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LDRC 1998 REPORT ON SIGNIFICANT DEVELOPMENTS

Findings of the 1998-99 LDRC 50-State Surveys and Recent Developments

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INTRODUCTION

While it is probably fair to say that libel law suffered no doctrinal set-backs this year -- and for Internet service providers and Texas state court defendants, it might even be concluded that they gained ground -- certain other media law areas met with more turbulence from the public, the judiciary or both.

For one, journalists learned, if indeed they had not known it before, that breaking and entering into a corporation's voice mail system may be prosecuted as criminal activity. The dangers of such conduct were made clear in the highly publicized incident involving the *Cincinnati Enquirer* and one of its reporters, Michael Gallagher, and Chiquita Brands International, Inc. Investigative articles by Gallagher on Chiquita were allegedly realized, at least in part, by illegally entering Chiquita's voice mail system. The *Cincinnati Enquirer* quickly paid a reported \$10 million plus settlement to Chiquita and ran a front page apology. Gallagher pled guilty to unauthorized access to communications and unlawful interception of wire transmissions, both felonies. Still pending: a multimillion dollar lawsuit by Chiquita against Gallagher for defamation, violation of federal and state wiretapping statutes, trespass, conversion, civil conspiracy, fraud, and inducement to breach employee contracts and fiduciary duties. See page 50.

New concerns about traditional issues faced the media this year as well. The reporters' privilege, for example, took a battering in the United States Court of Appeals for the Second Circuit when a panel held that there simply is no privilege for nonconfidential information and thus one need not be applied to a third party subpoena to the media in a civil lawsuit. *Gonzales v. National Broadcasting Company*, 155 F.3d 618 (2d Cir. 1998). In the Fifth Circuit, a panel held that there is no reporters' privilege to withhold nonconfidential work product or information in criminal cases. *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998). In both, the courts limited the protection for journalists derived from the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), to protection against little more than intentional harassment, and otherwise emphasized that the media should expect to be treated no different than any other business when it comes to responding to subpoenas. Discussion of reporters' privilege cases starts on page 23.

Media ride-alongs -- news coverage gained when reporters accompany law enforcement, emergency services and other governmental agents in their tasks -- also met with harsh appraisals from some courts this year. The United States Court of Appeals for the Ninth Circuit was outraged by a CNN ride-along with federal Fish and Wildlife officers as they executed a search warrant on ranchers in Montana. *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997). The Ninth Circuit held that the news crew acted jointly with the government and thus could be liable for conducting an illegal search in violation of the Fourth Amendment. The Ninth Circuit also let stand claims for trespass and emotional distress. In *Shulman v. Group W. Productions*, 955 P.2d 469 (Cal. 1998), the California Supreme Court, albeit without any of the rage expressed by the Ninth Circuit in *Berger*, allowed claims for intrusion to go forward where a crew videotaped and ultimately reported on a rescue of

plaintiffs from a highway automobile accident. Note, however, the support for ride-alongs in an *en banc* decision of the Fourth Circuit in *Wilson v. Layne*, 141 F.3d 111, 26 Media L. Rep. 1545 (4th Cir. 1998). Finding that law enforcement officials were entitled to qualified immunity against claims arising from a media ride-along during the execution of an arrest warrant at the plaintiffs' home, the court offered serious and thoughtful policy reasons for encouraging such press scrutiny of governmental activities. See pages 47-48.

Also going to trial this year were claims by on-air sources against NBC for negligent and fraudulent misrepresentation, as well as defamation, invasion of privacy, and emotional distress, arising out of allegations that NBC persuaded them to participate in a news story based upon assurances that the report would show the "positive side" of their industry (trucking) and would not include a specific advocacy group for more regulation. Among the privacy claims was one for revealing that one of the plaintiff-truckers had failed a drug test. *Veilleux v. NBC*, 1998 U.S. Dist LEXIS 8056 (D.Me. May 29, 1998). NBC had sought and failed to get these claims dismissed on summary judgment. Asserting that NBC lied to them, the plaintiffs won \$525,000 from a Maine federal district court jury in a verdict that did not require the jury to distinguish between the various claims for purposes of awarding damages. See pages 52-53.

This year, Minnesota and Washington gave explicit recognition to privacy tort causes of action. In both instances, the courts were ruling in non-media cases. In Minnesota, the Supreme Court held that the state would recognize all but false light claims, rejecting false light on First Amendment grounds. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 26 Media L. Rep. 2175 (Minn. 1998). In Washington, where no case had ever been permitted to proceed to trial, the claims before the court were for public disclosure of private facts. *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998). See pages 36 and 40-41.

While Chiquita's complaints, discussed above, were unique under the wiretap statutes, it is worth noting a dispute in Florida over an old issue under the wiretap statutes: conflicts of laws. Two Florida courts went in different directions in determining whether Florida law on recording telephone conversations applies when non-Floridians tape calls with Florida residents. See pages 50-51.

Regarding libel, the Fourth Circuit was the first Court of Appeals to affirm that §230 of the Communications Decency Act immunizes Internet service providers from liability for information posted by third parties. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). A federal district court in the District of Columbia quickly followed suit in the well-publicized libel case brought by White House aide Sidney Blumenthal and his wife against online gossip columnist, Matt Drudge, dismissing AOL from the suit based upon Drudge postings on a site available through AOL. *Blumenthal v. Drudge*, 992 F.Supp.44 (D.D.C. 1998). See page 19.

And in Texas, home of some of the very largest libel verdicts in the history of the tort, procedural changes have made the possibility of summary judgment for defendants in state court proceedings more favorable. For one, Texas has adopted a "no evidence" summary judgment motion that allows, "after adequate time for discovery," a party to move on the ground "that there is no

evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." Tex.R.Civ.P. 166a(1). Unless the nonmovant produces evidence sufficient to raise a genuine issue of material fact, the motion must be granted. See page 32.

Also in Texas, media defendants in cases involving First Amendment issues are entitled to an interlocutory appeal of any denial of summary judgment. Whether because of a small explosion in cases in Texas state courts, a willingness of the appellate judiciary to take a hard and thoughtful look at libel issues, or other less obvious reasons, the Texas appellate courts in recent months have proven very effective in dismissing libel cases against media defendants on review of summary judgment motions. See e.g., *WFAA-TV, Inc. v. McLemore*, 41 Tex.S.Ct.J. 1394 (Tex. 1998), *HBO v. Harrison*, No. 14-96-01529-CV (Tex.Ct.App. Oct. 8, 1998), *KTRK v. Fowkes*, No. 01-96-01290-CV (Tex.Ct.App. Sept. 30, 1998). See page 32.

In Texas again, the first trial under an agricultural disparagement law resulted in a media win. Oprah Winfrey and one of her guests, Howard Lyman, were sued in federal court in Texas by Texas cattlemen for statements made during a segment on "Mad Cow disease." Plaintiffs sued under the False Disparagement of Perishable Food Products Act, and also alleged claims for libel, common law business disparagement, and negligence. At the close of plaintiffs case, the court threw out all of the claims except those under common law business disparagement, and thus did not reach the constitutional issues posed by the Texas agricultural disparagement law. As to this law, the court held that cattle were not "perishable" within the meaning of the law. The jury found for the defendants on the business disparagement claim. See pages 35 and 69.

A. FINDINGS OF THE LDRC 50-STATE SURVEY 1998-99: MEDIA LIBEL LAW

1. Defamatory Meaning

Examples of Defamatory and Nondefamatory Speech

In decisions this past year, courts have held the following capable of defamatory meaning: that a department store sometimes put callers "on hold for 20 minutes – or the phone is never picked up at all," *Levinsky's v. Wal-Mart Stores, Inc.*, 127 F.3d 122 (1st Cir. 1997); that a car buyer is a "faggot," *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 310-11 (5th Cir. 1997); that an employer committed a sexual assault and "overlooked rapes by other men in the ... office," *Matta v. May*, 118 F.3d 410, 414-15 (5th Cir. 1997); that an article about Clint Eastwood was an "Exclusive Interview," *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 25 Media L. Rep. 2198 (9th Cir. 1997); that a public figure was a "con man," *City of Rome v. Glanton*, 958 F.Supp. 1026 (E.D. Pa. 1997); that a developer was a "slumlord," *Ramunno v. Cawley*, C.A. No. 530, 1996, slip op. at 18 (Del. Supr. Jan. 22, 1998).

In the legal realm, describing paralegals as "devious" and their work product as "worthless" was held to be defamatory in *Becker v. Zellner*, 292 Ill. App. 3d 116, 684 N.E.2d 1378 (1997), *appeal denied*, 690 N.E.2d 1379 (1998). Statements that an attorney was often out of the office during normal working hours and that a client sought to remove the attorney from its case was held to be defamatory in *Wallace v. Skadden Arps, Slate, Meagher & Flom*, 715 A.2d 873 (D.C. 1998). It was defamatory to state that a law firm "dropped the ball" in "handling the law in briefing and argument." *Friederichs v. Kinney & Lange, P.A.*, 1997 WL 89147 (Minn. Ct. App.) (unpublished).

Similarly, statements that lawyers took most of a settlement award as fees was defamatory as it implied unethical and unprofessional conduct. *White v. Wilkerson*, 328 S.C. 179, 493 S.E.2d 345, 26 Media L. Rep. 2051 (1997).

In contrast, letters by citizens' group for tort reform referring to "frivolous lawsuits," "unnecessary litigation costs," and "the extortion of unjustified settlements," and newspaper articles and editorials in support of groups' initiative, were not defamatory. *Gaylord Entertainment Company v. Thompson*, 1998 OK 30 (newspaper articles); *Brock v. Thompson*, 948 P.2d 279, 1997 OK 127 (citizens' group).

