LDRC 1999 REPORT ON
SIGNIFICANT DEVELOPMENTS

Part I: Findings of the 1999-2000 50-State Surveys and Recent Developments

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INTRODUCTION

LDRC’s 1999 Significant Developments BULLETIN is a two-part issue this year. Here in Part I, we publish our annual review of decisions of interest of the past year in libel, privacy and related areas of law, as reported in LDRC’S MEDIA LIBEL and MEDIA PRIVACY AND RELATED LAW 50-STATE SURVEYS, and updated with significant post-publication developments. LDRC’s annual review of significant developments typically lends itself to identifying trends in the development and application of the law. Of course, the impulse to trend spot is even greater as we near the end of the decade.

Part II, to be published later this month, contains articles analyzing important areas of law that have experienced significant development over the course of the decade. These areas of law include media ride-alongs, incitement, damages in newsgathering claims, reporter’s privilege, commercial speech, cyberspace and doctrinal areas of libel law such as opinion, implication and incremental harm.

It was undoubtedly just a fortunate coincidence that in 1999 a number of important cases in these areas were addressed by the Supreme Court, the Federal Courts of Appeal and state courts, providing ample fodder for the lengthier reflections to come in Part II.

As for this past year, the results for the media were decidedly mixed.

The Supreme Court’s decision in Wilson v. Layne, 119 S. Ct. 1692 (1999), may have effectively put an end to media ride-alongs during the execution of search warrants in private homes. In a unanimous opinion, the Court held that “it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.” Although the Court acknowledged that the media’s first-hand observation of governmental conduct serves an important purpose, such as publicizing crime fighting efforts and reinforcing a positive public image for law enforcement, it is not of sufficient importance to justify the media’s presence inside the home. See p. 41.

On the other hand the Fourth Circuit’s long awaited decision in Food Lion v. ABC, (Oct. 20, 1999 4th Cir.) came down just this past month, the court reducing plaintiff’s damages to a mere two dollars on claims of trespass and breach of duty, and dismissing fraud claims. While rejecting the applicability of First Amendment principles in analyzing liability, the court held that the First Amendment barred plaintiff from obtaining publication damages in the guise of claims for newsgathering. While not 100 percent favorable to the media, the decision does send a clear message that generic torts such as fraud and trespass cannot be bent out of shape to bypass the protections of New York Times v. Sullivan. See pp. 46-48.

In a similar vein, the Illinois Supreme Court rebuffed a plaintiff’s effort to bring a negligent hiring claim against a radio station for employing a notorious shock jock prone to engage in

Federal and state laws against eavesdropping emerged as an important media law issue this past year. This is an area in which there was virtually no case law prior to the 1990's dealing with the liability, if any, of those who are recipients and subsequent publishers/users of what is shown to be illegally obtained tapes of conversations. In *Boehner v. McDermott*, No. 98-7156 (D.C. Cir. September 24, 1999), the court reinstated a claim by Congressman Boehner (R - Ohio) against Congressman McDermott (D - Washington) for disclosing to news media a recording of Boehner's mobile-phone conference call with then-Congressman Newt Gingrich and other members of the House of Representatives. The court did not have to confront the question whether the press can be punished for publishing communications it knew to have been unlawfully obtained. This issue is still pending before the Third Circuit in *Bartnicki v. Vopper*, No. 98-7156 (3d Cir.). Deciding this question under state eavesdropping law, a Louisiana Court of Appeal held that a newspaper could be held liable for publishing excerpts from conversations that were allegedly illegally recorded by a third party. *Central Newspapers, Inc. v. Johnson*, 722 So. 2d 1224 (La. Ct. App. 1998), cert. denied, (U.S. Nov. 1, 1999). According to the Louisiana court, the privacy rights at stake outweighed the First Amendment considerations in holding the newspaper liable. See pp. 43-45.

In a stunning result, a Michigan jury returned a $25 million verdict against the producers and distributors of the *Jenny Jones* show based on a claim that the show was negligent in the death of one of its guests at the hands of another guest. *Graves v. Warner Bros, et al.*, No. 95-494536-NZ Wch. Cir. Ct. May 7, 1999). See p. 61. Still ongoing in a Louisiana state court is the litigation brought against the director and distributors of the motion picture *Natural Born Killers*, alleging that the defendants intended to inspire viewers to commit crimes. The so-called Hit Man case, *Rice v. Paladin Press*, settled shortly before trial was to begin in Spring after the Fourth Circuit reversed the dismissal of the claims. 128 F.3d 233 (4th Cir. 1997).

The law of reporter's privilege recovered somewhat this past year. The Second Circuit reversed itself on the issue of whether a qualified privilege applies to reporters' nonconfidential materials. *Gonzales v. National Broadcasting Co.*, No. 97-9454 (2d Cir. August 27, 1999) See p. 23. Having determined last year that the privilege did not exist at all, the court on reconsideration held that a qualified privilege does exist for nonconfidential material, but it then articulated a less demanding standard for the requesting party to obtain such material.

On the libel front, the decade started with the prediction that *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), would lead to the demise of the opinion defense. That has not happened. While courts continue to grapple with the doctrinal distinctions between fact and opinion, this area continues to yield thoughtful decisions. The Tenth Circuit issued its most detailed analysis to date of *Milkovich* in holding that a bond rating report constituted protected opinion. See pp. 9-12.

On the other hand, courts in California and New York rendered decisions in the libel area containing bare-knuckled criticism of the tabloid press. In *Kaelin v. Globe Communications Corp.,*
162 F.3d 1036 (1998), the Ninth Circuit held that a tabloid cover headline could support a claim for defamation even when the inside story dispelled the defamatory insinuation of the headline. Moreover, the court found sufficient evidence of actual malice in an editor's testimony that, in part, merely acknowledged that the magazine sells itself on its cover. See p. 16. A New York appellate court issued two decisions holding that the spouses of prominent figures in the entertainment business were not public figures nor were the reports on celebrity divorces of any public concern. *Krauss v. Globe Int'l, Inc.*, 251 A.D.2d 191, 674 N.Y.S.2d 662, 26 Media L. Rep. 2118 (1st Dep't 1998); *Huggins v. Moore*, 689 N.Y.S.2d 21, 27 Media L. Rep. 1691 (1st Dep't 1999).

Texas appellate courts, though, continued to stand out in protecting the press on a range of libel law issues. Two Texas cases cast doubt on the viability of libel by implication claims where the stated facts are substantially true. *KTRK Television, Inc. v. Fowkes*, 981 S.W.2d 779 (Tex. App. - Houston [1st Dist.] 1998, pet. denied); *Texas Monthly, Inc. v. Transamerican Natural Gas Corp*, 1998 WL 437417 (Tex. App. - Houston [1st Dist.] 1998). In *KTRK Television*, the court noted that "the notion that a plaintiff can assert a cause of action for libel by implication, where the facts stated are substantially true, has been rejected by the Texas Supreme Court." See pp. 6-7. The TEXAS SURVEY also reports a recent trend for state courts to recognize and apply a principle very close to neutral reportage, without using the term, requiring that a libel defendant need only prove "that third party allegations reported in the questioned broadcast were in fact made and under investigation in order to prove substantial truth; media defendants need not demonstrate the underlying allegations are substantially true." *Dolcefino v. Turner*, 987 S.W.2d 100, 119-21 (Tex. App. - Houston [14th Dist.] 1998, pet. filed); *American Broadcasting Cos. v. Gill*, 1999 WL 391645 (Tex. App. - San Antonio June 16, 1999, no pet. h.). See p. 20. Finally, according to the TEXAS SURVEY, it has also become common for courts to grant summary judgment in public figure/official cases when a defendant has submitted affidavits stating that journalists believed the story at issue to be true and the plaintiff has been unable to offer affirmative evidence that would support a finding of actual malice. *HBO v. Huckabee*, 1998 WL 889828 (Tex. App. - Houston [14th Dist.] pet. granted). See p. 29.

As the decade and the millennium both come to a close, it is worth noting that the Media Libel Survey reports decisions of note in the context of the Internet. The development of this medium in the 1990's and its potential to be a dominant medium in the new millennium are facts that have surely captured most media lawyers' attention. Courts continue to grapple with questions of jurisdiction. See p. 30. Other doctrinal issues will undoubtedly also play out with interesting results. Witness the actions of the federal court in D.C. when faced with Internet gossip Matt Drudge. Last year the court decided that Drudge was not a journalist, at least with regard to the privilege afforded newsgatherers under D.C.'s long arm statute, stating "Drudge is not a reporter, a journalist or a newsgatherer." *Blumenthal v. Drudge*, 992 F. Supp. 44, n.18 (D.D.C. 1998). But when faced with a reporters' privilege issue in the same case a year later, the court denied plaintiff access to information about Drudge's sources and the membership of his legal defense fund in the absence of a strong showing of need sufficient to overcome First Amendment protections. *Blumenthal v. Drudge*, 1999 WL 304039, at *7-8 (D.D.C. April 22, 1999) See p. at 24.
A. FINDINGS OF THE LDRC 50 STATE SURVEY 1999-2000: MEDIA LIBEL LAW

1. Defamatory Meaning

Examples of Defamatory and Nondefamatory Speech

Defamatory

In decisions this past year, courts have held the following capable of defamatory meaning: descriptions of plaintiff as a "sex offender" and a "pedophile," *Miles v. National Enquirer, Inc.*, 38 F. Supp. 1226 (D. Colo. 1999); a newspaper quote that "there simply was no family support to encourage" a teenager "to continue her education," *Holtzscheiter v. Thompson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497, 26 Media L. Rep. 2537 (1998) (Holtzscheiter II); the identification of plaintiffs as "prime suspects" in conjunction with other statements implying their guilt, notwithstanding an attempted disclaimer stating "I'm not saying that they are responsible for this atrocious act." *Harcrow v. Struhar*, 236 Ga. App. 403, 511 S.E.2d 545 (1999); a letter sent by the chairman of the board of a non-profit organization to its members noting questions raised about "the morality issue," "wanton expenditures," and the "falsification of documents," *Meade v. Anderson*, No. CIV.A.97-CV-365, 1999 WL 58640 (E.D. Pa. Jan. 28, 1999); and statements implying that a judge was a homosexual and pedophile whose decisions could be influenced by sending "a young man in front of Judge Hoch, as he prefers boys in shorts." *Hoch v. Rissman, Weisberg, Barrett*, 1999 WL 445800 (Fla. App. 5 Dist. 1999).

A letter sent by an airline to ticket purchasers alerting them that their tickets had been reported as stolen and urging them to seek refunds supports a defamatory inference against the ticket seller that "smacks of criminality." *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998). Similarly, a letter sent to the plaintiff's customers, alluding to theft (without actually accusing plaintiff of criminality or even naming plaintiff) was found to be defamatory in *Beverly Enterprises, Inc. v. Trump*, 1999 U.S. App. LEXIS 14206 (3d Cir. June 28, 1999).

Radio

Radio talk show sidekicks were put on notice that their Ed McMahon-like assents to the host's pronouncements can spell defamation liability. *Van Horne v. Muller*, 185 Ill. 2d 299, 705 N.E.2d 898, 27 Media L. Rep. 1010 (1998), *cert. denied*, (1999). After radio shock jock "Mancow" Muller described on-air that he was physically assaulted by former Chicago Bears linebacker Keith Van Horne, his sidekick stated, among other things, "I really believe that," and "It happened this morning." These and other comments rendered the sidekick an active participant in the publication of Mancow's defamatory charge of assault against Van Horne.

Headlines

Several cases this past year examined the impact of headlines. In *Q International Courier, Inc. v. Seagraves*, 27 Media L. Rep. 1982 (D.D.C. 1999), the D.C. District Court endorsed what it described as "the majority rule that headlines are to be construed in conjunction with their accompanying articles." Thus, read in context the term "nailed" in the headline "Two Firms
Nailed for Postage Fraud” could not reasonably be interpreted as meaning that plaintiffs were “arrested.” See also Early v. Toledo Blade, 26 Media L. Rep. 2569, 2586 (Lucas App. 1998) (alleged defamatory newspaper headline must be construed together with article in determining the defamatory effect of either).

A Connecticut court held that inaccurate headlines are not libelous if they are correctly clarified by the text of the article. Perugini v. Journal Publishing Co., 1999 WL 115126 (Conn. Super. 1999). In contrast, in Kaelin v. Globe Communications Corp., 162 F.3d 1036, 27 Media L. Rep. 1142 (9th Cir. 1998), the Ninth Circuit held that a tabloid cover headline that is susceptible of a defamatory meaning could constitute the basis of a libel action, when the accompanying article, published 17 pages inside the issue, dispelled the defamatory insinuation of the headline. Globe’s National Examiner featured a front page headline which stated the following: “COPS THINK KATO DID IT!...he fears they want him for perjury, says pals.” In viewing the evidence in the light most favorable to Kato Kaelin, the court held that reasonable jurors could find that the headline falsely insinuated that the police believed Kaelin to be guilty of the murders of Nicole Brown Simpson and Ronald Goldman, and that the headline’s false insinuation was not necessarily cured by the non-defamatory story about Kaelin 17 pages inside the issue. Id. at 1037.

Not Defamatory


The term “patronage” in a newspaper article did not imply that the plaintiffs were guilty of criminal or immoral behavior and thus was not capable of defamatory meaning. Rush v. Philadelphia Newspapers, Inc., No. 96-360, 1999 WL 373144 (Pa. Super. June 9, 1999). In a similar vein, two cases held that accusations of violations of ordinances, as opposed to criminal laws, cannot be regarded as defamatory since such violations do not involve wrongdoing or crime. Fitzgerald v. Town of Kingston, 13 F. Supp. 2d 119, 126 (D. Mass. 1999) (accusation of speeding); Jordan v. City of Kansas City, 972 S.W.2d 319 (Mo. App. W.D. 1998) (violation of a municipal ordinance).

Defamation by Implication or Innuendo

Two Texas cases affirmed that state’s hard line on the viability of libel by implication claims where the stated facts are substantially true. KTRK Television, Inc. v. Fowkes, 981
S.W.2d 779, 789 (Tex. App. - Houston [1st Dist.] 1998, pet. denied); see also Texas Monthly, Inc. v. Transamerican Natural Gas Corp., 1998 WL 437417 (Tex. App. - Houston [1st Dist.] 1998), motion for rehearing pending). In KTRK Television, the court noted that “the notion that a plaintiff can assert a cause of action for libel by implication, where the facts stated are substantially true, has been rejected by the Texas Supreme Court.” These cases rely on Randall’s Food Market, Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995), a slander case rejecting a claim that a literally true statement could constitute actionable slander because those who heard the statement might infer a false and defamatory fact. Earlier cases had held that true statements might be actionable if the omission of other facts creates a “false impression.”

Louisiana appears to have adopted a similar approach, at least regarding public figures and matters of public concern. In Fitzgerald v. Tucker, 1999 WL 451100 (La. 1999), the Louisiana Supreme Court held that “truthful facts which carry a defamatory implication can only be actionable if the statements regard a private individual and private affairs. Where public officers and public affairs are concerned, there can be no libel by innuendo.” In Fitzgerald, the defendant participated in a televised interview regarding licensing of substance abuse counselors. While discussing the proposition that “bogus” certificates could enable a person to “masquerade” as a substance abuse counselor, the defendant held the plaintiff’s license up to the camera. Although that particular license had been voided for an administrative error, a new license had been issued to plaintiff, who was a properly licensed counselor. The Louisiana Supreme Court reversed a jury verdict for plaintiff. According to the court, the issuance of improper licenses unquestionably was of public concern, and therefore plaintiff had no action for defamation by implication based on the truthful facts presented by defendant.

A federal court in Minnesota held that to be actionable, a plaintiff must prove not only that defamatory implications can be reasonably derived from the broadcast but also that the defendant intended those implications. Johnson v. Columbia Broadcasting System, Inc., 10 F. Supp. 2d 1071, 27 Media L. Rep. 1148 (D. Minn. 1998). The Johnson Court set forth the following test for libel by implication: 1) is the alleged statement capable of being proved true or false, 2) is the relevant portion of the broadcast susceptible to the implication alleged, 3) did the defendant intend the implication alleged, 4) is the alleged implication in fact false, and 5) would a person in exercise of reasonable care have known that the implication was false. Id. at 1076.

The District of Columbia federal district court also held that a plaintiff must prove that a defamatory implication was intended or endorsed. Cline Watkins v. Johnson Pub’g Co., 26 Media L. Rep. 1986, 1987 (D.D.C. 1998). This case involved the publication of the plaintiff’s photograph -- shown operating a printing press at the Bureau of Printing and Engraving -- to illustrate an article about money missing from the Bureau. The court rejected plaintiff’s claim that the illustration implied that she was stealing money where the text and graphic elements of the article provided no evidence that this meaning was intended.

Two cases examined the interesting question of whether intonation or emphasis could create defamatory implications. An Illinois court, on motion for reconsideration, dismissed a
complaint based on a reporter's incredulous or sarcastic tone of voice. *Hanash v. WFLD Fox Television*, 1998 WL 781113 (N.D. Ill. November 4, 1998). Plaintiff alleged that the reporter's voice inflection implied plaintiff was lying. The court held that the intonation was not an external fact to support a defamatory meaning. Similarly, in *Smith v. Maldonado*, 85 Cal. Rptr. 2d 397 (1999), a California appellate court held that a truthful news article that was copied and disseminated with one paragraph intentionally highlighted did not create a defamatory innuendo.

**Incremental Harm / Libel-Proof Plaintiff**


Applying the "libel-proof plaintiff" doctrine for the first time at the pleading stage in the Second Circuit, the court in *Cerasani v. Sony Corporation*, 991 F. Supp. 343 (S.D.N.Y. 1998) found that the plaintiff's reputation was so tarnished, he could be held to be a "libel-proof" plaintiff as a matter of law. Likewise, in Tennessee a plaintiff who was a convicted first-degree murderer on death row was held libel-proof, as "his character is judicially declared to be evil" and neither his reputation nor character could be impaired by allegedly libelous statements made by the Governor. *Coker v. Sundquist*, slip op., No. 01A01-9806-BC-00318, 1998 Tenn. App. LEXIS 708 (Tenn. Ct. App., Middle Section, Oct. 23, 1998), app. denied (Tenn. May 10, 1999). The notorious Dr. Jack Kevorkian was also held to be "virtually libel-proof" in *Kevorkian v. American Medical Association*, (Mich. Ct. App. Aug. 6, 1999).

**Innocent Construction**

Illinois' adherence to the innocent construction doctrine proved beneficial to the media in *Wilson v. Arts & Entertainment Network*, 1998 WL 704081 (N.D. Ill. September 25, 1998). There the court innocently construed an allegedly defamatory "voiceover" statement, "those who enforced the law were the cheapest to buy," which a television program aired during the introduction to an interview with the plaintiff, a former police officer. According to the court, the voice-over could reasonably be interpreted as referring to persons other than the plaintiff.

Although Missouri has not expressly adopted the innocent construction doctrine, an appellate court appears to have endorsed it, ruling that "if a statement is capable of two meanings (one defamatory and one nondefamatory), and can reasonably be construed in an innocent sense, the court must hold the statement nonactionable as a matter of law." *Ampleman v. Schweppe*, 972 S.W.2d 329, 333 (Mo. App. E.D. 1998).

In contrast, a Georgia decision reaffirmed that state's rejection of the doctrine. *Douglas v.*
Maddox, 233 Ga. App. 784, 746, 505 S.E.2d 43, 45 (1998). The court found that the term “indicted,” as used in a press release relating to civil proceedings, was clearly capable of two interpretations, one asserting criminality; the other, not. The court held it was for the jury to say which of the two meanings would be attributed to it.

Of and Concerning

For the first time in recent history, the D.C. Circuit had occasion to consider the “of and concerning” element in a defamation case. In Croixland Properties Ltd. Partnership v. Corcoran, 174 F.3d 213, 216 (D.C. Cir. 1999), the D.C. Circuit held that the “of and concerning” requirement is satisfied where “the statements at issue lead the listener to conclude that the speaker is referring to the plaintiff by description, even if the plaintiff is never named or misnamed.” In Croixland, the owner of a dog racing track brought a defamation action against Washington lobbyists who allegedly thwarted the plaintiff’s plans for a casino by falsely stating to government decision makers that the track’s owner had connections to organized crime. However, the defendant lobbyists either misidentified or did not identify the true owner of the track in the challenged statements. The district court granted the defendants’ motion to dismiss for failure to state a claim, concluding that the alleged defamation was not “of and concerning” the plaintiff. The D.C. Circuit reversed, concluding that the failure to identify the plaintiff explicitly did not remove the perception that the plaintiff, as the true owner of the track, was tied to organized crime. Id. at 216-17.

Statements about “police misconduct” were not “of and concerning” any one police officer. Early v. Toledo Blade, 26 Media L. Rep. 2569 (Lucas App. 1998).

Publication

Two recent holdings rejected the so-called “compelled self-publication” doctrine. In Valencia v. Citibank International, 728 So. 2d 330 (Fla. 3d DCA 1999), the court held that it was not prepared to create an exception to the requirement of Florida law that the defendant must publish the defamatory statement to a third party for there to be an action for defamation. The Tennessee Supreme Court also rejected the principle, reversing a decision of the Tennessee Court of Appeals and holding, in a case by a discharged employee against her former employer, that compelled self-publication does not satisfy the publication element essential to a prima facie case of defamation. Sullivan v. Baptist Memorial Hospital, slip op., No. 02-S-01-9804-CV-00032 (Tenn. July 12, 1999).

2. Opinion

Decisions involving the defense of opinion in the wake of Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) continue to provide interesting analyses as courts attempt to distinguish between fact and opinion.
In *Jefferson County School Dist. v. Moody's Investor's Services*, 175 F.3d 848, 27 Med. L. Rep. 1737 (10th Cir. 1999), the Tenth Circuit provided its most comprehensive analysis to date of *Milkovich* in concluding that a bond rating report which was alleged to have been motivated by ill will (i.e., plaintiff's selection of another rating agency) nevertheless constituted protected opinion. In court considered “(1) the phrasing of the allegedly defamatory statement; (2) the context in which the statement appears; (3) the medium through which it is disseminated; and (4) the circumstances surrounding its publication.” *Id.* at 1740. It applied these considerations in concluding that the plaintiff's “failure to identify a specific false statement reasonably implied from Moody's article, combined with the vagueness of the phrases ‘negative outlook’ and ‘ongoing financial pressures’ indicates that Moody's article constitutes a protected expression of opinion.” *Id.* at 1743. This First Amendment protection was further extended as complete defenses to plaintiff's other tort claims, as well as to its antitrust claims.

