# KEY FINDINGS OF THE 1996–97 LDRC 50-STATE SURVEYS

## FINDINGS OF THE 1996–97 MEDIA LIBEL SURVEY

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Libel Defense Resource Center
404 Park Avenue South, 16th Floor
New York, New York 10016

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KEY FINDINGS OF THE 1996–97 LDRC 50-STATE SURVEYS

INTRODUCTION

As in prior volumes of the LDRC BULLETIN, the final issue of the year is devoted in part to reporting new developments in libel, privacy, and related law that have occurred during the past year.

Most of these developments were initially reported either in the 1996–97 LDRC 50-STATE SURVEY OF MEDIA LIBEL LAW (published October 1996) or 1996–97 LDRC 50-STATE SURVEY OF PRIVACY AND RELATED LAW (published July 1996). The Surveys look at the law in the states, the District of Columbia, U.S. territories (Guam, Puerto Rico, and Virgin Islands), and the individual federal circuits. Also included in the summary are key developments that were reported following the publication of the Surveys.

In Part I, below, the key findings of the 1996–97 MEDIA LIBEL SURVEY are reported. In Part II, beginning infra at page 36, the key findings of the 1996–97 PRIVACY AND RELATED LAW SURVEY are reviewed. In Part III, beginning infra at page 56, statutes and related case law development are discussed. Finally, Part IV, beginning infra at page 61, reports a recent case of great significance to the media that is not limited to the libel or privacy context.

The findings are organized by topic and generally follow the outline format of the LDRC Surveys. Within each topic, recent cases that make a significant contribution to the law are discussed in some detail whereas cases that apply existing law are briefly noted or string-cited. Where appropriate, an introductory paragraph provides a summary of the law in areas in which the states are free to adopt differing standards, for example, the recognition of various of the privacy or related torts, limitations on the size or availability of punitive damages, or the level of fault required, under Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in cases involving private figures and speech of public concern.

I. FINDINGS OF THE 1996–97 MEDIA LIBEL SURVEY

A. SUBSTANTIVE LAW

Perhaps the most interesting collection of decisions reported in substantive libel law during the past year have been those analyzing and applying the principles related to the protection of “opinion.” See infra page 5. Notwithstanding a decision written by Retired Justice Byron White, sitting on the Eighth Circuit, that pointedly noted the rejection in Milkovich v. Lorain Journal of a blanket exemption for opinion, in cases reported during the past year courts have continued to protect opinion in a variety of ways.

Another area of both interest and importance are common law and statutory developments
that have the potential of limiting the availability as well as the size of damage awards. See infra page 26. On the other hand, however, during the last year courts have affirmed punitive damages awards that are extremely large both in absolute terms and as a percentage of the compensatory award.

1. Defamatory Meaning

   Examples of Defamatory and Nondefamatory Speech

In cases reported during the past year, the following statements were held capable of defamatory meaning: the accusation that a public official’s conduct was motivated by racism, MacElree v. Philadelphia Newspapers, Inc., 674 A.2d 1050, 24 Media L. Rep. 2204 (Pa. 1996); a memo that could be read as suggesting that plaintiff had engaged in inappropriate business practices, Claude v. Thomason, 1996 WL 217887, at *3 (D.D.C. Apr. 25, 1996); a statement that plaintiff operated “a large scale illegal (bingo) hall operation,” Trentecosta v. Beck, 1996 La. App. LEXIS 775 (La. App. 4th Cir., May 1, 1996); claims that a hospital executive was excitable, threw temper tantrums, was a misanthrope, recruited feebly, and caused job candidates to pack their bags and head home, Callender v. Nichtern, 1995 V.I. LEXIS 24 (V.I. Terr. Ct. 1995); and the charge that a woman had “assaulted” her ex-husband. Maguire v. Journal/Sentinel, Inc., 1995 WL 672534 (Wis. Ct. App. 1995) (unpublished opinion), review denied, 546 N.W.2d 471 (Wis. 1996).

On the other hand, courts have continued to recognize that not every utterance to which a plaintiff might object can form the basis of an action for defamation. In cases newly reported, a Texas appellate court noted that a statement may be false, abusive, and unpleasant without being defamatory. Free v. American Home Assurance Co., 902 S.W.2d 51, 54 Tex. App.—Houston [1st Dist.] 1995, n.w.h.). See also Guillory v. State Farm Ins. Co., 662 So. 2d 104, 112 (La. App. 4th Cir. 1995) (“Casual remarks made in informal conversation, even if they include unflattering words, do not constitute actionable defamation.”)

In other cases reported during the past year in the 1996–97 LIBEL SURVEY, the following statements were held incapable of defamatory meaning: accusations that plaintiff was “crude, vulgar and insubordinate,” Maier v. Maretti, 671 A.2d 701 (Pa. Super. 1995), reargument denied, (03/06/96); characterization of the plaintiff as “illiterate,” Guillory v. State Farm Ins. Co., 662 So. 2d 104, 112 (La. App. 4th Cir. 1995); claim that a public official had “washed his hands” of the county’s budget. Cazalet v. Flanagan, 24 Media L. Rep. 1501 (Ky. App. 1995) (depublished decision); and the accusation that plaintiff was a “fast talker who generated excitement.” Milsap v. Journal/Sentinel, Inc., 897 F. Supp. 406, 410-11 (E.D. Wis. 1995).

Per Se/Per Quod

In many jurisdictions, even statements capable of a defamatory meaning may not be actionable unless they are defamatory per se or the plaintiff can establish special damages. In decisions newly reported in the 1996–97 LIBEL SURVEY, the following statements were held not to be defamatory per
The following statements were held to be defamatory per se in cases decided during the past year: allegations of serious sexual misconduct, French v. Jadon, Inc., 911 P.2d 20 (Alaska 1996); statements implying unethical business practices, Southern Co. v. Hamburg, 220 Ga. App. 834, 470 S.E.2d 467 (1996), review denied (05/31/96); accusations that plaintiff acted as “an industrial spy” and was guilty of “lying, stealing, and attempting to deceive” company’s management, Swick v. Liautaud, 169 Ill. 2d 504, 662 N.E.2d 1238 (Ill. 1996), rehearing denied (03/01/96); announcement of a shoplifter code at a Wal-Mart store coupled with store manager’s statement that two employees had seen plaintiff remove merchandise without paying for it, Thomas v. Busby, 670 So. 2d 603 (La. Ct. App. 1996), writ granted, judgment vacated and remanded for reargument before five-judge panel, 673 So. 2d 601; an accusation of criminal complicity, Rippet v. Bemis, 672 A.2d 82 (Me. 1996); an accusation of corruption and the claim that plaintiff had arranged for someone to be beaten, Newman v. Delahunty, 293 N.J. Super. 469, 681 A.2d 659 (N.J. App. Div. 1996); and statement that plaintiff was a woman who “would climb into bed with anybody.” Rivera v. National Enquirer, Inc., 24 Media L. Rep. 1865, 1874 (N.J. Super. Ct. Law Div. March 13, 1996).

Defamation by Implication/Innuendo

In an opinion written by former Justice Byron R. White reported during the past year, the Eighth Circuit recognized a claim for libel by implication under Minnesota law, at least by private figures, holding that false implications from artificially juxtaposed facts or materially omitted facts are actionable by a private figure. Toney v. WCCO Television, 85 F.3d 383, 24 Media L. Rep. 1993 (8th Cir. 1996). In reversing the district court’s holding that Minnesota did not recognize claims for libel by implication, Justice White initially questioned whether there was actually majority support for this position in the divided decision of the Minnesota Supreme Court upon which the district court had relied. In the end, however, he distinguished that case as involving a public official plaintiff, and, relying on earlier decisions of the Minnesota Supreme Court that involved private figure plaintiffs and nonmedia defendants, held that private figures could bring a claim for libel by implication under Minnesota law.

In two other newly reported cases, courts limited the operation of such claims, holding that for a statement to be actionable as defamation by implication/innuendo, it is necessary to show that the defendant knew of or intended the allegedly defamatory inference. Chaiken v. VV Publishing
Finally, in a case involving a pornographic parody of a television advertisement, the court reversed its prior holding that the parody was potentially susceptible to the defamatory implication that the plaintiff had consented to appear in the parody. *Geary v. Goldstein*, 1996 WL 447776 (S.D.N.Y. Aug. 8, 1996). The parody had been created by splicing pornographic footage into an advertisement in which the plaintiff had previously appeared, and the court noted that the both the differing levels of production quality and the different content would have made it obvious that two different sources were involved. *Id.* at *1.* While acknowledging that most reasonable viewers would have inferred from the defendant’s mockery of the advertisement in which the plaintiff had appeared that both the plaintiff and the original sponsor would have been displeased by the parody and unlikely to have given their consent, the court had previously denied summary judgment because “channel surfers” unfamiliar with the defendant’s brand of humor might have thought that the defendant had produced the entire advertisement and that the plaintiff had consented to appear in it. *Id.* at *2.*

On reconsideration the court admitted that it had previously given insufficient weight to the requirement under New York law that courts consider the full context in which a statement appears when analyzing defamatory meaning. Citing New York cases that had taken the entire broadcast as the relevant context, the court concluded that it had been error to include “channel surfers” among reasonable viewers. *Id.* at *3* (“New York courts would recognize that to predicate liability on misimpressions garnered by a ‘channel-surfing’ viewer is too dangerous to the right of media speakers.”) The court also dismissed the plaintiff’s misappropriation claim. See infra page 45.

**Innocent Construction**

In a case reported during the past year, the Illinois Supreme Court reaffirmed its commitment to the state’s innocent construction rule, holding that the statements that plaintiff “could not get along with her coworkers” and “did not follow up on assignments” were capable of an innocent construction. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 667 N.E.2d 1296 (1996). Other remarks held to be nonactionable under the innocent construction rule included the statement that plaintiff was “very aggressive, to the point of being cocky” and “[a] con artist,” *Quinn v. Jewel Food Stores, Inc.*, 276 Ill. App. 3d 861, 658 N.E.2d 1225 (Ill. Ct. App. 1995); an allegation that the plaintiff was rude and lacked customer relations skills, *Gosling v. Conagra, Inc.*, 1996 WL 199738 (N.D. Ill. April 23, 1996); and the suggestion that plaintiff’s sales figures reflected year-end “loading.” *Ecton v. Van Houten North America, Inc.*, 1996 WL 296587 (N.D. Ill. May 31, 1996).

The innocent construction rule did not provide a defense in two other newly reported Illinois cases, however. *Buckley v. County of DuPage*, 1996 WL 238908 (N.D. Ill. May 2, 1996); *Swick v. Liautaud*, 169 Ill. 2d 504, 662 N.E.2d 1238 (Ill. 1996), rehearing denied (03/01/96). In *Buckley*, a plaintiff accused of a brutal murder was in custody awaiting retrial when another individual confessed to committing the murder alone. The court held that the statement by the plaintiff’s prosecutor in the
original trial that "multiple persons" had committed the murder and that he was "skeptical" about the confession were not capable of an innocent construction. In Swick, accusations that an employee was an industrial spy, had lied and stolen from the company, and had attempted to deceive company's management were also held incapable of an innocent construction.

Of and Concerning

In Fornshill v. Ruddy, 891 F. Supp. 1062 (D. Md. 1995), aff'd, 89 F.3d 828, 24 Media L. Rep. 1986 (4th Cir. 1996), the district court dismissed an action brought by the police officer who discovered the body of former White House official Vincent Foster against the author and publisher of a report that was critical of the investigation into Foster's death. The court held that the contentions that the Park Police had participated in a coverup by changing the location of where Foster's body had been found and had failed to take a crucial crime scene photograph were not of and concerning the plaintiff because he was not identified by name in this context.

In Desnick v. American Broadcasting Co., 24 Media L. Rep. 2238 (N.D. Ill. April 17, 1996), however, the district court denied defendants' summary judgment motion as to the corporate plaintiff, holding that viewers would find the broadcast's allegations to be "of and concerning" the corporate plaintiff and rejecting the defendants' argument that "only statements that actually refer to [plaintiff corporation] by name, or by a registered assumed name, can be defamatory." The case, involving a television report on practices at an eye care center that included allegations of tampering with equipment designed to detect glare problems, was on remand from the Seventh Circuit, which had reversed the district court's previous grant of defendants' motion to dismiss.

2. Opinion

The privilege or defense of "opinion" continues to be one of the most active and fertile grounds for litigation in defamation law, according to the 1996-97 LIBEL SURVEY. 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.

For example, a number of claims reported during the past year were dismissed completely or in part under Milkovich on the ground that they involved only nonactionable hyperbole. See, e.g., Dilworth v. Dudley, 75 F.3d 307, 24 Media L. Rep. 1542 (7th Cir. 1996) (calling academic "a crank" for his wrong-headed theories was mere rhetorical hyperbole); Underwager v. Channel 9 Australia, 69 F.3d 361, 367, 24 Media L. Rep. 1039 (9th Cir. 1995) (accusation that plaintiff was "lying" was just "rhetorical hyperbole" and not actionable as an accusation of perjury, for "'lying' applies to a spectrum of untruths including 'white lies,' 'partial truths,' 'misinterpretation' and 'deception'"); Gold v. Harrison, 24 Media L. Rep. 1383 (Haw. Cir. Ct. 1995) (remark by ex-Beatle George Harrison, "Have you ever been raped? I'm being raped by all these people," in connection with easement litigation held to be rhetorical hyperbole); Fasi v. Gannett Co., Inc., 930 F.Supp. 1403 (D.
Haw. 1995) (editorial critical of former mayor entitled “Blackmail Incorporated” held to be rhetorical hyperbole and not to involve an objective assertion of actual criminal wrongdoing); Aroonsakul v. Shannon, 279 Ill. App. 3d 345, 664 N.E.2d 1094 (Ill. App. 1996), appeal denied (10/02/96) (statement that claims in plaintiff’s brochure about novel treatment for Alzheimer’s disease were akin to “saying that toenail polish cures Parkinson’s disease” held to be nonactionable hyperbole); Kirsch v. Jones, 219 Ga. App. 50, 51, 464 S.E.2d 4, 6 (1995), cert. denied (Ga. Jan. 26, 1996) (statement that attorney bringing the malpractice claim had “bungled” the underlying case, should be liable to his firm for any judgment rendered in the malpractice action, and should not have “touched the case with a ten foot pole” nonactionable hyperbole); Newman v. Delahunty, 293 N.J. Super. 469, 681 A.2d 659 (N.J. App. Div. 1996) (cartoons and caricatures containing elements of exaggeration, hyperbole and obvious overstatement were nonactionable statements of opinion, although cartoon charging plaintiff with corruption contained defamatory statement of fact); Rivera v. National Enquirer, Inc., 24 Media L. Rep. 1865, 1875, 1878 (N.J. Super. Ct. Law Div. Mar. 13, 1996) (statements that plaintiff was “shamelessly and brazenly violating the law by having children out of wedlock and receiving welfare to support them” was hyperbole but statement that plaintiff was someone “who would climb into bed with anybody” and was depriving her children “of the right of being brought up in a moral home with a mother and a father” were potentially actionable); Condit v. Clermont County Review, 1996 Ohio App. LEXIS 1734 (Cler. App. 1734 April 29, 1996) (editorial describing political candidate and his family as “fascists” and “anti-Semites” is protected as hyperbole); Kilcoyne v. Plain Dealer Publishing Co., 1996 Ohio App. LEXIS 1995 (Cuya. App. May 16, 1996) (“miscreant,” “despicable,” “seedy,” “sordid,” and “bum” protected hyperbole).

Several recently reported cases were dismissed as nonactionable under Milkovich because the allegedly defamatory statements could not reasonably be understood as stating facts. See Campanelli v. Regents of Univ. of Cal., 44 Cal. App. 4th 572, 580, 51 Cal. Rptr. 2d 891 (Cal. Ct. App. 1996) (parent’s claim that someone or something was making his child sick was not a factual assertion in a medical sense because parents are not generally considered to be experts in the medical field; effect on the reader of such a statement is different when it is made by a parent as opposed to a professional with some expertise in the subject matter); Copp v. Paxton, 45 Cal. App. 4th 829, 840, 52 Cal. Rptr. 2d 831 (Cal. Ct. App. 1996), review denied, (08/14/96) (characterization of plaintiff’s views as “nonsense” and statement that defendant’s task to “keep [plaintiff] honest” was “[q]uite a challenge” contained no factual imputation of specific dishonest conduct); Newman v. Delahunty, 293 N.J. Super. 469, 681 A.2d 659 (N.J. App. Div. 1996) (comparing someone’s actions to those of a “Colombian drug lord” was nonactionable because no reasonable man would, in the context, accept that as a statement of fact charging the person with being a “Colombian drug lord”).

A number of other newly reported decisions dismissed claims completely or in part under Milkovich as incapable of being proven true or false. See Schroering v. Courier-Journal and Louisville Times Co., No. 95-CA-520-MR (Ky. App. Apr. 26, 1996), mot. for discretionary review, No. 96-SC-000468 (1996) (editorial reporting statements of attorneys and judges concerning the judicial candidate’s competency were personal opinions of the persons interviewed and could not be proven false); Silk v. City of Chicago, 1996 WL 312074 (N.D. Ill. June 7, 1996) (characterization of plaintiff as “useless piece of shit” is “most certainly an expression of subjective opinion which cannot be objectively verified”); Washington v. Smith, 80 F.3d 555 (D.C. Cir. 1996) (dismissing as
nonactionable the statement in a sports preview magazine that a college basketball coach "usually screws things up" because the coach could not prove that the statement was based "upon facts that are demonstrably untrue," or that no reasonable person could find that the statement was "a supportable interpretation of the underlying facts") Liles v. Finstad, 23 Media L. Rep. 2409 (Tex. App.—Houston [1st Dist.] 1995, error denied) (holding that none of the following phrases contain a provable false factual connotation: "John Liles existed in a sea of gray," "Where Kenny Williamson was direct and modest, John Liles was, by nature, furtive, mysterious — 'The Dudley Bell of the police department," Kenny once dubbed him"); Rivera v. National Enquirer, Inc., 24 Media L. Rep. 1865 (N.J. Super. Ct. Law Div. Mar. 13, 1996) (statement that the plaintiff was "one of the worst elements in our society" was not provably false, but statements that plaintiff was someone "who would climb into bed with anybody" and was depriving her children "of the right of being brought up in a normal home with a mother and a father" were capable of defamatory meaning and potentially actionable).

In two nonmedia decisions reported during the past year, however, courts rejected the defense and identified statements capable of being proven false under Milkovich. See H&R Industries, Inc. v. Kirshner, 899 F. Supp. 995 (E.D.N.Y. 1995); Schuller v. Swan, 911 S.W.2d 396 (Tex. App.—Corpus Christi 1995, no writ). In H&R Industries, the defendants had asserted that plaintiff had posed as an inspector and "contrive[d] shortages of inventory" in order to "sp[y] upon" customers. Although the characterization of plaintiff's activities as "disgusting and reprehensible" and the statement that plaintiff "is willing to prostitute himself in order to gain some expected economic benefit" were both dismissed as nonactionable opinion, whether the plaintiff had posed as an inspector was held to be a disputed issue of potentially defamatory fact. Id. at 1010–11. Similarly, in Schuller, the defendant's statements concerning police chief's tolerance of misconduct by police officers were held to be potentially false and defamatory assertions of fact rather than protected expressions of opinion.

Without referring to Milkovich, other recent decisions have relied upon pre-Milkovich cases to dismiss claims as nonactionable opinion under state law. For example, citing a 1987 decision of the Delaware Supreme Court holding "pure expressions of opinion" protected under the First Amendment, a district court dismissed as nonactionable a patient's statements that the treatment recommended by her gynecologist was unnecessary, inappropriate, and a violation of the standard of care owed to her. Kanaga v. Gannett Co., 24 Media L. Rep. 1074 (Del. Super. Ct. Oct. 20, 1995). Similarly, an Illinois appellate court cited a pre-Milkovich decision of the Illinois Supreme Court that had adopted the fact–opinion test set forth in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), in holding that the characterization of plaintiff as "very aggressive, to the point of being cocky" and "[a] con artist! Watch out for the bullshit!" was protected opinion. Quinn v. Jewel Food Stores, Inc., 276 Ill. App. 3d 861, 658 N.E.2d 1225 (Ill. Ct. App. 1995).

In another recently reported decision that also relied on Ollman, the Oklahoma Supreme Court held that accusations of wrongdoing leveled by one candidate for governor against his opponent were nonactionable opinion. Price v. Walters, 1996 Okla. LEXIS 76 (Okla. May 21, 1996). The court's only reference to Milkovich was to Justice Brennan's dissenting opinion; for its First Amendment analysis the court relied primarily on Ollman v. Evans, from which it quoted extensively.
The court also quoted the well-known passage from *Gertz v. Robert Welch, Inc.* that “there is no such thing as a false idea” and stated that it was particularly important in the political arena to protect statements “which the reader should perceive as functionally more ‘opinion’ than ‘fact’ because they appear in the context of swirling political controversy.”

Several other decisions newly reported during the past year followed *Milkovich* in refusing to recognize a wholesale exemption for opinion and holding that “opinions” that rely on undisclosed defamatory facts are actionable. See *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 24 Media L. Rep. 2204 (Pa. 1996) (charges that a public official had engaged in “racism” and “electioneering” set forth actionable statements of fact; *Callender v. Nichtern*, 1995 V.I. LEXIS 24 (V.I. Terr. Ct. 1995) (newspaper report that hospital executive “can’t get along with other doctors and makes derogatory comments about them,” “is excitable and has temper tantrums,” and is a “misanthrope [who] doesn’t like anyone” potentially actionable under *Milkovich* as containing undisclosed defamatory facts). On the other hand, although an appellate court in Oregon followed *Milkovich*, it dismissed the claim because the statement did not imply the existence of undisclosed defamatory facts. *Hickey v. Settlemer*, 141 Or. App. 103, 917 P.2d 44 (Or. Ct. App. 1996), review denied, 323 Or. 690, 920 P.2d 549 (Or. 1996).

Moreover, in a decision written by retired Justice Byron White, the Eighth Circuit stated that by rejecting the fact–opinion dichotomy as “artificial” and reducing the relevant inquiry to whether a statement is provably false, *Milkovich* had weakened prior decisions that had applied a multifactor test for separating potentially actionable fact from nonactionable opinion. *Toney v. WCCO Television*, 85 F.3d 383, 24 Media L. Rep. 1993 (8th Cir. 1996). However, while holding that multifactor tests were no longer dispositive, Justice White acknowledged that “some courts have found [them] instructive in determining whether a statement is capable for (sic) being proved false.” *Toney* is particularly significant not only for its author, but because joining in the decision was Chief Judge Arnold, who had written the en banc majority opinion in *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 12 Media L. Rep. 1961 (8th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 883 (1986), which set forth the multifactor test characterized in *Toney* as no longer dispositive.

In another newly reported decision, however, a district court in the Eighth Circuit held that statements preceded by a phrase such as “it is my position” or “it is my belief” or “I will attempt to prove” are generally, as a matter of law, nonactionable as opinion. *Pape v. Reith*, 918 S.W.2d 376 (Mo. App. E.D. 1996). The court reasoned that such cautionary phrases will alert readers that the following statements reflect the expression of an opinion. “Put plainly, it is impossible to interpret [statements preceded by such cautionary language] as positing a verifiable proposition, and verifiability is the crux of the fact/opinion distinction in defamation law.”

Cases reported during the past year indicate that courts have continued to examine the context in which a statement appears in order to determine whether a reasonable reader or listener would consider that facts are being expressed. See *Brian v. Richardson*, 87 N.Y.2d 46, 637 N.Y.S.2d 347, 660 N.E.2d 1126, 24 Media L. Rep. 1534 (1995) (courts must consider the “larger context in which statements [are] published, including the nature of the particular forum”); *Goetz v. Kunstler*, 164 Misc. 2d 557, 625 N.Y.S.2d 447, 23 Media L. Rep. 2140 (Sup. Ct. N.Y. Co. 1995) (content, tone
and apparent purpose of a statement should signal reader that statement reflects author's opinion).

In suits arising from television appearances by the singer Melba Moore to discuss her bitter divorce from her former manager, three separate New York State trial courts relied on context to dismiss the libel claims brought against the media defendants, holding that the allegedly defamatory statements would have been understood by viewers as nonactionable statements of opinion. See Huggins v. Povich, Index No. 131164/94 (N.Y. Sup. Ct. Apr. 10, 1996) ("Moore's comments were made as part of the give and take of a television talk show" and "the host and other guests repeatedly pointed out, and Moore confirmed, that her statements were her own personal views on the subject of her bitter divorce and its financial aftermath, and that her exercise-husband denies her 'charges' and 'allegations'"); Huggins v. Whitney, 24 Media L. Rep. 1088 (N.Y. Sup. Ct. 1996) (television show was "known as a show featuring gossip and scandals" and media defendants made clear that they were only giving Ms. Moore a forum for expressing her opinions); Huggins v. NBC, Index No. 119272/95 (N.Y. Sup. Ct. Feb. 5, 1996) ("loose structure and conversational tone [of television interview] signaled to the viewers that they were hearing Ms. Moore's own beliefs and perspectives").

Several other recently reported cases were dismissed on the ground that statements that had appeared on a newspaper's editorial pages would not reasonably be understood as stating facts about an individual. See Millsap v. Journal/Sentinel, Inc., 897 F. Supp. 406, 411 (E.D. Wis. 1995) ("The entire piece, of course, is on the editorial page and is clearly marked as opinion."); Cazalet v. Flanagan, 24 Media L. Rep. 1501 (Ky. App. 1995) (depublished decision) ("the average lay reader would undoubtedly interpret the statements [contained on the editorial page] as the opinion of the author").

As the decision of a New York appellate court makes clear, however, publication on an editorial page does not automatically transform a false factual statement into an opinion. See Millus v. Newsday, Inc., 638 N.Y.S. 2d 613, 24 Media L. Rep. 1726 (1st Dep't 1996). In Millus, the defendant published an editorial in which it stated that the plaintiff, who was running for public office, "admits he doesn't expect to win and is relieved by the prospect." In rejecting the defendant's opinion defense, the court held that the use of the word "admits" conveyed to a reasonable reader that the defendant was "giving a factual account of a statement made by the plaintiff, rather than offering their own opinion of plaintiff's attitude."

### 3. Truth/Falsity

#### Burden (and Quantum) of Proof of Falsity

It is clear, under Philadelphia Newspapers v. Hepps, that the plaintiff bears the burden of proof in cases involving media defendants and speech on matters of public concern. Several cases newly reported during the past year in the 1996–97 LIBEL SURVEY have considered the applicable burdens of proof in other contexts.

In an opinion that traces the history of Massachusetts defamation law, a trial court held that
under Massachusetts law the plaintiff bears the burden of proving falsity regardless of the defendant’s status. *Gilbert v. Bernard*, 4 Mass. L. Rptr. 143 (Bristol Cty. Superior Court 1995) (Garsh, J.). Although the case involved speech on an issue of public importance — use of public funds — the court suggested in dictum that under the holding of the Massachusetts Supreme Court in *Stone v. Ewex Fins., Inc.*, 367 Mass. 849, 330 N.E.2d 161 (Mass. 1975), the plaintiff bears the burden of proving falsity regardless of the content of the speech.

In two newly reported nonmedia decisions, appellate courts in Tennessee affirmed dismissals on summary judgment because the plaintiff had failed to provide any evidence of falsity. The courts neither discussed whether such a result was constitutionally required, or whether the burden of proof would have shifted to the defendant had the plaintiff provided any evidence of falsity. In both cases, however, the court appeared to assume that regardless of the plaintiff’s status or the nature of the speech, it was the plaintiff’s burden to prove the statement false. See *Gibbons v. Schwartz-Nobel*, C.A. No. 01A01-9507-CH-00316, 1996 Tenn. App. LEXIS 57 (Tenn. Ct. App. Jan. 31, 1996) (“[a]n essential element of a cause of action for defamation is a false and defamatory statement which the plaintiff must prove”); *Newsom v. Textron Aerostructures*, 1995 Tenn. App. LEXIS 681 (Tenn. Ct. App. Oct 20, 1995) (“Since [plaintiff] apparently does not even know what statements were made to the government . . . he certainly cannot prove that the statements were false or caused him actual damages.”)

In an opinion that the court indicated was based upon state rules of civil procedure rather than constitutional considerations, the Supreme Court of Pennsylvania held that in order to defeat a motion for summary judgment, the plaintiff must produce sufficient evidence to demonstrate that there is a genuine issue of material fact as to the issue of falsity. *Ertel v. Patriot-News*, 674 A.2d 1038, 24 Media L. Rep. 2233 (Pa. 1996), *reargument denied*, (07/17/96). See infra page 30.

By contrast with the above decisions, in a private figure libel case against a nonmedia defendant that did not involve a matter of public concern, the First Circuit applied Maine common law defamation principles and imposed on the defendants the burden of proving truth. *Simon v. Navon*, 71 F.3d 9 (1st Cir. 1995). The court cited two prior Maine cases, one of which in turn cited to a 1988 decision stating that if a case involves “a nonmedia defendant, defaming a private plaintiff concerning a matter that is not of public concern,” then “the falsity of a defamatory statement is presumed and it is the defendant’s burden to plead and prove truth as an affirmative defense.” *Citing Ramirez v. Rogers*, 540 A.2d 475, 477–78, 15 Media L. Rep. 1364 (Me. 1988).

Another unsettled issue is the requisite quantum of proof in cases in which plaintiff bears the burden of proof of falsity. In another newly reported decision, an appellate court in Washington held that actual malice is the only element of a libel claim for which clear and convincing evidence is required and that all other elements, including falsity, require proof by only a preponderance of the evidence. *Richmond v. Thompson*, 79 Wash. App. 327, 901 P.2d 371 (Wash. App. 1995), *aff’d*, 922 P.2d 1343 (Wash. 1996). This holding conflicts with the position of other appellate divisions in Washington, which require proof of all elements by clear and convincing evidence, and the case is currently under review by the Washington Supreme Court.
Scope of the Truth Defense

In analyzing the truth defense in cases reported during the past year courts have applied the basic law that "[minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." Masson v. The New Yorker, 501 U.S. 496, 516–17 (1991) (internal quotation and citation omitted). See, e.g., Tilton v. Capital Cities/ABC, Inc., 905 F. Supp. 1514, 23 Media L. Rep. 2057 (N.D. Okla. 1995), aff'd, 95 F.3d 32 (10th Cir. 1996) (plaintiff "cannot simply point to minor inaccuracies in the challenged statements... [but] must show that the statements were not substantially true... It is the ‘substance, the gist or the sting’ of the alleged defamatory statements that are critical to the Court’s analysis." ) (quoting Masson), Smiley’s Too, Inc. v. The Denver Post Corp., 24 Media L. Rep. 2272 (Colo. Ct. App. June 27, 1996) (upholding jury instruction stating that "in order for the plaintiff to recover you must find that the substance or gist of the statement was false at the time the article was published, and the falsity was such that the article as a whole would produce a materially more damaging effect upon the reader than the truth of the matter").

In recently reported decisions, two Texas appellate courts applied the substantial truth doctrine to dismiss defamation claims. Barbouti v. Hearst, 927 S.W.2d 37 (Tex. App.–Houston [1st Dist.] 1996, no writ); Reeves v. Western Co. of North America, 867 S.W.2d 385, 393 (Tex. App.–San Antonio 1993, writ denied). In Barbouti, the court held that it was substantially true to report that the plaintiff had been found guilty of conspiring to steal technology for export to the Middle East when the jury had found such a conspiracy but without specific reference to the export destination. In Reeves, the court held that it was substantially true to report that the plaintiff had failed an alcohol test with an alcohol reading of 0.4%, when the actual reading was 0.04%.

Similarly the Eighth Circuit recently held that based on positive results of drug test, the gist of a supervisor’s statements that an employee used illicit drugs was true, and affirmed the dismissal of the plaintiff’s claim. Landon v. Northwest Airlines, Inc., 72 F.3d 620, 627–628 (8th Cir. 1995). See also Prus v. Penn Mutual Life Ins. Co., 1996 WL 224518 (N.D. Ill. May 1, 1996) (document that defendant submitted to National Association of Securities Dealers, informing it of plaintiff’s termination and of her investigation for alleged violation of investment-related rules, was substantially true); White v. Town of Chapel Hill, 899 F. Supp. 1428, 1438 (M.D.N.C.), aff’d, 70 F.3d 1264 (4th Cir. 1995) (statement that plaintiff was a “gunman” held to be “a fair representation of the full truth”); Simmons v. Ware, 920 S.W.2d 438 (Tex. App.–Amarillo 1996, no writ) (stating that a reporter drank a toast to the castration of an individual is substantially the same as the reporter being at a party and observing such a toast).

In a recently reported federal case, the Sixth Circuit affirmed a grant of summary judgment in a suit involving a newspaper article entitled “Wynonna and Naomi: We were ripped off $20 million” that reported on a dispute between a country music duo and their former business manager. Stills v. Globe International, No. 95-5554 (6th Cir. July 2, 1992). The plaintiff claimed that the article reported that he had been “bleeding [his clients] dry for ten years” and had “pocketed most of what [his clients] had earned.” The Sixth Circuit rejected the plaintiff’s contention that the “gist” of the article was that he had stolen funds from his clients, holding that the gist of the article was that
there was a controversy between the parties and that this was substantially true.

Similarly, a federal court in Texas recently held that an article reporting that a broker was under investigation for having participating in a money-laundering scheme with savings and loans executives at a bank that later failed was substantially true. Mullens v. The New York Times, 3-95-CV-0368-R (N.D. Tex. July 30, 1996). The story was based upon sealed affidavits and pleadings filed by the FBI that had been obtained by the defendant. Although the plaintiff claimed that the story was false because he had never been charged with a crime, the court compared the article with one of the affidavits and held that it was substantially true as a matter of law because it accurately summarized the FBI investigation and the plaintiff’s alleged involvement in the activities being investigated.

