LDRC 2000 REPORT ON
SIGNIFICANT DEVELOPMENTS

Findings of the 2000-2001 50-State Surveys and Recent Developments

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INTRODUCTION

LDRC’s 2000 Significant Developments Bulletin contains 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.

Federal and state laws against eavesdropping continued to be an important media law issue this past year, marked most notably by the U.S. Supreme Court’s grant of certiorari in Bartnicki v. Vopper, 200 F.3d 109, 28 Media L. Rep. 1933 (3d Cir. 1999), cert. granted, 120 S. Ct. 4320 (2000). Oral argument in the case was heard by the Court on December 5th and a decision is expected in Spring 2001.

The central question before the Supreme Court is whether the federal and Pennsylvania wiretapping statutes violate the First Amendment insofar as they prohibit the disclosure of unlawfully intercepted communications by persons who were not involved in the interception itself. The Court’s decision will undoubtedly offer significant guidance on the larger question of whether and in what circumstances the disclosure of truthful information about matters of public interest can be punished.

In Bartnicki, the Third Circuit dismissed on First Amendment grounds state and federal wiretap complaints against two radio stations that broadcast an intercepted phone conversation and against the source who provided the tape to the media. The defendants did not intercept the call nor did they know the identity of the person who did. The court held that the wiretap statutes would be unconstitutional if applied to persons who merely disclosed the contents and were not involved in the illegal interception. See infra at 39.

The constitutionality of federal and state eavesdropping statutes was also addressed by the Fifth and D.C. Circuit Courts of Appeal with different analyses and results. McDermott v. Boehner, 191 F.3d 463 (D.C. Cir. 1999), pet. cert. filed, 68 U.S.L.W. 3693 (U.S. Apr. 25, 2000); Peavy v. WFFA-TV., 221 F.3d 158 (5th Cir. 2000), pet. cert. filed, (Oct. 30, 2000). See infra at 40-41.

Another area of doctrinal and practical concern to the media is right of publicity/misappropriation. Following last year’s federal court decision in favor of actor Dustin Hoffman, a California state court continued the expansive approach on right of publicity. KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 92 Cal. Rptr. 2d 713 (2000). Here a California state court held that federal copyright law was not the exclusive remedy for the unauthorized publication of models’ photos on a web site. Plaintiff – the photographer and copyright owner, who also held the rights of publicity of the models by assignment – could pursue a statutory misappropriation claim on the grounds that a “human likeness” is not copyrightable. The Fifth Circuit recently reached a similar conclusion, holding that the tort of misappropriation is not preempted by the Copyright Act because the publicity right does not fall into the subject matter of copyright and does not conflict with the purposes and objectives of the Act. Brown v. Ames, 201 F.3d 654 (5th Cir. 2000). See infra at 46 to 49.
Another California appellate court held that statements on the cover of the *Beardstown Ladies* investment guide book constituted commercial speech and was therefore subject to regulation under California’s Unfair Trade Practices Act. *Keimer v. Buena Vista Books, Inc.*, 89 Cal. Rptr. 2d 781 (Ct. App. 1999). A short time later, a New York trial court squarely disagreed, holding that the same book, its cover, flyleaf and introduction were all protected by the First Amendment, and that the publisher and packager did not have a duty to investigate the accuracy of the contents of the book, which were excerpted on the cover. *Lacoff v. Buena Vista Publishing, Inc.*, 183 Misc.2d 600, 705 N.Y.S.2d 183, 28 Media L. Rep. 1307 (N.Y. Sup. 2000). See infra at 54.

One the libel front while there were no major doctrinal developments there were several significant appellate reviews in media libel trials. Four jury verdicts for plaintiffs were overturned on appeal. *Levan v. Capital Cities/ABC*, 190 F.3d 1230 (11th Cir. 1999), cert. denied, 120 S. Ct. 1262 (2000) (reversing $10 million jury award); *Journal Pub. Co. v. McCullough*, 743 So.2d 352 (Miss. 1999) (reversing $600,000 jury award); *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899, 28 Media L. Rep. 2295 (2000) (reversing $300,010 jury award); and *Veilleux v. National Broadcasting Co.*, 206 F.3d 92 (1st Cir. 2000) (reversing $525,000 jury award). See infra at 14 to 15.

The first three cases were reversed for insufficient evidence of actual malice. *Veilleux*, a private figure case, was a strong media victory. The First Circuit reversed all the libel claims with in-depth analysis of issues of substantial truth, opinion and negligence. But the court permitted plaintiffs to recover on one misrepresentation claim: their allegation that the defendants secured plaintiffs’ participation in the broadcast by promising that members of a safety advocacy group would not be included in the broadcast – a decision that potentially creates an opening for “swearing contests” between parties over alleged representations about the content of a publication or broadcast. See infra at 17.

Lastly, in an important ruling, the New York Court of Appeals reaffirmed that great deference should be given to the judgment of editors in determining whether stories about private figures involve matter of legitimate public concern. *Huggins v. Moore*, 94 N.Y. 2d 296, 704 N.Y.S.2d 904, 726 N.E.2d 456, 28 Media L. Rep. 1601 (1999). This issue is of particular import in New York law because such a finding triggers a higher fault standard in libel cases. In such cases plaintiffs must prove that defendants acted in a grossly irresponsible (as distinct from negligent) manner. See infra at 18.
A. **FINDINGS OF THE LDRC 50 STATE SURVEY 2000-2001: MEDIA LIBEL LAW**

1. **Defamatory Meaning**

   **Examples of Defamatory and Nondefamatory Speech**

   **Defamatory**


   A Pennsylvania appellate court found that a newspaper article that focused on a loss of consortium claim in a defamation lawsuit was capable of a defamatory meaning. *Tucker v. Philadelphia Daily News*, 2000 Pa. Super. LEXIS 1500 (June 28, 2000). Plaintiff, anti “gangsta rap” activist C. Dolores Tucker had filed a defamation lawsuit against the estate of rap star Tupac Shakur and several recording companies. Numerous newspapers and magazines reported on the lawsuit and focused on plaintiffs’ loss of consortium claim. Reversing dismissal of the complaint, the court held the article capable of defamatory meaning. Because of plaintiffs’ “advanced age and . . . reputation as people of strong morals” the focus on the loss of consortium claim in the article suggested that plaintiffs were “overly concerned with sexual matters.”

   In a brief opinion labeled “Unreported – Not Precedential,” the Third Circuit affirmed summary judgment against Tucker in her suit against Shakur and other defendants. *Tucker v. MTS Inc., et al.*, No. 99-1169 (3d Cir. July 17, 2000) (unpublished). The allegedly defamatory lyrics, which included Tucker’s name juxtaposed with profanity (including “motherfuckin’ mind”), were “vulgar but not defamatory.” *Id.* at 6.

   A television news report alleging that a judge was not a “hard worker,” was capable of a defamatory meaning where the report was backed up by factual estimates of how many hours per week the judge spent at the courthouse. *Gaylord Broadcasting Co. v. Francis*, 7 S.W.3d 279, 283 (Tex. App. – Dallas 1999, pet. denied). Based on parking records the broadcast estimated that the judge’s “average work week appears to be about 27 hours.”

   According to the Ohio Supreme Court, a cartoon in political campaign literature depicting an unidentified hand clutching cash and extending toward the reader from underneath a table was a defamatory assertion that an incumbent public official had accepted a bribe. *McKimm v. Ohio Elections Comm’n*, 89 Ohio St. 3d 139, 729 N.E.3d 364 (2000).
Nondefamatory

Hyperbolic or merely insulting statements were found to be nondefamatory in a number of cases: that plaintiff had “stiffed” or “shafted” a bank out of millions of dollars in loan payments was not objectively verifiable, Wilkow v. Forbes, Inc., 2000 WL 631344 (N.D. Ill. May 15, 2000); describing pilots who crossed picket lines during labor disputes “scabs,” Dunn v. Air Line Pilots Ass’n, 193 F.3d 1185 (11th Cir. 1999); calling someone a “camel jockey” and “that Arab” are non-defamatory. Northern Indiana Pub. Serv. Co. v. Dabagia, 721 N.E.2d 294, 303 (Ind. App. 1999). According to the court “while racial slurs and epithets are contemptible and do not belong in a civil society, they are generally not defamatory in the absence of particular circumstances that make them so.” But see Taylor v. Carmouche, 2000 WL 675312 (5th Cir. May 24, 2000) (noting, in dicta, that the statement “[defendant] is a ‘racist’” is a statement of fact litigated every day in federal court – not “opinion” protected by the First Amendment).

A mayor’s statements that his political opponent was “almost a felon” and that his proposed hotel was a “flophouse” were not actionable. No meaning could be gleaned from the first statement, since the state of being “almost a felon” does not exist, and the second statement was rhetorical hyperbole not directed against his opponent personally. Kassouf v. White, 2000 WL 235770 (Ohio App. Mar. 2, 2000). The same Ohio appellate court also ruled that the statement that plaintiff “passed a bad check” was not a defamatory accusation of criminal conduct. Bram v. M. Weingold & Co., 2000 WL 336535 (Cuyahoga App. Mar. 30, 2000). See also Levee v. Beeching, 729 N.E.2d 215, 220 (Ind. App. 2000) (statement that a school principal was a “liar” and “favored some staff” not defamatory); Marina Management Services, Inc. v. Vessel My Girl, 202 F.3d 315 (D.C. Cir. 2000) (name-calling, personal attacks non-defamatory).

A bull’s-eye on a jacket worn to symbolize a feeling of harassment was “a classic example of symbolic speech, and...therefore not actionable as slander.” Rutkiewicz v. Sadowsky, 431 Mass. 748; 730 N.E.2d 282 (2000). The answer “no comment” in response to question about a bribery investigation was held nondefamatory. Black v. National Football League Players Association, 87 F.Supp.2d 1 (D.D.C. 2000). In a similar vein a Georgia appellate court held that a supervisor’s comment in investigating allegations of theft that “we’re going to get to the bottom of this” is not defamatory. Palombi v. Frito-Lay, Inc., 241 Ga. App. 154, 526 S.E.2d 375 (1999). According to the court “By its inherent expression of ignorance of the facts, the phrase does not amount to a statement by the speaker that wrongdoing has occurred.” Id. at 155, 526 S.E. 2d at 377. See also Brown v. O’Bannon, 84 F. Supp. 2d 1176 (D. Colo. 2000) (crisis counselor’s statement to police describing plaintiff as “suicidal” not actionable as defamation).

A satirical videotape that lampooned plaintiff’s severance package and that was played at a dinner marking a corporate merger was incapable of a defamatory meaning. Karl v. Donaldson, Lufkin & Jenrette Secs. Corp., 78 F. Supp. 2d 393 (E.D. Pa. 1999) (narration that “plaintiff exercised his modest severance package” was illustrated with bank robbery scene from movie).

Per Se / Per Quod Distinction

The common law distinction between defamation per se and per quod proved fatal to a plaintiff’s suit against the media in North Carolina. EEE ZZZ Lay Drain Co. v. Lakeland Ledger Publ’g Corp., 28 Media L. Rep. 1954, 1956-58 (W.D. N.C Feb. 28, 2000). A local newspaper published two articles discussing
homeowners’ complaints over plaintiff’s septic systems. Plaintiff pled that the articles were libelous per se. Discussing the per se / per quod distinction, the federal magistrate judge determined that under North Carolina law a statement that is libelous per se must be capable of only a defamatory meaning. The court then went on to read the articles as a whole to determine whether the alleged defamatory statements were capable of bearing the defamatory interpretation advanced by plaintiff. Applying this reading, the court reasoned that the articles were not obviously defamatory and recommended dismissal.

In *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714, 28 Med. L. Rep. 1401 (10th Cir. 2000), the court affirmed summary judgment for defendant radio station for its vilification of plaintiff – identified only by telephone number – as the source for t-shirts bearing offensive legends about the bombing of the federal building in Oklahoma City. An unknown person identifying himself as “ZZ03” had posted an announcement on an Internet bulletin board offering the t-shirts for sale and listing plaintiff’s phone number to call to place an order. Without successfully verifying the accuracy of this listing, defendant’s radio announcers urged listeners to call the number and complain. The court found plaintiff’s defamation claim to be for libel per quod, which failed for lack of evidence of damage to reputation. According to the court, there was no evidence that anyone who called his number in response to the postings or the broadcast knew his identity.

**Defamation by Implication or Innuendo**

Several cases examined defamation by implication. The Mississippi Supreme Court reasoned that a claim for defamation by implication can be based on the overall tone or structure of a newspaper article. *Journal Pub. Co. v. McCullough*, 743 So.2d 352 (Miss. 1999). The court’s decision was actually positive – it reversed a $600,000 jury award against a newspaper on lack of actual malice – but it went on in dicta to reason that the tone or structure of an article can so distort the truth and create an underlying false implication of fact even where no material omissions are involved. *See also American Transmissions, Inc. v. Channel 7 of Detroit*, Inc., 239 Mich. App. 695, 609 N.W.2d 607, 28 Media L. Rep. 1823 (2000) (entertaining plaintiff’s claim that broadcast as a whole created defamatory implication of dishonesty but affirming summary judgment because plaintiff failed to prove implication was false).

A recent Texas Supreme Court decision has made the viability and scope of “libel by implication” and “libel by omission” claims unclear under Texas law. Addressing the issue in dicta, the court apparently approved of such a cause of action in at least narrow circumstances but left open the scope of the doctrine. *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 43 Tex. Sup. Ct. J. 674, 2000 WL 553876 (Tex. May 4, 2000). The plaintiff in *Huckabee* was a family court judge whose custody rulings were criticized in an HBO documentary. The court affirmed summary judgment for defendant on lack of actual malice, but noted that an “omission of facts may be actionable if it so distorts the viewers’ perception that they receive a substantially false impression of the events.”

According to the Texas Survey, prior to this decision several Texas cases disapproved of libel by implication claims where the facts stated are substantially true. *See KTRK Television, Inc. v. Fowkes*, 981 S.W.2d 779, 789 (Tex. App. – Houston [1st Dist.] 1998, pet. denied); *Texas Monthly, Inc. v. Transamerican Natural Gas Corp.*, 7 S.W.3d 801 (Tex. App. – Houston [1st Dist.] 1999, no pet.) (opinion on rehearing); *Ortiz v. San Antonio Employees Federal Credit Union*, 974 S.W.2d 833
The Texas Survey notes that Huckabee appears to stand for the proposition that a journalist may not knowingly exclude all reference to evidence supporting a judge’s ruling in order to make the ruling appear “arbitrary” when in fact it was not. In an opinion issued after Huckabee, one Texas appellate court again ruled that alleged defamatory implications arising from true facts are not actionable. Dolcefino v. Randolph, 2000 WL 729414 (Tex. App. – Houston [14th Dist.] June 8, 2000, no pet. h.). In this case, a television news report noted that a city official and his subordinate spent a weekday afternoon together with the official’s children at a water park. The subordinate complained that this implied that the two were having an extramarital affair. The court held that since the facts set forth were true, no cause of action for libel would lie.

The Ohio Survey also reports conflicting decisions on libel by implication. This past year the Ohio Supreme Court held that a cartoon in political campaign literature implied the false assertion that an incumbent elected public official had accepted a bribe. McKimm v. Ohio Electrical Comm’n, 89 Ohio St. 3d 139, 729 N.E. 3d 364 (2000). But a year earlier an appellate court ruled that Ohio does not recognize libel through implied statements. Krems v. University Hospitals, 1999 Ohio App. LEXIS 620 (Ohio App. 1999).

The Federal District Court in New Hampshire determined that libel by implication claims have to meet a strict standard – that plaintiff must show by clear and convincing evidence that the publisher intend the defamatory implication. Howard v. Antilla, 191 F.R.D. 39 (D.N.H. 1999). The plaintiff sued a reporter over a news article that appeared in the New York Times and reported on a rumor that was circulating on Wall Street and roiling the stock of Presstek, Inc. The rumor was that the plaintiff, chairman of the board of Presstek, was a convicted felon. Although the reporter had investigated the rumor for almost a month, she did not know whether it was true and took no position on its truth or falsity in writing the article. The plaintiff, however, claimed libel by implication — the article implied the rumor was true. The court held that the plaintiff had to prove that the reporter intended the defamatory implication. (At trial the jury returned a verdict in favor of the reporter on the defamation by implication count but decided against her on false light invasion of privacy, and awarded the plaintiff damages of $480,000.)

**Incremental Harm / Libel-Proof Plaintiff**

In Tonnesson v. Denver Publishing Company, 5 P.3d 959, 28 Media L. Rep. 2039 (Colo. App. 2000), the Colorado Court of Appeals explicitly adopted a “limited application” of the incremental harm doctrine. In this case a newspaper reported on marriage dissolution proceedings in which the wife accused her husband of rape and also published the wife’s sister’s repetition of this accusation. This latter statement was not actionable under the incremental harm doctrine. This conclusion was compelled, the court noted, in order to prevent plaintiff from “do[ing] indirectly what he could not do directly; that is, to make Denver Publishing liable for accurately reporting the wife’s in-court statement.” Moreover any damage attributed to the repetition of the wife’s rape allegation through the sister’s statement would be “nominal.”

A Wisconsin appellate court noted that the state does not recognize the doctrine of incremental harm. Maguire v. Journal/Sentinel, Inc., 232 Wis. 2d 236, 248, 605 N.W.2d 881, 888,
A Rhode Island court accepted the "libel-proof" plaintiff doctrine. *DeWitt v. Outlet Broadcasting, Inc.*, 1999 WL 1334932 (R.I. Super. 1999). Although the Rhode Island Supreme Court has not yet ruled on this defense, the Superior Court allowed the dismissal of an action when the substantial criminal record of the plaintiff showed, as a matter of law, that plaintiff would not be able to recover more than nominal damages.

**Innocent Construction**

The Sixth Circuit construed Ohio’s innocent construction rule as requiring courts to adopt a nonactionable meaning “even if the defamatory meaning is the more obvious one.” *New Olde Village Jewelers, Inc. v. Outlet Communications, Inc.*, 2000 U.S. App. LEXIS 785 (6th Cir. Jan. 14, 2000). This case involved a television news investigation about a consumer’s complaint over the quality of a diamond ring. Even though the natural meaning of the reporter’s words was defamatory (that a drilling process lowered a diamond’s quality), the court held that so long as the statement may reasonably be read to have an innocent meaning, the innocent construction rule commands that the statement be deemed non-defamatory.