Several other cases applying *Milkovich*, however, sustained liability. In *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d. 317, 708 N.E.2d 441 (1999), the court applied the *Milkovich* test, acknowledging that the use of phrases such as “I believe,” “I predict,” and “it is my judgment” were not sufficient to turn a factual assertion of misconduct into opinion. A federal court in Nevada, relying on *Milkovich*, held that statements regarding the public's likely reaction to a coach's termination prefaced by “when it comes out in the open” were actionable as the “articulation of an objectively verifiable event.” *Riggs v. Clark County School*, 19 F.Supp.2d 1177 (D.Nev. 1998).

Other statements found not to be protected opinion included: a defendant's statement that “[the plaintiff] had either intentionally falsified information provided to the bank or had been negligent in failing to verify the information,” *Arlington Financial Corp. v. Ben Franklin Bank*, 1999 WL 89567 (N.D. Ill. February 16, 1999); a statement that “Compuware is a terrible company for which to work and will fire unproductive employees,” because the second portion of the statement is capable of being proven true or false and also provides a factual basis for the first part of the statement, *Pivotal Development Solutions, Inc. v. Hoffman*, 1998 WL 748272 (N.D. Ill. October 22, 1998); and a statement that a basketball scout had “destroyed and undermined the girls' program” contained factual assertions sufficient to defeat a motion to dismiss, *McQueen v. Fayette Cnty. School Corp.*, 1999 WL 326281 (Ind. App. 1999).

In *Anson v. Paxson Communications Corporation*, 24 Fla. L. Wkly D1112 (Fla. 4th DCA 1999) (reversing grant of motion to dismiss on opinion grounds) the court held that the allegations of the complaint must be taken as true on a motion to dismiss, therefore the statements at issue could not be opinion as a matter of law (also quoting *Milkovich* as limiting the opinion defense). In another Florida case relying on language from *Milkovich*, the court found that the statement “we do not believe [plaintiff] is an honest company,” could be actionable. *Centro Nautico v. International Miami*, 23 Fla. L. Wkly. D2321 (Fla. 1998). The Court held that the broad *Gertz* opinion privilege dictum had been greatly narrowed by *Milkovich*, finding that the language used in the case at bar could be understood as “an attempt to mask a positive assertion of dishonesty.”
On the other hand, several decisions involving heated words in the context of political
debates received protection under the rubric of rhetorical hyperbole. In *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 701 N.E.2d 99 (1998), the (former) treasurer of (former) Illinois Senator Carol Moseley-Braun’s re-election campaign sued for defamation based on a campaign committee member’s statement that he was “fired for incompetence.” The court affirmed dismissal on grounds that the “vague and general” statement was non-actionable opinion. Moreover, “[in] light of today’s ever controversial political climate . . . the public most likely understood [defendant’s] statement as substanceless rhetoric.” In *Arrington v. Palmer*, 971 P.2d 669 (Colo. App. 1998), the court held that statements made in the context of a campaign that a political candidate had “in the past bullied and physically threatened those who disagreed with him” could not reasonably be interpreted as stating actual facts about the candidate. In another Colorado case, allegedly defamatory statements made in a recall petition concerning the plaintiffs’ compliance with statutory open meetings requirements were held to be the political opinions of dissatisfied citizens and not assertions of fact. *Lockett v. Garrett*, 1999 WL 374083 (Colo. App. June 10, 1999).

Similarly, statements made by a county commissioner at a news conference, alleging that a taxpayer group’s newspaper advertisement contained “bare faced lies,” and that the group itself was a “ruse,” were held not defamatory where the statements were made in the context of a heated public debate. *Mast v. Overson*, P.2d 928, 932-33 (Utah App. 1998). Likewise, in *Beverly Enterprises, Inc. v. Trump*, 1999 U.S. App. LEXIS 14206 (3d Cir. June 28, 1999), the Third Circuit held that the defendants’ alleged statements at political meetings that the plaintiff was a “criminal” and a “union buster” who was “part of that World War II generation that danced on the graves of Jews” were merely vigorous rhetorical hyperbole and not susceptible of a defamatory meaning. And the Ninth Circuit held that a statement that a union official was a “Jimmy Hoffa” was “the type of rhetorical hyperbole or caustic attack that a reasonable person would expect to hear in a rancorous political debate involving money, unions, and politics [and thus] could not give rise to a cognizable claim of defamation.” *Gilbrook v. City of Westminster*, 1999 U.S. App. LEXIS 9764, *54 (9th Cir. 1999).

Stating that a record label was akin to a “bank robber” and had committed a “heist,” a “crime,” and a “theft,” was held to be hyperbole because the statements were made “in the context of a news story or program where both sides of [a] lawsuit were present to discuss the suit.” *Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1159 - 62 (C.D. Cal. 1998). See also *Cook v. WHDH-TV, Inc.*, 8 Mass. L. Rprr. 589, 591, 27 Media L. Rep. 1242 (Worcester Cty. Superior Court 1998) (a television reporter’s on-camera statement to the subject of her investigative report, “I call that stealing,” in the context of a request to the subject to answer allegations was protected opinion).

Characterizing a person as anti-Semitic, prejudiced against gays, and mentally unstable, without implying the existence of any defamatory facts, was held to be opinion in *Tech Plus, Inc. v. Ansel*, 9 Mass. L. Rprr. 671, 674-77 (Norfolk Cty. Superior Court 1999); so too the statements that a person is “racist” and a “harasser,” *Puccia v. Edwards*, C.A. No. 98-00065 (Norfolk Cty. Superior Court 1999); and the statement “We need to get rid of the SOB Strasburger before he
hurts one of those girls” and the term “pervert,” Strasburger v. Board of Education, 143 F.3d 351 (7th Cir. 1998).

Some recent Texas cases suggest that in that state, pre-Milkovich cases discussing opinion may still be good law. In American Broadcasting Cos. v. Gill, 1999 WL 391645 (Tex. App. – San Antonio June 16, 1999, no pet. h.), the court noted that opinion is nonactionable under the Texas Constitution, thus applying pre-Milkovich law; and in Brewer v. Capital Cities/ABC, Inc., 986 S.W.2d 636, 643, 27 Media L. Rep. 1235 (Tex. App. – Fort Worth 1998, no pet.), the court held that an opinion cannot form the basis of a defamation action in Texas, particularly “when the facts underlying an opinion are set out in the publication itself.” In Brewer, a statement in a report on nursing homes that “the most likely excuse for patient neglect is profiteering on the part of the owners” was held to be nonactionable opinion in part because “profiteering” was simply a “likely” explanation.

3. Truth/Falsity

Scope of the Truth Defense

A Massachusetts case applied the “substantial truth” doctrine to a defamation claim by a college professor against the student-author of an article in a college newspaper. Martin v. Roy, 9 Mass. L. Rptr. 522, 526 (Middlesex Cty. Superior Court 1998). The professor claimed he was defamed by the statement that he had gained tenure “only by successfully suing the College for racial discrimination.” In fact, the professor had sued the college for racial discrimination and had alleged maltreatment with respect to his tenure decision, but the suit did not come until well after he had been awarded tenure. The court held, however—after a bench trial—that the conclusion the reporter drew from the erroneous statement “that the College might be exercising particular restraint in dealing with [the professor] for fear of being sued, follows at least as strongly from the actual facts as it would from the erroneous version.”

In Smith v. Cuban American National Foundation, 731 So. 2d 702 (Fla. 3d DCA 1999), a Florida appellate court reversed a jury verdict for plaintiff on the grounds of substantial truth. The trial court erred by not allowing the jury to consider the statements in the context of the documentary in which they were made. The court also rejected one of Florida’s standard defamation jury instructions, which had been given by the trial court, as failing to properly instruct the jury on substantial truth. As a result, the Florida committee on standard instructions is reviewing the defamation instruction.

A Connecticut court held that a statement by the defendant’s lawyer about the plaintiff that “some medical, legal and law enforcement officials say” the plaintiff molested his minor children was not, in the plaintiff’s libel suit against the lawyer, protected by the defense of truth; the issue was not whether the cited sources said it, but whether the underlying accusation was accurate. Wilkinson v. Schoenhorn, 1999 WL 203750 (Conn. Super. 1999). Similarly, in Republic
Tobacco, L.P., v. North Atlantic Trading Co., 1999 WL 261712 (N.D. Ill. April 9, 1999), the court rejected the defendant’s argument that the statements about the plaintiff in the defendant’s letters to customers were “literally true” because they were prefaced with the phrase “the complaint alleges”; rather, the court found it “plain that [the defendant] was conveying the substance of its allegations . . . and it is the substance of those allegations that [the plaintiff] is claiming to be false.”

In what appears to be an issue of first impression in the Third Circuit, a district court in Pennsylvania granted a motion to dismiss on the ground that the defamatory statements at issue (made by a group of Orthodox Jewish rabbis about plaintiff, a member of their community) raised issues “uniquely religious in tenor and content, the resolution of which goes to the very heart of ecclesiastical concern, including discipline, faith, and religious rule, custom, and law.” Klagsbrun v. Va’ad Harabonim of Greater Monsey, 1999 U.S. Dist. LEXIS 9408 (E.D. Pa. June 15, 1999). Although the court dismissed on subject matter jurisdiction, it added that determining the truth or falsity of the allegedly defamatory statements would require the court to “delve dangerously into questions of doctrine and faith” in violation of the Establishment Clause.

4. Fault

Determination of Public Figure Status under Gertz

Following up on a case reported on in last year’s New Developments BULLETIN, the Fourth Circuit reversed a district court’s finding that a secretary in the offices of the Democratic National Committee (“DNC”) at the time of the Watergate break-in was an involuntary public figure. Wells v. Liddy, 1999 WL 547916 (4th Cir., July 28, 1999), rev’ng, 1 F. Supp.2d 532 (D. Md. 1998). Because stories had connected DNC personnel to arranging dates with a prostitution ring, one theory had developed over the years that the “real” reason for the burglary was to obtain information linking the DNC to this ring. G. Gordon Liddy, leader of the burglars, contended that he later came to believe this theory as the true rationale for the event, which he described in public accounts that tied plaintiff to contacts with the ring, and Wells brought a libel action. Granting summary judgment to Liddy, the district court based her involuntary public figure status on its holding that plaintiff simply had the misfortune to have been involved in that incident, and, therefore, “stood in a path of legitimate inquiry” about this immensely important public controversy.

The Fourth Circuit rejected misfortune as the touchstone for public figure status. Rather, it held that a private person could not be subjected to involuntary public figure status unless she had taken some action to voluntarily assume the risk of publicity. In addition, the court limited involuntary public figure status to “central figures” in a “significant public controversy,” and it required both that the controversy have existed prior to the allegedly defamatory publication and that plaintiff had not lost public figure status at the time of that publication.

While offering a rather expansive view of the limited-purpose public figure category, the
First Circuit expressed skepticism as to the existence of the third category of public figure identified in Gertz: the “person who becomes a public figure ‘through no purposeful action of his own.’” Pendleton v. City of Haverhill, 156 F.3d 57, 67 n.7, 26 Media L. Rep. 2281, 2287 n.7 (1st Cir. 1998). In Pendleton, the court reiterated the Supreme Court’s admonition that “the instances of truly involuntary public figures must be exceedingly rare.” Id., quoting Gertz, 418 U.S. at 345, 1 Media L. Rep. at 1642. In Faigin v. Kelly, F.3d, 1999 WL 498565, *4 n.2 (1st Cir. July 19, 1999), the court did not acknowledge such a category at all, though it appeared to expand the definition of limited-purpose public figure to include individuals “who are sucked into particular public controversies.”

The California Supreme Court declined to apply involuntary or limited purpose public figure status to a photographer who stood near Robert Kennedy shortly before Kennedy’s assassination. Khawar v. Globe International, Inc., 19 Cal. 4th 254, 259, 79 Cal. Rptr. 2d 2505 (1998), cert. denied, 119 S.Ct. 1760 (1999). The court noted that the plaintiff “was never a suspect in the government’s investigation of the assassination, [his] views on the assassination were never publicized, and [he] never sought to influence public discussion about the assassination.”

In WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571-72, 26 Media L. Rep. 2385 (Tex. 1998), the court applied the Fifth Circuit’s three-prong test for limited-purpose public figure status. It concluded that the plaintiff, a local television news reporter, became a public figure by “choosing to engage in activities that necessarily involved increased public exposure and media scrutiny.” 978 S.W.2d at 573. This approach was followed in American Broadcasting Cos. v. Gill, _ S.W.2d _, 1999 WL 391645 (Tex. App. - San Antonio June 16, 1999, no pet. h.), which directly quoted McLemore.


Several New York cases took a narrow view of the public figure issue. Two appellate court decisions decided that the spouses of prominent figures in the entertainment business were not
Several decisions examined the status of corporate plaintiffs. The Eighth Circuit in Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1116-17 (8th Cir. 1999), reaffirmed its earlier decision in Northwest Airlines, Inc. v. Astraea Aviation Services, Inc., 111 F.3d 1386, 1393-94 (8th Cir. 1997), again holding that a corporation is a public figure under Minnesota law.

The D.C. District Court held in Metastorm, Inc. v. Gartner Group, Inc., 28 F. Supp. 2d 665, 669, 27 Media L. Rep. 1433, 1436-37 (D.D.C. 1999), that the issuance of a press release announcing a marketing agreement between two corporations and the ramifications of that agreement for their customers created a public controversy for the purposes of establishing limited-purpose public figure status. The plaintiff corporation that aided in drafting the press release announcing its own participation in the agreement was held a limited-purpose public figure. In contrast, a Pennsylvania federal court held that a computer company, Hewlett-Packard, was not a limited purpose public figure where it issued press releases regarding its intent to develop a product similar to the one being developed by the defendant. Computer Aid, Inc. v. Hewlett-Packard Co., 1999 U.S. Dist. LEXIS 9243 (E.D. Pa. June 15, 1999).

Public Official Status

On the other hand, a Louisiana court found that the Administrative Director of the Louisiana State Board for Certification of Substance Abuse Counselors was not a public official, even though she was the sole employee of the state office, as her duties included typing, answering the phone, and paying bills for the Board. She was also held not to be a public figure. Fitzgerald v. Tucker, 715 So. 2d 1281 (La. App. 3d Cir. 1998), rev’d on other grounds and specifically reserving public official/public figure issue, 1999 WL 451100 (La. 1999).

Application of Actual Malice Rule

In Kaelin v. Globe Communications Corp., 162 F.3d 1036, 27 Media L. Rep. 1142 (9th Cir. 1998), the Ninth Circuit held that there was clear and convincing evidence of actual malice to survive a motion for summary judgment where an editor testified that a tabloid headline stating “COPS THINK KATO DID IT! . . . he fears they want him for perjury, say pals” was not “very accurate to the story”; that “the front page of the tabloid paper is what we sell the paper on, not what’s inside;” and that the word “it” could be understood to refer to murder.

Lawyers will be pleased to know that evidence that a film was under continuous legal reviews, that “legal problems” delayed its production, and that a filmmaker sought indemnity for libel claims from the producer was found insufficient to establish actual malice in a Texas court last year. HBO v. Huckabee, 1998 WL 889828 (Tex. App. – Houston [14th Dist.] pet. granted). The court also found that the editorial choice to exclude certain interviews is insufficient evidence of actual malice.

In a similar vein, another Texas court stressed that when a journalist knows that different parties have different versions of the facts, the journalist can accept one version over the other, or even decide not to report one side of the story. HBO v. Harrison, 983 S.W.2d 31, 42-43 (Tex. App. – Houston [14th Dist.] 1998, no pet.) (editorial choices provide no evidence of actual malice). See also Dolcefino v. Turner, 987 S.W.2d 100, 119-21 (Tex. App. – Houston [14th Dist.] 1998, pet. filed) (same).

In Jenkins v. Liberty Newspapers, 89 Haw. 254, 971 P.2d 1089, 27 Media L. Rep. 1513 (1999), the Hawaii Supreme Court reviewed the actual malice standard in a misidentification case involving the use of confidential government documents. The court found (1) that publication of information from lawfully acquired government documents may not be penalized merely by virtue of the fact that the information was intended to be confidential; (2) inadvertent errors in publication are not evidence of actual malice, and (3) actual notice as to the confidentiality of the information is irrelevant to a finding of actual malice, so long as it is lawfully obtained. Moreover, the defendant’s failure to issue a timely correction or retraction could not be used as evidence of actual malice.

The Supreme Court of Indiana held in Journal-Gazette Co. v. Bandido’s, Inc., 1999 WL
(Ind. 1999), that actual malice was not established by the newspaper's failure to heed a judge's alleged "warning" concerning the sensitivity of health reports, departure from the newspaper's standards for headline writing, a refusal to retract the inaccurate headline, and the fact that the headline was revised for different editions of the newspaper.

In contrast, the Maine Supreme Court affirmed a finding of actual malice against a newspaper for publishing a defamatory news story when there was evidence that the reporter had been informed of the true facts four days before the story by a witness with knowledge. *Beal v. Bangor Pub. Co.*, 1998 ME 176, ¶¶ 12-13 714 A.2d 805.

In *Stokes v. CBS Inc.*, 25 F. Supp. 2d 992, 27 Media L. Rep. 1385 (D. Minn. 1998), the following factors were considered to evidence of actual malice to defeat a motion for summary judgment: the lack of time-sensitive deadlines which might otherwise excuse the media's failure to verify facts, the media's failure to ask critical questions, the existence of evidence that would undermine the credibility of a source, and the slanted perspective of the report suggesting a preconceived storyline.

A newspaper's publication of an anonymous "citizen's voice" column wherein the writer questioned whether the local sheriff was in the pay of drug dealers was "an extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers" and therefore supported a finding of actual malice. *Elder v. The Gaffney Ledger*, 333 S.C. 651, 511 S.E.2d 383 (Ct.App. 1999).

**Private Figure Standard under Gertz**

According to the 1999-2000 *MEDIA LIBEL SURVEY*, 43 jurisdictions apply the negligence standard to private figure defamation cases under *Gertz*; New York applies a gross irresponsibility standard in matters of public concern, a standard which is higher than negligence but not as demanding as actual malice; three jurisdictions require actual malice in matters of public concern; and two jurisdictions require actual malice in some circumstances.

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2. Alaska, Colorado and Indiana.

3. In Louisiana, private figure plaintiffs must establish 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
Kansas may be nearing an actual malice standard in cases of public concern. A federal court applying Kansas law stated that there is a qualified privilege for communications of public concern that requires a plaintiff to establish actual malice on the part of the defendant to recover. *Bosley v. Home Box Office, Inc.*, Civ. No. 98-2343-GTV (D. Kan. July 14, 1999). This ruling casts doubt on whether negligence is the standard of liability in Kansas for defamation of a private individual.

This year the Indiana Supreme Court issued its long-awaited opinion in *Journal-Gazette Co. v. Bandido's, Inc.*, 1999 WL 418697 (Ind. 1999). In a 3-2 decision that produced four separate opinions, the court reaffirmed that a private individual must prove actual malice if the defamatory statement involves matters of public concern. The decision upheld the 25-year-old standard established in *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*

**Standard for Nonmedia versus Media Defendants**

In Delaware, the fact that an individual defendant had a background as a writer of several articles, and had attempted unsuccessfully to publish an article about the events surrounding the litigation at issue did not change her status as a non-media defendant subject to Delaware's strict liability standard in private figure/private interest cases. *Kanaga v. Gannett Co., Inc.*, No. 92C-12-182-JOH (Del. Super. Ct. 1998).

In *Fitzgerald v. Tucker*, 715 So. 2d 1281 (La. App. 3d Cir. 1998), an appellate court in Louisiana affirmed a defamation jury verdict against a non-media defendant, and stated on the issue of malice, "Because Fitzgerald is a private citizen, malice would be implied if she proved that the statements Tucker made were false." The Louisiana Supreme Court later reversed this decision on other grounds and specifically reserved ruling on the correctness of this holding.

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

The D.C. district court has determined, "This Circuit has defined legitimate public interest broadly. This is in keeping with First Amendment jurisprudence which long has recognized that matters of public concern exceed the purely political." *Metastorm v. Gartner Group, Inc.*, 28 F. Supp. 2d 665, 670, 27 Media L. Rep. 1433, 1437 (D.D.C. 1998) (citations omitted). In *Metastorm*, the district court held that an industry analyst's published report regarding a marketing agreement between two corporations involved a matter of legitimate public interest.

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In New York, an appellate court in *Huggins v. Moore*, 689 N.Y.S.2d 21, 27 Media L. Rep. 1691 (1st Dep’t 1999), seemingly confusing the public concern and public figure tests, held that because the plaintiff’s divorce from a singer was not a matter of public concern, New York’s gross irresponsibility standard in matters of public concern should not apply. The court stated that “the public controversy ‘must be a real dispute, the outcome of which affects the general public . . . in an appreciable way’” in order for the standard to apply. Leave to appeal the decision was granted by the New York’s Court of Appeal.

5. Liability for Republication

A Minnesota court held that a newspaper that republishes an article from a reputable wire service is not liable for defamation. *Cole v. Star Tribune*, 581 N.W.2d 364, 26 Media L. Rep. 2415 (Minn. Ct. App. 1998) (finding no journalistic obligation to independently verify an Associated Press story). However, in *Jewell v. NYP Holdings*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998), the “wire service” privilege was held to be unavailable where reporters could not recall the specific wire reports on which they claimed to have relied.

In *Jenkins v. Liberty Newspapers*, 89 Haw. 254 971 P.2d 1089, 27 Media L. Rep. 1513 (1999), the Hawaii Supreme Court held that liability for republication is dependent upon proof that the original publisher acted with actual malice in the initial publication of the defamatory statement.

6. Privileges

**Fair Report**

In *Baktiarnejad v. Cox Enters.*, No. E-98VS0147570E (Ga. Super. Ct. Fulton County May 24, 1999), a Georgia court rejected the contention that the fair report privilege is a conditional privilege which disappears in the face of actual malice, citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975). However, in a very recent opinion in the Northern District of Georgia, the court cited Georgia law in stating that the fair report privilege is qualified, and can be defeated by a showing of malice (though the opinion is a bit unclear as to which malice standard it adopts). *AirTran Airlines v. Plain Dealer Publishing Co.*, No. 1:98-cv-1750-CAM (N.D. Ga. Sept. 14, 1999). Likewise, dictum in *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 700 N.E.2d 1064 (1998), suggested that a showing of actual malice may result in the forfeiture of the fair report privilege in Illinois. And the Minnesota Court of Appeals recently held that in Minnesota the privilege given to reports of an official proceeding or document can be overcome by a showing of common law malice. *Moreno v. Crookston Times Printing Co.*, 594 N.W.2d 555 (Minn. Ct. App. 1999).