In another recent decision applying the substantial truth doctrine, a Minnesota appellate court held that in constitutional cases a statement concerning an ambiguous situation is not defamatory if a reasonable person could find the statement was substantially true even if other interpretations of the situation were possible. Hunter v. Hartman, 545 N.W.2d 699, 24 Media L. Rep. 2004 (Minn. Ct. App. 1996), review denied (07/19/96).

In a decision reported from the Northern District of Illinois, involving an article published by Church of Scientology, the substantial truth doctrine was only partially successful in deflecting the plaintiff’s claim. Kisser v. Coalition for Religious Freedom, 1996 WL 98971 (N.D. Ill. March 1, 1996). Although the court found no factual dispute with respect to the statement that the plaintiff associated with criminals, it held that an association with criminals was insufficient to provide a truth defense to the charge that plaintiff had herself engaged in criminal activity.

In a recent decision involving inaccurate quotations, a Texas appellate court applied the substantial truth doctrine, holding that even if the plaintiff was somewhat misquoted, it did not change the substance of the defendant’s article. San Antonio Express News v. Dracos, 922 S.W.2d 242 (Tex. App.—San Antonio 1996, no writ) (“the common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth.”) (citing Masson v. The New Yorker, 501 U.S. 496, 518 (1991)).

In a recent decision involving claims and counterclaims arising from the closing of a commodities office, the Fifth Circuit warned that there is “no statutory or jurisprudential basis for the proposition that a criminal conviction satisfies the truth inquiry in a civil proceeding for defamation.” Conti Commodity Servs., Inc. v. Ragan, 63 F.3d 438, 442 (5th Cir. 1995), cert. denied, 116 S.Ct. 1318 (1996). The criminal conviction was on appeal at the time the district court relied upon it in dismissing the defamation counterclaim, and the conviction was subsequently reversed. Thus, despite the troublingly broad language in Ragan, the holding would appear to be limited to convictions that are on appeal and not to convictions on which appeals have been exhausted. Although the Fifth Circuit reversed the district court on the issue of truth, it nevertheless affirmed the entry of summary judgment based on a common interest privilege. See infra, page 24.
4. Fault

Determination of Public Figure Status under Gertz

In cases reported during the past year in the 1996-97 LIBEL SURVEY, the following persons were held to be public officials: the assistant regional administrator of a branch office of the United States Securities Exchange Commission, **Matta v. May**, 888 F. Supp. 808 (S.D. Tex. 1995); police detective, **Padilla v. El Vocero**, 96 JTS 26; incumbent candidate for mayor and active mayoral candidate, **Newman v. Delahunty**, 293 N.J. Super. 469, 681 A.2d 659 (N.J. App. Div. 1996). On the other hand, a jail supervisor and a jail matron were held not to be public officials in a nonmedia case, **Penland v. Long**, 922 F. Supp. 1085, 1091 (W.D.N.C. 1996).

In a decision reported during the past year, an appellate court in Texas came to the unsurprising conclusion that a television reporter who did his own regular commentary news segment was a general purpose public figure. **San Antonio Express News v. Dracos**, 922 S.W.2d 242 (Tex. App.—San Antonio 1996, no writ).

In addition, the following individuals were held to be limited purpose public figures in cases reported during the past year: a housing developer with respect to a controversy involving the provision of mortgage insurance by the U.S. Department of Housing and Urban Development, **Clardy v. Cowles Publishing Co.**, 81 Wash. App. 53, 912 P.2d 1078, 24 Media L. Rep. 2153 (1996); a mathematician within the academic community in which he was known, **Dilworth v. Dudley**, 75 F.3d 307, 309, 24 Media L. Rep. 1542 (7th Cir. 1996) (“anyone who publishes becomes a public figure in the world bounded by the readership of the literature to which he has contributed”); former “Legion of Doom” members who actively sought publicity regarding their former affiliation with respect to the particular controversy of threats caused by hackers to computer security, **Goggans v. Boyd & Fraser Publishing Co.**, 1995 WL 574530 (Tex. App.—Houston [1st Dist.] 1995, no writ); a broadcaster/general manager at a radio station with respect to a controversy involving the station, **Q-Tone Broadcasting Co. v. Music Radio of Maryland, Inc.**, 24 Media L. Rep. 1929 (Del. Super. Ct. 1995); an individual who made public statements concerning earthquake safety procedures, **Copp v. Paxton**, 45 Cal. App. 4th 829, 52 Cal. Rptr. 2d 831 (1996), review denied, (08/14/96); an individual who injected herself into the public view by contacting the media and continuing to participate in the public controversy thereafter. **Rivera v. National Enquirer, Inc.**, 24 Media L. Rep. 1865 (N.J. Super. Ct. Law Div. March 13, 1996); and a food processor for purposes of controversy regarding contamination of water supply, **Bay View Packing Co. v. Taff**, 543 N.W.2d 522, 24 Media L. Rep. 1289 (Wis. Ct. App. 1995) (plaintiff became a public figure involuntarily by virtue of its failure to immediately comply with the federal government’s notice requiring it to recall its products).

Several decisions reported during the past year have involved the status of corporate plaintiffs. In **Harris Nursing Home, Inc. v. Narragansett Television, Inc.** (No. 95-52-M.P.) (R.I. 1995) (unpublished opinion), the Rhode Island Supreme Court held that a nursing home was a public figure. The court reasoned that the plaintiff had voluntarily entered a closely regulated industry that involved matters of great public concern and should have realized its business would invite attention, comment, and even criticism from the state, the public, and the media.
By contrast, a New Jersey appellate court held that despite the fact that it was state regulated, highly advertised, and well known to the public, a real estate agency was not a public figure. Van Sciver Co. v. Ocean Nat'l Bank (No. A-5039-93T2, App. Div. Aug. 24, 1995), certif. denied, 143 N.J. 327 (1996). Inter alia, the court pointed to the fact that the allegedly defamatory statement, namely that the plaintiff was "bankrupt," involved neither regulatory affairs, government controls, nor matters related to the public interest, such as consumer fraud or shoddy business practices. The court also stated that advertising and selling products or services to the public alone does not automatically thrust "business owners into the vortex of public controversy."

Finally, a Delaware court held that a radio station was a general purpose public figure, despite its relatively small broadcast area, because the station had achieved "general fame and notoriety" in the community to which it broadcast. Q-Tone Broadcasting Co. v. Music Radio of Maryland, Inc., 24 Media L. Rep. 1929 (Del. Super. Ct. 1995).

Application of Actual Malice Rule

Decisions applying and explicating the actual malice rule continue to be reported with some frequency, according to the 1996–97 LIBEL SURVEY. In an opinion that characterized the actual malice standard as "daunting," the D.C. Circuit rejected as evidence of actual malice all of the following: (1) lack of corroboration of the article's primary source, despite reasons to doubt his credibility, (2) alleged fabrication by editors of an attorney's endorsement of the source's credibility by deleting portions of the attorney's statement, (3) editorial embellishment supporting the conspiracy theories, and (4) changing the plaintiff's reported response from "[he] denied the charges" to "[he] refused comment." McFarlane v. Esquire Magazine, 74 F.3d 1296, 24 Media L. Rep. 1332, 1341 (D.C. Cir. 1996), cert. denied, 65 U.S.L.W. 3245 (October 8, 1996). Because of the subjective nature of the actual malice standard, the McFarlane court also held that absent a relationship of respondeat superior, actual malice will not be imputed from an author to the publisher. Id. at 1336–37.

Several decisions reported in the last year held that, standing alone, evidence of defendant's hostility towards the plaintiff or a desire to cast the story in a particular light is insufficient to satisfy the actual malice standard, for neither is evidence of a belief in the falsity or probable falsity of the statement. Thus, in McFarlane v. Esquire, the D.C. Circuit observed that "[t]he fact that a commentary is one-sided and sets forth categorical accusations has no tendency to prove that the publisher believed it to be false." 74 F.3d at 1307, 24 Media L. Rep. at 1341 (quoting Westmoreland v. CBS, Inc., 601 F. Supp. 66, 68, 11 Media L. Rep. 1703, 1705 (S.D.N.Y. 1984)). Similarly, in Freedom Communications, Inc. v. Brand, 907 S.W.2d 614 (Tex. App.—Corpus Christi 1995, no writ), a Texas appellate court held that actual malice cannot be inferred from the frequency of a media defendant's criticism of the job performance of a public official. Finally, in a nonmedia case the Louisiana Supreme Court held that circumstantial evidence that the defendants' activities were motivated by hostility to plaintiff's associates did not provide the necessary "corroborating evidence" of plaintiff's own testimony sufficient to constitute clear and convincing evidence of actual malice. Davis v. Borskey, 660 So. 2d 17, 23–25 (La. 1995). See also Torgerson v. Journal Sentinel, Inc., 546 N.W.2d 886 (Wis. App. 1996) (unpublished opinion) ("The newspaper is under 'no legal obligation
to present a balanced view' and cannot lose is constitutional protection because the plaintiff believes it failed to do so.

Although evidence of hostility is insufficient by itself to establish actual malice, the Connecticut Court of Appeals noted in a recent nonmedia decision that evidence of ill will can "assist in drawing an inference of knowledge or reckless disregard of falsity." Abdelsayed v. Narumanchi, 39 Conn. App. 778, 783, 668 A.2d 378, 381 (Conn. App. 1995), cert. denied, 65 U.S.L.W. 3245 (10/07/96, No. 96-144). In affirming a jury finding of actual malice, the court pointed to the demonstrated ill will between the parties, the defendant's refusal to retract, and the defendant's admission that an allegedly plagiarized idea did not originate with him, leading to finding of awareness of the statement's probable falsity and proof of actual malice with convincing clarity.

Two recently reported decisions emphasized the fact that, standing alone, failure to investigate does not rise to the level of actual malice. Davis v. Borskey, 660 So. 2d 17, 25 (La. 1995) (that defendant "failed to investigate fully the truth of the statements before publication" cannot satisfy actual malice standard); Freedom Communications, Inc. v. Brand, 907 S.W.2d 614, 622 (Tex. App.--Corpus Christi 1995, no writ) ("failure to investigate, without more, cannot establish actual malice. There must be evidence at least that the defendants purposefully avoided the truth.") (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685 (1989).

In a recent unreported opinion that reviewed actual malice instructions in a qualified privilege context, however, the Seventh Circuit held that while failure to investigate is not alone enough to establish malice, "so long as the defendant doubted the veracity of the statement, his failure to investigate may well be enough to establish liability." Mann v. City of Chicago, 74 F.3d 1242 (7th Cir. 1996), cert. denied, 65 U.S.L.W. 3262 (10/07/96, No. 96-260).

In two recently reported decisions, reliance upon reputable sources was held to defeat a finding of actual malice. In Underwager v. Channel 9 Australia, 69 F.3d 361, 368, 24 Media L. Rep. 1039 (9th Cir. 1995), the defendant had relied upon a statement in a published opinion of the Washington Supreme Court in reporting that plaintiff's research on sexual abuse of children was funded by the insurance industry. And in Johnson v. Nickerson, 542 N.W.2d 506 (Iowa 1996), the Iowa Supreme Court held that a motion to be filed with the court by legal professionals had "sufficient indicia of reliability" to prevent a finding of actual malice.

Private Figure Fault Standard under Gertz

According to the 1996–97 LIBEL SURVEY, 43 of the 49 jurisdictions\(^1\) that have determined the applicable fault standard under Gertz v. Robert Welch, Inc. do not impose a fault standard more

\(^1\)Only Missouri, Montana, Nebraska, North Dakota, and South Dakota have yet to establish a state law standard under Gertz.
demanding than the minimum required under federal constitutional law and permit liability upon a showing of mere negligence. Three jurisdictions require plaintiffs to establish actual malice; two more require plaintiffs to demonstrate actual malice in some circumstances, and one applies a standard more demanding than negligence but less demanding than actual malice.

No cases newly reported in the LIBEL SURVEY addressed the state’s Gertz standard.

Standard for Nonmedia Versus Media Defendants

Whether nonmedia defendants may assert all of 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 1996–97 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, 28 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, in cases involving issues of public concern. By contrast, only eight jurisdictions have either explicitly or implicitly distinguished between media and nonmedia defendants, with the remainder either having not yet addressed the issue or having divided authority in their lower courts. Finally, an additional 12 jurisdictions refuse to distinguish between media and nonmedia defendants.

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3Alaska, Colorado, and Indiana.

4In Louisiana, private figure plaintiffs must demonstrate actual malice in cases involving issues of public concern where defamation per se is not at issue. Hebert v. La. Ass’n of Rehabilitation Professionals, Inc., 657 So. 2d 998, 23 Media L. Rep. 2213 (La. 1995). In New Jersey, the actual malice standard is applied to businesses concerned with matters of public health and safety, businesses subject to substantial government regulation, and businesses that have been charged with criminal fraud, a substantial regulatory violation, or consumer fraud that raises a legitimate public concern; a negligence standard is applied in all other cases. Turf Lawnmower Repair v. Bergen Record Corp., 139 N.J. 392, 655 A.2d 417, 23 Media L. Rep. 1609 (1995), cert. denied, 116 S. Ct. 752, 133 L. Ed. 2d 700 (1996).

5New York (gross irresponsibility).

6Alabama, Alaska, California, Colorado, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, Mississippi, Montana, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Virgin Islands, Virginia, Washington, and West Virginia.

7Arizona, Arkansas, Florida, Kentucky, Minnesota, Oregon, Pennsylvania, and Vermont.
when the plaintiff is either a public official or public figure required to prove actual malice.\(^8\)

In nearly all cases reported during the past year that addressed the issue, nonmedia and media defendants were afforded the same level of constitutional protection.

Thus, in affirming a grant of summary judgment based on the plaintiff's failure to establish actual malice, a Tennessee appellate court rejected the claim a public official need not prove actual malice in cases involving a nonmedia defendant. Selby v. Ilabaca, 1996 Tenn. App. LEXIS 254 at *12 (Tenn. Ct. App. April 29, 1996).\(^9\) See also Landry v. Roberson Advertising Service, Inc., 660 So. 2d 194, 197 (La. App. 4th Cir. 1995), rehearing denied (09/26/95) ("elevated standard" of review applicable to motions for summary judgment motions in the defamation context applies to nonmedia as well as media defendants). Similarly, a federal court in New York held a private figure plaintiff to the same Gertz standard in a nonmedia case as would be applicable in a media case. Mott v. Anheuser-Busch, Inc., 910 F. Supp. 868, 875, 24 Media L. Rep. 1353 (N.D.N.Y. 1995), aff'd, 1996 WL 560749 (2nd Cir., Oct. 3, 1996). The court noted that although the New York Court of Appeals had never expressly extended constitutional protection to nonmedia defendants in cases involving a private figure plaintiff and an issue of public concern, federal courts in the Second Circuit as well as intermediate-level state appellate courts in New York had declined to draw a distinction between media and nonmedia defendants.

With respect to the requirement under Hepps that plaintiffs bear the burden of proving falsity in cases involving issues of public concern and a media defendant, in two newly reported cases of first impression, courts held that the plaintiff bears the burden of proving falsity regardless of the defendant's status when the speech involves a matter of public concern. Nizam-Aldine v. City of Oakland, 54 Cal. Rptr. 2d 781 (Cal. Ct. App. 1996) ("distinction between media and nonmedia defendants . . . has been rejected by courts in other jurisdictions and is inconsistent with the First Amendment analysis set forth in several California cases."); Gilbert v. Bernard, 4 Mass. L. Rptr. 143 (Bristol Cty. Superior Court 1995) ("Precedent, logic and the deep commitment of this Commonwealth and nation to protecting the free speech of all its citizens compel placing the burden of proving falsity upon [the plaintiff].")

And in another recent case, the Ninth Circuit held that First Amendment protections should apply to all persons legally within the United States borders, including foreign visitors. Underwager v. Channel 9 Australia, 69 F.3d 361, 367, 24 Media L. Rep. 1039 (9th Cir. 1995) ("the attempt of a United States citizen to use our courts to deny the privilege of free speech to a visitor to the United States, legally within the country, cannot be countenanced").

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\(^8\)Georgia, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, North Carolina, Oregon, Pennsylvania, Rhode Island, and Texas.

\(^9\)While the appellate court based its decision on Tennessee law, it is clear under New York Times v. Sullivan that public officials must prove actual malice regardless of the defendant's status.
Standard for Issues of Public Concern versus Private Concern under Gertz


In cases reported in the 1996-97 LIBEL SURVEY during the past year, the following issues were held to be matters of public concern: allegations of consumer problems involving a dry cleaning business, Smiley's Too, Inc. v. The Denver Post Corp., 24 Media L. Rep. 2272 (Colo. Ct. App. June 27, 1996) (the public has a legitimate need for information that affects many consumers and involves a consumer affairs agency); allegations of racist views held by jury foreman in a criminal case involving a black defendant, Johnson v. Nickerson, 542 N.W.2d 506 (Iowa 1996) (there is a valid public concern when the subject matter involves the criminal justice system), representations made in promotional brochures regarding government entity’s prepaid college tuition program, College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 919 F. Supp. 756, 761 n.3, 24 Media L. Rep. 1558 (D. N.J. 1996) (“That a statement embodies or addresses a commercial matter certainly does not preclude a court from finding that it falls within the realm of public concern.”)

Among issues held not to be matters of public concern in cases reported in the LIBEL SURVEY were a patient’s comments regarding the level of care provided by her doctor, despite the court’s acknowledgment that “the cost of health care and increased patient second-guessing of physician recommendations and alternative treatments have been issues publicly discussed for a number of years,” Kanaga v. Gannett Co., 24 Media L. Rep. 1074, 1081 (Del. Super. Ct. Oct. 20, 1995) (dictum); and a commercial defamation dispute between two business entities, Van Sciver Co. v. Ocean Nat'l Bank (No. A-5039-93T2, App. Div. Aug. 24, 1995), certif. denied, 143 N.J. 327 (1996).

It is worth noting, however, that even where a court has declined to treat the allegedly defamatory speech as a matter of public concern, in many instances this has not meant that it has applied a strict liability standard. For example, despite holding that the commercial dispute at issue in Van Sciver did not implicate a matter of public concern, and its ruling that the plaintiff real estate agency was not a public figure, see supra page 14, the court applied a negligence standard to the defamation claim. Similarly, the Alaska Supreme Court applied a negligence standard to statements concerning a private plaintiff on issues that are not of public concern. French v. Jadon, Inc., 911
P.2d 20 (Alaska 1996). Lastly, although the court in *Gilbert v. Bernard*, 4 Mass. L. Rptr. 143 (Bristol Cty. Superior Court 1995), determined that the speech at issue did involve a matter of public concern, it opined that under Massachusetts law, the plaintiff would have borne the burden of proving falsity regardless of the content of the speech.

5. **Liability for Republication: The “Wire Service” Defense**

The wire service defense was employed in two relatively new and interesting contexts in cases reported during the past year.


In *Merco*, the court held that the affiliate did not have an independent duty to review the program it had received from the network, which it noted had already been reviewed for content by the network’s in-house counsel. In such circumstances the *Merco* court concluded that it was not only economically impractical for an affiliate to re-review the program but “overreaching” to require it to do so. 923 F. Supp. at 929. Similarly, in *Medical Laboratory*, the court noted that the affiliate “did not in any way participate” in the production of the program but had “acted as a mere conduit” for the network’s feed. 931 F. Supp. at 1492.

6. **Respondeat Superior and Other Cases**

Several recently reported cases were also dismissed because there was an insufficient connection between the defendant and the party responsible for the defamatory statement to trigger liability under *respondeat superior*. See, e.g., *Chaiken v. VV Publishing Corp.*, 907 F. Supp. 689, 24 Media L. Rep. 1449 (S.D.N.Y. 1995), reargument denied, 1995 WL 731626 (no liability under the doctrine of respondeat superior if author is an independent contractor (freelancer)); *Matson v. Dvorak*, 40 Cal. App. 4th 539, 549, 46 Cal. Rptr. 2d 880, 886 (1995) (persons who contribute money to political campaigns but who are not involved in the preparation, review, or publication of campaign literature cannot be subjected to liability in a defamation action regarding statements contained in that literature); *Walters v. Homestaff Health Care*, 1996 WL 88058 (Conn. 1996) (agent’s statements must have been made in furtherance of the defendant-principal’s business); *Thomas v. Parker*, C.A.
university cannot be held liable for statements made on a student-operated radio station where the university had no control over the content of broadcasts); *Hyatt v. Purcell*, 24 Media L. Rep. 1250, 1253 (Mass. Super. 1995) (newspaper executive who “did not write, edit, approve or have anything to do with” column could not be held individually liable for its contents).

7. 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.

**Fair Report Privilege**

According to the 1996-97 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, 31 by common law, and seven by both statute and common law.

In a newly reported case from a New Jersey appellate court, the common law fair report privilege was applied to comments made by a public official regarding other public officials, even though made during a nonpublic interview. *Orso v. Goldberg*, 284 N.J. Super. 446, 665 A.2d 786 (N.J. App. Div. 1995). In applying the privilege, the court noted that it was not necessary that the account be exact in every detail, so long as it conveys to the person(s) who read it a “substantially correct” account. See also *Maguire v. Journal/Sentinel, Inc.*, 542 N.W.2d 239 (Wis. Ct. App. 1995) (unpublished opinion), *review denied*, 546 N.W.2d 471 (Wis. 1996) (use of the word “heckled” to describe plaintiff’s conduct, rather than “harassed,” the word chosen by the court, was a fair summary falling within the absolute judicial privilege).

In a troubling opinion, a Connecticut Superior Court judge appeared to impose an independent duty to research the complaint upon a media defendant invoking the fair report privilege, denying summary judgment despite the fact that newspaper had accurately reported allegations of a complaint alleging *inter alia* that plaintiff had violated a state statute by fraudulently conveying property. *Zupnik v. Day Publishing Company*, 1996 WL 150755 (Conn. Super. March 8, 1996). The

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


12 Arizona, California, Kentucky, Louisiana, Ohio, Virgin Islands, and Wisconsin.
court reasoned that had the newspaper investigated the complaint, it would have been able to
determine that the allegedly violations had occurred before the statute was enacted.

The fair report privilege is a qualified rather than an absolute privilege insofar as report must
be fair and accurate, and in several jurisdictions the publication must have been without some form
of malice. In several cases reported during the past year, the court addressed the circumstances under
which the fair report privilege might be defeased.

In an opinion applying the fair report privilege to newspaper articles reporting that plaintiff
had been issued numerous citations charging numerous violations of land-use ordinances, an Ohio
appellate court held that the privilege would be lost upon a showing that the defendants had published
the charges solely in order to harm the plaintiff. Smitek v. Lorain County Printing & Publishing Co.,
24 Media L. Rep 1403 (Ohio Ct. App. 1995), dismissed, appeal not allowed, 75 Ohio St.3d 1405,
661 N.E.2d 755 (Ohio 1996). In an unpublished decision, a New Jersey federal court held that the
fair report privilege would be lost by circulating a court’s opinion in a prior case if the person acted
with actual malice, i.e., that allegations reported in the opinion were known to be false. National
League for Nursing v. Jaffee, No. 95-2193 (D. N.J. June 13, 1996). By contrast, a Maryland
appellate court cited favorably what it termed the modern view that fair, accurate reports of judicial
proceedings are privileged regardless of the reporter’s state of mind. Chesapeake Publ. Corp. v.

**Fair Comment Privilege**

According to the 1996–97 LIBEL SURVEY, 39 jurisdictions recognize a qualified privilege for
fair comment, 4 by statute and 35 by common law.

In a case newly reported in the 1996–97 LIBEL SURVEY, the Oklahoma Supreme Court
applied the fair comment privilege to statements made by one gubernatorial candidate about his
Oklahoma’s statutory fair comment privilege applied to expressions of opinion and comment on
official proceedings as well as mere reportage of the proceedings. The court also relied on the opinion
privilege in dismissing the claim. See supra page 7.

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13California, North Dakota, Oklahoma, and Texas.

14Arizona, 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,
Washington, West Virginia, Wisconsin, and Wyoming.
Neutral Reportage Privilege

The neutral report privilege was first proposed by the Second Circuit in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 2 Media L. Rep. 1849 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977). Although the New York Court of Appeals later rejected its application as a matter of state law, according to the 1996-97 LBRE SURVEY, in 13 jurisdictions at least one court has recognized the doctrine of neutral reportage,\(^{15}\) four jurisdictions have recognized related principles that might lead to adoption of neutral reportage or provide similar protection under the common law,\(^{16}\) there is split authority in an additional two jurisdictions,\(^{17}\) and only four jurisdictions have explicitly rejected the privilege.\(^{18}\) Additionally in the federal courts, the Eighth and Ninth Circuits recognize the neutral reportage privilege, the Fourth Circuit has declined to adopt until it is faced with the appropriate fact pattern, the Third Circuit has declined to apply it in any circumstances, and there is no case law in the remaining circuits.

Although the neutral report privilege was raised in a number of decisions reported during the past year, it was neither applied nor adopted by any court asked to consider the issue.

Thus, a federal court in New York also declined to apply the neutral reportage privilege to a case involving a private figure plaintiff, interpreting the Second Circuit decision in *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980), as limiting the neutral reportage privilege first proposed in *Edwards* to cases involving public official or public figure plaintiffs. *Levin v. McPhee*, 917 F. Supp. 230, 239 (S.D.N.Y. 1996).


Judicial and Official Proceedings Privilege

Privileges, of course, play a significant role in litigation between nonmedia parties as well. Indeed, in litigation arising from judicial, quasi-judicial, and employment context, LDRC found that

\(^{15}\)Alabama, Arizona, California, Delaware, Florida, Georgia, Indiana, Ohio, Oklahoma, Pennsylvania, Vermont, Washington, and Wyoming.

\(^{16}\)Arkansas, Louisiana, Missouri, and Nebraska.

\(^{17}\)Illinois and Texas.

\(^{18}\)Kentucky, New York, South Dakota, and Virgin Islands.
the disposition of a great many suits was based upon the application of a privilege.

Thus the absolute privilege for statements made in the course of judicial, administrative, and quasi-judicial proceedings was the basis for the dismissal of numerous nonmedia suits reported in the 1996–97 LIBEL SURVEY. See Thompson v. Community Nursing Serv. & Hospice, 910 P.2d 1267, 1267-68 (Utah Ct. App. 1996) (statements by counsel and witnesses during administrative proceeding before EEOC absolutely privileged); Hardwick v. Houston Lighting & Power Co., 881 S.W.2d 195 (Tex. App.—Corpus Christi 1994, writ dism’d w.o.j.) (statements made by employer’s representative to Texas employment commission absolutely privileged); Village of Bayou Vista v. Glasko, 899 S.W.2d 826 (Tex. App.—Houston [14th Dist.] 1995, no writ) (alderman’s statements during board of aldermen meeting were absolutely privileged as a quasi-judicial proceeding); Mangold v. Analytic Services, Inc., 77 F.3d 1442 (4th Cir. 1996) (government contractor and its employees absolutely immune from state tort liability based on any statements made and information given in response to an internal investigation by United States Air Force into fraud and mismanagement); Gibson v. Mutual Life Insurance Co. of New York, 121 N.C. App. 284, 465 S.E.2d 56 (1996) (absolute privilege extends to statements made during a break in a deposition, in connection with questions asked during the deposition).

An absolute privilege was also afforded to “quasi-judicial” bodies and actions “necessarily preliminary” to judicial or quasi-judicial proceedings in a number of decisions reported during the past year. See Illinois College of Optometry v. Labombarda, 910 F. Supp. 431 (N.D. Ill. 1996) (Illinois Council on Optometric Education a “quasi-judicial” body for purposes of the common law absolute privilege); Bradley v. Avis Rental Car System, Inc., 902 F. Supp. 814, 820 (N.D. Ill. 1995) (statements or reports to law enforcement agencies concerning suspected criminal activity are absolutely privileged); Vincent v. Williams, 279 Ill. App. 3d 1, 664 N.E.2d 650 (Ill. App. 1996) (statements to police investigating altercation in which plaintiff was involved were cloaked in absolute privilege); Rose v. First American Title Ins. Co., 907 S.W.2d 639 (Tex. App.—Corpus Christi 1995, no writ) (insurer’s filing of complaint against CPA with the Board of Public Accountancy absolutely privileged as communications made in quasi-judicial process); Ashton-Blair v. Merrill, 217 Ariz. Adv. Rep. 34 (Ct. App. May 28, 1996) (statements contained in a complaint to the State Bar of Arizona absolutely privileged); Woodward v. Weiss, 932 F.Supp. 723 (D.S.C. 1996) (one physician’s evaluation reports of another physician’s medical treatment of automobile accident victims absolutely privileged since they were rendered as a preliminary step to a judicial proceeding which bore a reasonable relation to potential litigation).

Other courts declined to apply an absolute privilege to statements preliminary to such proceedings, however, extending only a qualified privilege in such instances. See Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132 (6th Cir. 1996) (NASD’s Form U-5, asking if the terminated individual was under internal review for fraud or wrongful taking of property, was merely a preliminary or investigatory formality, not part of the NASD’s quasi-judicial regulatory process, and thus not entitled to an absolute privilege); Doe v. Kutella, 1995 WL 758131 (N.D. Ill. Dec. 20, 1995) (citizen complaint to internal investigations division of police department covered by qualified, not absolute privilege); Bitner v. Ottumwa Community School District, 549 N.W.2d 295 (Iowa 1996) (statements made by the defendants in the course of judicial proceedings entitled to absolute privilege
but statements made prior to criminal prosecution entitled only to a qualified privilege).

**Legislative and Official Acts Privilege**

Although recognizing an absolute state legislative immunity that applies to comments made during legislative hearings, the First Circuit recently affirmed a holding of the district court of Puerto Rico refusing to extend the privilege to statements made through “press releases, interviews, and speeches occurring outside the strict scope of their legislative duties.” *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 30 (1st Cir. 1996), aff’g and quoting, 876 F. Supp. 1332, 1342 (D.P.R. 1995).

By contrast, in a case decided by a federal court in Indiana, statements made by a mayor during a news conference were afforded an absolute privilege as being within the scope of his duties and in the performance of a discretionary function under the Indiana Tort Claims Act. *Spencer v. City of Elkhart*, 1995 WL 358819 (N.D. Ind. Apr. 26, 1995).

In another recent federal court decision, the district court for the District of Columbia held that various CIA personnel were acting within the scope of their employment, and therefore were protected by official immunity, when they placed allegedly untrue statements in a former CIA employee’s personnel file. *Blazy v. Woolsey*, 1996 WL 43554 (D.D.C. Jan. 31, 1996).

**Other Common Law Privileges**

A qualified privilege for statements in which the communicator and listener share a common interest (the “common interest” privilege) was applied in a number of nonmedia decisions newly reported in the 1996–97 LIBEL SURVEY.

Many of these decisions occurred in the employment context, typically arising from statements made by the plaintiff’s former employer to his or her current employer or statements made by the plaintiff’s co-employees. *See Conti Commodity Servs., Inc. v. Ragan*, 63 F.3d 438, 442 (5th Cir. 1995), cert. denied, 116 S.Ct. 1318 (1996) (statements by former plaintiff’s employer to current employer); *Degrand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218 (D. Kan. 1995) (communications by one corporate employee to another concerning the job performance of a third); *Maier v. Maretti*, 671 A.2d 701 (Pa. Super. 1995), reargument denied, (03/06/96) (allegations reported by supervisor to branch manager); *Dawson v. New York Life Ins. Co.*, 932 F.Supp. 1509 (N.D. Ill. 1996) (statements in training video, at manager’s meeting, and on Form U-5 submitted to NASD, linking ex-employee plaintiff to conduct which resulted in multimillion dollar jury verdict against the company).

The common interest privilege was also applied in a number of nonmedia cases involving business investigations and statements involving business creditworthiness. *Woodward v. Weiss*, 932 F.Supp. 723 (D.S.C. 1996) (physician’s reports regarding another physician’s medical treatment of automobile accident in context of insurance company’s investigation of fraudulent or overstated
claims); Claude v. Thomason, 1996 WL 217887, at *3 (D.D.C. Apr. 25, 1996) (allegations suggesting that plaintiff had engaged in inappropriate business practices made to officials investigating White House travel office); Willis v. Roche Biomedical Labs, Inc., 62 F.3d 313 (5th Cir. 1995) (results of drug tests on employees reported by laboratory testing employees at the behest of their employer); Rubin v. Sterling Enterprises, Inc., 674 A.2d 782 (Vt. 1996) (default notice sent by defendant lessor to plaintiff lessee’s bank); Calhoun v. Chase Manhattan Bank, 911 S.W.2d 403 (Tex. App.–Houston [1st Dist.] 1995, no writ) (credit card issuer statements to credit agency about plaintiff).


The common interest privilege was also applied to statements made in correspondence made as a part of settlement negotiations, Pape v. Reither, 918 S.W.2d 376, 381-82 (Mo. App. E.D. 1996); a letter sent to all homeowners in a subdivision complaining about the way the plaintiff management company was managing the subdivision, Century Management, Inc. v. Spring, 905 S.W.2d 109 (Mo. App. W.D. 1995); and the statement by a restaurant to customers that it had discharged bartender for theft. Giering v. Nashville Productions, Inc., 1996 WL 191782 (Cuya. App. Apr. 18, 1996).

**Application of Defamation Privileges to Other Torts**

In cases newly reported in the 1996–97 LIBEL SURVEY, courts rejected attempts by plaintiffs to disguise libel claims by pleading a different tort. A federal court in Texas held that a media defendant cannot be liable for intentional infliction of emotional distress when the statement complained of is not false. Bass v. Hendrix, 931 F.Supp. 523 (S.D. Tex. 1996). After granting summary judgment on the plaintiff’s defamation claim, a state appellate court in Texas dismissed the conspiracy claim as well, holding that one cannot avoid the protections given the press by simply relabeling a libel claim as a conspiracy claim. Barbouti v. Hearst, 927 S.W.2d 37 (Tex. App.–Houston [1st Dist.] 1996, no writ).

Similarly, in a suit alleging defamation as well as intentional infliction of emotional distress, the Southern District of New York dismissed both claims on the ground that the plaintiff had failed to establish the requisite degree of fault. Chaiken v. VV Publishing Corp., 907 F. Supp. 689, 24 Media L. Rep. 1449 (S.D.N.Y. 1995), reargument denied, 1995 WL 731626.