In *McKimm v. Ohio Electrical Comm’n*, supra, the Ohio Supreme Court declined to apply the innocent construction rule to a cartoon in a candidate’s campaign literature. The court ruled that the cartoon depicting a hand grasping cash under a table was reasonably capable of only one meaning: an assertion of fact that the opposing candidate had accepted a bribe.

The *Illinois Survey* reports that appellate courts are watering down the state’s innocent construction rule. For example, a court declined to apply the rule to a newspaper column about the “Baby Richard” adoption case. *Moriarty v. Greene*, 2000 WL 863145 (June 28, 2000). The columnist Bob Greene’s statement that the “plaintiff [the child’s doctor] sees her job as doing whatever the natural parents instruct her to do” was not capable of an innocent construction. The court based its finding primarily on the grounds the “overriding point of Greene’s columns was that the biological parent was not acting in the best interest of the child and that plaintiff was aiding and abetting the actions and desires of the biological parent.” Accordingly, the court held that “[i]n that context, a construction that plaintiff will ignore her professional obligations to her child-client in favor of the wishes of the child’s parent is more probable.”

In another decision, an appellate court declined to apply the rule to a letter that stated “[A] lawsuit will be filed shortly against [plaintiffs] alleging software piracy and industrial espionage related to theft of trade secrets. This will likely affect any client that does business with them.” *Gardner v. Senior Living Systems*, 2000 WL 713738 (Ill. App. June 2, 2000) (statement implied that plaintiff committed a specific crime).

Although none of the jurisdictions comprising the First Circuit have adopted the “innocent construction” rule recognized in some other states, the Court of Appeals recognized its converse, noting that “a defamation claim may not be based solely on a reading that interprets the language in the most negative way possible.” *Veilleux v. National Broadcasting Co.*, 206 F.3d 92, 108, 111 (1st Cir. 2000) (applying Maine law and relying on “most plausible interpretation” of defendants’ statement). Thus, for example, a statement that a trucker “hasn’t taken any time off since he left Maine eleven days ago” would not reasonably be understood to mean that the trucker had not slept.
in 11 days, and liability cannot be premised on such an interpretation of the statement. *Id.* at 112-13.

**Publication**

One Georgia case addressed a nuance regarding publication. *Mullinax v. Miller*, 242 Ga. App. 811, 28 Med. L. Rep. 1858 (Ga. App. 2000). The court noted that publication “entails the ability to control the libel” and held that a party cannot be held liable for merely “contributing background information” used in a complained of article.

Two cases addressed the issue of compelled publication. In *Hill v. Hamilton County Public Hospital*, 71 F. Supp. 2d 936, 953-54 (N.D. Iowa 1999), the court, applying Iowa law, found that compelled publication was a question of fact that must be supported by substantial evidence and ruled that the doctrine was not applicable when the communications was made to persons beyond prospective employers.

In *Estate of Martineau v. Arco Chemical Co.*, 203 F.3d 904, 914 (5th Cir. 2000)(Texas law), the Fifth Circuit found that in order for an employer to be liable for an employee’s defamation by compelled publication the employee must be able to show that he was, at the time of publication, unaware of the defamatory nature of the statement “because otherwise the defamed party is under no duty to mitigate its damages by refraining to self-publish known defamatory statements.”

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.

The First Circuit issued two decisions that gave thoughtful consideration to the distinction. It determined that a number of alleged defamatory statements were non-actionable opinion, particularly where the complained of words are “highly subjective” and “susceptible of numerous interpretations.” *Veilleux v. National Broadcasting Co.*, 206 F.3d 115 (1st Cir. 2000). The claims in *Veilleux* were brought by the subjects of a Dateline report on trucking industry. That a trucker was “sleeping less than he should” was non-actionable in part because of the “vagueness of the term should.” That plaintiff was “gambling that his fatal fatigue number doesn’t come up,” was hyperbole and did not exceed what defendants could “reasonably report” in light of the facts they possessed. *Id.* The conclusions that “this stay awake and on the road at all costs mentality has led to many accidents and deaths” and has put “people at risk,” even though “sensationally worded,” are opinions that “drew reasonable support from the information presented.” *Id.* at 116.

The First Circuit also wrestled with the opinion defense in *Gray v. St. Martin’s Press, Inc.*, 221 F.3d 243, 28 Media L. Rep 2313 (1st Cir. 2000). At issue was a biography of Robert Gray, a veteran Republican Party activist and lobbyist. One statement at issue was that Gray “often faked” his “closeness” to President Reagan and other senior officials. In context, this charge was protected opinion because it was a “subjective judgment that is only minimally about ‘what happened’ but expresses instead a vague and subjective characterization of what happened.” Similarly, the statement that his business “ultimately failed because it offered very little real substance” was protected opinion because in context the “criteria for success are debatable” — in context “what is ‘success’ in a situation like this one is very much a matter of opinion.” *Id.* at 249 (but noting that allegation that company went bankrupt or did not turn a profit would be actionable). Finally, the Court of Appeals in *Gray* also ruled that an allegation that plaintiff “may have” spied on his clients was protected opinion because it was speculative. “The test, admittedly a very crude one, is whether the statement is properly understood as purely speculation or, alternatively, implies that the speaker or writer has concrete facts that confirm or underpin the truth of the speculation.” *Id.*
In *Cochran v. NYP Holdings, Inc.*, 210 F.3d 1036 (9th Cir. 2000) (per curiam), the Ninth Circuit affirmed dismissal of a defamation action against the owner of the New York Post and a Post columnist arising from a statement about noted trial attorney Johnnie Cochran. The allegedly defamatory statement, included in a column concerning a report of Cochran’s joining the defense team of a high-profile criminal case in New York, was the following: “But history reveals that he will say or do just about anything to win, typically at the expense of the truth.” *Id.* at 1038. Cochran argued that when read in context, the statement implied that he had a history of lying and unethical conduct.

In a *per curiam* opinion, the Ninth Circuit expressly approved and adopted the analysis of the district court in *Cochran v. NYP Holdings*, 58 F. Supp. 2d 1113, 1116 (C.D. Cal. 1998), that the statement about Cochran was protected opinion. Considering the broad context in which the statement was made, including the “general tenor” of the work, the court determined that the column was a general critique of the O.J. Simpson trial and also emphasized that the statement was made by an opinionated columnist.

A California federal district court dismissed defamation claims brought against a broadcaster and source for statements about the possible government regulation of the nutritional supplement Metabolife. *Metabolife Int’l, Inc. v. Wornick*, 72 F. Supp. 2d 1160, 1174 (S.D. Cal. 1999). According to the court, the prediction of future government regulation was “by definition” merely opinion and not provably false.

In what a court described as a plot for a situation comedy, Michael Costanza, the self-proclaimed inspiration for the character George Costanza of the television show *Seinfeld* sued NBC and the show’s creators for defamation and related claims. *Costanza v. Seinfeld*, 181 Misc. 2d 562, 693 N.Y.S. 2d 897, 27 Media L. Rep. 2177 (Sup. Ct. N.Y. Co. 1999). The alleged defamatory statement that plaintiff was a “flagrant opportunist who barely knew Jerry (Seinfeld) less than a year” was protected opinion.

A North Carolina appellate court held that statements of opinion related to matters of public concern that do not contain provably false connotations are constitutionally protected. *Gaunt v. Pittaway*, 135 N.C. App. 442, 520 S.E.2d 603 (1999), aff’d on reh’g, 2000 WL 1218199 (Aug. 29, 2000) (defendant doctors whose opinions of another doctor’s training and testing practices were published in newspaper story about *in vitro* fertilization).

The South Dakota Supreme Court undertook a lengthy analysis of *Milkovich* in the non-media case of *Paint Brush Corp. v. Neu*, 1999 SD 120 (1999). The court held that under *Milkovich* “there is no additional constitutional privilege for a broad category labeled ‘opinion,’” and the court expressly overruled its 1990 decision in *Janklow v. Viking Press*, 459 N.W.2d 415, 17 Media L. Rep. 2220 (S.D. 1990) which followed *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985) (looking at specificity; verifiability; literary context; public context). Instead, the Court held the “dispositive question…becomes whether a reasonable factfinder could conclude that the statements…imply a false assertion of objective fact”; and that it was for the jury to decide whether a statement implies a false statement of fact.

The Delaware Supreme Court affirmed that a newspaper article reporting on a patient’s complaint against her doctor was not protected opinion. *Gannett Co. v. Kanaga*, 750 A.2d 1174 (Del. 2000). The trial court found that whether the article was fact or opinion posed a jury question and the jury found, *inter alia*, that the article was factual. The Delaware Supreme Court affirmed because “taken as a whole the article conveys the impression that Dr. Kanaga recommended unnecessary surgery for financial gain.”

The Second Circuit Court of Appeals held that the description of a lawyer as an “ambulance chaser” in an attorney referral directory was factual and not a statement of opinion because in such a context the statement implied defamatory facts. *Flamm v. American Assoc. of University Women*, 201 F.3d 144, 153 (2d Cir. 2000).

Several cases examined the opinion defense in the political context. The Kentucky Supreme Court in dicta noted that a political ad containing allegations that a city was “broke” because the candidate “squandered” its funds cast the candidate in a negative light, but was not provably false. *Welch v. American Publishing Co.*, 3 S.W.3d 724, 730. In a case decided on actual malice grounds, the court noted that figurative phrases or rhetorical exaggerations about candidates are insufficient and are merely “political opinion[s] solidly protected by the First Amendment.”

Similarly, the Oklahoma Supreme Court held that a voter guide which, according to the state senator plaintiff, mischaracterized his voting record on abortion and other issues was not demonstrably true or false but a matter of opinion. *Herbert v. Oklahoma Christian Coalition*, 992 P.2d 332, 1999 OK 90. Describing a political opponent’s plan to develop a “flophouse” hotel was rhetorical hyperbole. *Kassouf v. White*, 2000 WL 235770 (Ohio App. Mar. 2, 2000). *But see McKimm v. Ohio Elections Comm’n*, 89 Ohio St. 3d 139, 729 N.E.3d 364 (2000) (cartoon in campaign literature implied assertion of fact that an incumbent public official named in the literature had accepted a bribe); *and Zius v. Shelton*, 2000 Tenn. App. LEXIS 360 (Tenn. Ct. App. June 6, 2000) (newspaper editorial criticizing pay raises to local government officials that described raises as “hush money” implied awareness of illegal or immoral activities and was actionable).

Statements made in the employment context that were found to be assertions of fact: former employer’s
statement that plaintiff had “taken valuable documents with him” because the claim is provably false, *Lively v. McDaniel*, 240 Ga. App 132, 522 S.E.2d 711, 712 (1999); former employer’s statements that plaintiff was “burnt out,” “defeated,” and “no longer had the capacity to work at Paine,” *McBirney v. Paine Furniture Co.*, 11 Mass. L. Rptr. 123 (Middlesex Cty. Superior Court 1999); statement that plaintiff had “mismanaged” a partnership’s companies “implied the existence of undisclosed defamatory facts,” *Lipsig et al. v. Ramlawi*, 2000 Fla. App. LEXIS 3729 (Fla. 3rd DCA March 29, 2000); former employer’s statements that defendant was “not a good pilot” and constituted a “threat to passengers”; a reasonable person would see the assertions as statements of fact susceptible of being proven false or true, *Sky Fun 1, Inc. v. Schutloflel*, 2000 WL 371055 (Colo. App. 2000).

3. **Truth/Falsity**

The 2000-2001 *MEDIA LIBEL SURVEY* reports on several cases involving inexact descriptions of legal proceedings or terms – a common scenario giving rise to libel claims and the defense of substantial truth.

**Substantial Truth**

For example, where plaintiffs admitted to frequent and regular violations of federal regulations, it is neither false nor negligent to extrapolate that, “almost every time [plaintiff] goes to work he breaks the law.” *Veilleux v. National Broadcasting Co.*, 206 F.3d 92, 113-14 (1st Cir. 2000). According to the First Circuit, “reporters have leeway to draw reasonable conclusions from the information before them without incurring defamation liability.” *Id.*

The 10th Circuit Court of Appeals reaffirmed New Mexico’s adherence to the substantial truth doctrine by holding that while a statement that a doctor was “being sued for stock fraud” was technically inaccurate, the gist of the comment was substantially true and could not serve as the basis for a defamation action. *Schwartz v. American College of Emergency Physicians*, 215 F.3d 1140, 28 Media L. Rep. 1929 (10th Cir. 2000) (“if [defendant] had said Dr. Schwartz is ‘being sued for making deceptive statements made relating to stock transactions,’ this statement would be unquestionably true”).

A report that a doctor pled guilty to insurance fraud was substantially true, although he actually pled guilty on behalf of a corporation. *Saferin v. Malrite Communications Group, Inc.*, 2000 WL 299454 (Ohio App. Mar. 24, 2000). The doctor was the president and principal shareholder, the surgeon who performed the acts that led to the fraud, and was physically present in court entering the plea. Also, according to the court, mischaracterization of the type of insurance fraud was a distinction without a difference not rising to the level of falsity because no type of insurance fraud was any more egregious than any other type.

Stating that plaintiff invoked the Fifth Amendment before a grand jury was substantially true when in fact the plaintiff never addressed the jury but his attorney did; the attorney’s acts were attributable to plaintiff. *Associated Press v. Cook*, 17 S.W.3d 447, 455-56 (Tex. App.–Houston [1st Dist.] 2000, no pet.). In addition, the statement that plaintiff committed perjury was substantially true even though plaintiff was never indicted because evidence showed that plaintiff misstated the
contents of telephone records while under oath. But see Bunton v. Bentley, 1999 Tex. App. LEXIS 7947 (Tex. App. – Tyler 1999, pet. filed) (calling a judge “corrupt” and a “criminal” was not substantially true even if the judge had committed technical violations of ethical canons); and Celle v. Filipino Reporter Enterprises, Inc., 209 F.3d 163, 176 (2d Cir. 2000) (describing denial of summary judgment as finding of “negligence” was a false statement of fact).

The Court of Appeals of Wisconsin declined to apply the substantial truth doctrine to a specific allegation of assault. Maguire v. Journal/Sentinel, Inc., 232 Wis. 2d 236, 247, 605 N.W.2d 881, 888, 28 Media L. Rep. 1641 (Ct. App. 1999). At issue was a newspaper article that detailed a nasty marital dispute between plaintiff and her estranged husband. In relevant portion the article stated that a guard was posted outside defendant’s classroom at Marquette University after plaintiff “assaulted him at the university.” Although plaintiff had assaulted her husband on other occasions she had not done so at the university. The court stated: “We are unwilling to stretch the substantial truth doctrine this far. There is a great distinction between printing a statement that contains "slight inaccuracies" and attempting to define slight inaccuracies to include separate conduct or incidents . . . .” The court noted that the newspapers defense sounded more appropriately in the theory of incremental harm which Wisconsin rejects.

Burden of Proof

The Supreme Judicial Court of Maine held that in all defamation cases the plaintiff has the burden of proving falsity. Courtney v. Bassano, 1999 ME 101, ¶ 16, 733 A.2d 973 (non-media private figure case). See also Sethi v. WFMJ Tele. Inc., 134 Ohio App. 3d 796; 732 N.E.2d 451 (Ohio App. 1999) (private figure must establish that statements are false and defamatory, must prove actual injury and some degree of fault on the part of the media).


4. Fault

Determination of Public Figure Status under Gertz

Two Wisconsin media libel cases examined the determination of public figure status. The subject of a police manhunt was held to be a limited purpose public figure in Erdman v. SF Broadcasting, 299 Wis. 2d 156, 165, 599 N.W.2d 1, 10, 27 Media L. Rep. 2274 (Ct. App. 1999), rev. denied, 604 N.W.2d 572 (Wis. 1999). Plaintiff was falsely accused of a shooting that led to a police search and intense media coverage. According to the court, plaintiff was involved in a public controversy “defined in terms of whether the dispute or controversy had ‘an impact outside of those immediately interested’ in the dispute.” The police search involved, inter alia, the participation of regional law enforcement, evacuation of a prominent public building by a SWAT team, and public identification of a suspect as armed and dangerous. Id. at 165-66, 599 N.W.2d at 6.

On the other hand there was no public controversy, and therefore no public figure status, where a woman expressed views about her ex-husband and divorce, even though she had been active

A Connecticut case examined the interesting and important question of whether a person who has at one time become a public figure can lose that status by subsequent years of relative obscurity. *Jones v. New Haven Register*, 2000 Conn. Super. LEXIS 220 (2000). After a lengthy analysis of the issue, the court held that plaintiff who was a local elected official in the 1970's remained a public figure in 1996 when his photograph was erroneously used to illustrate a news article about the arrest of someone with the same name.


**Public Figure Status**

The Second Circuit Court of Appeals defined public figure status to “those who have voluntarily sought and attained influence or prominence in matters of social concern.” *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 176 (2d Cir. 2000) (radio commentator who admits being “well known” is a public figure under New York law).


**Public Official Status**
In an interesting decision, a former city administrator was deemed a public official even though the defamatory statements were made after her dismissal from that public position and the statements criticized her for actions she took after her dismissal because those actions were “continuations” of actions begun as a public official and defendant criticized her for conduct “directly related” to her work as a public official. Victoria v. LaBlanc, 168 Ore. App. 586; 7 P.3d 668 (Or. App. 2000).

In other cases reported in this year’s SURVEY, the following plaintiffs were deemed public officials: a state senator, Herbert v. Oklahoma Christian Coalition, 992 P.2d 332, 1999 OK 90; an unpaid member of a town’s Board of Selectmen, Lane v. Memorial Press, Inc., 11 Mass. L. Rptr. 468 (Plymouth Cty. Superior Court 2000); a police officer, Moreno v. Crookston Times Printing Co., 610 N.W.2d 321 n.5 (Minn. 2000); and Rutkiewicz v. Sadowsky, 431 Mass. 748, 730 N.E.2d 282 (2000) (“because of the broad power vested in police officers and the great potential for abuse of these powers, as well as police officers’ high visibility within and impact on a community,” police officers — including patrol-level officers — are “public officials” for purposes of defamation); as well as a probationary police officer, Mercer v. City of Cedar Rapids, 2000 WL 1009698, at *40 (N.D. Iowa July 19, 2000).