[fair report] privilege.” The court also found no abuse of the qualified privilege where an article based on a police press release stated that police “found” rather than “determined that” plaintiff was “taking shots at the Pennsylvania Turnpike” instead of “in the direction of” the Turnpike.

In a decision of note, the same district court held that the fair report privilege may not apply to press releases about a complaint provided to the media by the plaintiff’s law firm the night before the complaint was filed. See Computer Aid, Inc. v. Hewlett-Packard Co., 1999 U.S. Dist. LEXIS 9243 (E.D. Pa. 1999). Applying both Pennsylvania and New York law, the district court held that a jury could find that the press releases are not protected by the fair report privilege, and denied summary judgment for the law firm that disseminated them.

In Jenkins v. Liberty Newspapers, 89 Haw. 254, 971 P.2d 1089, 27 Media L. Rep. 1513 (1999), the Hawaii Supreme Court held that publication of information from lawfully acquired government documents may not be penalized because the government documents were intended to be confidential. In contrast, an Illinois court held in Lykowski v. Bergman, 299 Ill. App. 3d 157, 700 N.E.2d (1998), that statements to a third party concerning charges made to the Attorney Registration and Discipline Commission (ARDC) were not protected, because the public did not have a right to review charges that remain private and confidential until the ARDC decides to act on them.

Neutral Reportage

Without deciding whether the neutral report privilege exists for public figures, the California Supreme Court held that California does not recognize the privilege for reports regarding private figures. Khawar v. Globe International, Inc., 19 Cal. 4th 254, 258, 79 Cal. Rptr. 2d 178, 26 Media L. Rep. 2505 (1998). At issue in Khawar was a Globe magazine article that recounted allegations made in a book by a previously best-selling author that the plaintiff was the real assassin of Robert Kennedy. Having found that plaintiff was a private figure, the court concluded that recognizing the privilege in such circumstance would emasculate Gertz, upsetting the balance struck there for protecting the reputation of private figures.

In Texas, a recent trend is for courts to recognize and apply a principle very close to neutral reportage, without using the term. Under these cases, a libel defendant need only prove “that third party allegations reported in the questioned broadcast were in fact made and under investigation in order to prove substantial truth; media defendants need not demonstrate the underlying allegations are substantially true.” Dolcefino v. Turner, 987 S.W.2d 100, 109 (Tex. App. – Houston [14th Dist.] 1998, pet. filed). This extends to investigations or charges made even by non-governmental organizations or individuals. For example, the court in American Broadcasting Cos. v. Gill, 1999 WL 391645 (Tex. App. – San Antonio June 16, 1999, no pet. h.), held not actionable an accurate report of a Resolution Trust Corporation investigation.
Judicial and Official Proceedings Privileges

Regarding the absolute privilege commonly recognized for statements made leading up to or during a legal proceeding, a Connecticut court, in Wilkinson v. Schoenhorn, 1999 WL 203750 (Conn. Super. 1999) declined to find an absolute privilege protecting a lawyer’s statements made to the media, when they were not made during the course, or as part of, a bond hearing. Similarly, in Seidl v. Greentree Mortgage Co., 30 F. Supp.2d 1292 (D. Colo. 1998) (Colorado law) the court held that an attorney did not have an absolute privilege to make statements to the press or to post statements on the Internet for the purpose of publicizing the case.

Likewise, in Heldmann v. Tate, 1999 WL 353476 (Conn. Super. 1999) the court held that a NASD U-5 report accusing the plaintiff of intentional misappropriation of funds was not a quasi-judicial, legislative or judicial proceeding, and therefore was not protected by an absolute privilege.

However, an absolute privilege did apply to a lawyer’s defamatory statements concerning his client, made in his motion to withdraw as counsel, since they were made in the course of a judicial proceeding. Dadic v. Schneider, 722 So. 2d 921 (Fla. 4th DCA 1998). See also Stucchio v. Tinch, 726 So. 2d 372 (Fla. 5th DCA 1999) (judicial proceedings privilege applied to statements voluntarily made by a witness in an interview conducted by a party’s attorney in preparation for trial); Simon v. Navon, 951 F. Supp. 279 (D. Me. 1997) (absolute privilege attaches to communications preliminary to judicial proceedings made by attorneys and parties involved in the action); Tanguay v. Asen, 1998 ME 277, 722 A.2d 49 (1998) (recognizing a privilege of counsel to inquire and develop evidence relevant to a legal proceeding without deciding if the privilege is qualified or absolute).

In Imperial v. Drapeau, 351 Md. 38, 716 A.2d 244 (1998), Maryland’s highest court extended the absolute judicial proceedings privilege to cover statements made in a letter of complaint to a public official which only indirectly and inadvertently led to an administrative (quasi-judicial) inquiry. In Shanks v. AlliedSignal, Inc., 169 F.3d 988, 992-996 (5th Cir. 1999), the Fifth Circuit ruled that under Texas law, the protection extended to communications during judicial, quasi-judicial or legislative proceedings was not simply a defense to liability, but in fact a total immunity from suit. The court also determined that a National Transportation Safety Board accident investigation did indeed qualify as a quasi-judicial proceeding for purposes of immunity from suit.

However, in Rockwood Bank v. Gaia, 170 F.3d 833 (8th Cir. 1999), the Eighth Circuit — deciding an issue of first impression — held that routine bank examinations are not judicial or quasi-judicial proceedings and, as such, participants in such examinations do not enjoy absolute immunity from statements made therein.

In Nevada the absolute privilege attached to judicial proceedings protects the republication of pleadings and other material from such proceedings. Sahara Gaming v. Culinary Workers, 115

**Official Immunity**

The Guam Supreme Court in *Hamlet v. Charfauros*, 1999 Guam 18 (1999), held that the playing by a Senator on the floor of the legislature a tape apparently containing the unauthorized recording of a conversation was privileged pursuant to the Speech or Debate provision of the Organic Act of Guam which provides that “[n]o member of the legislature shall be held to answer before any tribunal other than the legislature itself for any speech or debate in the Legislature.” 48 U.S.C. § 1423c(b)(1950).

While the Illinois Tort Immunity Act, 745 ILCS 10/2-201, provides public employees with immunity from suit for their acts of discretion, one court recently held that comments criticizing a teacher made by a high school principal to a newspaper were not considered unique to the job of a high school principal and were thus not entitled to immunity. *Bevell v. Breashears*, 1999 WL 102773 (N.D. Ill. February 22, 1999).

**Other Privileges**

The Missouri Supreme Court extended the absolute privilege of intra-corporate immunity to employees of state universities in *Dean v. Wissman*, No. 55832, slip op. at 3 (Mo. App. W.D. May 11, 1999). In a case involving a student’s reported theft of exams, the court determined that the university was a quasi-public corporation that must communicate on matters of student honesty and carry out its duties as a for-profit corporation would. As such, the court held that faculty members were entitled to the same protection as those in the private sector, and statements by faculty to each other about student stealing are the legal equivalent of speaking only to one’s self and are not considered published for the purposes of a libel action.

Likewise, in *Gumbhir v. Curators of the Univ. of Missouri*, 157 F.3d 1141 (8th Cir. 1998), cert denied, 119 S. Ct. 1143 (1999), the court examined Missouri law and held that internal communications circulated within a corporation (or, as in *Gumbhir*, a university) to resolve a personnel problem are entitled to a qualified privilege.

In *Wheeler v. Miller*, 168 F.3d 241, 252-53 (5th Cir. 1999), the Fifth Circuit ruled that statements by university faculty members about a student made to an internal committee and by the university to a prospective employer were covered by a qualified common interest privilege since they all shared a common interest in the student’s progress and his qualifications for a degree.
7. Discovery

Reporters' Privilege (Shield Law)

Following up on a case reported on in last year's Bulletin, the Second Circuit reversed itself on the issue of whether a qualified privilege applies to reporters' nonconfidential materials. On petition for rehearing in Gonzales v. National Broadcasting Co., Inc., Docket No.97-9454 (2d Cir. August 27, 1999), the court held that a qualified privilege does attach to a news program's outtakes even though the materials were not obtained under an agreement of confidentiality with a source. In its earlier panel decision in the same case, 155 F.3d 618 (2d Cir. 1998) the court had found that the privilege applied only to confidential materials. On reconsideration, the court recognized that its earlier decisions had extended the privilege to nonconfidential materials as well. While reversing itself on that point of law, the court found the standard for a litigant to obtain such material is less demanding than that to obtain confidential material. Ultimately, it again affirmed a district court order requiring NBC to produce the materials to litigants in a civil suit who had issued a non-party subpoena for them. The court found that the requesting parties had overcome the privilege by showing that the materials sought "are of likely relevance to a significant issue in the case and are not reasonably obtainable through other available sources."

Last year, the First Circuit ruled that the same considerations protecting journalists from intrusive discovery also apply to academic researchers. Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998). The court noted that journalists receive "a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information." Id. The protection applies at least to both confidential sources and confidential information, and may protect nonconfidential information as well. Id. at 715. The court set up a sliding scale of protection. Noting that "confidentiality comes in varying shapes and sizes," the court ruled that "determinations of where particular disclosures fall along the continuum of confidentiality, and related determinations anent the degree of protection that attaches to them, must take into account the totality of the circumstances." 162 F.3d at 715.

In California, where reporters enjoy state constitutional protection from discovery of their unpublished material, an appellate court suggested that prosecutors may also "have a federal due process right sufficient to overcome a claim of immunity under the state shield law." Miller v. Superior Court, 77 Cal. Rptr. 2d 827, 831 (Cal. Ct. App. 1998). In affirming an order requiring a television journalist to turn over to prosecutors outtakes of statements made by a murder defendant, the court also held that a "state due-process interest in the disclosure of evidence" might surpass the shield law's protections. Id. at 834.

However, this opinion was depublished when the California Supreme Court granted review late last year. Furthermore, other courts in California have shown greater resistance to relaxing the shield where a criminal defendant's due process rights are not at stake. Most significantly, an appellate court annulled an order of contempt against a reporter who refused to appear before a grand
jury to identify unnamed informants. In *Rezendes-Herrick v. Superior Court*, E023949 (Cal. Ct. App. June 15, 1999), the court recognized that "the People's 'due process' right is at least generally subordinate to that of the press under the shield law." A trial court also quashed the subpoena of a reporter's notes of an interview with a criminal defendant, limiting the prosecution to questioning the reporter about published information only. *People v. Bradley*, No. SCR 24398, slip op. at 2 (Super. Ct. Sonoma County Mar. 31 1999) (order granting in part motion to quash trial subpoena).

The D.C. District Court, in *Alexander v. Federal Bureau of Investigation*, 1998 WL 1049005, at *1 (D.D.C. May 28, 1998), quashed what it termed "an amazingly broad subpoena" when the plaintiffs moved to compel the production of documents by George Stephanopolous in connection with claims based on the White House "Filegate" scandal. The court considered the fact that Stephanopolous (who in the context of the case was found to be acting in a journalistic capacity) was not a party. It then found that the materials could not be compelled where "there has been no demonstration that the information sought . . . goes to the 'heart' of plaintiffs' case" and where the plaintiffs offered only "conclusory statements that the information cannot be obtained from alternative sources."

In *Blumenthal v. Drudge*, 1999 WL 304039, at *7-8 (D.D.C. April 22, 1999) the court also upheld the privilege, denying plaintiff access to information about Internet gossip columnist Matt Drudge's sources and the membership of his legal defense fund in the absence of a strong showing of need sufficient to overcome First Amendment protections. Interestingly, last year the same court decided that Drudge was a not a journalist, at least with regard to the privilege afforded newsgatherers under D.C.'s long arm statute, stating "Drudge is not a reporter, a journalist or a newsgatherer." *Blumenthal v. Drudge*, 992 F. Supp. 44, n.18 (D.D.C. 1998)

In the wake of enactment of a statutory privilege, the Florida Supreme Court held that independent of the evidentiary statute, Florida case law recognizes a reporter's privilege derived from the *Branzburg* decision of the United States Supreme Court. *State v. Davis*, 720 So. 2d 220 (Fla. 1998); *Morris Communications Corp. v. Frangie*, 720 So. 2d 230 (Fla. 1998). The Supreme Court held in *Davis* that the qualified privilege applies to both confidential and nonconfidential information, with exceptions for eyewitness observations, or physical evidence, of a crime. Where the qualified privilege applies, a movant seeking to overcome the privilege must show the reporter possesses relevant information which is not available from alternative sources, and that the movant has a compelling need for the information. In *Morris*, the Court held this privilege applies with equal force to criminal and civil proceedings. In a very important decision, the Fifth District held that the reporter’s privilege is not waived by a reporter’s voluntary disclosure of the privileged information to a third party, since a reporter’s privilege is not grounded on a prior promise of confidentiality. *Ulrich v. Coast Dental Services, Inc.*, 24 Fla. L. Wkly D1688 (Fla. 5th DCA 1999).

In *In re Paul*, 270 Ga. 680, 513 S.E.2d 219 (Ga. 1999), the Georgia Supreme Court held that an immediate appeal can be taken from any order requiring disclosure of statutorily privileged newsgathering information, stating "the public interest in a free press would be irreparably
harmed if review of the order compelling disclosure had to await a jury verdict.” *Id.* at 683. The court also explicitly recognized that the privilege “does not distinguish between the source’s identity and information received from the source or between non-confidential and confidential information.” *Id.* at 684.

In *Ayash v. Dana Farber Cancer Institute*, 46 Mass. App. Ct., 384, 706 N.E.2d 316 (1999), the trial court had ruled that because an investigative reporter’s investigation was not ongoing, the media defendants had failed to meet their burden of showing that forced disclosure would harm the free flow of information. The court accordingly ordered the reporter to reveal his confidential sources, and held him and his newspaper in contempt when he failed to do so. The Massachusetts Appeals Court vacated and remanded, holding that at least in the case of investigative reporters’ confidential sources, forced disclosure is likely to threaten the reporter’s future news-gathering ability and thus pose a risk to the free flow of information. The Appeals Court further suggested that the media’s initial burden to demonstrate such a risk is not a heavy one. *Id.*, 46 Mass. App. Ct. at 390, 706 N.E.2d at 320. Concluding that in the case at hand the press defendants had met this burden, the court remanded the case to the trial court to balance the First Amendment interests against the public interest in discovery of evidence.

Other recent cases involving the reporters’ privilege included *Olszewski v. Sinclair Broadcast Group, Inc.*, 26 Media L. Rep. 2535, No. 259-C (C.P. Luzerne Pa. Sept. 24, 1998) (radio host was newsgatherer for purposes of asserting the shield, but ordering the release of documents after redaction to obscure the identities of confidential sources); *In re Subpoena to Barnard*, 1999 WL 38269, at *2 (E.D. Pa. Jan. 25, 1999) (reporter waived privilege by publishing a statement, but that the shield law protects from disclosure unpublished information related to confidential sources); *In re Armstrong*, 26 Media L. Rep. 1700 (Sup. Ct. N.Y. Co. 1998) (quashing a subpoena where plaintiff did not attempt to obtain the information through alternative sources). In *Quigley v. Rosenthal*, 1999 WL 137926 (D. Colo. Mar. 11, 1999), the court held that the Anti-Defamation League qualifies as a “newsperson” for purposes of invoking Colorado’s Shield Law.

North Carolina enacted a shield statute, N.C. Gen. Stat. §8-53.9, that establishes a qualified privilege for journalists. The statute applies to both confidential and nonconfidential information. The statute became effective October 1, 1999.

8. **Damages**

*Actual Damages*

Whether a plaintiff must show injury to reputation to recover actual damages is a question determined by state law. Of the jurisdictions that have decided this issue in the post-*Sullivan/Gertz* era, five have found that such proof is required, while five have found that no such showing is
necessary.

The Iowa Supreme Court in *Schlegel v. The Ottumwa Courtier*, 585 N.W.2d 217, 224, 27 Media L. Rep. 1178 (Iowa 1998) reaffirmed the state’s proof of reputational injury requirement and disavowed some decisions that implied a defamation plaintiff could recover damages solely for physical and mental pain and suffering, such as *Spencer v. Spencer*, 479 N.W.2d 293 (Iowa 1991). The Court in *Schlegel* stated that it agreed with those other courts that “have continued to impose a reputational harm prerequisite in defamation actions” because to allow defamation damages “without a showing of reputational harm would undercut the Supreme Court’s purpose behind the presumption limitation.” *Schlegel*, 585 N.W.2d at 224.

Likewise, a recent New Jersey appellate court case held that a failure to demonstrate pecuniary or reputational harm other than a minimal level of emotional distress was fatal to the defamation claim at issue. *Rocci v. Ecole Secondaire MacDonald-Cartier*, (N.J. App. Div. July 6, 1999).

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4 Minnesota, Iowa, Arkansas, Kansas, and the Fifth Circuit Court of Appeals (applying Mississippi law) have all ruled that evidence of damage to reputation is a prerequisite to the recovery of damages in a defamation action. Minnesota, in *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 24 Media L. Rep. 1897 (Minn. 1996), and Iowa, in *Johnson v. Nickerson*, 542 N.W.2d 506 (Iowa 1996), are the most recent jurisdictions to decide the issue. Arkansas decided the issue in *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933, 10 Media L. Rep. 1063 (Ark. 1983); Kansas in *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (Kan. 1982); and the Fifth Circuit in *Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (applying Mississippi law). In addition, New York’s Appellate Division, First Department, has twice held that proof of loss of reputation is required. See *France v. St. Clares Hosp. & Health Center*, 441 N.Y.S.2d 79 (1981), *Salomone v. MacMillan Publishing Co.*, 429 N.Y.S.2d 441 (1980). Both cases cited the 1858 New York Court of Appeals decision in *Terwilliger v. Wands*, 17 N.Y. 54 (1858), which held that recovery for emotional harm is foreclosed in the absence of proof of reputational harm, but the New York Court of Appeals has not revisited the issue since *Gertz*.

Punitive Damages

Punitive damages are determined by state law, with only rough guidance from the Supreme Court on the constitutionality of such awards in the First Amendment context. According to the 1999-2000 Media Libel Survey, eight jurisdictions do not permit punitive damages in defamation cases. Ten states impose statutory limitations on punitive damage awards and 15 states limit punitive damages through retraction laws.

Under current Maine law, punitive damages may be awarded only where the plaintiff demonstrates "common law actual malice," a confusing phrase that denotes a "showing of ill will or conduct so outrageous that malice is implied." This showing is distinct from a showing of constitutional "actual malice," and is also distinct from "the concept of 'implied malice' that drives the per se actionability of limited categories of defamatory statements." Norris v. Bangor Publishing Co., 1999 WL 427655, *10-11 (D. Me. June 11, 1999), citing Veilleux v. National Broadcasting Co., Inc., 8 F. Supp. 2d 23, 42, 26 Media L. Rep. 1929, 1943 (D. Me. 1998)).

In Schlegel v. The Ottumwa Courier, 585 N.W.2d 217, 226, 27 Media L. Rep. 1178 (Iowa 1998), the Iowa Supreme Court said that even if negligence were the appropriate standard of care in a private figure libel case, punitive damages could not be sustained without evidence of "willful and wanton disregard for the rights of others" and further, that there must be an award of some actual damages before punitive damages can be awarded.

In Arkansas, an award of punitive damages was held proper where the jury could have concluded from the evidence that defendants acted with malice, displayed a conscious indifference for plaintiff, acted with deliberate intent to injure plaintiff, and acted with reckless indifference to the effect their allegations would have on plaintiff. Ellis v. Price, 337 Ark. 542, 990 S.W.2d

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6 Louisiana, Michigan, Nebraska, Puerto Rico and Washington do not allow punitive damages; Massachusetts and Oregon prohibit punitive damages in cases involving the First Amendment; and New Hampshire, although prohibiting punitive damages, permits plaintiffs an "enhanced recovery" in tort cases where defendant acted with malice or wanton disregard of plaintiff's rights.

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

The Supreme Court of Delaware found that the manner and process of prepublication review by editors, the nature of the article, alleged review for balance and the decision when to print demonstrated ratification of the act in question sufficient to allow recovery of punitive damages against a corporate media defendant. *Kanaga v. Gannett Co., Inc.*, No. 92C-12-182-JOH (Del. Super. Ct. 1998).

The court in *King v. Cablevision Systems*, 1998 WL 556162 (Conn. Super. 1998) set aside a punitive damages award of $95,346 in the absence of proof of “outrageous conduct which is malicious, wanton, reckless or in willful disregard for another’s rights” (citing New York authority).

9. **Procedural Matters**

**Statute of Limitations**

In a case applying New Mexico’s statutory “single publication” rule, the court held that the statute of limitations began to run when a magazine article “was substantially and effectively communicated to a meaningful mass of readers,” not on the date on the magazine cover, and had expired before the action was commenced. *Printron, Inc. v. McGraw-Hill, Inc.*, 35 F. Supp. 2d 1325, 1327 (D.N.M. 1999). The court further held that plaintiff’s causes of action for prima facie tort, interference with existing and prospective contracts and civil conspiracy were also time barred, as it is “the nature of the right sued upon, and not the form of action . . . [which] determines that applicability of the statute of limitations” under New Mexico law. *Id.*

However, the single publication rule was not applied to the dissemination of confidential credit reports. A Florida appellate court reversed a summary judgment granted on statute of limitations grounds for the defendant in a credit defamation action, ruling that the “multiple publication rule” applies to such dissemination. *Musto v. Bell South Telecommunications Corp.*, 24 Fla. L. Wkly. D1651 (Fla. 4th DCA 1999). The court held that each time a credit reporting agency issues a defamatory credit report to a different customer, a separate cause of action accrues. Thus, the statute begins to run separately from the date of each dissemination, rather than from the date of the first publication.

**Motions to Dismiss**

Several cases discussed pleading requirements in the context of a motion to dismiss.

impose no special pleading requirements for defamation as they do for a specified list of other matters." In contrast, in Special Force Ministries v. WCCO Television, 584 N.W.2d 789 (Minn. Ct. App. 1998), a pleading which merely paraphrased or characterized broadcast statements was held insufficient.

An Illinois court held in Lykowski v. Bergman, 299 Ill. App. 3d 157, 700 N.E.2d 1064 (1998) that a complaint alleging the defendant claimed the plaintiff “was a liar and guilty of unethical and improper conduct” was not sufficiently pled, because it fell short of the “clearly and with particularity standard,” it failed to allege to whom the allegedly libelous statements were made, and it failed to provide specific allegations from which actual malice could reasonably have been inferred (the plaintiff was a public figure).

In what appears to be an erroneous decision involving the burden of proof on public figure status, a Florida appellate court reasoned that on a motion to dismiss it was bound to accept as true plaintiff’s pleading of private figure status. Dockery v. Florida Democratic Party, et al., 23 Fla. L. Wky. D1965 (2 DCA 1998).