Finally, in affirming the dismissal of a libel claim for failure to comply with New York’s one-year statute of limitations, a New York appellate court held that the plaintiff could not revive the claim by pleading it as conspiracy. Pravda v. Saratoga County, 637 N.Y.S.2d 508, 24 Media L. Rep. 1633, 1635 (3d Dep’t 1996) (“Since the gravamen of the complaint addresses an injury to plaintiff’s
reputation, the statute of limitations may not be circumvented by denoting the libel cause of action as a different tort.

8. Damages

**Actual Damages**

Damages remains a troubling and stubborn issue in the defamation context. In large part this is due to the fact that in limiting plaintiffs in suits involving matters of public concern to the recovery of "actual damages," the Supreme Court in Gertz v. Robert Welch Inc., 418 U.S. 323 (1974), defined actual damages as encompassing not only economic loss but such nebulous and open-ended categories of recovery as "injury to reputation" and "emotional distress." Moreover, two years later, in Time Inc v. Firestone, 424 U.S. 448 (1976), the Court declined to hold as a matter of federal constitutional law that proof of reputational loss is a prerequisite to recovery for damages in a defamation action, leaving this issue to the states to determine.

According to the 1996–97 LIBEL SURVEY, of jurisdictions that have addressed the question, courts in five jurisdictions allow plaintiffs to recover damages without first establishing a loss of reputation and five jurisdictions condition recovery on a showing of loss of reputation.

In two cases newly reported in the 1996–97 LIBEL SURVEY, Minnesota and Iowa joined the jurisdictions that require evidence of damage to reputation as a prerequisite to the recovery of damages in a defamation action. See Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 24 Media L. Rep. 1897 (Minn. 1996); Johnson v. Nickerson, 542 N.W.2d 506 (Iowa 1996).

In Richie, the Minnesota Supreme Court reversed an intermediate appellate court and reinstated the trial court’s grant of defendants’ motion for summary judgment in a case in which the plaintiff had provided no evidence of either reputational damage or actual malice. The court noted that Firestone had left to the states the question of whether recovery of damages in a defamation suit should be conditioned upon proof of injury to reputation or whether damages could be recovered even in the absence of reputational loss. In requiring damage to reputation as a prerequisite to

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recovery for emotional distress, the court reasoned that while defamation law focuses upon damage to reputation, invasion of privacy law compensates for emotional distress. The court then concluded that it would be inconsistent with Minnesota law, which does not recognize claims for invasion of privacy, to allow a plaintiff to recover for emotional distress alone in a defamation suit.

In Johnson, the Iowa Supreme Court affirmed the trial court’s grant of summary judgment on the ground that the plaintiff had provided no “evidence of cognizable injury, such as injury to reputation.” 542 N.W.2d at 513. The court went on to hold that “[h]urt feelings alone cannot serve as the basis of a defamation action.” Id.

In a nonmedia case, the Fifth Circuit affirmed a $250,000 judgment in a suit alleging slander and intentional infliction of emotional distress, which included recovery for emotional distress, despite having previously reversed the verdict for intentional infliction of emotional distress in the same case and having remanded to the trial court to apportion damages between the two claims. Burroughs v. FFP Operating Partners, 70 F.3d 31 (5th Cir. 1995). In attributing the entirety of the damages to the slander claim, the opinion nowhere considers the fact that the jury had probably intended a portion of the award to be applied to the intentional infliction of emotional distress claim. The trial court’s somewhat strained reasoning in apportioning all of the award to the slander claim, approved by the Fifth Circuit, proceeded as follows. The court first determined that none of the evidence of damages was admissible solely with respect to the intentional infliction of emotional distress claim; therefore, reasoned the court, all of the evidence of emotional distress had properly been before the jury on the slander claim and it followed that the entire award could thus be attributable to the slander claim.

**Libel-Proof Plaintiff**


The plaintiff in Jones, Marla Maples’s former publicist, had already been convicted of burglary, possession of stolen property and criminal possession of a weapon, and had admitted to a sexual-psychological fascination with women’s shoes. The district court in New York concluded that his reputation was already so badly tarnished that it could not be further injured by allegedly false statements on that subject. By contrast, in Da Silva, the Connecticut federal court denied the defendant’s motion for summary judgment, holding that an issue of fact existed as to whether plaintiff had developed a “new reputation” that could have been tainted by the allegedly libelous depiction.

The federal court in Church of Scientology also declined to apply the libel-proof plaintiff doctrine at the summary judgment stage because it required findings of fact as to the plaintiff’s reputation. Nevertheless it dismissed the plaintiff’s suit based on the “subsidiary meaning” doctrine, which reasons that “where a maliciously false statement implies the same ultimate conclusion as that
of the remainder of the publication, which has been published without actual malice, a plaintiff cannot
base his defamation suit solely on inaccuracies contained within statements subsidiary to these larger
views." Id. at 2084 (quoting Herbert v. Lando, 781 F.2d 291, 311 (2d Cir.), cert. denied, 476 U.S.
1182 (1986).

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 1996–97 LIBEL SURVEY, 27 jurisdictions continue to allow
presumed damages in such instances.22

In affirming the largest award ever entered against nonmedia individuals in a defamation suit,
a California Court of Appeal found that the award was not so “grossly disproportionate to the injury
that [it] may be presumed to have been the result of passion or prejudice.” Sommer v. Gabor, 40 Cal.
$3.3 million, was divided into $2 million in presumed damages and $1.3 million in punitive damages.

Punitive Damages

According to the 1996–97 MEDIA LIBEL SURVEY, seven states do not permit punitive
damages in defamation cases.23 In addition, ten states impose limitations on punitive damages by
statute24 and 15 states limit punitive damages by operation of their retraction statutes.25

In decisions newly reported during the past year, Pennsylvania appellate courts upheld several
huge (both in absolute size and as a ratio of actual damages) punitive damage awards in defamation
actions. In a public official defamation action, the Supreme Court of Pennsylvania refused to hear the
defendant’s appeal of an intermediate appellate court decision that had affirmed a $21.5 million
— (1996). And in a private figure action, an appellate court affirmed a $1.4 million punitive damage

22Alaska, Arizona, Colorado, Connecticut, Hawaii, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine,
Maryland, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Utah,
Vermont, Virgin Islands, Virginia, and Washington.

23Massachusetts and Oregon prohibit punitive damages in cases involving the First Amendment; Louisiana,
Michigan, 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.

24Colorado, Georgia, Kansas, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Texas, and Virginia.

25Alabama, California, Connecticut, Florida, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana,
Nevada, New Jersey, North Carolina, Tennessee, and Utah.

In a nonmedia case involving opposing mayoral candidates, a New Jersey appellate court affirmed a $214,000 punitive damage award based upon a $1000 award of nominal damages. Newman v. Delahunt, 293 N.J. Super. 469, 681 A.2d 659 (N.J. App. Div. 1996). The court did not discuss the fact that the punitive award was not based on any actual damages, affirming the damages, as well as over $13,000 in attorneys’ fees, in a short per curiam opinion resting solely on the trial court’s “well reasoned, comprehensive opinion.”

In upholding a $500,000 punitive damages award in a suit brought by a police officer against a city administrator who had accused him of sexually harassing a co-worker, the Supreme Court of South Carolina rejected the defendant’s argument that the award violated public policy because employers are required to investigate allegations of sexual harassment. Miller v. City of West Columbia, 471 S.E.2d 683 (S.C. 1996). The court noted that at the time the defamatory statement was made, the defendant’s conclusions were unsupported and that it was not within the defendant’s official duties to either conclude that the plaintiff was guilty of sexual harassment or publish the charges without confirmation.

Finally, during the past year, New Jersey, North Carolina, and Ohio enacted statutes that limit punitive damages in all cases. See infra page 56.

B. PROCEDURAL ISSUES

1. Summary Judgment

According to the 1996-97 LIBEL SURVEY, the majority of jurisdictions continue to endorse the application of summary judgment in defamation cases: 30 jurisdictions favor summary judgment and only 4 disfavor summary judgment in the libel context, with the remaining 20 jurisdictions having adopted a neutral standard.

In many of the cases dismissed on summary judgment that were reported during the past year, courts have underlined the importance of summary judgment in suits against the media. For example,


27 Alaska, Michigan, New Hampshire, and New Mexico.

28 Delaware, Florida, Guam, Kansas, Kentucky, Maryland, Missouri, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virgin Islands, and Virginia.
in granting summary judgment on all but one claim the district court noted that "without judicious use of summary judgment to dispose of libel suit, 'the threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.'" Church of Scientology Int'l v. Time Warner, Inc., 903 F. Supp. 637, 640, 24 Media L. Rep. 1044, 1045 (S.D.N.Y. 1995) (quoting Immuno A.F. v. Moor-Jankowski, 74 N.Y.2d 548, 561, 549 N.Y.S.2d 938, 944 (N.Y. 1989), vacated, 497 U.S. 1021 (1990), adhered to, 77 N.Y.2d 235, 566 N.Y.S.2d 906, cert. denied, 500 U.S. 954 (1991). The court stressed that "[a]lthough a defendant's state of mind is at issue in a libel case . . . that fact alone cannot preclude summary judgment, for First Amendment protection cannot be emasculated by unwillingness on the part of a court to grant summary judgment where 'affirmative evidence of the defendant's state of mind' is lacking" and noted that "[a] libel suit cannot be allowed to get to the jury, at enormous expense to the defendant, based on mere assertions of malice by the plaintiff."

Similarly sensitive to the dangers of a refusal to grant summary judgment in cases implicating the First Amendment, a Wisconsin appellate court observed that "[s]ummary judgment may be particularly appropriate in defamation actions in order to mitigate the potential 'chilling effect' on free speech and the press that might result from lengthy and expensive litigation." Bay View Packing Co. v. Taff, 543 N.W.2d 522, 528, 24 Media L. Rep. 1289, 1293 (Wis. Ct. App. 1995). See also Barbouti v. Hearst, 927 S.W.2d 37 (Tex. App.—Houston [1st Dist.] 1996, no writ). ("To deprive a party of a trial by jury is not something to be done without caution; however, the First Amendment right to freedom of speech is of such necessity to a free society that the court's responsibility is to protect it jealously.") Landry v. Roberson Advertising Service, Inc., 660 So. 2d 194, 197 (La. App. 4th Cir. 1995), rehearing denied (09/26/95) ("Although Louisiana has a strong preference for full trial on the merits, this rule is not applicable in defamation cases.")


In Ertel, an intermediate appellate court had held that the defendant, as movant, was required to submit evidence regarding the truth of the allegedly defamatory article. Reversing the appellate court and reinstating the trial court's grant of summary judgment, the Pennsylvania Supreme Court held that the defendant was entitled to summary judgment as a matter of law because the plaintiff, a public official who bore the burden of proof of falsity, had failed to introduce any evidence of falsity. Adverting to Pennsylvania's rule of granting summary judgment "where a party lacks the beginnings of evidence to establish or contest a material issue," the court characterized the lower court's decision to require a party "to go to trial on a meritless claim under the guise of effectuating the summary judgment rule" as "a perversion of that rule." 674 A.2d at 1042.

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In a footnote, the *Ertel* court observed that the Pennsylvania rule governing summary judgment had been amended, effective July 1, 1996, to provide that summary judgment was appropriate where "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." *Id.* at n.3 (citing *Pa. R. Civ. P. No. 1035.2*). The Pennsylvania Supreme Court then concluded that its grant of summary judgment in the *Ertel* was consistent with the amended rule.

In *Brill*, a nondefamation case, the New Jersey Supreme Court adopted the federal standard represented by *Anderson v. Liberty Lobby, Inc.*, 427 U.S. 242 (1986), as a general summary judgment standard for all cases. Prior to the decision in *Brill*, New Jersey courts applied the *Liberty Lobby* only in defamation cases involving public officials and public figures subject to the actual malice standard of *New York Times Co. v. Sullivan*.

2. **Appellate Review**

In a recent nonmedia case involving opposing mayoral candidates, a New Jersey appellate court affirmed a $214,000 punitive damage award based upon a $1000 award of nominal damages. *Newman v. Delahunty*, 293 N.J. Super. 469, 681 A.2d 659 (N.J. App. Div. 1996). Attorneys’ fees of over $13,000 were also affirmed. Without independently reviewing the trial court record, the short *per curiam* decision noted simply that "[w]e affirm substantially for the reasons stated in [the trial court’s] well reasoned, comprehensive opinion."


Although it is clear that appellate courts have a constitutional duty to independently review the record on the issue of actual malice, there has long been disagreement as to whether other issues should be subject to this more rigorous standard of review. In a recent decision from the Eighth Circuit that reversed a district court entry of judgment notwithstanding the verdict and reinstated a $1 million jury verdict for the plaintiff, the court refused to independently review the record on the issue of falsity. *See Lundell Manufacturing Company, Inc. v. American Broadcasting Companies, Inc.*, 1996 U.S. App. LEXIS 26790 (Oct. 15, 1996).

The court rejected the defendant’s argument that because it is a constitutional requirement, under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), that the plaintiff prove falsity in a case involving a media defendant and an issue of public concern, appellate courts must independently review the record on the issue of falsity. 1996 U.S. App. LEXIS 26790 at *10–11. The
Eighth Circuit reasoned that in *Hepps* the "Court identified the burden of proof, not the element of falsity, as the constitutional requirement." *Id.* at 12.

3. **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 remains of great significance. 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 1996–97 LIBEL SURVEY, 50 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.


In *Worldwide Primates*, the Eleventh Circuit affirmed Rule 11 sanctions entered in connection with a nonmedia action for tortious interference with contract. (The defendant, Shirley McGreal, was the author of the letter to the editor that prompted the long-running suit in *Immuno A.G. v. Moor-Jankowski*, 74 N.Y.2d 548, 561, 549 N.Y.S.2d 938, 944 (N.Y. 1989), vacated, 497 U.S. 1021 (1990), *adhered to*, 77 N.Y.2d 235, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991).) The trial court had initially denied defendant's motion for sanctions following the plaintiff's voluntary dismissal of the suit, a ruling that was reversed by the Eleventh Circuit. 26 F.3d 1089 (11th Cir. 1994). On remand, the trial court entered sanctions in the amount of $25,000 against each the plaintiff and its attorney. The Eleventh Circuit rejected the attorney's contention that he was not under an obligation to independently investigate the facts of the claim prior to filing because he was entitled to rely on the representations of the plaintiff, a long-time client, holding that "under Rule 11, an attorney must make a reasonable inquiry into both the legal and factual basis of a claim prior to filing suit." 87 F.3d at 1255.

In *Small*, a Wisconsin appellate court affirmed the dismissal of the *pro se* plaintiff's invasion

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


32 Hawaii, New Jersey, Ohio, South Carolina, Tennessee, Texas, Utah, and Virginia.
of privacy claim against a television station on the ground that he had consented to the interview that formed the basis of his suit. The court also affirmed the award of attorneys' fees and costs to the defendant under a Wisconsin statute governing frivolous litigation. In Church of Scientology, a California appellate court affirmed the dismissal of a suit to set aside a previously obtained judgment as well as the trial court's award of more than $130,000 in attorneys' fees under California's anti-SLAPP statute in connection with the defense of the suit.

In Winn, a New York federal court dismissed the plaintiff's libel action and awarded the defendant $12,000 in sanctions for the plaintiff's abuse of discovery, as well as an amount to be determined for attorneys' fees and costs in connection with the defense. While dismissing the claim on the basis of the wire service defense, see supra page 19, the court noted that the numerous and egregious instances of obstruction of discovery by the plaintiff would itself have been a sufficient ground for dismissal. Id. at 582.

Finally, a recent decision from the Supreme Court of New Hampshire illustrates the interplay among abuse of process, malicious prosecution, and frivolous claims and the risks involved in confusing them. Business Publications, Inc. v. Finnegan, 140 N.H. 145, 666 A.2d 932, 24 Media L. Rep. 1094 (1995). In Business Publications, the plaintiffs in a defamation suit were awarded attorneys' fees for the costs involved in defending against an abuse of process claim brought by the media defendant prior to resolution of the underlying defamation claim. The Supreme Court held that under New Hampshire law the remedy for commencement of a “groundless” libel suit is malicious prosecution rather than abuse of process and that an action for malicious prosecution cannot be brought until the party bringing the claim has prevailed in the underlying suit. Because New Hampshire law is clear on this point, the Supreme Court held that the abuse of process action was itself groundless and that the defendant (the plaintiff in the underlying libel suit) was entitled to attorney's fees.

4. Jurisdiction/Venue/Choice of Law


In Bounty-Full, a court in the Southern District of Texas held that the mailing of a letter to a Texas resident constituted sufficient “minimum contacts” for the purposes of personal jurisdiction. In Gordy, jurisdiction was based on the delivery of 13 daily and 18 Sunday copies of a local New York–based newspaper to California. And in Nova Biomedical, a federal court in Massachusetts held that the publication of disparaging statements about a Massachusetts medical device manufacturer in a national newsletter and on an on-line service was sufficient to confer personal jurisdiction over
the defendant in a defamation and product disparagement suit where a jury had found that the newsletter and on-line publisher had acted as the defendant’s agent in distributing the article.

In *Faigin* and *Gray*, the United States District Court for the District of New Hampshire adopted an expansive position on personal jurisdiction in cases where an allegedly defamatory publication is distributed nationally. In both cases, the court held that authors of nationally distributed books were subject to personal jurisdiction even though the number of copies shipped to New Hampshire was negligible (0.13 percent of nationwide sales in *Faigin*, 61 of 30,817 copies sold in *Gray*) and the authors had no other contact with the state and no control over distribution of the book. Both courts found that by granting the publisher distribution rights, the authors had purposefully availed themselves of the privilege of conducting activities in New Hampshire. *Gray*, 929 F. Supp. at 44-48, *Faigin*, 919 F. Supp. at 532. Both courts also denied an interlocutory appeal under 28 U.S.C. 1292(b). See also *Brother Records, Inc. v HarperCollins Publishers*, No. 95-214 (N.H. Sup. Ct. Sept. 25, 1996).

In another newly reported case, however, the court declined to assert personal jurisdiction over overseas defendants in a defamation suit because the allegedly defamatory advertisement had appeared in Massachusetts as a result of the “serendipitous third party distribution” of French-language magazines. *Noonan v. Winston Co.*, 902 F. Supp. 298 (D. Mass. 1995).

Finally, in a nonmedia suit for libel and misappropriation, a Tennessee appellate court affirmed the dismissal for lack of personal jurisdiction of an out-of-state distribution company that had provided videotapes of a television show to two libraries in Tennessee. *Gibbons v. Schwartz-Nobel*, C.A. No. 01A01-9507-CH-00316, 1996 Tenn. App. LEXIS 57 (Tenn. Ct. App. Jan. 31, 1996). Noting that the defendant had no offices, representatives, or any other presence in Tennessee as well as the absence of evidence that the defendant intended to serve the Tennessee market, the court held that the fact that defendant distributed its videotapes via computer transfers of information was not sufficient to establish the requisite minimum contacts to support an exercise of jurisdiction.

5. **Prior Restraint**


In *Gilbert*, a California Court of Appeal reversed a preliminary injunction entered by a trial court in conjunction with a defamation and invasion of privacy lawsuit filed by actress Melissa Gilbert against her former husband and the *National Enquirer*. The injunction barred Gilbert’s former husband, Chester Brinkman, from disclosing any information about Gilbert’s drug or alcohol use before, during, and after their marriage as well as “any information relating to any sexual or physical relationships between Gilbert and third parties,” a scope that the appellate court characterized as overbroad.
The Court of Appeal began its opinion by repeating the well-settled rule that prior restraints are disfavored and presumptively invalid. While conceding that prior restraints may be imposed under extraordinary circumstances, the court held that the threatened invasion of Gilbert's privacy and harm to her reputation fell short of what is needed to justify such an extreme measure. Gilbert's remedy lay in a civil action for damages and not in injunctive relief.

In Lee v. Ingle, a state court judge denied an ex parte motion for a temporary restraining order blocking Penthouse magazine from publishing a videotape allegedly stolen from the home of television actress Pamela Anderson Lee and her husband, rock musician Tommy Lee, and directing Penthouse to return any copies of the tape in its possession. Relying on Gilbert, the court held that the alleged invasion of privacy was insufficient to overcome the heavy presumption against the constitutionality of a prior restraint.

The plaintiffs then amended their complaint to assert a civil claim for receipt of stolen property, and again moved for a preliminary injunction and a writ of possession for the tapes. Invoking New York Times v. United States and the Gilbert case, a second state court judge denied both motions. The court began by noting that the added claim did not alter the fact that what the plaintiff were seeking was to impose a prior restraint: "Prevention of publication and use, after all, is what plaintiffs seek in this action and in their application for pendente lite relief." Finding no evidence that the defendants had stolen or procured the theft of the tape, the court noted that the mere fact that "information comes into the hands of the press by misconduct" cannot justify a prior restraint. The court also denied the motion for return of the tape, again observing that the plaintiffs' real interest was in suppressing publication of the tape, and noting that the defendant had offered to return a copy of the tape in its possession, but that this did not satisfy the plaintiffs.

C. Statutes

According to the 1996–97 Libel Survey, there were a number of judicial and legislative developments in the enactment and application of statutory provisions of pertinence to libel actions. In a decision reported during the past year, the Eastern District Court held that Kentucky's retraction statute unconstitutional because it only applied to newspapers and not to other forms of print media. White v. Manchester Enter., 910 F. Supp. 311, 316, 24 Media L. Rep. 1627, 1631 (E.D. Ky. 1996).

In response to White, the Kentucky General Assembly amended KRS 411.051 so that the revised retraction statute applies to libel actions brought against magazines and periodicals as well as newspapers. Additionally, the amended KRS 411.051 increases the time these publications have to print a retraction from three to ten days.

Two other newly reported decisions addressed the constitutionality of criminal defamation statutes. In Phelps v. Hamilton, 59 F.3d 1058, 23 Media L. Rep. 2121 (10th Cir. 1995), the Tenth Circuit upheld the Kansas criminal defamation statute against a constitutional challenge. The court ruled that the statute is facially valid because it requires a showing of actual malice in criminal prosecutions brought under it that involve speech on matters of public concern. By contrast, in State of Montana v. Helfrich, 922 P.2d 1159 (1996), the Montana Supreme Court struck down Montana's
criminal defamation statute because it required the defendant to establish the speech was communicated for “good motives and justifiable ends,” even if true.

Statutes and related case law that are not limited to the libel or privacy context are discussed in section III, infra page 55.

II. FINDINGS OF THE 1996-97 PRIVACY AND RELATED LAW SURVEY

A. FALSE LIGHT

According to the 1996-97 PRIVACY AND RELATED LAW SURVEY, currently 33 jurisdictions recognize the false light tort, 33 although in eight of these jurisdictions the tort has not been applied in the media context. 34 Eight other jurisdictions have explicitly rejected the tort. 35

No new cases reported during the past year in the PRIVACY SURVEY have involved the recognition or refusal to recognize the tort of false light invasion of privacy. However, a number of cases reported during the past year were dismissed for failure to meet one or more of the elements of a false light action.

Failure to prove sufficiently extensive publication was one such ground. See, e.g., Morrow v. II Morrow, Inc., 139 Or. App. 212, 911 P.2d 964 (Or. Ct. App. 1996) (memorandum on a computer hard drive did not reach “the public generally or a large number of persons”; court distinguished publication in a defamation case from the heightened requirement of publication in a false light claim), rev. denied, 323 Or. 153, 916 P.2d 312 (Or. 1996); McNulty v. Kessler, 3 Mass. L. Rptr. 457, 464 (Mass. Super. Ct.) (exhibiting attendance records to only five people constituted “disclosure to too small a group to meet the ‘publicity’ requirement the [false light] tort contains”).

In false light claims involving broadcasts reported during the past year, courts have looked to the segment in its entirety to determine whether plaintiff was placed in a false light. See, e.g., Russell v. American Broadcasting Company, et al., 23 Media L. Rep. 2428 (N.D. Ill. 1995) (reversing dismissal of plaintiff’s false light claim based on Prime Time Live exposé about sanitation problems in fish industry because, although plaintiff was shown instructing employee always to tell customers that fish was “today fresh,” “[t]aken in the context . . . as a whole . . . and considering the voice-over . . . the implication is clearly that plaintiff is telling . . . [the employee] . . . to lie . . . [T]he insinuation from the voice-over is that the fish should have been thrown away rather than sold in any . . . .


34 Delaware, Idaho, Indiana, Kansas, Nebraska, Nebraska, Vermont, and Virgin Islands.

35 Massachusetts, Minnesota, New York, North Carolina, Ohio, Texas, Virginia, and Wisconsin.
form . . .''); Stith v. Cosmos Broadcasting, No. 96-CI 00309 (Jefferson Cir. Ct. Louisville, Ky. Sept. 3, 1996) (plaintiff, an amateur horse trainer, failed to prove that, despite graphic and violent images of other trainers, Inside Edition exposé of cruelty in the training of horses placed him in a false light because, as stated in the program, the use of chains on horses was legal under Kentucky law).

In an interesting twist on the falsity requirement in the media context, the district court in Grimes v. CBS Broadcasting Intern. of Canada, Ltd., 905 F. Supp. 964 (N.D. Okla. 1995), dismissed plaintiffs' false light claim because, although falsity was conceded, the television program at issue, Top Cop, which reenacted the murder of state highway patrol man, placed plaintiffs in a more favorable light than an accurate rendition would have. Grimes v. CBS Broadcasting Intern. of Canada, Ltd. also held that a false light claim may not be brought on behalf of a dead person.

B. PRIVATE FACTS

According to the 1996-97 PRIVACY SURVEY, 38 jurisdictions currently recognize a claim for publication of private facts, although in four of these jurisdictions the tort has not been applied in a media context. Additionally the tort has specifically been rejected in five jurisdictions.

In cases reporting during the past year, disclosure of an individual's HIV status has been a frequently litigated private facts claim.

In Woody v. West Publishing Co., 24 Media L. Rep. 1382 (N.D. Ill. 1995), a media case involving a plaintiff's HIV status, the defendant relied on defamation privileges in its motion for summary judgment. The plaintiff, incarcerated at a Federal Correctional Institute, brought a private facts action against West Publishing and others for reporting information already on record that plaintiff was HIV positive. The district court granted summary judgment, holding that West Publishing had absolute immunity to report facts on public record.

In one nonmedia case, Borquez v. Robert C. Ozer, P.C., 923 P.2d 166 (Colo. Ct. App. 1995), a court upheld a jury verdict based on disclosure of plaintiff's homosexuality and need for HIV testing. Plaintiff, a law firm associate, was fired within one week of disclosing to a law firm partner that plaintiff's companion had been diagnosed with AIDS and that he would need immediate AIDS testing. Although the plaintiff had asked the partner to keep this information confidential, within two days all employees and shareholders in the firm had learned about the plaintiff's personal life and his

36 Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgin Islands, West Virginia, and Wisconsin.

37 Colorado, Indiana, Nevada, and Virgin Islands.

38 Minnesota, Nebraska, New York, North Carolina, and Virginia.

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need for AIDS testing. Plaintiff sued for wrongful discharge, as well as invasion of privacy by public disclosure, and received a jury award of $30,000 in economic damages, $20,000 for “embarrassment and humiliation,” and $40,000 in punitive damages. On appeal, the Colorado Court of Appeals upheld the verdict, rejecting defendants’ claim that there had not been sufficient disclosure. Compare Handler v. Arends, 1995 WL 107328 (Conn. Super. 1995) (disclosure to ten members of plaintiff’s department that she was denied tenure held not to constitute sufficient publicity).

In Doe v. SEPTA, 72 F.3d 1133 (3d Cir. 1995), cert. denied, 117 S. Ct. 51 (1996) an HIV-infected employee of Southeastern Pennsylvania Transportation Authority (SEPTA) brought a § 1983 action against his employer, alleging the violation of his right to privacy when SEPTA’s chief administrative officer discovered his HIV status in the course of reviewing records of drug purchases made through its self-insured employee health program. Although the Third Circuit followed precedent and recognized a privacy interest in an individual’s prescription records, the Court affirmed summary judgment in favor of the nonmedia defendant, holding that such an interest does not provide an individual with an absolute right against disclosure of prescription records.

In a media case involving arrest records, Howell v. Goerdt, 96-177-S (W.D. Wis. 1996), a statutory private facts action under sec. 895.50 of the Wisconsin Statutes was held to be barred by consent. In Howell, a 16-year old girl voluntarily agreed to appear on The Charles Perez Show to discuss problems relating to her stepmother. The stepmother, in turn, read from the girl’s police report, documenting a record of violence. The district court dismissed the case on the pleadings, finding that, even though plaintiff was a minor whose records would otherwise be confidential, she “lost her expectation of privacy . . . when she voluntarily made her private life public by appearing on a television show.”

C. INTRUSION

According to the 1996-97 PRIVACY AND RELATED LAW SURVEY, currently 40 jurisdictions recognize a claim for intrusion, although the tort has not been applied in the media context in 18 of these jurisdictions. Additionally three jurisdictions have explicitly declined to recognize intrusion and in one jurisdiction a federal court has opined that the jurisdiction does not recognize the tort.

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40Alaska, Colorado, Delaware, Idaho, Indiana, Kansas, Louisiana, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virgin Islands, and West Virginia.

41Minnesota, New York, and Virginia.

42Eighth Circuit opinion interpreting North Dakota law.
Although no decisions reported during the past year appear to have involved the recognition or refusal to recognize intrusion claims, a federal court in Illinois questioned whether such a cause of action lies in Illinois and held that it was not the role of a federal court in a diversity case to make new law. *Russell v. American Broadcasting Company*, 23 Media L. Rep. 2428 (N.D. Ill. 1995). By contrast, the Eighth Circuit affirmed the dismissal of a claim involving a supervisor's opening of plaintiff's locked desk and went on to hold that North Dakota would not recognize a cause of action for intrusion. *Nelson v. J.C. Penney Company, Inc.*, 75 F.3d 343 (8th Cir.), *reh'g en banc denied*, 79 F.3d 84 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996).

The vast majority of civil intrusion cases reported during the past year arose in the employment area, with the courts almost uniformly upholding the right of an employer to intercept employee's communications or search their offices. *See also O'Bryan v. KTIV Television*, 64 F.3d 1188 (8th Cir. 1995); *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996) (rejecting claim involving employer's interception of employee's e-mail messages). *Compare Benoit v. Roche*, 657 So. 2d 574 (La. Ct. App. 1995) (reversing summary judgment in favor of defendant, holding that there were genuine issues of fact regarding eavesdropping on employee telephone calls and monitoring break room conversations by means of a nursery monitor); *Dwyer v. American Express Co.*, 273 Ill. App. 3d 742, 652 N.E. 2d 1351 (1st Dist. 1995), *appeal denied*, 165 Ill.2d 549, 662 N.E.2d 423 (1996) (in an intrusion brought by American Express cardholders, court found no cause of action based upon the defendant's collection and dissemination to vendors of plaintiffs' buying habits because plaintiffs had no legitimate expectation of privacy when they made purchases with their American Express cards).

1. **Eavesdropping/Hidden Cameras/Other Forms of Surveillance**

According to the 1996-97 PRIVACY SURVEY, currently 51 jurisdictions have eavesdropping statutes.\(^{43}\) In 40 of these jurisdictions, however, it is not a violation of the statute if one party gives consent to the recording.\(^{44}\) The other 11 jurisdictions require the consent of all parties, at least in delineated circumstances.\(^{45}\) Decisions during the past year based on eavesdropping, hidden cameras and similar theories of liability have yielded mixed results.

The most recent state to enact an eavesdropping statute was North Carolina. Under N.C. Gen.

\(^{43}\)Only South Carolina and Vermont lack eavesdropping statutes. Mississippi has a very narrowly drafted eavesdropping statute that it is limited to criminal controlled substances investigations. *See* 1996-97 *MEDIA PRIVACY SURVEY*, at 737.


Stat. § 15A-287 (1995), effective December 1, 1995, it is unlawful to intercept, disclose or use any wire, oral or electronic communication, unless one party to the communication consents. The statute also authorizes civil actions by one whose wire, oral, or electronic communication has been intercepted and authorizes damages (computed at the rate of $100 per day for each day of the violation or $1,000, whichever is greater), punitive damages, and attorney’s fees. Good faith reliance on the advice of a local district attorney is a complete defense to a civil action brought pursuant to this statute.

In two recent media cases, hidden cameras and wiretap claims were dismissed. In the first, Stith v. Cosmos Broadcasting, No. 96-CI 00309 (Jefferson Cir. Ct., Louisville, Ky. Sept. 3, 1996), the use of hidden cameras by a reporter for Inside Edition at the site of a horse show was held not to constitute an invasion of privacy because the plaintiff had no reasonable expectation of privacy at the show grounds and, as a “mere invitee” on those grounds, lacked standing to object to the use of hidden cameras.

The other case, Russell v. American Broadcasting Company, 23 Media L. Rep. 2428 (N.D. Ill. 1995), involved a segment of ABC’s PrimeTime Live exposing sanitation problems in the commercial fish industry. Securing “employment” with plaintiff, a retail seafood store, an ABC reporter wore a hidden camera and microphone, recording conversations with the plaintiff in which the reporter/employee was instructed always to tell the customers that the fish is “today fresh.” These conversations were aired in the broadcast. Plaintiff’s complaint alleged, inter alia, violations of the federal and state eavesdropping statutes. The federal claim was dismissed because the statute provides for one-party consent and the reporter, a party to the conversation, had consented to its being recorded. Although by its terms the Illinois statute requires the consent of all the parties, the court observed that Illinois courts had construed this statute to exempt conversations in which the plaintiff was a party. It should be noted, however, that the court did not consider a recent Amendment to the Illinois statute specifically designed to overrule this interpretation of the statute and make clear that the consent of all parties is required.