Corporations

Several decisions examined the status of corporate plaintiffs. A federal district court in California held that although corporations are not automatically considered public figures, sports utility vehicle (SUV) manufacturer Isuzu is a public figure since it participated in the market for SUVs and advertised claims of SUV safety, an issue of public concern. Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 66 F. Supp. 2d 1117, 1122 (C.D. Cal. 1999).

In Gaunt v. Pittaway, 135 N.C. App. 442, 520 S.E.2d 603 (1999), aff’d on reh’g, 2000 WL 1218199 (Aug. 29, 2000), the North Carolina Court of Appeals affirmed a trial court’s ruling that an infertility specialist’s clinic was a limited-purpose public figure for purposes of a story on in vitro fertilization that discussed the doctor’s training and testing practices.

In a suit between two newspaper publishers, both were held to be public figures. San Juan Star v. Casiano Communications, Inc., 2000 WL 224893, (D.Puerto Rico 2000).

Application of Actual Malice Rule

Three decisions reversed jury damage awards against the media for lack of sufficient evidence of actual malice.

In Levan v. Capital Cities/ABC, 190 F.3d 1230 (11th Cir. 1999), cert. denied, 120 S. Ct. 1262 (2000), the Eleventh Circuit overturned a $10 million jury award against ABC and a 20/20 news producer. ABC aired a story about plaintiff conducting a “rollup” in which investors gave up $46 million in assets for debentures with a market value of only about $6 million. The court held that for a statement to be actionable there needs to be a tight nexus between its falsity and the gist of the broadcast taken in context. ABC contended that the gist was that the rollups were unfair whereas plaintiff argued the gist was that he knowingly misled investors. The court found that ABC clearly implied the rollup was so unfair that “a viewer would believe Levan must have known [the deal was
unfair], particularly in light of his financial expertise.” But considering the terms of the rollup itself and the voluminous testimony that the rollup was unfair, the court, in a striking understatement, concluded there was no actual malice because “the proof was insufficient to show that ABC entertained serious doubts that the underlying thrust of the broadcast was untrue.”

In Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899, 28 Media L. Rep. 2295 (2000), the South Carolina Supreme Court reversed a jury verdict of $10,000 actual damages and $300,000 punitive damages for a former police chief who had been “accused” of taking bribes from drug dealers in a newspaper’s “citizens’ voice” column. The Supreme Court held that there was insufficient evidence of actual malice to withstand the newspaper’s motion for a directed verdict. Reaffirming the St. Amant definition of actual malice, the Court stated that “a reckless disregard for the truth ... requires more than a departure from reasonably prudent conduct. ‘There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.’ ... Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard.” (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

According to the court, the newspaper’s failure to introduce into evidence a tape recording of the anonymous call on which the subject article was based was not evidence that the call had been fabricated by the newspaper’s editor: “Contrary to the Court of Appeals’ insinuation, there was simply no evidence that [the editor] fabricated the phone call, or that the tape was non-existent. In relying upon the absence of the tape to establish evidence of [the editor’s] possible motive, the Court of Appeals effectively switched the burden to Newspaper to introduce the recording.”

The Mississippi Supreme Court reversed a jury awarded of $600,000 in a libel case over a newspaper article that erroneously identified plaintiff as the owner of a truck seized in a drug arrest. Journal Pub. Co. v. McCullough, 743 So.2d 352 (Miss. 1999). Conducting an independent review of the evidence, the court noted that the mistaken identification was based on vehicle information contained in a National Crime Center computer database and therefore the defendants entertained no serious doubts about the truth of the article. The newspaper’s motive in publishing a story—whether to promote an opponent’s candidacy or to increase its circulation—amounts to no more than “hatred, ill will, malice in the common law sense,” which does not constitute actual malice.

In Texas Beef Group v. Winfrey, 201 F.3d 680 (5th Cir. 2000), the Fifth Circuit affirmed a directed verdict in favor of talk-show host Oprah Winfrey in a “veggie-libel” action filed against her by Texas beef producers under the Texas False Disparagement of Perishable Food Products Act. Plaintiffs failed to prove that defendants knowingly disseminated false information about beef. In particular, the Fifth Circuit found that the editing of the broadcast did not give rise to an inference of knowing falsity where the broadcast did not misrepresent statements made and the factual underpinnings remained accurate.

The Seventh Circuit recently affirmed summary judgment to ABC on the final claims outstanding in Desnick v. ABC, 2000 U.S. App. LEXIS 27038 (7th Cir. Oct. 27, 2000). In a decision by Judge Posner, the court dismissed libel claims for lack of sufficient evidence of actual malice. See also LDRC LibelLetter Nov. 2000 at 1.

In other decisions the following factors were found insufficient evidence of actual malice:

But the Second Circuit affirmed a small jury damage award in Celle v. Filipino Reporter Enterprises, Inc., 209 F.3d 163, 183 (2d Cir. 2000)($1 actual damages and $15,000 punitive damages conditionally remitted to $10,000), upholding an actual malice finding in a decision that places more emphasis than it perhaps intends on evidence of ill will between the parties. In a case brought by a radio commentator against a small newspaper, the court found that evidence of ill will between the parties combined with evidence of knowing disregard can establish actual malice. In Celle, for example, the defendant’s deposition testimony supported the finding that he knowingly misrepresented that plaintiff was found negligent in another case.

An Oregon appellate court held that there was sufficient evidence of actual malice to defeat a motion for summary judgment where defendant’s deposition testimony suggested he did not believe his statements or did not know enough about the facts to give him a basis to make the statements. Victoria v. LaBlanc, 168 Ore. App. 586, 7 P.3d 668 (Or. App. 2000) (reversing summary judgment for defendant in case involving letters of complaint about a public official published in a local newspaper).

A Pennsylvania appellate court, reversing dismissal of a complaint, held that actual malice might be shown where a newspaper article that reported on a defamation lawsuit focused on the particular claim of loss of consortium. Tucker v. Philadelphia Newspapers, Inc., 2000 Pa. Super. 183 (Pa. Super. June 28, 2000). According to the court, “had the appellees more thoroughly investigated the complaint and its allegations, they would have known that the complaint contained more than the consortium claim and would have more fairly covered the entire complaint.” The PENNSYLVANIA SURVEY notes that the decision invokes a mere “failure to investigate” or “fairness” test for proving actual malice and seems inconsistent with Supreme Court precedent.

A Texas appellate court held that there was sufficient evidence for a jury to find actual malice where a television news report on the lax work habits of a judge relied on “made up” or “estimated” time entries of when judges came and went from a secure parking lot. Gaylord Broadcasting Co. v. Francis, 7 S.W.3d 279, 285 (Tex. App. – Dallas 1999, pet. denied).

Finally, a Texas appellate court in another defamation case brought by a judge affirmed an $8 million dollar jury verdict against a cable television talk show host who called the judge “corrupt” and a “criminal” in broadcasts. The court held that the defendant’s continued insistence at trial that his challenged statements were true, in spite of the fact that evidence of their falsity had been adduced, was also evidence of actual malice. Bunton v. Bentley, 1999 Tex. App. LEXIS 7947 (Tex. 1999).
Private Figure Standard under Gertz

According to the 2000-2001 Media Libel Survey, 44 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; four jurisdictions require actual malice in matters of public concern; and one jurisdiction requires actual malice in some circumstances.

The First Circuit reversed a jury award of $525,000 for defamation and misrepresentation arising out of a television news broadcast in a private figure case governed by the negligence standard. Veilleux v. National Broadcasting Co., 206 F.3d 92 (1st Cir. 2000) (private-figure plaintiffs must prove fault “amounting at least to negligence” on the part of a media defendant in order to recover damages, at least as to matters of public concern.).

The plaintiffs in Veilleux, a trucker and truck company owners, alleged that they were libeled by an NBC Dateline program that depicted the trucker’s cross-country trip. Among other things, the broadcast asserted that the trucker violated federal hours-of-service regulations and falsified his log book; that he was “sleeping less than he should, and gambling that his fatal fatigue number doesn’t come up”; that he had “put himself and others at risk”; and that he had “escaped any scrutiny” from federal inspectors. On summary judgment, the district court judge held that some of the statements could support liability; but declined to analyze them one by one because such a detailed undertaking would delay the case. The jury then found for the plaintiffs on 13 of the 18 allegedly libelous statements (including all of the statements described above). The First Circuit reversed all of the libel claims on the grounds of substantial truth, opinion and lack of negligence.

The Montana Supreme Court for the first time affirmed that negligence is the fault standard in private figure defamation cases. Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. 2000) (en banc).

The Supreme Judicial Court of Maine reaffirmed that in private figure cases the standard of fault is negligence: whether a party has a “reasonable basis” for his or her statement. Courtney v. Bassano, 1999 ME 101, ¶ 16, 733 A.2d 973; see also Moreno v. Crookston Times Printing Co., 610 N.W.2d 321 (Minn. 2000) (reaffirming that Minnesota adopted negligence standard for private figure defamation claims: “a private individual may recover actual damages for a defamatory publication

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2 Alaska, Colorado, Indiana and New Jersey.

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 (L.a. 1995).
upon proof that the defendant knew or in the exercise of reasonable care should have known that the defamatory statement was false.”)

But a Texas state court recently held that in a libel case not involving a media defendant, there is no requirement that the plaintiff prove any type of fault. *Peshak v. Greer*, 13 S.W.3d 421, 426 (Tex. App. – Corpus Christi 2000, no pet.).

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

New York’s highest court, the Court of Appeals, reaffirmed the proposition that great deference should be given to the judgment of editors in determining whether stories about private figures involve matters of legitimate public concern. *Huggins v. Moore*, 94 N.Y. 2d 296, 704 N.Y.S.2d 904, 726 N.E.2d 456, 28 Media L. Rep. 1601 (1999). The Court of Appeals reversed an appellate decision that seemingly confused the public concern and public figure tests and held that because the plaintiff’s divorce from singer Melba Moore was not a matter of public concern, New York’s gross irresponsibility standard in matters of public concern should not apply. Instead, the Court of Appeals declined to second-guess the reporter’s editorial determination that Melba Moore’s “personal saga” of economic spousal abuse was reasonably related to a “matter of social concern to the community.” Thus New York’s gross irresponsibility standard applies “so long as a published report can be “fairly considered as relating to any matter of political, social, or other concern of the community.”

The New Jersey Supreme Court ruled that the behavior of teachers, especially concerning their conduct with and around students, is a matter of public concern. *Rocci v. Ecole Secondaire MacDonald-Cartier*, 165 N.J. 149, 755 A.2d 583 (2000) (non-media case). Thus, a defamation claim based on a letter of complaint about a teacher’s conduct would be held to the actual malice standard. See also *Govito v. West Jersey Health System, Inc.*, 332 N.J. Super. 293, 753 A.2d 716 (App. Div. 2000) (quality of health care generally and nursing care specifically are of public interest and concern).

A Colorado appellate court held that statements that plaintiff was “not a good pilot” and a “threat to passengers” were made not to protect public safety but to thwart defendant’s employment opportunities with a new airline and therefore were not about matters of public concern. *Sky Fun 1, Inc. v. Schutloffel*, 2000 WL 371055 (Colo. App. 2000).

5. **Privileges**

**Fair Report**

The Minnesota Supreme Court adopted the *Restatement (Second) of Torts* § 611 articulation of the Fair and Accurate Reporting Privilege. *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321 (Minn. 2000). The privilege protects “the accurate and complete report or a fair abridgement of events” at a public proceeding and cannot be overcome by a showing of actual or common law malice.

The fair report privilege was applied in a Colorado case to protect a newspaper’s account of
in-court proceedings in which plaintiff’s ex-wife accused plaintiff of marital rape. Explaining that the fair report doctrine privileges reports of in-court proceedings that are fair and substantially accurate, or are substantially accurate accounts of what took place, the court stated that the privilege exists even if the reporter believes or knows them to be false; thus, it was irrelevant as a matter of law whether the rape allegation was false. *Tonnesson v. Denver Publishing Company*, 5 P.3d 959, 28 Media L. Rep. 2039 (Colo. App. 2000).


In *Johnson v. KFOR-TV*, 2000 OK CIV APP 64 (Okla. Ct. App. 2000), the court affirmed dismissal of a dentist’s defamation claim on the ground the television news report was privileged, even though the report about official disciplinary proceedings against the dentist contained allegedly false and defamatory comment by a patient which was not part of the public record. The court concluded that the gist of the news report was substantially accurate, and the privilege was not defeated by the presence of the patient’s comment.

The Delaware Supreme Court affirmed a jury’s findings that the privilege did not apply where a newspaper article about a patient’s complaint against a doctor was not a fair and accurate report of the complaint to a medical review board. *Gannett Co. v. Kanaga*, 750 A.2d 1174 (Del. 2000). Moreover the court noted that the privilege “extends to opinion, not express or implied misstatements of fact.” *Id.* at 1183.

Similarly, the fair report privilege did not protect a newspaper’s statement that a school bus driver, who refused to let students off his bus, took students on a “drug crazed ninety minute ride home” because the statement did not accurately report the DUI charge instituted by the police against the bus driver following his arrest. *McMillian v. Philadelphia Newspapers, Inc.*, 1999 U.S. Dist. LEXIS 18526 (E.D. Pa. Nov. 16, 1999).

**Neutral Reportage**

In *Norton v. Troy Publishing Co., Inc.* (No. 95-06483 (Pa. Court of Common Pleas August 2, 1999)), a Pennsylvania court adopted the neutral reportage privilege regarding statements made by one public official about another even though the media believed the statements were false. At a subsequent jury trial, the court specifically adopted the privilege in its charge to the jury with the only issue being whether the media accurately reported the statements being made.

**Judicial and Official Proceedings Privileges**

An interesting and recurring issue is the extent to which the judicial proceedings privilege applies to statements made in connection with a lawsuit.

Ohio courts also made clear that the absolute privilege for statements made in judicial proceedings attaches prior to the filing of a lawsuit. The privilege extends to draft complaints,*Lang v. Trimble-Weber*, 2000 WL 337619 (Ohio App. Mar. 30, 2000), letters by attorneys,*Krakora v.*

The absolute privilege was also extended to communications between attorneys and potential clients. **Popp v. O’Neil, 2000 WL 635400 (Ill. App. 2000)** (absolute privilege extends to communications between attorney and potential client because the need for “open and full” communication is “equally compelling during the preliminary legal consultations” which require that both attorney and potential client be as frank as possible). **But see Thompson v. Frank, 2000 WL 689747 (Ill. App. 2000)** (reinstating plaintiff’s complaint because a defamatory letter sent by one party’s attorney to the spouse of the opposing party falls outside the realm of an absolutely privileged attorney-client communication); **In Re Mediaworks, Inc., 1999 U.S. Dist. LEXIS 13680 (E.D. Pa. Aug. 26, 1999)** (letter indicating intent to commence litigation not privileged); and **Johnson v. McDonald, 310 Ariz. Adv. Rep. 7, 9 (Ct. App. 1999)** (statements made to legislators considering a bill that could affect a future lawsuit were not protected by the absolute privilege because the legislators “lack a direct relationship to the future suit”).

In **Kennedy v. Zimmerman, 601 N.W.2d 61, 64, 28 Media L. Rep. 1188 (Iowa 1999),** the Iowa Supreme Court held that statements made by attorney to a newspaper about a lawsuit fell outside the privilege. According to the court, comments to the press about a lawsuit are not part of the “judicial proceedings” protected by the absolute privilege even if the statements merely restate matters in the legal papers.

In a similar vein a California appellate court held that the absolute judicial immunity privilege does not extend to defamatory statements made by judge to a reporter. **Soliz v. Williams, 74 Cal. App. 4th 577, 88 Cal. Rptr. 2d 184 (1999).**

In an unusual case, a fired reporter sued his former employer-newspaper for defamation because it published a retraction that stated one of plaintiff’s articles was inaccurate. **Eisenberg v. Alameda Newspapers, Inc., 74 Cal. App. 4th 1359, 88 Cal. Rptr. 2d 802 (1999).** The court rejected the newspaper’s claim that the retraction was privileged because it was published pursuant to a demand for retraction under California statutory law. According to the court, a demand for retraction alone does not indicate that a lawsuit is imminent so as to invoke the judicial proceedings privilege.

**Other Privileges**

An employer’s statements to the media about a former employee may be qualifiedly privileged. **Palmisan v. Allina Health Sys. Inc., 190 F.3d 881, 885 (8th Cir. 1999)** (holding that Minnesota recognizes a qualified privilege protecting an employer against liability for a defamatory statement made about an employee). Here the privilege applied to defendant’s statements to the media about a matter of public concern – an investigation into possible Medicare/Medicaid billing rules violations.

Similarly, a high school superintendent had a qualified privilege when making statements to a reporter about a fired employee where comments were motivated by the superintendent’s responsibility to respond to the public on a matter affecting the community. **Smith v. Lebanon City Schs., 1999 WL 1016185 (Ohio App. Nov. 8, 1999).**
A Maine court reversed the grant of summary judgment in favor of a police officer who had merely transcribed a list of names from one sheet of paper to another for re-broadcast on a cable program listing individuals subject to outstanding arrest warrants, finding that the act of transcribing names was a ministerial act only, and therefore not entitled to statutory immunity as a discretionary function. *Carroll v. City of Portland*, 1999 ME 131, ¶ 10, 736 A.2d 279, 283-84 (Maine Tort Claims Act, 14 M.R.S.A. § 8111 et seq.)