A second statement at issue in *Levinsky's v. Wal-Mart Stores, Inc.*, 127 F.3d 122 (1st Cir. 1997), that plaintiff department store was "trashy," was too variable and "polysemous" in meaning to support a defamation claim. 127 F.3d at 129-30, 26 Media L. Rep. at 1166. Surveying dictionaries, case law, literature from Jeremiah Dyke (1640) to Louis Bromfield (1945), and even plaintiff's opening and closing statements, the First Circuit found it was impossible to pin down the meaning of "trashy," and added, "Those who sue for defamation are not at liberty to pick and choose among a word's various possible definitions and saddle the speaker with the consequences." *Id.* n.6.

Other nondefamatory statements included the following: the sobriquet "Director of Butt

Licking” as applied to a college administrator, *Yeagle v. Collegiate Times*, 255 Va. 293, 497 S.E.2d 136 (1998); “silver-tongued devil,” *Blomberg v. Cox Enters.*, 228 Ga. App. 178, 491 S.E.2d 430, 25 Media L. Rep. 2342 (1997); “racist,” *Hopkins v. Lapchick*, 129 F.3d 116, 25 Media L. Rep. 2567 (4th Cir. 1997) (unpublished); describing a book as “slickly written” or that plaintiff “ran afoul of the SEC” (even though plaintiff was never sanctioned by the SEC), *Schuler v. McGraw-Hill Companies, Inc.*, 989 F.Supp. 1377, 25 Media L. Rep. 2409 (D.N.M. 1997), *aff’d*, 145 F.3d 1346 (table), 26 Media L. Rep. 1604 (10th Cir. 1998); a notice to customers that a sales person had “retired” does not rise to the level of “exposing him to public hatred, contempt, or ridicule,” *Kitfield v. Henderson, Black & Green*, 231 Ga. App. 130, 498 S.E. 2d 537 (1998); statement that a public figure “purposely misled” high level city officials, *City of Rome v. Glanton*, 958 F.Supp. 1026 (E.D. Pa. 1997); that the manager of a boxer was only a “bit player,” *Horne v. Matthews*, 1997 U.S. Dist. LEXIS 14518 (S.D.N.Y. Sept. 24, 1997); and that an instructor was a “bully,” *Hupp v. Sasser*, 490 S.E.2d 880, 885 (W. Va. 1997).

Defamation by Implication or Innuendo

Several media libel cases involved claims of defamation by implication. In a sports agent’s libel action over former Buffalo Bills quarterback Jim Kelly’s autobiography, *Armed and Dangerous*, the court held that one of the challenged statements, “I learned my lesson the hard way about whom to trust and whom not to trust in business,” was non-actionable opinion, but that Kelly filed a “major lawsuit” against his former agent and that when new agents looked into Kelly’s business affairs “the more they looked, the more they didn’t like what they found” created the defamatory implication that Kelly’s former agent was untrustworthy. *Faigin v. Kelly*, 978 F. Supp. 420, 26 Media L. Rep. 1208 (D. N.H. 1997). Following the court’s decision, Kelly sought a ruling that he could not be held liable for true statements that arguably implied an underlying defamatory meaning. In an unpublished opinion, the court rejected Kelly’s argument, but ruled that the plaintiff must prove that the defamatory implication was intended. *Faigin v. Kelly*, C-95-317-SD, order dated March 12, 1998.

In *Richardson v. The State-Record Co.*, 499 S.E.2d 822, 26 Media L. Rep. 1859 (Ct. App. 1998), the South Carolina Court of Appeals reversed summary judgment to a newspaper over articles describing the death of a local police chief. The court held that the articles, which truthfully reported a prior incident in which plaintiff struck the police chief with her car, but which contained statements such as “chief dies a year after being hit by car,” created the defamatory insinuation that plaintiff caused the police chief’s death.

Similarly, a New York appellate court reinstated a libel action against a local newspaper that reported in its “Community Grapevine” section that plaintiffs’ “secret is out,” that they are engaged “after ten years as an unofficial couple,” and that plaintiff’s “divorce was final after waiting for two years.” These statements supported the defamatory connotation that plaintiffs engaged in a long clandestine adulterous relationship. *Donati v. Queens Ledger Newspaper Group*, 659 N.Y.S.2d 306, 25 Media L. Rep. 2375 (2d Dep’t 1997).

In *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 26 Media L. Rep. 1705 (9th Cir.

1998), the court rejected claims of defamation by implication and further held that the clear and convincing standard applied to the question of whether the publisher intended to convey a defamatory implication.

A Tennessee court rejected a claim that a sarcastic tone of voice (or "eye rolling" for that matter) rendered non-defamatory words actionable by innuendo. *Hunt v. Tangel*, 1997 WL 778989 (Tenn. Ct. App., December 19, 1997) ("actionable defamation may occur through sarcasm, insinuation, and the like, when the truth is twisted by either omitting relevant facts and circumstances, or alluding to 'facts' and circumstances that do not exist" but the alleged innuendo cannot enlarge or restrict the natural meaning of the words).

Incremental Harm

While recognizing that no reported New York state court case has explicitly recognized the incremental harm doctrine, a federal court in New York recently predicted that the state would most likely adopt the doctrine based on New York's historical "greater protection" of libel defendants under its state constitution. *Jewell v. NYP Holdings, Inc.*, 97 Civ. 5399 (S.D.N.Y. Sept. 30, 1998).

Innocent Construction

Several Illinois cases addressed the innocent construction doctrine. In one case, a radio personality's statements criticizing plaintiff's demolition of a historic structure ("they're just flat lying . . . there were shenanigans going on over there") were innocently construed. *Chicago City Day School v. Wade*, 697 N.E.2d 389 (Ill App. 1998). However, on-air statements by a radio personality's sidekick about an altercation between radio host Mancow Muller and former Chicago Bear linebacker Keith Van Horne -- that Van Horne "literally ran into Muller at the elevators in the building, with a near brawl with Muller threatening Muller's life," did not have any non-defamatory meaning. *Van Horne v. Muller*, 294 Ill. App. 3d 649, 691 N.E.2d 74 (1998), petition for leave to appeal to Illinois Supreme Court granted.

In another media case, an Illinois appellate court reversed dismissal of a libel case, finding the broadcast reports on charges that a school teacher encouraged children to beat a classmate were not subject to an innocent construction, the court suggesting it was necessary for broadcasts to "give enough background information to doubt the charges" in order for an innocent construction to apply. *Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.*, 696 N.E.2d 761 (Ill App. 1998). See also *Gibson v. Phillip Morris, Inc.*, 292 Ill. App.3d 267, 685 N.E.2d 638 (1997) (statements implicitly accusing co-worker of selling company incentive items at family yard sale in violation of company policy incapable of being innocently construed).

Of and Concerning

In the much publicized case brought by a group of Texas cattlemen against Oprah Winfrey over a "Mad Cow" segment on her talk show, the court granted judgment as a matter of law for

Winfrey, before submission to the jury, on plaintiffs' libel claim, holding that the plaintiffs – who had not been specifically identified in the broadcast – could not meet the “of and concerning” requirement. *Texas Beef Group v. Winfrey*, 11 F. Supp.2d 858, 26 Media L. Rep. 1498 (N.D. Tex. 1998). Without explanation, however, the court allowed the cattlemen's business disparagement claim to be submitted to the jury.

Dismissing a libel action based on a novel, a federal district court held that the similarities between plaintiff and a fictional character in defendant's novel *My Soul To Take* were too few for allegedly defamatory statements to even be “of and concerning” the plaintiff. *Polby v. Spruill*, 25 Media L. Rep. 2259 (D.D.C. 1997), *aff'd*, 1998 WL 202285 (D.C. Cir. March 11, 1998). And in Ohio, a court held that an alleged defamatory statement about the plaintiff's business is not “of and concerning” the plaintiff, even where the business is a sole proprietorship and the plaintiff conducts the business as a “dba.” *Worldnet Software Co. v. Gannett Satellite Information Network*, 25 Media L. Rep. 2331, 1997 WL 603378 (Hamilton App. 1997). The court indicated that whether an allegedly defamatory statement is “of and concerning” the plaintiff is a question of law, appropriately determined in a ruling on a motion to dismiss for failure to state a claim.

In a case arising out of news articles about a corporation's layoffs, a Wisconsin federal court held that although the statements “the basis of our social and moral problems is not having family-supporting jobs” and “Milwaukee now lays claim to one of the worst wage gulfs between blacks and whites nationwide” do not on their face appear to refer to plaintiff corporation, it denied a motion to dismiss because read in context, it could not “conclude that on some level these statements were not attributed to the plaintiffs' actions.” *Briggs & Stratton Corp. v. National Catholic Reporter Publ'g. Co.*, 978 F.Supp. 1195, 26 Media L. Rep. 1503 (E.D. Wis. 1997). On the other hand, the same court dismissed a libel suit brought by the corporation's public relations spokesman on the ground that no reasonable person could believe that the spokesman was responsible for cutting 2000 jobs. *Thompson v. National Catholic Reporter Publ'g. Co.*, 4 F. Supp.2d 833, 26 Media L. Rep. 2039 (E.D. Wis. 1998).

Group Libel

In two significant decisions, Florida appellate courts applied the “group libel” doctrine to affirm the dismissal of libel actions brought by commercial fisherman, one a class action suit, asserting that political advertisements supporting the proposed ban on net fishing defamed them. In both cases the courts affirmed a finding that commercial fisherman are too numerous to meet the traditional group libel test of “less than 25.” Thus, they were held to be unable to meet the “of and concerning” requirement of common law defamation. *Brown v. New World Communications of Tampa, Inc.*, 22 F.L.W. D2729 (Fla. 2d DCA 1997); *Thomas v. Jacksonville Television, Inc.*, 699 So.2d 800, 26 Media L. Rep. 1335 (Fla. 1st DCA 1997).

A Massachusetts federal district court, interpreting state law, held that an unincorporated association has standing to sue for defamation. *Operation Rescue National v. United States*, 975 F. Supp. 92 (D. Mass. 1997), *aff'd on other grounds*, 147 F.3d 68 (1st Cir. 1998). But the unidentified

individual members of the association may lack standing “unless “the group or class is so small that the matter can reasonably be understood to refer to the member, or . . . the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.” 975 F. Supp. at 99.