On the other hand, a number of eavesdropping and wiretap claims were upheld during the past year in nonmedia cases. In Re State Police Litigation, 888 F. Supp. 1235 (D. Conn. 1995), appeal dismissed, 88 F.3d 111 (2d Cir. 1996), an action was brought against the Connecticut state police who had instituted a policy of systematically recording all telephone calls, including private and privileged calls, to and from police barracks over a period of several years. The practice came to public attention when a suspect learned that his phone calls to his attorneys and others had been recorded without his consent. A class composed of all individuals who unknowingly were parties to recorded calls in or out of police facilities brought an action that included claims under the Federal Communication Act, Section 1983, the Connecticut Constitution and the Connecticut State Wiretap Act (Conn. Gen.Stat. section 54-41a, et. seq.). Although the court dismissed a number of other causes of action, it did uphold the federal wiretapping claims, as well as plaintiffs’ claims under the Connecticut Constitution and the state Wiretap Act, rejecting the defense of sovereign immunity and holding that there existed material issues of facts such as whether the officials actually listened to the calls at issue.
In *Commonwealth v. McIvor*, 448 Pa. Super. 98, 670 A.2d 697 (Pa. Super. Ct. 1996), the defendant was a police officer charged with secretly recording conversations with motorists during routine traffic stops. Although plaintiffs conceded that the matters discussed during the stops were not confidential, the motorists, suing under the Pennsylvania statute, 42 Pa.C.S.A. § 5527, alleged they were unaware that the conversations were being recorded and had not consented to their recording. The police officer sought refuge under a provision of the statute which provides that in “*any investigative . . . officer . . . [may] . . . intercept a wire or oral communication involving suspected criminal activities where the officer . . . is a party to the communication . . .*” The Pennsylvania Superior Court disagreed, holding that the defendant had failed to obtain authorization as required by the statute.

Finally, in *Parker v. Parker*, 897 S.W.2d 918 (Court of Appeals, Texas—Fort Worth, 1995), *writ denied*, an appeal from a divorce judgment, plaintiff brought an eavesdropping action based on husband’s wiretapping of her attorney’s telephone. The Texas Appellate court, applying *Tex. Code Crim. Proc. Ann.* art. 18.20 § 16 (West Supp. 1996), affirmed the trial court’s award of $2000 in actual damages and $1,000,000 in punitive damages on the eavesdropping claim. Referring to the husband’s conduct as “outrageous and reprehensible,” the court held inapplicable the limitation on punitive damages contained in *Tex. Civ. Prac. & Rem. Code Ann.* § 41.007.

A nonmedia case decided during the past year considered the issue of damages under the 1986 Electronic Communications Privacy Act. At issue in *Reynolds v. Spears*, 857 F. Supp. 1341 (W.D. Ark. 1994), aff’d, 93 F.3d 428 (8th Cir. 1996), was whether the award of damages is mandatory with a court or discretionary, an issue on which the circuits are divided. *See Nalley v. Nalley*, 53 F.3d 649 (4th Cir. 1995) (damages under the Act are discretionary); *Rodgers v. Wood*, 910 F. 2d 444 (7th Cir.) (damages under the act are mandatory), *reh’g denied*, 914 F.2d 260 (7th Cir. 1990). In an earlier action, *Deal v. Spears*, 780 F. Supp. 618 (W.D. Ark. 1991), aff’d, 980 F.2d 1153 (8th Cir. 1992), a liquor store owner, suspecting inside robberies, had installed a recording device on a phone line shared by the store and his adjacent residence. Although the tapes revealed no robberies, they *did* reveal an employee’s adulterous affair. After that case resulted in a verdict in favor of the lovers, some thirty other plaintiffs, whose calls likewise had been recorded, commenced the *Reynolds v. Spears* action. Although the district court granted summary judgment in favor of the plaintiffs who were recorded, it declined to award damages, invoking what it viewed to be judicial discretion under 1986 revisions to the Act, which, in the damage section, substituted the word “shall” for “may.” In affirming, the Eighth Circuit sided with the Fourth Circuit in reading the Act as leaving to the discretion of the trial courts whether to award damages.

2. **Related Newsgathering Torts**

Continuing a recent trend toward the assertion of new theories of media liability for alleged “newsgathering” torts, during the past year a significant series of such claims were considered, arising out of the February 28, 1993, raid by the Bureau of Alcohol, Tobacco, and Firearms (“ATF”) of the Branch Davidian compound near Waco. The raid resulted in ten separate lawsuits alleging “negligent
reporting” and “negligent publication” against media defendants. *Risenhoover, et al. v. Cox Texas Publications, Inc., et al.*, 936 F. Supp. 392, 24 Media L. Rep. 1705 (W.D. Tex. 1996). Plaintiffs were injured AFT agents and surviving family members of dead AFT agents who alleged that local news media and others alerted inhabitants of the center of the impending raid whose secrecy, plaintiffs contended, was essential. All defendants moved for summary judgment, arguing, *inter alia*, that the claims were barred by the First Amendment. By the time of the motion, however, plaintiffs had dropped the negligent publication claims. The court rejected defendants’ claim that their newsgathering activities were protected by the First Amendment, holding that “the First Amendment does not invest members of the press with absolute immunity from the consequences of their acts . . . despite the incidental burden upon the ability to gather or report the news.” 24 Media L. Rep. at 1713.

Also at issue in *Risenhoover* was a question of apparent first impression in any jurisdiction: whether a journalist can be liable for negligence for actions taken during a law enforcement operation on the basis of newsgathering activities. Citing cases from the nonmedia context in which individuals have been held liable for interference with law enforcement activities, the court found that all individuals, including the media, have a duty not to interfere negligently with the execution of arrest or search warrants. The court held that the media defendants “are no more free to cause harm to others while gathering the news than any other individual” nor to avoid the requisite duty “to exercise reasonable care to avoid foreseeable injury to others.” 24 Media L. Rep. at 1715.

3. **Trespass**

Other theories of potential newsgathering liability considered during the past year included trespass and claims involving media “ride alongs” with law enforcement agents.

In a media case, *Berger v. Cable News Network*, 24 Media L. Rep. 1757 (D. Mont. 1996), discussed *infra* at page 43, the court held that CNN had not trespassed on plaintiff’s property when it accompanied the police in the execution of a search warrant because permission from the government constituted sufficient “consent” to enter the premises.

In a nonmedia case, *Sundheim v. Board of County Commissioners*, 904 P.2d 1337 (Colo. App. 1995), *affd*, 1996 WL 617372 (Colo. 1996), the Colorado Court of Appeals affirmed the grant of summary judgment on a trespass claim brought after a private investigator hired by the defendant gained access to the premises by posing as a potential customer. The appellate court suggested that business premises enjoy a lower expectation of privacy than do private premises and that “when an intrusion into a commercial establishment is based upon the nature of the business activities there taking place . . . the business owner may not have a reasonable expectation of privacy in those activities . . .” Moreover, the court held a claim for trespass may not lie “[w]hen an agent of the government posing as a willing participant in unlawful activity is allowed entry by invitation, there

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46It was reported that the parties settled the case in October 1996 on unspecified terms.
has been no unreasonable search" (emphasis supplied).

4. **Ride-Alongs**

In *Parker v. Clarke*, 905 F. Supp. 638 (E.D. Mo 1995), aff'd sub. nom, *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), a mother brought an action on behalf of her 16-year old-daughter based upon a police search, pursuant to a lawful warrant, for illegal weapons on the premises that she and her daughter occupied. Also present during the search, with neither the consent nor the objection of the police, was a crew from the local television station, KSDK, which filmed the search and included plaintiffs in their footage. Plaintiffs brought a federal claim under § 1983 and state law claims for invasion of privacy by false light, publication of private facts, and intrusion against both the media defendants and the police. The court dismissed the state law claims without prejudice to an action in state court "in view of the novel and complex issues of state law." *Id.* at 646. The disposition of the § 1983 claims are discussed *infra* at page 50.

In *Berger v. Cable News Network*, 24 Media L. Rep. 1757 (D. Mo. 1996), Cable News Network, Inc. (CNN) and one of its reporters were granted consent to accompany a state agency's search of plaintiff's ranch, resulting in a CNN news story, which included footage from the search, about ranchers killing predators. Plaintiffs asserted a litany of claims against CNN and its reporter, including violation of their Fourth Amendment rights, of the Federal Wiretapping Act, trespass, conversion, and intentional infliction of emotional distress. The court grant summary judgment to the defendants on all claims.

The First Amendment claim was barred by collateral estoppel, having been previously litigated. Moreover, the court found, CNN was not acting under color of law but "as a means of furthering its own interests." The court also held that the one-party consent requirement of the Federal Wiretapping Act had been satisfied because CNN had been granted consent by the law enforcement officials and that the "tortious act" exception was inapplicable ("the Court does not find that defendants made the recordings for the purpose of committing a crime or tortious act . . . [but] . . . for the purpose of producing a new story . . . .") 24 Media L. Rep. at 1760.

5. **Stalking**

According to the 1996-97 PRIVACY SURVEY, Maine, Texas, Utah, the Virgin Islands, and Virginia have joined the growing number of jurisdictions which provide for civil and/or criminal penalties for "stalking." Thus far, statutes of this kind do not appear to have been successfully applied to media defendants and at least one of the statutes specifically exempts "constitutionally protected activities."

In related judicial developments during the past year, the Michigan Court of Appeals, in *Anderson v. Lake*, 536 N.W.2d 609 (1995), *appeal granted*, has instructed courts to vigilantly
observe the 14-day limitation on issuing *ex parte* restraining orders under that state’s stalking statute, Minn. Stat. § 609.728.

In *State v. Martel*, 273 Mont. 143, 902 P. 2d 42 (1995), the Montana stalking statute, MCA § 45-5220, was held to be constitutional.

The North Dakota stalking statute, NDCC § 12.1-17-07.1, and related statutes were held to be inapplicable to constitutionally protected activities. See *Kirkby v. Furness*, 52 F. 3d 772 (8th Cir. 1995) (statute held constitutionally suspect; preliminary injunction imposed to protect picketing by anti-abortion protesters), *aff’d following remand*, 92 F.3d 772 (1996); *Habiger v. City of Fargo*, 80 F. 3d 289 (8th Cir. 1996) (addressing First Amendment issues in context of anti-abortion protests); *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 178 (1996).

In *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (Ark. 1995), the Arkansas Supreme Court held, under § 5-71-229(b)(1), that stalking requires the perpetrator to make a threat with the intent of placing his victim in imminent fear of death or serious bodily injury.

In *Long v. Texas*, 1996 WL 512396 (Tex. Crim. App. 1996), the Court of Criminal Appeals of Texas struck down as unconstitutionally vague that state’s criminal stalking statute, V.T.C.A., Penal Code § 42 (a)(7), which employed the words, in the disjunctive, “harass,” “annoy,” “alarm,” “threat,” “torment,” and “embarrass,” finding these terms to be so vague as to “cover any conduct in which a person could possibly engage.”

### D. MISAPPROPRIATION/RIGHT OF PUBLICITY

According to the 1996–97 PRIVACY AND RELATED LAW SURVEY, 42 jurisdictions currently recognize the tort of misappropriation.47 One jurisdiction has rejected the tort entirely,48 and in 11 jurisdictions the courts have not yet had the opportunity to rule on the issue.49

In the 42 jurisdictions recognizing misappropriation, it has been applied in the media context in all but Pennsylvania, which has expressly rejected its application to the media. The protection derives from statute in 14 jurisdictions, in 9 of which the statute exists in addition to the protections

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48Minnesota.

49Alaska (no modern cases have ruled on the issue), Guam, Iowa, Montana, New Hampshire, North Dakota (no direct cases but addressed in dicta), Puerto Rico, South Dakota, Tennessee, Washington, and Wyoming.

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provided at common law,\textsuperscript{50} while in the remaining 5 jurisdictions the statute is the sole source for protection against misappropriation.\textsuperscript{51}

During the past year, misappropriation and right of publicity claims continued to be the subject of frequent litigation in both the media and nonmedia contexts, with varying results. Judicial and statutory expansion of the potential reach of right of publicity claims occurred in California and New York.

In New York, the legislature amended § 50 of the New York Civil Rights Law, which prohibits the use of “the name, portrait or picture of any living person,” for trade or advertising purposes, without the written consent of that person, extending statutory protection to use of voice. See 1995 N.Y. Laws 674.

In California, the basketball star Abdul-Jabbar brought common law and statutory misappropriation claims under California law after General Motors used his former name, Lew Alcindor, without his consent, in a television commercial aired during the 1993 NCAA men's basketball tournament. \textit{Abdul-Jabbar v. General Motors Corporation}, 85 F.3d 407 (9th Cir. 1996). Holding that Abdul-Jabbar had abandoned the name Lew Alcindor, the district court granted summary judgment on all claims.

Reversing, the Ninth Circuit court cited its earlier decision in \textit{White v. Samsung Electronics of America}, 971 F.2d 1395 (9th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 2443 (1993), for the proposition that the right of privacy is not limited to the appropriation of name or likeness but encompasses other means of identifying an individual. (“Neither the cases cited by the district court, nor the cases listed above stand for the proposition that the reference must be ‘in common, present use’ under the statute or under California common law. Rather they stand for the proposition that identity is a more flexible proposition and thus more permissive than the statutory ‘laundry list’ of particular means of appropriation.” \textit{Id.} at 415.) While acknowledging that \textit{White} had construed the statutory protection more narrowly than the common law protection, the court found that “name and likeness” under the statute were not limited to present or current use. On both the common law and statutory misappropriation claims, the court found a triable issue as to whether the use of “Lew Alcindor” was the equivalent of using “Kareem Abdul-Jabbar.” \textit{Id.} at 416. (The court’s disposition of the Lanham Act claims is discussed \textit{infra} at page 53.)


\textsuperscript{50}California, Florida, Indiana, Nevada, Oklahoma, Tennessee, Texas (statute appears to only apply to the misappropriation of the identities of the deceased), Utah, Wisconsin.

\textsuperscript{51}Massachusetts, Nebraska, New York, Rhode Island, and Virginia.
Blue.” On the misappropriation claim, Judge Wood found no violation of New York Civil Rights law §§ 50, 51 because plaintiff failed to demonstrate that her “name, portrait or picture” was used within New York for “advertising purposes or for the purposes of trade.” Judge Wood also dismissed the plaintiff’s defamation claim. See supra page 4.

In PAM Media, Inc. v. American Research Corp., 889 F. Supp. 1403 (D. Colo. 1995), the United States District Court for the District of Colorado, although it upheld other claims, granted summary judgment on the invasion of privacy/misappropriation claim brought by the producer and syndicator of Rush Limbaugh’s radio talk show against the producer of a competing radio talk show entitled “After the Rush.” Noting the paucity of Colorado cases, the federal court assumed that the Colorado courts would follow the RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995), and granted the defendants’ summary judgment motion because the plaintiffs did not make a sufficient showing that the defendants attempted to exploit the persona of Rush Limbaugh for their commercial benefit.

In Ventura v. Titan Sports, Inc., 65 F.3d 725, 729-730 (8th Cir. 1995), cert. denied, 116 S.Ct. 1268 (1996), the plaintiff, a wrestler, brought an action against a wrestling organization which distributed videotapes of wrestling matches which included plaintiff’s commentary. In a 2-1 decision, the Court, stating that “we believe that the Minnesota court would recognize the right of publicity,” held that recovery for unjust enrichment would be available under that claim. However, five months later, in a defamation case which also alleged misappropriation, based on the use of a child’s photograph on The Maury Povich show, the Minnesota Supreme Court, while expressly listing “appropriation for the defendant’s benefit or advantage of the plaintiff’s name or likeness” as one of the four separate kinds of invasion of privacy claims recognized by other jurisdictions, failed to address the misappropriation claims. Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 24 Media L. Rep. 1897 (Minn. 1996).

The U.S. District Court for the Eastern District of Wisconsin, in Hagen v. Dahmer, 24 Media L. Rep. 1311 (E.D. Wis. 1995), affirmed a magistrate’s recommendation to dismiss a complaint because the Wisconsin privacy statute only recognizes a right of publicity for living persons, and it does not create a claim for an individual identified only as a “family member” of a named person. The issue of whether family members have a cause of action for misappropriation also arose in Hagen v. Dahmer. After serial killer Jeffrey Dahmer’s father dedicated his book to named victims of his son and their families, family members of several of the named victims brought an action against the defendant for using the victims’ names and mentioning “their families” for personal monetary gain without obtaining consent, alleging violation of § 895.50(2)(b), Wis. Stats. The federal district court affirmed a magistrate’s recommendation to dismiss the action because Wisconsin’s right of publicity statute only recognizes a cause of action on behalf of living persons and because “being a family member is a status which falls outside the statutory right to publicity . . . .”

In a misappropriation case involving conflict of law, Page v. Something Weird Video, 908 F. Supp. 714 (C.D. Cal. 1995), a district court held that California law would apply where the likeness of a current California resident, made while plaintiff was a New York resident, was being used
commercially in New York.

In *Town & Country Properties, Inc. v. Riggins*, 249 Va. 387, 394, 457 S.E.2d 350, 23 Media L. Rep. 2045 (Va. Sup. Ct. 1995), John Riggins, former Redskins star and Pro Football Hall of Famer, brought suit under the Virginia misappropriation statute, Va. Code Section 8.01-40, when his former wife, an associate with the defendant real estate broker, distributed 1,619 copies of a flyer which used his name in order to promote the sale of her own marital residence. On appeal, the court affirmed the ruling (although it reduced the punitive damages from $28,608 to $20,000), rejecting defendant’s argument that the flyers did not imply endorsement, but was instead constitutionally protected speech that truthfully stated that the home had belonged to the plaintiff. Holding that plaintiff’s name had, in fact, been used for “advertising purposes” in violation of the statute, the court stated that “[t]he placement on the document of defendants’ logo and the agent’s name . . . as well as the wide distribution of the piece to a targeted audience leaves no doubt . . . that the flyer was designed to enhance the probability of ultimate sale of the property.” 23 Media L. Rep. at 2048.

In *Chavez v. Arte Publico Press*, 59 F. 3d 539 (5th Cir. 1995), the Fifth Circuit held that plaintiff’s claim of misappropriation against a state university and its press was barred by sovereign immunity.

In *Shamsky v. Garan*, 632 N.Y.S. 2d 930 (N.Y. Sup. Ct. 1995) members of the 1969 World Series Champion Mets team brought an action against a clothing manufacturer, alleging that defendant’s sale of clothing emblazoned with a group portrait of the team violated the team’s rights under §§ 50 and 51 of the New York Civil Rights Law. The court denied defendant’s motion for summary judgment, upholding plaintiff’s claims, but limiting recovery to sales within the state of New York.

E. Conversion

According to the 1996–97 PRIVACY AND RELATED LAW SURVEY, only 5 jurisdictions have applied conversion in the newsgathering and publishing context.52

Two cases decided during the past year involved conversion claims. In *Berger v. Cable News Network*, 24 Media L. Rep. 1757 (D. Mont. 1996), supra at page 43, a Montana federal district court rejected plaintiffs’ claim that defendants “wrongfully seized and appropriated . . . [their] . . . statements and images.” The court rejected this claim, holding that “[t]he elements necessary for a conversion action in Montana include ownership of property, a right of possession, unauthorized dominion over the property by another . . .” and that statements and private images cannot constitute “‘property’ for purposes of a conversion action.” 24 Media L. Rep. at 1760-61.

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52California, District of Columbia, Illinois (federal court used California law for conversion but applied Illinois defenses), Kansas, New York.
The opposite result was reached in Town & Country Properties, Inc. v. Riggins, 249 Va. 387, 457 S.E.2d 356, 363-64, 23 Media L. Rep. 2045 (1995), supra at page 46. There, the Virginia Supreme Court upheld the football star's claim of conversion, holding that "conversion occurs when . . . a defendant uses another's personal property as its own and exercises dominion over it without the owner's consent" and that "one holds a property interest in one's name and likeness." 23 Media L. Rep. 2049.

F. INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

According to the 1996-97 PRIVACY AND RELATED LAW SURVEY, all 54 jurisdictions recognize the tort of intentional infliction of emotional distress, and 35 have case law specifically dealing with the tort in the media context. In the remaining 19 jurisdictions, the courts have yet to address the application of the tort to the media.

During the past year, intentional infliction of emotional distress claims were dismissed in two media cases, with mixed results in the nonmedia context.

In a media case involving intentional infliction of emotional distress, along with other claims, Guilbeaux v. The Times of Acadiana, Inc., 661 So. 2d 1027 (La. Ct. App. 1995), writ denied, 670 So. 2d 1238 (La. 1996), a businessman who had sought to attract riverboat gambling to the area brought an action against a newspaper which had reported adversely on his business activities. Upholding the lower court's dismissal of the claim for intentional infliction of emotional distress, the Court of Appeal held that the facts as alleged did not support plaintiff's claims that the conduct complained of was "extreme or outrageous"; that the plaintiff suffered "severe emotional distress"; or that the defendant "desired to inflict or knew that severe emotional distress would be likely."

In another media case, Berger v. Cable News Network, 24 Media L. Rep. 1757 (D. Mont. 1996), discussed supra at page 43, the court granted summary judgment on the intentional infliction claim against CNN, holding that because the defendants were not liable for trespass or on the other grounds alleged, and were "broadcasting a truthful, newsworthy story," no tortious conduct had occurred and therefore emotional distress had not been "reasonably foreseeable." 24 Media L. Rep. at 1762.

53Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Kentucky (intermediate), Louisiana, Maine (federal), Maryland, Massachusetts, Michigan (intermediate), Minnesota, Mississippi (federal), Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma (intermediate), Pennsylvania, Rhode Island (federal), South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wyoming.

54Arkansas, Delaware, Guam, Hawaii, Idaho, Indiana, Iowa, Kansas, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Puerto Rico, South Dakota, Vermont, Virgin Islands, West Virginia, Wisconsin.
In *Drainer v. O'Donnell*, 1995 WL 338700 (Del. Super.), appeal dismissed, 667 A.2d 1318 (Del. 1995), a nonmedia sexual harassment and slander case brought by a legal secretary against the client of a law firm, the alleged harasser fabricated a story asserting that plaintiff had traveled with him to the Bahamas and that, while on vacation, plaintiff's "breasts had become sunburned and that he had taken nude pictures of her on the beach." Although the court held that a plaintiff need not allege bodily harm, but need only allege that "as a result of defendant's extreme and outrageous conduct, he or she suffered severe emotional distress," the court held that "when the gravamen . . . of a complaint 'sounds in defamation,' no independent action for intentional infliction of emotional distress will lie." In so holding, the court noted that "[t]he rationale for this rule is to preclude on from reviving a defective defamation claim by pleading it as a claim for intentional infliction of emotional distress" and that the plaintiff "may allege either defamation or intentional infliction of emotional distress," but not both.

In *Bowman v. Heller*, 420 Mass. 517, 651 N.E.2d 369, cert. denied, 116 S. Ct. 682 (1995), a case alleging both defamation and intentional infliction of emotional distress, the defendant had distributed in the workplace pictures of plaintiff, a candidate in a union election, in which her face had been superimposed on pornographic pictures. On the defamation claim, the Massachusetts Supreme Judicial Court, reversed the lower court, holding that plaintiff was not a public figure and need not prove actual malice. The court, however, affirmed the lower court's refusal to dismiss the intentional infliction claim, the court, agreeing with the lower court that the defendant's actions were "extreme and outrageous . . . outside all reasonable bounds of civilized society . . . aimed intentionally at causing, and actually did cause, the plaintiff severe emotional harm.”

In *Sacco v. High Country Independent Press*, 896 P.2d 411 (Mont. 1995), a former employee alleged civil rights violation, malicious prosecution, defamation and intentional and negligent infliction of emotional distress, based on the employers’ allegation of theft against his former employee. After reviewing the Montana case law and authorities from other jurisdictions, the court concluded that “it is appropriate that we join a multitude of jurisdictions in recognizing both torts [i.e. intentional infliction and negligent infliction] as independent causes of action . . .” 896 P. 2d at 417–18.

G. **Prima Facie Tort**

In a nonmedia case reported during the last year, a federal court in Pennsylvania concluded that the state has not recognized an independent cause of action for “prima facie tort.” *See L & M Beverage Co. v. Guinness Import Co.*, No. 94-CV-4492, 1995 WL 771113 (E.D. Pa. Dec. 29, 1995).

H. **Negligent Infliction of Emotional Distress**

According to the 1996-97 PRIVACY AND RELATED LAW SURVEY, 43 jurisdictions currently
recognize a cause of action for negligent infliction of emotional distress. In 15 of these jurisdictions the tort has been applied in the media context, in 28 jurisdictions there have been no cases involving the media, and one jurisdiction has expressly rejected its application in the media context. Seven jurisdictions have expressly rejected the tort in all cases and in three jurisdictions there are no cases reported.

In a nonmedia decision reported last year, the Montana Supreme Court recognized the tort of negligent infliction of emotional distress. *Sacco v. High Country Independent Press*, 896 P.2d 411 (Mont. 1995).

**I. SECTION 1983**

The 1996-97 PRIVACY AND RELATED LAW SURVEY reports no successful claim asserted under 42 U.S.C. § 1983 during the past year.

In one significant § 1983 case reported during the past year, *Parker v. Clarke*, 905 F. Supp. 638 (E.D. Mo 1995), aff'd sub. nom, *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), a mother brought an action on behalf of her 16-year old daughter based upon a search for illegal weapons, pursuant to a lawful warrant, of the premises occupied by the plaintiffs. Also present during the search was a crew from the local television station, KSDK, which, with neither the consent nor the objection of the police or the plaintiffs, filmed the search and included plaintiffs in their footage.

In *Parker*, plaintiffs claimed violation of § 1983 and common law invasion of privacy claims against both the media defendants and the police. The court dismissed the § 1983 claims against the media defendants because the media defendants were not "state actors" for the purposes of § 1983, that is, they were neither state officers nor were they acting under some "right or privilege created

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58Michigan.

59Alabama, Arkansas, Iowa, Kentucky, Maryland, North Dakota, and Texas.

60Kansas, Puerto Rico, and South Carolina.
by the State.” Id. at 642. Under the authority of the Second Circuit’s decision in Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), cert. denied, 115 S. Ct. 1689 (1995), the court granted summary judgment in plaintiff’s favor as to the § 1983 claims against the three individual police, one a supervisor, two who brought the crew into the premises, dismissing the § 1983 claims against the remaining defendants as well as the Police Department.

On appeal, the Eighth Circuit affirmed dismissal of the § 1983 claim against the media defendants on the basis of the plaintiff’s failure to establish that the media had acted under a “right or privilege created by the state.” Parker v. Boyer, 93 F.3d 445, 448 (8th Cir. 1996). Chief Judge Richard Arnold dissented from this portion of the opinion stating that in his view “the news crew acted in concert with the police in entering the [plaintiffs’] home.” Id. at 449 (Arnold, C.J., dissenting).

The court then reversed the grant of summary judgment to the plaintiffs with respect to their § 1983 claim against the police defendants, holding that their actions had not violated a “clearly established federal right[] of which a reasonable person would have known” so as to overcome their qualified immunity from suit. Id. at 447 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The majority noted that at the time the search was performed, which was prior to the decision in Ayeni, “most courts ha[d] rejected the argument that the U.S. Constitution forbids the media to encroach on a person’s property while the police search it.” Id. at 447. The majority went on to observe that it did not “think it self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone’s house during the execution of a search warrant.” Although Judge Rosenbaum concurred that the right was not firmly established, he agreed with the holding in Ayeni that the police violate the Fourth Amendment “when they admit representatives of the public media into a private citizen’s home, without first securing the resident’s express consent.” Id. at 448 (Rosenbaum, J., concurring).

J. INTERFERENCE WITH CONTRACT

According to the 1996-97 PRIVACY AND RELATED LAW SURVEY, interference with contract claims have been analyzed in the media context in 12 jurisdictions. In the majority of these cases, the plaintiff was alleging that the adverse publication by defendants had harmed the plaintiff’s business. In one instance the federal court in the District of Columbia recognized the claim as an attempted “end run” and dismissed the claim, holding that plaintiffs may not circumvent the constitutional strictures of a defamation claim against a media defendant by recasting his claim as one for intentional interference with prospective economic advantage. In only a small number of cases was the claim made that the defendant induced a source to breach an agreement with the plaintiff.

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61 California, Connecticut, Florida, Illinois, Louisiana, Maryland (federal), Massachusetts, Mississippi (federal), Missouri, New Jersey, New York, Washington.

During the past year, media defendants have prevailed in a number of interference with contract cases either because they acted without the tort’s requisite malice in reporting on matters of public concern or were held to be immunized from such claims by the First Amendment.

In a media case alleging interference with contract, Guibbeaux v. The Times of Acadiana, Inc., 661 So. 2d 1027 (La. Ct. App. 1995), writ denied, 670 So. 2d 1238 (La. 1996), plaintiff claimed that an article published by the defendant prevented him from bringing riverboat gambling to Lafayette, Louisiana, the court, noting the limited scope of that claim in Louisiana, affirmed dismissal of plaintiff’s claim for tortious interference with contract, holding that it “only applies to a corporate officer interfering with his employer’s contractual relations with third persons.”

In three related New York state cases, courts have dismissed claims of tortious interference with contract filed by Charles Huggins, actress/singer Melba Moore’s former husband and manager, against various media defendants. Huggins v. Povich, Index No. 131164/96 (N.Y. Sup. Ct. 1996); Huggins v. NBC, Inc., Index No. 119272/95 (N.Y. Sup. Ct. 1996); Huggins v. Whitney, 24 Media L. Rep. 1088 (N.Y. Sup. Ct. 1995). The lawsuits arose out the litigious divorce between Huggins and Moore, resulting in a settlement agreement in which, among other things, the parties agreed not to discuss the settlement or otherwise publicly criticize, demean or malign the other. That provision notwithstanding, Moore proceeded to embark on a media campaign, appearing on numerous talk shows (including Maury Povich and Jane Whitney), giving interviews to tabloids, TV news magazines and the like. In each case, Moore claimed that Huggins had “blackballed” her in the entertainment industry, improperly managed her assets and career, leaving her broke and on welfare.

Huggins brought suits for libel and tortious interference with contract against those members of the broadcast media who had aired her interviews. Each filed successful motions to dismiss both the defamation claims and the claims for tortious interference. Although the media defendants had knowledge of the non-disparagement provision in the parties’ divorce agreement, the courts dismissed the tortious interference claims. In the Povich case, the court held that “the broadcaster’s first amendment right to broadcast an issue of public importance, its lack of any motive to harm the plaintiff and the obvious societal interest in encouraging freedom of the press” barred the claim for tortious interference. The NBC and Jane Whitney courts reached the same conclusion, the latter holding that the media defendants were “immune under the First Amendment from a tortious interference claim.”

Likewise, in another media case, Dulgarian v. Stone, 420 Mass. 843, 652 N.E. 2d 603 (Mass. Sup. Jud. Ct. 1995), the media defendant’s motive in airing matters of public concern was held to bar a claim for tortious interference. In that case, a body shop owner brought an action based on a television program’s investigative report entitled “Highway Robbery?”, which detailed possible conflicts of interest between automobile body repair shops and drive-in appraisal services. Plaintiff alleged defamation, intentional interference with business relations and assorted other claims, alleging that defendants’ statements in the broadcast and to Allstate insurance company during the newsgathering for the report interfered with plaintiff’s business relations. The court affirmed the lower court’s grant of summary judgment on the tortious interference claim, holding that plaintiff had
failed to prove an essential element of the tort: that the interference be improper in motive or means: "There is no indication that the report was broadcast for any reason other than the reporting on an issue of public concern."

K. INJURIOUS FALSEHOOD

Two courts during the past year held privileges applicable to defamation actions are likewise applicable to actions for injurious falsehood. McBride v. Pizza Hut, 658 A. 2d 205 (D.C. Ct. App. 1995) (absolute privilege for statements to unemployment office as well as an attorney's letter applies to injurious falsehood claim as well defamation claim). See also A&B Abell Elevator Co, Inc. v. Columbus/Central Ohio Bldg. and Const. Trades Council, 73 Ohio St. 3d 1 (1995) (disparagement action based on statements that are qualifiedly privileged under defamation law must also overcome the qualified privilege with a showing of actual malice).

In a legislative development during the past year, on February 7, 1996, Ohio enacted a statute authorizing an action in tort for the disparagement of agricultural and agricultural food products (O.R.C. § 2307.81). The statute allows either the producer, or any association representing producers, of any perishable agricultural or aquacultural food products to sue for damages. Compensatory and punitive damages, attorneys' fees and costs may be awarded "if the plaintiff establishes that the disseminator knew or should have known that the information was false." False information is defined as "any information not based upon reasonable and reliable scientific inquiry, facts, or data, and that directly indicates that a perishable agricultural or agricultural product is not safe for human consumption." Treble damages are provided against any person who intentionally disparages a perishable agricultural or agricultural food product "for the purpose of harming the producers of that product . . ." A two-year statute of limitations "after the last disparagement" was adopted.

According to the 1996–97 PRIVACY AND RELATED LAW SURVEY, eleven other jurisdictions currently have produce disparagement statutes: Alabama, Arizona, Florida, Georgia, Guam, Idaho, Louisiana, Mississippi, Oklahoma, South Dakota, and Texas.

L. LANHAM ACT/STATE UNFAIR COMPETITION LAW/TRADEMARK

In the small number of cases involving Lanham Act and related claims reported during the last year, media defendants have found little protection under the First Amendment.

In a case of first impression, The Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Productions, 934 F. Supp. 868 (N.D. Ohio), appeal filed, No 96-3759, plaintiff alleged that posters of the Rock and Roll Hall of Fame and Museum in Cleveland infringed upon its trademarks on the name and building design. Chief Judge George White issued a preliminary injunction restraining a photographer from selling unlicensed posters, finding them to be "misleading as to its source of

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sponsorship” and not entitled to First Amendment protection.

In Abdul-Jabbar v. General Motors Corporation, 85 F.3d 407 (9th Cir. 1996), basketball star Kareem Abdul-Jabbar sued General Motors for misappropriation and under § 43(a) of the Lanham Act for use of his former name, Lew Alcindor, in a television commercial aired during the 1993 NCCAA men’s basketball tournament. The district court granted summary judgment to the defendant on the ground that Abdul-Jabbar had “abandoned” the name Lew Alcindor by having failed to use it for over ten years.