**Summary Judgment**

The Texas interlocutory appeals statute which permits appeals of denials of summary judgment in libel cases against the media continues to be a highly important tool in disposing of such claims before trial. The statute has survived constitutional challenge in an intermediate appellate court. KTRK Television, Inc. v. Fowkes, 981 S.W.2d 779 (Tex. App. - Houston [1st Dist.] 1998, pet. denied). According to the Texas Survey, it has also become common for courts to grant summary judgment in public figure and public official libel cases when a defendant has submitted affidavits stating that journalists believed the story at issue to be true and the plaintiff has been unable to offer affirmative evidence that would support a finding of actual malice. HBO v. Huckabee, 1998 WL 889828 (Tex. App. - Houston [14th Dist.] pet. granted).

**Prior Restraint**

The 1999-2000 MEDIA LIBEL SURVEY contains reports of two significant prior restraint cases outside the libel context. In Jeffries v. State, 724 So. 2d 897, 27 Media L. Rep. 1413 (Miss. 1998), the Mississippi Supreme Court held that a trial court judge’s order barring a reporter from reporting on the juvenile record of the defendant after it had been discussed in open court was a prior restraint on speech and presumptively invalid.

In a case with an extremely complicated procedural history, a Tennessee trial court’s prior restraint on pretrial publication of time records, then in the possession of a newspaper, prepared by defense attorneys for a capital defendant and submitted to a court agency for reimbursement, was first affirmed on technical grounds by the Tennessee Court of Criminal Appeals, then set aside by the original trial court on a further evidentiary hearing, with this decision being affirmed by the appellate court. State v. Huskey, 982 S.W.2d 359 (Tenn. Crim. App.) (declining to reverse due to deficiencies in appellate record), appeal denied, (Tenn. 1998), appeal after
remand, slip op., No. 03C01-9905-CR-00211 (Tenn. Crim. App., Eastern Section, July 9, 1999) (affirming trial court decision setting aside its earlier prior restraint).

**Jurisdiction**

The 1999-2000 Media Libel Survey, contains several reports of jurisdiction decisions in the context of the Internet. For the first time, a Delaware court held that merely posting allegedly defamatory information on the Internet, even if accessed by third-parties within the State, was not sufficient to confer personal jurisdiction over a defendant who otherwise had no contacts with Delaware. *Clayton v. Farb*, No. 97C-10-306-WTQ (Del. Super. Ct. 1998).

In *Jewish Defense Organization, Inc. v. Rambam*, 1999 Cal. App. LEXIS 557, *30, 85 Cal. Rptr. 2d 611 (1999), the court held that nonresident defendants' use of Internet service providers which maintained servers and offices in California was insufficient to support personal jurisdiction in a defamation action.

However, in *Bochan v. La Fontaine*, 1999 WL 343780 (E.D. Va. May 26, 1999), a district court in Virginia found personal jurisdiction over defendants residing in Texas and New Mexico as to defamation claims based on Internet e-mail and USENET postings concerning a Virginia resident. The court held the jurisdictional fact that defendants knew plaintiff resided in Virginia constitutionally sufficient for defendants to reasonably foresee being haled into a Virginia court concerning statements involving local (i.e., Virginia) activities and resulting primarily in local harm.

The U.S. District Court in New Jersey dismissed for lack of diversity jurisdiction a defamation complaint against a “John Doe” defendant alleged to have sent defamatory e-mails from New York. The court held that the origin of e-mails in New York was not sufficient to establish diversity of citizenship of the unknown sender. *Vail v. Doe*, 39 F. Supp. 2d 477 (D.N.J. 1999).

Outside the realm of cyberspace, the Utah Supreme Court held that transmitting facsimiles into Utah containing defamatory statements impugning a business located in Utah constitutes sufficient minimum contacts to invoke Utah’s long arm statute. *Starways, Inc. v. Curry*, 369 Utah Adv. Rep. 40, 40-41 (Utah 1999).

**Choice of Law**

A magistrate in the D.C. District held in *Hanan v. Corso*, 1999 WL 320858 (D.D.C. May 18, 1999), that where the plaintiff could point to no one in the District of Columbia who saw the allegedly defamatory memorandum, Virginia law should be applied as that state was the jurisdiction in which the memorandum was published.

in Illinois applied the law of the state where the plaintiffs were domiciled at the time of the alleged defamation. However, despite the Seventh Circuit’s recent adoption of the “victim’s domicile” test in *Cook v. Winfrey*, 141 F.3d 322, 26 Media L. Rep. 1586 (7th Cir. 1998), at least one court has nevertheless employed the “most significant contacts” approach of the *Restatement Second of Conflicts of Law* to resolve a choice of law dispute in a defamation action. See *Pivotal Development Solutions, Inc. v. Hoffman*, 1998 WL 748272 (N.D. Ill. October 22, 1998).

In *Lee v. Bankers Trust Co.*, 166 F.3d 540 (2d Cir. 1999), the Second Circuit partially clarified the applicable analysis for choice of law in a defamation case. In *Lee*, a case involving an ex-employee’s complaint against his former employer, the court concluded that the law of the situs of the tort should control. *Id.* at 545. The court reasoned that a federal court sitting in diversity is to apply the choice of law rules of the forum state. *Id.* It then noted that New York applies a different analysis depending on whether the rules at issue are “conduct-regulating” or “loss-allocating.” Where conduct-regulating rules are in dispute, New York applies the law of the situs of the tort. The court then held “[d]iscouraging defamation is a conduct regulating rule” and applied the law of New Jersey — where the plaintiff worked and lived and not that of the defendant corporation’s home state. *Id.* at 545. Plaintiff argued that the court should apply a nine-factor choice-of-law analysis that several district courts had employed in recent years. The court said, however, that the nine-factor test “applies, if at all, only in cases of multi-state publication of defamatory material, — i.e., publication of a libelous article by a magazine that is distributed in a large number of states.” *Id.* at 546.

10. Other Noteworthy Issues

Evidence

In *Miles v. Ramsey*, 31 F. Supp. 2d 869 (D. Colo. 1998), a case growing out of the JonBenet Ramsey murder investigation, on a motion for summary judgment, the court dismissed claims against JonBenet’s father that the court found were based on inadmissible “double-hearsay” evidence. The *National Enquirer*, quoting a second unnamed source, attributed allegations that the plaintiff was the murderer to John Ramsey. The court held the tabloid article inadmissible as evidence of actual malice. Similarly, a Massachusetts court held that a libel claim could not survive summary judgment where the only evidence supporting a party’s defamation claim is inadmissible hearsay—for example, a copy of a newspaper article quoting the defendant’s alleged statement. *Afrasiabi v. Rooney*, 9 Mass. L. Rptr. 654 (Middlesex Cty. Superior Court 1999).

In *Lopez v. Univision Communications, Inc.*, 45 F. Supp. 2d 348 (S.D.N.Y. 1999), the court, finding fault with the authentification of documents, refused to declare a prominent cosmetic surgeon a public figure on a motion for summary judgment.

1. False Light

Recognition

According to the 1999-2000 MEDIA PRIVACY AND RELATED LAW SURVEY, 34 jurisdictions currently recognize the false light tort. In seven of these jurisdictions, however, the tort has not been applied in the media context. Nine other jurisdictions have explicitly rejected the tort.

Significant Media Cases

In Newcombe v. Adolph Coors Co., 157 F.3d 686, 26 Media L. Rep. 2364 (9th Cir. 1998), the Ninth Circuit affirmed the grant of summary judgment in favor of media defendants on false light claims, based on a determination that an advertisement for beer which included plaintiff's likeness was not libelous on its face and plaintiff had failed to demonstrate special damages. Defendants placed an alcohol advertisement in Sports Illustrated magazine that featured an artist's rendition of the plaintiff, a former major league all-star pitcher who is a recovering alcoholic. Plaintiff sued the ad sponsor, Coors, in addition to publisher Time, Inc. and the ad agency that created the ad. Plaintiff claimed, among other things, that the ad was libelous and falsely suggested that he endorsed alcohol. Applying California law, the court held that whether pled as a false light or a libel claim, a plaintiff must establish that either the publication was libelous on its face or special damages were incurred. Suggesting a Major League pitcher endorsed alcohol was not defamatory, the court found, without resort to the "explanatory matter" regarding plaintiff's battle with alcohol addiction. Because plaintiff also failed to show special damages, summary judgment was proper.

In Cline-Watkins v. Johnson Publishing Co., 26 Media L. Rep. 1986, 1987 (D.D.C. 1998), summary judgment was granted on plaintiffs' false light claim in favor of defendants, a news service and a magazine publisher, for publishing a photograph of the plaintiff, a Bureau of Printing and Engraving employee, operating a printing press in conjunction with an article concerning missing money. The court dismissed the claim holding that the article was not of and concerning the plaintiff, referred to her only as an "unidentified employee" and contained no suggestion that she is either accused or suspected of any involvement with the missing money.

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

3. Massachusetts, Minnesota, New York, North Carolina, Ohio, South Carolina, Texas, Virginia, and Wisconsin.
In Marcus Garvey Charter Sch. v. Washington Times Corp., 27 Media L. Rep. 1225, 1232-1233 (D.C. Super. Ct. 1998), the court dismissed plaintiffs' false light claims against a newspaper that published an article describing an assault by plaintiffs with an accompanying photograph which did not portray the assault to which the article or caption referred. According to the court, because each of the plaintiffs was found guilty of assault during the same incident, the information published characterizing plaintiffs as assailants was not false.

In a mixed blessing to media defendants, the Pennsylvania Superior Court has ruled that, in an action for false light invasion of privacy, a plaintiff cannot recover for alleged emotional distress absent expert medical testimony supporting the claim but can, even in the absence of any injury whatsoever, pursue a claim for nominal damages. Wecht v. PG Publishing Co., 1999 WL 68909 (Pa. Super. 1999) ("Wecht II"). The trial court in the case had granted summary judgment against Wecht, the Allegheny County Coroner, finding that Wecht's failure to introduce expert testimony to support emotional distress damages and his failure to show any injury — economic, reputational, or emotional — was fatal to his false light claim. The Superior Court upheld the trial court's decision regarding the necessity of expert testimony, predicting that "requiring expert medical testimony will also ensure that fraudulent or exaggerated claims or a 'flood of litigation' will not ensue." Wecht II at ¶ 14. The Superior Court reversed summary judgment, however, with respect to the issue of nominal damages, finding that a trial for nominal damages would not be a waste of time.

In Perere v. Louisiana Television Broadcasting Corp., 721 So. 2d 1075 (La. App. 1st Cir. 1998), a court of appeal addressed the issue of implication in a false light case. In that case, the defendant television station allegedly aired a report that stated plaintiff had "walked out" on his sick wife and children. According to plaintiff, he and his wife actually mutually had agreed to an uncontested divorce. Although plaintiff had not specifically pleaded a false light cause of action, the court found that the plainmhad stated such a cause of action, because the statement implied that he had abandoned his family, and created a "false portrayal" of the plaintiff.

Non-Media False Light Decisions

In Brodbeck v. NRA, (May 13, 1999) a federal jury returned a $4.45 million verdict against the National Rifle Association. The case arose out of an incident at an NRA board meeting during which Mr. Brodbeck attempted to videotape a presentation by his wife. Security guards reportedly tried to stop Brodbeck from videotaping the presentation and Brodbeck was allegedly knocked unconscious. Following the incident, NRA President Charlton Heston, stated that the plaintiffs had staged the incident in order to "stir up trouble."

A number of non-media false light cases were dismissed based upon the court's application of defamation law. In Sullivan v. Conway, 157 F.3d 1092 (7th Cir. 1998), for example, a former union lawyer sued a union official for defamation and false light based on the official's statement at a union meeting that the plaintiff was "a very poor lawyer." The court affirmed the summary judgment dismissing all claims because the statement at issue was subject to a qualified privilege and the defendant did not abuse the privilege, and because the statement was protected opinion.
According to the court, "the same privileges are applicable to the false-light tort as to the defamation tort." Id. at 1098-99. The union official, the Seventh Circuit held, enjoyed a common law privilege because he had a duty to speak and he did so in good faith, and a privilege under federal labor law to express his opinion on matters of union business in communications to union officers and members.

See also Ireland v. Edwards, 230 Mich. App. 607 (1998) ("we do not believe that actions for false light invasion of privacy or intentional infliction of emotional distress have any greater right [than a libel claim] to such immunity [from Constitutional protections]. Indeed, any other conclusion would allow a plaintiff to circumvent the First Amendment limitations, and would effectively eliminate the 'breathing space' required for freedom of expression"); Johnson v. McGraw-Hill Cos., 27 Media L. Rep. 1153 (E.D. Mich. 1998) ("the same privileges that are available to defendants under defamation exist under a false light claim").

A number of non-media false light claims were also dismissed because plaintiffs failed to satisfy the elements of the tort. In Frobose v. American Savings and Loan Association of Danville, 152 F.3d 602 (7th Cir. 1998), for example, a former savings and loan officer "claimed that she had been placed in a false light before the public based on a series of events culminating in her discharge..." The Seventh Circuit affirmed the dismissal of her false light claim because most of the statements were not communicated to the public at large and those that were made "no mention of [the plaintiff] by name or by any other description that would make her readily identifiable to the public." Id. at 618. See also Frye v. IBP, Inc., 15 F. Supp. 2d 1032, 1043-44 (D. Kan. 1998) ("As a matter of law, communication to only three prospective employers is not ‘publicity’ which is sufficient to sustain a false light claim"); Honan v. Dimyan, 52 Conn. App. 123, 133, ___ A.2d ___ (1999) (court of appeals upheld defense jury verdict, citing plaintiffs’ failure to show evidence that defendants had acted in reckless disregard as to the falsity of the statement or that the plaintiffs were portrayed in a highly offensive manner); Melder v. Sears Roebuck & Company, No. 98-0939, 1999 La. App. LEXIS (La. App. 3d Cir. Mar. 31, 1999) (no cause of action arose from defendant former employer of plaintiff telling other employees that the plaintiff had been accused of stealing from the store and allegedly instructing other employees not to associate with plaintiff where other employees did not actually cease associating with plaintiff); Ostrzenski v. Siegel, 3 F. Supp. 2d 648 (D. Md. 1998) (where plaintiff alleged only that defendant appointed to conduct physician peer review had falsely misrepresented that he had no conflicts of interest with plaintiff, court granted motion to dismiss on grounds that allegedly false statement "is not even mildly offensive, let alone ‘highly offensive’ as required by Maryland law").

2. Private Facts

Recognition

According to the 1999-2000 MEDIA PRIVACY SURVEY, 41 jurisdictions currently recognize
a claim for publication of private facts, although in seven of these jurisdictions the tort has not been applied in a media context. Additionally the tort has specifically been rejected in four jurisdictions.

**Significant Media Cases**

In *Jessup-Morgan v. America Online, Inc.*, 20 F. Supp. 2d 1105, 26 Media L. Rep. 2426 (E.D. Mich. 1998), plaintiff alleged violation of the Electronic Communication Privacy Act which prohibits disclosure of the contents of an electronic communication to any person or entity or to the government without first meeting certain restrictions. Plaintiff had posted a message under a false name meant to harass and injure her lover’s ex-wife in violation of numerous provisions of her AOL Member Agreement. AOL disclosed information to the ex-wife’s attorney, pursuant to a court-ordered subpoena, that identified plaintiff as the person who sent the message. The court found no violation because disclosing information identifying the author of a communication is not disclosure of the “contents” of an electronic communication.

Courts also dismissed private facts claims against the media in *Birmingham News, Inc. v. Watson*, 1999 WL 96044 (Feb. 26, 1999 Ala. Civ. App.) (statements about plaintiff’s private life to a “limited audience” was not publication to the public at large or to a large enough number of persons that the statements were substantially certain to become public knowledge); *Peckham v. Levy*, 26 Media L. Rep. 122 (Mass. Super. 1997) (gossip column report on paternity action did not disclose private facts since plaintiff already had told his daughter and two close friends about the matter); *Munoz v. American Lawyer Media, L.P.*, 1999 Ga. App. LEXIS 208, (evidence introduced in a legal proceeding, including photographic or other exhibits, cannot be subject of action for invasion of privacy); *Thompson v. National Catholic Reporter Publishing Co.*, 4 F. Supp. 2d 833, 26 Media L. Rep. 2039 (E.D. Wis. 1998) (court dismissed private facts claim on a motion for summary judgment, “[b]ecause the purportedly objectionable phrases do not specifically identify [the plaintiff].”); *Marich v. QRZ Media*, (Cal. Ct. App. July 2, 1999) (dismissing private facts claim based upon broadcast of videotape depicting police informing unseen plaintiffs that their was dead because plaintiffs failed to show that the broadcast contained specific information identifying them).

In contrast, courts permitted private facts claims to stand in two media-related cases. *See Doe v. Univision Television Group, Inc.*, 717 So. 2d 63, 65 (Fla. 3d DCA 1998) (claim for invasion of privacy stated against media defendant for disclosing the identity of a victim of bad plastic surgery, where the plaintiff had agreed to be interviewed provided that her identity was protected by concealing her face and voice); *Zereski v. American Postal Workers Union*, 1998 Mass. Super.

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5 Colorado, Hawaii, Indiana, Minnesota, Nevada, Virgin Islands, and Washington.

6 Nebraska, New York, North Carolina, and Virginia.
LEXIS 507 * 22-24 (1998)(union newsletter’s republication of vulgar comments obtained from plaintiff’s personnel file without her permission stated claim under §1B).

Non-Media Private Facts Decisions

In an interesting case involving the interaction of tort law and the authority of organized religion, Smith v. Calvary Christian Church, 233 Mich. App. 96 (1998), plaintiff brought an invasion of privacy claim after his pastor disclosed the contents of plaintiff’s confession — i.e., that he engaged in marital infidelity with prostitutes — to the congregation. The court found that where “the plaintiff is a member of the church at the time of the defendant church’s alleged tortious activity and that relationship has not been freely severed, ‘the church has authority [pursuant to the Free Exercise Clause] to prescribe and follow disciplinary ordinances without fear of interference by the state.”’ Id. at 104. The court found, however, that a fact issue existed as to whether plaintiff was a member of the church at the time of the disclosure. If he was not, the court found plaintiff had pleaded a claim for public disclosure (and intentional infliction of emotional distress).


Plaintiff’s failure to prove wide public disclosure was also often fatal to their claims. In Doe v. Hendersonville Hospital Corp., 1999 U.S. App. LEXIS 848 (6th Cir. 1999), for example, the defendant disclosed the plaintiff’s hospitalization to a limited number of employees who, for work-related reasons, had reason to know of plaintiff’s condition. The court reiterated that where confidential information about an employee was only disclosed to a limited number of people, all of whom had a job-related connection to the plaintiff, there was no “publicity” as contemplated under the tort of “undue publicity of private matters.”

See also Yoder v. Ingersoll-Rand Co., 1998 U.S. App. LEXIS 31993 (6th Cir. 1998) (defendant’s employee read plaintiff’s confidential medical forms disclosing that plaintiff had AIDS, held plaintiff failed to show that there was a public disclosure); Dotson v. Wal-Mart Stores, Inc., 165 F.3d 27 (6th Cir. 1998) (disclosure of investigative report about an incident in which plaintiff allegedly shoplifted by mailing copies to plaintiff’s supervisors, and placing a copy on plaintiff’s car windshield while she was working did not sufficiently publicize the information because it was not directed to the public at large); Wayne v. Genesis Medical Center, 140 F.3d 1145 (8th Cir. 1998) (discussion of plaintiff patient’s behavior during a meeting of the defendant hospital’s executive committee was not publication of information about plaintiff’s surgery); Larson v. Suburban
In addition, a number of the cases reported turned on whether the matter publicized was a matter of legitimate public concern or was reasonable under the circumstances. In Ferraro v. City of Long Branch, 314 N.J. Super. 268, 290-291 (App. Div. 1998), for instance, the court held that the release of city employee’s medical records to a reporter was non-actionable because plaintiff’s collapse and subsequent disability had been rendered newsworthy by virtue of plaintiff’s status as a public official, the possibility of the city being held responsible for damages, and the publication of several articles on the subject, including at least one in which plaintiff publicly aired his grievances against the city. Additionally, the Mississippi Supreme Court held that a woman who was secretly photographed through her bedroom window having sexual relations with her lesbian lover did not have a claim for invasion of privacy because the photographs were taken as part of a custody dispute over a child, and were reasonable in that context. Plaxico v. Michael, 1999 WL 174262 (Miss. 1999).

In a few cases, however, courts found that plaintiffs did state claims for the disclosure of private facts. In Doe v. High-Tech Institute, Inc., 972 P.2d 1060 (Colo. App. 1998), cert. denied, (March 1, 1999), the plaintiff sued a medical technical college and a medical laboratory for testing his blood for HIV without his authorization, and for disclosing the results to the State of Colorado and to third parties. The plaintiff asserted claims for disclosure of private facts and intrusion. The Colorado Court of Appeals found that both claims were well-founded and not duplicative. The plaintiff’s intrusion claim was based upon the “improper appropriation of private information resulting from the HIV test that was performed without his knowledge and consent.” By contrast, his “private facts” claim was based upon the communication of the test results to the health department and other third parties. The court also held that damages for each claim are not duplicative, as each is designed to compensate the plaintiff for a different type of harm — one for “unreasonable dissemination of private information,” the other for “improper appropriation of that information.”

See also Hoskins v. Howard, 1998 WL 835098 (Idaho 1998) (rejecting the majority rule, the court found that the Idaho Communications Security Act protected cordless telephone conversations and at least generated a material issue of fact as to whether or not the plaintiffs’ held an expectation

3. **Intrusion**

*Recognition*

According to the 1999-2000 *Media Privacy Survey*, currently 41 jurisdictions recognize a claim for intrusion, although the tort has not been applied in the media context in 20 of these jurisdictions. Two jurisdictions have explicitly declined to recognize intrusion, in one jurisdiction a federal court has opined that the jurisdiction does not recognize the tort, while in Illinois conflicting authority exists as to whether intrusion is recognized.

In *Doe v. High-Tech Institute, Inc.*, 972 P.2d 1060 (Colo. App. 1998), *cert. denied* (March 1, 1999), the state court of appeals formally recognized the tort of invasion of privacy by intrusion. The plaintiff sued a medical technical college and a medical laboratory for testing his blood for HIV without his authorization, and for disclosing the results to the State of Colorado and to third parties. The plaintiff asserted claims for both intrusion and disclosure of private facts. The trial court dismissed the intrusion claim, but allowed the private facts claims to go forward, resulting in a jury verdict for the plaintiff.