2. Opinion

Decisions involving the defense of opinion in the wake of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 Media L. Rep. 2009 (1990) continue to provide an interesting analysis of the line between verifiable fact and protected opinion.

The First Circuit reaffirmed the protection extended to opinion and arguably extended it in *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127-32, 26 Media L. Rep. 1161, 1163-67 (1st Cir. 1997). While the court recognized in *Levinsky's* that “[a] statement couched as an opinion that presents or implies the existence of facts which are capable of being proven true or false can be actionable,” *Id.* at 127, 26 Media L. Rep. at 1163, it added a speech-protective twist: The court noted that statements are protected if the speaker is “expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.” 127 F.3d at 127, 26 Media L. Rep. at 1163. Also protected, the court said, are “imaginative expression,” “loose, figurative language that no reasonable person would believe presented facts,” “exaggeration and non-literal commentary” (which “have become an integral part of social discourse”), and “rhetorical hyperbole” (“the coin of the modern realm”). *Id.* at 128, 26 Media L. Rep. at 1163. The test for a court is to “segregate casually used words, no matter how tastelessly couched, from fact-based accusations.” *Id.*, 26 Media L. Rep. at 1164.

The First Circuit in *Levinsky's* then applied these principles to two comments made by a store manager about a rival's store: that it was “trashy” and that when one calls the store, “you are sometimes put on hold for 20 minutes – or the phone is never picked up at all.” 127 F.3d at 128-132, 26 Media L. Rep. at 1165-1167. While “uncomplimentary” and perhaps “unwarranted,” the word “trashy” ultimately “is loose language that cannot be objectively verified,” and reliance on it “to underpin a defamation claim offends the First Amendment.” *Id.* at 130, 26 Media L. Rep. at 1166. By contrast, the comment about being “put on hold for 20 minutes – or the phone is never picked up” was, the court ruled, specific, verifiable, and neither “inherently implausible” nor “an obvious exaggeration.” Thus, it was sufficiently factual to ground plaintiff's defamation claim. 127 F.3d at 130-32, 26 Media L. Rep. at 1166-1167. “[N]either the type of language employed nor the overall tenor of the article” suggested otherwise. *Id.* at 131, 26 Media L. Rep. at 1167.

In its second post-*Milkovich* decision examining the fact-opinion distinction, the Fourth Circuit in *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 26 Media L. Rep. 2114 (4th Cir. 1998), affirmed a grant of summary judgment for defendant, holding that three statements in a “stock tip” column were expressions of opinion. Under *Milkovich* an opinion could support a libel action, but only if it “can reasonably be interpreted to declare or imply untrue facts.” Emphasizing the “breezy” context and “irreverent” language used to discuss the column's evaluation of Biospherics' stock

value, the court concluded that no reasonable person could consider the opinions stated to be based on anything other than the circumstances disclosed in the column. Similarly, in an action alleging injurious falsehood over an article in Moody's "Ratings News" that gave a "negative outlook" on a school district's refinancing bond issue, a court held that the article was protected opinion and therefore not actionable under any tort theory (or under the Sherman Act). *Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 988 F.Supp. 1341, 25 Media L. Rep. 2351 (D.Colo.1997).

In another case arising out of an article published in the financial press, the Tenth Circuit affirmed the dismissal of claims brought by a transexual CEO (and former cold war agent) over a *Business Week* article exploring SEC investigations of plaintiff. *Schuler v. McGraw-Hill Companies*, 145 F.3d 1346 (table), 26 Media L. Rep. 1604 (10th Cir. 1998) (affirmance on grounds stated by district court), *affirming*, -- F.Supp. 1377, 25 Media L. Rep. 2409 (D.N.M. 1997). The district court held that references to the "bizarre Printron case," plaintiff's "checkered record" and that "we have nothing against transexuals" are all statements of opinion.

In a case involving a judge's penchant for consulting a crystal ball to support his decisions, the Ninth Circuit upheld the right to express opinions "regarding the fitness or qualifications of public officials, including judges, to hold office, as long as in doing so they do not make statements of fact that are otherwise actionable." *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 26 Media L. Rep. 1705 (9th Cir. 1998). Thus, alleged implications in an ABC broadcast that plaintiff was "one of the three worst judges in the country," that he "wrongfully and constantly pressures parties to settle cases for less than they are worth" and that he "is unfit to serve as a judge" were all nonactionable opinion.

A *Dateline* segment that likened plaintiffs to the fictional character "Rambo" is hyperbolic speech and not an assertion of fact that plaintiffs are psychopaths who use deadly force to accomplish their ends, *Corporate Training Unlimited, Inc. v. NBC, Inc.*, 981 F. Supp. 112, 26 Media L. Rep. 1417 (E.D.N.Y. 1997).

Other statements considered to be opinion include: quarterback Jim Kelly's statement in his autobiography that "I learned my lesson the hard way about whom to trust and whom not to trust in business," *Faigin v. Kelly*, 978 F.Supp. 420, 26 Media L. Rep. 1208 (D.N.H. 1997); ex-Beatle George Harrison's comments made in connection with easement litigation "Have you ever been raped? I'm being raped by all these people," *Gold v. Harrison*, No. 20468 (Haw. Sup. Ct. Jul. 8, 1998) (affirming summary judgment and Rule 11 sanctions plaintiffs' attorney); that child in controversial "Baby Richard" custody case was being "broken like a dog," *Kirchner v. Greene*, 294 Ill.App.3d 672, 691 N.E.2d 107 (1998); "incompetent and unable to function in his position" possessed the general tenor of an opinion as opposed to a verifiable statement of fact, *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997); "a Brooklyn Bridge of misrepresentation" and "extort" were merely "imaginative expression" and "rhetorical hyperbole," *Novecon II*, 977 F. Supp. 45, 51 (D.D.C. 1997); that county administrator was "hurting the county as a whole" was not capable of being proved or disproved, *Board of Comm'rs. v. Farmer*, 228 Ga. 819, 493 S.E.2d 21 (1997);

that plaintiff "was going to spend the night" with baseball star Cal Ripkin was, taken in context, a statement of "pure opinion" and intended as a humorous jest, *Morse v. Ripkin*, 707 So.2d 921 (Fla. 4th DCA 1998); that the plaintiff "offered very little real substance," and that he "faked his closeness" to President Reagan are too "vague and ambiguous" to be proved true or false and are not actionable, *Gray v. St. Martin's Press, Inc.*, C95-285-M (unpublished opinion) (March 5, 1998); calling someone a "racist" was not provably false, *Hopkins v. Lapchick*, 25 Media L. Rep. 2567 (4th Cir. 1997); as is the caption "Director of Butt Licking" beneath the photograph of an assistant to a college Vice President of Student Affairs, *Yeagle v. Collegiate Times*, 255 Va. 293, 497 S.E.2d 136 (1998).

A statement by college dean that a graduate assistant is a "bully" falls within the category of protected speech as the opinion is devoid of a provably false assertion of fact. *Hupp v. Sasser*, 490 S.E.2d 880, 887. What constitutes "bullyism" is totally subjective. *Id.* Furthermore, referencing graduate assistant's "unprofessional behavior" and "unacceptable behavior" are also subjective conclusions clearly not provably false. *Id.* at 887-88.

In contrast the Seventh Circuit determined that the assertion that plaintiff was a "liar" was not, as a matter of law, an opinion, noting the observation in the case law that "the statement 'in my opinion Jones is a liar' is really a factual assertion masked as opinion, and is therefore not privileged." *Cook v. Winfrey*, 141 F.3d 322, 26 Media L. Rep. 1586 (7th Cir. 1998).

In Ohio, two appellate courts have held that the protection of opinion under the Ohio Constitution set out in *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St. 3d 279, 649 N.E.2d 182 (1995) provides greater protection of expression of opinion than does the First Amendment (*Vail's* protection though does not apply to nonmedia defendants or to media defendants republishing the opinions of nonmedia defendants). *Kilcoyne v. Plain Dealer Publishing Co.*, 112 Ohio App. 3d 229, 678 N.E.2d 581 (Cuyahoga 1996); *Conese v. Nichols*, 26 Media L. Rep. 1907 (Hamilton App. 1998).

3. Truth / Falsity

Scope of the Truth Defense

Following up on a case reported in last year's BULLETIN, the Massachusetts Supreme Judicial Court reversed a trial court ruling that substantial truth is not a complete defense in a case concerning statements in the *Let's Go* travel guide recommending that "travelers DO NOT stay" at a hostel whose manager sexually harassed guests. *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 691 N.E.2d 925, 26 Media L. Rep. 1730 (1998). The trial court relied on Massachusetts General Law c. 231, § 92, which provides that in a libel action "truth shall be a justification unless actual malice is proved." The Supreme Judicial Court held, however, that § 92's "actual malice" exception cannot constitutionally be applied in cases brought against media defendants concerning matters of public concern. In this connection, the court held that allegations of sexual harassment were matters of public concern and that the author and publisher of the *Let's Go* budget travel guide were "media defendants" who were entitled to the same protections as newspapers or other media outlets.

Quoting from *Branzburg v. Hayes*, 408 U.S. 665, 704-05 (1972), the court emphasized that “[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.” *Shaari*, 427 Mass. at 134. The court’s inclusive view of the “media” suggests that World Wide Web sites might well receive the same protection.

One month after the decision in *Shaari*, the First Circuit stated that “truth is an absolute defense to a defamation action under Massachusetts law.” *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 142 F.3d 26, 42 (1st Cir. 1998). A federal district court in New Hampshire similarly stated that, “In the law of defamation, truth is defined as ‘substantial truth,’ as it is not necessary that every detail be accurate.” *Faigin v. Kelly*, 978 F. Supp. 420, 425, 26 Media L. Rep. 1208, 1212 (D.N.H. 1997) (literal truth is not required, so long as the remark’s “gist” or “sting” is justified by substantial truth).