The Ninth Circuit reversed, holding that one’s birth name is an integral part of one’s identity that is neither “bestowed for commercial purposes . . . nor ‘kept alive’ through commercial use.” As such, the court concluded, a name “cannot be deemed ‘abandoned’ throughout its possessor’s life, despite his failure to use it, or continue to use it, commercially.” 85 F.3d at 412. The court also rejected the defendant’s fair use defense under the Lanham Act on the ground that there was a triable issue as to whether viewers would be confused that plaintiff had endorsed the advertised product. Id. at 413. The plaintiff’s misappropriation claims are discussed supra at page 45.

Lanham Act violations were alleged, along with assorted other claims, in PAM Media, Inc. v. American Research Corporation, 889 F. Supp. 1403 (D. Col. 1995). In that case, Rush Limbaugh’s producer alleged unfair competition and violation of the Lanham Act against the producer of a radio talk show entitled “After the Rush,” a show with markedly different political views than Rush Limbaugh’s. Rejecting defendant’s claim of First Amendment protection, the court addressed the Lanham Act and related claims, noting questions of whether “station managers or listeners are likely to be confused about production, licensing and sponsorship of these two shows”; whether defendant’s promotional materials “suggest a purpose to retain a part of the audience hearing ‘The Rush Limbaugh Show’ and to trade on its success.” Holding that “[t]hese disputed fact question will require a trial,” the court denied summary judgment for both parties.

M. NEGLIGENT MEDIA PUBLICATION

Two consolidated wrongful death cases, Rice v. Paladin Enterprises, Inc. and Saunders v. Paladin Enterprises, Inc., 24 Media L. Rep. 2185 (D. Md. 1996), addressed a publisher’s liability for the contents and alleged consequences of its publications. In those cases, convicted hit man James Perry had been hired by Lawrence Horn to kill Horn’s ex-wife, Mildred, and her son, Trevor and his nurse, so that Horn would inherit a $1.7 settlement awarded to Trevor in a medical malpractice action. According to the plaintiffs, survivors of victims, Perry had purchased and relied upon a book published by defendant Paladin Enterprises (“Paladin”): Hit Man: A Technical Manual for Independent Contractors.

Defendants moved for summary judgment, invoking their First Amendment rights to publish the books in question. Alleging that Paladin and its president had aided and abetted the murders, and also raising for strict products liability, civil conspiracy and negligence, the plaintiffs relied in part on
the "Soldier of Fortune" cases, including *Braun v. Soldier of Fortune Magazine*, 968 F. 2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993), in which courts upheld actions against damages against that magazine for deaths resulting from the magazine's "gun for hire" advertisements.

In granting summary judgment in favor of the defendants, and noting "this is a novel case with unprecedented future implications," the court held that the First Amendment bars the imposition of liability because, under the standard of the United States Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) the "book does not constitute incitement to imminent lawless action." 24 Media L. Rep. at 2194.

III. STATUTES AND RELATED CASE LAW REPORTED IN THE 1996-97 SURVEYS

A. LIMITATIONS ON DAMAGE AWARDS

New Jersey, North Carolina, and Ohio enacted statutes during the past year that limit punitive damage awards in all cases. N.J.S.A. 2A:15-5.9; N.C. Gen. Stat. § 10-25.

Under the New Jersey statute, punitive damages are limited to the greater of $350,000 or five times the compensatory damages. The plaintiff must also establish by clear and convincing evidence either "actual malice," defined as "intentional wrongdoing in the sense of an evil-minded act," or "a wanton and willful disregard of persons who foreseeably might be harmed."

Punitive damages under the North Carolina statute are limited to three times the compensatory damage award or $250,000, whichever is greater. Consistent with common law standards in North Carolina, the plaintiff must also establish one of the following aggravating factors as a prerequisite to the recovery of punitive damages: (1) fraud, (2) malice, or (3) willful or wanton conduct.

For all defendants except large employers, punitive damages under the Ohio statute are limited to the lesser of three times compensatory damages or $100,000. For organizations with more than 25 employees, punitive damages are limited to the greater of three times compensatory damages or $250,000. Additionally the statute allows any party to request a bifurcated trial, eliminates multiple punitive awards for the same act, and eliminates "oppression" as a standard for awarding punitive damages.

In a recently reported decision in the context of a wrongful death suit, the Oregon Supreme Court upheld against a constitutional challenge an Oregon statute limiting noneconomic damages to $500,000. *Greist v. Phillips*, 322 Or. 281, 906 P.2d 789 (1995).
According to the 1996-97 PRIVACY AND RELATED LAW SURVEY, eight states — California, Delaware, Georgia, Massachusetts, Minnesota, New York, Rhode Island, and Washington — have enacted statutes to protect against what have become to be known as “SLAPP” (strategic lawsuit against public participation) suits.

In New York, courts have thus far been reluctant to give an expansive reading to the state’s anti-SLAPP statute. N.Y. Civ. Rights Law §§ 70-a, 76-a. In Harfenes v. Sea Gate Association, Inc., 167 Misc. 2d 647, 647 N.Y.S.2d 329 (N.Y. Sup. Ct. 1995), for example, the trial court judge ruled that the statute is in “derogation of the common law” and accordingly should be construed narrowly. In another case decided this year, Rambo, Inc. v. Genovese, No. 95-15344 (N.Y. Sup. Ct. 1996), the defendant in a malicious prosecution action moved for summary judgment under New York’s anti-SLAPP statute. Although the court granted summary judgment on the malicious prosecution claim on the ground that the plaintiff had failed to establish lack of probable cause, it declined to apply the anti-SLAPP statute and dismissed the defendant’s counterclaims for sanctions.

During the past year, several new cases continued the generally, but not uniformly, broad construction accorded to the California anti-SLAPP statute. Cal. Code. Civ. P. § 425.16. See, e.g., Averill v. Superior Court, 42 Cal. App. 4th 1170, 1175, 50 Cal. Rptr. 2d 62 (1996) (noting that “the Legislature intended the statute to have broad application” to any lawsuits arising out of the exercise of constitutional speech and petition rights,” and applying that statute to a slander suit based on private conversations concerning a public issue); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (1996) (§ 425.16 applies to suit by Scientology against former church member arising out of prior litigation between the parties); Matson v. Dvorak, 40 Cal. App. 4th 539, 46 Cal. Rptr. 2d 880 (1995) (§ 425.16 applies to suit by defeated political candidate for libel and invasion of privacy against contributor to organization that published campaign flyer at issue); Evans v. Unkow, 38 Cal. App. 4th 1490, 45 Cal. Rptr. 2d 624 (1995) (§ 425.16 applies to suit by recalled official for defamation and related torts against proponents of recall campaign); Ludwig v. Superior Court, 37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350 (1995) (§ 425.16 applies to action by city against developer for interference with contractual relations and other torts based on claim developer was behind environmental opposition to city mall).

Several California courts have held that the protections of § 425.16 may be invoked by the media in response to libel and related actions. In Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46, 50 (1995), cert. denied 117 U.S. 53 (1996), after reviewing the history on the statute which indicated media publishers, “who regularly face libel litigation, would be one of the ‘prime beneficiaries’ of § 425.16,” the court held that a media defendant can carry its initial burden under the statute by showing the libel suit was “based on its news reporting activities.”

However, a recent decision of a California intermediate court offered a much narrower application of that state’s anti-SLAPP Statute. In Xi Zzhao v. Wong, No. A068903 (Cal. Ct. App. 56
The court held that the right of petition did not include statements to the media. The Court narrowly construed the phrase “public interest,” finding it did not include statements about an unsolved murder which had been the subject of the coroner’s investigation, a probate proceeding and a front page newspaper story. See also Harfenes v. Sea Gate, 167 Misc.2d 647, 647 N.Y.S.2d 329 (N.Y. Sup. Ct. 1995) (holding New York’s SLAPP statute, Civil Rights Law § 70-a, inapplicable because claimants were in no way involved as petitioners and therefore were not entitled to the statute’s protection); Milford Power Limited Partnership v. New England Power Company, 918 F. Supp. 471 (D. Mass 1996) (with respect to defamation counterclaim, holding anti-SLAPP statute inapplicable to filing of lawsuit and issuance of press release.) Compare Thomson v. Town of Andover Board of Appeals, 4 Mass. L. Rptr. 19, 411 (Mass. Super. 1996), the Superior Court held that letters to the editor written by private citizens fell within the protection Massachusetts’s SLAPP statute.

In a recent legislative action, during its 1996 session, Georgia enacted an anti-SLAPP statute, O.C.G.A. § 9-11-11.1, requiring that any claim based upon an act that “reasonably could be construed” as furthering “the right of free speech or the right to petition government . . . in connection with an issue of public interest or concern” must be accompanied by written verifications under oath by both the party asserting the claim and the party’s attorney. O.C.G.A. § 9-11-11.1(c) defines an “act in furtherance of the right of free speech or the right to petition government . . . in connection with an issue of public interest or concern” to “include any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.”

Rhode Island also enacted an anti-SLAPP statute this past year. R.I. Gen. Laws § 9-33-1-33-4. The statute provides a conditional immunity for “a party’s lawful exercise of its right of petition or of free speech under the United States or Rhode Island Constitution in connection with a matter of public concern.” § 9-33-2(2). The immunity applies “as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech . . . except if said petition or free speech constitutes a sham [as defined under the statute].” The statute permits a party who is sued in contravention of the anti-SLAPP statute to file a motion to dismiss and also requires the court to stay discovery proceedings in the underlying suit while the motion to dismiss is considered.
Currently, according to the 1996–97 Media 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, and 29 of the 51 jurisdictions with shield protections have considered their application, either by statute or case law, in the libel context.63

Perhaps the most troubling development in this area of the law during the past year were the sanctions threatened by a Texas state court for a reporter’s refusal to identify a confidential source. The reporter had unsuccessfully appealed the trial court’s original order to the Supreme Court. See Dolcefino v. Ray, 902 S.W.2d 163 (Tex. Ct. App. 1995), cert. denied, 64 U.S.L.W. 3656 (4/1/96, No. 95-1250). Following the denial of certiorari, the district court issued an order that if the reporter continued to refuse to identify the source, the court would instruct the jury that it should presume from his refusal that the “evidence that would have been revealed by his truthful answers to those questions would be detrimental to the defendants’ case.” Turner v. Dolcefino, No. 92-32914 (Tex. Dist. Ct. July 3, 1996) (order). After obtaining permission from counsel for the confidential source, the reporter complied with the court’s order.

In perhaps the most important shield law victory of the past year for the media, a federal court in the Middle District of North Carolina granted the defendant Capital Cities/ABC’s request for a protective order from third party subpoenas directed to a large number of hotels, telecommunications companies, and letter-carrier services seeking “communications to and from ABC journalists during an eighteen-month period and communications by and to a large number of other persons and entities.” Food Lion, Inc. v. Capital Cities/ABC, Inc., 1996 WL 575946 at *1 (M.D. N.C. Sept. 6, 1996). In granting the protective order, the court pointed not only to the “fatally overbroad” nature of the subpoenas, an overreach it characterized as “startling,” but also to the fact that the subpoenas “clearly infringe ABC’s First Amendment rights with regard to its confidential sources.” Id. at *2.

Citing the decision of the Virginia trial court in Philip Morris, Inc. v. American Broadcasting Companies, Inc., 23 Media L. Rep. 2438 (Va. Cir. Ct. July 7, 1995), the Food Lion court reasoned that although the plaintiff had not directly requested discovery from ABC, the third party subpoenas nonetheless implicated ABC’s reporter’s privilege because they would “necessarily tend to reveal confidential sources.” Id. Because the plaintiff had failed to exhaust alternative sources of information, the court held that it had not overcome the qualified privilege. 1996 WL 575946 at *2.

A number of other decisions cited in the 1996–97 Surveys have involved media attempts to


64This modified an even more draconian order in which the jury was to be instructed that the failure to identify the source is “presumptive evidence that [he and his co-defendants] acted with reckless disregard for the truth” in the underlying libel suit. Turner v. Dolcefino, No. 92-32914 (Tex. Dist. Ct. June 13, 1996) (order).

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quash third party subpoenas in civil cases, although these decisions have come in the more common posture where the media is being called to testify as a third party witness, rather than as a defendant, in the suit. In most of the cases reported in the survey the media has been successful in quashing the subpoena. See In re Brown & Williamson Tobacco Corp., 24 Media L. Rep 1720 (N.Y. App. Div. 1996) (quashing subpoena as not “critical or necessary” to suit against former employee); In re Application to Quash Subpoena to NBC (Krase v. Graco), 79 F.3d 346, 24 Media L. Rep. 1599 (2d Cir. 1996) (quashing subpoena as not “critical or necessary” to defense of products liability claim); Matter of Winner International Corporation, N.Y.L.J. May 9, 1996 (N.Y. Sup. Ct.) (quashing subpoena as not “critical or necessary” to defense of misappropriation suit); Kurzynski v. Spaeth, 538 N.W.2d 554, 24 Media L. Rep. 1016 (Wis. Ct. App. 1995) (quashing subpoena in malpractice suit on ground that party had failed to exhaust reasonable alternatives for obtaining information). But see SEC v. Seahawk Deep Ocean Technology Inc., 24 Media L. Rep. 1856 (D. Conn. 1996) (holding material sought was directly relevant, not available from another source, and involved neither confidential sources nor unpublished material); In re Inclusion/Viratek Securities Litigation, 87 Civ. 4296 (S.D.N.Y. July 9, 1996) (same).

In the most significant of these decisions, In re Brown & Williamson Tobacco Corp., a New York appellate court affirmed the trial court’s decision to quash subpoenas sought by the tobacco company Brown & Williamson against CBS and a number its employees seeking information in support of its suit against Jeffrey Wigand, a former employee who had been interviewed by CBS, allegedly in violation of his confidentiality agreement with his employer. Applying New York State’s qualified privilege for nonconfidential news material, the court held that Brown & Williamson had failed to demonstrate that the information sought was “critical or necessary” to its action against Wigand. In light of the publicly available tapes of Wigand’s interview with CBS, the court noted that B & W already possessed ample evidence of Wigand’s breach of his confidential agreement with B & W. 24 Media L. Rep. at 1724.

Another significant decision was the holding of the Second Circuit, in In re Application to Quash Subpoena to NBC (Krase v. Graco), that information sought under New York State’s qualified privilege for nonconfidential news material is not “critical or necessary” unless the party seeking the information can demonstrate that its claim or defense “virtually rises or falls” on the evidence. This rigorous standard was cited shortly afterwards by a New York appellate court in vacating a trial court order directing two television journalists to be deposed in connection with a misappropriation claim. See Matter of Winner International Corp, N.Y.L.J. May 9, 1996 (N.Y. Sup. Ct.).

Two other recently reported decisions involved third party subpoenas requiring reporters to identify confidential sources. In a troubling and unprecedented decision, a federal court in New York ordered disclosure of the confidential source after declining to apply the New York State Shield Law, which provides absolute immunity for confidential sources, and instead applying a qualified shield privilege under federal common law. Pellegrino v. New York Racing Association, 94 Civ. 5161 (E.D.N.Y 1996). Because the identity of the source was being sought in connection with the plaintiff’s § 1983 claim against his employer, the court reasoned that the privilege to be applied
should be determined by federal common law. The court then held that plaintiff had overcome the qualified privilege by showing that the information sought was highly material and relevant, necessary or critical to the claim, and not obtainable from other sources.

In the other decision, a federal court in Texas granted a writ of habeas corpus to a reporter who had exhausted her state remedies and who was being held in contempt for refusing to identify sources who had spoken to her in possible violation of grand jury secrecy laws. *Lenhart v. Thomas*, 4:96-CV-0072 (S.D. Tex. Jan. 23, 1996). In striking down the criminal contempt as unconstitutional, the court applied Fifth Circuit precedent that recognized a qualified reporter’s privilege. The court then held that by failing to exhaust alternative means of obtaining the identity of the reporter’s source, the state had failed to overcome the privilege.

By contrast, in a case arising out of the murder prosecution of Susan Smith, the South Carolina Supreme Court held that the South Carolina reporter’s shield law does not apply to protect a reporter in the situation where a trial court sought disclosure of the reporter’s confidential source, as the shield law was designed to protect the reporter from disclosure only to a party in the underlying proceeding. *Matter of Decker*, 471 S.E.2d 462, 23 Media L. Rep. 2542 (S.C. 1995).

A number of decisions reported during the past year involved the application of the reporters’ privilege to oppose third party subpoenas in criminal cases, although in most cases motions to quash the subpoenas were unsuccessful. See *Application of Magrino*, 640 N.Y.S.2d 545 (1st Dep’t 1996) (upholding third party subpoena issued under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, seeking outtakes of an interview conducted in connection with a Home Box Office broadcast of a special report on a professional football player who had been charged with criminally negligent manslaughter in Florida); *Turner v. Northwest Publications, Inc.*, 550 N.W.2d 622 (Minn. 1996) (neither the Minnesota reporter’s shield law nor the state or federal constitutions protects against disclosure of unpublished photographs in a criminal trial, where disclosure will not tend to identify a confidential source); *Coleman v. Texas*, 915 S.W.2d 80, 84 (Tex. App.–Waco 1996, writ granted) (holding that qualified reporter’s privilege does not apply in criminal cases; “[n]ewsmen have no constitutional privilege, qualified or otherwise, to withhold evidence relevant to a pending criminal publication”); *In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1313 n.13 (8th Cir. 1996) (“absent ‘unusual circumstances,’ the First Amendment rarely offers protection from a duty to testify before a grand jury”).

IV. OTHER SIGNIFICANT CASES

In one of the most closely watched cases of the past year, the Sixth Circuit reversed a federal district court judge who had enjoined *Business Week* magazine from publishing an article based on sealed court documents in litigation between Procter & Gamble and Banker’s Trust. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 24 Media L. Rep. 1385 (6th Cir. 1996), reh’g en banc denied (May 8, 1996). Opening the opinion by adverting to the “bedrock First Amendment principle that the press shall not be subjected to prior restraints,” the court ultimately concluded that the permanent injunction issued by the court was “patently invalid and should never have been
entered.” Id. at 221, 225.

The Sixth Circuit also held that the district court had erred by granting two temporary restraining orders prior to entry of the permanent injunction, emphasizing that prior restraints are forbidden “absent the most compelling circumstances.” Id. at 226. Finally, the appellate court was highly critical of the stipulated protective order under which the parties themselves were permitted to determine which documents would be filed under seal, warning that a district court “cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public.” Id. at 227.

The underlying litigation involved a claim filed by P&G against Banker’s Trust for fraud in connection with the sale of corporate derivatives that had resulted in over $100 million loss to P&G. The parties entered into a broad stipulated protective order that allowed them to file both discovery material and subsequent pleadings under seal without prior judicial approval or any showing of good cause. P&G subsequently amended its complaint to add a RICO claim, which was filed under seal. After the parties learned that Business Week had obtained a copy of the amended complaint, they moved for an emergency order enjoining publication, which was granted ex parte by the Judge Feikens, of the Eastern District of Michigan. Id. at 222.

Business Week’s appeals to both the Sixth Circuit and Supreme Court were denied, on the ground that the (open-ended) temporary restraining order was not a final order and thus not appealable. Judge Feikens then commenced a two-day fact-finding hearing, which revealed that information about the amended claim had come to the attention of Business Week as a result of a tip from a contact at P&G and that the copy of the amended claim had been forwarded to Business Week by one of the partners at the law firm representing Banker’s Trust’s lawyers, although neither the Business Week journalist nor the partner who forwarded the documents but was not working on the case knew that they had been filed under seal. Id. at 222-23.

Judge Feikens then entered two orders. Concluding that Business Week had “knowingly violated the protective order,” Judge Feikens permanently enjoined Business Week from using “the confidential materials that it had obtained unlawfully” to report on the litigation. In the second order, however, he unsealed P&G’s amended claim, finding that parties could not establish a “substantial government interest” in keeping the documents sealed. Id. at 223.

Although Business Week was thus free to obtain a copy of the amended claim from the court and use this copy for its report, the Sixth Circuit rejected that argument that Business Week’s appeal was moot, citing the well-recognized exception to the mootness doctrine for “wrongs ‘capable of repetition, yet evading review.’” In rejecting the mootness claim, the court made clear that it was not amused by Judge Feikens’ “strange combination of orders,” which it concluded were designed “to make a statement or declaration of wrongdoing while seeking to prevent review under the mootness doctrine.” Writing for the Sixth Circuit majority, Judge Merritt observed that “appellate courts cannot allow themselves to be done out of their jurisdiction so cleverly” and warned that the “doctrine of mootness is not be used as a spoof on appellate courts.” Id. at 224.
Judge Merritt went on to note that not only had the district court failed to consider the constitutional implications of the temporary restraining orders but that "it compounded the harm by holding hearings on issues that bore no relation to the right of Business Week to disseminate the information in its possession." In strong language, the court then criticized Judge Feikens for his failure to conduct any meaningful inquiry into whether the underlying facts justified the imposition of a prior restraint:

In short, at no time — even to the point of entering a permanent injunction after two temporary restraining orders — did the District Court appear to realize that it was engaging in a practice that, under all but the most exceptional circumstances, violates the Constitution: preventing a news organization from publishing information in its possession on a matter of public concern.

Id. at 225. Judge Merritt then concluded that had the district court engaged in the proper constitutional inquiry, it would never have entered the injunction, for it was obvious that "private litigants' interest in protecting their vanity or their commercial self-interest" falls far short of the "single, extremely narrow class of cases" where publication would be so dangerous to fundamental government interests as to justify a prior restraint." Id. at 226 (citing New York Times Co. v. United States, 403 U.S. 713 (1971) (Brennan, J., concurring)).

Having determined that the permanent injunction was patently unconstitutional, Judge Merritt turned his attention to the standards governing the issuance of a temporary restraining order when the First Amendment is implicated. While conceding that in ordinary cases it might be the responsible course to issue the restraint in order to "preserve the status quo long enough to study the question," the Sixth Circuit identified several reasons why "absent the most compelling circumstances," such an approach is prohibited when it "results in a prior restraint on pure speech by the press." Id. (quoting In the Matter of Providence Journal Company, 820 F.2d 1342, modified on reh'g, 820 F.2d 1354 (1st Cir. 1986)).

The court noted first that a temporary restraining order disturbs rather than preserves the status quo, for when the freedom of the press is involved, the status quo is to "publish news promptly." Id. Secondly, observing that Judge Feikens had granted the temporary restraining order on an ex parte basis, the court emphasized that "there is no place for [ex parte] orders in the First Amendment realm 'where no showing is made that it is impossible to serve or to notify the opposing parties and give them an opportunity to participate.'" Id. (quoting Carroll v. President and Comm'r of Princess Anne, 393 U.S. 175, 180 (1968). Thirdly, while in a normal civil case, a court would review such factors as the parties' likelihood of success and the threat of irreparable injury, "[i]n the case of a prior restraint on pure speech, the hurdle is substantially higher: publication must threaten an interest more fundamental than the First Amendment itself." Id. at 227.

Finally, the court was also sharply critical of the underlying protective orders, which had allowed P & G and Banker's Trust to unilaterally dictate, without any judicial inquiry or showing of good cause, which documents were to be kept from public view. Characterizing the protective order as an abdication of the district court's responsibility "to determine whether filings should be made available to the public," the court held that the order should either be vacated or substantially changed. Id.
SUPREME COURT REPORT

Each year, LDRC reports to readers of the BULLETIN on actions by the U.S. Supreme Court in libel, privacy, and related cases. In this BULLETIN, we provide three views of the Court at the end of its 1995 Term. Part I presents the thoughts of a number of leading practitioners and close observers of trends on the Court in First Amendment and media cases. Part II, beginning on page 77, presents a statistical analysis of pertinent certiorari petitions filed during the past eleven Supreme Court Terms (1985–1995). Finally Part III, beginning on page 85, provides a summary of actions by the Court on certiorari petitions filed during the most recent Term in cases of interest to BULLETIN readers.

I. THE U.S. SUPREME COURT: FIRST AMENDMENT PERSPECTIVES

Recently, LDRC asked five prominent attorneys who follow the Supreme Court — Floyd Abrams, Terry B. Adamson, P. Cameron DeVore, Bruce J. Ennis, Luther T. Munford — for some thoughts on this Court, this Term, and the First Amendment. The section concludes with an essay originally published on the op-ed page of the New York Times by Burt Neuborne, a leading constitutional scholar, acknowledging the current Court’s First Amendment activism but questioning its application in favor of “concentrations of private power . . . and vast wealth.”

By Floyd Abrams

The Supreme Court gave proponents of press freedom a special gift this year. It declined to hear any case involving libel or privacy.

The result is that the law stays as it was — still more protective of the press than anywhere else in the world; still filled with doctrinal weapons which lead to the dismissal of most cases at or before trial or after jury verdicts against the press; still lacking in much in the way of protection against occasionally vindictive judges and more than occasionally angry jurors.

It may seem more than a bit curious that a Court that is viewed by some as so unremittingly partial to First Amendment arguments (see Burt Neuborne’s article at the end of this section),65 should leave me with such a sense of relief when it leaves this body of law alone. But then, I don’t share Burt’s view that the First Amendment always wins in this Court. Doctrinally, for example, I view the recent Supreme Court offering in the cable indecency case (Denver Area Educational Telecommunications Consortium v. F.C.C., 116 S. Ct. 2374 (1996)),66 as not only unsatisfying but

65See infra page 75.

66See infra page 109.
dangerous. And I don't look forward with much confidence to what the Court is likely to offer in other areas involving "new" — or not so old — technology. The Internet may remain more or less free of regulation for a while more. If it does, I'm afraid that it will only be because Congress could not restrain its natural enthusiasm to joust with the First Amendment in a manner so unmistakable that the Court simply can't overlook it. As for prior restraint law, Justice Stevens' denial of a stay to McGraw-Hill in its battles (ultimately, but belatedly, wholly successful) in the Sixth Circuit surely can't leave anyone with too much serenity about the Court's orientation.

What about libel? Most of the cases the court passed on this year were media victories, some rather expansively. The denial of a writ from CBS's victory in the Avril case (the Washington state apple growers litigation) is heartening, so was the fact that the Court left standing rulings in South Carolina (Parker v. Evening Post Publishing Co., 64 U.S.L.W. 3623 (3/18/96, No. 95-1085)) and Texas (Dolenz v. Southwest Media Corp., 64 U.S.L.W. 3690 (4/15/96, No. 95-1256)) that a court dedicated to narrowing press freedoms might have found inviting.

So why am I so plentifully grateful that the Court passed on all libel and privacy cases? It's because its state of mind (to coin a felicitous phrase) about the press just isn't very affirmative. Not at all. It's because the chance of persuading this court to adopt (as opposed to not reversing) New York Times Co. v. Sullivan is about nil. And that the chances of persuading it to expand that ruling (or to do anything it views that way) are even slighter.

How do I know? I don't. Why do I think so? Because no court — even one less unenthusiastic about the press than this — would likely do so. The press doesn't make everyone angry all the time. But it doesn't make anyone enthusiastic most of the time. It's reminiscent of the old story of Lyndon Johnson, beset by opposition to the war in Vietnam, turning to Dean Acheson and asking "Why doesn't the country love me?" "Because," Acheson famously explained, "you're not very lovable."

So, alas, with much the press. And with too much of it that the public and the courts think of when they hear the word "media."

I don't mean by this that significant cases involving large doctrinal issues may not still be won in the Supreme Court. There are some libel/privacy issues which I think the Court may yet agree to review — and which the media defendants might well win. The need for a narrowly drafted neutral reportage privilege is one. The need for some clarity as to when a corporation is a public figure is

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67 See Avril v. CBS "60 Minutes," 67 F.3d 816 (9th Cir. 1995). cert. denied, 64 U.S.L.W. 3722 (4/30/96, No. 95-1372); see infra page 94.
68 See infra page 95.
69 See infra page 94.
another. (The Court's denial of a writ of certiorari in the *American Cyanamid* case does not change my mind on that one.) The establishment of some potential limits on punitive (or even compensatory) awards beyond those articulated in the *Gore* case is a third.

On balance, though, I repeat my warning from above. The press may well do best if this court continues to contract the commerce clause, to expand the contract clause and to start to focus on the marvelous ambiguities of the Second Amendment.

*Floyd Abrams is with the firm Cahill Gordon & Reindel in New York City.*

By Terry B. Adamson

In initially exploring a doctrinal analysis to this term's several important First Amendment decisions, nagging questions of a decision that may be before the Court next term kept creeping into the equation. The conjecture revolved around the decision of the Third Circuit in June (and a parallel case in New York) in the Internet case in which two provisions ("indecency" and "patently offensive" criminal provisions) of the Communications Decency Act (CDA) of 1996 were held constitutionally invalid. It thus became personally challenging, though far riskier than merely opining, to present in this brief format a view of the current body politic of the Court and its evolving First Amendment "doctrine" by venturing a prediction of the decision and variant rationales in this case when, as is likely, it reaches the Supreme Court.

A generalized overview follows: First, a number of the Justices are increasingly reflecting a libertarian view of the First Amendment. Second, many members of the Court are willing to undertake doctrinal experimentation and a willingness, as exemplified in the area of commercial speech in *44 Liquormart v. Rhode Island*, 116 S. Ct. 1495 (1996),73 to abandon prior formulations, although the historic themes of promoting self-government and the free market of ideas continue to dominate discussions by different routes. Third, as exemplified by the lengthy and fractured opinions in *Denver Area Educational Telecommunications Consortium v. F.C.C.*, 116 S.Ct. 2374 (1996),74 one group is extremely cautious in applying historic doctrine to new technologies; another group extols the virtue of applying prior doctrines to new communication challenges and information distribution. Fourth, each of the Justices seems determined to write at length as to his or her variant views. The latter point, the one indisputable truth, makes it even more difficult to divine a common First Amendment jurisprudence to future applications.

71 See *McKnight v. American Cyanamid Co.* (4th Cir. 1995) (unpublished), cert. denied, 64 U.S.L.W. 3248 (10/02/95, No. 94-1942)


73 See infra page 102.

74 See infra page 109.
Thus, the Third Circuit’s decision in American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) will likely be affirmed by the Court, perhaps unanimously, in a series of individual opinions that could span the length of opinions in the Denver Area decision that upheld one portion and struck two other provisions from the Cable Television Consumer Protections and Competition Act of 1992.

In the Denver Area case, Justices Breyer’s and Kennedy’s opinions offer contrasting conceptions of how the Court will likely address novel First Amendment questions such as application to the Internet. Justice Breyer spoke for a plurality of four and cautiously resisted the invitation of Justices Kennedy and Ginsburg to apply established First Amendment doctrine to cable television. Rather, Justice Breyer noted that orthodox analysis may prove unworkable when applied to dynamic, novel technology. Although chided by Kennedy as “adrift,” the Breyer plurality assessed each provision of the Cable Act under an ambiguous standard — putatively less demanding than strict scrutiny, yet not as lenient as some variant of heightened scrutiny. Instead of strict scrutiny, Justice Breyer spoke in terms of “close judicial scrutiny,” compelling interest was substituted for “extraordinary problem,” and “carefully tailored” replaced narrowly tailored under Breyer’s provisional First Amendment doctrine for cable.

Justice Kennedy, however, was willing to subject the Cable Act to the traditional burdens of strict scrutiny analysis. Rather than offer ambiguous standards with little predictability, Justice Kennedy found existing First Amendment doctrine — namely, public forum analysis — adequate to strike as unconstitutional all three contested provisions of the Cable Act. Expressing sympathy for courts and lawyers, Justice Kennedy lamented the plurality’s imprecise and potentially unprotective standard: “This is why comparisons and analogies to the other areas of first amendment case law become a responsibility, rather than the luxury the plurality considers them to be.” 116 S.Ct. at 2407.

There are obvious and important differences between the Cable Act and the CDA, but the concerns that animated Justice Breyer’s and Kennedy’s opinions should have considerable impact on the CDA appeal. The Internet case is unlikely to appease those seeking clarification about the standard articulated by Justice Breyer. If anything, the novelty and complexity of the Internet dwarfs the technological issues involved with cable — and portends potential applications to a multiple of issues that extend far beyond “indecency” and variously asserted governmental interests — including potential reach to issues involving libel and privacy, copyright, and potential statutory and regulatory application. Justice Breyer’s cautious ad hoc approach to resolving technologies of first impression and the corresponding level of First Amendment protection is likely to continue. Indeed, in concurring with Justice Breyer, Justice Souter underscored the plurality’s patience when he matter-of-factly noted that “round half-century passed before the clear and present danger of Shenk v. United States evolved into the modern incitement rule of Brandenburg v. Ohio.” Denver Area, at 2402.

If Justice Kennedy’s opinion in Denver Area underscores his increasingly ardent First Amendment jurisprudence and applies it to rapidly developing new technologies and modes of communication, he will likely seek an existing doctrine most analogically similar to the Internet. He may find Judge Dalzell’s Third Circuit opinion attractive. Judge Dalzell, as did Judge Sloviter, rejected assertions that the Internet regulations should be subjected to the lower scrutiny historically
afforded broadcast media. Finding the Internet to be “the most participatory form of mass speech yet developed,” Judge Dalzell, in a well-articulated and expansive rationale, found that the Internet “deserves the broadest possible protection from government-imposed, content-based regulation” similar to that afforded the print media. *American Civil Liberties Union*, 929 F. Supp. at 881. Because Justice Kennedy in *Denver Area* pursued definitive speech-protective standards, he and Justice Breyer will likely part ways in the doctrinal approach in striking the CDA provisions as violative of the First Amendment.