6. **Discovery**

*Reporters’ Privilege (Shield Law)*

This past year the California Supreme Court resolved a conflict regarding the scope of the state’s shield law. In 1980, California voters made the state’s shield law, Evidence Code § 1070, a part of the California Constitution, Art. I, § 2(b). The constitutional amendment provides that reporters from newspapers, magazines, wire services, and radio or television stations may not be held in contempt by any judicial, legislative, or administrative body for refusing to disclose their sources or unpublished information obtained during news gathering. In 1998, 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) (affirming order requiring a television journalist to turn over to prosecutors outtakes of statements made by a murder defendant).

The California Supreme Court granted review and held that the shield law does not conflict with the California Constitution's due process provision, Cal. Const. art. I § 29. *Miller v. Superior Court*, 21 Cal. 4th 883, 898, 986 P.2d 170, 89 Cal. Rptr. 2d 834 (1999) ("[T]here is nothing illogical in interpreting the people's right to due process not to include the right to compel the press through the sanctions of contempt—incarceration and substantial fines—to supply unpublished information obtained in the newsgathering process.") (internal quotation marks omitted, emphasis in original).

However, in a criminal case, a reporter who was called as a defense witness solely to authenticate articles could not invoke the shield law to resist proper cross-examination. *Fost v. Superior Court*, 80 Cal. App. 4th 724, 95 Cal. Rptr. 2d 620 (2000) (witness’s direct testimony may be stricken or barred on proper motion). In such a case, the witness may be compelled to submit to cross-examination if the defendant can show that the court’s refusal to hear the witness's direct testimony would deprive the defendant of a fair trial. *Id.* at 625.

The D.C. shield law statute was held to apply in libel actions brought in the District of Columbia against non-resident defendants, and to documents created before the enactment of the statute so long as the subpoena (or other discovery request at issue) was served after the enactment of the statute. *Prentice v. McPhilemy*, 27 Media L. Rep. 2377 (D.C. Super. Ct. 1999).

The Illinois Supreme Court issued its second-ever opinion on the state’s shield statute. It upheld the principles behind the privilege with some favorable language for the media, but ultimately divested the reporters of the privilege and ordered them to identify their sources to a grand jury on the grounds that disclosure was “essential to the public interest involved.” *People v.*
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) and *Schlegel v. The Ottumwa Courrier*, 585 N.W.2d 217, 224, 27 Media L. Rep. 1178 (Iowa 1998), are the most recent jurisdictions to decide the issue. Arkansas decided the issue in *Little Rock Newspapers, Inc. v. Do drill*, 281 Ark. 25, 660 S.W.2d 933, 10 Media L. Rep. 1063 (Ark. 1983); Kansas in *Gobin v.*

The Nevada Supreme Court, overruling previous decisions that held that the state’s shield statute could be waived by voluntary disclosure, ruled a Nevada waiver statute does not apply to the shield statute and that the news shield statute protects both published and unpublished information, including both the information and its source. *Diaz v. Eighth Judicial District Court*, 993 P.2d 50, 28 Media L. Rep. 1513 (Nev. 2000) (declining to compel reporter to testify in wrongful death action on which he had reported).

A Michigan appellate court held that a reporter is subject to a prosecutor’s investigative subpoenas only if the prosecutor seeks to obtain previously published information or if the reporter is the subject of the investigation. *In re Subpoenas*, 240 Mich. App. 369, 613 N.W. 2d 342, 28 Media L. Rep. 1662 (2000). “[T]he ... media enjoy a special position in our society ...” and the government should not be permitted “to, in effect, conduct a fishing expedition utilizing the media as its indentured servants.”

The First Circuit Court of Appeals analyzed New Hampshire’s qualified confidential source privilege for reporters in *Gray v. St. Martin’s Press, Inc.*, 221 F.3d 243, 28 Media L. Rep. 2313, 2320 (1st Cir. 2000) (affirming jury verdict for defendants). The district court held that the privilege shielded an author from revealing the source of an alleged defamatory statement. Noting that the state’s privilege law is “not a model of clarity,” the First Circuit expressed sympathy for plaintiff’s claim that he had made all reasonable efforts to obtain the identity of the confidential source by means other than compelling disclosure. It also noted that if plaintiff had exhausted all reasonable efforts, he would have been entitled to a presumption that no source existed, thereby helping him to prove actual malice. But here the privilege decision by the district court was not reversible error where the jury’s verdict was based on alternate grounds of insufficient evidence of actual malice and failure to prove falsity.

### 7. 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.4
The Massachusetts Supreme Judicial Court took what appeared to be a remarkably relaxed standard of proof of mental suffering. *Shafir v. Steele*, 431 Mass. 365, 727 N.E.2d 1140 (2000). In *Shafir*, the defendant sent to the plaintiff an unfiled legal complaint that charged the plaintiff with fraud and extortion in connection with a property sale. The complaint was delivered to the plaintiff’s real estate agent and was read by the plaintiff herself, who testified that she felt “bludgeoned,” “stunned,” and then “outrage” and “anger.” The court upheld a jury award based on this testimony, noting that “such feelings are the ‘natural result’ of the defamation, sufficient to prove mental suffering.” The court did not discuss what would appear to be a relevant distinction: whether the “mental suffering” was caused by the publication of the complaint to a third party or was caused by the direct threat and insult to the plaintiff herself. See also *Brinich v. Jencka*, 2000 WL1035975 (Pa. Super. Ct. July 28, 2000) (plaintiff’s being “momentarily angered” and testimony that a listener “considered the possibility” that statements were true sufficient to prove damages in a slander per se case).

A Texas appellate court observed that there is no fixed standard or rule for mental anguish damages and upheld a jury verdict of more than $7 million in mental anguish damages, *Bunton v. Bentley*, 1999 Tex. App. LEXIS 7947 (Tex. App. – Tyler 1999, pet. filed).

The New Jersey Supreme Court held that presumed damages are not available in libel cases subject to the actual malice standard. *Rocci v. École Secondaire MacDonald-Cartier*, 165 N.J. 149, 755 A.2d 583 (2000) (“On issues of public concern, heightened standards of free speech require that a plaintiff allege and prove pecuniary or reputational harm.”). The court reserved for a future case whether presumed damages would be available in a claim by a private figure plaintiff where no public interest was implicated.

### 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

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*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*.


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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.


8. Procedural Matters

Retraction

A Florida appellate court held that in a libel action over Internet bulletin board messages, the plaintiff was not required to comply with the presuit notice requirements of Florida’s retraction law. Zelinka v. Americare Healthscan, Inc. et al., 2000 Fla. App. LEXIS 500 (Fla. 4th DCA Jan. 26, 2000) (Florida Statutes Section 770). According to the court, Florida’s retraction statute applies only
to media defendants, stating “it may well be that someone who maintains a web site and regularly publishes internet “magazines” on that site might be considered a “media defendant” who would be entitled to notice” but defendant “is a private individual who merely made statements on a web site owned and maintained by someone else.”


The Puerto Rico Supreme Court held that printing a retraction is not an admission of negligence but merely an admission of error. *Pérez Rosado v. El Vocero*, 99 JTS 160 (P.R. 1999).

**Statute of Limitations**

A plaintiff’s libel claim against a newspaper was defeated on statute of limitation grounds based on publication of the newspaper on the Internet. *Simon v. Arizona Board of Regents*, 28 Media L. Rep.1240 (Ariz. Super. Ct. 1999). According to the Arizona court, a newspaper’s Internet edition constitutes publication and as a result the statute of limitations begins to accrue upon such publication.

A Pennsylvania federal district court rejected a plaintiff’s request to apply the discovery rule in a defamation case. *Barrett v. Catacombs Press*, 64 F. Supp. 2d 440 (E.D. Pa. 1999) (it does not matter whether plaintiff became aware of the defamatory writings, the statute of limitation accrues so long as a publication has occurred).

The D.C. District court rejected a similar request to apply the discovery rule in *Judd v. Resolution Trust Corporation*, 1999 WL 1014964 (D.C.C. 1999) (rejecting plaintiff’s argument that the statute of limitations begins to accrue upon plaintiff’s discovery of damages). See also *Turner v. Shoney’s* 2000 U.S. Dist. LEXIS 7081 (S.D. Ind. Feb. 15, 2000) (burden of investigating and identifying the source of alleged defamation is on plaintiff who should investigate the source of the defamation with due diligence).

A plaintiff’s “voluntary but improvident foray” into federal court did not toll the statute of limitations. *Ovadia v. Bloom*, 756 So. 2d 137 (Fla. 3rd DCA 2000). Plaintiff originally filed suit in federal court but there was no diversity to support jurisdiction. The state court ruled that plaintiff ventured into federal court without full diversity at his own peril and although the plaintiff had in fact intended to initiate an action, the statute of limitations continued to accrue and the state court suit was time barred.

The Oregon Supreme Court ruled that in determining whether the defamation one-year limitation applies, the question is whether plaintiff’s claims are at bottom alleging defamation, regardless of how they may be denominated. *Bradbury v. Teacher Standards and Practices Comm.*, 328 Or. 391, 396 (1999) (affirming that plaintiff pled breach of duty other than defamation and two year limitation applied). See also *West v. Kysela*, 2000 WL 23083 (Ohio App. Jan. 13, 2000) (rejecting plaintiff’s attempt to plead a defamation case as a conspiracy cause of action with longer statute of limitations).
Motions to Dismiss

In Tucker v. Philadelphia Newspapers, Inc., 2000 Pa. Super. 183 (Pa. Super. June 28, 2000), the appellate court reversed the trial court’s granting of preliminary objections (motion to dismiss), finding that an article that emphasized the consortium count of another lawsuit filed by the plaintiffs could create a defamatory meaning that the plaintiffs – a married couple in their seventies – were “overly concerned with sexual matters.” The Pennsylvania Survey reports that, if followed, this may create difficulty in achieving success in a motion to dismiss based on defamatory meaning.

With regard to pleading requirements, the Minnesota Supreme Court ruled that generally defamatory material must be set out verbatim. Moreno v. Crooklyn Times Printing Co., 610 N.W.2d 321 (Minn. 2000). See also Silva v. Hit or Miss, 73 F. Supp. 2d 39, 43 (D. Mass. 1999) (properly pleaded defamation claim must provide “the precise wording of at least one sentence of the alleged defamatory statement.”); Black v. National Football League Players Association, 87 F.Supp.2d 1 (D.D.C. 2000) (must state time, place, content and speaker and listener of alleged defamation); and Treadwell v. St. Joseph High School, 1999 WL 753929 (N.D. Ill. September 15, 1999) (allegation that defendants “made statements to others indicating [plaintiff] was a drug dealer” found sufficient to meet the pleading requirements since it “state[ed] enough about the defamatory statements to allow the defendant to respond”).


Summary Judgment

The Kentucky Supreme Court recognized the special role of summary judgement in defamation actions in Welch v. American Publishing Co., 3 S.W.3d 724 (Ky. 1999). The court noted that in the context of free speech cases, courts should “take precautions to avoid the chilling effect on free speech that defamation lawsuits create. . . [and] resolve free speech litigation more expeditiously whenever possible. The perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom.” Id. at 729.

The Welch decision also clarified the summary judgment standard in Kentucky. Prior to Welch, summary judgment motions in Kentucky focused on Steelvest v. Scansteel, Ky., 807 S.W.2d 476 (1991), in which the court held that summary judgment is proper only where it would be “impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant.” Id. at 483 (emphasis added). In Welch, however, the Court held that the “inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.” Id. at 730. See also Tonnessen v. Denver Publishing Co., 5 P.3d 959, 28 Media L. Rep. 2039 (Colo. App. 2000); Lockett v. Garrett, 1 P.3d 206 (Colo. App. 1999) (finding summary judgment particularly appropriate in defamation actions because the threat of protracted litigation could have a chilling effect upon constitutionally protected free speech rights).
Under recent Texas law, denials of summary judgment are appealable as of right. The Texas Survey reports several decisions interpreting the summary judgment standards and procedures.

The Texas Supreme Court has held that a libel plaintiff, to defeat summary judgment on actual malice grounds, must only adduce evidence that would support a finding of actual malice by the preponderance of the evidence, thus rejecting a bid to incorporate the “clear and convincing” standard at the summary judgment stage. Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 43 Tex. Sup. Ct. J. 674 (Tex. 2000).

In another Texas case, the court held that when a libel defendant moves for a “no evidence” summary judgment on the issue of truth, the burden is on the plaintiff to come forward with evidence of falsity. Dolcefino v. Randolph, 19 S.W.3d 906, 28 Media L. Rep. 2189 (Tex. App. – Houston [14th Dist.] June 8, 2000, no pet. h.).

Another appellate court held that if an interlocutory appeal taken by a media defendant is unsuccessful, the defendant must pay the plaintiff’s court costs and attorney’s fees for the appeal. Gaylord Broadcasting Co. v. Francis, 7 S.W.3d 279, 286 (Tex. App. – Dallas 1999, pet. denied) (Tex. Civ. Prac. & Rem. Code § 51.015).

Puerto Rico also allows appeals as of right from denials of summary judgment. A Puerto Rico Supreme Court decision reversed summary judgment in favor of a newspaper, where the plaintiff had diligently tried to take the deposition of one of the newspaper’s editors. Pérez Rosado v. El Vocero, 99 JTS 160 (P.R. 1999). The court held that full discovery by the non-movant must have concluded, before the movant seeks summary judgment on the basis of lack of evidence.

**Independent Appellate Review**

In Veilleux v. National Broadcasting Co., 206 F.3d 92 (1st Cir. 2000), the First Circuit resoundingly affirmed the doctrine of independent appellate review in defamation cases, noting that that “deference to the jury is muted . . . when free speech is implicated. Appellate courts must independently review the evidence on the dispositive constitutional issue . . . regardless of whether the fact-finding function was performed by a court or a jury.” Id. at 106. Review is limited, however, to those “determinations . . . that specifically involve the application of First Amendment law to specific facts.” Id. at 107. These include the issues of whether private-figure plaintiffs, suing over a matter of public concern, satisfied their burdens of proving both falsity and negligence. The court will not review the entire record, and “purely factual determinations,” including those relating to witness credibility, are left to the factfinder. Id. at 107.

In Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 27 Media L. Rep. 2555 (11th Cir. 1999), the Eleventh Circuit, after noting that there is “confusion” in the law about how independent appellate review relates to factual findings made by a jury, concluded that “a de novo review of the entire record is not required; we must only satisfy ourselves that the evidence is sufficient for a finding of actual malice.” Id.

**Jurisdiction**
The 2000-2001 MEDIA LIBEL SURVEY contains several reports of jurisdiction decisions in the context of the Internet.

In an Internet libel case, a California federal court held that merely publishing defamatory statements on a website is insufficient to confer personal jurisdiction over a nonresident—a defendant must do “something more.” Nicosia v. Rooy, 72 F. Supp. 2d 1093 (N.D. Cal. 1999) (finding personal jurisdiction because, in addition to publishing comments on her website, the defendant invited Californians to visit the website in at least seven e-mails).

In Rexall Showcase International, Inc. v. Matthias Rath, M.D., et al., 99-8972-CIV-RYSKAMP (S.D. Fla. March 31, 2000), the court held that it could not exercise jurisdiction over a Dutch defendant accused of libeling Florida residents on its largely passive Dutch website where the accessibility of the web site by Florida residents was the only defendant’s contact with Florida. See also Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790 (W.D. Tenn. 2000) (motion to dismiss granted for lack of personal jurisdiction where allegedly defamatory statements were merely posted on defendant’s website, and defendant had no other contacts with the state of Tennessee).

The New Jersey Supreme Court wrestled with jurisdictional issues resulting from defamatory e-mails posted by non-resident defendants. Blakey v. Continental Airlines, Inc., et al., 164 N.J. 38, 751 A.2d 538 (2000), reversing Blakey v. Continental Airlines, Inc., et al., 322 N.J. 187, 730 A.2d 854 (App. Div. 1999). Non-resident defendants were sued for posting allegedly defamatory e-mails to a bulletin board. Reversing dismissal on jurisdictional grounds, the court held that the defendants would be subject to personal jurisdiction in New Jersey if they posted their e-mails with knowledge that the messages would be published in the forum.

In a case involving sales over the Internet auction site eBay, a Louisiana court held that the combination of a phone call to the jurisdiction preceded by several e-mail communications were sufficient to confer jurisdiction. Bellino v. Simon, 1999 U.S. Dist. LEXIS 18081 (E.D. La., Nov. 22, 1999).

Massachusetts appellate courts have not yet ruled on the circumstances under which an out-of-state defendant’s operation of a Web site would grant jurisdiction in Massachusetts in defamation cases. But recent federal trademark and products liability cases suggest that the publication of defamatory statements on Web sites could give rise to jurisdiction in Massachusetts, at least where the defendant used the Web site to solicit business in Massachusetts. See Bartow v. Extec Screens and Crushers, Ltd., 53 F. Supp. 2d 518 (D. Mass 1999); Northern Light Technology, Inc. v. Northern Lights Club, 97 F. Supp. 2d 96 (D. Mass 2000).

In “real space,” a New York appellate court reinstated a libel action by a district attorney against a television reporter who was based in New York at the time of publication but was a Florida resident when suit was filed. Montgomery v. Minarcin, 263 A.D.2d 665, 693 N.Y.S.2d 293, 27 Media L. Rep. 2627 (3d Dep’t 1999). According to the court, New York’s long-arm statute applied because defendant’s interviews, research, and preparation of the news pieces at issue constituted doing business in New York.

A federal court in Hawaii found that it had personal jurisdiction over a New York newspaper that sold two subscription copies in the state. Miracle v. NYP Holdings, 87 F.2d 1060, 28 Media L. Rep. 1875 (D. HI. 2000). In particular, the court noted that plaintiff’s claim would be time barred.
in New York and therefore no alternative forum existed.

Choice of Law

An Illinois federal court issued an interesting choice of law decision in a media libel case, *Wilkow v. Forbes, Inc.*, 2000 WL 431344 (N.D. Ill. May 15, 2000) (defamation suit by Illinois resident against New York based magazine). Using the “most significant relationship” test the court determined that New York law applied to determine whether the article was protected by New York’s fair reporting privilege because the injury causing conduct occurred in New York, not Illinois; however Illinois law applied to other issues in the defamation claim because the injury occurred to plaintiff, a resident and citizen of Illinois. Under the decision, the defendant obtained the benefit of New York’s absolute fair report privilege.