Other cases resolved in whole or part on the grounds of substantial truth include: *Blomberg v. Cox Enters.*, 228 Ga. App. 178, 491 S.E.2d 430, 25 Media L. Rep. 2342 (1997) (the court held that a report on settlement of regulatory action was substantially true, reasoning that “[p]erfect accuracy in reporting quasi-judicial proceedings is not required”); *Swate v. Schiffers*, 975 S.W.2d 70 (Tex. App. - San Antonio 1998) (statement in news article that plaintiff assaulted process server was substantially true even where plaintiff was charged with such an assault but was found not guilty); *Corporate Training Unlimited, Inc. v. NBC, Inc.*, 981 F. Supp. 112, 26 Media L. Rep. 1417 (E.D.N.Y. 1997) (statements regarding “financial improprieties” and that plaintiff was “forced to leave the military” were substantially true).

A Washington appeals court considering whether a newspaper’s report of squalid conditions at a shelter for battered women defamed the center’s owners engaged in a lengthy analysis of the “substantial truth” doctrine, discussing it in terms of factual causation, as in negligence cases. *Schmalenberg v. Tacoma News, Inc.*, 87 Wash.App. 579, 943 P.2d 350, 26 Media L. Rep. 1001 (1997), *rev. denied*, 134 Wn.2d 1013 (1998). The court concluded that a statement that is true in part and false in part satisfies the element of falsity in defamation law but such a statement may not be the factual cause of plaintiff’s damage where the false part of the statement does not increase the “sting” caused by the true part. Applying its method to the case at hand, the court held that minor false statements in the article were not the factual cause of damage that occurred because the gist of the article was true.

A Delaware court reversed summary judgment for the defendant because the statement that plaintiff owned poorly maintained parking lots and rental homes could be found to be not “substantially true” by a trier of fact, since the plaintiff only owned one rental property, the rest of his property consisting of parking lots, commercial properties or abandoned buildings. *Ramunno v. Cawley*, No. 530, 1996 (Del. Supr. January 22, 1998).

Burden and Quantum of Proof of Falsity

While in matters of public concern the plaintiff must prove the falsity of each defamatory

statement, see, e.g., *Veilleux v. National Broadcasting Co.*, 1998 U.S. Dist LEXIS 8056 at *19-20 (D. Me. May 29, 1998); *Lizotte v. Welker*, 45 Conn. Supp. 217, 224-25, 709 A.2d 50, *aff'd*, 244 Conn. 156, 709 A.2d 1 (1998), in contrast, in a private figure non-media case on a matter of private concern, a Louisiana court held that falsity and malice were presumed and the defendant bore the burden of rebutting the presumption. *Albarado v. Abadie*, 703 So. 2d 736 (La. App. 5th Cir. 1997).

In a libel suit by a private figure an Ohio court held that the quantum of proof of falsity is a preponderance of the evidence, not clear and convincing evidence. *Davis v. Jacobs*, 1998 WL 107992 (Logan App. 1998).

4. Fault

Determination of Public Figure Status under Gertz

Demonstrating, perhaps, that nothing new exists under the sun, one court examined the status of a plaintiff in a case involving attempts to investigate an alleged sex scandal which led to the disgrace of a President. *Wells v. Liddy*, 1 F. Supp.2d 532, 26 Media L. Rep. 1779 (D. Md. 1998). Of greater interest to media lawyers, this case involves one of the "exceedingly rare" instances of an involuntary public figure plaintiff. Plaintiff Ida Wells, a secretary in the offices of the Democratic National Committee ("DNC") at the time of the Watergate break-in, sued convicted Watergate burglar, and current radio talk show host and lecturer, G. Gordon Liddy, over the theory he described in various public accounts that the "real" reason for the Watergate break-in was to obtain information linking the DNC to a prostitution ring. DNC personnel were rumored have been involved in setting up dates with prostitutes, Wells' telephone had been tapped during the break-in, and one of the burglars was arrested with the key to her desk in his possession. Liddy, leader of the burglars, contended that although he did not know about this purpose at the time, he later came to believe this theory as the true rationale for the break-in, and in his accounts he tied Wells to the prostitution ring.

Regarding her status, the court held that Wells simply had the misfortune to be working at the DNC at the time of the break-in, and her telephone and desk key tied her to that incident. It held that she "stood in a path of legitimate inquiry," and, thus, was an involuntary public figure due to the "immense public importance of the Watergate controversy," and the public interest in discovering the reasons for the break-in.

The First Circuit recently released an important decision addressing limited-purpose public figure status. *Pendleton v. City of Haverhill*, 156 F.3d 57 (1st Cir. 1998). The opinion, written by Judge Selya, holds that "the question of whether a defamation plaintiff is a public figure is properly resolved by the court, not a jury, regardless of the contestability of the predicate facts." 1998 WL 537823 at *10. The court affirmed a district court ruling that an African-American candidate for a public school teaching position, who was profiled in a newspaper article about his quest for the position, and who was quoted as decrying the paucity of minority teachers, was a limited-purpose public figure with respect to a police officer's published comments that plaintiff was a drug user in need of rehabilitation. *Id.* at *13.

In *Ellis v. Time*, plaintiff's use of the Internet influenced a decision to hold a plaintiff to be a public figure. 26 Media L. Rep. 1225 (D.D.C. Nov. 18, 1997). The district court found that plaintiff's participation in an Internet discussion group discussing a controversy over the authenticity of published photographs was sufficient to render him a limited purpose public figure, though the court declined to establish a per se rule to this effect. *Id.* at 1229.

In other cases reported in the 1998-99 MEDIA LIBEL SURVEY, the following people were deemed to be public figures: a corporation's Director of Communications who "frequently and publicly defended the company's layoff decisions" was a limited purpose public figure. *Thompson v. National Catholic Reporter Pub'lg. Co.*, 26 Media L. Rep. 2039 (E.D. Wis. 1998); an individual who enjoyed a prominent role in the creation and enforcement of environmental legislation in Arkansas and thrust himself into the public controversy surrounding the subject of hazardous waste, *Southall v. Little Rock Newspapers, Inc.*, 332 Ark. 123, 964 S.W.2d 1887, 26 Media L. Rep. 1815 (1998); the wife of a physician who had over several years been the subject of state civil, licensure and criminal proceedings concerning his practice, leading to fine, imprisonment and loss of his license, *Zupnik v. The Associated Press*, No. 3:95CV00795 (DJS) (1998) (unpublished decision); a personal assistant to the actor Tom Arnold who made public appearances with and was photographed with Tom Arnold and Roseanne Barr, *Silva v. Hearst Corp.*, 1998 U.S. Dist. LEXIS 8966 (C.D. Cal. March 19, 1998); a parent involved in publicized child custody controversy spanning nearly 10 years of court battles and extensive media coverage, *Foretich v. ABC, Inc.*, 1997 WL 669644, 26 Media L. Rep. 1171 (D.D.C. 1997); a corporation, *Novecon, Ltd. v. Bulgarian-American Enterprises, Fund*, 977 F.Supp. 45, *amended by* 977 F.Supp. 52 (D.D.C. 1997); a former nominee to parish levee board who called a radio station and urged station to talk to defendant about plaintiff's nomination and failed confirmation, *Hahn v. City of Kenner*, 984 F.Supp. 436 (E.D. La. 1997); a sports agent, *Faigin v. Kelly*, 978 F.Supp. 420, 26 Media L. Rep. 1208 (D.N.H. 1997); the owner of a chain of convenience stores, *Devaney v. Thriftway Marketing Corp.*, 124 N.M. 512, 953 P.2d 277, *cert. denied*, 118 S. Ct. 2296 (1997); a person who launched a pervasive public campaign to combat private accusations, issuing statements to the press, television, radio and internet, *Freyd v. Whitfield*, 972 F. Supp. 940 (D.Md. 1997); the former executive director of Oklahoma Human Rights Commission, *Johnson v. The Black Chronicle, Inc.*, 1998 OK CIV APP 77; the president of an art museum, *City of Rome v. Glanton*, 958 F.Supp. 1026 (E.D. Pa. 1997); a beauty pageant and its top officials, *Miss America Petite Inc. v. Fox Broadcasting Co.*, 26 Media L. Rep. 1796 (Sup. Ct. N.Y. Co. 1998).

An assistant superintendent of a public school district was deemed a public official, *Beck v. Lone Star Broadcasting Co.*, 970 S.W.2d 610 (Tex. App. -Tyler 1998, n.w.h.), as was a court appointed psychiatrist, *HBO v. Harrison*, 1998 WL 724768 (Tex. Ct. App. Oct. 8, 1998).

A New York appellate court held that the ex-husband of television personality Joan Lunden was not a public figure. *Krauss v. Globe Int'l, Inc.*, 674 N.Y.S.2d 662, 26 Media L. Rep. 2118 (1st Dep't 1998). Reversing the trial court's public figure determination, the court reasoned that although plaintiff produced many of Ms. Lunden's television programs, scripted many of her public appearances, and co-authored her newspaper column -- almost all of which focused on marital and

family life -- plaintiff was not famous in his own right and therefore not a public figure nor was he a limited public figure in connection with the alleged defamatory article which described an affair between plaintiff and a prostitute.

The Arkansas Supreme Court affirmed that a former U.S. Attorney was not a general or limited purpose public figure in connection with a newspaper article that erroneously identified him, via a photograph, as being a defendant in a Whitewater criminal case. *Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914, 26 Media L. Rep. 1801, cert. denied, 118 S. Ct. 1563 (1997).