The Chief Justice may find the Breyer more cautious approach attractive, and thus assign writing tasks for a plurality to Breyer, who may be joined by Stevens, Souter, and O’Connor. Justice O’Connor, who frequently and lengthily scrutinizes factual context, and Kennedy most frequently occupy the decisive core center of the Court in many of its most difficult cases. Context and the consideration that any intrusion in important rights must be narrowly drawn, drive the Court as a whole. Justice Ginsburg may join Kennedy in a separate concurrence. Justices Scalia, Thomas, and probably Rehnquist, will probably concur, though it is less clear, but their emphasis in *Denver Area* was the First Amendment right of cable operators to ban indecent programs. That is not present in the Internet case, but Scalia and Thomas may reflect a concern that despite ambiguous “safe harbors” as affirmative defenses, the CDA makes operators of Internet services potentially liable for indecency communicated through them by virtue of the statute’s vagueness and broadness.

*Terry B. Adamson*, who co-chairs the LDRC/NAB/NAA Biennial Libel Conference and a former senior Justice Department official, is with the firm Kaye, Scholer, Fierman, Hays & Handler in Washington, D.C. Chris Handman, a Yale Law School senior and a summer associate at Kaye Scholer, contributed to this project, though the errors are the author’s.

By P. Cameron DeVore

The 1995 term was a good year for the First Amendment in the Supreme Court. While their doctrinal approaches varied, the justices often agreed that government cannot burden any category of speech if less speech-intrusive alternatives are readily available.

In cases of less direct interest to the media bar, the Court broke new First Amendment ground in *O’Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353 (1996), and *Board of County Commissioners v. Umbehr*, 116 S.Ct. 2342 (1996), extending to independent government contractors the First Amendment protection accorded the speech of government employees. And in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S.Ct. 2309 (1996), the Court struck down a federal election law limiting political party expenditures made independently of a particular candidate.

Continuing its pro-speaker trend in media-related cases, the Court’s two most significant First Amendment decisions were the unanimous result in the latest in its apparently annual commercial
speech series in 44 Liquornart v. Rhode Island, 116 S. Ct. 1495 (1996), and a mixed but disquieting decision in the cable indecency case, Denver Area Educational Telecommunications Consortium v. F.C.C., 116 S.Ct. 2374 (1996). 44 Liquornart and Denver Area also provided an early glimpse into cases currently or inevitably on the Court's agenda, one testing Congress's Internet indecency ban, and others challenging the federal restrictions on tobacco advertising.

44 Liquornart was a splendid decision — less for any profound changes wrought in the Central Hudson test than as a harbinger of the eventual demise of Central Hudson and evolution toward stricter scrutiny for commercial speech regulations. All nine justices agreed that Rhode Island's ban on liquor price advertising was "more extensive than necessary" to serve the state's asserted interest in promoting temperance, thus failing the fourth prong of Central Hudson. Justices Stevens, Kennedy, Ginsburg, and Thomas would apply a higher level of scrutiny to any paternalistic government suppression of nonmisleading and truthful commercial speech. Justices O'Connor, Souter, Breyer, and Chief Justice Rehnquist would nominally retain the Central Hudson test, but all appeared to agree to such a strong reading of part four as to greatly limit the reach of Central Hudson. Justice Scalia supported the result but was relatively noncommittal.

The Central Hudson test has allowed such aberrations as Posadas (now effectively overruled by 44 Liquornart), Edge Broadcasting, and Florida Bar. The dark side of Central Hudson has always been its arguable approval of advertising restrictions designed to suppress demand for a lawful product. Justice Stevens' opinion in 44 Liquornart would lop off the worst aspects of that reading of Central Hudson, reiterating Rubin's insistence that there is no special deference permitted for restrictions of advertising of so-called "vice" products, and rejecting the much criticized Rehnquist theory in Posadas, which asserted that government's power to ban a product must include the "lesser" power to ban speech about same.

In any event, 44 Liquornart is a powerful result highlighting the apparently growing number of justices prepared to give enhanced protection of commercial speech.

Regrettably, Denver Area is a darker story. Cable operators challenged the operation of three key provisions of the 1992 Cable Television Consumer Protection and Competition Act. Two were struck down by the Court under the First Amendment, but Section 10(a), giving cable operators editorial discretion to ban "indecent" programming on leased-access channels, survived. Justice Breyer's almost painfully hedged opinion declined to apply even intermediate scrutiny to the provision, and instead invented a brand new and more lenient scrutiny called "close judicial scrutiny" — requiring something called an "extraordinary problem," and only a "carefully tailored" governmental solution. Justice Kennedy, clearly this Court's most consistent and eloquent First Amendment spokesman, described his colleague's opinion on Section 10(a) as "adrift." In spite of some comments that Justice Breyer was wise to take a cautious approach in considering "new

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75 See infra page 102.

technologies" under the First Amendment, it was hard to disagree with Justice Kennedy’s critical analysis.

Both 44 Liquormart and Denver Area will play a significant role in the 1996 Term, and in cases in the Fourth Circuit involving alcohol beverage and tobacco advertising -- all of which may ultimately be headed for the Court.

As opposed to Justice Breyer’s unanalyzed assertion that the adequately “extraordinary” problem underlying Section 10(a) is “protecting children from exposure to patently offensive depictions of sex,” a three-judge court applied classic First Amendment analysis in its unanimous decision of June 12 in American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), striking down congressional attempts to “protect children” by forbidding indecency on the Internet. In sharp contrast to Justice Breyer’s approach, Judge Dalzell observed:

My analysis does not deprive the Government of all means of protecting children from the dangers of Internet communication. The Government can continue to protect children from pornography on the Internet through vigorous enforcement of existing laws criminalizing obscenity and child pornography... As we learned at the hearing, there is also a compelling need for public education about the benefits and dangers of this new medium, and the Government can fill that role as well. In my view, our action today should only mean that the Government’s permissible supervision of Internet content stops at the traditional line of unprotected speech.

The powerful fact base and profound acknowledgment of the uniqueness of the Internet supporting the ACLU v. Reno decision will make it difficult for the Supreme Court to overturn the trial court. However, Denver Area, at least given Justice Breyer’s “new technology” analysis, leads to concern about how some justices may respond in Reno.

Denver Area’s stress on protecting children has also been seized upon by the United States to help legitimize the FDA’s wide-ranging limits on tobacco advertising. However, when confronting advertising of a legal product as opposed to attempted limits on patently offensive depictions of sex, Denver Area cannot legitimately be stretched to overcome the Butler, Sable, and Bolger requirement that adult speech not be reduced to a level appropriate for the sandbox. Summary judgment will be argued early in 1997 in the tobacco and advertising industry challenges in North Carolina to the FDA’s regulations.

More immediately, the Fourth Circuit is likely to respond this fall to the Supreme Court’s remand of Anheuser-Busch v. Schmoke, 63 F.3d 1305 (4th Cir. 1995), and Penn Advertising v. Baltimore, 63 F.3d 1318, the Baltimore billboard cases, for reconsideration in light of 44 Liquormart. The United States has also filed an amicus brief in the Fourth Circuit, asserting that 44 Liquormart does not foreclose the Fourth Circuit’s extraordinarily deferential approval of § 12(b)(6) dismissal

of those challenges to the Baltimore billboard regulations, and asserting that Denver Area’s protection of children allows the Fourth Circuit to affirm its earlier result.

In short, the United States is pursuing a unified strategy in these various cases, and this Term’s results in 44 Liquormart and Denver Area will obviously play a central role in this continuing First Amendment drama.

_P. Cameron DeVore is with the Seattle firm of Davis Wright Tremaine LLP._

**By Bruce J. Ennis**

The Court issued two decisions resoundingly supportive of free speech that bolster the current Court’s growing reputation as “the fiercest defender of the First Amendment in the Court’s history.”

In _44 Liquormart, Inc. v. Rhode Island_, 116 S. Ct. 1495 (1996), the Court chose unanimously to widen the bounds of protected commercial speech by striking down a ban on advertising liquor prices — a type of regulation the Court has refrained from overturning in the past. _In Denver Area Educational Telecommunications Consortium v. F.C.C.,_ 116 S.Ct. 2374 (1996), a majority found mandatory controls on indecent cable programming invalid.

Both cases generated splintered opinions, indicating somewhat more clearly which Justices prefer to approach First Amendment cases by developing and then applying a limited range of categories, and which Justices focus more specifically on the particular interests at issue and arrive at the appropriate disposition by balancing the relevant factors.

Especially in areas where strict scrutiny has been overtly or covertly found inapplicable, such as commercial speech and indecent speech, categorical analysis may be nearly as malleable as a balancing approach. Thus, particularly in those cases, the Justices’ differing evaluations of the governmental and private interests involved may play a significant role in determining outcome.

_44 Liquormart_ suggested that the existing boundaries of the commercial speech category may not be permanent. At least three, and likely four, Justices challenged the established definition of not-fully-protected commercial speech as any speech that merely proposes a commercial transaction. Justice Stevens, consistent with his writing in earlier cases, claimed that “[t]he mere fact that messages propose commercial transactions does not in and of itself dictatethe constitutional analysis that should apply to decisions to suppress them.” 116 S. Ct. at 1507. Instead, he argued, commercial speech should receive less than full First Amendment protection only where there is a danger of fraud. Truthful and nonmisleading commercial speech, he wrote, should receive full First Amendment

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79 See _infra_ page 102.

80 See _infra_ page 109.
protection. Significantly, he is no longer alone in this view. He was joined by Justice Ginsburg and Justice Kennedy.

At the same time, Justice Thomas wrote separately to criticize the Central Hudson test as an "inherently nondeterminative . . . case-by-case balancing 'test' unaccompanied by any categorical rules . . . ." Id. at 1520. Furthermore, Justice Thomas found the ban on advertising liquor prices unconstitutional on the ground that the government has no legitimate interest in keeping "legal users of a product or service ignorant in order to manipulate their choices in the marketplace." Id. at 1515-16. Justice Stevens, and the two Justices who joined his opinion, clearly had the same reservations, as Justice Stevens stressed that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."

Thus, whether the Central Hudson test is considered a categorical approach, as a number of commentators have suggested, or a balancing test, as Justice Thomas argued, there is clearly a growing restlessness about its contours. Nonetheless, the Central Hudson test continues to be accepted by Justice O'Connor, joined by Justices Souter, Breyer and Chief Justice Rehnquist. Justice O'Connor argued against "adoption of a new analysis for the evaluation of commercial speech regulation." Id. at 1522.82

The fragmented opinions in Denver Area Consortium showed the Justices grappling even more uncertainly with the difficulties of fashioning an appropriate approach. Here, the Justices were fragmented both in terms of analysis and outcome. Of those Justices more inclined to approach First Amendment issues by developing and applying appropriate categories, two (Justices Ginsburg and Kennedy) would have invalidated all three sections of the law; and three (Chief Justice Rehnquist, and Justices Scalia and Thomas) would have upheld all three sections. Nor were those Justices who approach such problems by identifying and balancing the relevant factors fully aligned.

Kennedy, joined by Ginsburg, lashed out at the plurality’s mode of decision-making: "The opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance: it applies no standard, and by this omission loses sight of existing First Amendment doctrine." 116 S.Ct. at 2403. Kennedy and Ginsburg adhere to a categorical and rule-based approach - they would apply the strictest level of scrutiny to the content-based provisions at hand and strike them down. Thomas, Rehnquist, and Scalia also adhered to a


82Within the context of Central Hudson, however, the Court’s unanimous rejection of Rhode Island’s justifications reinforces its decision in Rubin v. Coors Brewing Company, 115 S.Ct. 1585 (1995), last Term and demonstrates again that governments have no greater leeway to regulate speech concerning allegedly “socially harmful activities,” cf. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); that the Twenty-First Amendment does not alter First Amendment scrutiny when the speech at issue concerns liquor and the restrictions are imposed by states; and — most importantly — that commercial speech restrictions must be sensible and defensible measures to pass constitutional muster. The author represented Coors in the Supreme Court.
categorical and rule-based approach, but found different categories applicable, explaining, for
example: “[l]abeling leased access a common carrier scheme has no real First Amendment
consequences.” Id. at 2425.

Justice Souter was unwilling to establish a new category or apply an existing one, explaining:
“[U]ntil a category of indecency can be defined both with reference to the new technology and with
a prospect of durability, the job of the courts will be . . . [to] recognize[e] established First Amendment
interests through a close analysis . . .” Id. at 2403 (Souter, J., concurring). Justice Breyer expressed
the same reluctance to rely on a categorical approach in this case because “no definitive choice among
competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single
standard, good for now and for all future media and purposes.” Id. at 2385. Justices Stevens (“I am
convinced that it would be unwise to take a categorical approach to the resolution of novel First
Amendment questions arising in an industry as dynamic as this,” id. at 2398 (concurring)), Souter (“in
charting a course that will permit reasonable regulation in light of the values in competition, we have
to accept the likelihood that the media of communication will become less categorical and more
protean,” id. at 2402 (concurring)), and O’Connor (“I agree . . . that we should not yet undertake
fully to adapt our First Amendment doctrine to the new context we confront here,” id. at 2403
(concurring in part and dissenting in part)) agreed.

Although the Justices’ rhetoric portrays a battle between the categorical and balancing modes
of constitutional interpretation, increasingly it may be the characterization of the interests at stake that
determines outcomes. In 44 Liquormart, whether under categorical analysis or under a balancing
approach, the Justices criticized the government’s attempt to discourage alcohol consumption by
banning price advertising. In Denver Area Consortium, Justice Breyer was criticized by defenders
of the categorical approach for assessing whether the regulation “properly addresses an extremely
important problem, without imposing, in light of the relevant interests, an unnecessarily great
restriction on speech.” 116 S.Ct. at 2385. But the true differentiating factor was the Justices’
differing evaluations of the relevant interests. Thus, Breyer maintained that “Justice Kennedy’s focus
on categorical analysis forced him to disregard the cable system operators’ interests.” Id. at 2387.

Although the Court’s rhetoric centers around choices of an appropriate level of scrutiny, and
continues to rely on categorical distinctions such as “content-based” versus “content-neutral,” the
opinions in both cases indicate the importance of each Justice’s view of the relevant interest at stake.
As Breyer explains: “most important, the effects of Congress’ decision on the interests of
programmers, viewers, cable operators, and children are the same whether we characterize Congress’
decision as one that limits access to a public forum, discriminates in common carriage, or constrains
speech because of its content.” Id. at 2389.

It is clear from this Term’s decisions that different modes of First Amendment analysis still
appeal to different Justices. In the end, however, the outcome under both the categorical and
balancing modes may turn largely on the Justices’ differing evaluations of the importance of the
various interests involved.

Bruce J. Ennis is managing partner of the D.C. office of Jenner & Block. He wishes to thank Yale
law student Catherine M. Sharkey for her ideas and assistance.
By Luther T. Munford

It has been suggested that the better part of valor for an LDRC member is to keep news gathering and publishing cases away from the current Supreme Court. That Court, after all, is much like the one that undermined the opinion doctrine in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), rejected a First Amendment defense to promissory estoppel in Cohen v. Cowles Media Co., 501 U.S. 663 (1991), and weakened the actual malice standard in Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).

For this reason, the best news from the 1995 Term may be that there is no news on libel, privacy, access or prior restraint from the Court’s 1995 merits docket. The Court decided a number of important First Amendment cases, but none of them involved these doctrines that are of central concern to all gatherers and publishers of news.

The Term’s First Amendment opinions nevertheless provide some food for thought for those who represent reporters and publishers. Among other things, a review of those cases, together with Justice Stevens’ in-chambers opinion in McGraw-Hill Companies, Inc. v. Procter & Gamble Co., 64 U.S.L.W. 3181 (No. A-276, Sept. 21, 1995), suggests the type of case that an LDRC member might want to take to the Supreme Court: A case involving core speech, infringed by a bright-line rule, recently invented by a state legislature or court. A few examples illustrate this point.

The Court believes in protecting core speech. For example, in O’Hare Truck Service, Inc. v. City of Northlake, 116 S.Ct. 2353 (1996), and Board of County Commissioners v. Umbehr, 116 S.Ct. 2342 (1996), the Court extended to government contractors freedom from discrimination based on either political affiliation or political speech. Additionally, the Court in Colorado Republican Federal Campaign Committee v. Federal Election Commission, 116 S.Ct. 2309 (1996), found the role of political parties to be so important as to require invalidation of Congressionally-mandated contribution limits.

The Court does not like bright-line rules. In fact, it mowed down bright-line rules wherever it found them, and substituted facts-and-circumstances constitutional tests. In O’Hare, for example, the Court rejected a well-understood distinction between government employees and independent contractors and substituted such defenses to claims of political bias as “rewarding good performance” and avoiding the “appearance of favoritism.” 116 S.Ct. at 2360. A similar distaste for bright-line rules may have motivated the ruling in 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996). There the various opinions appear to have done away with the sweeping doctrine announced in Posadas de Puerto Associates v. Tourism Co., P.R. 478 U.S. 328 (1986), that the greater power to prohibit conduct necessarily carried with it the lesser right to regulate speech. To the extent the fractured Court agreed, it agreed that some variant of the more nuanced least-restrictive-means test found in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), is to be applied in all commercial speech cases. Also, one reading

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83See infra page 102.
of Justice Stevens' in-chambers opinion in *McGraw-Hill* is that he thought factual analysis should temper the absolute prohibition against prior restraint.

Finally, as shown by *Denver Area Educational Telecommunications Consortium v. F.C.C.*, 116 S.Ct. 2374 (1996), novel regulation can get even Congress in trouble. Conversely, historical practice equates with constitutional virtue in the eyes of Justices Antonin Scalia and Clarence Thomas. Justice Scalia despaired that the parties in *44 Liquormart* had failed to brief the ban on liquor price advertising from an historical standpoint, and he dismissed the Court's expansion of First Amendment rights in *O'Hare* with the aphorism that a constitutional rule was either "a matter of history or else it is a matter of opinion." 116 S.Ct. at 2363.

One footnote of particular media interest: Justice Souter's opinion in *Denver Area Educational Television* contains the first reference in a U.S. Supreme Court opinion to the World Wide Web and the first Web site addresses. 116 S.Ct. at 2402, n.4. Whether or not one agrees with his thesis that changing technology means changing law, he illustrated his point nicely.

*Luther T. Munford is with the firm Phelps Dunbar in Jackson, Mississippi. He is Immediate Past President of the American Academy of Appellate Lawyers.*

**By Burt Neuborne**

The current Supreme Court is the fiercest defender of the First Amendment in the Court's history. None of the great names in First Amendment theory — Holmes, Brandeis, Black, Douglas, Brennan — ever sat on a Court so protective of speech.

Consider what the Supreme Court decided in the past term alone. It ruled that Rhode Island's ban on advertising liquor prices violated commercial free speech. Kansas and Illinois were told that patronage, the tradition of awarding government contracts to political supporters, violated freedom of association. Ceilings on campaign spending by political parties were found to violate political free speech. Mandatory controls on sexually explicit cable programming were held unconstitutional.

First Amendment arguments prevailed in every case last term, and in eight of nine cases in the term before that. So why am I not smiling? Why am I uneasy just as the Court is accepting expansive First Amendment arguments that I have been making for more than 30 years?

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*See infra page 109.*

*This essay first appeared on the OP-ED page of the Monday, July 15 edition of *The New York Times* and is reprinted with the permission of the author and *The New York Times*. *
It is not because my commitment to freedom of speech has lessened. Protection of free speech, especially by dissenters and the powerless, remains the Court's most important duty. The recent lower court decision barring government censorship of the Internet is exactly on target. I am troubled because the First Amendment is increasingly being used to reinforce concentrations of private power. The current Court cannot seem to distinguish between government efforts to censor speech and government efforts to regulate private power.

At the beginning of the century, when vast wealth was being used to mass produce tangible goods, the Supreme Court declared early laws regulating the minimum wage, maximum workweek, child labor and product safety unconstitutional because they interfered with private property and freedom of contract. Only the Great Depression forced the Court to retreat, and the earlier damage was subsequently undone both by future justices and Congress.

As we move toward the 21st century, vast wealth is being used to mass-produce not only tangible goods but information. The First Amendment is being deployed by this Court to block reform, just as property and contract rights were used at the turn of the century. Consider the practice of campaign financing and concentration of media ownership. American democracy has become a vast feeding farm, where the rich throw money in a trough and invite selected politicians to put their snouts in. But the Supreme Court, by treating money as speech, has virtually doomed campaign finance reform.

The Court has also used the First Amendment to reinforce the increasing power of media barons. To this Court, communications empires are just high-decibel street-corner orators. In fact, the modern media empire acts as a gatekeeper, determining whose speech reaches the public. The Court should not treat government efforts to let alternative voices be heard as violations of the First Amendment.

Allowing government any power over the process by which speech is produced poses obvious dangers. But paralyzing government in the face of concentrations of private power is even worse. We can prevent democracy from turning into the domain of the rich without submitting to government censorship. A good place to start would be to remind the Supreme Court that money isn't speech: it's raw power. There is nothing unconstitutional about curbing excessive powers over any market, especially the market of ideas.

_Burt Neuborne is director of the Brennan Center for Justice at New York University Law School and former legal director of the American Civil Liberties Union._
II. STATISTICAL ANALYSIS OF CERT. PETITIONS FOR THE 1985–1995 TERMS

The tables that follow report the results of 244 petitions for certiorari filed in the 11 Supreme Court Terms extending from the 1985 Term to the recently completed 1995 Term. The key findings of the 1995 Term can be briefly summarized as follows:

1. For the fifth consecutive Term, the Supreme Court granted none of the libel, privacy or related petitions filed and disposed of in the 1995 Term. Over the 11 Terms studied by LDRC, the Court has granted cert. in only 4.9% (12 of 244) of filings. See Table 1.

2. Looking at the cumulative results of the 1985–1995 Terms, the Court appears more willing to hear cases involving the media than cases without a media party. Thus, over the 11 Terms studied, the Court granted petitions in 11 of 148 media cases (7.4%), versus only 1 of 96 nonmedia cases (1%). See Table 2.

3. This increased likelihood that certiorari would be granted in media cases has held regardless of which party prevailed below. Thus, during the 1985–1995 Terms, the Court granted certiorari in 5 of 41 (12.2%) of filings by media defendants, versus 1 of 34 (2.9%) of filings by nonmedia defendants. Similarly, certiorari was granted in 6 of the 107 (5.6%) petitions filed by plaintiffs in media cases and 0 of the 62 (0%) petitions filed by plaintiffs in nonmedia cases. See Table 2.

4. In the 1995 Term, 6 of the 22 (27%) petitions were appeals from federal court determinations. This represents a modest decrease in the incidence of federal filings as compared with the 1994 Term (in which 9 of the 21 petitions [43%] were from federal courts), although it is in line with the cumulative results of the 1985–1995 Terms (in which 86 of the 244 petitions [37%] were from federal court). Although no petitions were granted in the 1995 Term, over the 11 Terms studied, the Court granted 6.5% of petitions from federal courts (6 of 92) versus 3.9% of petitions from state courts (6 of 152). See Table 3.

5. In terms of the finality of judgments appealed, 20 of the 22 petitions in the 1995 Term were from final judgments. This continues a general trend that has seen relatively few attempts at petitions from nonfinal judgments in these cases, with only 22 of the 244 petitions filed in the 1985–1995 Terms coming from nonfinal judgments. Nevertheless, the percentage of cases in which petitions were granted are essentially equal in both instances, with the Court granting 5% of petitions from final judgments (11 of 221) versus 4.3% of petitions from nonfinal judgments (1 of 23). See Table 4.

6. Finally, in terms of legal issues presented for review, the two most frequently presented issues during the 1995 Term were actual malice (6 cases) and plaintiff status (also 6 cases), followed by common law or statutory privilege (5 cases), due process or equal protection (4 cases), and opinion (3 cases). See Table 4. Over the 1985–1995 Terms, the issues of actual malice (64 cases), opinion, (42 cases), plaintiff status (38 cases), common law privilege (33 cases), and privacy (23 cases) were presented most frequently. Perhaps not surprisingly, the only issue to be decided on a plenary basis more than once during this period was actual malice (4 cases).
# TABLE 1: CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES: 1985–1995 TERMS

<table>
<thead>
<tr>
<th>Term</th>
<th>Media Cases</th>
<th>Nonmedia Cases</th>
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<tbody>
<tr>
<td></td>
<td>Grants</td>
<td>Denials</td>
<td>Percent Granted</td>
</tr>
<tr>
<td>1985</td>
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<td>15.8%</td>
</tr>
<tr>
<td>1986</td>
<td>0</td>
<td>21</td>
<td>0.0%</td>
</tr>
<tr>
<td>1987</td>
<td>1&lt;sup&gt;b&lt;/sup&gt;</td>
<td>11</td>
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<tr>
<td>1988</td>
<td>2&lt;sup&gt;c&lt;/sup&gt;</td>
<td>22</td>
<td>8.3%</td>
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</tr>
<tr>
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</table>


## TABLE 2: Centiorari Petitions in Libel/Privacy Cases by Petitioner: 1985–1995 Terms

### Petition Filed by Defendants

<table>
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<th>Nonmedia Action</th>
<th>Total</th>
</tr>
</thead>
<tbody>
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<td></td>
<td>Grants</td>
<td>Denials</td>
<td>Percent Granted</td>
</tr>
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# TABLE 3: CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM AND FINALITY OF JUDGMENT: 1985–1995 TERMS

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## TABLE 3: CERTIORARI GRANTS IN LIBLE/PRIVACY CASES BY COURT SYSTEM AND FINALITY OF JUDGMENT: 1985–1995 TERMS

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*hMilovich v. Lorain Journal Co., 497 U.S. 1 (1990); Immuno A.G. v. Moor-Jankowski, 58 U.S.L.W. 3834 (6/28/90, No. 89-1760); Jones v. American Broadcasting Companies, Inc., 59 U.S.L.W. 275 (10/9/90, No. 89-1952); but note that two of these "grants" were for the sole purpose of remand for reconsideration in light of Milovich.

Because many petitions presented more than one issue, the sum of grants and denials as to particular issues is higher than the total number of petitions filed.
III. SUMMARY OF ACTIONS ON CERTIORARI PETITIONS IN LIBEL, PRIVACY, AND RELATED CASES DURING THE 1995 TERM

Because of the obvious importance of Supreme Court action, LDRC again this year has undertaken to catalogue the Court’s responses to the Term’s petitions for certiorari which raise libel, privacy and certain other First Amendment issues of specific interest to the media.

The 1995 Supreme Court Term proved, as did the 1994 Term, to be generally advantageous to media organizations in libel and privacy actions. Eight decisions favorable to the media were left standing. No cases were accepted for hearing by the Court.

Brought to conclusion during the 1995–96 Term was Ami1 v. CBS “60 Minutes,” perhaps the best known disparagement case since Bose v. Consumers Union. Filed by Washington State apple growers, the unsuccessful suit subsequently spawned reasonably successful efforts by agri-business to obtain adoption of produce disparagement laws in several states.87

Left standing, not surprisingly, were two state supreme court decisions, each articulating protection for speech mandated under state constitutions beyond that required by the First Amendment.88 Three certiorari petitions remained pending at the end of the 1995 Term in cases which likewise had favorable lower court rulings for media defendants but certiorari was denied at the beginning of the 1996 Term.89

On the other hand, certiorari was denied in two cases unfavorable to the media parties. Neither, however, may suggest long-term consequences for the media.

The first of these unfavorable rulings was Dolcefino v. Ray, a libel case out of the Texas state
courts, with a somewhat unique fact pattern. A Texas Court of Appeals affirmed a lower court's order requiring a journalist to answer questions about a confidential source. In addition to defendant's argument that the confidential source played a modest role in the report at issue, the plaintiff had acknowledged that he knew the identity of the supposed source. And, indeed, the individual identified had already been deposed. The journalist argued unsuccessfully that his own testimony would verify that the individual was, in fact, the confidential source in question. After **certiorari** was denied, the trial court issued an order stating that if Dolcefino continued to refuse to testify, the court would instruct the jury that it was to presume that the "evidence that would have been revealed by his truthful answers to those questions would be detrimental to the defendants' case."

The second case, **National Enquirer v. Hood**, has a more commonplace fact pattern, and a disturbingly un-analytical California appellate decision; however, the decision is "unpublished," which should reduce its importance, even in California. In **Hood**, the California Supreme Court let stand a lower court decision, refusing to dismiss an invasion of privacy claim based on the National Enquirer's publication of some of the *details* about the illegitimate child of the performer Eddie Murphy, an admittedly public figure, even though the court conceded that the *subject matter* was newsworthy.

During the 1995 Term, the Supreme Court also let stand seven decisions favorable to nonmedia defendants which raise libel or privacy issues. Two of those cases appear to have applied expansive views of the concept of "limited purpose public figure"; four found statements shielded by various privileges; one found that the statement in question was not defamatory.

The Court, however, let stand two other nonmedia cases with narrow applications of the limited purpose public figure doctrine. **McKnight v. American Cyanamid Co.**, an unpublished opinion, continues the regrettably pinched view of public figures of the Fourth Circuit, finding that American Cyanamid is neither a limited nor a general public figure in connection with comment on a dispute over a contract for a popular drug. And in **Heller v. Bowman**, the Massachusetts Supreme Court found that a candidate for president of a 8,700-person municipal union was not a limited purpose public figure, refusing to apply **Hustler v. Falwell**'s reasoning to a claim for intentional infliction of
emotional distress. In Heller, a union worker had superimposed the plaintiff’s face on nude and lewd body shots which he circulated during the campaign.

In the same term as 44 Liquormart, Inc. v. Rhode Island, the 1995-96 installment from the Court on commercial speech doctrine, the Court also vacated judgment in two other alcohol advertising cases. Certiorari was also denied in three relatively diverse commercial speech cases, from California’s restrictions on the use of environmental terms (e.g., “biodegradable”) on consumer goods, to direct mail advertising by lawyers, doctors, and others in Texas, to Amtrak’s policies for its station billboards.

The cable broadcast “must carry” requirements of the 1992 Cable Television Consumer Act will be heard by the Court next Term. And while the Court heard and decided the challenge to those sections of the 1992 Cable Television Consumer Act that concerned indecent programming on leased access and PEG (public, education, or government use) channels, the Court refused to hear a First Amendment challenge to the FCC’s continuing efforts to “channel” indecent programming on radio and television. Also to be heard next Term is a challenge to forced assessment by the Department of Agriculture of nectarine and peach handlers for generic advertising programs.

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99Ventura v. Morales, 63 F.3d 358, 64 U.S.L.W. 2178 (5th Cir. 1995), cert. denied, 64 U.S.L.W. 3557 (2/20/96, No. 95-920), see infra page 105.


LIBEL AND PRIVACY CASES

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A. **Libel and Privacy Cases**

1. **Media Defendants**

   a. **Favorable Libel/Privacy Decisions Left Standing — 8**

   **Auivil v. CBS 60 Minutes,** 67 F.3d 816 (9th Cir. 1995), *cert. denied,* 64 U.S.L.W. 3722 (4/30/96, No. 95-1372). The Ninth Circuit affirmed the District Court’s grant of summary judgment in favor of CBS. At issue was a 60 Minutes segment which charged that daminozide (Alar), a chemical used by Washington state apple growers, was a potent carcinogen. The Ninth Circuit ruled that the plaintiffs had failed to raise a genuine issue of material fact regarding the falsity of this and other statements in the report.

   Questions presented: (1) Is evidence that some scientific tests have failed to demonstrate that Alar causes cancer in humans, plus testimony from experts that there is no confirmed link between Alar and cancer in humans, sufficient evidence for plaintiffs in product disparagement case to withstand Rule 56 summary judgment motion on the question of the falsity of a media defendant’s claim that Alar is “the most potent cancer-causing agent in our food supply”? (2) Must a defendant seeking summary judgment call to the court’s attention the precise legal grounds for its motion before the burden shifts to the plaintiff to show a genuine issue of fact material to those legal grounds? (3) Does the First Amendment insulate a broadcast defendant from liability if all of the broadcast defendant’s individual statements are true, even though the plaintiff demonstrates that the implied message of the broadcast taken as a whole is false?

   **Coody v. Thomson Newspaper Publishing Inc.**, 320 Ark. 455, 896 S.W.2d 897 (Ark. 1995), *cert. denied,* 64 U.S.L.W. 3396 (12/4/95, No. 95-364). In a public figure libel case, the Supreme Court of Arkansas reversed and dismissed an award of $275,000 in compensatory and punitive damages. At trial, the jury found that the defendant newspaper had strongly implied that the plaintiff, a candidate for mayor, had committed an official act of a public official or other matters of public concern for general information.

   Questions presented: (1) May an appellate court in a defamation case undertake an independent review of subsidiary or historical facts found at trial and of factual determinations based on credibility? (2) May a public official or public figure prove actual malice largely or exclusively by circumstantial evidence that the defendant “entertained serious doubts” as to the truth of his publication? (3) Should the actual malice standard be reconsidered in light of the virtually insurmountable burden imposed on public plaintiffs in defamation cases?

   **Dolenz v. Southwest Media Corp.**, No. 05-94-00091 CV, 1994 WL 720265 (Tex. Ct. App. Dec. 30, 1994) (unpublished), *cert. denied,* 64 U.S.L.W. 3690 (4/15/96, No. 95-1256). The Court of Appeals of Texas in Dallas affirmed a grant of summary judgment in favor of the defendants, writer and publisher of an allegedly defamatory article about the plaintiff, the attorney for a well-known Dallas portrait artist, Dimitri Vail. The court found that, taken as a whole, the article was substantially true, that the plaintiff was a limited purpose public figure, and that the defendants did not act with actual malice.

   Questions presented: (1) Did the court of appeals err in ruling that the petitioner is a limited purpose public figure? (2) Did the court of appeals err in ruling that a libelous newspaper article as a whole, and specific statements therein, are protected by the following privileges: (a) “fair, true, and impartial account[s] of a judicial proceeding[s]” pursuant to Tex. Civ. Prac. & Rem. Code 73.002(b)(1)(A), and (b) “reasonable and fair comment on or criticism of an official act of a public official or other matters of public concern for general information” pursuant to Tex. Civ. Prac. & Rem. Code 73.002(b)(2)? (3) Did the trial court err in ruling that the article as a
whole is a reasonable and fair comment on a matter of public concern? (4) Did the trial court err in ruling that the article is a protected statement of opinion that does not imply false and defamatory facts and is therefore not libelous? (5) Did the court of appeals err in ruling that the article as a whole, and the factual statements therein, are true or substantially true? (6) Did the trial court err in ruling that the article is shielded by the “neutral reportage” privilege? (7) Did the court of appeals err in ruling that no material issue of fact existed as to whether or not the defendants subjectively drafted/published article with actual malice?