9. International Developments

England

The House of Lords issued two important rulings in defamation cases. In *Reynolds v. Times Newspapers Limited* [1999] 3 WLR 1010, the court recognized a qualified privilege for the press when reporting on matters of public interest. Under the privilege, if the press has acted fairly and reasonably in such instances it is relieved of the burden of having to prove the truth of the alleged defamation. The court outlined ten areas that courts should inquire into to determine whether the privilege applies: 1) the seriousness of the allegation; 2) the nature of the information and the extent to which it is a matter of public concern; 3) the source of the information; 4) the steps taken to verify the information; 5) the status of the information; 6) the urgency of the matter; 7) whether comment was sought from the plaintiff; 8) whether the article contained the gist of the plaintiff’s side of the story; 9) the tone of the article; and 10) the circumstances of the publication including the timing.

The privilege was applied in *GKR Karate UK Limited v. Yorkshire Post Newspapers* [2000] (unreported). On pretrial motion, the court found that a newspaper’s report on serious allegations about the plaintiff’s business practices in teaching and promoting karate were covered by qualified privilege.

In *Berezovsky & Glouchov v. Forbes Inc & Ors*, [2000] __ WLR __ the House of Lords affirmed a Court of Appeal decision that England is the appropriate forum for a libel suit by non-resident plaintiffs against a foreign publication. The Court agreed that the plaintiffs had sufficient contacts to England to allow an English court to hear their claims. The court affirmed that Boris Berezovsky, a Russian businessman and former Deputy Secretary of the Security Council of the Russian Federation, and one of his business associates, had “significant” links to the UK. The House of Lords affirmed that the test for jurisdiction is whether there is a more appropriate forum “in which the case may be tried suitably for the interests of all the parties and the ends of justice.” Under this test, a multitude of factors may be taken into consideration, including: the subject matter of the libel; where the plaintiff is best known; where the plaintiff’s reputation has been most damaged; the
domicile of the parties and the witnesses; the language and nationality of the parties and the
witnesses; the witnesses’ safety in the countries in question; difficulties in obtaining witnesses
summons; the language of any documents relied upon; and the costs involved.

1. False Light

Recognition

According to the 2000-2001 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

Several courts have ruled that false light claims require a showing of fault greater than mere negligence. The First Circuit, in Veilleux v. National Broadcasting Co., Inc., 206 F.3d 92 (1st Cir. 2000), interpreted Maine’s treatment of the Restatement (Second) of Torts to require a showing of “actual malice” by the defendant in false light claims. In Zeran v. Diamond Broadcasting, Inc., 203 F.3d 714 (10th Cir. 2000), the Tenth Circuit rejected a negligence standard for false light cases and reaffirmed knowing or reckless disregard as the appropriate standard even in private figure cases. To establish reckless disregard, a plaintiff must demonstrate actual knowledge of probably falsity.

A Pennsylvania Superior Court also held that liability on a false light claim cannot be based on negligence, at least when the statement involved a matter of public concern. Rush v. Philadelphia Newspapers, Inc., 732 A.2d 648, 654 (Pa. Super 1999). In that case, the court found that articles suggesting that contracts awarded to the plaintiffs were the result of political patronage were a matter of public concern because the “public has an interest in and a right to know about their public school system.” See also Jones v. New Haven Register, 2000 WL 157704 (Conn. Super. 2000) (the defendants’ erroneous use of the plaintiff’s photograph in connection with an article about a parole violation by an individual with the same name as plaintiff was a mistake which was, at best, the result of negligence, not actual malice; therefore, the claim failed).

In Bueno v. Denver Publishing Co., 28 Media L. Rep. 2455, 2000 Colo. App. LEXIS 268, (Colo. App. Mar. 2, 2000), the defendant Denver Publishing Company (d/b/a Rocky Mountain News) published an article entitled “Denver’s Biggest Crime Family” describing the criminal activities of the Bueno family, which article included a family tree featuring the plaintiff’s photograph. The article referenced the criminal activities of the “Bueno boys,” the “older brothers,” and “the older boys.” The plaintiff, the oldest of the Bueno brothers, had never been charged with nor arrested for a crime. He sued, including a claim that the defendant had invaded his privacy by portraying him in a false light. The jury found for the plaintiff on that claim and awarded compensatory

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

11 Massachusetts, Minnesota, New York, North Carolina, Ohio, South Carolina, Texas, Virginia, and Wisconsin.
punitive damages.

The Colorado Court of Appeals concluded that false light invasion of privacy was a valid claim under Colorado law and adopted the elements set forth in the Restatement (Second) of Torts § 652E. The court expressly rejected defendant’s argument that false light was duplicative of a defamation claim, holding that the tort of defamation protects a person’s reputation in the view of a “respectable minority,” while false light is concerned with the plaintiff’s emotional distress in response to a statement that would be highly offensive to a reasonable person. The court determined, therefore, that “these torts protect entirely different interests.”

The court also determined that there was sufficient evidence to support a finding of actual malice because the article had been prepared over a six-month period and defendant’s employees testified that the information they had about plaintiff did not support the characterization of him as involved in criminal activities.

In Kitt v. Capitol Concerts, Inc., 742 A.2d 856 (D.C. 1999), the principal clarinetist of the National Symphony Orchestra (“NSO”) alleged that the producer of a televised production of a concert at the U.S. Capitol had portrayed him in a false light by using an actor to give the false impression that the clarinetist was playing while standing on the west porch of the Capitol building isolated from the remainder of the orchestra. Plaintiff alleged that the actor’s flawed impersonation made it appear that “he was engaging in buffoonery inconsistent with his status as a principal clarinetist of a distinguished symphony orchestra.”

The D.C. Court of Appeals affirmed the trial court’s holding (on a summary judgment motion) that the facts alleged were insufficient to satisfy the “highly offensive to a reasonable person” standard because the actor was not “‘engaging in any sort of obnoxious or offensive behavior’ and it was ‘unclear whether a musically sophisticated viewer would actually know who was playing.’” Responding to the plaintiff’s contention that a jury, rather than the trial judge, should determine whether it was offensive to “a reasonable performing artist,” the court stated that “[w]hile determining offensiveness in an invasion of privacy case is usually the province of the jury, the trial court must make a threshold determination of offensiveness in discerning the existence of a cause of action for intrusion.” 742 A.2d at 859; quoting Wolf v. Regardie, 553 A.2d 1213, 1219 (D.C. 1989). Finally, the court noted that the offensiveness of such conduct should be measured by the “ordinary reasonable person” standard, not the standard of a “reasonable performing artist.”

Furthermore, where the plaintiff agreed that the actor “neither resembled him, nor ‘played’ the way that he would” and where the actor was not identified as the plaintiff or the principal clarinetist, plaintiff could not establish that the actor’s portrayal was of and concerning the plaintiff.

In Veilleux, supra, the United States Court of Appeals for the First Circuit, applying Maine law, has held that “protected statements of opinion” cannot support a claim of false light. 206 F.3d at 134.

In Downs v. Gannett Co., 27 Media L. Rep. 2432 (Mich. Cir. Ct. 1999), a Michigan court held that plaintiff did not have a claim of false light because the newspaper published a truthful
report on a matter of public significance without malice. The media defendants reported that plaintiff failed a psychiatric exam for a police reservist position when, in fact, she did not adequately perform on a psychological examination. The court held that the distinction between the events and what was reported was insufficient to create falsity. Moreover, the fitness of a police reservist was of legitimate public interest and the employment records were lawfully obtained. See also Brown v. Wanlass, No. 980404712, slip op. at 12 (Utah 4th Dist. Ct. Aug. 11, 1999) (Utah’s conditional public interest privilege applied to a newspaper report concerning a misdemeanor charge and a city employee grievance filed against a former city councilman).

Non-Media False Light Decisions

In St. John v. Town of Ellettsville, 46 F. Supp. 2d 834, 851 (S.D. Ind. 1999), a federal district court observed that Indiana generally recognizes the tort of invasion of privacy, with four distinct strands, including false light publicity. As no cases set forth the elements of a false light claim, the court looked to the Restatement (Second) of Torts and Seventh Circuit law for the predicate elements of the claim. The court ruled that the following elements must be shown to maintain a false light invasion of privacy action: (1) the defendant places the plaintiff in a false light before the public; (2) the false light would be highly offensive to a reasonable person; and (3) the defendant had knowledge or acted in reckless disregard as to the falsity of the statements or publicized matter. The court also noted that states are free to relax the actual malice standard when the false light plaintiff is a private individual, but predicted Indiana would follow the Restatement’s standard given Indiana’s adherence to the strict “actual malice” standard in defamation cases involving matters of public interest.

In an Iowa federal district court opinion, a distinction between “publicity” under the Restatement and “publication” was drawn and the court sustained the defendants’ summary judgment motion, in part, because the disclosure at issue was made only to a third party, not “to the public at large.” Hill v. Hamilton Co. Public Hosp., 71 F. Supp. 2d 936, 952 (N.D. Iowa 1999) (applying Iowa law). The court said a false light claim could be sustained only when the communication was “so widespread as to constitute ‘publicity’ within the meaning of this tort.” See also Bennett v. Lindsay, 1999 WL 512672, at *4-5 (Conn. Super. 1999) (defendant’s motion for summary judgment granted where the defendant former attorney’s statements to postal police on plaintiff’s behalf were not “published” so widely as to have been made “public” as required for false light invasion of privacy).

The Oregon Court of Appeals has stated that the focus of the false light tort is not the truth or falsity of a particular statement, but whether it leads others to believe something false about the plaintiff. Phillips v. Lincoln County School District, 161 Or. App. 429, 984 P.2d 947 (1999). In that case, the court held that teachers’ statements that a student’s longtime nickname was a street name for marijuana were not statements implying that the student used or condoned drugs, and that even if such an inference could be drawn, there was no evidence that defendants knew of that inference or acted in reckless disregard of the likelihood that the inference would be made.

In Aranyosi v. Delchamps, Inc., 739 So. 2d 911 (La. Ct. App. 1st Cir. 1999), a Louisiana appellate court affirmed the dismissal of a false light action arising from the defendant supermarket's
reporting to the police and a local newspaper that an aggravated battery and a bomb threat had occurred on its property on the same day that the defendant had laid off plaintiffs from their jobs, and that other co-workers had heard plaintiffs make threats following their dismissal. The court reasoned that "there is nothing to show defendants acted unreasonably in reporting activities occurring on Delchamps premises on the day of the aggravated battery and bomb threat." A federal court in Pennsylvania held in *Fanelle v. LoJack Corp.*, 79 F. Supp. 2d 558, 563 (E.D. Pa. 2000), that being falsely labeled a criminal could be highly offensive to a reasonable person.

The court in *Jones v. Sabis Educational Systems, Inc.*, 1999 WL 1206955 (N.D. Ill. Dec. 13, 1999), appeared to apply an abbreviated opinion analysis to a false light claim by holding the statement non-actionable because it was a “vague [statement] not capable of being proven true or false.”

In *Schmitz v. Aston*, 2000 WL 279215 (Ariz. Ct. App. 2000), the Arizona Court of Appeals commented extensively on the applicability of common law privileges and the interrelationship between defamation and false light claims. Casting doubt as to the predictable application of the common interest privilege, the court observed: “[t]here is no strict formula as to when a conditional privilege applies, but rather we must weigh a person’s interest in reputation against society’s interest in free speech and in encouraging certain beneficial communications.” Even when a privilege attaches, the court found, statements made to law enforcement officers and health care providers are protected only by a conditional privilege. Applying *Restatement (Second) of Torts* § 595, the court held that no conditional privilege attached to the defendant’s voluntary statements to neighbors that the plaintiff was a child molester, in part because there was no legal duty to communicate such information to neighbors. In contrast, the court noted that Arizona has recognized the privilege in situations in which a (1) former employer warns a prospective employer about an employee; (2) a person notifies an insurance company that it is being swindled by an insured; (3) a landlord is told that a tenant is undesirable; (4) a creditor is told about its debtor’s insolvency; and (5) a person is protecting a family member by publication of allegedly defamatory information. The court also recognized the potential for overlap between injuries addressed by defamation and false light claims, holding that where a plaintiff seeks emotional distress damages as a component of a defamation claim, a false light claim is duplicative and subject to dismissal.

2. **Private Facts**

**Recognition**

According to the 2000-2001 *MEDIA PRIVACY SURVEY*, 41 jurisdictions currently recognize a claim for publication of private facts, although in seven of those jurisdictions the tort has not been applied in a media context.\(^{13}\)

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\(^{12}\) Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts,
Additionally, the tort has been specifically rejected in four jurisdictions.\textsuperscript{14}

**Significant Media Cases**

In the media context, several courts passed upon the question of what facts are of “legitimate concern to the public” as opposed to “private facts.”

In *Veilleux v. National Broadcasting Co., Inc.*, 206 F.3d 92 (1st Cir. 2000) (Maine law), the First Circuit held that a televised news program was permitted to reveal the identity of a long-haul trucker who had failed a drug test during a trip. More generally, the court affirmed that “individuals’ drug use, particularly where related to public safety, may be a legitimate matter of public concern.” The court went on to hold that “compelling” factual circumstances that “strengthen the impact and credibility” of an article permit journalists to identify individuals where the subject matter is sufficiently related to a matter of public concern.

Likewise, two recent Massachusetts cases helped define the parameters of “legitimate public concern.” In *Peckham v. Boston Herald, Inc.*, 48 Mass. App. Ct. 282, 719 N.E.2d 888, 28 Media L. Rep. 1178 (1999), the Appeals Court of Massachusetts affirmed summary judgment for the newspaper/defendant on a public disclosure of private facts claim based upon the publication of the details surrounding a paternity action involving the plaintiff. The lower court granted summary judgment based upon plaintiff’s discussion of the allegedly private facts with third parties, which, the court reasoned, relinquished the plaintiff’s expectation of privacy. However, the appellate court affirmed the decision based not upon this disclosure, but rather upon the grounds that the article “touched on several topics that are issues of general modern public interest – a workplace liaison between an employee and her supervisor, the subsequent disavowal of paternity and layoff of the employee and the possibility that a mother would be forced to seek public assistance.” 28 Media L. Rep. at 1183.

In *Dineen v. Department of Social Services*, 11 Mass. L. Rptr. 184 (Mass. Super. 2000), a Massachusetts Superior Court held that publication of an article detailing a protracted custody battle, including allegations of sexual and physical abuse of the children, was of legitimate public concern and therefore not an actionable invasion of privacy. The article also included information about the current and potential guardians regarding their education and marital history, and allegations that one of the parties was raped as a child. This information was also held to be of legitimate public concern. The defendant newspaper was also granted summary judgment for an intentional infliction of emotional distress claim, as the newspaper was privileged to publish the article.

A California appellate court, in *Wilkins v. NBC*, 71 Cal. App. 4th 1066, 1086–87, 84 Cal. Rptr. 2d 866 (Cal. App. 1999), held that a television station was not liable for an allegation of invasion of privacy where the plaintiff had been a patient at a mental hospital.

\textsuperscript{13} Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgin Islands, Washington, West Virginia, and Wisconsin.

\textsuperscript{14} Colorado, Hawaii, Indiana, Minnesota, Nevada, Virgin Islands, and Washington.

\textsuperscript{14} Nebraska, New York, North Carolina, and Virginia.
Rptr. 2d 329, 27 Media L. Rep. 1865 (1999), concluded that information in a report on companies that lease and resell “900” telephone numbers, which gave the names of individual sales representatives and included a videotape of a sales presentation, was newsworthy as a matter of law.

**Non-Media Private Facts Decisions**

In *Gomez v. Larson*, 1999 WL 417819 (Conn. Super. 1999), the defendants were granted summary judgment on an invasion of privacy claim where their statements regarding the criminal background of the plaintiff, a public school employee, were independently available to the media, and there was “no dispute that the qualifications, including the criminal background checks, of public employees is a legitimate concern to the public.” On the other hand, a court in Ohio held that a city could possibly be liable for the authorized disclosure of the plaintiff employee’s background investigative file to a newspaper, since such documents are not public records and therefore not properly of public concern. *Patrolman X v. City of Toledo*, 132 Ohio App.3d 374 (Lucas Cty. 1999).

Another frequently raised issue was the extent of publication necessary to support a claim. A Maryland court, in *Taylor v. NationsBank, N.A.*, 128 Md. App. 414, 421, 738 A.2d 893, 897 (1999), cert. granted, 357 Md. 481, 745 A.2d 436 (Feb. 9, 2000), held that a bank’s disclosure of one depositor’s unlisted telephone number to another depositor was not sufficient publication. In *C.L.D. v. Wal-Mart Stores, Inc.*, 79 F. Supp. 2d 1080 (D. Minn. 1999), a federal court dismissed a claim for publication of private facts because publication was made to at most three persons and did not constitute “publicity” as required to state a claim for publication of private facts. The court applied the Restatement Second of Torts § 652D comment a in holding that it is not an invasion of privacy “to communicate a fact concerning the plaintiff’s private life to a single person or even to a small group of persons,” and required “that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” See also *Fernandez-Wells v. Beauvais*, 1999-NMCA-071, ¶¶ 9-10, 127 N.M. 487 (requiring disclosure of the private facts to “the public at large” or at least to persons with whom the plaintiff enjoys a “special relationship”).

A number of courts examined what constitutes “private facts” as an element of the tort. See *Chase v. First Parish Church*, 2000 Mass. Super. LEXIS 36 (Mass. Super. 2000) (the fact that plaintiff was mocked by a minister for her hearing impairment, and that she was cued by mouthed words in a play to know when to speak her lines, were not private facts because the actions were conducted in public); *Meury v. Eagle-Union Community School Corp.*, 714 N.E.2d 233, 242 (Ind. Ct. App. 1999) (references to disciplinary actions taken against student not private information); *Simpson v. Burrows*, 90 F. Supp 2d 1108, 1124 (D. Or. 2000) (holding that, under Oregon law, plaintiff’s sexual orientation was a private fact).