The Colorado Court of Appeals held that the trial court erred in dismissing the intrusion claim. Noting that the Colorado Supreme Court had recently recognized a cause of action based on disclosure of private facts (see *Borquez v. Robert C. Ozer, P.C.*, 940 P.2d 371 (Colo. 1997), and that the "vast majority of courts in other jurisdictions" had recognized the existence of a discrete claim based upon intrusion, the court adopted *Restatement (Second) of Torts* § 652B. The court found that the plaintiff's allegations that the defendants had tested his blood for HIV without permission was sufficient to state a claim for relief.

California has added a new tort for physical or constructive invasion of privacy, which appears to be another type of intrusion tort. Civil Code § 1708.8, effective January 1, 1999, imposes liability upon any person who (a) trespasses with the intent of obtaining any "visual image, sound recording

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

9 New York and Virginia.

10 Eighth Circuit opinion interpreting North Dakota law.
or other physical impression" of the plaintiff; (b) attempts to obtain such “physical impression” with the use of a visual or auditory enhancing device; or (c) directs, solicits, or induces another to obtain such a physical impression. To prevail, the plaintiff must demonstrate that the “physical impression” is of a “personal or familial activity” and that the intrusion is “offensive to a reasonable person.” Damages may include up to triple the general and special damages, punitive, damages, and disgorgement of any proceeds from the use of an image. The plaintiff may also seek injunctive relief. The sale or publication of an image obtained from a physical or constructive invasion of privacy does not by itself result in liability, and law enforcement activities are specifically exempted.

**Significant Media Intrusion Decisions**

Last year the California Supreme Court in *Shulman v. Group W Productions*, 955 P.2d 469 (Cal. 1998), allowed a claim for intrusion to go forward where a television crew videotaped and ultimately reported on a helicopter rescue of plaintiff from a highway automobile accident. This year the California Supreme Court held that the taping of a non-confidential conversation in the workplace can also support a claim for intrusion. *Sanders v. ABC*, 85 Cal. Rptr. 2d 909 (1999). The case arose out of a 1993 ABC *PrimeTime Live* hidden camera investigation into the telepsychic industry, during which an ABC reporter obtained employment as a telepsychic with a California company. Following the broadcast, an employee of the company who was taped by ABC’s undercover reporter filed suit and ultimately was awarded $635,000 on a claim for intrusion upon seclusion by surreptitious photography. The court of appeal reversed finding that the surreptitious photography theory did not exist, but the California Supreme Court vacated that decision and remanded the case for retrial. In remanding, the court reasoned that in a “workplace to which the public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants’ co-workers.” *But see Medical Lab. Management Consultants v. American Broadcasting Co*, 30 F. Supp. 2d 1182 (D. Ariz. 1998) (hidden-camera investigation of a place of business “at least partially open to the public and accessible to employees” did not intrude on a legally protectible privacy interest).

In a related case brought by other employees of the telepsychic company in federal court, the Ninth Circuit affirmed dismissal of federal wiretap claims. *Sussman v. ABC*, (9th Cir. Aug. 18, 1999) (citing one party consent standard and plaintiffs’ failure to allege that the videotaping was made for the purpose of committing some other crime or tort and thus qualify as an exception to the standard).

A California Court of Appeal affirmed summary judgment for NBC in a hidden camera lawsuit based on undercover videotaping in a crowded restaurant. *Wilkins v. National Broadcasting Company, Inc.*, 71 Cal. App. 4th 1066, 84 Cal. Rptr. 2d 329 (1999). The court found that the plaintiffs could not recover for intrusion because the video and audiotaping had taken place at a business meeting with four strangers in a crowded public place. *But see Marich v. QRZ Media*, (Cal. Ct. App. July 2, 1999) (finding plaintiffs stated a prima facie claim for intrusion based upon the broadcast of a videotape depicting a police officer telephoning plaintiffs that their son was dead).
In Marcus Garvey Charter Sch. v. Washington Times Corp., 27 Media L. Rep. 1225 (D.C. Super. Ct. 1998), the plaintiffs -- the principal and several school staff members -- claimed that defendant unreasonably intruded upon their privacy when several employees of the Washington Times entered the school without authorization. The court determined that, although the Washington Times employees were uninvited and unwelcome at the school, they entered and remained in areas of a school open to the general public, and the school staff had no reasonable expectation of privacy. Id. at 1229. The uninvited and unwelcome presence of the press at a public school does not constitute intrusion upon seclusion when they enter and remain in areas of the school open to the general public because there is no reasonable expectation of privacy in such areas. Id. See also Cline-Watkins v. Johnson Publishing, Co., 26 Media L. Rep. 1986, 1988 (D.D.C. 1998) (there can be no intrusion upon seclusion where a person is in a public place or at work in an open government building).

In Cook v. WHDH-TV, Inc., 27 Media L. Rep. 1242, , 8 Mass. L. Rptr. 389 (Mass. Super. 1998), however, the Superior Court denied summary judgment on an intrusion claim arising out of an interview of the plaintiff while in his car in a Burger King drive-through. The court seemed influenced by the presence of the plaintiff’s son in the car, his inability to extricate himself from the camera’s gaze, and the fact that the camera man leaned nearly into the car window while the reporter held a microphone in the plaintiff’s face. Whether the interest served by the intrusion was outweighed by plaintiff’s privacy interests was treated as a jury question governed by factors such as the defendants’ motivation for the intrusion and the importance to the public of the information gained by the intrusion. The court dismissed plaintiff’s alternative claim for unfair and deceptive business practices under M.G.L. ch. 93 and his claim for assault.

Ride-Alongs

In Wilson v. Layne, 119 S. Ct. 1692 (1999), the Supreme Court may have effectively put an end to unconsented media ride-alongs during the execution of search warrants in private homes. In a unanimous opinion, the Court held that “it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties ... in and out of the execution of the warrant.” Expounding on the Fourth Amendment principle of respect for the privacy of the home, the Court held that third parties may accompany officers when they execute a warrant only when those third parties “directly aid” the police in achieving their purpose. Although the Court acknowledged that the media’s first-hand observation of governmental conduct serves an important purpose, such as publicizing crime fighting efforts and reinforcing a positive public image for law enforcement, it is not of sufficient importance to justify the media’s presence inside the home.

By a vote of 8-1, the Court affirmed the Fourth Circuit’s en banc decision that the officers were entitled to qualified immunity because the law on this point was not clear at the time they invited journalists from the Washington Post to accompany them. Justice Stevens dissented, arguing that even in the absence of specific rulings in the ride-along context, general Fourth Amendment principles should have made it clear to any law enforcement officer that providing such access to the media would violate a homeowner’s Fourth Amendment rights.
In a companion case, *Berger v. Hanlon*, 119 S. Ct. 1706 (1999), the Supreme Court in a short per curium opinion vacated and remanded the underlying Ninth Circuit decision in light of *Wilson*. The Ninth Circuit had held that federal law enforcement officers who permitted a CNN news crew to accompany them during the execution of a search warrant on a Montana ranch were not entitled to qualified immunity. The Ninth Circuit further held that CNN could be liable for an illegal search as a joint state actor under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). On remand the Ninth Circuit following *Wilson* granted summary judgment to the officers on grounds of qualified immunity, but again held that CNN could be liable on a *Bivens* claim and that it could not assert a defense of qualified immunity. *Berger v. Hanlon*, 27 Media L. Rep. 2213 (9th Cir. 1999).

Prior to the decision in *Wilson v. Layne* lower courts confronted with media ride-along claims often reached conflicting results. A number of jurisdictions expressed hostility to ride-alongs. In *Swate v. Taylor, et al.*, 12 F. Supp. 2d 591 (S.D. Tex. 1998), the court began its opinion by stating “In the hands of the Drug Enforcement Administration, the tradition of public service in law enforcement has gone from ‘One riot — one Ranger’ to ‘one search warrant — one regional press officer, six assistants, and a television crew.’” *Id.* at 592. The court granted partial judgment on liability as a matter of law against a DEA agent who allowed television crews to enter and film searches of two private methadone clinics. *Id.* at 597. The court noted that a search is unreasonable when it exceeds the scope of the warrant and found that including extra people, and allowing them to “set foot” on the plaintiff’s property exceeded the scope of the warrant in violation of the plaintiff’s federal rights. *Id.* at 594. The court stated “Federal law about who may accompany an officer on a search is well-established and clear; it does not include commercial news crews.” *Id.* at 596.

Similarly, in *Robinson v. City and County of Denver*, 1999 WL 164041 (D. Colo. Feb. 26, 1999), a federal district court held that police who invite members of the media into a suspect’s house while executing an arrest warrant are in violation of the Fourth Amendment and are not entitled to qualified immunity. Although the police had invited the media into the suspect’s house to further a law-enforcement purpose — *i.e.*, to obtain video of the suspect to broadcast in order to encourage other victims of the suspect to come forward — this was not “reasonably related” to the purpose of the warrant, which was to execute an arrest. The court did not rule on any of the claims asserted against the media defendants, which included trespass, invasion of privacy, and outrageous conduct. *See also Barrett v. Outlet Broadcasting, Inc.*, 22 F. Supp. 2d 726 (S.D. Ohio 1997) (summary judgment denied to media defendants on claims of trespass and conspiracy to commit trespass arising out of ride-along where defendants filmed body of suicide victim and later broadcast footage of same).

In contrast, the court in *Nichols v. Hendrix*, No. 2:98-CV-161-WCO (N.D. Ga. filed Feb. 1, 1999), dismissed a suit against media defendants based on an allegation that the media acted jointly with law enforcement officers to violate plaintiffs’ constitutional rights during a raid of their home. The court found that the media “‘ride-along’ was not one of the ‘rare circumstances’ in which a private party constitutes a state actor.” *Id.* at 4. Plaintiffs presented no allegations that there existed an agreement or conspiracy between the media defendants and the police. *Id.* at 5. The district court specifically found “[T]he fact that the media was invited to accompany the officers and film the raid
is not enough to turn the defendants into state actors.” *Id.* at 5-6.

Similarly, in *O'Brien v. Perry*, Civ. No. 3:97CV1854 (JBA) (D. Conn. Sept. 28, 1998), the court ruled that there was no constitutional violation involved where the police invited a television crew to accompany them when executing an arrest warrant for a student on school grounds. The court distinguished *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994) (Secret Service agent violated plaintiffs’ constitutional rights by allowing news crew into home during the execution of a search warrant). Here “the execution of the warrant took place at Mr. O’Brien’s school, not his home, and that it was an arrest, not a search warrant.” *O'Brien* at 6. In the related state civil action, the Superior Court held that the arrest of the plaintiff was a public fact, and as such, could not be the basis for a violation of any right of privacy. *O'Brien v. Perry*, 1999 WL 124329, *2 (Conn. Super. 1999).

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

According to the 1999-2000 *MEDIA PRIVACY SURVEY*, currently 52 jurisdictions have eavesdropping statutes. In 39 of these jurisdictions, however, it is not a violation of the statute, as a general proposition, if one party gives consent to the recording. The other 13 jurisdictions require the consent of all parties, at least in delineated circumstances.

Liability for disclosure of unlawfully intercepted material under federal and state wiretap laws emerged as an important media law issue this past year. A petition for certiorari to the U.S. Supreme Court was recently denied in *Central Newspapers, Inc. v. Johnson*, 722 So. 2d 1224 (La. Ct. App. 1998), *cert. denied*, (U.S. Nov. 1999). The petition presented the question whether the First Amendment protects the media from liability under wiretapping laws when it accurately reports information of public concern that a source — not the media — acquires by unlawful interception. In the underlying cases, *Keller v. Aymond*, 722 So. 2d 1224 (La. App. 3d Cir. 1998) and *Johnson v. Aymond*, 709 So. 2d 1072 (La. App. 3d Cir.), *writ denied*, 720 So. 2d 1214 (La. 1998), a Louisiana Court of Appeal held that a newspaper could be held liable under the Louisiana Eavesdropping Statute, L.S.A.-R.S. 15:1301 *et seq.* for publishing excerpts from conversations that were allegedly illegally recorded by a third party who then held a press conference and provided the tapes to the

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11 Only South Carolina and Vermont lack eavesdropping statutes. South Carolina does have a “peeping Tom” statute which prohibits eavesdropping on another’s property, but it is unclear if the statute would apply to electronic eavesdropping. Mississippi has a very narrowly drafted eavesdropping statute that is limited to criminal controlled substances investigations. *See* 1998-99 *MEDIA PRIVACY AND RELATED LAW SURVEY*, at 827.


newspaper. According to the appellate court, the individuals' privacy rights outweighed the First Amendment considerations in holding the newspaper liable. The court further found that the Louisiana eavesdropping statute does not require an element of criminal willfulness or intent for civil liability to attach. Moreover, the court found that, even if a showing of willfulness were required, the "circumstances" of the case created issues of fact regarding the willfulness of the reporter. According to the court, "any reporter handed an audiotape and transcript of a private conversation between parties not in attendance would have 'reason to know' that the communications were obtained without consent."

In *Boehner v. McDermott*, No. 98-7156 (D.C. Cir. September 24, 1999), the D.C. Circuit reversed, in a 2-1 decision, a district court dismissal of a federal wiretap suit (18 U.S.C. § 2510 et. seq. ("Title III")) by Congressman Boehner (R - Ohio) against Congressman McDermott (D - Washington) for disclosing to news media a recording of Boehner's mobile-phone conference call with then Congressman Newt Gingrich and other members of the House of Representatives. The court reasoned that McDermott's dissemination of the recording to the media was conduct. Furthermore, it held he had a duty to refrain from disclosing contents of the secretly recorded phone call — a duty that stemmed "from every citizen's responsibility to obey the law." The decision did not confront the question of whether the press can be punished under Title III for publishing communications it knew to have been unlawfully obtained.

This question is squarely presented in an appeal still pending in the Third Circuit. *Barndicki v. Vopper*, No. 98-7156 (3d Cir.). Here an unknown person illegally recorded the cell phone conversation of two teacher union members involved in heated salary negotiations with their school district. The recording was obtained by newspapers and television stations. In an unpublished decision, a Pennsylvania federal district court denied the press defendants' motion for summary judgment, holding that the *Landmark, Daily Mail, Florida Star* line of cases did not apply, because the federal wiretap statute was a law of "general applicability" that did not "single out" the press, citing to the state breach-of-contract law at issue in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). Interestingly, the U.S. Justice Department intervened in the case at the Court of Appeals level to support the constitutionality of the federal wiretap law as applied to the case.

In contrast, in *Peavy v. WFAA-TV, Inc.*, 1999 WL 147729 (N.D. Tex. Feb. 18, 1999) (appeal pending), the court granted summary judgment for a television station and its reporter (the "media defendants") on claims by a former public official and his wife for violation of federal and state wiretap law, invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. The lawsuit arose out of a series of broadcasts reporting on the alleged public corruption of the plaintiff, who was a school board trustee at the time, and the plaintiff's business associate. The plaintiffs conceded that the media defendants did not actually intercept their telephone calls but argued that the media defendants should be held liable for "procuring" the interceptions. The court held that the media defendants' contact with the plaintiffs' neighbors was insufficient to constitute an illegal procurement under Title III. See 1999 WL 147729, at * 12-14. The plaintiffs' lack of evidence of participation in the interception also barred their invasion of privacy by intrusion claim against the media defendants. *Id.* at * 21. Also of note: even though the media defendants did not air or refer
to the tapes in their broadcasts, the court found that they "used" and "disclosed" them within the meaning of the federal law because they actively used the tapes in their investigation of the plaintiffs and disclosed information "initially derived from the tapes" in their broadcasts. See id. at * 13-14.

Applying the three-pronged test from Florida Star v. B.J.F., 491 U.S. 524 (1989), the court in Peavy held that Title III and the Texas Wiretap Act were unconstitutional as applied to the media defendants. First, the court concluded that the media defendants lawfully obtained truthful information about a matter of public significance, because the First Amendment protects the press from liability for publishing truthful information unlawfully acquired by a source, as long as the press used legitimate newsgathering techniques to acquire the information. 1999 WL 147729, at * 16. Second, the imposition of liability on the media defendants was not necessary to further a state interest of the highest order, because statutory privacy rights "fare poorly against the constitutional rights of a free and unfettered press." Id. at * 17. Third, because the media defendants' actions "were consistent with those of a responsible journalist — to investigate leads, verify facts, and publish newsworthy information," imposing liability on them would result in "timidity and self-censorship." In a separate action, Oliver v. WFAA-TV, Inc., No. 3-96-CV-3436 (N.D. Tex.), a federal magistrate judge recommended summary judgment in favor of the media defendants on similar claims brought by the plaintiff's business associate. The federal district court's decision concerning that recommendation is pending.

See also Graves v. City of Hartford, No. 3:98CV01568 (D. Conn. April 9, 1999) (holding that "if a newspaper or television station lawfully obtains truthful information about a matter of public concern, they may not be punished for publishing the information in the absence of a truly compelling state interest of the highest order"); Mayes v. Lin Television of Texas, Inc., 1998 U.S. Dist. LEXIS 15088, 27 Media L. Rep. 1214 (N.D. Tex. 1998) (summary judgment in favor of the media defendant on the basis of the lack of requisite knowledge of the tape's illegality); Ferrara v. Detroit Free Press, Inc., 26 Media L. Rep. 2355, 1998 U.S. Dist. LEXIS 8635 (E.D. Mich. 1998) (court found that a rational trier of fact could not conclude that defendant knew "sufficient facts concerning the circumstances of the interception such that [it] determined that the interception was prohibited in light of Title III").

In Lane v. Allstate Insurance Co., 969 P.2d 938 (1998), the Nevada Supreme Court held, by a 3-2 vote, that it is unlawful under that state’s wiretap law, NRS 200.260, to tape one's own telephone conversations without the consent of the other party, despite the fact that the concept of two-party consent is not expressed anywhere in the relevant statutes. Plaintiff, who was suing his former employer for wrongful discharge and related claims, secretly tape-recorded numerous conversations with individual defendants as well as witnesses. As a sanction, the court excluded all evidence obtained through the unlawful tape-recordings.

New Surveillance Laws

Part II, Dec. 23, 1998. Effective January 1, 1999, the statute imposes liability upon any person who (a) trespasses with the intent of obtaining any "visual image, sound recording or other physical impression" of the plaintiff; (b) attempts to obtain such "physical impression" with the use of a visual or auditory enhancing device; or (c) directs, solicits, or induces another to obtain such a physical impression. To prevail, the plaintiff must demonstrate that the "physical impression" is of a "personal or familial activity" and that the intrusion is "offensive to a reasonable person." Damages may include up to triple the general and special damages, punitive damages, and disgorgement of any proceeds from the use of an image. The plaintiff may also seek injunctive relief. The sale or publication of an image obtained from a physical or constructive invasion of privacy does not by itself result in liability, and law enforcement activities are specifically exempted.

The Arkansas Legislature passed Act 757 of 1999, which creates the crime of "video voyeurism." The legislation provides that "It is unlawful to use any camera, videotape, photo-optical, photo-electric, or any other image recording device for the purpose of secretly observing, viewing, photographing, filming, or video taping a person present in a residence, place of business, school, or other structure, or any room or particular location within that structure, where that person is in a private area out of public view, has a reasonable expectation of privacy, and has not consented to the observation." Violation of the law constitutes a felony punishable by up to six years in prison and/or a $10,000 fine. There is no newsgathering exemption in the Act.

And Missouri's Rev. Stat. § 565.253(1) states, "A person commits the crime of invasion of privacy if he knowingly views, photographs or films another person, without that person’s knowledge and consent, while the person being viewed, photographed or filmed is in a state of full or partial nudity and is in a place where he would have a reasonable expectation of privacy.” Violation under this statute is a class A misdemeanor unless more than one person is viewed, photographed or filmed in full or partial nudity during the same course of conduct, in which case the offense is a class D felony. Mo. Rev. Stat. § 565.253(2). If committed by a prior offender, the offense is a class C felony. Id. The statute of limitations period is three years from the date of viewing, photographing or filming or three years from discovery of the viewing, photographing or filming if the person who was viewed, photographed or filmed did not realize at the time that he was being viewed, photographed or filmed. Mo. Rev. Stat. §565.255. The statute creates certain exceptions for law enforcement personnel. Mo. Rev. Stat. § 565.257.

Related Newsgathering Torts

Trespass

The Fourth Circuit, in Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 972492P (4th Cir. Oct. 20, 1999), upheld a jury award of nominal damages on the plaintiff’s trespass and duty of loyalty claims against ABC, which had sent two reporters undercover to obtain employment at Food Lion supermarkets to film the premises with hidden cameras as part of an investigation into the store’s food handling practices. The court rejected the argument that a heightened level of First Amendment scrutiny should be applied to a trespass claim based on newsgathering because, it reasoned, the
trespass tort is a generally applicable law that does not single out the press. The court cited with approval Desnick v. American Broadcasting Cos., 44 F.3d 1345, 23 Med. L. Rep. 1161 (7th Cir. 1995) which rejected trespass claims against reporters posing as patients at an eye clinic. The court, however, upheld the trespass judgment on the grounds that the reporters exceeded the scope of consent to be on Food Lion's premises by breaching their duty of loyalty to Food Lion, but it rejected the claim that the reporters committed trespass through misrepresentation because that did not interfere with Food Lion's property interest. But the court strictly barred the recovery of reputation-type damages under non-reputational tort claims without satisfying the stricter First Amendment standards of a defamation claim. It affirmed that "such an end-run around First Amendment strictures is foreclosed by Hustler Magazine v. Falwell, 485 U.S. 46 (1988)."

In Medical Lab. Management Consultants v. American Broadcasting Co., 30 F. Supp. 2d 1182 (D. Ariz. 1998), the court recognized that the use of false pretenses to gain access to premises could give rise to a trespass claim, but held that no such claim could be maintained where the only damages flowed from the broadcast of truthful information obtained during the putative trespass.

In Willis/Kidson Broadway, Inc. v. Griffin Television, L.L.C., Case No. 91, 812 (Okla. Ct. Civ. App. March 5, 1999), the Oklahoma Court of Civil Appeals relied heavily on the Seventh Circuit decision in Desnick v. American Broadcasting Cos., 44 F.3d 1345, 23 Med. L. Rep. 1161 (7th Cir. 1995) to hold that the plaintiffs stated no viable claims for fraud, trespass, or interception of communications arising from the defendant television station's newsgathering activities even though the reporters misrepresented their identities and surreptitiously videotaped scenes of the interior of a child care facility, including children engaged in various activities.