In *Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.*, 696 N.E.2d 761 (Ill. App. 1998), the Illinois court held that plaintiff was not a public figure, despite plaintiff's allegations that the filing of the police report, upon which the allegedly defamatory broadcasts were based, was a result of a controversy involving plaintiff's former position as an elected member of Local School Council. The court reasoned that the broadcasts did not comment on the controversy or plaintiff's membership on the school council. In *Worldnet Software Co. v. Gannett Satellite Information Network*, 25 Media L. Rep. 2331 (Hamilton App. 1997), the court held that for pleading purposes an Internet company was not a limited purpose public figure in its defamation suit over newspaper and television reports that, inter alia, the company "appears to be a pyramid scam." The court reasoned that although the company does advertise on the Internet "much of Worldnet's notoriety has been created by the report in question."

Application of Actual Malice Rule

The Ninth Circuit issued an interesting decision, holding that the false representation that Clint Eastwood had given the *National Enquirer* an interview supported a finding of actual malice. *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 25 Media L. Rep. 2198 (9th Cir. 1997). The court upheld a \$150,000 jury award against the *National Enquirer* for touting an "Exclusive Interview" with Clint Eastwood when, in fact, Eastwood never spoke to the *Enquirer*. Eastwood contended that the *Enquirer* misdesignated the interview by labeling it "Exclusive" and by signaling, through text and graphics, that Eastwood had willingly talked to the *Enquirer*. The court found "from the totality of their choices, that the editors intended to convey the impression--known by them to be false--that Eastwood willfully submitted to an interview by the *Enquirer*," thus satisfying the actual malice standard. *Id.* at 1256. Also of note: Although Eastwood alleged privacy, misappropriation and Lanham Act claims, the court essentially treated this as a libel case under libel standards, leading off with a citation to *Sullivan* and the statement that "Eastwood was entitled to prevail if the *Enquirer* knowingly made a false statement that hurt his reputation."

In reviewing a jury verdict of actual malice, one Texas federal court observed that evidence of pre-publication enmity between the reporter and the plaintiff, primarily in the form of letters from the plaintiff complaining about the reporter's conduct, would allow a jury to infer that the reporter was "motivated to retaliate" against the plaintiff, thus providing evidence of actual malice. *MMAR Group, Inc. v. Dow Jones & Co.*, 987 F. Supp. 535, 25 Media L. Rep. 2537 (S.D. Tex. 1997). See

also *Yeager v. TRW, Inc.*, 984 F. Supp. 517 (E.D. Tex. 1997) (evidence that the defendant had been informed of a statement's falsity and acknowledged that the statement was incorrect, but still distributed the false information, was held sufficient to defeat summary judgment on lack of actual malice); *Beck v. Lone Star Broadcasting Co.*, 970 S.W.2d 610 (Tex. App. - Tyler 1998, n.w.h.) (credibility of the defendant is not the dispositive issue, so independent evidence of actual malice is necessary to defeat summary judgment).

In contrast, another court reasoned that showing that defendant had enmity toward plaintiff, without more, was insufficient to show actual malice. *Ellis v. Time, Inc.*, 26 Media L. Rep. 1225 (D.D.C. 1997) (also finding that minor misstatements of fact, such as incorrectly stating ages or job titles, are not evidence of actual malice).

The First Circuit held that actual malice could be found where a speaker, sued for saying plaintiff's store keeps a caller "on hold" for 20 minutes "or the phone is never picked up at all," testified at trial that he was actually put on hold for "maybe ten minutes," and never testified to any call that went unanswered. *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 26 Media L. Rep. 1161 (1st Cir. 1997). Similarly, in *Faigin v. Kelly*, 978 F. Supp. 420, 26 Media L. Rep. 1208 (D. N.H. 1997), the court held that there was sufficient evidence of actual malice to deny summary judgment where Jim Kelly implied in his autobiography that ex-agent was "untrustworthy" in handling his business affairs, but testified in a deposition that ex-agent only handled contract negotiations.

In *Wells v. Liddy*, 1 F. Supp.2d 532, 26 Media L. Rep. 1779 (D. Md. 1998) the court granted summary judgment on lack of actual malice and in doing so engaged in an interesting review of the literature and sources for Liddy's prostitution ring theory for the Watergate break-in. Plaintiff argued that the prostitution theory emanated from a single unreliable source -- a convicted felon with a history of substance abuse and mental illness. The court agreed that reliance on such a source would support a finding of actual malice, but that here there were other independent facts corroborating the theory, including contemporaneous independent rumors of a prostitution ring involving Wells, and that burglars taped her phone and had a key to her desk. Thus, although these facts may fall short of proving Liddy's theory, they are sufficient to prevent plaintiff from showing he spoke with actual malice.

Other cases also detailed the burden posed by the actual malice standard. For example, failure to interview the subject of a story, defendant's potential economic gain from broadcast, and allegations of extensive harm to plaintiff, are insufficient to show actual malice, *Foretich v ABC, Inc.*, 26 Media L. Rep. 1171, 1176 (D.D.C. 1997); hyperbolic expressions are not evidence of actual malice, *Novecon II*, 977 F. Supp. 45, 51 (phrases "a Brooklyn Bridge of misrepresentation" and "extort" not indicative of actual malice), *amended by* 977 F. Supp. 52 (D.D.C. 1997); similarly, where the alleged defamatory allegations that plaintiff was involved in "bid-rigging" and "racketeering," while not technically accurate, were close enough to actual charges against plaintiff actual malice was negated, *Beck v. Lone Star Broadcasting*, 970 S.W.2d 610 (Tex. App.--Tyler 1998, n.w.h.).

Private Figure Standard under Gertz

According to the 1998-99 MEDIA LIBEL SURVEY, 43 jurisdictions apply the negligence standard to private figure defamation cases under *Gertz*,¹ New York applies a gross irresponsibility standard in matters of public concern which is higher than negligence but not as demanding as actual malice; three jurisdictions require actual malice;² and two jurisdictions require actual malice in some circumstances.³

Washington and Pennsylvania cases reaffirmed that under their state law a private figure need only prove negligence. *Schmalenberg v. Tacoma News, Inc.*, 87 Wash. App. 579, 943 P.2d 350, 26 Media L. Rep. 1001 (1997); *Wilson v. Slatalla*, 970 F.Supp. 405, 25 Media L. Rep. 2281 (E.D.Pa. 1997). In *Wilson*, the court also declined to adopt a rule that a publisher's reliance on the integrity of a reputable author preclude's a finding of negligence. *Id.* at n.7

In contrast, under New York's gross irresponsibility standard, a court should consider whether a publisher followed sound journalistic practices; followed normal editorial procedures, such as fact checking; and had any reason to doubt the accuracy of the source relied upon. *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1032, 25 Media L. Rep. 2025 (2d Cir. 1997). The Second Circuit, in *Chaiken*, concluded that no reasonable jury could find that the defendant acted in a grossly irresponsible manner when it published an article by a writer with a sound reputation and subjected the article to normal fact checking.

An Indiana federal court case reiterated that state's requirement that private figure plaintiffs suing over a matter of public concern prove actual malice. *Moore v. Univ. of Notre Dame*, 968 F.Supp. 1330, 1337 (N.D. Ind. 1997) (stating that "a qualified privilege" exists for all media coverage on matters of public concern).

The Eleventh Circuit reversed a jury verdict for *Time* magazine because of what it termed a confusing instruction on the difference between actual malice and common law malice under Georgia statutory law. *Schafer v. Time, Inc.*, 142 F.3d 1361, 26 Media L. Rep. 1897 (11th Cir. 1998). *Time*

¹ Alabama, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

² Alaska, Colorado and Indiana.

³ In Louisiana, private figure plaintiffs must establish actual malice in cases involving issues of public concern where defamation per se is not at issue. *Hebert v. La. Ass'n of Rehabilitation Professionals, Inc.* 657 So. 2d 998, 23 Media L. Rep. 2213 (La. 1995). In New Jersey, the actual malice standard applies to businesses concerned with matters of public health and safety, businesses subject to substantial regulation and businesses charged with criminal fraud, substantial regulatory violations or consumer fraud. *Turf Lawnmower Repair v. Bergen Record, Corp.*, 139 N.J. 392, 655 A.2d 417, 23 Media L. Rep. 1609 (1995), cert. denied, 116 S. Ct. 752 (1996).

used a photograph of plaintiff in an article about the bombing of Pan Am 103 flight over Lockerbie, Scotland. *Time*'s report included statements about a "reported double agent for the U.S. and Iran" who allegedly figured in the bombing. Plaintiff's picture was mistakenly used in the article as a picture of the reported double agent/terrorist.

The Eleventh Circuit held that jury instructions created "'an ineradicable doubt' that the jury found for the defendant because the plaintiff had not proved *Time* deliberately intended to injure him." 142 F.3d at 1368. The trial court had correctly instructed the jury that "a libel is a false and malicious defamation of another" under Georgia statutory laws, O.C.G.A. § 51-5-1(a), and that the jury "need find . . . only that *Time* failed to exercise ordinary care in ascertaining whether the information it published was true or false before it could find in [plaintiff's] favor." 142 F.3d at 1365. For purposes of punitive damages, the court instructed the jury that the defamatory publication must have been made with actual malice, that is, "knowledge that it is false or with reckless disregard of whether it is false." *Id.*

Apparently confused by the court's two different references to "malice," the jury asked for clarification of the term as used in Georgia's statutory definition of libel. *The Eleventh Circuit found* that 'the district court answered the jury by attempting to distinguish a 'malicious statement' from the concept of 'actual malice' as it appeared in the instructions on damages," and that the trial court then defined a malicious statement as one "deliberately calculated to injure." *Id.* at 1366. The clarifying instruction required reversal, because the phrase "misled the jury by improperly requiring them to find that *Time* actually intended to injure [plaintiff]." *Id.* The court so held, even though the judge's clarifying instruction accurately quoted the Eleventh Circuit's own definition of a "malicious statement" as set forth in *Straw v. Chase Revel, Inc.*, 813 F.2d 356 (11th Cir. 1987). The ultimate effect of the *Schafer* opinion, according to the court, is not to overrule *Straw*, but to make clear that "a private plaintiff may recover for libel under Georgia law without proving an intentional tort." *Id.* 142 F.3d at 1366.