In *Pohle v. Cheatham*, 2000 WL 225929 (Ind. Ct. App. 2000), a woman’s consent to being photographed nude by her husband did not bar a post-divorce suit for publication of private facts based on the ex-husband’s public disclosure of the photos.

On the issue of offensiveness, in *Pinkston-Adams v. Nike, Inc.*, 1999 WL 543202 (N.D. Ill. July 22, 1999), the court held that the an employer’s disclosure of personnel matters, including
settlement terms of a discrimination suit, to plaintiff’s fellow employees could be highly offensive to a reasonable person. See also Simpson v. Burrows, 90 F. Supp 2d 1108, 1124 (D. Or. 2000) (the disclosure of plaintiff’s sexual orientation, with the intent to inflict emotional distress, was highly objectionable and provided the basis for a private facts claim).

A federal district court in Texas held that a claim of invasion of privacy arising from a set of facts that would support a libel or slander action against a government agency is subject to the doctrine of sovereign immunity and cannot succeed absent the government agency’s waiver of sovereign immunity. Doe v. United States of America, 83 F. Supp. 2d 833 (S.D. Tex. 2000). In Doe, the court found that a government agency’s posting of information concerning a criminal investigation on a website arose from a set of facts which would support a libel or slander action and so was subject to sovereign immunity under the provisions of the Federal Tort Claims Act 28 U.S.C. § 2680(h).

3. Intrusion and Related Causes of Action

Recognition

According to the 2000-2001 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. In Illinois, conflicting authority exists as to whether intrusion is recognized.

Significant Media Intrusion Decisions

In Wilkins v. National Broadcasting Co., 71 Cal. App. 4th 1066, 1078, 84 Cal. Rptr. 2d 329 (1999), a California appellate court held that no reasonable expectation of privacy was violated when the media’s agents secretly videotaped a business conversation held on a crowded restaurant patio. See also American Broadcasting Co. Inc. v. Gill, 6 S.W.3d 19 (Tex.App.– San Antonio 1999) (the filming of properties owned by the plaintiffs’ savings and loan association in connection with an

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16 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.

17 New York and Virginia.

18 Eighth Circuit opinion interpreting North Dakota law.
investigative report did not constitute an invasion of privacy because the broadcast showed nothing more than what the public could view from the street).

Eavesdropping/Hidden Cameras/Other Forms of Surveillance

According to the 2000-2001 MEDIA PRIVACY SURVEY, in addition to the Federal Wiretap Statute 18 U.S.C. §2510 et seq., 52 jurisdictions have electronic eavesdropping statutes. In 39 of those 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.

The U.S. Supreme Court has accepted for review a case that presents the immensely important issue of whether one who discloses but is not involved in the interception of third party communications can be held liable under federal and state wiretap statutes. Bartnicki v. Vopper, 200 F. 3d 109 (3d Cir. 1999), cert. granted, 120 S.Ct. 4320 (2000). In a 2-1 decision, the Third Circuit dismissed on First Amendment grounds federal and state civil wiretap complaints against radio stations which broadcast the contents of an illegally intercepted cell phone conversation and against the source who provided a tape of the conversation to the broadcasters. The tape captured a discussion between two teacher’s union members who were involved in heated contract negotiations with their school district. Plaintiff Gloria Bartnicki was recorded saying “if they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys.” The conversation was recorded by person(s) unknown and delivered anonymously to the leader of a local taxpayer group opposed to the teachers’ salary demands. He provided the tape to two local radio stations which played parts of the tape on air.

The federal district court denied summary judgment to defendants holding that even though they were not involved in the illegal interception they could be held liable by the mere finding that they had reason to believe that the communication they disclosed was obtained through an illegal

19 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 and was set to lapse in July 2000. See 2000-01 MEDIA PRIVACY AND RELATED LAW SURVEY, at 860.


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The Third Circuit rejected a mechanical application of Cohen v. Cowles, recognizing instead that the wiretap statutes could place undue burdens on the press. Applying intermediate scrutiny (the court found the Federal Wiretap Statute content neutral), the court balanced the government's interest in protecting the privacy of wire, electronic, and oral communications against the First Amendment. Noting that “the public interest and newsworthiness of the conversation broadcast and disclosed by the defendants are patent” the court reasoned that the application of the wiretap statutes here would deter significantly more speech than necessary to serve the government’s interest. Moreover the court found it “likely that in many instances these provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts.”

The U.S. Supreme Court accepted the case for review and oral argument was heard on December 5, 2000. A decision is expected in the Spring of 2001. The questions for the Court’s review are: 1) whether “the federal and Pennsylvania wiretapping statutes violate the First Amendment insofar as they prohibit the disclosure or other use of unlawfully intercepted electronic communications by persons who were not involved in the interception itself, but who know or have reason to know that the communication was unlawfully intercepted? And 2) Does the imposition of civil liability under 18 U.S.C. §2511(1)(c) and (d) for using or disclosing the contents of illegally intercepted communications, when the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, violate the First Amendment?

In Boehner v. McDermott, 191 F.3d 463, 27 Media L. Rep. 2345 (D.C. Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3693 (U.S. Apr. 25, 2000), a divided panel of the D.C. Circuit held that the First Amendment does not protect from civil wiretap liability a person who obtains an illegally taped conversation and — knowing it was illegally obtained — discloses it to the press. The court reinstated federal wiretap claims against Democratic Congressman Jim McDermott over his alleged release to the media of a tape of a cell phone conversation between former Congressman Newt Gingrich, Congressman Boehner and other House Republicans. The telephone call was intercepted and recorded by a Florida couple who used a police scanner to eavesdrop on the conversation. They provided a copy of the tape to the defendant with a cover letter explaining that it contained a conference call heard over a scanner. Defendant allegedly gave copies of the tape to several newspapers which published portions of the conversation.

The district court dismissed the complaint holding that the First Amendment prohibits punishment for the disclosure of truthful and lawfully obtained information on a matter of substantial public concern. Reversing, the D.C. Circuit applied an intermediate scrutiny standard (the mixed speech and conduct test of U.S. v. O’Brien, 391 U.S. 367 (1968)) and upheld the statute as applied to the defendant who had received the illegally intercepted tape-recording from a third person and then provided copies of that tape to the press. The court held that “the freedom not to speak publicly,
to speak only privately is violated whenever an illegally intercepted conversation is revealed, and it is violated even if the person who does the revealing is not the person who did the intercepting.” Circuit Judge Randolph, author of the lead opinion, opined in dictum (and in a section of the opinion in which his concurring colleague Judge Ginsburg did not join) that the First Amendment may not shield a newspaper that publishes truthful information that it knows or has reason to believe has been illegally obtained by another from either criminal or civil liability.

In *Peavy v. WFFA-TV*, 221 F.3d 158 (5th Cir. 2000) the Fifth Circuit reinstated wiretap claims in a case against a media defendant where it was alleged that the media encouraged albeit indirectly the interception. Plaintiff’s cordless phone conversations were intercepted by a neighbor using a police scanner. Claiming the conversations revealed threats and proof of public corruption relating to plaintiff’s position as a school district trustee, the neighbor contacted WFFA-TV and provided recordings of those conversations to an investigative reporter. The source also made and supplied the reporter with additional recordings. WFFA broadcast three reports on plaintiff’s alleged corruption. (Plaintiff was indicted on bribery and related charges and was subsequently acquitted.)

The district court granted summary judgment to defendants on First Amendment grounds. It applied a strict scrutiny standard to the wiretap statutes and found them unconstitutional as applied to the television station and reporter who disclosed but had not actually intercepted the communications. The Fifth Circuit reversed. Like the D.C. and Third Circuit Courts of Appeal, the Fifth Circuit applied a standard of intermediate scrutiny.

Distinguishing *Bartnicki*, the court found that issues of fact existed as to whether the reporter was indirectly involved in the interceptions and therefore procured the interception in violation of the statutes. The court noted that the reporter took tapes from the source, inquired about the content of the recordings, advised the source not to edit the tapes so as to compromise their authenticity, and promised to investigate the contents of the tapes. Issues of fact also existed on whether the news broadcasts disclosed the contents of the phone communications or whether the broadcasts were based on independent sources. A petition for certiorari to the U.S. Supreme Court was filed on October 30, 2000.

In a decision made prior to *Bartnicki*, Boehner and *Peavy*, a Connecticut federal district court dismissed claims against television and newspaper companies that published news reports, based in part on tapes and transcripts of telephone conversations that were allegedly intercepted in violation of federal and state wiretap statutes. *Graves v. City of Hartford*, Docket No. 3:98CV01568 (April 9, 1999). As in *Bartnicki*, there was no claim that the media defendants were responsible for the illegal wiretapping; rather it was alleged that unknown parties made the tapes and transcripts and delivered copies anonymously to the media defendants. Relying on *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the court adhered to the principle 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.”

In *Fischer v. Hooper*, 143 N.H. 585, 732 A.2d 396 (1999), the New Hampshire Supreme Court, reversing on other grounds a jury verdict in favor of a woman whose former spouse taped telephone conversations with him and with their daughter without the woman's consent, ruled that the jury could have found that the woman had a reasonable expectation of privacy in the
conversations despite the fact that the woman could have expected the content of her conversations with her daughter to be repeated to the daughter's therapist. The court held, however, that the requirement of "wilfulness" in the New Hampshire eavesdropping statute entails proof of either intentional or reckless disregard for the lawfulness of one's conduct, i.e., more than a mere knowing violation.

The Michigan Supreme Court reversed a directed verdict for plaintiff under Michigan’s eavesdropping law MCLA 750.539. *Dickerson v. Sally Jessy Raphael*, 27 Media L. Rep. 2215 (Mich. 1999) (directed verdict by appellate court). Plaintiff sued a television talk show for secretly recording and later broadcasting conversations plaintiff had with her children that were recorded and broadcast with the children’s, but not her, consent. The court reversed on the grounds that it was unclear whether the conversation at issue was private. But the court added that a conversation participant cannot unilaterally nullify another participant’s expectation of privacy by secretly broadcasting the conversation.

Also in Michigan, in *Williams v. Williams*, 237 Mich. App. 426, 603 N.W.2d 114 (1999), an appellate court addressed the issue whether a custodial parent of a minor child could consent on behalf of the child to the interception of conversations between the child and another party to avoid liability under Michigan’s eavesdropping statute. The court rejected the argument, refusing to create a vicarious consent exception to the state eavesdropping statute, but recognized that such an exception existed under federal wiretap laws.

In a criminal case, a Washington state court held that the state’s all-party consent eavesdropping statute (RCW 9.73.030 through 9.73.250) does not apply to e-mail or Internet chat rooms. In *State v. Townsend*, No. 99-1-01239-0 (Wash. Super. Ct. Dec. 15, 1999), the trial court denied the defendant’s motion to dismiss attempted rape and child pornography charges. A detective in a “sting” operation posed as a thirteen-year-old girl and saved on his computer e-mail and chat room messages sent by the defendant. The motion was based on a requirement in the eavesdropping statute that all parties must consent to the recording of “private communications by telephone, telegraph, radio or other device.” RCW 9.73.030. The court denied defendant’s motion and held that it was unreasonable to expect that recipients of e-mail and chat room messages would not save such communications.

Iowa Code § 727.8 prohibits tapping into, listening to, or recording any telephone or wire communication by persons having no right or authority to do so. The statute’s sunset provision called for the chapter to be repealed in 1999, but that section, Iowa Code § 808.9, itself was repealed. Accordingly, Iowa Code Chapter 808B remains in effect as amended in 1999. In 1999, Iowa also adopted Chapter 554C, the Electronic Commerce Security Act, which imposes restrictions on the use and storage of electronic certificates and related computerized or digital signatures.

Louisiana’s new “video voyeurism” statute forbids the use of any camera or other image recording device “for the purpose of observing, viewing, photographing, filming or videotaping” a person, without their consent, for a “lewd or lascivious purpose.” La. R.S. 14:283(A)(1). The video voyeurism statute also forbids the transmittal of these images by live or recorded telephone message, e-mail, the Internet, or a commercial online service. La. R.S. 14:283(A)(2). The providers of the
services used for this transmittal, however, including telephone companies, cable television companies and Internet service providers, are exempted from this provision of the statute. La. R.S. 14:283(C).

The video voyeurism statute provides fines and penalties of up to $2000 and two years in prison for a first offense and up to $2000 and three years in prison for subsequent offenses (with a 6-month minimum sentence for subsequent offenses). La. R.S. 14:283(B)(1)(2). Violations of the statute by filming certain described sex acts or body parts are subject to fines of up to $10,000 and imprisonment for one to five years. La. R.S. 14:283(B)(3). Violations of the statute by filming a child under the age of seventeen “with the intention of arousing or gratifying the sexual desires of the offender” are subject to fines up to $10,000 and imprisonment for two to ten years. La. R.S. 14:283(B)(4). The statute also provides that the court may order the destruction of all photographs or videotapes if a prosecution does not end in a conviction, if the prosecutor fails to timely prosecute within ninety days, or after a convicted offender is released from incarceration. La. R.S. 14:283(D).


Related Newsgathering Torts

Trespass

In American Transmission, Inc. v. Channel 7 of Detroit, Inc., 239 Mich. App. 695, 609 N.W.2d 607, 28 Media L. Rep. 1823 (Mich. App. 2000), defendants were sued for trespass, fraud, defamation and intentional interference with a prospective business relationship in connection with a broadcast of an undercover investigative report on transmission repair facilities. Plaintiff argued that the consent given defendants to enter plaintiff’s premises was invalid since it was given based on defendants’ misrepresentations. The court disagreed with plaintiff’s arguments and held that trespass cannot be found on grounds of misrepresentation. The court reasoned that defendants did not invade any specific interests relating to the peaceable possession of land, only entered those areas open to the public, did not disrupt plaintiff’s business, did not invade plaintiff’s privacy or reveal intimate details of anyone’s life, and thus, defendants were not liable for trespass.

Misrepresentation

In Veilleux v. NBC, 206 F.3d 92 (1st Cir. 2000), plaintiffs, owners of a trucking company, and an individual driver sued NBC for defamation, false light, misrepresentation, emotional distress and invasion of privacy arising from the content and alleged slant of a Dateline report on the long-distance trucking industry. Plaintiffs alleged that NBC obtained their cooperation in the development of the report – including permitting reporters to accompany the driver on a coast-to-coast run – by falsely representing that the report would show the positive side of the industry and
would not include representatives of Parents Against Tired Truckers ("PATT"), an advocacy group calling for stricter regulations. The report included representatives from PATT, showed the driver violating federal limits on truckers’ driving hours, staying on the road with little or no sleep, and falsifying the log book in which he recorded his driving hours.

The First Circuit held that NBC’s alleged promise that the story would be “positive” could not support a claim for misrepresentation under Maine law, and would likely run afoul of the First Amendment as well, but remanded for retrial the allegation that Dateline promised that representatives of PATT would not be included in the report. It held that if plaintiffs could show that such a promise was made and relied on, and that actual damage was caused by PATT’s inclusion in the broadcast (not from the broadcast generally), plaintiffs could recover for misrepresentation.

**Significant Non-Media Intrusion Decisions**

Although not a media case, *Johnson v. K-Mart Corp.*, 723 N.E.2d 1192 (1st Dist. 2000), may be applicable to investigative journalists. In *Johnson*, the court held that a genuine issue of fact existed as to whether there was an intrusion upon seclusion when the defendant corporation placed private detectives, posing as employees, in the workplace to gather information on employees. The court labeled the company’s acts as “deceptive” and held that information obtained was therefore not “truly voluntary.” The court particularly noted the facts that the information was “highly personal” and that the investigators gathered information not only on defendant’s premises but also in social settings.

In *McLaren v. Microsoft Corp.*, 1999 WL 339015 (Tex.App.– Dallas May 28, 1999), a Texas court held that the plaintiff failed to state a cause of action for invasion of privacy where the plaintiff sued his employer Microsoft for intercepting some or all of the personal folders maintained in his office computer and releasing the contents of the folders to third persons. In an unpublished opinion, the court held that the plaintiff, even by creating a personal password, did not manifest a reasonable expectation of privacy in the contents of the e-mail messages, because any message stored in the plaintiff’s personal folders was first transmitted over the network and was at some point accessible by a third person. In addition, the court held that a reasonable person would not consider Microsoft’s interception of the e-mail messages to be a highly offensive invasion. The plaintiff had been suspended pending an investigation into accusations of sexual harassment and “inventory questions,” and the plaintiff had notified Microsoft that some of the e-mails were relevant to the investigation. The court concluded that Microsoft’s interest “in preventing inappropriate and unprofessional comments, or even illegal activity, over its e-mail system would outweigh McLaren’s claimed privacy interest in those communications.”

Several courts dealt with the issue whether an intrusion claim could lie where there is no physical entry. While prior Connecticut case law required a “physical intrusion” upon the private affairs of a plaintiff to establish the tort of intrusion, a recent case held that an intrusion claim could proceed based on statements made regarding the plaintiffs’ sex lives, appearances, and values. *Bonanno v. Dan Perkins Chevrolet*, 2000 WL 192182 (Conn. Super. 2000). The court rejected the defendant’s argument on a motion to strike that the allegation of physical contact is necessary to state a claim for an unreasonable intrusion upon the seclusion of another. See also *Alexander v. Pathfinder, Inc.*, 189 F.3d 735 (8th Cir. 1999) (the taping of conversations by employees of a group
home with the plaintiff whose son was a resident at the home, where the tape recorders were visible, did not constitute intrusion).

A federal court in Florida held that while there is usually no intrusion upon seclusion when a plaintiff is in a public place, such as his or her workplace, a claim for intrusion may lie in specific instances when the plaintiff is cloaked in a “zone of privacy” within the otherwise public forum. *Benn v. Florida East Coast Railway Co.*, No. 97-4403-CIV, 1999 WL 816811, at *8 (S.D. Fla. July 21, 1999). A Maryland court held that surveillance film and photographs taken by a private investigator who trespassed on a yacht club’s property and observed the plaintiff “doing things that could be observed by non-trespassing members of the general public” did not violate the plaintiff’s reasonable expectation of privacy. *Furman v. Sheppard*, 130 Md. App. 67, 76, 744 A.2d 583, 587 (2000).