_**Parker v. Evening Post Publishing Co.**, 452 S.E. 2d 640 (S.C. Ct. App. 1994), cert. denied, 64 U.S.L.W. 3623 (3/18/96, No. 95-1085). The Court of Appeals of South Carolina affirmed a directed verdict in favor of the defendants on a privacy claim and a jury verdict on a libel claim. The defendant newspaper had printed an article implying that the plaintiff, a new owner of an auto dealership, may be liable in a lawsuit against the previous owner. Because he had recently engaged in a large public advertising campaign, the South Carolina Court of Appeals held that the plaintiff was a limited purpose public figure. The court also held that the newspaper article involved a matter of public concern, requiring the plaintiff to prove that it was false. Finally, the court held that viewing the evidence in the light most favorable to the plaintiff, the article was substantially true.

Questions presented: (1) Does an individual who acquires a corporate ownership interest in a new automobile dealership, which company employs advertising for the new dealership, thereby individually become a public figure with respect to erroneous media reports of his potential individual liability for judgment obtained against the owners of the former dealership’s assets and business location? (2) In a news article about a judgment obtained for bad acts of a former auto-dealership for fraudulently structuring straw purchases, does a media defendant invade the privacy of a private individual who, through a new corporation, has acquired an ownership interest of the old dealership’s assets, when the media defendant reports that the individual may be personally liable for judgment against the former dealership?

_Rielly v. News Group Boston Inc., _38 Mass. App. Ct. 909, 644 N.E.2d 982 (Mass. App. Ct. 1995), cert. denied, 64 U.S.L.W. 3244 (10/2/95, No. 95-106). The defendant, owner of the Boston Herald, published information about compensation paid by the National Association of Government Employees (NAGE), a labor organization, to the plaintiff and others. The phrase in question was “Lorraine Reilly also is on the NAGE pad,” presumably implying by the use of the word “pad” that the plaintiff was receiving compensation not legally due her. Affirming the lower court’s dismissal of the complaint, the Massachusetts Court of Appeals held that the use of the word “pad” must be considered “in the totality of the article,” and, thus considered, was not defamatory as a matter of law.

Question presented: Did the state court action in ruling that the characterization of a union employee as “on the pad” was incapable of defamatory meaning _per se_ violate the plaintiff’s rights of Free Speech and to Due Process?

_Stolz v. KSFM 102_, 30 Cal. App. 4th 195, 23 Media L. Rep. 1233 (Cal. Ct. App. 1995), cert. denied, 64 U.S.L.W. 3240 (10/2/95, No. 94-2049). In a defamation action between two radio stations concerning derogatory statements made by the defendant on air about the quality of the plaintiff’s journalism, the California Court of Appeal for the Third District affirmed a jury verdict for the defendant, holding the plaintiff radio station to be an all-purpose public figure because it occupies a position of general fame and has a pervasive influence in the community through advertisements and charity work. 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 plaintiff’s allegedly irresponsible journalism or on-air comments were held to be an issue of public concern, imposing on the plaintiff the burden of proving falsity. The court upheld the use of jury instructions which stated that to establish falsity, the “gist” of the information must be false and that minor
inaccuracies are not sufficient. The court also held that none of the statements asserted as unambiguous fact that the plaintiff radio station took part in shoddy journalism and thus the remarks were not slander per se.

Questions presented: (1) Does the fact that the plaintiff is a radio station and can rebut slanderous statements conclusively render it a public figure, thereby shifting to the plaintiff the burden of proving falsity and forcing it to prove actual malice? (2) Does the fact that the plaintiff is a radio station make an unrelated subject a matter of public concern, thus shifting to the plaintiff the burden of proving falsity merely because responsibility in broadcasting is a matter of public concern? (3) Does the absence of a showing that he has interjected himself into a particular public controversy render the owner of a radio station a limited purpose public figure, based solely on his ownership of the station?

_Turf Lawnmower Repair Inc. v. Bergen Record Corp.,_ 139 N.J. 392, 655 A.2d 417, 23 Media L. Rep. 1609 (N.J. 1995), cert. denied, 64 U.S.L.W. 3455 (01/09/96, No. 95-424). The New Jersey Supreme Court upheld application of the actual malice standard to cases in which the defamatory information reported, if true, would constitute a violation by the plaintiff of the New Jersey Consumer Fraud Act. Although the investigative newspaper reporter may have been negligent or grossly negligent in alleging that plaintiffs routinely cheated their customers, plaintiffs failed to show that the reporter ever doubted that the plaintiff's conduct constituted fraud, therefore failing to establish actual malice in the reporting. Accordingly, the New Jersey Supreme Court affirmed the grant of summary judgment to the defendant.

Questions presented: (1) Does a decision which allows media defendants to create their own defense and control the applicable standards of liability violate a plaintiff's rights to Equal Protection? (2) Did the court's failure to consider an individual libel plaintiff's claim as distinct from a corporation's claim violate the individual plaintiff's right to Equal Protection? (3) Can the court's decision finding no actual malice be sustained in light of_Masson v. New Yorker Magazine, 501 U.S. 496 (1991), Milkovich v. Lorain Journal, 497 U.S. 1 (1990)_ and _Harte Hanks v. Connaughton, 491 U.S. 657 (1989)?

_Vail v. Plain Dealer Publishing Co.,_ 72 Ohio St. 3d 279, 649 N.E.2d 182, 23 Media L. Rep. 1881 (Ohio 1994), cert. denied, 64 U.S.L.W. 3455 (01/09/96, No. 95-491). In a libel suit brought against a newspaper by a candidate for the Ohio Senate, the Ohio Supreme Court ruled that, under the Ohio Constitution, when determining whether speech is protected as opinion, Ohio courts must consider the totality of the circumstances, including whether the statement is verifiable, the general context of the statement, and the broader context in which the statement was made. In the case at hand, the court ruled that the average reader would have accepted the statements at issue — an editorial column in which the author stated that plaintiff, a political candidate, "doesn't like gay people" — was opinion as opposed to fact.

Questions presented: (1) May the Ohio Supreme Court, based on its own state Constitution, adopt an opinion privilege in libel cases broader than that of the U.S. Supreme Court's in_Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)? (2) Does the Due Process Clause require the state to provide a reasonable means to vindicate reputational interests adversely affected by publication of defamatory falsehoods that are actionable under the standard adopted by the Supreme Court in_Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986)_ and reaffirmed in_Milkovich v. Lorain Journal Co.?}

**b. Unfavorable Libel/Privacy Decisions Left Standing — 2**

_Dolcefino v. Ray_, 902 S.W. 2d 163 (Tex. Ct. App. 1995), cert. denied, 64 U.S.L.W. 3656 (4/1/96, No. 95-1250). The Court of Appeals of Texas, First District, affirmed the lower court's order requiring a journalist in a libel action to answer questions about a confidential source. The court already had
deposition testimony from a person who was identified by the libel plaintiff as the confidential source, and who had testified about his communications with the journalist. However, by answering the questions posed, the defendant would be confirming or denying that this individual was in fact the confidential source in question.

Question presented: Is a journalist, who is a defendant in a libel action brought by a public official plaintiff, protected by the First Amendment from answering deposition questions that would tend to reveal the identity of a confidential source who was inconsequential to the publication at issue, without a determination by the trial court that there is a compelling need for such testimony and that the information cannot be obtained from an alternative source?

National Enquirer, Inc. v. Hood, No. B082611 (Cal. 1995) (unpublished), cert. denied, 64 U.S.L.W. 3396 (12/04/95, No. 95-468). The California Supreme Court refused review of an unpublished decision of the Superior Court in a privacy, intrusion and, misappropriation suit brought by the mother of an allegedly illegitimate child of the performer Eddie Murphy. The article in question, whose truth plaintiff did not dispute, reported that Mr. Murphy was the father of the plaintiff’s child, and further disclosed the name of the child, his mother, and other salient details of certain financial arrangements between Murphy and the plaintiff. Upholding dismissal of the intrusion and misappropriation claims, the Court of Appeal found that under both California common law and Constitutional law, even when the subject of the article is newsworthy, publication of certain details may not be newsworthy, and that, consistent with the First Amendment and California law, a jury may find invasion of privacy based on the reporting of those details.

Question presented: Do the First and Fourteenth Amendments permit state privacy laws to impose liability for truthful publication about a public figure on a subject of public interest, if the jury finds that the facts published lacked sufficient “social value,” or finds that there had been “feasible and effective alternatives” to including those facts?

c. Libel/Privacy Petitions Filed But Not Yet Acted Upon as of the End of the 1995 Term

Hopewell v. Midcontinent Broadcasting Corp., 538 N.W.2d 780, 24 Media L. Rep. 109 (S.D. 1995), cert. filed, 64 U.S.L.W. 3823 (3/16/96, No. 95-1954). The South Dakota Supreme Court affirmed summary judgment in favor of the defendant, a television station, that had been sued for defamation by a judicial candidate in Sioux Falls. The station aired a news report, based on information from a confidential source, that twelve years earlier the candidate had been slipped a hallucinatory drug that caused him to enter a drug store and a cathedral completely nude and ultimately lead to his arrest for attempted rape. The South Dakota Supreme Court ruled that the lower court correctly did not compel the journalist to divulge his source and that there was no evidence of actual malice.

Question presented: Did the release of confidential records in violation of city regulation and state statutes deprive the petitioner of his rights to Equal Protection, Due Process, the protections of the Fourth Amendment, and his First Amendment right to run for office without tortious interference by his election opponents?


Certiorari was denied on Thomas at the beginning of the 1996 Term. See 65 U.S.L.W. 3257 (Oct. 7, 1996).
San Francisco Chronicle based on a series of articles describing a dispute between More University and the county authorities. Defendant moved to dismiss, relying on section 425.16 of California Code Civ. Proc, an anti-SLAPP statute that provides for a procedure for early review and dismissal of nonmeritorious actions involving free speech. Ruling that More failed to present proof of falsity, the trial court granted the defendant’s motion. On appeal, the California Court of Appeal affirmed the dismissal, holding that the plaintiffs did not show a probability that they would prevail on the libel claim.

Questions presented: (1) Is California’s anti-SLAPP statute unconstitutionally vague? (2) Were the petitioners denied equal protection guaranteed by the Fourteenth Amendment by application of the anti-SLAPP statute against them, limiting their access to the courts when they sought redress against a newspaper for a series of articles that defamed them and invaded their commercial and academic interests? (3) Is an anti-SLAPP statute depriving the petitioners of their right to discovery fundamentally unfair in violation of their due process and equal protection rights under the Fourteenth Amendment? (4) Were the petitioners incorrectly held to be limited purpose public figures?

*McFarlane v. Esquire Magazine*, 74 F.3d 1296, 24 Media L. Rep. 1332 (D.C. Cir. 1996), cert. filed, 64 U.S.L.W. 3765 (3/29/96, No. 95-1769). In October 1991, *Esquire Magazine* published an article by a free-lance writer accusing the plaintiff, former Reagan security advisor “Bud” McFarlane, of working with Israeli intelligence to forestall the release of the American hostages in Iran until after the 1980 Presidential election. The D.C. Circuit affirmed summary judgment for the magazine, holding that the plaintiff could not show that the magazine acted with actual malice. Affirming the lower court’s dismissal of the action against the freelancer for lack of personal jurisdiction, the D.C. Circuit went on to note that, even if provable, the freelancer’s malice could not be imputed to the magazine except by application of *respondeat superior*, a doctrine inapplicable to a freelancer.

Questions presented: (1) In a case governed by *New York Times v. Sullivan*, does a publisher act with actual malice when it publishes without corroboration highly defamatory accusations of an informant that the publisher acknowledges is a liar? (2) In a case governed by *New York Times v. Sullivan*, can a publisher avoid a finding of actual malice by claiming that it trusts the reporter who has relied upon an acknowledged liar, when the publisher knows that the reporter has no independent corroboration for the liar’s statements? (3) In a case governed by *New York Times v. Sullivan*, does a publisher act with actual malice when it advocates believability of an untruthful informant, and fabricates and suppresses material information that could lead the reader to discredit the publisher’s endorsement? (4) Is the *New York Times v. Sullivan* standard so purely subjective that admitted review of information demonstrating the publication’s falsity will not constitute actual malice unless the publisher confesses to his thoughts concerning the material? (5) In a case governed by *New York Times v. Sullivan*, may a court disregard evidence of actual malice through weighing of evidence that the court acknowledges would support a conclusion of recklessness? (6) Can a publisher be liable under *respondeat superior* for defamatory statements concerning a public figure made with actual malice by a writer “assigned” by the publisher to “cover” a story, when the publisher edits, approves, and shapes the defamatory product? (7) Should the actual malice requirement of *New York Times v. Sullivan* be re-examined, when its “daunting” standard allows publication of defamatory falsehoods invented by an acknowledged liar? (8) Is construction of D.C. Code Section 13-423(a)(3) by the court below, separating the “act” of libel from the “injury” it causes, inconsistent with *Keeton v. Hustler Magazine*, which recognized that the tort of libel occurs “wherever offending material is circulated,” and based upon an impermissible extension of procedural safeguards to protect First Amendment rights in violation of *Calder v. Jones*?
2. Nonmedia Defendants

a. Favorable Libel/Privacy Decisions Left Standing — 7

Allen and Allan Arts v. Rosenblum, 201 A.D.2d 136, 615 N.Y.S.2d 410 (N.Y. App. Div.), cert. denied, 64 U.S.L.W. 3269 (10/10/95, No. 95-221). The New York State Appellate Division, Second Department, affirming the lower court's dismissal of the action, upheld as absolutely privileged statements made at a quasi-judicial public hearing, in this case a zoning board of appeals. In the lower court, plaintiff contended, among other things, that the defendant's voluntary participation rendered the privilege inapplicable.

Question presented: Did New York violate First and Fourteenth Amendments by granting an absolute privilege to a voluntary participant at a zoning board of appeals hearing, thus protecting her from liability for making malicious and false statements about applicant?

Denney v. Regents of University of California, was Nadel v. Regents of University of California, 28 Cal. App. 4th 1251, 34 Cal. Rptr. 2d 188, 22 Media L. Rep. 2481 (Calif. Ct. App. 1994), cert. denied, 64 U.S.L.W. 3416 (12/11/95, No. 94-426). The California Court of Appeal, First Appellate District, Division Five, affirmed summary judgment in favor of the defendants, Regents and employees of the University of California at Berkeley, who had made statements to the press characterizing the plaintiffs, members of the People's Park Defense Union, as violent and destructive of property. The court found that the plaintiffs were limited purpose public figures, conferring on the defendants the protections of New York Times Co. v. Sullivan.

Question presented: Should the standards of New York Times Co. v. Sullivan be extended to a public entity and its employees acting in their official capacities who are sued by alleged limited public figure plaintiffs and critics of the public entity's policies?

Einhorn v. LaChance, No. 01-94-00180-CV, 1995 WL 134861 (Tex. Ct. App. March 30, 1995), cert. denied, 64 U.S.L.W. 3690 (4/15/96, No. 95-1279). In an action for slander, the Court of Appeals of Texas in Houston reversed a jury verdict awarding $250,000 in actual damages to plaintiffs, pilots employed by the defendant hospital. Finding that the plaintiffs were limited purpose public figures, the court held that the statement in question, that the plaintiffs were fired by the defendant hospital because they had a “conflict of interest” with the hospital, was not shown by clear and convincing evidence to have been made with actual malice.

Questions presented: (1) Does the First Amendment require proof of actual malice in a slander suit against non-media defendants? (2) Did the Texas Court of Appeals misinterpret First Amendment law to conclude that the petitioners, helicopter pilots in hospital life flight program, were “limited purpose public figures,” required to prove actual malice? (3) Did the Texas Court of Appeals misinterpret First Amendment law to set aside a jury finding that respondents acted with actual malice when they slandered petitioners, on the theory that the First Amendment (a) requires the fact-finder to accept respondent’s professions of good faith, even if they disbelieve the testimony, and (b) disallows through circumstantial evidence, proof of actual malice?

Gensburg v. Miller, 37 Cal. Rptr. 2d 97, 31 Cal. App. 4th 512 (Calif. Ct. App. 1994), cert. denied, 64 U.S.L.W. 3240 (10/2/95, No. 94-1984). The Court of Appeal of California sustained grant of a demurrer on the ground that the defendants, state and county employees, have absolute immunity from civil liability for having issued an allegedly defamatory report to the effect that the plaintiffs were bigoted and violent toward the foster children in their care.

Questions presented: (1) Should county social workers, who lack any prosecutorial authority, be denied
absolute immunity? (2) Should a state prosecutor be denied absolute immunity for his own investigative conduct in seeking evidence of unrelated new charges to add to a pending proceeding to revoke a foster care license? (3) Should state prosecutors be denied absolute immunity for their unilateral administrative action in suspending a foster care license pending a hearing on licensing revocation charges in order to protect the foster children from a substantial threat of harm? (4) Should county social workers and a state prosecutor be denied absolute immunity for making defamatory statements about foster care licensees outside the ambit of proceedings to revoke the foster care license?

Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling, 535 N.W. 2d 653, 64 U.S.L.W. 2178, 11 Law. Man. Prof. Conduct 265 (Minn. Ct. App. 1995), cert. denied, 64 U.S.L.W. 3793 (5/28/96, No. 95-1539). The Court of Appeals of Minnesota affirmed summary judgment in favor of the defendant law firm in a libel case. Soliciting plaintiff’s former shareholders, the law firm claimed to be investigating “the possibility of bringing an action against [plaintiffs] for, among other things, theft of corporate property, fraud and misrepresentation, and breach of fiduciary duty as an officer,” qualifying this statement with the statement that “[w]e have only done a preliminary investigation.” Defendant was granted summary judgment under the judicial action privilege.

Questions presented: (1) Is it a denial of Due Process for a state to deny access to its courts for the trial of claims arising from loss of property, freedom of association, and loss of employment opportunity based on an attorney’s immunity from suit for use of untruthful statements in a letter soliciting clients and retainer fees? (2) May a state court grant substantial benefit to attorneys and their clients as a class by adopting a rule that denies all others the only judicial remedy available to protect the value of their property, employment, and commercial associations from per se defamatory statements maliciously made as part of a solicitation of clients for possible litigation?

Ragan v. ContiCommodity Services, Inc., 63 F.3d 438 (5th Cir. 1995), cert. denied, 64 U.S.L.W. 3639 (3/25/96, No. 95-1151). The Fifth Circuit affirmed summary judgment in favor of the defendant, plaintiff’s former employer, for having made disparaging remarks about the plaintiff to a potential new employer. Holding that an employer’s communications to a person having an interest in the matter are subject to a qualified privilege, the Fifth Circuit found that the plaintiff had failed to present clear evidence of actual malice required to overcome the privilege.

Questions presented: (1) Under Fed.R.Civ.P. 56 and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), may a movant carry the burden of a summary judgment motion simply by asserting generally that the nonmovant lacks evidence of an element of his claim such as “actual malice” without specification of actual acts? (2) Under New York Times v. Sullivan are statements of purely subjective belief in the truth of a defamatory statement sufficient as a matter of law to establish lack of “actual malice” when the defamatory statements admittedly lack factual support and are contrary to facts of record showing that the speaker knew that defamatory statements are false?

Sanjuan v. American Board of Psychiatry and Neurology, Inc., 40 F.3d 247 (7th Cir. 1994), cert. denied, 64 U.S.L.W. 3591 (3/4/96, No. 95-1172). Plaintiffs, two psychiatrists who failed an oral examination for board certification, sued the American Board of Psychiatry and Neurology and its Executive Director for defamation and other claims. The Seventh Circuit affirmed the lower court’s dismissal of the action, finding that the statement in question, that the plaintiffs failed the oral exam, was true, and, in any event, was not defamatory.

Questions presented: (1) Have the petitioners asserted claims upon which federal relief may be granted? (2) Do antitrust violations involve factual determinations? (3) Should the U.S. Supreme Court interfere with a board certification process when it appears that oral examination is not duly authorized and that misconduct is rampant among examiners, grading is done in non-customary manner of unusual standards, and when the internal
appeals process failed to at minimum review any portion of petitioners’ oral examination answers? (4) Did the respondents, by engaging in concerted activity with others, unduly burden interstate commerce? (5) Have the respondents placed arbitrary and capricious restraints on international medical graduates specializing in the field of psychiatry? (6) Did the district court fail to review the petitioners’ claims against the respondent pursuant to Fed. R. Civ. P. 9(b)? (7) Are the respondents quasi-state actors who are violating numerous clauses of the Constitution? (8) Did the American Board of Psychiatry and Neurology defame petitioners by publishing false statements stating that petitioners had failed psychiatry board certifying examination? (9) Is board’s release against public policy?

b. Unfavorable Libel/Privacy Decisions Left Standing — 5

_Heller v. Bowman_, 420 Mass. 517, 651 N.E.2d 369 (Mass. 1995), _cert. denied_, 64 U.S.L.W. 3416 (12/11/95, No. 95-393). During an election campaign for the 8,700-member union, a worker distributed to other union workers a photo which superimposed the face of a female candidate for president over lewd photos of nude women. Following a bench trial, the candidate was awarded $35,000 in damages. On appeal, the Massachusetts Supreme Judicial Court held that the plaintiff was neither a limited-purpose public figure nor a general purpose public figure, and that the union worker responsible for the doctored photos was not entitled to the protection of the First Amendment against the candidate’s claim for intentional infliction of emotional distress.

Questions presented: (1) Under Hustler Magazine, Inc. v. Falwell may a state constitutionally impose tort liability for a pure expression of opinion totally devoid of false statements of fact made during a union election campaign when the expression was made as political satire? (2) May a candidate for presidency of an 8,700 member union constitutionally be deemed not to be a public figure? (3) Does the First Amendment ever permit states to impose tort liability for pure expression of opinion utterly devoid of false factual statements? (4) May states constitutionally impose tort liability for infliction of emotional distress based on judicial determinations imbued with an unconstitutional viewpoint discrimination?

_McKnight v. American Cyanamid Co._ (4th Cir. 1995) (unpublished), _cert. denied_, 64 U.S.L.W. 3248 (10/02/95, No. 94-1942). The Fourth Circuit held that a contractual dispute between two pharmaceutical companies over American Cyanamid’s efforts to market a drug developed by the plaintiff, the smaller of the two rival companies, was not a public controversy because the issue in dispute was not one that would potentially affect the public. Finding that the larger firm is not, in such a context, a public figure, the court reinstated a libel counterclaim for consideration under the libel standards applicable to private individuals.

Questions presented: (1) Is the respondent an all-purpose public figure? (2) Is the respondent a 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. denied_, 64 U.S.L.W. 3240 (10/03/95, No. 94-2062). The Ninth Circuit affirmed in part and reversed in part verdicts for defendants in an action for discrimination, invasion of privacy and defamation. The action brought by the plaintiff arose out of remarks made by the defendant city’s chief of police after the plaintiff resigned his position and filed an invasion of privacy action in response to having been 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 had lied. The Ninth Circuit affirmed the jury verdict for the defendants on the discrimination claim, but 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 to authorize use of electronic listening devices by law enforcement
officials for criminal investigations only. Additionally, 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 Ninth Circuit reversed the district court’s subsequent grant of defendants’ 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 Ninth Circuit held, unlike actual malice, need only be proved by a preponderance of the evidence.

## Question presented:
Did the Ninth Circuit err in holding that a public official who brings a defamation action need only prove falsity by a preponderance of the evidence in light of this Court’s imposition of the “convincing clarity” standard of New York Times Co. v. Sullivan, and the Second Circuit’s view that falsity must be proven by clear and convincing evidence?

*Schnabel v. Securitron Magnalock Corp.*, 65 F.3d 256 (2nd. Cir. 1995), cert. denied, 64 U.S.L.W. 3557 (2/20/96, No. 95-893). The Second Circuit affirmed a jury verdict granting plaintiff damages in the amount of $1,050,000, under RICO, the New York General Business Law and the New York law of defamation. Plaintiff, a manufacturer of security equipment, proved at trial that defendant and its principals had deliberately prevented plaintiff from receiving numerous municipal contracts by making false statements about the plaintiff’s products. On the RICO claim, the Second Circuit upheld the lower court’s finding that the defendants constituted an “enterprise,” dismissing as without merit defendants’ other contentions under RICO. In addition to affirming the monetary award, the Second Circuit also upheld the lower court’s injunction, prohibiting the defendant from making certain specific misrepresentations about plaintiff’s product in the future.

Questions presented: (1) Does a single individual who does business through two closely held corporations constitute an “enterprise” under RICO? (2) Does the civil RICO statute permit persons alleged to have committed RICO acts to be exactly the same as a RICO enterprise beyond particular acts alleged? (3) Does the New York Constitution permit a court to issue an injunction imposing prior restraint of allegedly defamatory speech?

*Williams v. Garraghty*, 455 S.E.2d 209, 249 Va. 224 (Va. 1995), cert. denied, 64 U.S.L.W. 3240 (10/3/95, No. 94-1959). The Supreme Court of Virginia upheld a $177,000 damage award in a defamation suit brought by a prison warden against a subordinate employee who had written a memorandum accusing the warden of sexual harassment. The court held that while defendant’s claim 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 appellate review, the court also upheld a punitive damage award against the defendant, finding that “the record supports a finding of actual malice with convincing clarity.”

## Question presented:
Can the protection afforded employees by the opposition clause of Title VII of the 1964 Civil Rights Act for voicing concerns about sexual harassment in the workplace be limited by a more restrictive definition of a qualified privilege under state defamation law adopted by the highest court of state?

### B. CERTIORARI PETITIONS IN OTHER AREAS OF INTEREST

#### 1. Commercial Speech

##### a. Judgment Reversed — 1

*44 Liquormart Inc. v. Rhode Island*, 39 F.3d 5, 22 Media L. Rep. 2409 (1st Cir. 1994),
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rev'd, 64 U.S.L.W. 4313 (U.S. 1996). Plaintiff challenged on First Amendment grounds R.I. Gen. Laws 3-1-5, which prohibits the advertisement of liquor prices except at the place of sale. The First Circuit upheld the regulation by characterizing the prohibition as controlling "traffic in alcoholic beverages" rather than infringing upon speech.

Question presented: May Rhode Island, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages?

Supreme Court holding: In a decision that produced four separate opinions, a unanimous court struck down Rhode Island's ban on advertising of liquor prices as violative of the First Amendment. In the principal opinion, Justice Stevens held that the state had failed to demonstrate that the legislation either directly advanced a substantial governmental interest or was reasonably tailored to advance that goal, thus failing prongs three and four, respectively, of the Central Hudson test.

Although Justice Stevens conceded that it was reasonable to assume that the ban on advertising would reduce price competition and thus tend to increase alcohol prices, he concluded that "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance." 116 S. Ct. at 1509. He went on to caution that requiring the Court "to engage in 'speculation and conjecture' . . . is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interests." Id. at 1510.

The state also failed to demonstrate a "reasonable fit" between the prohibition on advertising and the goal of promoting temperance, insofar as a number of "alternate forms of regulation that would not involve any restrictions on speech would be more likely to achieve the state's goal of promoting temperance." Among such alternative means Justice Stevens suggested increased taxation on the sale of liquor, direct regulation of liquor prices, or even educational programs about alcohol. Id.

Although Justice Stevens applied an intermediate level of scrutiny under Central Hudson, in a portion of the principal opinion joined by Justices Kennedy and Ginsburg, he suggested that strict scrutiny should be applied to prohibitions on the dissemination of "truthful, nonmisleading commercial messages." He observed that in such cases "there is far less reason to depart from the rigorous review that the First Amendment generally demands." Id. at 1507.

In his concurring opinion, Justice Thomas similarly observed that he saw no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" Id. at 1517 (Thomas, J., concurring). Writing separately because he disagreed with the use of the Central Hudson test for evaluating paternalistic regulatory schemes, Justice Thomas would have held that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible" under Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). Id. at 1520.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Souter and Breyer, concurred in the judgment but would have resolved the case more narrowly under Central Hudson. Id. at 1521 (O'Connor, J., concurring). In concluding that there was not a "reasonable fit" between the state's goals and means, Justice O'Connor pointed to the ready availability of alternative (and far more effective) methods suggested in Justice Stevens's principal opinion. Id. at 1521-22.

Justice O'Connor rejected the state's reliance upon the Court's decision in Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986), in which the "Court accepted without question Puerto Rico's account of the effectiveness and reasonableness of its speech restriction." Id. at 1522. In doing so, she wrote that following Posadas the Court had "examined more searchingly the State's prosed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny." Id.

Justice Scalia concurred in part and concurred in the judgment. Id. at 1515 (Scalia, J., concurring). Although he shared Justice Thomas's discomfort with the Central Hudson test he wrote that he was not prepared to replace it without a better understanding of historical practices with respect to regulation of commercial speech,
of which the parties and amici had provided no evidence. Id.

Finally, the Court was unanimous in rejecting the First Circuit’s view that the Twenty-first Amendment provided an “added presumption in favor of the validity of state regulation” by delegating to the states regulatory power over the sale of alcohol. Id. at 1514–15 (Stevens, J., principal opinion); see also id. at 1522–23 (O’Connor, J., concurring).

b. Judgment Vacated — 3


Questions presented: (1) May a court dismiss a commercial speech challenge on a motion without conducting an independent review of the evidence relied on by the government to carry its burden of proof, or allowing the plaintiffs to test the government’s evidence or submit contrary evidence? (2) Does the government satisfy its burden of proof under the test of Central Hudson, (i) when it shows no more than a reasonable belief that a logical nexus exists between its restrictions on speech and its asserted goal and (ii) when it fails to address obvious alternatives for achieving its goal that would impose no restrictions on speech?

Hospitality Investments of Philadelphia Inc. v. Pennsylvania State Police, 650 A.2d 863 Pa. 1994), vacated for reconsideration in light of 44 Liquormart, 64 U.S.L.W. 3778 (5/20/96, No. 94-1247). The Pennsylvania Supreme Court reversed the decision of the lower court in favor of the plaintiff and held that the Twenty-First Amendment of the U.S. Constitution confers on the states broad authority to regulate liquor prices. Specifically at issue was plaintiff’s advertising of liquor prices.

Questions presented: (1) Does the Twenty-First Amendment strip commercial speech concerning alcoholic beverages of all First Amendment protection, thereby reducing judicial scrutiny of Pennsylvania’s ban on price advertising from the rigorous test articulated in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York, to whether the ban bear[s] a reasonable relation to the evil sought to be controlled? (2) Does Pennsylvania’s ban on price advertising for alcoholic beverages violate the First Amendment, particularly when the government (a) omits its own advertising from that ban, (b) introduced no evidence that its ban will directly and materially advance its asserted purpose of reducing excessive consumption, and (c) contradictorily concluded in 1985 that price advertising for beer does not cause increased consumption.

Pennsylvania Advertising of Baltimore Inc. v. Schmoke, 63 F.3d 1318, 23 Media L. Rep 2367 (4th Cir. 1995), vacated for reconsideration in light of 44 Liquormart, 116 S. Ct. 2575 (1996). Baltimore municipal ordinance 307 prohibits outdoor cigarette advertisements in certain areas of the city. Plaintiff challenged the statute as pre-empted by the Federal Cigarette Labeling and Advertising Act and also as a violation of the First and Fourteenth Amendment protections of commercial speech. The Fourth Circuit upheld the constitutionality of the ordinance because it limits only the location of cigarette advertisements and not their content and, therefore, is not preempted by the Federal Cigarette Labeling and Advertising Act, which regulates the content of advertisements. The court likewise denied the First and Fourteenth Amendment challenges. Applying the test for state regulation of commercial speech announced by the Supreme Court in Central Hudson Gas and Elec. Corp. v. Public Serv. Comm’n of New York, 447 U.S. 557 (1980), the court held that, although
the ordinance may not be the ideal means of reducing illegal consumption of cigarettes by minors, it nonetheless falls within the restrictions on commercial speech tolerated by the First Amendment.

Questions presented: (1) May a restriction on non-misleading commercial speech be upheld when the reviewing court asked only whether the legislature could have found a logical nexus between the restriction’s means and ends, and made no independent inquiry as to whether the restriction either would in fact materially advance its goals or was narrowly tailored to do so? (2) Does an ordinance that bans cigarette advertising on billboards escape pre-emption under the Federal Cigarette Labeling and Advertising Act on the ground that the ordinance does not purport to dictate the content of cigarette advertisements?

c. Review Denied — 3

Association of National Advertisers Inc. v. Lungren, 44 F.3d 726, 22 Media L. Rep. 2513 (9th Cir. 1994), cert. denied, 64 U.S.L.W. 3240 (10/2/95, No. 94-1930). Section 17508.5 of the California Business and Professions Code makes it unlawful for a manufacturer or distributor of consumer goods to represent that its products are ozone friendly, biodegradable, photodegradable, recyclable, or recycled unless the goods in question meet the statute’s definitions of those terms. A panel of the Ninth Circuit, over one dissent, held that since the statute directly advances California’s substantial interests in conservation and consumer protection, it does not run afoul of the First Amendment’s limited protections for commercial speech.

Questions presented: (1) May a state, consistent with the First Amendment, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, even though the language is truthful and not misleading? (2) May a state, consistent with the First Amendment, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, at the same time that their critics are permitted to use identical language about the same goods in an unrestricted manner?

Lebron v. National Railroad Passenger Corp., 69 F.3d 650, 64 U.S.L.W. 2291 (2nd Cir. 1995), cert. denied, 64 U.S.L.W. 3762 (5/13/96, No. 95-1373). In a case challenging defendant Amtrak’s refusal to display the plaintiff’s political advertisement on its billboard, known as the “Spectacular,” the Second Circuit held that defendant’s historical refusal to accept political advertisements is a viewpoint-neutral, reasonable use of that forum. The court further held that the plaintiff lacked standing to assert a challenge to the defendant’s general advertising practice.