The Minnesota Supreme Court upheld the constitutionality of the criminal trespass statute in a challenge by anti-fur protesters at the Mall of America who claimed it violated their free speech rights. The court held that the Minnesota Constitution offers no greater protection to speech than the First Amendment, and that neither the presence of public financing nor the invitation to the public to come onto mall property transformed privately-owned property into public property for purposes of "state action" restricting speech. State v. Wicklund, 1999 WL 126690 (Minn. March 11, 1999).

State law claims of trespass against media defendants could see an increase in California following the state's adoption of a so-called "Anti-Paparazzi Statute" (Cal. Civ. Code § 1708.8), providing enhanced damages against reporters and media employers for trespass.

Fraud

In Food Lion, Inc. v. Capital Cities/ABC, Inc., No. 972492 (4th Cir. Oct. 20, 1999), the Fourth Circuit reversed a jury judgment of fraud against ABC ($1,400 compensatory damages and $5.5 million punitive damages, reduced on remittitur to $315,000). As part of an investigation into the supermarket chain's food handling practices, ABC reporters obtained low level positions at two stores based on false resumes. While employed there the reporters used hidden cameras to record such practices. The Fourth Circuit, in a 2-1 vote on this issue, found that Food Lion had not shown

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sufficient injury, an essential element of a fraud claim under North Carolina law, to support the judgment. While the plaintiff argued that it incurred hiring costs when the reporters left their supermarket positions, the court found that they were at-will employees who had not committed themselves to any length of employment. As to the claim of injury based on the wages paid, the evidence showed that the reporters provided adequate services in return for the wages. Moreover, the court held the First Amendment bars the recovery of reputation-type damages under non-reputational tort claims without satisfying the stricter First Amendment standards of a defamation claim.

In June 1999, the First Circuit heard argument in Veilleux v. National Broadcasting Co., Inc., 8 F. Supp. 2d 23, 26 Media L. Rep. 1929 (D. Me. 1998), cross-appeals docketed, Nos. 98-2104, 98-2176 (1st Cir. Oct. 9, 1998, Oct. 29, 1998), involving a media defendant’s liability for allegedly false representations regarding the content and slant of a television news broadcast. The plaintiffs, a trucker and the truck company owners, alleged that the “NBC Dateline” producer and correspondent obtained their cooperation — including their agreement to allow filming of the trucker’s cross-country drive — by falsely representing that the broadcast would show the “positive side” of the trucking industry and would not include representatives of an advocacy group calling for stricter trucking safety regulations. Instead, the program concluded that “American highways are a trucker’s killing field,” included representatives of the advocacy group, alleged that the plaintiff trucker had “repeatedly violated hours-of-service regulations, falsified his logbooks, and lied to federal inspectors”; and revealed that he had failed a random drug test. 8 F. Supp. 2d at 29-30, 26 Media L. Rep. 1931.

Plaintiffs brought, and largely survived summary judgment on, claims of negligent misrepresentation, fraudulent misrepresentation, defamation, invasion of privacy, negligent infliction of emotional distress, and loss of consortium. The court granted summary judgment for defendants on claims for intentional infliction of emotional distress and punitive damages. 8 F. Supp. 2d at 42-43, 26 Media L. Rep. at 1943. In July 1999, after 10 hours of deliberation, the jury found for the plaintiffs on all claims (except five of the 18 allegedly libelous statements) and issued a $525,000 verdict. The jury awarded the trucking company owner $150,000 for pecuniary loss, $50,000 for physical injury and emotional distress, and $100,000 for reputational damages; his wife $50,000 for loss of consortium; and the individual trucker $100,000 for emotional distress and mental suffering and $75,000 for reputational damages.

In Medical Lab. Management Consultants v. American Broadcasting Co., 30 F. Supp. 2d 1182 (D. Ariz. 1998), the court applied Arizona law to a broad range of privacy and newsgathering-related torts. Though the court noted that Arizona authority on point is scarce, it issued the only Arizona judicial pronouncement on several unsettled issues. The court held that: (1) journalists’ use of false pretenses to gain access to business premises for a hidden-camera story did not give rise to claim for intrusion; (2) while use of false pretenses might have given rise to trespass claim, no such claim could be maintained where the only damages flowed from the broadcast of truthful information obtained during the putative trespass; (3) while journalist’s misrepresentations in connection with hidden-camera investigation might otherwise have constituted actionable fraud, no fraud claim could
be maintained where damages stemmed from broadcast of truthful information and not the misrepresentations themselves, and (4) pecuniary component of emotional distress caused by fraud might be recoverable in tort.

In *W.D.I.A. v. McGraw-Hill, Inc.*, No. C-1-93-448 (S.D. Ohio Dec. 18, 1998), ruling after a bench trial the court held that the defendants committed contract breach and fraudulent inducement in making misrepresentations to the plaintiff in order to test the security of the nation’s credit reporting system. The court, however, severely limited damages by refusing to award punitive damages and limiting compensatory damages to the harm that the court found was proximately caused by the defendants’ pre-publication acts.

**Stalking/Harassment**

While no cases were reported in the media context, stalking statutes continue to be challenged on constitutional grounds. In *State v. Musser*, 191 Ariz. 228, 954 P.2d 1953 (Ct. App. 1997), the Arizona Court of Appeal held that A.R.S. § 13-2916, which prohibits threats and harassment by telephone, is unconstitutionally vague. In March 1999, however, the Arizona Supreme Court rejected the First Amendment overbreadth challenge on standing grounds and vacated the opinion of the Court of Appeals. *State v. Musser*, 1999 WL 153609 (Ariz. 1999). Though the court left open the possibility of future challenges on different facts, the statute can once again give rise to liability for threats by telephone.

In *Troncalli v. Jones*, 1999 WL 134688 (March 15, 1999), the Georgia Court of Appeals ruled that the state’s criminal stalking statute does not create a private cause of action in tort. See also *Goosen v. Walker*, 714 So. 2d 1149, 1150 (Fla. 4th DCA 1998) (finding activity to be stalking under Florida Statutes §§ 784.046 and 784.048, injunctive relief was granted based on a defendant’s videotaping his neighbors on two or four occasions during four months).

**Significant Non-Media Intrusion Decisions**

In *Plaxico v. Michael*, 1999 WL 174262 (Miss. 1999), the Mississippi Supreme Court discussed offensiveness for the first time in the context of intrusion on privacy. In Plaxico, the plaintiff was a woman who was photographed through her bedroom window during sexual relations with her lesbian lover. The photographer was the lover’s ex-husband, who wanted to use the lesbian relationship as evidence to wrest custody of his minor daughter away from the ex-wife. The photographs, which showed the plaintiff partially nude, were developed and allowed as evidence in a custody hearing; the man successfully gained custody of his daughter.

A subsequent privacy lawsuit was filed against the man by his ex-wife’s lover. A trial judge dismissed the suit with prejudice, finding that the man was protected by a qualified privilege to protect the interests of the minor child. The Supreme Court affirmed, but its decision rested on whether the man’s conduct was offensive, and the court declined to reach the issue of qualified privilege. The court held that “most reasonable people would feel [the man’s] actions were justified.
in order to protect the welfare of his minor child.” *Id.* at *4. It is unclear whether the court was measuring offensiveness by asking whether a reasonable person in the man’s position would do the same thing, instead of whether a reasonable person in the plaintiff’s position would be highly offended by the defendant’s conduct. In dissent, four members of the Supreme Court called the incident a “gross invasion of privacy” that was “highly offensive.” *Id.* at *4.

See also *Swerdlick v. Koch*, 721 A.2d 849 (1998) (no violation of the intrusion prong of the Privacy Act (R.I. Gen. Laws § 9-1-28.1(a)(1)) when plaintiff’s neighbor photographed “events that were taking place outside of plaintiff’s house, all of which were in full view of their neighbors.”); *Sabrah v. Lucent Technologies, Inc.*, 1998 WL 792503 (N.D. Tex. 1998) (plaintiff found to have validly asserted a claim for intrusion against her former employer based upon the plaintiff’s assertions that a co-employee opened several packages of her mail, including one marked “private” which contained information about her bank accounts, and removed their contents); *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032 (D. Kan. 1998) (under Kansas law, a reasonable jury would not conclude plaintiff suffered an intrusion on privacy within the meaning of *Restatement (Second) of Torts* § 625B by his employer’s application of its drug testing policy); *Tapia v. Sikorsky Aircraft Division of United Technologies Corp.*, 1998 WL 310872 (Conn. Super. 1998) (defendant entered into plaintiff’s personal locker while plaintiff was under suspension and inventoried contents; allegation that discovery of plaintiff’s personal and private items contributed to decision to terminate plaintiff’s employment failed to support allegation that the intrusion was highly offensive to a reasonable person); *Blackwell v. Harris Chemical North America, Inc.*, 11 F. Supp. 2d 1302, (D. Kan. 1998) (defendant’s alleged harassing and badgering the office of plaintiff-employee’s physician to obtain confidential information and its alleged publicizing personal medical information to other employees was sufficient to withstand a motion to dismiss); *Aguinaga v. Sammina Corp.*, 1998 U.S. Dist. LEXIS 6630 (N.D. Tex. 1998) (reasonable jury could find sexual misconduct was an intentional intrusion where the plaintiff alleged that the supervisor forced the plaintiff to engage in sexual conduct and photographed the conduct without the plaintiff’s consent); *Liu v. Srituli*, 36 F. Supp. 2d 452 (D.R.I. 1999) (holding that rape would be actionable under this intrusion sub-section of the Privacy Act); *Melder v. Sears, Roebuck & Company*, 98-0939 (La. App. LEXIS 1136 (La. App. 4th Cir. March 31, 1999) (no actionable intrusion damages to plaintiff where defendant former employer of plaintiff informed other employees that plaintiff had stolen from the store and directed other employees not to associate with plaintiff, but where employees nonetheless continued to associate with plaintiff); *St. Anthony’s Medical Center v. H.S.H.*, 974 S.W.2d 606, 609-10 (Mo. App. 1998) (hospital that gave a former patient’s medical records to his wife’s divorce attorney was not liable for intrusion upon seclusion because the hospital did not use unreasonable means to obtain the records).

4. Misappropriation/Right of Publicity

Recognition

According to the 1998–99 *Media Privacy Survey*, 45 jurisdictions currently recognize the
tort of misappropriation. In nine jurisdictions the courts have not yet had the opportunity to rule on the issue.

The protection derives from statute in 16 jurisdictions, in 10 of which the statute exists in addition to the protections provided at common law, while in the remaining six jurisdictions the statute is the sole source for protection against misappropriation.

According to the 1999-2000 Media Privacy Survey, two states — Illinois and Washington — have this past year enacted legislation protecting against misappropriation. Illinois’ Right of Publicity Act, 765 ILCS 1075/1, et seq. became effective January 1, 1999. The statute proscribes the use of a person’s identity for commercial purposes during the individual’s lifetime without having obtained previous written consent from the appropriate person or persons or their authorized representatives. Id. at 1075/30(a). The prohibition is effective for 50 years after the date of death. Id. at 1075/30(b).

“Identity” is defined as “any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener” and includes name, signature, photograph, image, likeness or voice. Id. at 1075/5. The rights afforded under the Act are property rights that are “freely transferable in whole or in part” by written transfer or by intestate succession to a spouse, parent, child or grandchild. The rights (distinguished from the proceeds of the rights), however, are not subject to levy or attachment and may not be the subject of a security interest. Id. at 1075/15. Written consent for commercial use of the identity of an individual may be given by the individual or authorized representative, a person to whom rights have transferred in writing, or, after death and if no written transfer is made, any person who possesses an interest in the rights. Id. at 1075/20.

Several exceptions are set out in the Act, including (1) the use of an individual’s identity in an attempt to portray, describe or impersonate them in a live performance, a single and original work of fine art, play, book, article, musical work, film, radio, television, or other audio, visual or audio-visual work, provided that the work itself does not constitute a commercial advertisement; (2) use for non-commercial purposes; (3) use of an individual’s name in truthfully identifying the person as an author of a particular work or performer in a particular performance; (4) promotional material,


15 Alaska (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, and Wyoming.

16 California, Florida, Illinois, Indiana, Nevada, Oklahoma, Tennessee, Texas (statute appears to only to apply to the misappropriation of the identities of the deceased), Utah, and Wisconsin.

17 Massachusetts, Nebraska, New York, Rhode Island, Virginia, and Washington.
advertisements or commercial announcements for any of the above described uses; and (5) use of photos, videotape or images by a person, firm or corporation practicing the profession of photography to exhibit in the professional photographer’s place of business or portfolio, unless such exhibition continues after written notice objecting to such exhibition has been given by the individual portrayed. 765 ILCS 1075/35.

Violators of the statute may be held liable for the greater of (1) actual damages, profits derived for unauthorized use, or both; or (2) $1000.00. Injunctive relief and attorneys’ fees are available, as are punitive damages for willful violations. 765 ILCS 1075/45, 50 & 55. The Act supplants common law rights of publicity; however, the Act specifically states that its terms supplement “the common law right of privacy.” Id. at 1075/60.

Effective June 11, 1998, the Washington legislature enacted a law recognizing a property right in every individual in the use of his or her name, voice, signature and likeness. RCW 63.60.010 et seq. RCW 63.60.010 and .030 declare that every natural person has a property right in his or her name, voice, signature, photograph and likeness. “Likeness” includes an individual’s distinctive appearance, gestures and mannerisms. The property right is freely transferable by otherwise appropriate inter vivos or testamentary documents. The statutes provide protection for the right for ten years following death for “persons” and for seventy five years following death for “personalities” (those whose rights have commercial value).

Under RCW 63.60.070 the use of a person’s right of publicity “in connection with matters of cultural, historical, religious, educational, newsworthy, or public interest, including, without limitation, comment, criticism, satire, and parody relating thereto, shall not constitute a use for which consent is required . . . .” In addition, consent is not required for use in original works of art that are not published in more than five copies, literary and theatrical works, musical compositions, television programming, sports broadcasts and the like so long as the use does not claim an endorsement by the person.

The statute provides for the greater of presumed damages of $1,500.00 or actual damages plus defendant’s profits from the use. In addition, RCW 63.60.060 provides for injunctive relief as well as impoundment and destruction of materials including molds, plates, masters, tapes and negatives.

Significant Media Decisions

In Hoffman v. Capital Cities/ABC, Inc., 1999 WL 38490 (C.D. Cal. 1999), the federal district court awarded $1.5 million in compensatory damages and $1.5 million in punitive damages to actor Dustin Hoffman for the unauthorized use of a photograph of Hoffman from the movie “Tootsie” and Hoffman’s name in connection with an article concerning current designer fashions in Los Angeles Magazine. The court found that the magazine piece “crossed over the line between editorial content and advertising” when it used the name and likeness of “truly one of our country’s living treasures, actor Dustin Hoffman.” The decision is on appeal.
In 1998, the Ninth Circuit granted another victory to a celebrity plaintiff in a misappropriation case, but also reaffirmed the immunity of media defendants from misappropriation suits where the media defendants’ role is limited to running a challenged advertisement. In *Newcombe v. Adolf Coors Company*, 157 F.3d 686, 26 Media L. Rep. 2364 (9th Cir. 1998), the Ninth Circuit reversed the grant of summary judgment for defendants Coors and its advertising agency on common law and statutory misappropriation claims. The court found triable issues regarding whether plaintiff’s likeness was used in a beer advertisement that featured an artist’s drawing based on a newspaper photograph of the plaintiff pitching during the 1949 World Series. The court first noted that neither the common law nor the California statute indicate the degree to which a plaintiff must be identifiable from a likeness, such as an artist’s drawing, as opposed to a photograph. The court reviewed the statutory definition for “readily identifiable” appearing in the California statute to address photographs (Cal. Civ. Code § 3344(1)), and held that the same standard applied to plaintiff’s common law claim of “likeness” in the drawing. The court found that with the exception of Newcombe’s player number and the coloring of the bill of his hat, the artist’s rendition was largely identical to the photograph and a triable issue existed regarding whether Newcombe’s pitching stance was sufficiently distinct to render him readily identifiable in the advertisement.

The court went on to affirm the grant of summary judgment for Time, Inc., publisher of *Sports Illustrated*, where the ad appeared. On plaintiff’s common law claim, the court held that the second prong of *Eastwood*, 149 Cal. App. 3d at 420, requiring the appropriation to have been used to the defendants’ advantage, was not established. Time’s only role in the case was the receipt of payment for carrying the ad in its magazine. While Time “benefitted” from the ad by the receipt of payment, the court held that its benefit was not related to the content of the advertisement and, therefore, summary judgment was proper. On similar grounds, and based on an express exemption under California law for advertisers who act without knowledge of an unauthorized use, the court also affirmed summary judgment for Time on plaintiff’s statutory misappropriation claim. *But see Ainsworth v. Century Supply Co.*, 295 Ill. App. 3d 644, 693 N.E.2d 510 (2d Dist. 1998) (media company producing and broadcasting a television commercial may be liable for misappropriation of plaintiff’s name or likeness because the media company received a commercial benefit in the form of a fee for such production and broadcast, notwithstanding that the advertisement was for another company’s products).

In the Second Circuit, the appellate court certified a question to New York Court of Appeals in *Messenger v. Gruner + Jahr USA Publishing*, 994 F. Supp. 525 (S.D.N.Y. 1998), to resolve questions raised by seeming conflict between older and newer New York decisions applying the newsworthiness exception to the state’s commercial misappropriation. Specifically, the Second Circuit is seeking guidance about whether New York would not apply the “newsworthiness” exception to a publication “infected with substantial falsification or fictionalization.” The appeal is from a $100,000 jury verdict finding *YM Magazine* liable for misappropriating the image of a 14-year-old model by putting her picture alongside an advice column which contained a letter in which the author stated she had sex with three boys.

In other cases, results were mixed for media defendants. *Compare Michaels v. Internet*

Significant Non-Media Misappropriation Decisions

The California Supreme Court has granted review in Comedy III Productions, Inc. v. Gary Saderup, Inc., 68 Cal. App. 4th 744 (1998), review granted, 80 Cal. Rptr. 464 (March 17, 1999). The California Court of Appeal had found that an artist’s sale of lithographs and t-shirts bearing a sketch of The Three Stooges was not protected by the First Amendment. According to the court, the exception to the state’s statute which provides for the survivability of a “personality’s” right of publicity, Cal. Civ. Code § 990, covers only newsworthy material, not every newsworthy individual.

In Harbin v. Jennings, et al., 1999 WL 58569, (Miss. Ct. App. 1999), a minor sued a commercial photographer and a picture frame company for invasion of privacy in the unauthorized use of the child’s school photograph in up to 1,000 picture frames distributed by the company. The Court of Appeals reversed a trial court’s award of actual and punitive damages, but noted that use of the child’s photograph was a “textbook example” of a misappropriation claim. Id, at *3. The court ordered a new trial, and instructed the judge to allow the jury to consider awarding only nominal damages.

The right of publicity in Alabama is limited by the “first-sale doctrine,” which provides that “once the holder of an intellectual property right ‘consents to the sale of particular copies . . . of his work, he may not thereafter exercise the distribution right with respect to such copies.” Allison v. Vintage Sports Plaques, 136 F. 3d 1443, 1447 (11th Cir. 1998) (quoting Nimmer on Copyright § 8.12[b][1](1997)). In Allison, plaintiff had a licensing agreement with a third-party company to manufacture and market trading cards bearing her deceased husband’s likeness. Plaintiff sued defendant company for violation of the right of publicity when defendant mounted the cards on plaques and re-sold them. The Court of Appeals for the Eleventh Circuit held that reselling a product that was lawfully obtained does not give rise to a cause of action for the violation of the right to publicity. Id. at 1451.

See also Oliveiro v. Frito-Lay, Inc., 1999 U.S. Dist. LEXIS 352, 1999 WL 20849, 50 U.S.P.Q.2d 1152 (S.D.N.Y. 1999) (individual may not state a § 51 claim for unlawful use of her voice when she had already disposed of rights to her voice by placing the song in the public domain);
5. Intentional Infliction of Emotional Distress

Recognition

According to the 1999-2000 MEDIA PRIVACY SURVEY, all 54 jurisdictions recognize the tort of intentional infliction of emotional distress, and 34 have case law specifically dealing with the tort in the media context. In the remaining 20 jurisdictions, the courts have yet to address the application of the tort to the media.

Significant Media Cases

According to the 1999-2000 50-STATE MEDIA PRIVACY AND RELATED LAW SURVEY, plaintiffs continued to have limited success stating claims of intentional infliction of emotional distress against media defendants. See, e.g., Newcombe v. Adolf Coors Co., 157 F.3d 686, 26 Media L. Rep. 2364 (9th Cir. 1998) (magazine’s motion for summary judgment granted on plaintiff’s claim of intentional infliction of emotional distress stemming from the use of plaintiff’s image in an alcohol advertisement); Munoz v. American Lawyer Media, LP, 1999 Ga. App. LEXIS 208 (1999) (intentional infliction of emotional distress will not provide a remedy to a plaintiff when the news media truthfully reports an actual newsworthy event, even if the event was so insulting as naturally to humiliate, frighten or embarrass plaintiff); Johnson v. McGraw-Hill Cos., 27 Media L. Rep. 1153 (E.D. Mich. 1998) (defendants’ conduct in writing and publishing the challenged article was not “outrageous” where the reporter spent several months researching the article and conducted numerous interviews); Gaylord Entertainment v. Thompson, 958 P.2d 128, 1998 OK 30 (Okla. 1998) (“the offensive publications in this case scenario are both protected and nondefamatory. These two characteristics, when combined, take the tendered . . . conduct out of that category which makes it actionable under the tort-of-outrage rubric”); Lunney v. Prodigy Services Co., 683 N.Y.S.2d. 557 (2d Dep’t 1998) (intentional infliction of emotional distress claim dismissed against on-line service provider on grounds that the provider was protected from liability by the qualified privilege historically afforded to telegraph companies that transmit offensive or libelous text).

But in Barrett v. Outlet Broadcasting, Inc., 22 F. Supp. 2d 726 (S.D. Ohio 1997), the District Court for the Southern District of Ohio held that media defendants could be liable for broadcasting

18 Alabama, 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, Texas, Utah, Virginia, Washington, and Wyoming.

19 Alaska, Delaware, Guam, Hawaii, Idaho, Indiana, Iowa, Kansas, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Puerto Rico, South Dakota, Tennessee, Vermont, Virgin Islands, West Virginia, and Wisconsin.
footage of suicide victim and thus denied summary judgment to defendants on plaintiffs' claim for intentional infliction of emotional distress.