Construing the offensiveness element of an intrusion upon seclusion claim, the U.S. District Court for the District of Minnesota held that the plaintiffs failed to state such a claim in *Revering v. Norwest Bank Minnesota*, 1999 U.S. Dist. LEXIS 20726 (D. Minn., Nov. 30, 1999). The suit against the bank and a collection agency was based in part on an alleged “intrusion” by the agent sent to repossess plaintiffs’ automobile. Plaintiffs had invited the repossession agent into their home, where he remained for about 45 minutes while plaintiffs searched through documents and attempted to contact the bank. Although plaintiffs later “objected” to the presence of the agent in their home by bringing the lawsuit, the court held that such presence would not have been objectionable to a reasonable person, especially in light of plaintiffs’ acquiescence during the actual presence. In *Munoz v. Chicago School Reform Bd. of Trustees*, 2000 WL 152138 (N.D. Ill. Feb. 4, 2000), a federal court in Illinois held that the plaintiff stated a cause of action for intrusion when she alleged that the defendant entered her home without her permission.

In *Patterson v. State*, 985 P.2d 1007 (Alaska App. 1999), an Alaska appellate court held that the state’s sex offender registration program does not violate federal or state constitutional rights of privacy. The court noted that the federal constitution’s implicit right of privacy does not attach to matters already within the public domain. With respect to the state’s explicit constitutional right of privacy, the court noted that the existence of the constitutional protection in any given case depends on the factual context and the competing interests between society and the individual. At least in the context of convicted sex offenders, the offender’s assumed subjective expectation of privacy in biographical information gathered and released pursuant to the statute must yield to society’s public safety interest. The court found that any subjective expectation of privacy held by a sex offender in matters already of public record, such as details of conviction or date of birth, or in his physical appearance (as represented by his photograph), or in his employer’s address, was not an expectation society would recognize as reasonable. The court noted that “this compilation of personal information and its public accessibility represents a notable and significant alteration in the relationship between an individual and the government.”

The New Hampshire Supreme Court has held that, unlike a cause of action for intentional infliction of emotional distress, a claim of intrusion does not require a showing of "severe" or "extreme" emotional distress, nor does it require proof of emotional distress by expert testimony. *Fisher v. Hooper*, 143 N.H. 585 (1999). The court held that one who has established a cause of
action for invasion of privacy may recover damages for (1) the resulting harm to his interest in privacy; (2) his mental distress if it is of a kind normally resulting from such an invasion; and (3) special damages caused by the invasion.

In Benitez v. KFC Nat’l Management Co., 305 Ill. App. 3d 1027, 714 N.E.2d 1002 (2d Dist. 1999), an Illinois appellate court held that the one year statute of limitations applicable in Illinois to “actions for slander, libel, or for publication of matter violating the right of privacy” did not apply to the tort of intrusion upon seclusion. The Benitez court reasoned that the plain language of the statute refers to “publication” and “publication” is not an element of an intrusion claim and therefore the one year limitation was not applicable.

4. Misappropriation/Right of Publicity

Recognition

According to the 2000-2001 Media Privacy Survey, 45 jurisdictions currently recognize the tort of misappropriation / right of publicity. In nine jurisdictions the courts have not yet had the opportunity to rule on the issue.

The protection derives from statute in 17 jurisdictions, in 11 of which the statute coexists with protections provided at common law, while in the remaining six jurisdictions the statute is the sole source for protection.

According to the 2000-2001 Media Privacy Survey, Ohio has this past year enacted legislation protecting against the unauthorized use of an individual’s persona for commercial purposes. In August of 1999, the Ohio Legislature passed Senate Bill 54, the “Ohio Right of Publicity Act.” Found at Chapter 2741 of the Ohio Revised Code, the law provides protection for a person’s “persona,” defined to include one’s name, voice, signature, photograph, likeness, image, or distinctive appearance. The right is fully transferable and assignable during a person’s lifetime, and is descendible to the person’s estate, which may enforce the right for 60 years. Persons whose

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23 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.

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

25 Massachusetts, Nebraska, New York, Rhode Island, Virginia, and Washington.
"persona" has "commercial value" may recover statutory damages and attorney’s fees for unauthorized, "commercial exploitation" (a term of art under the Act) of that persona.

In Colorado, where the tort of misappropriation had previously been recognized only in federal court, a state court recognized it this year. Dittmar v. Joe Dickerson & Assoc’s, LLC, 9 P.3d 1145 (Colo. App. 1999). Defendants, who were in the business of investigating financial fraud, successfully investigated plaintiff, who was later found guilty by a jury. Defendants published plaintiff’s name and photograph in their newsletter alongside an article about the successful investigation. Plaintiff had not consented to the use of her image. Applying the standard set forth in Restatement (Second) of Torts § 652C, the court concluded that there were genuine issues of material fact as to whether defendants had appropriated plaintiff’s image or likeness for their own use or benefit, which the court determined was a recognized tort in Colorado.

The California Legislature enacted the “Astaire Celebrity Image Protection Act” amending California’s right of publicity statute with respect to deceased personalities in several ways. First, the Legislature extended its protection from 50 to 70 years after the personality’s death. Second, in response to a Ninth Circuit decision which permitted the use of a clip of Fred Astaire in introductory material to an instructional dance video, the Legislature carved out an “exception to the exception” from the statute, so that it now applies to works such as plays, books, newspapers and other works of newsworthy value. As a result of the amendment, uses that the claimant proves are so “directly connected with a product . . . or service as to constitute an act of advertising, selling or soliciting purchases of that product . . . or service by the deceased personality” fall within the statute’s reach even if contained in otherwise exempt works. Third, the Legislature extended the reach of the statute to apply to any act that occurs in California regardless of the domicile of the personality at the time he or she died. Finally, the Legislature recodified the statute, moving it from Civil Code § 990 to Civil Code § 3344.1.

**Significant Media Decisions**

Several decisions held that right of publicity claims are not preempted by federal copyright law. In KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 92 Cal. Rptr. 2d 713 (2000), a California appellate court held that a right of publicity claim arising out of the unauthorized use of nude photographs of models to attract subscribers to a web site was not preempted by federal copyright law. Plaintiff – the photographer and copyright owner, who also held the rights of publicity of the models by assignment – could pursue a statutory misappropriation claim on the grounds that “human likeness is not copyrightable” – thus a distinct claim under state law existed.

The Fifth Circuit recently reached a similar conclusion, holding that the tort of misappropriation is not preempted by the Copyright Act because the personal publicity right protected by tort does not fall into the subject matter of a copyright and does not conflict with the purposes and objectives of the Act. Brown v. Ames, 201 F.3d 654 (5th Cir. 2000). The court affirmed 1) the jury’s damage award for copyright claims based on defendants sale of CDs and tapes of plaintiffs’ recordings and 2) the jury’s damage award for misappropriation under state law for using the names and pictures of plaintiffs on the same CDs and tapes.

An Ohio federal court, recognized a First Amendment defense to a publicity claim brought by Tiger Woods’ licensing agent against a publisher who sold an artist’s prints that featured Woods. *ETW Corp. v. Jireh Publishing*, 99 F. Supp. 2d 829 (N.D. Ohio 2000). The court held the prints were expressive works protected by the First Amendment. See also LibelLetter April 2000 at 30.

In contrast, an Ohio federal district court rejected a First Amendment defense in a case between a web site devoted to covering professional football and the NFL Players Association, owner of players’ right to publicity. *NFLPA v. Gridiron*, 106 F. Supp. 2d 1309 (S.D. Fla. 2000). The court rejected the web site’s argument that it should be considered a book or magazine rather than a commercial product. See LibelLetter August 2000 at 21.

The New York Court of Appeals, in *Messenger v. Gruner + Jahr Printing and Publishing*, 94 N.Y.2d 436, 727 N.E.2d 549, 706 N.Y.S.2d 52, 28 Media L. Rep. 1491 (2000) (on certified question from the Second Circuit), held that “the fact that a publication may have used a person’s name or likeness ‘solely or primarily to increase the circulation’ of a newsworthy article — and thus to increase profits — does not mean that the name or likeness has been used for trade purposes within the meaning of [New York’s] statute.” Whether an item “is newsworthy depends solely on the ‘content of the article’ — not the publisher’s ‘motive to increase circulation.’” The court then held that defendant’s use of plaintiff’s image in conjunction with a newsworthy column was protected under the “newsworthiness” exception to the rights created under New York law if it bore a relationship to the subject matter of the article and was not an advertisement in disguise, even though defendant used plaintiff’s likeness in a “substantially fictionalized way without plaintiff’s consent.”

In *Williams v. Newsweek, Inc.*, 63 F. Supp. 2d 734 (E.D. Va. 1999), a federal court in Virginia construed the “newsworthiness” or “matters of public interest” exception to the rights created under Virginia Code Section 8.01-40. The plaintiff alleged that the defendant’s publication of his picture in connection with a book review was a violation of Section 8.01-40. The defendant claimed that, since the picture, which appeared in the book being reviewed, was published in connection with the article, the “newsworthiness” exception applied. The court first found that the article concerned a “matter of public interest,” as the defendant had published excerpts from a book focusing on “the growing problem of violence and drug-related crime in the United States.” The court then concluded that the pictures “are related to the article as they depict different stages in [the author’s] life.” Based on these findings, the court concluded that the article and the pictures contained in it “fall within the ‘newsworthiness’ exception.”

In *Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000), a district court concluded that New Jersey would protect the right of publicity by prohibiting the unauthorized imitation of a singer’s voice. In this case, the widow of noted singer, songwriter and performer, Louis Prima, sued defendants for hiring a singer to imitate Prima’s voice in a television commercial for defendant’s Olive Garden chain of restaurants. Plaintiff alleged, *inter alia*, a violation of New
Jersey’s common law right of publicity. The court, following the trend among courts in California, held that “imitation of a celebrity’s voice can give rise to a cause of action for violation of the right of publicity, and conclude[d] that the New Jersey courts would adopt such a rule.” The court further held that the claim was not preempted by the Copyright Act.

**Significant Non-Media Misappropriation Decisions**

In *Herring v. Radding Signs*, 2000 WL 192959 (Conn. Super. 2000), plaintiff claimed that defendant appropriated her likeness when it used her photograph on outdoor billboards advertising welfare to work programs, without her consent. The court refused to strike this claim, holding that “the Restatement deems such an expropriation to be the prime example of an invasion of privacy.” The court rejected defendant’s argument that a business entity may use the likeness of an average citizen, who lacks fame or notoriety, for commercial purposes because there is no reputation or prestige to appropriate.

In *Hannigan v. Liberty Mutual Ins. Co.*, 1999 WL 667303 (Wis. Ct. App. 1999) (unpublished decision), the court noted that the Wisconsin legislature has limited the misappropriation tort to commercial contexts, by making it applicable only when the defendant is using the plaintiff’s likeness “for advertising purposes or for purposes of trade.” The court rejected the plaintiff’s argument that the attorney defendants had used the plaintiff’s name for purposes of their trade by submitting altered documents to the court that were purportedly signed by the plaintiff.

In Massachusetts, a claim for misappropriation based upon the sale of names, addresses and personal prescription information for a marketing campaign survived a motion for summary judgment. *Weld v. CVS Pharm., Inc.*, 10 Mass. L. Rptr. 217 (Mass. Super. 1999).


5. **Intentional Infliction of Emotional Distress**

**Recognition**

According to the 2000-2001 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…

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26 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,
application of the tort to the media context.27

**Significant Media Cases**

In *Cowras v. Hard Copy*, 56 F. Supp. 2d 207 (D. Conn. 1999), a district court granted partial summary judgment to a television news magazine that falsely reported that the plaintiff filed a police brutality lawsuit and then withdrew it after his lawyer viewed a videotape of the incident. The court held that plaintiff’s claims were not sufficient, as a matter of law, to sustain a claim for intentional infliction of emotional distress as the media defendants’ conduct was not sufficiently extreme or outrageous. The court noted that there was nothing in the record to support plaintiff’s contention that the media defendants should have known that plaintiff was particularly susceptible to emotional harm from public embarrassment and there was no evidence that the media defendants acted recklessly or that their failure to interview plaintiff was an extreme departure from responsible journalistic practices.

In *Norris v. Bangor Publ. Co.*, 53 F. Supp. 2d 495 (D. Me. 1999), a district court held that where an intentional infliction of emotional distress claim is grounded in a defamation claim, the claim and related damages for intentional infliction of emotional distress are subsumed and “swallowed” by surviving defamation claims.

In *Doe v. United States*, 83 F. Supp. 2d 833 (S.D. Tex. 2000), the court granted the government’s motion to dismiss plaintiffs’ claims for intentional infliction of emotional distress. The plaintiffs filed the lawsuit for invasion of privacy and intentional infliction of emotional distress after the U.S. Attorney’s Office for the Southern District of Texas posted a “News Release” on its website which falsely asserted that the plaintiffs had been indicted for mail fraud and money laundering. Based on its determination that the only government conduct complained of was the publication of the erroneous information on the website, the court concluded that the plaintiffs’ claims for intentional infliction of emotional distress arose out of libel or slander. Consequently, the court held plaintiffs’ claims were barred by the Federal Tort Claims Act 28 U.S.C. § 2680(h), which provides an exception to the waiver of sovereign immunity for “any claim arising out of” libel or slander.

A California appellate court held that because filming a business lunch in a public setting did not constitute intrusion, fraud, or public disclosure of private facts, the conduct was consequently not sufficiently extreme and outrageous to justify a claim for intentional infliction of emotional distress. *Wilkins v. Nat’l Broadcasting Co.*, 71 Cal. App. 4th 1066, 84 Cal. Rptr. 2d 329 (1999).

**Non-Media Intentional Infliction of Emotional Distress Decisions**

Washington, and Wyoming.

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27 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.
The Utah Supreme Court has expressly held that the judicial proceeding privilege extends to claims of intentional infliction of emotional distress. *DeBry v. Godbe*, 1999 UT 111, ¶ 25, 992 P.2d 979 (1999).

A New Jersey court held that, when an intentional infliction of emotional distress claim is based on allegedly defamatory statements, if the alleged defamation is not actionable, then the emotional distress claim is not actionable. *LoBiondo v. Schwartz*, 323 N.J. Super. 391, 733 A.2d 516, 530 (A.D. 1999) (dismissing a club owner’s claim for defamation, tortious interference and intentional infliction of emotional distress against an area resident).

On the other hand, in South Carolina, the viability of a libel claim does not necessarily portend the viability of an intentional infliction of emotional distress claim. In *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732 (S.C. Ct. App. 2000), the South Carolina Court of Appeals reversed the entry of summary judgment on a libel claim against a non-media defendant, but affirmed the grant of summary judgment as to the claim for intentional infliction of emotional distress, on the ground that “there is no evidence of any hostile or abusive encounter or any suggestion of coercive or oppressive conduct . . . [w]e find the facts of this case do not establish [that] the conduct of either [defendant] was so extreme and outrageous as to constitute intentional infliction of emotional distress.” *See also Meyers v. Hot Bagels Factory, Inc.*, 1999 WL 22264 (Ohio App.) (intentional infliction of emotional distress is a tort independent of defamation).

The Tennessee Supreme Court has held that, ordinarily, the outrageous nature of the conduct itself vitiates the need for expert testimony regarding the severity of the resulting emotional distress. *Miller v. Willbanks*, 8 S.W.3d 607 (Tenn. 1999). *See also Speed v. Scott*, 2000 WL 471536 (Miss. App. April 25, 2000) (holding that a fire chief’s referring to a volunteer as “a thief and a liar” was not sufficiently outrageous or extreme to establish a claim for intentional infliction of emotional distress, since the statements arose out of a short term dispute and were not considered credible).

6. **Negligent Infliction of Emotional Distress**

**Recognition**

According to the 2000-2001 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

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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.

7. Conspiracy

The Northern District of Illinois has recognized that the common law truth and privilege defenses applicable to defamation claims also apply to claims for conspiracy to defame. *Bogosian v. Board of Education*, 73 F. Supp. 2d 949 (N.D. Ill. 1999).

Likewise, in *Sahara Gaming v. Culinary Workers*, 984 P.2d 164 (Nev. Aug. 27, 1999), the Nevada Supreme Court, after dismissing a libel claim held to be protected by the fair report privilege, also dismissed collateral interference with contract and conspiracy claims as derivative of the defamation claim. And in *Dolcefino v. Randolph*, 2000 WL 144126 (Tex. App.– Houston [14th Dist.] Feb. 10, 2000) an appellate court in Texas dismissed a conspiracy claim against the media that was entirely dependent on an invalid defamation claim.

8. Breach of Contract

In *Pierce v. St. Vrain Valley School Dist.*, 981 P.2d 600 (Colo. 1999), the Colorado Court of Appeals refused to void a nondisclosure agreement entered into by a public school district and its former superintendent. The defendant school district had conducted an investigation into complaints of sexual harassment against the superintendent, concluded that there was a basis for the complaints, and asked for the superintendent’s resignation. The superintendent resigned, pursuant to a settlement agreement prohibiting the school district from disclosing the details of the investigation and from making derogatory statements regarding the superintendent. Subsequently, an article appeared in the *Denver Post* that revealed the sexual harassment allegations. It also contained statements from current and former board members to the effect that they were frustrated that they could not reveal more about the reasons for the superintendent’s resignation and that the school district might face lawsuits due to the superintendent’s behavior.

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31 Michigan.

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

33 Kansas and South Carolina.
When the superintendent sued for breach of contract, the trial court granted summary judgment, the court of appeals affirmed, and the Colorado Supreme Court reversed. Relying on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the court concluded that Colorado contract law was generally applicable and did not offend the First Amendment simply because its enforcement in a particular instance required a party to abide by its promise not to disclose certain information. The court in *Pierce* concluded that the settlement agreement did not violate public policy because the laws governing both the powers of school boards and access to public records authorized the board to enter into such an agreement. Specifically, the Open Records Act contains an exception for personnel files, and while this exception does not shield disclosure of amounts paid in settlement agreements, this does not imply that there is a public policy that other types of information in settlement agreements must also be disclosed.