Standard for Issues of Public Concern versus Issues of Private Concern

The First Circuit took its first excursion down the murky path of "public concern" in *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 132-134, 26 Media L. Rep. 1161, 1167-1170 (1st Cir. 1997), on remand, 999 F. Supp. 137, 139-143, 26 Media L. Rep. 1822, 1823-1827 (D. Me. 1998), in which a family-owned business and several family members sued Wal-Mart, the nation's largest retailer, which had recently expanded into Maine. The action was based on two comments a Wal-Mart store manager made to a local business magazine (which was not sued): that plaintiff Levinsky's store was "trashy," and that when one calls the store, "you are sometimes put on hold for 20 minutes – or the phone is never picked up at all." 127 F.3d at 126, 26 Media L. Rep. at 1162. The jury awarded the plaintiff \$600,000 for presumed damages to reputation, despite the absence of any specific evidence of actual pecuniary loss. *Id.*, 26 Media L. Rep. at 1162. On appeal, the Court of Appeals cited *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751, 756-57 (1985) that "a private individual who seeks damages for a defamatory statement involving a matter of public concern cannot recover presumed or punitive damages absent a showing of actual malice." 127 F.3d at 128, 26 Media L. Rep. at 1164. Therefore, the Court was required to determine

whether the quoted statements involved a matter of public concern – a task the Court described as “surpassingly difficult.” *Id.*, 26 Media L. Rep. at 1164.

The Court of Appeals described matters of public concern as those “fairly considered as relating to any matter of political, social, or other concern to the community,” and matters of private concern as those addressing “matters only of personal interest.” Distinguishing between the two requires examining a statement’s “content, form and context.” To be of public concern, a matter need not concern a “very large” community or be of “paramount importance or national scope”; rather, the statement need only “concern matters in which even a relatively small segment of the general public might be interested.” 127 F.3d at 132, 26 Media L. Rep. at 1168.

The Court of Appeals vacated the lower court’s finding that the statements at issue in *Levinsky’s* were of only private concern. That decision was based entirely on the Wal-Mart manager’s testimony that he had thought he was talking to a college student, not a reporter for a regional business magazine. The Court of Appeals vacated that finding because “[t]he primary focus of the relevant constitutional inquiry must remain on the speech’s content and the public’s perception of the topic, not on the speaker’s subjective belief as to the conversation’s confidentiality.” 127 F.3d at 133, 26 Media L. Rep. at 1168. It urged the district court to consider media interest in the stores’ rivalry prior to the lawsuit.

On remand, that court methodically examined the statement’s context, form, and content, and determined that it was of public concern. *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 999 F. Supp. 137, 140, 143, 26 Media L. Rep. 1822, 1824, 1826-1827 (D. Me. 1998). It rejected Wal-Mart’s broad assertion that because the national debate over retail superstores is of public concern, any statement relating to that topic is of public concern. Instead, it said the context of the “on hold” statement (the only statement remaining in the case) was the competition between the two stores that had been turned into a public issue by the smaller retailer’s aggressive advertising campaign. The form of the statement, it found, was not intended to contribute to public discourse, because the Wal-Mart manager thought he was talking to a student. But the content of the speech, when examined in context, was “highly relevant” to the two stores’ commercial rivalry. Concluding that the “on hold” statement was of public concern, the court sent it back to the jury to determine whether plaintiff acted with actual malice such as to justify the presumed damages award.

In a controversial opinion, a New York appellate court held that an alleged affair between the husband of a celebrity and a prostitute is not a matter of public concern. The husband and wife team had made careers of promoting their views on marriage and family life and the alleged affair (and later break-up of the marriage) was the subject of some coverage. *Krauss v. Globe Int’l, Inc.*, 674 N.Y.S.2d 662, 26 Media L. Rep. 2118 (1st Dep’t 1998). In fact, the court stated that the article about the alleged affair was lurid gossip not even “arguably within the sphere of legitimate public

concern.” In contrast, the Second Circuit, addressing public concern under New York law, stated that “New York courts generally defer to publishers’ judgments as to what subjects are matters of public concern.” adding that what is published by the media “may be powerful evidence of the hold those subjects have on the public’s attention.” *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1032, 25 Media L. Rep. 2025 (2d Cir. 1997).

In holding that college football is a matter of public concern, an Indiana federal court ruled that whether a matter is of public interest for the purposes of applying the actual malice standard is a determination to be made by the trial courts. The question is whether the subject is of public interest, and it is not affected by the participation of a private individual or by the ‘involuntariness’ of the individual’s participation. *Moore v. University of Notre Dame*, 968 F.Supp. 1330 (N.D. Ind. 1997). Also held to be a matter of public concern: a video recording of a private plaintiff slapping his six-year old son in public at a little league baseball game when used in a news story about adults putting pressure on children in sports, *Forrester v. WVTM, Inc.*, 1997 WL 707082 (Ala. Civ. App. 1997). But an employee’s voicing of dissatisfaction with nonrenewal of an employment contract was not. *Totman v. Eastern Idaho Technical College*, 129 Idaho 714, 931 P.2d 1232 (Ct.App. 1997)(considering the content, form and context of the utterance to reach its conclusion).

5. Liability for Republication

The Communications Decency Act

The Fourth Circuit held that §230 of the Communications Decency Act (“CDA”) immunizes Internet service providers from liability for information posted by third parties and affirmed the dismissal of a claim based on anonymously posted defamatory messages. *Zeran v. America Online, Inc.*, 129 F.3d 327, 25 Media L. Rep. 2526 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 2341 (1998). A Washington, D.C. federal district court followed *Zeran* and dismissed a defamation claim against America Online based on statements contained in the *Drudge Report* web site. *Blumenthal v. Drudge*, 992 F.Supp. 44, 26 Media L. Rep. 1717 (D.D.C. 1998) (concerning admittedly false statements that White House Director of Communications, Sidney Blumenthal, beat his wife). AOL carried the *Drudge Report* on its site pursuant to a contract with Drudge and AOL had the right to edit the report. Noting the contrast between the anonymous messages in *Zeran* and the content provided by Drudge, the court observed that “were it writing on a clean slate” it would not dismiss the claim against AOL, however, under the CDA an Internet service provider is immune from suit over third party content.

Republication

Creating an exception to the general rule that one who publishes a defamatory statement is not liable for the repetition of it by others, the Alabama Supreme Court held that “when the original publisher of a defamatory statement might reasonably expect the statements to be repeated, the original publisher is responsible for the damage that results from that repetition of the slander.” *Barnette v. Wilson*, 706 So.2d 1164 (Ala. 1997). Similarly, a Colorado appellate court held that a

plaintiff could recover from a defendant who made allegedly defamatory statements to police that were later republished by a newspaper if the plaintiff could demonstrate that the newspaper's republication of the statements was a natural consequence of the defendant's original publication of the statements to the police or was either expressly or impliedly authorized by the defendant. *Burke v. Greene*, No. 97CA0894, 1998 LEXIS 158 (Colo. App. June 11, 1998). A Maryland court held that an original publisher is liable for republication by others if such republication was foreseeable as natural and probable-foreseeability is a jury question, but plaintiff's own republication and reports based thereon are not actionable. *Hickey v. St. Martin's Press, Inc.*, 978 F.Supp. 230, 26 Media L. Rep. 1065 (D.Md. 1997).

6. Privileges

Common law and statutory privileges continue to play an important role in libel suits.

Fair Report

A Pennsylvania Superior Court expanded the fair report privilege to specifically apply to pleadings upon which no judicial action has been taken, and found that the privilege is not abused through the use of colorful words and spiced-up language designed to attract reader attention. *First Lehigh Bank v. Cowen*, 700 A.2d 498, 26 Media L. Rep. 1075 (Pa. Super. 1997). *See also Wilson v. Slatalla*, 970 F. Supp. 405, 25 Media L. Rep. 2281 (E.D. Pa. 1997) (fair report privilege applies to non-media defendants). A Maryland federal court held that the fair report privilege applied to a government report, also rejecting plaintiff's claim that the media's use of "colorful words" to characterize the report defeated the privilege. *Boyd v. Univ. Of Maryland Med. System*, 26 Media L. Rep. 1401 (D. Md. 1998) (media's reports, although not verbatim, were still "substantially accurate accounts" of the original publication).

An Illinois court rejected a fair report defense based on a police report where the broadcasts contained additional evidence not found in the police report. *Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.*, 1998 WL 300954 (Ill. App. June 9, 1998). The court held that whether the fair report privilege applied to school officials' statements to police creates a fact issue concerning the privilege.

Fair Comment

A Texas court held that a fair comment privilege applied to a news article that detailed numerous and long-standing problems with plaintiff's medical practice. *Swate v. Schiffers*, 1998 WL 208886 (Tex. App.-San Antonio 1998, n.w.h.). *See also Northeast Financial Management Associates v. Record-Journal Publishing Company*, 1998 WL 150662 (Conn. Super. 1998) (unfavorable editorial on operations of municipal tax audit company, e.g., "capricious, unprofessional, adversarial" – entitled to fair comment and opinion protection under federal and state constiutions).

Neutral Reportage

The neutral reportage privilege was recognized in dicta in *Freyd v. Whitfield*, 972 F. Supp. 940, 946 n.11 (D.Md. 1997).

Judicial and Official Proceedings Privileges

In *Jones v. Clinton*, 974 F.Supp. 712, 731 (E.D. Ark. 1997), the Eastern District of Arkansas concluded that statements made by White House aides and the President's attorney to the press denying Paula Jones' allegations of sexual harassment and questioning her motives, prior to her filing suit, were absolutely privileged under Arkansas law because the statements were made in connection with possible litigation. The court also noted that, even if the statements were not absolutely privileged, the statements still were not actionable because Jones had invited a response. *Id.* at 732. See also *Novecon, Ltd. v., Bulgarian-American Enterprise Fund*, 977 F.Supp. 45, amended by, 977 F. Supp. 52 (D.D.C. 1997) (extending qualified "self-defense" privilege to anything which reasonably appears necessary to defend reputation in response to defamation of another).

