound recording or audiovisual work without disclosing its origin does not, on its face, violate First Amendment rights because it is narrowly tailored to achieve the state's content-neutral interests of preventing piracy and protecting consumers. The possibility that the statute may apply to recordings whose performers and manufacturers may wish to remain anonymous is not a substantial enough interest as to render the statute overbroad. The questions presented by the petition were: (1) May the state, consistent with the First Amendment guarantees of freedom of speech and case law requirements of *Talley v. California*, 362 U.S. 60 (1960), outlaw anonymous speech in the commercial marketplace by requiring the true name and address of the manufacturer and the name of the actual author on all sound recordings as prerequisite to offering them for sale? (2) Because piracy is not at all addressed by the statute, and consumer protection could be accomplished by much narrower identification requirement that would not impinge on protected speech, is the statute unconstitutionally overbroad?