In *Nichols v. Hendrix*, 27 Media L. Rep. 1503, 1999 WL 727233 (N.D. Ga. 1999), plaintiffs alleged that various media defendants acted jointly with law enforcement officers in violating plaintiffs’ Fourth Amendment rights during a raid of their home. The court dismissed the § 1983 claims against the media defendants, holding that plaintiffs’ assertions that the media defendants accompanied the officers on the raid at the “express invitation” of the sheriff, “acted jointly” with the officers, and were present only for “commercial purposes” were insufficient to allege state action on the part of the media defendants. The court distinguished the Ninth Circuit’s decision in *Berger v. Hanlon*, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), *vacated and remanded*, 526 U.S. 808 (1999), pointing out that *Berger* involved a written contract between law enforcement officials and the media defendants.

In *Lauro v. City of New York*, 39 F. Supp. 2d 351 (S.D.N.Y. 1999), *aff’d*, 219 F.3d 202 (2d Cir. 2000), the Southern District of New York found that the City of New York violated an arrestee’s Fourth Amendment rights by staging a “perp walk” in front of a precinct building at the request of Fox 5 News so that footage could be obtained of the suspect entering the station house. The staged perp walk constituted an unreasonable seizure in violation of the Fourth Amendment. The Second Circuit affirmed this holding.

10. **Interference With Contract/Business Relations**

In *Norris v. Bangor Publ. Co.*, 53 F. Supp. 2d 495 (D. Me. 1999), a reporter wrote a series of articles characterizing a political “opposition consultant” as a “dirt-for-hire consultant with a checkered past.” The consultant filed an interference claim, asserting that his employment prospects for the next election cycle had been damaged by these articles. Applying Maine law, the court rejected these claims, noting that the prospective economic advantage allegedly interfered with was, in fact, only an attenuated conclusion of his marketability based on hypothetical queries presented to persons who were not employers in an “immediate or even ongoing sense.” See also *Ovadia v. Bloom*, 25 Fla. L. Weekly D509, D510 (Fla. 3d DCA March 10, 2000) (affirming the dismissal of a claim against a television station for intentional interference with advantageous business
relationships brought by a physician who was featured in a broadcast on “Dangerous Doctors”).

A Wyoming court held that a bank loan officer’s derogatory comments about the plaintiff to a prospective borrower were protected by a common interest privilege. As the bank officer did not act with malice, he was not liable for intentional interfere with a contract or prospective business advantage, though the statements caused the borrower to terminate a business venture with the plaintiff. Lever v. Community First Bancshares, Inc., 989 P.2d 634, 640 (Wyo. 1999).

In Primerica Financial Services, Inc. v. Mitchell, 48 F. Supp. 2d 1363 (S.D. Fla. 1999), the court rejected the defendant’s assertion that a claim for tortious interference must be based on actions that are themselves independently tortious or proscribed by statute. The court also rejected the contention that the two-year statute of limitations for defamation claims, not the four-year statute of limitations for tortious interference claims, should apply to this action because this tortious interference claim was a defamation claim “in disguise,” holding that “[a]lthough Defendant is correct that Plaintiffs appear to be relying in large part upon allegedly untruthful statements in support of their tortious interference claim, they have also pled the other circumstances necessary in support of a claim for tortious interference.”

11. Injurious Falsehood/Product Disparagement/Slander of Title

In an appeal of a suit brought under the Texas agricultural disparagement statute by Texas cattle ranchers for allegedly false depictions of the dangers of “Mad Cow Disease” on a television program, the Fifth Circuit held that the opinions complained of, though strongly worded, were based on “truthful, established fact” and were therefore not actionable under the First Amendment. Texas Beef Group v. Winfrey, 201 F.3d 680 (5th Cir. 2000) (affirming directed verdict for defendants on agricultural disparagement claim and jury verdict on product disparagement claim).

In Procter & Gamble Co. v. Amway Corp., a case in which a household products manufacturer sued a competitor for allegedly defamatory statements, the court held that, because the plaintiffs had pleaded economic loss to the company in the form of lost sales, the two-year business disparagement statute of limitations applied. 80 F. Supp. 2d 639, 656 (S.D. Tex. 1999).

12. Lanham Act/State Unfair Competition Law

In Keimer v. Buena Vista Books, Inc., 89 Cal. Rptr. 2d 781 (Ct. App. 1999), the California Court of Appeals held that statements on the cover of the Beardstown Ladies’ Common-Sense Investment Guide book constituted commercial speech subject to the state Unfair Trade Practices Act, and were not protected from liability by the First Amendment. A short time later, a New York trial court squarely disagreed, holding that the same book, its cover, flyleaf and introduction were all protected by the First Amendment, and that the publisher and packager did not have a duty to investigate the accuracy of the contents of the book, which were excerpted on the cover. Lacoff v. Buena Vista Publishing, Inc., 183 Misc.2d 600, 705 N.Y.S.2d 183, 28 Media L. Rep. 1307 (N.Y. Sup. 2000).
In Scranton Gillette Communications, Inc. v. Dannhausen, 1999 WL 558134 (N.D. Ill.), the Northern District of Illinois held that a magazine’s misleading statements concerning its anticipated circulation and readership could support a false advertising claim under the Lanham Act.

In SNA, Inc. v. Array, 51 F. Supp. 2d 554 (E.D. Pa. 1999), a federal court in Pennsylvania found a violation of the Lanham Act where the defendants used the plaintiff’s mark on their website and meta tagged the plaintiff’s name within their site in order to lure web browsers to the site, coupled with general intent to harm the plaintiff. (Meta tags are descriptions or keywords, intentionally embedded in a website’s code, that direct search engines to the site if the word or description is entered as search term).

In Sugar Busters LLC v. Brennan, 177 F. 3d 258 (5th Cir. 1999), the Fifth Circuit held that a finding that a book title is likely to cause confusion with another book title in violation of § 43(a) must be “particularly compelling” to outweigh the defendant author’s First Amendment interest in choosing a title for his work.

13. Conversion

Two federal district courts were presented, in distinguishable cases, with the question whether an action of conversion based on “theft” of copyrighted material is preempted by the Copyright Act. See Pritikin v. Liberation Publications, Inc., 1999 WL 1212193 *2 (N.D. Ill.) (a photographer’s state law conversion claim based on a publisher’s unauthorized reproduction of a copyrightable photograph was preempted by the Copyright Act); Lennon v. Seaman, 63 F. Supp. 2d 428 (S.D.N.Y. 1999) (a claim for conversion based on defendant’s removal of photographs from plaintiff’s home is a cause of action separate from copyright).

14. Negligent Media Publication

In Lunney v. Prodigy Services Co., 94 N.Y.2d 242, 723 N.E.2d 539, 701 N.Y.S.2d 684, 28 Media L. Rep. 1090 (1999), cert. denied, 120 S. Ct. 1832 (2000), New York’s highest court held that an internet service provider (“ISP”) was not negligent in failing to perform investigations on subscribers to prevent imposters from opening accounts in others’ names. The court found that to hold otherwise would “open an ISP to liability for the wrongful acts of countless potential tortfeasors committed against countless potential victims.”

C. Statutes and Related Case Law Reported in the 2000-2001 Surveys
1. Anti-SLAPP Statutes

Based on the 2000-2001 surveys, anti-SLAPP (strategic lawsuits against public participation) statutes are emerging as significant remedies against meritless lawsuits, most notably in California. According to the survey, California, Delaware, Georgia, Louisiana, Maine, Massachusetts, 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.

California courts were once again active in applying the state anti-SLAPP statute, Code of Civil Procedure § 425.16. Two courts held that it applies to state law claims in federal cases, so long as it is not used in a manner that conflicts with the Federal Rules of Civil Procedure. One federal court held that a special motion to strike based upon § 425.16 must wait “until discovery has been developed sufficiently to permit summary judgment under Rule 56.” Rogers v. Home Shopping Network, 57 F. Supp. 2d 973 (C.D. Cal. 1999); see also Metabolife International, Inc. v Wornick, 72 F. Supp. 2d 1160 (S.D. Cal. 1999). In Metabolife, the court stayed discovery and granted summary judgment to defendant where plaintiff failed to come forward with sufficient evidence of falsity.

In DuPont Merck Pharmaceutical Co. v. Superior Court, No. G024013, 2000 WL 25654 (Cal. Ct. App. Jan. 25, 2000), the California Court of Appeal held that § 425.16 could be invoked by a nonmedia corporate defendant sued for lobbying, advertising, marketing and public relations activities directed against a competing, generic version of the company’s widely-used prescription drug Coumadin. In Globetrotter Software v. Elam Computer Group, 63 F. Supp. 2d 1127 (N.D. Cal. 1999), however, a federal district judge took a contrary view, holding that § 425.16 did not apply to statements by one company regarding the conduct of another company.

Other cases in which the statute was applied included the following: Conroy v. Spitzer, 70 Cal. App. 4th 1446, 83 Cal. Rptr. 2d 443 (1999) (§ 425.16 applied to a suit arising from statements made by a candidate for public office regarding a sexual harassment lawsuit filed against his opponent); Marich v. QRZ Media, Inc., 86 Cal. Rptr. 2d 406 (1999) (order not published) (applying § 425.16 to plaintiffs’ claims for invasion of privacy, intentional infliction of emotional distress, and violation of Penal Code section 632 against media defendants arising from a televised report of the death of plaintiffs’ son due to a suspected drug overdose).

Georgia courts have not explicitly ruled on whether O.C.G.A. § 9-11-11.1, the state anti-SLAPP statute, applies to libel claims. While not deciding whether or not the lawsuit was considered a “SLAPP suit” as defined under O.C.G.A. § 9-11-11.1, a Georgia superior court dismissed a plaintiff’s defamation lawsuit on the basis that it was clearly an illegal act of intimidation and an attempt to chill First Amendment rights. See Nairon v. Land, 2000 Ga. App. LEXIS 149 (2000).

The New York Appellate Division, in Long Island Assoc. for AIDS Care v. Greene, 702 N.Y.S.2d 914 (2d Dep’t 2000), reversed a trial court’s finding that the defendant could avail herself
of the anti-SLAPP statute, reasoning that the defendant’s statements to the press concerning the plaintiff’s alleged misuse of funds were “not materially related to any efforts by [defendant] to report on, comment on, challenge, or oppose an application by the plaintiff for a permit, license, or other authorization from a public body.” Other New York trial courts, however, have taken a more expansive view of the statute. See, e.g., *Street Beat Sportswear v. National Mobilization of Sweatshops*, 182 Misc. 2d 447, 698 N.Y.S.2d 820 (Sup. Ct. N.Y. Cty. 1999) (a clothing manufacturer’s suit for tortious interference against a group of protesting garment workers and a legal rights organization fell within the scope of the statute and was dismissed).

In *American Iron and Supply Co. v. Dubow Textiles, Inc.*, 1999 WL 326210 (Minn. Ct. App. May 25, 1999) (unpublished opinion), the Minnesota Court of Appeals affirmed denial of a motion to dismiss under the state anti-SLAPP statute, Minn. Stat. § 554.03. The court dismissed claims based on four allegedly defamatory statements but held that a claim based on one allegedly defamatory statement was supported by clear and convincing evidence, so that the case should proceed. The defendant had written a letter to the editor of the local newspaper questioning city officials’ consideration of a zoning change to accommodate plaintiff’s proposed metal shredding operation. The newspaper published an edited version, but, with defendant’s permission, a competitor of plaintiff sent the unedited letter to all residents in two zip codes surrounding the proposed site. Two days later, plaintiff’s rezoning application was voted down. Plaintiff’s claims were based on the unedited letter, not the letter published in the newspaper.

New Jersey has no anti-SLAPP statute. Moreover, the Appellate Division recently declined to declare the existence of this new tort counterclaim, finding it unnecessary because of the availability of the similar but broader tort of malicious use of process, which the court reinvigorated with strong language. *LoBiondo v. Schwartz*, 323 N.J. Super. 391, 733 A.2d 516, 534 (A.D. 1999) (dismissing a club owner’s claim for defamation, tortious interference, and intentional infliction of emotional distress against an area resident and finding the elements of malicious abuse of process by plaintiff). The court held that a plaintiff in a malicious use of process action must prove that the original action complained of was brought without probable cause and was actuated by malice, that it terminated favorably to plaintiff, and that plaintiff suffered a special grievance. Also, the court held, “[t]he element of malice may be met by a showing that the purpose of the suit was to retaliate against defendants for exercising their rights of expression and petition or to stop them from further exercise of these rights or both.” The court defined a special grievance as interference in a liberty interest, including suppression of a public debate. The Appellate Division also urged the New Jersey Supreme Court to overrule precedent that forbids malicious use of process claims from being brought prior to the conclusion of the underlying matter to avoid burdening defendants with bringing a second action.

2. **Access**

**Courtroom Access**

The North Carolina Supreme Court has recognized for the first time a qualified right for the public, including reporters, to attend civil court proceedings pursuant to the North Carolina
Constitution. In *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 515 S.E.2d 675, 27 Media L. Rep. 2537 (1999), *cert. denied*, 2000 WL 287284 (Mar. 20, 2000), the supreme court concluded that this presumptive right can only be denied when there is a compelling countervailing public interest, and closure of the court proceedings or sealing of documents is required to protect that interest. In performing this analysis, trial judges must consider alternatives to closure, and, if a proceeding is closed, the trial judge must make specific findings of fact justifying the closure.

In applying the new qualified constitutional standard to the specific facts in *Virmani*, which involved confidential medical peer review information, the court held that the lower court judges were correct in closing a series of court hearings and sealing certain court records. The court determined that the constitutional right of access was outweighed by the “compelling countervailing governmental interest” in protecting the confidentiality of medical peer review information.

**Cameras in the Courtroom**


While Oklahoma’s rules providing for the presence of cameras in state courtrooms have been in effect since 1978, very few state criminal proceedings have been televised because of the prohibition in the rules against using cameras in courtrooms unless the criminal defendants on trial have affirmatively given their consent on the record to the use of cameras in the proceeding. On May 8, 2000, the District Court of Oklahoma County ruled that a portion of the Oklahoma Rules governing and limiting the use of cameras in state courtrooms violates both the State and the Federal Constitutions. In pretrial proceedings in the case of *State of Oklahoma v. Terry Lynn Nichols* (Case No. CF-99-1845), the court granted a motion by the television news media to permit a “pool” broadcast of the preliminary hearing, trial and other proceedings in the case, which arose from the April 19, 1995 bombing of the A.P. Murrah Federal Building in Oklahoma City. The portion of the Oklahoma rules governing cameras in courtrooms provides “there shall be no photographing or broadcasting of . . . any portion of any criminal proceedings until the issues have been submitted to the jury for determination unless all accused persons who are then on trial shall affirmatively, on the record, given their consent to the photographing or broadcasting.” Oklahoma Code of Judicial Conduct, 5 Okla. Stat. Ch. 1, App. 4, Canon 3(B)(9)(e)(2). In granting the motion, the court found that the presence of a camera in the courtroom neither detracts from the dignity of the proceedings nor distracts the parties and witnesses, and that the parties act more professionally in the courtroom when a camera is present. In holding the court rule unconstitutional, the court held that it improperly transferred discretionary authority from the presiding judge to a criminal defendant.

West Virginia has adopted trial court rules which govern camera coverage of courtroom proceedings. *West Virginia Trial Court Rules 8.01 et seq.* The rules became effective July 1, 1999.
The circuit judge or magistrate has ultimate discretion to permit camera coverage. Rule 8.01. Further, camera coverage will only be allowed in proceedings that are open to the public. Rule 8.04. The rules provide the procedural requirements for camera coverage. Rule 8.02. Additionally, the rules specify the type and the maximum amount of video and audio equipment that shall be permitted in a courtroom at any one time. Rule 8.06.

In *Florida Times-Union v. State*, 747 So. 2d 1030 (Fla. 1st DCA 1999), an appellate court held that the trial court’s **sua sponte** decision to exclude cameras could not be sustained because no notice or hearing was provided by the court, and the requisite factual findings were not made.

### D. PRIOR RESTRAINT / GAG ORDERS REPORTED IN THE 2000-2001 SURVEYS

The 2000-2001 MEDIA LIBEL SURVEY reports two cases involving prior restraint outside of the libel context.

In a juvenile delinquency proceeding, an Arkansas juvenile court judge issued an oral and written gag order prohibiting the photographing of the juvenile defendant, the police officer the defendant was accused of shooting, their families, and “any juvenile entering or leaving the Courts Building.” The order’s scope included not only the courtroom and the courthouse but photographs taken outside of the courthouse as well.

In a later proceeding, the court modified the gag order to preclude pictures of juveniles entering or leaving the Courts Building and to prohibit the publication of the photographs of the families of the juvenile defendant and the police officer “in any manner.” The Supreme Court of Arkansas held that because the juvenile proceedings had been open to the media, despite the juvenile court judge’s statutory authority to close the proceedings, and because the media already had published a photograph of the juvenile defendant along with other identifying information prior to the entry of the gag order, the state’s policy in favor of confidentiality in juvenile proceedings had already been substantially undermined. Under such circumstances, the Court held that there was no overriding state interest at stake to justify restraining the media from taking additional photographs of the juvenile defendant. *Arkansas Democrat-Gazette v. Judge Stacy Zimmerman*, 341 Ark. 771, 20 S.W.3d 301, 28 Media L. Rep. 2321(2000).

The Court directed the juvenile court judge to define more precisely the category of other persons, aside from the juvenile defendant, covered by the gag order. The Court further held that, once juvenile proceedings have been open to the public and the media, there is no overriding state interest at stake to justify the gag order’s prohibition on photographing the juvenile defendant and others entering or leaving the courthouse.

The California Supreme Court affirmed a lower court order that enjoined a defendant in an employment discrimination case from using racial epithets in the workplace. *Aguilar v. Avis Rent a Car Sys.*, 21 Cal. 4th 121, 980 P.2d 846, 87 Cal. Rptr. 2d 132 (1999), **cert. denied**, 120 S. Ct. 2029 (2000). The court rejected arguments that this constituted an impermissible prior restraint. According to the court, “a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination.” Id. at 126, 980 P.2d 848.