A judge's false statements to the media labeling a disgruntled litigant a "stalker" were not judicial acts and were therefore not privileged. *Barrett v. Harrington*, 130 F.3d 246, cert. denied, 118 S.Ct. 1517 (1997). Other cases raising the issue of privilege in the judicial and litigation context include: *Golden v. Mullen*, 693 N.E.2d 385 (Ill. App. 1998) (attorney's post-litigation statements to client about opposing counsel privileged; but privilege does not extend to letter to client's wife); cf. *ZDEB v. Baxter International, Inc.*, 697 N.E.2d 425 (Ill. App. 1998) (absolute privilege protects attorneys, not clients); *Houpe v. City of Statesville*, 497 S.E.2d 82 (1998) (grand jury testimony on issues material to the inquiry absolutely privileged, even if the testimony is given with express malice and knowledge of its falsity); *Milliner v. Enck*, 709 A.2d 417 (Pa. Super. 1998) (statements published prior to any judicial proceeding privileged so long as they have a bearing on the subject matter of the litigation); *Price v. Armour*, 949 P.2d 1251 (Utah 1997) (party's prelitigation statements about the ability of opposing counsel absolutely privileged).

A New York federal district court held that New York's statutory privilege for reporting judicial proceedings applied to press releases issued by a party as well as to reports by the media. *Procter & Gamble Co. v. Quality King Dist. Inc.*, 974 F. Supp. 190, 197 (E.D.N.Y. 1997). An Indiana court held that for an absolute privilege to apply to a prosecutor's statements to the press, the statements must inform the public about a pending case in his or her office. *Sims v. Barnes*, 689 N.E.2d 734 (Ind. App. 1997). A mayor's press release announcing the suspension of a police chief was absolutely privileged, but mayor's statements concerning her private criminal complaint against the chief were not. *McKibben v. Schmotzer*, 700 A.2d 484 (Pa. Super. 1997).

A judicial or quasi-judicial privilege was applied to the following: a medical report submitted as part of a workers compensation proceeding, *Harris v. King*, 60 Cal. App.4th 1185, cert. denied, __ S.Ct. __ (1998); a court-appointed psychologist's statements in a custody dispute even though statements pertained to a nonparty, *Obos v. Scripps Psychological Ass'n.*, 59 Cal. App. 4th 103

(1997); a newspaper ad that “captures the substance of, and does not deviate from, the allegations in [a] complaint,” and likewise “does not produce a different effect on the reader than would reading the complaint,” *Microsoft Corp. v. Yokohama Telecom Corp.*, 993 F.Supp. 782 (C.D. Cal. 1998); statements by police officers made in the scope of their employment, *Stephens v. Geoghegan*, 702 So.2d 517 (Fla. 2d DCA 1997); a proposed order prepared by a party at the direction of a judge, *Williams v. Stepler*, 229 Ga.App. 591, 490 S.E.2d 167 (1997); statements made in a “request to investigate” filed with the Georgia Real Estate Commission, *Skogland v. Durham*, 1998 Ga. App. LEXIS 937 (June 29, 1998); a Department of Insurance investigation, *Li v. Metropolitan Life Ins. Co., Inc.*, 955 S.W.2d 799 (Mo. Ct. App. 1997).

Resolving a long standing issue, the Florida Supreme Court held that statements made in a grievance filed with the Florida Bar are absolutely privileged from a defamation suit, so long as the contents of the Bar complaint are not disseminated outside of the bar process by the complainant. *Tobkin v. Jarkoe*, 1998 Fla. LEXIS 949 (Fla. 1998).

Legislative and Official Acts Privilege

Statements made by a state legislator within the “legitimate legislative sphere” are subject to an absolute privilege, *Hahn v. City of Kenner*, 984 F.Supp. 436 (E.D. La. 1997). But the *Hahn* court concluded that the Speech and Debate clause would not protect a federal legislator for comments made on a radio program, and that therefore a state legislator’s comments on a local radio program also were not privileged. Similarly, a citizen’s statements at a council meeting were not protected by an absolute legislative privilege where statements were not compelled by subpoena, given under oath, or directed or supervised by questions from the city council. *Vultaggio v. Yasko*, 215 Wis. 2d 325, 572 N.W. 2d 450 (1998) (statements before city council only qualifiedly privileged).

In Washington, the statements by high-ranking state officials in the course of their official duties were held to be absolutely privileged. *Aitken v. Reed*, 89 Wash. App. 474, 949 P.2d 441 (1998). See also *St. Louis v. Eldredge*, C.95-178-B (unpublished) (N.H. 1997) (predicting that New Hampshire will adopt *Restatement (Second) Torts* § 590, extending absolute immunity to legislators for statements made in performance of their legislative functions);

Privileges in Employment Context

In a case involving statements about an employee to the media, a Florida court held that Florida’s statutory privilege for employers’ statements about employees did not extend to statements to the media about the termination of an employee. *Scholz v. RDV Sports, Inc.*, 1998 Fla. App. LEXIS 2955 (Fla. 5th DCA 1998) (statements by Orlando Magic basketball team to media were outside the scope of statutory privilege).

In the non-media employer-employee context, a California court held that complaints made to an employer about workplace harassment were qualifiedly privileged. *Cruey v. Gannett Co.*, 1998 Cal. App. LEXIS 481, at 1 (May 29, 1998). In *Ramirez v. American Airlines*, 957 F.Supp 359

(D.P.R. 1997), the court dismissed a complaint based on a supervisor's reading of a dismissal letter at a meeting attended by another supervisor and an invited friend of the plaintiff. *See also Hanton v. Gilbert*, 126 N.C. App. 561, 486 S.E. 2d 432 (1997) (qualified privilege applies to memo summarizing events leading to employee's dismissal); *Ewald v. Wal-Mart Stores, Inc.*, 139 F.3d 619 (8th Cir. 1998) (qualified privilege applies to supervisor's report of suspected employee theft); *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 871 (1998) (common interest privilege applies to communication to a former employee); *Smith v. Digital Equipment Corp.*, 149 F.3d 1184 (6th Cir. 1998) (unpublished) (analyzing shared interest privilege); *Smith v. Westlake PVC Corp.*, 132 F.3d 34 (6th Cir. 1998) (statements at disciplinary hearing qualifiedly privileged); *Dorricott v. Fairhill Center for Aging, et al.*, 1998 WL 199070 (N.D. Ohio 1998) (unpublished) (job performance memo qualifiedly privileged).

Finally, addressing an issue of first impression under Illinois law, the Seventh Circuit held that a qualified privilege extends to brokerage firms who report customer complaints about an agent on the NASD Form U-5. *Dawson v. New York Life Ins. Co.*, 135 F.3d 1158 (7th Cir. 1997).

7. Discovery

Reporters' Privilege (Shield Law)

Several Circuit Courts of Appeal issued controversial decisions narrowing protections for journalists.

The Second Circuit held that there is no federal reporters' privilege for nonconfidential information, rejecting arguments that a privilege was necessary to protect newsgathering and editorial decisionmaking and rejecting arguments and prior caselaw that a qualified privilege attached to such information. *Gonzales v. National Broadcasting Co.*, 155 F.3d 618 (2d Cir. 1998), *reversing in part, Gonzales v. Pierce*, 175 F.R.D. 57, 26 Media L. Rep. 1060 (S.D.N.Y. 1997). This is the first federal Court of Appeals decision to hold that there is no privilege for nonconfidential material in civil lawsuits. The court ordered NBC to comply with a non-party subpoena requesting outtakes from a *Dateline* segment on discriminatory highway stops in Louisiana. The outtakes were subpoenaed by parties in a federal civil rights suit alleging such discrimination by a police officer taped for the *Dateline* report. The district court below had recognized a federal reporters' privilege but held that movants had met their burden to obtain disclosure. A motion for rehearing is pending.

In a remarkably similar case, decided before the Second Circuit's decision in *Gonzales*, a district court stated that "under federal common law journalists possess a qualified privilege not to disclose information prepared or obtained in connection with a news story." *Pugh v. Avis Rent a Car System, Inc.*, 26 Media L. Rep. 1311, 1315 (S.D.N.Y. 1997) (quashing subpoena seeking outtakes from *60 Minutes* broadcast on discriminatory car rental practices for use in federal civil rights suit re same). *See also United States v. National Talent Associates, et al.*, 25 Media L. Rep. 2550 (D.N.J. 1997) (unpublished) (recognizing federal reporters' privilege).

Another district court within the Second Circuit simply applied state law protection, reasoning that while a federal court is not bound by the state shield law, the court may consider the state law's policy and its effect on the day-to-day operation of news gatherers who act "under the expectation that they will be protected by the state statute, and they are not thinking about what might happen in federal court." *Ryan v. Thoubboron*, 26 Media L. Rep. 1094, 1096 (S.D.N.Y. 1997).

In *United States v. Smith*, 135 F.3d 963, 26 Media L. Rep. 1457 (5th Cir. 1998), the Fifth Circuit held there is no news reporters' privilege to withhold nonconfidential work product in criminal cases. The court vacated a trial court order that quashed a government subpoena to a New Orleans television station to produce a videotape of an interview with a criminal defendant. The court refused to follow the lead of other circuits that have crafted a qualified news reporters' privilege in criminal cases based on the language of Justice Powell's concurrence in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Fifth Circuit held that *Branzburg* merely protects the media from intentional governmental harassment. In addition, the court rejected the claim that lack of a privilege would hinder newsgathering, deter potential sources and transform the media into a prosecutorial tool. *Id.* at 970-72. According to the court, while discovery requests may be burdensome, the press is in the same position as any other business that might possess relevant criminal evidence. Finally, Judge Higginbotham found no empirical support for the claims that without a privilege in place, the press might avoid important news or destroy archival materials. *Id.* at 971. The court's language strongly suggests that the Fifth Circuit would reject a qualified privilege for nonconfidential work product in civil cases as well.