Questions presented: (1) Did Amtrak’s refusal to display the petitioner’s advertisement based on an unwritten policy against political advertising constitute viewpoint discrimination under Rosenberger v. Rector of University of Virginia, 63 U.S.L.W. 4702 (U.S. 1995), when Amtrak previously had permitted the display of conservative political advertising and would have permitted petitioner’s ad had he addressed the same subject matter -- whether to buy Coors beer -- from a commercial rather than a political viewpoint? (2) In its public forum analysis, did the court of appeals err by focusing narrowly on only a single Penn Station billboard, when Amtrak’s implementation of its stationwide advertising policy showed that it had created a designated public forum for political and commercial advertising on all billboards? (3) Was Amtrak’s unwritten and undefined policy against political advertising unconstitutionally vague under the Supreme Court’s decision in Hynes v. Mayor of Oradell, 425 U.S. 610 (1976), which held impermissibly vague the term political...cause? (4) Did the court of appeals err in creating a standing doctrine that makes it more difficult to bring First Amendment claims than other legal claims and bars the petitioner from challenging the very policy that was applied to him?

Ventura v. Morales, 63 F.3d 358, 64 U.S.L.W. 2178 (5th Cir. 1995), cert. denied, 64 U.S.L.W. 3557 (2/20/96, No. 95-920). Texas Penal Code 38.12(b)(1)(1994) prohibits doctors, attorneys,
private investigators and chiropractors from direct mail solicitation of accident victims and their families within thirty days of an accident. In a challenge to the statute, the Fifth Circuit upheld the statute as applied to attorneys, relying on the decision of the U.S. Supreme Court in Florida Bar v. Went for It Inc., 63 U.S.L.W. 4644 (U.S. 1995), which upheld a similar ban on Florida attorneys. As to the other professions, the court remanded the case for further proceedings in light of the three-prong First Amendment test articulated in Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980): (1) the State must assert a substantial interest supporting the regulation; (2) the regulation must directly and materially advance that interest; and (3) the regulation must be narrowly drawn to advance that interest.

Questions presented: (1) Does the First Amendment standard of review articulated in Bose Corp. v. Consumers Union of the United States Inc., 466 U.S. 485 (1984), allow a court of appeals to review de novo, rather than by the clearly erroneous standard of Fed. R. Civ. P. 52(a), findings of the trial court striking down a state bartry statute as violating the First Amendment, and, if the First Amendment allows such review, does it or another law require that a court of appeals articulate its findings of fact and conclusions of law in a manner similar to that prescribed in Fed. R. Civ. P. 52(a)? (2) May a district court, applying Cincinnati v. Discovery Network Inc., 61 U.S.L.W. 4272 (U.S. 1993), give close scrutiny to a state bartry statute criminalizing direct mail solicitation within thirty days of an accident when, because of anticompetitive motivation, the statute favors the speech of insurance company adjusters and lawyers, and disfavors the speech of personal injury lawyers, or does Florida Bar v. Went for It Inc., 63 U.S.L.W. 4644 (US Sup Ct 1995), establish the new rule that content-based, discriminatory commercial speech prohibition is subject to scrutiny only under the standard of Central Hudson Gas & Elec. Corp. v. Public Service Comm’n? (3) May a district court, applying Central Hudson, decide that a state bartry statute criminalizing direct mail solicitation within thirty days of an accident is a bad fit when the state has adopted a more narrow and direct means of promoting the professionalism of lawyers and the privacy of accident victims, namely, submitting for review by state bar copies of all written solicitations prior to or concurrently with the solicitation, and may a district court, in such circumstances, decide that a bartry statute is a bad fit when there is no economically feasible means for lawyers of moderate means to communicate with poor and minority communities except through direct mail solicitation? (4) After hearing conflicting evidence, may a district court decide that under Central Hudson a state has not justified its bartry statute criminalizing direct mail solicitation within thirty days of an accident, or does Florida Bar establish a new burden of proof rule that a state’s evidence, if alone sufficient, adequately justifies such a criminal statute? (5) After hearing trial evidence, may a district court decide — consistent with Central Hudson and Edenfield v. Fane, 61 U.S.L.W. 4431 (U.S. 1993) — that a state has not justified its criminalization of direct mail solicitation within thirty days of an accident by physicians, surgeons, chiropractors, and other health professionals, or does Florida Bar establish a new analytical framework for judicial review of all professional solicitation?

d. Petitions Filed but Not Yet Acted Upon as of the End of the 1995 Term — 1

Greater New Orleans Broadcasting Ass’n v. U.S., 69 F.3d 1296, 24 Media L. Rep. 1146 (5th Cir. 1995), cert. filed, 64 U.S.L.W. 3741 (4/22/96, No. 95-1708). The Fifth Circuit affirmed the lower court’s dismissal of a challenge to the constitutionality of 18 U.S.C. 1304, which prohibits the broadcasting of radio and television advertisements for casino gambling. Acknowledging that commercial speech is entitled to limited protection, the court held that the statute did not violate the First Amendment because the statute (1) promotes federal interests in assisting states that restrict gambling and discourage participation in

104 Certiorari was subsequently granted at the beginning of the 1996 Term and the judgment vacated and remanded for reconsideration in light of 44 Liquormart. See 65 U.S.L.W. 3225 (Oct. 7, 1996).
commercial gambling, and (2) is narrowly tailored to serve these interests.

Question presented: May governmental restrictions on truthful, non-misleading commercial speech be upheld when the government failed to provide evidence that such restrictions materially advance any legitimate goal or are narrowly tailored to do so, and when the reviewing court, rather than demanding such evidence and making an independent inquiry regarding the effectiveness and scope of the restrictions, relied instead upon speculation and conjecture to uphold them?

2. Speech in the Employment Context

a. Review Denied — 4

_Barnard v. Jackson County, Mo., 43 F.3d 1218, 10 IER Cases 323 (8th Cir. 1995), cert. denied, 64 U.S.L.W. 3239 (10/2/95, No. 94-1846)._ The Eighth Circuit affirmed in part and reversed in part the district court’s grant of summary judgment in favor of defendant in plaintiff’s section 1983 action alleging retaliatory discharge in violation of his First Amendment rights. Plaintiff, who worked as a legislative auditor, investigated allegations about a legislator in office, brought these allegations to the FBI’s attention and, on another occasion, released a local newspaper results of an audit of the county medical examiner before presenting them to the legislature. Plaintiff was fired shortly thereafter. The Eighth Circuit reversed the trial court’s grant of summary judgment as to plaintiff’s contacts with the FBI, finding issues of material fact as to whether such contacts underlay his termination. The court did, however, affirm the trial court’s grant of summary judgment regarding plaintiff’s contacts with the newspaper, holding that the defendant had satisfactorily demonstrated that its interest in the efficient functioning of the legislature outweighed plaintiff’s personal interest in disseminating audit and investigation results to the press prior to providing them to his employer.

Questions presented: (1) May a public employee be discharged for allegedly violating a confidentiality rule when he speaks with members of the press on matters of inherent public concern that have already been fully disclosed in newspaper accounts? (2) In conducting the balancing test set out in _Pickering v. Board of Education_, 391 U.S. 563 (1968), may the court of appeals engage in fact finding in order to resolve the legal question of whether petitioner’s interest in free speech was outweighed by the interests of respondents as his governmental employers?

_Botsie v. O'Dowd_, 456 S.E.2d 403 (S.C. 1995), cert. denied, 64 U.S.L.W. 3244 (10/2/95, No. 95-77). On the third appeal of this case, the Supreme Court of South Carolina affirmed a directed verdict in favor of the defendant, Sheriff of Charleston County. Plaintiff, a former employee of the Sheriff’s department, challenged his termination on First Amendment grounds based on “speech activity” which, according to the defendant, included disloyal comments about the defendant that undermined his standing with the public. The court below applied the two-prong test articulated in _Connick v. Myers_, 461 U.S. 138 (1983), to determine whether discharge of an employee for speech violates the First Amendment: (1) whether the speech at issue involves a matter of public concern; and (2) if so, whether the government’s countervailing interest in effectively and efficiently fulfilling its responsibility outweighs the plaintiff’s First Amendment rights. The court agreed that the state’s interest in effectively managing the Sheriff’s Department outweighed plaintiff’s interest in free speech and affirmed the directed verdict.

Question presented: Under a proper application of _Waters v. Churchill_, 62 U.S.L.W. 4397 (U.S. 1994), and _Connick v. Myers_, can a plaintiff fired for engaging in speech protected by the First Amendment have his claim dismissed upon a directed verdict: (a) without the fact-finder determining whether the speech in question motivated the employee’s termination, (b) when the court applied _Connick’s_ balancing test, not to protected speech, but to conduct the employee claims never occurred and is a pretext for his firing, or (c) when no evidence
is offered to show that the protected speech in any way disrupted public employment?

_Canez v. Laborers' Int'l Union of North America_, 40 F.3d 1246 (9th Cir. 1994) (unpublished), _cert. denied_, 64 U.S.L.W. 3347 (11/13/95, No. 95-418). Plaintiff, Manager/Secretary of Local 383, also served as trustee of the Laborers' pension fund. In the latter capacity, the plaintiff allegedly took a loan from union funds but did not disclose it. Plaintiff also knowingly sent a misleading letter to pension fund recipients falsely assuring them that over $50 million in fund losses were recoverable. Following a union audit of the plaintiff's activities, the union terminated his employment. Claiming that his speech was protected, the plaintiff brought an action alleging retaliatory discharge, alleging that the union fired him for speaking out about the pension fund losses in violation of his Free Speech and Due Process rights under Section 101 of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 411. The trial court granted summary judgment in favor of defendant. On appeal, the Ninth Circuit affirmed, holding that the plaintiff's claim to protected speech, even if true, would not immunize him from discipline on other grounds.

Questions presented: (1) Does the Ninth Circuit's decision conflict with _Sheet Metal Workers v. Lynn_, 488 U.S. 347 (1989), by holding that the petitioner's removal from his union office was not retaliatory and did not deny him rights of Free Speech, voting, and assembly guaranteed under 29 USC 411? (2) Does the Ninth Circuit's decision conflict with _Anderson v. Liberty Lobby Inc._, 477 U.S. 242 (1986), by affirming summary judgment despite compelling evidence that the petitioner's firing was based on pretextual grounds hiding the true reason for his firing, i.e., to remove him from office so that he could not exercise his rights of Free Speech and assembly to inform local union members regarding respondent's wrongdoing in handling pension fund monies? (3) May district court judges properly grant summary judgment under _Anderson_ by adopting factual and legal determinations made by a union "hearing panel" composed of one hearing officer who is the vice president of the defendant, when allegations in the court action are made against that hearing panel's employer, and when the prosecutor at the "hearing" was a fact witness on a dispositive issue on which summary judgment was based by the district court?

_Jeffries v. Harleston_, 52 F.3d 9 (2nd Cir. 1995), _cert. denied_, 64 U.S.L.W. 3244 (10/2/95, No. 95-34). In its first disposition of this case, the Second Circuit had held that defendant City University of New York could not remove from his chairmanship a non-policymaking employee for voicing his view on issues of public concern unless the speech was actually disruptive of government operations. Thereafter, the Supreme Court vacated the Second Circuit's decision, remanding in light of _Waters v. Churchill_, 62 U.S.L.W. 4397 (U.S. Sup. Ct. 1994), in which the Court held that the government can terminate the employment of a non-policymaking employee based on a reasonable prediction that the speech will cause disruption. On remand, the Second Circuit, relying on _Waters_, upheld the constitutionality of defendant's actions because, notwithstanding a jury finding of lack of actual disruption, there was a reasonable expectation that the speech in question would disrupt university operations.

Questions presented: (1) Did the Second Circuit properly apply the principles enunciated in _Waters_, by affirming punishment of government employee for speech? (2) Did the Circuit Court err in failing to balance the interests of the parties as required by _Pickering v. Board of Education_, 391 U.S. 563 (1968)? (3) Did the respondents, as a matter of law, and considering petitioner's First Amendment rights and the exercise of academic freedom, meet their burden of justifying their denial of petitioner's chairmanship in response to petitioner's speech? (4) Is the principle of "reasonable expectation" without limitation or qualification with respect to the time, circumstances, and actual conditions known to the employer at the time the employee is punished for his speech?
b. Petition Filed but Not Yet Acted Upon - 1

_Fickesimer v. Cox_ (4th Cir. 3/19/96) (unpublished), _cert. filed_, 65 U.S.L.W. 3001 (6/17/96, No. 95-2037). The plaintiff claimed that he was constructively discharged from his position as juvenile court counselor for “protected speech,” namely complaints made about his supervisor to superiors. In considering whether the speech at issue was protected by the First Amendment, the court employed the four-prong test of _Hall v. Marion School Dist. No. 2_, 31 F.3d 183 (4th Cir. 1994): (1) whether plaintiff’s speech involved an issue of public concern; (2) whether the plaintiff would have been fired but for his protected speech; (3) whether the plaintiff’s exercise of speech is outweighed by the “countervailing interest of the state in providing the public service” that plaintiff was hired to perform. In _per curiam_ decision, the Fourth Circuit summarily rejected plaintiff’s claim of protected speech, holding that the speech at issue did not involve matters of public concern, but was “only a matter of personal interest.”

Questions presented: (1) Are there genuine issues as to material facts concerning petitioner’s constitutional claims against respondent, in her individual capacity, sufficient to withstand a motion for summary judgment? (2) Are there genuine issues as to material facts sufficient to overcome respondents’ motion for summary judgment as to petitioner’s claim for intentional infliction of emotional and mental distress?

3. Access

a. Review Denied - 1

_Globe Newspaper Co. v. U.S._, 61 F.3d 86, 23 Media L. Rep. 2262 (1st Cir. 1995), _cert. denied_, 64 U.S.L.W. 3726 (4/29/96, No. 95-815). The First Circuit affirmed the lower court’s decision to deny plaintiff access to a juvenile proceeding. Media access to juvenile proceedings is governed by the Federal Juvenile Delinquency Act, 18 USC 5031-42. The First Circuit held that the Act does not mandate “across-the-board” closure for all juvenile proceedings, but merely authorizes, at the discretion of the court, any measures designed to ensure confidentiality, closure included.

Questions presented: (1) Does the public have a presumptive First Amendment right of access to juvenile delinquency proceedings charging an 18 year-old and two 16 year-olds with a series of hate crimes intended to rid the community of black and Jewish citizens? (2) Does the First Amendment require that juvenile delinquency proceedings may be closed to the public only if the trial court makes specific findings demonstrating that, first, there is a substantial probability that the juvenile’s interests in rehabilitation will be prejudiced by the publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect interests in rehabilitation? (3) Does the Federal Juvenile Delinquency Act supplant the public’s common-law right of access by establishing a presumptive rule of closure for proceedings conducted under the Act?

4. Obscenity/Indecency

a. Judgment Reversed in Part, Affirmed in Part - 1

_Denver Area Educational Telecommunications Consortium, Inc. v. FCC, Alliance for Community Media v. FCC_, 56 F.3d 105 (D.C. Cir. 1995) (en banc), _aff’d in part, rev’d in part_, 64 U.S.L.W. 4706 (6/28/96, Nos. 95-124, 95-227). At issue were three subsections of Section 10 of the 1992 Cable Television Protection and Competition Act: (1) subsection (a), which confers on cable operators the right
to refuse to carry programs that the operator "reasonably believes describe[] or depict[] sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards;" (2) subsection (b), which directs the FCC to establish rules requiring cable operators to place "indecent" programs on a separate, blocked-out channel which individual subscribers can access only by written request; and (3) subsection (c), which required the FCC to promulgate regulations authorizing cable operators to prohibit the use of PEG (public, educational, or governmental use) channels for "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

Sitting en banc, the D.C. Circuit upheld, over a First Amendment challenge by five organizations, the constitutional validity of all three subsections. First, the Court held that subsections (a) and (e) do not constitute state action by the F.C.C. because, among other reasons, the content requirements are discretionary; that is, in the court's words, they "do not command." Cable operators, the court noted, "may carry indecent programs on their access channels, or they may not." The Court went on to hold subsection (b), challenged on a number of grounds, does not impermissibly single out leased access programming and, moreover, is acceptable under the First Amendment as the least restrictive means of limiting children's access to indecent programming. Summarily rejected were two other challenges to subsection (b): that it constitutes "prior restraint," and that it is "impermissibly vague."

Questions presented: (1) Can a federal statute evade scrutiny under the First Amendment for lack of state action when that statute — Section 10 of the 1992 Cable Television Consumer Protection and Competition Act — on its face disfavors certain constitutionally protected speech on cable access channels based solely on its content? (2) Does Section 10 implicate state action and therefore invoke First Amendment scrutiny because: (a) the statute and its implementing regulations preemp! state and local law and cable franchise agreements, (b) the government has significantly encouraged the ban on indecent programming, and (c) the media that Section 10 regulates — cable access channels — have been dedicated by governmental authorities for the public to use for expressive discourse and are therefore public forums? (3) May Section 10's content-based requirement that cable operators segregate and block "indecent" access programming on cable television be considered the least restrictive means to further a compelling interest when Congress never evaluated the effectiveness of existing, less restrictive means of furthering that interest? (4) Is Section 10 unconstitutionally vague under the heightened scrutiny required in First Amendment cases, when it (a) defines "indecent programming" based upon its "patently offensive manner as measured by contemporary community standards," (b) authorizes cable operators to ban leased access programming that they "reasonably believe" to be indecent, and (c) will produce self-censorship by access programmers by requiring them — on pain of fines or cut-off of access — to guess what the FCC may decide is, and what the cable operator may "reasonably believe" to be, "indecent," and to certify that their programs do not violate these standards?

Supreme Court holding: In a decision that produced six separate opinions, the Court upheld the indecency provisions with respect to leased channels (§ 10(a)) but struck down such provisions with respect to the public, educational, and government ("PEG") channels (§ 10(c)) as well as the requirement that cable operators choosing to carry indecent programming must do so on a single blocked channel, allowing access to that channel only upon receipt of a written request from the subscriber (§ 10(b)).

The Court unanimously rejected the D.C. Circuit's holding that §§ 10(a) and 10(b) did not involve state action, holding that Congress's authorization of private parties is subject to constitutional review. Whereas Justice Kennedy, concurring, would have applied strict scrutiny to § 10, Justice Breyer, who wrote the lead opinion, which was joined in its entirety by Justices Stevens and Souter, declined to "declare a rigid single standard, good for now and for all future media and purposes," characterizing such a course as unwise in view of the rapid changes "taking place in the law, the technology, and the industrial structure, related to telecommunications." 116 S. Ct. 2374, 2385 (1996).

Instead, Justice Breyer chose to "closely scrutinize[] § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." Id. at 2386. Justice Breyer then point to a number of factors that supported the conclusion.
that "§ 10(a) is a sufficiently tailored response to an extraordinary problem": (1) the "extremely important justification" for the regulation, namely "the need to protect children from exposure to patently offensive sex-related material"; (2) the particular historical context of leased access channels, namely that prior to the previous Act of Congress establishing leased access channels, cable operators had full control over programming, so that § 10(a) only restored to cable operators rights they had previously held; (3) the facts that cable broadcasts were "uniquely accessible to children" and that the broadcast media "have established a uniquely pervasive presence in the lives of all Americans, citing FCC v. Pacific Foundation, 438 U.S. 726 (1978); and (4) the regulation was less restrictive than what had been upheld in Pacifica because § 10(a) did not entirely ban indecent broadcasts but merely permitted cable operators to do so. Justices Breyer, Stevens, and Souter were joined in this part of the opinion by Chief Justice Rehnquist and Justices Scalia and Thomas. Id. at 2386–8.

With respect to § 10(c), however, Justice Breyer identified several differences from § 10(a). For one, cable operators had traditionally agreed to reserve channels for PEG access as part of their agreement with the municipalities that award them franchises; thus § 10(c) did not restore speech rights previously held by cable operators. Secondly, unlike leased access channels, on which the lessee had total control, PEG channels are subject to numerous and complex supervisory systems that reduce the likelihood that children will be exposed to patently offensive broadcasts on these channels. Thirdly, because PEG access programming is designed to encourage programming of value to the community, it is less likely that a "cable operator's veto" will be needed to protect children. Finally, the record showed no evidence of patently offensive programming on PEG channels. Justices Breyer, Stevens, and Souter were joined in this part of the opinion by Justices Kennedy, Ginsburg, and O'Connor. Id. at 2394–96.

In striking down § 10(b), Justice Breyer noted that unlike the other sections it does not merely permit, but rather requires, restrictions on speech. While agreeing that protection of children is a "compelling interest," Justice Breyer disagreed that the "segregate and block" requirements were the least restrictive means of achieving that interest. As less restrictive alternatives he identified provisions in the Cable Communications Policy Act of 1984 requiring cable operators to provide a "lockbox" that would enable parents to block programs or channels they did not wish their children to see. Similarly the 1996 Telecommunications Act requires cable operators to honor requests by subscribers to block programming they wished not to receive and require television manufacturers to install a "V chip" that would permit subscribers to block sexually explicit or violent programs themselves. Justices Breyer, Stevens, and Souter were joined in this part of the opinion by Justices Kennedy and Ginsburg. Id. at 2391–94.

Justice Kennedy, joined by Justice Ginsburg, would have applied strict scrutiny and struck down all parts of § 10. Id. at 2403 (Kennedy, J., concurring). To the extent that Justice Breyer had applied strict scrutiny, Justice Kennedy concurred in the finding that § 10(b) was insufficiently well tailored. With respect to § 10(a) as well as § 10(c), he would have held these sections violative of the First Amendment rights of the cable programmers.

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would also have applied strict scrutiny but would have upheld all three parts of § 10. Id. at 2419 (Thomas, J., concurring). He would have upheld § 10(b) as sufficiently well tailored to further a compelling governmental interest. In applying strict scrutiny to §§ 10(a) and 10(c), Justice Thomas focused on the First Amendment rights of the cable operators to control the programming broadcast on their systems. He concluded that allowing cable operators to block indecent broadcasts restored the free speech rights taken from cable operators by prior statutes that required access.

b. Review Denied — 1

*Action for Children's Television v. Federal Communications Commission*, 58 F.3d 654, 78 Rad. Reg. 2d(P&F)685 (D.C. Cir. 1995), cert. denied, 64 U.S.L.W. 3465 (1/8/96, No. 95-520). In a challenge to the constitutionality of Section 16(a) of the Public Telecommunications Act of 1992, the D.C.
Circuit remanded the cases to the FCC with instructions to revise its regulations. Section 16(a) seeks to shield minors from indecent radio and television programs by restricting the hours within which such programs may be broadcast, authorizing broadcast of indecent materials only between midnight and 6:00 a.m. At issue here is the exception granted to stations that go off the air at or before midnight; such stations may broadcast indecent materials after 10:00 p.m. The court found that the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts and that the “channeling” of indecent broadcasts between the hours of midnight and 6:00 a.m., standing alone, would not unduly burden the First Amendment. The D.C. Circuit held, however, that the distinction drawn between the two categories of broadcasters is unconstitutional because it bears no apparent relationship to the governmental interests served by 16(a). The court thus instructed the FCC to revise its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m.

Question presented: Does section 16(a) of the 1992 Public Telecommunications Act, standing alone or as limited by the court of appeals, violate the First Amendment?

5. Internet

a. Petition filed but not yet acted upon105 — 1

**Thomas v. United States**, 74 F.3d 701 (6th Cir. 1996), **cert. filed**, 64 U.S.L.W. 3839 (6/10/96, No. 95-1992). The Sixth Circuit affirmed the conviction of defendants, husband and wife, for distributing sexually explicit images across state lines via the electronic bulletin board system they owned and operated in California. Because the government agent chose to download the images to a computer in Tennessee, defendants were tried and convicted in the United States District Court for the Western District of Tennessee, which applied that state’s community standards.

Questions presented: (1) Whether 18 U.S.C. sec. 1465, which forbids the transfer of “obscene material,” is applicable to the transfer of Graphic Interchange Format files which are transmitted in binary code through computers and are therefore not tangible objects subject to the statute? (2) Whether venue is proper in a federal district where the sole connection between petitioners and that district was the act of a government agent in downloading information from a computer bulletin board which was established in another federal district? (3) In a federal obscenity prosecution, which community’s standards should determine whether the contents of a nationwide computer-accessed communication system are obscene?

6. Other

a. **Judgment Vacated** — 2

**U.S. v. US West Inc.**, 48 F.3d 1092, 63 U.S.L.W. 2428 (9th Cir. 1995), **vacated and remanded for consideration of mootness**, 116 S. Ct. 1036 (1996). The Ninth Circuit affirmed the district court’s grant of summary judgment in favor of US West, which had challenged 47 USC 533(b), a portion of the 1984 Cable Communications Policy Act which prohibits telephone carriers from providing cable television service to customers in their telephone service areas. Employing intermediate level scrutiny, the Ninth Circuit held that the provision fails the “narrow tailoring” requirement.

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105 *Certiorari* was denied at the beginning of the 1996 Term. See 65 U.S.L.W. 3245 (Oct. 7, 1996).
Question presented: Does 47 USC 533(b) violate the First Amendment?

U.S. v. Chesapeake and Potomac Telephone Company of Virginia and National Cable Television Association Inc v. Bell Atlantic Corp., 42 F.3d 181, 63 U.S.L.W. 2348 (4th Cir. 1994), vacated and remanded for consideration of mootness, 116 S. Ct. 557 (1996). The Fourth Circuit, as did the Ninth Circuit in U.S. v. West, supra, likewise struck down Section 533(b), holding that the statute was not sufficiently “narrowly tailored” to serve the government’s interests in promoting competition in the market for video programming and in preserving a diversity of communications media ownership, and also because it does not leave open sufficient alternative channels for communication of information.

Question presented: Does 47 USC 533(b) violate the First Amendment?

b. Probable Jurisdiction Noted — 1

Turner Broadcasting System Inc. v. Federal Communications Commission, et. al., No. Civ. A. 92-2247, 1995 WL 755299 (D.D.C. December 12, 1995), prob. juris. noted, 64 U.S.L.W. 3557 (2/20/96, No. 95-992). Plaintiff challenged the “must carry” provisions of the 1992 Cable Television Consumer Protection and Competition Act, which require cable television systems to devote a portion of their channels to the broadcast of local commercial and public television stations. On remand from the U.S. Supreme Court, the three-judge district court, utilizing intermediate level scrutiny, upheld the provisions because (1) they are “narrowly tailored” to serve the government’s interest in protecting the economic health of the broadcast industry, and (2) they are “content-neutral restrictions” that impose only a minimal burden on speech. The court thus granted the defendants’ motions for summary judgment.

Question presented: In the absence of any jeopardy to the health of the overall system of free, local broadcast television (nationally or in particular markets), does the First Amendment permit Congress to impose on all cable operators the requirement of mandatory carriage of local broadcast stations in preference to all other programmers?

c. Review Granted — 1

Glickman v. Wileman Brothers & Elliott, Inc., was Wileman Brothers & Elliott, Inc. v. Espy, 58 F.3d 1367 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3806 (6/3/96, No. 95-1184). The Ninth Circuit affirmed in part and reversed in part summary judgment in favor of the Secretary of Agriculture in an action arising under the Agricultural Marketing Agreement Act of 1937. The Department of Agriculture sought to compel California nectarine and peach handlers to fund a generic advertising program. The Ninth Circuit held that while the assessment regulations were acceptable, using forced assessments to fund generic advertising programs violated plaintiffs’ First Amendment right not to be compelled to render financial support for the speech of others.

Question presented: Does it violate the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the 1937 Agricultural Marketing Agreement Act, to require handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities?
d. Review Denied — 4

_Bilder v. Ohio_, 651 N.E.2d 502, 99 Ohio App. 3d 653 (Ohio Ct. App. 1994), _cert. denied_, 64 U.S.L.W. 3396 (12/4/95, No. 95-531). An Ohio appellate court affirmed defendant Bilder's conviction for stalking a probation officer in violation of Akron City Code Section 135.09. On appeal, the defendant challenged the statute as an unconstitutionally overbroad infringement upon free speech. The Court upheld the validity of the ordinance as applied to the defendant on the ground that the stalking ordinance undoubtedly reflects a legitimate state interest.

Questions presented: (1) Is section 135.09 unconstitutional as applied in this case because it denied the defendant freedom of speech and association? (2) Is section 135.09 overbroad in its application? (3) Can name calling form the basis for criminal violation when the speech is merely expression and is incidental to association?

_Power v. Massachusetts_, 650 N.E.2d 87, 420 Mass. 410 (Mass. 1995), _cert. denied_, 64 U.S.L.W. 3465 (1/8/96, No. 95-277). Plaintiff, Katherine Power, long sought by the FBI for her role in the 1970 robbery of State Street Bank, surrendered to the state of Massachusetts in 1993. After she entered a plea of guilty, the lower court granted probation on the special condition, to which Power agreed, that she not profit in any form from the sale of her story. Despite her agreement to this condition on appeal from the portion of her sentence containing the special provision, the plaintiff challenged the restriction as a violation of her First Amendment rights. The Supreme Judicial Court of Massachusetts affirmed the condition, distinguishing _Simon and Schuster, Inc. v. New York Crime Victims Board_, 502 US 105 (1991), on the grounds that the condition was (1) rationally related to the State’s interest underlying the probation, (2) narrowly tailored to permit the plaintiff to speak of her crimes without pecuniary gain, and (3) distinguishable from an outright ban applicable to all convicted criminals.

Questions presented: (1) May a state court impose admittedly content-based restrictions on the speech of a probationer upon no more than a general finding that such restraint “reinforces moral foundations of our society”? (2) Must the courts strictly scrutinize content-based restrictions on speech, or, alternatively, did the court below err by not reviewing the content-based restriction as specified in _Madsen v. Women’s Health Center Inc.,_ 62 U.S.L.W. 4686 (U.S. 1994)? (3) Is a probation condition that forbids a probationer from “directly or indirectly engaging in any profit or benefit generating activity relating to publication of facts or circumstances pertaining to [her] involvement in criminal acts for which [she was] convicted” so vague as to impose a prior restraint on speech?

_State of Louisiana v. Schirmer_, 646 So. 2d 890 (La. 1994), _cert. denied_, 64 U.S.L.W. 3347 (11/13/95, No. 94-2022). In a case challenging the constitutionality of LSA-R.S. 18:1462(A), subsections (2), (3), and (4), which effectively prohibit all political speech within 600 feet of polling places on election days, the Supreme Court of Louisiana affirmed the lower court’s ruling that the statute is unconstitutionally overbroad. The Louisiana statute was drafted in order to provide a sanctuary in the vicinity of polling places to protect voters from interference with their right to vote. The defendant, charged with violating this ordinance by soliciting signatures at a polling place for a petition to recall the Governor, challenged the statute as an infringement of his First Amendment rights. Affirming the lower court’s decision to quash the information filed against the defendant, the state’s high court held that the statute is an unconstitutionally overbroad limitation upon the defendant’s right of free speech and expression. The court also held that subsection (a)(2) is unconstitutionally vague in that it fails to establish guidelines for enforcement.

Questions presented: (1) Is Louisiana’s electioneering law, LSA-R.S. 18:1462A, (3) & (4), constitutional? (2) Is Louisiana’s compelling interest in maintaining a campaign-free zone around its polling places during elections best served by its total ban on all political campaigning? (3) Is the 600-foot limitation in Section 1462 narrowly tailored to protect Louisiana’s compelling interest? (4) Is LSA-R.S. 18:1462
overbroad? (5) Is LSA-R.S. 18:1462A(2) void for vagueness?

Titan Sports Inc. v. Ventura, 65 F.3d 725 (8th Cir. 1995), cert. denied, 116 S. Ct. 1268 (1996). Defendant, which operates the World Wrestling Federation (WWF), entered into a licensing agreement for the production of videotapes of WWF matches, ninety of them featuring performances by the plaintiff. Initially negotiated without an agent and later with one, the plaintiff’s contract with the defendant did not provide royalties for commercial use of plaintiff’s image. Plaintiff brought an action for quantum meruit recovery of royalties from these videotapes. The Eighth Circuit held that the district court did not err in permitting quantum meruit recovery for the period before and after plaintiff had the services of an agent.

Questions presented: (1) Is a federal appellate court, conducting a predictive law analysis under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), free to create sua sponte a heretofore unannounced state right that is acknowledged by the court to be prohibited by federal law -- Section 301 of the Copyright Act? (2) Is it appropriate for this Court to exercise its supervisory powers when a federal appellate court creates sua sponte a previously non-existent state claim to sustain an award rendered on other grounds when the newly announced state right: (a) was dismissed prior to trial on both factual and legal grounds; (b) was not preserved for appeal by respondent; and (c) is prohibited by provisions of Section 301 of the Copyright Act?

e. Petitions Filed but Not Yet Acted Upon — 1

Hill v. Colorado, 911 P.2d 670 (Colo. Ct. App. 1995), cert. filed 64 U.S.L.W. 3808 (5/24/96, No. 95-1905). Section 18-9-122(3), C.R.S. (1994), a Colorado statute, creates a buffer zone around abortion clinics. Specifically, the statute makes it a crime knowingly to approach a person — within eight feet of that person and within one hundred feet of an abortion clinic — for the purpose of disseminating information to or counseling that person without that person’s consent. In a challenge to the statute on First Amendment grounds, the trial court granted summary judgment for the defendant. On appeal, the Colorado Court of Appeals affirmed the trial court, holding that the statute is content-neutral, advances significant governmental interests in ensuring safety and unobstructed access for patients and staff entering and departing from health care facilities, and does not burden speech more than is reasonably necessary.

Questions presented: (1) Is a statutory obligation to obtain consent before exercising constitutionally protected expressive rights in a traditional public forum inconsistent with the decision in Madsen v. Women’s Health Center, Inc., 62 U.S.L.W. 4686 (U.S. 1994), striking down an injunctive “consent to speak” requirement? (2) Does C.R.S. 18-9-122(3) violate petitioners’ First and Fourteenth Amendment rights to Freedom of Speech, Press, and Assembly? (3) Does C.R.S. 18-9-122(3) violate petitioners’ Fourteenth Amendment rights to Equal Protection of the law?