Non-Media Intentional Infliction of Emotional Distress Decisions

The non-media cases reported in the 1999-2000 MEDIA PRIVACY SURVEY reinforced the difficulty of stating an intentional infliction of emotional distress claim. In Colorado, for instance, the Colorado Supreme Court has recently emphasized that the "level of outrageousness required for conduct to create liability . . . is extremely high." Coors Brewing Company v. Floyd, 1999 WL 9769 (Colo. Jan. 11, 1999). The plaintiff alleged that his supervisors ordered him to perform illegal surreptitious narcotics investigations of Coors employees. Although Coors had been advised to discontinue such investigations, the plaintiff alleged that Coors, in conspiracy with its outside legal counsel, continued the investigations and laundered money used to fund the investigations through the law firm. The plaintiff alleged that after several years of such illegal investigations, he was "scapegoated" by the company and ultimately fired in order to protect his supervisors and the company from liability.

The Colorado Supreme Court held that the plaintiff failed to state a claim for outrageous conduct. Although Coors' conduct toward society may have been "outrageous," its conduct toward the plaintiff was what was at issue. Because the plaintiff had willingly participated in the illegal investigations, Coors' decision to scapegoat and fire him could not rise to "the high level of outrageousness required by our case law." Id.

See also Ortega Trujillo v. Banco Central del Ecuador, 17 F. Supp. 2d 1340, 1343 (S.D. Fla. 1998) ("an attempt to state a claim for intentional infliction of emotional distress based on the same publication as the defamation count must fail"); Troche v. Smith, 1998 WL 516292 (Conn. Super. 1998) (while acknowledging a split in the Connecticut Superior Courts as to whether or not extreme and outrageous behavior may be determined as a matter of law, the court held that the more recent cases provide for the court to make such a threshold determination, and held that two statements made to a news reporter did not constitute extreme and outrageous behavior); Coble v. Joseph Motors, Inc., 695 N.E.2d 129 (Ind. Ct. App. 1998) (finding a supervisor's display of the severed tip of an employee's finger at an employee safety meeting was not "intended to hurt," and thus was not intentional conduct); DeLeon v. Kmart Corp., No. 2970938, 1998 WL 678078, *2 (Ala. Civ. App. Oct. 2, 1998) (holding that defendant's action in detaining plaintiff sustained a cause of action for false imprisonment and assault and battery but did not amount to extreme and outrageous conduct even though possibly insulting and embarrassing); Ball v. Heilig-meyers Furniture Co., No. 98-599-Civ-T-17A, 1999 WL 80355, *5 (M.D. Fla. Feb. 10, 1999) (store manager's verbal sexual comments and physical grabbing and rubbing against plaintiff employee was not sufficiently outrageous); Coddington v. Staab, 716 So. 2d 850, 851 (Fla. 4th DCA 1998) (complaint alleging that defendant entered plaintiff's apartment without permission and ransacked his personal property failed to state a claim for intentional infliction of emotional distress).

Jan. 15, 1999) (affirming trial court award of $2,000,000 in damages for severe emotional distress suffered by plaintiff following funeral home's unauthorized interference with entombed remains of plaintiff's wife); Kohnke v. Shoney's Inc., 1998 WL 800112 (E.D. La. Nov. 12, 1998) (plaintiff stated cause of action where police officer allegedly berated, threatened, verbally abused, humiliated and handcuffed plaintiff and later arrested and jailed plaintiff for 15 hours for allegedly resisting arrest when plaintiff simply was waiting in his automobile for police after getting into dispute with restaurant manager over alleged overcharging); Brunetti v. Rubin, 999 F. Supp. 1408 (D. Colo. 1998) (plaintiff's allegations of sexual harassment by her supervisor — which included unwanted touching and repeated phone calls at home — was sufficient to withstand a motion to dismiss); Cassidy v. Millers Casualty Insurance Company of Texas, 1 F. Supp. 2d 1200 (D. Colo. 1998) (allegations that insurance company engaged in vexatious and frivolous litigation and employed "abusive and delaying" tactics were, in view of plaintiff's vulnerable mental condition, sufficient to state claim for outrageous conduct).

6. Negligent Infliction of Emotional Distress

Recognition

According to the 1999-2000 Media Privacy Survey, 45 jurisdictions currently recognize a cause of action for negligent infliction of emotional distress. In 15 of these jurisdictions the tort has been analyzed in the media context, in 29 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 two jurisdictions there are no cases reported.


23 Michigan.

24 Alabama, Arkansas, Georgia, Iowa, Kentucky, Maryland, and Texas.

25 Kansas and South Carolina.
Significant Media Cases

In Rosin v. Fort Howard Corp., 222 Wis. 2d 365, 588 N.W. 2d 58 (Ct. App. 1998), a minor sued for negligent infliction of emotional distress after he saw a photograph in a local newspaper showing his father's body being removed from the scene of an accident at the defendant's power plant. The Wisconsin Court of Appeals affirmed a judgment dismissing the case for failure to state a claim upon which relief can be granted. A claim for negligent infliction of emotional distress fails as a matter of law, the court recognized, unless the following three factors are present: 1) the injury the victim suffered must have been fatal or severe; 2) the victim and the plaintiff must be related as spouses, parent-child, grandparent-grandchild, or siblings; and 3) the plaintiff must have observed an extraordinary event soon after the injury occurred. Id. at 369-70, 588 N.W. 2d at 61. The court held that the third factor was not present because the plaintiff learned about his father's death through indirect means and, therefore, did not "observe" his father's death nor his father at the accident scene soon after the accident. Id. at 373, 588 N.W. 2d at 62-63.

Additionally, a Florida court has ruled that where the source of plaintiff's emotional distress was the disclosure of private facts, it was not independently actionable under the heading of negligent infliction of emotional distress. Doe v. Univision Television Group, Inc., 717 So. 2d 63, 65 (Fla. 3d DCA 1998).

7. Conspiracy

Plaintiffs also had little success stating conspiracy claims against the media. See, e.g., Brewer v. Capital Cities/ABC, Inc., 1999 WL 74616 (Tex. App.--Fort Worth Oct. 15, 1998, no writ) (conspiracy to libel claim fails as a matter of law because defendant established that she did not make any false statements about plaintiff); Peavy v. WFAA-TV, Inc., 1999 WL 147729 (N.D. Tex. Feb. 18, 1999) (granting summary judgment in favor of media defendants on claim that defendants conspired with news sources to violate plaintiffs' rights under the federal wiretap statute and common law); Gaylord Entertainment v. Thompson, 958 P.2d 128, 1998 OK 30 (Okla. 1998) (a conspiracy to carry on an activity that is lawful and shielded by fundamental law cannot be deemed tortious).

8. Breach of Contract

One Florida appellate court has recognized an action against the media which is based upon a breach of contract/promissory estoppel cause of action. In Doe v. Univision Television Group, Inc., 717 So. 2d 63, 64 (Fla. 3d DCA 1998), the court reversed a dismissal for failure to state a cause of action claiming breach of contract and promissory estoppel based on agreement to be interviewed for television broadcast "on condition that her identity would be concealed."


In addition to the ride-along cases reported above, two additional decisions involving § 1983 claims are of note. In Lauro v. City of New York, (S.D.N.Y. February 25, 1999), the District Court
for the Southern District of New York held that the “perp walk” — the police practice of deliberately walking an arrestee outside the station house at the request of the media so that the suspect can be photographed, filmed or questioned — constitutes a violation of an arrestee’s privacy and personal rights under the Fourth Amendment. Although the arrestee did not bring a claim against the media for broadcasting the perp walk, the decision did note that the media could be potentially liable for constitutional violations if it acts as a willing participant in joint activity with the state.

In Riley v. St. Louis County, 153 F.3d 627 (8th Cir. 1998), the Eighth Circuit affirmed dismissal of plaintiff's § 1983 action seeking damages against a county police department because the department photographed her deceased son as he lay in his coffin and subsequently displayed the photographs at a public gathering concerning gang-related activity. Plaintiff claimed that the department’s acts violated her rights of sepulchre and privacy. The Eighth Circuit dismissed the sepulchre claim because plaintiff failed to allege any physical insult to the deceased as required under Missouri law, and because the right of sepulchre did not constitute a fundamental liberty interest for purposes of § 1983.

The court dismissed the plaintiff’s constitutional right of privacy claim because the disclosure of the photographs of plaintiff’s deceased son did not reach the level of a “shocking degradation” or an “egregious humiliation,” and because plaintiff allowed her son’s body to be viewed at visitation and therefore had no legitimate expectation of privacy. Because the case arose in a civil rights context, in which the plaintiff had to prove a constitutional right, the decision will not automatically bar common-law privacy claims against the media in similar situations. However, the court’s focus on the lack of a legitimate expectation of privacy, and its reluctance to extend the sepulchre right beyond the traditional physical handling limitations, ought to translate into the media law area and discourage similar claims against the media.

10. Interference With Contract/Business Relations

According to the 1999-2000 PRIVACY AND RELATED LAW SURVEY, plaintiffs achieved little success in attempting to sue the media for tortious interference with contract/business relations. In Medical Lab. Management Consultants v. ABC, 30 F. Supp. 2d 1182 (D. Ariz. 1998), the court held that where a media report relates to a matter of public concern (and therefore triggers constitutional protections), the intentional interference theory cannot be used to circumvent the defects in a defamation claim (such as plaintiff’s inability to prove falsity). The court recognized that even where such an action is constitutionally permissible, Arizona law requires that the defendant act either with the “purpose” of interfering with business relationships or with knowledge “with substantial certainty” that interference will result. 1998 WL 896979 at *9-11.

See, e.g., Evans v. Dolcefino, 986 S.W.2d 69 (Tex. App.--Houston [1st Dist.] 1999, n.w.h.) (media defendants entitled to summary judgment on libel plaintiff’s tortious interference claim because broadcast was substantially true); Dudrick v. Dolcefino, 1998 WL 856236 (Tex. App.--Houston [14th Dist.] Dec. 10, 1998, pet. filed) (media defendants entitled to summary judgment on libel plaintiff’s tortious interference claim because there was no evidence of actual malice); Galveston
Newspapers, Inc. v. Norris, 981 S.W.2d 797 (Tex. App.--Houston [1st Dist.] 1998, pet. filed) (same); KTRK Television, Inc. v. Fowkes, 981 S.W.2d 779 (Tex. App.--Houston [1st Dist.] 1998, review denied), (media defendants entitled to summary judgment on libel plaintiff’s tortious interference claim because broadcast was substantially true); Peavy v. WFAA-TV, Inc., 1999 WL 147729, (N.D. Tex. Feb. 18, 1999) (one-year libel statute of limitations applies to tortious interference claim against media defendants where it is based on disparaging or defamatory statements).

See also Gaylord Entertainment vs. Thompson, 958 P.2d 128, 1998 OK 30 (Okla. 1998) (any publication that falls within the state constitutional freedom of political speech cannot be viewed as an act of tortious interference with an advantageous business relationship); Martens v. Davis, 1998 WL 240411 (E.D. La. May 12, 1998) (intentional interference claim against an author and a book publisher dismissed on the ground that the tort “only applies to a corporate officer interfering with his employer’s contractual relations with third persons”); Martens v. North, 1998 WL 378137 (E.D. La. 1998) (dismissing claim for intentional interference with contractual relations on statute of limitations grounds); American Broadcasting Co. v. Maljack Productions, Inc., 1998 WL 870685 (N.D. Ill. Dec. 9, 1998) (sending cease and desist letter to protect a copyright interest is privileged in a tortious interference case. A good faith belief in copyright interests is sufficient to establish the privilege, even if the copyright is later proven invalid.).

11. Injurious Falsehood/Product Disparagement/Slander of Title

While the Restatement provides that a defendant in an action for injurious falsehood is liable if he “knew of the falsity or acted with reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interests of the plaintiff in an unprivileged fashion,” Restatement (Second) of Torts, § 623 A, comment g, a California Court of Appeal concluded that “it is clear the Constitution will not permit liability to be imposed for injurious falsehood absent a showing of actual malice.” Melaleuca, Inc. v. Clark, 66 Cal. App. 4th 1344, 78 Cal. Rptr. 2d 627 (1998). The court found support for its application of this standard in the common law distinctions between defamation and injurious falsehood, and in the cases that have permitted liability on defamation claims on a finding of negligence alone. Those cases “permit liability to be imposed where less than actual malice has been shown because of the relatively high value we place on individual dignity and reputation. . . . Where the unique interest individuals and business organizations have in their reputations is not implicated, the public’s interest in avoiding self-censorship requires application of a higher standard of culpability.” Id. at 1360. That standard, according to the court, is constitutional actual malice.

12. Lanham Act/State Unfair Competition Law/Copyright

In Procter & Gamble, et al v. Amway Corp., et al., Civil Action No. H-97-2384 (S.D. Tex. 1999), the court granted Amway a motion for judgment as a matter of law rejecting Procter & Gamble’s allegations that Amway had violated the Lanham Act by spreading a 20-year-old rumor that Procter & Gamble was associated with Satanism. The court ruled that Procter & Gamble was a limited purpose public figure with respect to the Satanism rumor and applied the actual malice
standard in finding for the defendants. See also Porous Media Corp. v. Pall Corp., 173 F.3d 1109 (8th Cir. 1999) (applying public figure/actual malice analysis to a Lanham Act claim).

In Rock & Roll Hall of Fame v. Gentile Productions, No. 1:96 CV 899 (N.D. Ohio Sept. 1999), the court ruled that a professional photographer has the right to sell posters that feature his photographs of the Rock and Roll Hall of Fame without violating any trademark laws. The decision follows last year’s order by the Sixth Circuit Court of Appeals vacating a preliminary injunction against the photographer. On remand, the district court found that the Hall of Fame had not used the building design as a trademark, and that the photographer’s use of the words “Rock N’ Roll Hall of Fame — Cleveland” was a “fair use” and not an infringement of the Hall of Fame’s service mark.

In American Broadcasting Co. v. Maljack Productions, Inc., 1998 WL 870685 (N.D. Ill. Dec. 9, 1998), the court considered a Lanham Act claim against the BBC for sending cease and desist letters to potential copyright infringers that allegedly contained false or exaggerated statements concerning the scope of the BBC’s copyrights. The court held that the BBC’s transmittal of 50 cease and desist letters satisfied the “advertising or promotion” element of a Lanham Act claim, and that false claims of exclusive copyright protection are actionable.

See also Richards v. Cable News Network, Inc., 15 F. Supp. 2d 683 (E.D. Pa. 1998) (owner of World Beat record company’s claim that the Cable News Network had violated trademark infringement protection by naming its international music program “World Beat” was rejected on the grounds that the network’s use of the name will not create a likelihood of confusion); Martens v. Davis, 1998 WL 240411 (E.D. La. May 12, 1998) (unfair trade practices claim dismissed because only consumers and business competitors can have a cause of action under the Unfair Trade Practices Act, and the plaintiff did not qualify as either or consumer or a business competitor); Morgenstein v. ABC Inc., 27 Media L. Rep. 1350 (N.D. Cal. 1998) (brief depiction, in a one-hour special report, of a portion of a magazine article containing a photograph taken by plaintiff was a fair use);

13. Negligent Media Publication/Wrongful Death

In a stunning result, a Michigan jury returned a $25 million verdict against the producers and distributors of the Jenny Jones show based on a claim that the show was negligent in the death of one of its guests at the hands of another guest. Graves v. Warner Bros., et al., No. 95-494536-NZ (Mich. Cir. Ct. May 7, 1999). Scott Amedure was killed three days after he and his murderer, Jonathan Schmitz, appeared on the Jenny Jones show in which Amedure revealed that he had a crush on Schmitz and a private sexual fantasy about himself and Schmitz.

In yet another suit arising out of ABC’s undercover investigation into the telepsychic industry, the Ninth Circuit affirmed a grant of summary judgment in favor of ABC on a claim that the broadcast caused Narsas Kersis, an employee of the telepsychic business who was videotaped by ABC, to relapse into drinking and subsequently die. Kersis v. ABC, Inc., No. CV-95-00848-JMJ (9th Cir. June 8, 1999). The Ninth Circuit based its holding on the fact that the plaintiffs, Kersis’ parents, failed to sufficiently draw a connection between ABC’s actions and their son’s death.
In Brundt v. The Weather Channel, Inc., No. 98-10060-Civ-Paine, 1999 U.S. Dist. LEXIS 3998 (S.D. Fla. March 18, 1999), the District Court for the Southern District of Florida ruled on a motion to dismiss that the Weather Channel was not liable for the alleged weather-related death of a Florida fisherman. The family of Charles Cobb sued the network for $10 million claiming adverse weather conditions caused him to be thrown from his fishing boat and drown in June, 1997. The family claimed Cobb watched the Weather Channel before his departure and received no warning of potentially dangerous weather. The court found the Cobb family’s wrongful death claim an unreasonable expansion of tort law, refusing to “impose on a television broadcaster of weather forecasts a general duty to viewers who watch a forecast and take action in reliance on that forecast.” 1999 U.S. Dist. LEXIS 3998, at *5.

In Orozco v. The Dallas Morning News, 975 S.W.2d 392 (Tex. App.--Dallas 1998, no writ), a negligent publication claim was alleged over a newspaper article in which The Dallas Morning News accurately reported the street block of the home of a gang member, who was arrested as a suspect in a fatal drive-by shooting. On the night of the publication of the newspaper article, unknown assailants fired on the suspect’s home, killing the suspect’s sister and wounding a child. The suspect’s family sued the newspaper claiming that the retaliatory shooting was caused by the newspaper’s publication of the block address. The state district court entered summary judgment for the newspaper on the ground that the newspaper owed no legal duty to the plaintiffs. The Court of Appeals affirmed the summary judgment, finding there was no duty owed and applying a risk-utility balancing test. The court emphasized the burden on the press to refrain from reporting newsworthy facts that are publicly available.

See also Newcombe v. Adolf Coors Compny, 157 F.3d 686, 26 Media L. Rep. 2364 (9th Cir. 1998) (court affirmed summary judgment for magazine on plaintiff’s negligence claim, which arose out of an advertisement containing an image bearing likeness to the plaintiff, holding that negligence claim was essentially identical to plaintiff’s claims for misappropriation and defamation and accordingly the constitutional and statutory requirements for misappropriation and defamation applied); Stoianoff v. Gaehona, 248 A.D.2d 525, 670 N.Y.S.2d 204, 26 Media L. Rep. 2054 (2d Dep’t), aff’d, 92 N.Y.2d 844, 699 N.E.2d 430, 677 N.Y.S.2d 70 (1998), cert. denied, 119 S. Ct. 384 (1998) (newspaper not liable for alleged negligent failure to investigate its advertisement); Coakley v. TV Publishing Corp., 679 N.Y.S.2d 20 (1st Dep’t 1998) (newspaper not liable for alleged negligent failure to investigate truthfulness of statements in an advertisement; $500 in sanctions awarded).

14. Negligent Retention and Hiring

In Van Horne v. Muller, 705 N.E.2d 898 (1998), cert. denied, (1999), the Illinois Supreme Court rejected a claim, brought by the subject of an allegedly defamatory statement, against a radio station for negligent and reckless hiring, supervision and retention of a radio personality who allegedly had a history of outrageous, irresponsible and reckless on-air stunts and comments. The plaintiff claimed that the radio station was liable for the personality’s libelous remarks because it knew or should have know of the personality’s prior misconduct when it hired him, and because it negligently
The court dismissed these claims because none of the examples of prior misconduct by the personality involved defamatory statements, and therefore the allegations failed to establish a nexus between the particular alleged unfitness of the personality (the on-air stunts and bad taste) and the injury suffered by the plaintiff— injury to reputation from defamatory statements. The court expressly stated that it was not basing its decision on First Amendment grounds. It also stated, however, that it was construing the common law tort of negligent hiring and retention narrowly to avoid implicating First Amendment concerns, because it recognized that holding a media employer liable for hiring or retaining a broadcaster who was controversial or likely to engage in defamatory speech would make media employers reluctant to hire controversial broadcasters, and therefore have a chilling effect on free speech.

15. Other Theories of Liability

Civil/Criminal Contempt

In a controversial opinion, a federal district court in Raleigh held a journalist and her newspaper, the Wilmington Morning Star, owned by the New York Times Company, in civil contempt for viewing and reporting on a document given to her by a court clerk at the clerk’s office. See Ashcraft v. Conoco, Inc., 26 Media L. Rep. 1620 (E.D.N.C. 1998). One month earlier, the same journalist had been found in criminal contempt for the same conduct. The district court imposed on both parties, jointly and severally, a fine of $500,000 plus attorneys’ fees to compensate an oil company for the economic injury caused by the contemnors’ actions.

In the underlying lawsuit, a large group of plaintiffs sued defendants for environmental contamination. After the case was settled, the parties filed with the court a confidential settlement agreement that the district court judge ordered sealed. Using customary reporting methods, the newspaper learned from confidential sources that the settlement amount was $36 million. A reporter from the newspaper later confirmed this settlement figure after viewing a stack of documents, which included the settlement agreement, that a court clerk at the clerk’s office had given her. The newspaper reported the information it had learned in a published article.

After finding the reporter in criminal contempt at the close of a day-long trial, the district court subsequently ruled that she was guilty of civil contempt as well. More specifically, the court found that the reporter had violated a court order by viewing the settlement agreement and by opening the white envelope containing the settlement agreement. According to the court, the order at issue read “CONFIDENTIAL SETTLEMENT AGREEMENT[,] FILED UNDER SEAL[,] TO BE OPENED ONLY BY THE COURT,” appearing on the front of the white envelope. The court reasoned that because the reporter knew the settlement agreement was either under seal or had previously been under seal, she had knowingly violated a court order by opening the envelope and viewing its contents.
In addition, the court found that the newspaper had knowingly violated the same court order — the directive on the front of the white envelope — because it had published the story despite having knowledge that the settlement agreement was either under seal or had been under seal. In the alternative, the court also found the newspaper in civil contempt for the reporter’s actions under an agency theory. The case has been briefed and argued before the U.S. Court of Appeals for the Fourth Circuit and is awaiting decision.

**Criminal Liability**

A number of reporters found themselves facing criminal liability over the past year in widely publicized cases. In *US v. Matthews*, Larry Matthews, an award-winning news reporter was sentenced to 18 months in prison for trafficking in child pornography on the Internet. Matthews claimed he was receiving and distributing the material in the course of researching a report on child pornography on the Internet. The District Court for the District of Maryland denied Matthew's motion to dismiss and granted the government's motion in limine, holding that a news reporter cannot raise the First Amendment as a defense to criminal charges that he was engaged in trafficking child pornography on the Internet. After the court's ruling, Matthews entered a conditional plea of guilty to allow him to take the constitutional issue to the Fourth Circuit.

Former *Cincinnati Enquirer* reporter Michael Gallagher was sentenced in July 1999 to five years probation and 200 hours of community service for using stolen voice mail messages. Gallagher pleaded guilty to felony charges of unlawful interception of communications and unauthorized access to computer systems in connection with an investigative series of articles about Chiquita Brands International's business articles. It was reported that as part of the plea agreement, Gallagher identified George Ventura, a former Chiquita lawyer, as the source who gave him access codes to Chiquita's voice mail system. In his sentencing memorandum, however, Gallagher denied that he identified Ventura. Ventura, for his part, was sentenced to two years probation and 40 hours of community service.

The Utah Court of Appeals has held that two reporters who taped and broadcast interviews of minors chewing tobacco may be charged with contributing to the delinquency of minors. *State v. Krueger*, 1999 WL 93222 (Utah App. 1999). The reporters were covering a school assembly aimed at addressing the problem of chewing tobacco use by the school's students. Following the assembly, the reporters interviewed students who admitted they were concerned about the health risks, but had no immediate plans to quit. In fact, the students chewed tobacco during the interview. Charges were filed against the reporters when the students who appeared on the broadcast told prosecutors that the reporters asked them to chew tobacco on camera. The reporters deny having done so. The Utah Court of Appeals rejected the reporters attempts to shield themselves under the First Amendment and ordered that the reporters must go to trial on the charges.

In *U.S. v. Sanders*, No. 98-CR-013 (E.D.N.Y. April 13, 1999), an author of a 1997 book alleging that a missile brought down TWA Flight 800, and his wife, a former TWA flight training
supervisor, were sentenced to probation for conspiring to steal a piece of seat fabric from the plane’s wreckage and aiding and abetting in the theft of the wreckage. The defendants had failed to convince the court that their conduct in obtaining the fabric was protected by a First Amendment newsgathering privilege.

Obscenity

The U.S. District Court for the Western District of Oklahoma has twice ruled since December, 1997 on issues related to “The Tin Drum,” a 1979 Academy Award winning foreign film which was seized from video stores and their customers as containing scenes which violated Oklahoma’s child pornography statute. The film was alleged by the Oklahoma County District Attorney and the Oklahoma City Police to contain three scenes in violation of 21 O.S. § 1021.2 (involving the participation of minors in prohibited sexual activities in film, pictures, videos, paintings, plays or performances).

In Video Software Dealers Association, Inc. v. Oklahoma City, 6 F. Supp. 2d 1292, 26 Media. L. Rep. 1508 (W.D. Okla. 1997) the court enjoined the police department and individual police officers from continuing to withhold the film from the plaintiffs from whom they were taken. The court found the police removal of the film from public access without prior adversarial hearing, constituted an invalid prior restraint. In Oklahoma ex rel. Macy v. Blockbuster Videos, Inc., 27 Media L. Rep. 1248 (W.D. Okla. 1998) the court found the offending film did not constitute child pornography under Oklahoma law because inclusion of three sexually suggestive scenes in the motion picture did not have a dominant theme appealing to prurient interest and the film was a serious and bona fide artistic work.

The terms of the statute, which imposed a penalty upon conviction of imprisonment for up to 20 years and/or a fine of up to $25,000, changed effective July 1, 1999 by removing the specific term of imprisonment language. However, the offense will still be a felony and will carry the possibility of imprisonment as a category S-4 crime under Oklahoma’s 1997 Truth in Sentencing laws.

C. Statutes and Related Case Law Reported in the 1999-2000 Surveys

1. Anti-SLAPP Statutes

Based on the 1999-2000 SURVEYS, anti-SLAPP (strategic lawsuits against public participation) statutes are emerging as significant remedies against meritless lawsuits, most notably in California. According to the SURVEYS, California, Delaware, Georgia, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New York, Rhode Island, Tennessee and Washington have enacted anti-SLAPP statutes. Anti-SLAPP statutes generally provide for the early dismissal of claims brought against the protected right of petition and/or free speech. The statutes may also provide for the recovery of legal fees.
In 1999, Louisiana became the latest state to enact an anti-SLAPP statute. Modeled on the California statute, the Louisiana law provides, "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim."

As in years past, California courts were the most active in expanding the reach of anti-SLAPP legislation. In *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115, 1123 (1999), the California Supreme Court adopted a broad construction of California's anti-SLAPP statute, holding that a defendant moving to strike a lawsuit arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need not also demonstrate that the statement was made in connection with an "issue of public interest." *Briggs*, 19 Cal. 4th at 1123. *See also Sipple v. Foundation for National Progress*, No. B120358 (Cal. Ct. App. Apr. 7, 1999) (statements made in connection with a custody proceeding in another state were deemed to concern a public issue under California law); *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees*, 69 Cal. App. 4th 1057, 1064, 82 Cal. Rptr. 2d 10 (1999) ([§ 425.16 applies to statement "made during a major labor dispute in the community"]). *But see Marich v. QRZ Media*, (Cal. Ct. App. July 2, 1999) (reversing special motion to strike intrusion and eavesdropping claims based on broadcast of videotape showing plaintiffs receiving news that their son was dead).

Media defendants scored a major victory in *Newsham v. Lockheed Missiles & Space Co.*, 1999 WL 156058 (9th Cir. 1999), when the court held that in diversity actions applying California law, federal courts are to apply California's anti-SLAPP law, permitting its special motion to strike and recovery of fees and costs to eliminate frivolous claims. In that case, plaintiffs brought a *qui tam* action against Lockheed, their former employer, alleging improper billing practices on government contracts. Lockheed filed state-law counterclaims alleging breach of fiduciary duties by the former employees, breach of contract, and other claims. While plaintiffs' motion to dismiss was granted by the district court, plaintiffs' motion to strike and to recover fees and costs, pursuant to the anti-SLAPP statute, was denied due to a perceived conflict with various provisions of the Federal Rules of Civil Procedure.

The Ninth Circuit reversed, finding that no direct conflict exists between application of the statute to Lockheed's state law counterclaims and the federal rules. The court noted that a plaintiff could bring a special motion to strike pursuant to the anti-SLAPP statute and if successful seek fees and costs. If not successful, the litigant "remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment. We fail to see how the prior application of the anti-SLAPP provisions will directly interfere... In summary, there is no direct collision here." *Id.* at *9. Going to the next step in its Erie analysis, the court found that the statute reflected an important, substantive state interest and no countervailing federal interest in denying access to the statute could be found. The court next found that the twin aims of Erie — discouraging forum shopping and avoiding inequitable results — were best served by applying the statute to diversity cases. California's anti-SLAPP statute "adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is
enhanced by [an] entitlement to fees and costs.” Id. at *10. The court, therefore, remanded the case for ruling on plaintiffs’ motion to strike and for fees and costs. See also Sanders v. The Hearst Corporation, dba San Francisco Examiner, 27 Media L. Rep. 1733 (N.D. Cal. Feb. 22, 1999) (decision prior to Newscham holding that California’s anti-SLAPP statute may be used in a federal diversity action after removal by the media defendants).

With respect to attorneys fees, in Moore v. Liu, 69 Cal. App. 4th 745, 751 (1999), the court determined that when plaintiff dismisses a lawsuit after a motion to strike is filed, the defendant is entitled to a hearing on the merits of the motion to obtain attorneys fees and costs. Another appellate court held that in such circumstances an award of attorneys’ fees is discretionary. Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107, 77 Cal. Rptr. 2d 600 (1998) (“where the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorneys’ fees”).

See also O’Neil v. Gilvey, 1998 Mass. Super. LEXIS 578 (Mass. Super. 1998) (granting newspaper’s motion to dismiss and awarding attorneys fees under § 59H where plaintiff failed to file opposition to anti-SLAPP motion); Morse v. Schwartz, 179 Misc. 2d 112, 683 N.Y.S.2d 733 (Sup. Ct. Ulster Co. 1998) (dismissal of a SLAPP counterclaim prior to trial is not tantamount to a finding that plaintiff’s slander suit has merit); Bell v. Little, 250 A.D.2d 485, 673 N.Y.S.2d 402 (1st Dep’t 1998) (dismissing SLAPP action because inscribing allegedly false and malicious statements on a building exterior and sidewalk did not affect defendant’s rights of public petition and participation before public agencies).

2. Access

Courtroom Access

In a unanimous, sweeping opinion, the California Supreme Court has held that the public and press have a Constitutional and statutory right of access to civil proceedings. Directly addressing the issue for the first time, California’s high court held that a trial judge in the well-publicized dispute between Clint Eastwood and Sondra Locke wrongly excluded the press and public from proceedings conducted outside of the jury’s presence. The ruling makes clear that civil trials are presumptively open, and closure is permitted only in “the rarest of circumstances” where a trial court expressly finds, after adequate notice and an open hearing, that there exists an overriding interest supporting closure, there is a substantial probability that the interest will be prejudiced absent closure, the proposed closure is narrowly tailored to serve the overriding interest, and there is no less restrictive means of achieving the overriding interest. NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 86 Cal. Rptr. 2d 778, 980 P. 2d 337 (Cal. 1999).

See also In Re Associated Press, 162 F.3d 510 (7th Cir. 1998) (reaffirming “the public’s right of access to court proceedings and documents,”” the Seventh Circuit reversed a district court denial of a press petition to intervene in a criminal trial), State of Vermont v. Koch, 9 Vt. L. Wk. (1999) (Brattleboro Reformer and Rutland Herald, Intervenors) (Vermont Supreme Court overturned a
lower court ruling that excluded the press and public from a hospitalization hearing of a criminal defendant; *Great Falls Tribune Company, Inc. v. Day*, 959 P.2d 508, 26 Media L. Rep. 2377 (Mont. 1998) (the media has the right to attend meetings of a committee established by the Department of Corrections to screen proposals for the construction of a private prison).

In *Citizens First National Bank of Princeton v. Cincinnati Insurance Co.*, Nos. 98-3534, 98-3535, and 98-3957 (7th Cir. May 28, 1999), the Seventh Circuit, in an opinion written by Chief Judge Richard Posner, significantly advanced the public's right of access to sealed documents in a civil case by finding a presumption of access to discovery materials. In doing so, the Seventh Circuit joined the Sixth Circuit in *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 277 (6th Cir. 1996), in explicitly articulating the presumption of access and in imposing on district judges the independent obligation to ensure that the presumption of access is protected even though no party demands access to documents sealed under a protective order.

See also *United States v. Vazquez*, 31 F. Supp. 2d 85 (D. Conn. 1998) (trial exhibits consisting of videotapes that captured images of people entering a women’s clinic could not be permanently sealed); *State of Connecticut v. Saraceno*, Docket No. CR9-130425 (Conn. Super. Feb. 25, 1999) (allowing copying of redacted videotape exhibit, the court held that concerns that the videotape will not contain cautionary instructions as present when shown in court, and that broadcast may bias potential jurors if a new trial is required did not rise to the level of exceptional circumstances that would preclude the copying of the exhibit, which is a public record); *George W. Prescott Pub. Co. v. Stoughton Div. of Dist. Ct.*, 428 Mass. 309, 701 N.E.2d 307, 27 Media L. Rep. 1348 (1998) (vacating an injunction prohibiting newspaper from publishing the names or photographs of juveniles involved in delinquency proceedings, rejecting the trial court’s rationale that the order was needed to protect children engaged in delinquent conduct from public exposure); *Worden v. Montana Board of Pardons*, 926 P.2d 1157 (Mont. 1998) (prison inmates have a right of access to their parole files).

The Oregon Supreme Court reversed a Court of Appeals decision upholding Oregon rules that prohibit witnesses from viewing the executions of condemned murderers by lethal injection from beginning to end and impose conditions of nondisclosure on those witnesses. *Oregon Newspaper Publishers v. Dept. of Corrections*, 329 Or. 115, 1999 WL 517170 (Or. July 22, 1999) (No. CA A97110, SC S45795). The case arose when several news media organizations challenged the statutory and constitutional validity of these Oregon Department of Corrections (DOC) rules. Although the Court of Appeals upheld the constitutionality of the rules, the Oregon Supreme Court invalidated them on statutory grounds, and therefore did not address whether they violated the state or federal constitution.

**Cameras in the Courts**

A bill that would allow all federal court judges — from the district court level to the U.S. Supreme Court — to open their courtrooms to cameras was introduced in Congress in March 1999. Under the Sunshine in the Courtroom Act, the decision to open the courtroom to cameras would rest with the presiding judge. In proceedings with multiple judges, the senior active judge would generally
The bill also provides that witnesses must be informed of their right to have their faces and/or voices disguised. The provision, however, would not apply to parties to the action.

While Congress considered the legislation, courts across the country continue to wrestle with the issues involved in allowing cameras into the courtroom. In New York, for example, where New York Civil Rights Law § 52 prohibits audio-visual coverage of proceedings (including trials) in which testimony will be taken through compulsory process, Clear Channel Communications, Inc. (“CCLI”), moved to intervene to provide audio-visual coverage of trial proceedings in People v. McKenna and Bonanni, a controversial and high profile criminal case. The court ultimately granted CCCI’s motion to intervene but denied its application to televise trial proceedings in the case. Despite stating that § 52 is “hopelessly anachronistic and needs a permanent shelving,” and that it could “hardly envision any serious argument that a rational basis can be crafted to justify what appears to be clear discrimination against the electronic media,” the court upheld § 52 — albeit “with sincere and considerable reluctance” — principally on the ground of avoiding a potential due process challenge by the defendants on appeal based on the presence of cameras in the courtroom.

See also Reynolds v. Giuliani, No. 98 Civ. 8877 (WHP), 1999 WL 9836 (S.D.N.Y. 1999), (denying coverage because of the cameraman’s admitted inexperience videotaping trial, the spacial constraints of the courtroom, and the intrusive nature of the planned taping); Sunbeam Television Corp. v. State, 723 So. 2d 275, 280 (Fla. 3d DCA), opinion adopting panel dissent on grant of rehearing en banc, 1998 WL 771463 (Nov. 4, 1998) (prohibiting television broadcasters’ video photography of jurors, but permitting their publishing the jurors’ names and addresses); Seron v. 1842 Beacon Street Associates L.P., Norfolk Civ. No. 96-1132 (Mass. Super. March 23, 1999)(prohibiting photographs or broadcasts of testimony of victims of abortion clinic bombing in civil suit against property owners).

Although Wyoming has no statutory provision regarding the use of cameras in the courtroom and no rule has been promulgated by the Wyoming Supreme Court for cameras in civil trials, the Wyoming District Courts have adopted Wyoming Rule of Civil Procedure, Rule 53, regarding media’s access to civil proceedings, and Wyoming Rule of Criminal Procedure, Rule 53, governing media’s access to courts in criminal proceedings. Rule 53 allows the taking of photographs in the courtroom during judicial proceedings, or radio or television broadcasting of judicial proceedings from the courtroom, at the discretion of the court.

Access to Information

Holding that individuals possess no Fourteenth Amendment right of privacy in their names, addresses and telephone numbers, the Fourth Circuit overturned federally-mandated restrictions on access to state motor vehicle records in Condon v. Reno, 155 F.3d 453, 26 Media L. Rep. 2185 (4th Cir. 1998). Congress enacted these access limitations in an attempt to reduce use of the information for direct marketing activities and to prevent use in facilitating criminal activity. The federal statute at issue, the Driver’s Privacy Protection Act, prohibited state departments of motor vehicles and their agents from disclosing or otherwise making available any personal information about an individual
that had been obtained in connection with a motor vehicle record, and it provided civil and criminal
penalties for knowing violations. Because the same information is easily available from many other
sources, the court found that individuals possess no reasonable expectation that the information is
confidential. For this reason, the court rejected the government’s claim that the Act was a valid
regulation that assists in enforcing an individual’s Fourteenth Amendment privacy right.

The Fourth Circuit also invalidated the Act under the Tenth Amendment, which prohibits
federal exercise of powers not specifically delegated to it under the Constitution, and, as a result, are
reserved to the states. Although the federal government may incidentally regulate state conduct when
it enacts a law of general applicability under its Commerce Clause authority, it may not attempt to
directly regulate state conduct. The court held that the Act made no attempt to generally regulate
disclosure of personal information in a public or private database, and, therefore, that its regulation
of state motor vehicle records violates the Tenth Amendment. The U.S. Supreme Court has granted
review.

According to the 1999-2000 MEDIA PRIVACY SURVEY, Connecticut courts gave expansive
reading to the state’s disclosure laws. In Department of Children and Families v. Freedom of
Information Comm’n, 48 Conn. App. 467, 710 A.2d 1378, cert. denied, 245 Conn. 911, 718 A.2d
1378 (1998), for example, the court affirmed an order of disclosure of employee names and records
of department employees disciplined in death of child, holding that the information was of legitimate
public concern, and “[o]nce it has been established that the information is of legitimate public concern
... the degree to which intimate details will be revealed will not prevent disclosure.” See also East
(grievance document containing school principal’s response to grievant’s statement held subject to
disclosure); Youngquist v. Freedom of Information Comm’n, 1997 WL 88211 (Conn. Super. 1997),
aff’d on other grounds, 51 Conn. App. 96, 719 A.2d 1210 (1998), cert. denied, 247 Conn. 955
(1999) (publication of the home address of a public employee is not an invasion of privacy);
disclosure of materials relating to allegations that teachers in a public school allowed students to have
access to pornography or sexually explicit materials upheld because the materials were found to be
of legitimate public concern); Chairman v. Freedom of Information Comm’n, 1998 WL 832415
(Conn. Super. 1998) (evaluations of the superintendent of schools were of legitimate public concern,
exception to disclosure of teacher evaluations does not apply to superintendent).

In 1999, the Connecticut’s Open Records Act was amended to include those records received
or maintained by private entities performing services on behalf of public agencies. In addition, the
amended legislation clarifies that records are to be produced for inspection and copying within three
business days. If the records are not available within that time, the public official must provide a
timetable for production within three business days.

See also Mississippi Dep’t of Wildlife, Fisheries and Parks v. Mississippi Wildlife Enforcement
Officers’ Ass’n, Inc., 1999 WL 47779 (Miss. 1999) (compensation information for public employees is not protected by any right to privacy and is not exempt from release under the
Mississippi Public Records Act); International Association of Fire Fighters, Local 1264, v. Municipality Of Anchorage and Anchorage Daily News, 973 P.2d. 1132, 1136 n.5, 6 (Alaska 1999) ("IAAF") (noting that public employees, as such, have a reduced expectation of privacy, citing earlier cases from Alaska recognizing that applicants for high government positions expose their private lives to public scrutiny, and from other jurisdictions holding that although one does not lose the right to privacy upon accepting public employment, the very fact that he or she is engaged in the public's business strips the employee of some anonymity).

Other jurisdictions, however, were not as eager to order disclosure. In Scottsdale Unified School Dist. v. KPNX Broad. Co., 191 Ariz. 297, 955 P.2d 534 (1998), the Arizona Supreme Court looked to the federal Freedom of Information Act and held that birth dates of public employees are protected by a privacy interest that can be sufficient to bar disclosure of such information pursuant to Arizona's Public Records Law. A.R.S. § 39-121, et seq. See also Bolm v. Tucson Police Dep't, 969 P.2d 200 (Ct. App. 1998) (recognizing that there is no blanket exemption for agency personnel and Internal Affairs documents from production under the Public Records law, the court held that the balancing test adopted in KPNX supported the Department's decision to withhold such records from public view).

In a series of decisions, the Pennsylvania Supreme Court and Commonwealth Court have limited the public's ability to obtain certain government records pursuant to the Right-to-Know Act. The courts held that records such as audio tapes of 911 emergency calls, Unemployment Compensation Board of Review appeal petitions and hearing notices, and legal opinions of a borough solicitor and outside counsel are not "public records" subject to disclosure under the Act. See, e.g., North Hills News Record v. McCandless, 722 A.2d 1037 (Pa. 1999); Bargeron v. Department of Labor and Indus., 720 A.2d 500 (Pa. Commw. 1998); Arduino v. Borough of Dunmore, 720 A.2d 827 (Pa. Commw. 1998).

In City of Colorado Springs v. White, 967 P.2d 1042 (Colo. 1998), the Colorado Supreme Court held that the governmental deliberative process privilege may be asserted to prevent disclosure of materials requested under the Colorado Open Records Act. The privilege applies to materials that are "predecisional" (i.e., generated before the adoption of an agency policy or decision) and "deliberative" (i.e., reflective of the give-and-take of the consultative process). The policy behind the privilege is to "protect the frank exchange of ideas and opinions critical to the government's decision-making process where disclosure would discourage such discussion in the future."

The governmental deliberative process privilege is a qualified privilege, and may only be upheld if "disclosure of the material would expose an agency's decision-making process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." The governmental entity must provide a privilege log ("Vaughn index") for all materials it claims are protected. If the party seeking to overcome the privilege makes a preliminary showing that the material is not privileged, or that the party's need for the information outweighs the government's interests in protecting it, then the court should conduct an in camera inspection.
Following the *White* decision, the Colorado Open Records Act was amended to allow the custodian of records to deny inspection of records protected under the "deliberative process" privilege, "if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government . . . ." C.R.S. 24-72-204(3)(a)(XIII). The custodian must provide a sworn document explaining why the record is privileged, and "why disclosure would cause substantial injury to the public interest." *Id.* If the applicant requests, a hearing must be held, at which "all persons entitled to claim the privilege with respect to the record" may appear and be heard.

See also *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150 (Colo. App. 1998) (holding that the names of former city employees who received payments under the city's Transitional Employment Program must be disclosed under the Colorado Open Records Act because the custodian failed to establish that disclosure of their names and the amounts paid to them "would be offensive and objectionable to a reasonable person"); *Kirwan v. The Diamondback*, 352 Md. 74, 721 A.2d 196 (1998) (campus parking tickets issued to student athletes and their coach do not constitute either "education records" as defined in the federal Family Educational Rights and Privacy Act or "personnel" or "financial" records as defined in the Maryland Public Information Act and, as a consequence, such tickets and records related to them are not exempt from disclosure to the press and public under the Maryland Public Information Act); *Johnston v. United States Dept. of Justice*, 1998 WL 518529 (8th Cir. 1998) (unpublished disposition) (third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy and that this invasion of privacy was unwarranted under FOIA where the FOIA request seeks no information about the agency, as plaintiff's did not); *The Times Picayune Publishing Corp. v. The United States Department of Justice and The United States Marshals Service*, 1999 WL 123809 (E.D. La. 1999) (public disclosure of a mug shot of a well-known businessman could reasonably be expected to constitute an unwarranted invasion of the businessman's personal privacy within the meaning of the FOIA exemption for records or information compiled for law enforcement purposes); *Stilley v. McBride*, 332 Ark. 306, 965 S.W. 2d 125 (1998) (police officers' home addresses were exempt from disclosure under the state's Freedom of Information Act (Ark. Code Ann. §25-19-107 (Repl. 1996)) because officers' privacy interests outweighed the public interest in their addresses).