The Third Circuit took a restrictive view this year on the issue of who qualifies for a reporters' privilege to protect the identity of confidential sources, albeit in a non-libel case. *In re Mark Madden (Titan Sports, Inc. v. Turner Broadcasting Systems, Inc.)*, 1998 U.S. App. LEXIS 16458 (3d Cir. July 21, 1998). The Third Circuit reversed the district court's decision that a professional wrestling commentator was a journalist entitled to the protections of the privilege. Although Madden had invoked both a general "journalist's" privilege and also the protections of the Pennsylvania Shield Law, 42 Pa. C.S.A. § 5942, the court discussed only the federal qualified privilege against the compelled disclosure, determining that Madden was not a "bona fide journalist" and could not invoke the protections of the privilege.

In reaching that conclusion, the court established for the Third Circuit a three-pronged test for determining whether a claimant of the privilege is a journalist. The court held that "individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public." *In re Madden*, at *16. It relied heavily on a case out of the Second Circuit, *von Bulow v. von Bulow*, 811 F.2d 136, 13 Media L. Rep. 2041 (2d Cir. 1987), in establishing this test. The court found that Madden did not pass the test because his activities, which included creating commentaries based on information gathered from executives and other employees in the professional wrestling organization with which he was affiliated, "cannot be considered 'reporting,' let alone 'investigative reporting.'" *In re Madden*, at *16. Rather, the court characterized Madden's activities as "fiction writing." *Id.* at *17. The court did not address at all whether Madden would be entitled to claim the journalist's

privilege under the Pennsylvania Shield Law.

According to the PENNSYLVANIA SURVEY, the protection of its state shield law continues to erode. In *Davis v. Glanton*, 705 A.2d 879, 26 Media L. Rep. 1492 (Pa. Super. 1997), the Superior Court held that the Shield Law does not protect from disclosure reporter notes and other unpublished information which cannot reasonably lead to the discovery of a confidential informant or which can be redacted to eliminate the revelation of such a source of information. Further, the court held that the First Amendment does not protect a non-party news reporter from disclosing the entirety of her conversation with a disclosed source where the published statement was ambiguous, and information as to the context in which certain statements were made was relevant, material and crucial to the underlying case.

Minnesota broadened its Free Flow of Information Act (Minn. Stat. s. 595.023-525.024). An amendment to the Act effectively overturns the decision of the Minnesota Supreme Court in *State v. Turner*, 550 N.W.2d 622 (Minn. 1996), in which the court rejected the argument that journalists had a privilege against compelled testimony and disclosure of unpublished information. The amendment extends protection to unpublished data "whether or not it would tend to identify the person or means which the information was obtained." The Act provides an exception for information "clearly relevant" to certain crimes when the information cannot be obtained from alternative means and disclosure is necessary to prevent an injustice.

Missouri recognized a qualified reporters' privilege to protect confidential sources in *State ex rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650, 26 Media L. Rep. 1427 (Mo. Ct. App. 1997). In *Ely*, a plaintiff in a libel suit sought to compel a reporter and editor to disclose confidential sources which may have confirmed some of the matters reported in an allegedly libelous article, but that were not relied upon by them. The court adopted a four-part balancing test to determine whether the media should be forced to disclose the names of confidential sources in civil cases, considering 1) whether the movant had exhausted alternative sources; (2) the importance of protecting confidentiality given the circumstances of the case; (3) whether the information sought was crucial to the plaintiff's case; and (4) whether the plaintiff has made a prima facie case of defamation.

In two separate per curiam orders issued late in 1997, the Rhode Island Supreme Court reiterated that a media defendant may not invoke the statutory reporters' privilege to shield confidential sources if the defendant is relying upon those sources to assert a good faith belief in the truth and accuracy of the published information. *Guiliano v. Providence Journal Co.*, 704 A.2d 220 (R.I. 1997); *Lett v. Providence Journal Co.*, 703 A.2d 1125 (R.I. 1997). See also *Ayash v. Dana-Farber Cancer Institute*, 8 Mass. L. Rptr. 73, 73-74 (Mass. Super. 1998) (ordering disclosure of reporter's confidential sources based upon findings that sources were central to plaintiff's libel claims and that plaintiff had exhausted all reasonable alternative sources for the information).

7. Damages

In the past year, there were only three significant appellate decisions in media libel cases and, although they went against the media, the damage awards were relatively small.

In *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 25 Media L. Rep. 2198 (9th Cir. 1997) -- a case which was not pled as a libel case but which was treated as such -- the Ninth Circuit upheld a \$150,000 jury award against the *National Enquirer* for touting an "Exclusive Interview" with Clint Eastwood when, in fact, Eastwood never spoke to the *Enquirer*. The court noted that there was sufficient testimony of damage to Eastwood's reputation because Eastwood's fans might "think him (1) a hypocrite for giving the *Enquirer* an 'exclusive interview' about his private life (plus access to an 'exclusive' baby picture) and/or (2) essentially washed up as a movie star if he was courting publicity in a sensationalist tabloid."

In *Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914, 26 Media L. Rep. 1801, *cert. denied*, 118 S.Ct. 1563 (1997), the Arkansas Supreme Court affirmed a \$50,000 jury award against a newspaper that mistakenly used plaintiff's photograph in connection with an article on a defendant in a Whitewater criminal case.

Finally, in *Beal v. Bangor Publishing*, 714 A.2d 805 (Me. 1998), the Maine Supreme Court affirmed a \$125,000 jury verdict to a Navy employee who sued over newspaper articles reporting on disciplinary steps taken against him.

Following up on a case discussed in last year's BULLETIN, a Delaware jury awarded a doctor \$3.282 million in compensatory and punitive damages against a newspaper and its source in connection with an article discussing plaintiff's treatment of a patient. *Kanaga v. Gannett Co., et al.*, C.A. No. 92C-12-182 (Del. Super. 1998). As reported last year, the Delaware Supreme Court reversed a summary judgment for defendants, holding that it was a jury question whether the alleged defamatory statements in the newspaper article were matters of opinion. 687 A.2d 173 (Del. 1996).

Actual Damages

Whether a plaintiff must show injury to reputation to recover actual damages is a question determined by state law. As reported in last year's BULLETIN, 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

⁴ Minnesota, Iowa, Arkansas, Kansas, and the Fifth Circuit Court of Appeals (applying Mississippi law) have all ruled that evidence of damage to reputation is a prerequisite to the recovery of damages in a defamation action. Minnesota, in *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 24 Media L. Rep. 1897 (Minn. 1996), and Iowa, in *Johnson v. Nickerson*, 542 N.W.2d 506 (Iowa 1996), are the most recent jurisdictions to decide the issue. Arkansas decided the issue in *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933, 10 Media L. Rep. 1063 (Ark. 1983); Kansas in *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (Kan. 1982); and the Fifth Circuit in *Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (applying Mississippi law). In addition, New York's Appellate

Arkansas and Kansas decisions reaffirmed their state law requirement that plaintiff prove injury to reputation. *United Insurance Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998) (private plaintiff must prove reputational injury in order to recover damages); *Classic Communications, Inc. v. Rural Telephone Service Co.*, 995 F.Supp. 1185 (D.Kan. 1998) ("since Kansas no longer recognizes a cause of action for defamation per se, every claim for defamation requires proof of damage to plaintiff's reputation."). Another Arkansas case held that plaintiff met the burden of proving injury to reputation by putting on witnesses who had read the defamatory newspaper article and who testified that they initially believed that plaintiff was the subject of the criminal investigation reported on therein. *Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. 561, 954 S.W. 2d 914, 26 Media L. Rep. 1801 (1997).

An Oklahoma federal district court granted summary judgment to a radio station where the plaintiff could prove no actual injury to reputation. *Zeran v. Diamond Broadcasting, Inc.*, 26 Media L. Rep. 1855 (W.D. Okla. 1997). The persons who knew the plaintiff did not hear the broadcast; those who heard the broadcast did not know the plaintiff, who was identified in the broadcast only by first name and a long-distance telephone number. The court noted that "the plaintiff cannot identify a single person in the world who thinks less of him today than they did before the broadcast." Implicit in the court's judgment for the defendant was the conclusion that emotional distress, absent proof of actual loss of reputation, would not sustain a defamation claim under Oklahoma law.

Presumed Damages

In *Salgado v. Joyner Management Services, Inc.*, 127 N.C. App. 209, 409 S.E.2d 253, 26 Media L. Rep. 1595 (1997), the court held claiming potential pecuniary damages are insufficient to support a per quod libel claim. Similarly, a Connecticut court held that, despite a finding of slander per se, damages based on mere speculation were insufficient to support the award of estimate of possible losses. *Nemeth v. Carroll*, 1998 WL 165036 (Conn. Super. 1998). In *Lyons v. Heid*, 1998 WL 309797 (Conn. Sup. Ct. 1998) the court held that a plaintiff must "show by a preponderance of the evidence" what injuries to his reputation "specifically flowed" from the libelous statement. In *Lyons*, the court found no proof of an actual loss and therefore awarded only nominal damages.

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*.

On the other hand, Colorado, Florida, Louisiana, Maryland, and the Virgin Islands have all held that plaintiffs may recover damages without first establishing a loss of reputation. Colorado reached its conclusion in *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994); Florida in *Time Inc. v. Firestone*, 305 So. 2d 172 (Fla. 1974), *vacated and remanded*, 424 U.S. 448 (1976); Louisiana in *Freeman v. Cooper*, 414 So. 2d 355 (La. 1982); Maryland in *Hearst Corporation v. Hughes*, 466 A.2d 486, 9 Media L. Rep. 2504 (Md. Ct. App. 1983); and the Virgin Islands in *Ross v. Bricker*, 770 F. Supp. 1038 (D.V.I. 1991).

In a non-media libel case, the New Hampshire Supreme Court ruled that a plaintiff suing over a mortgage foreclosure advertisement was entitled to presumed damages because this was a case of purely private concern. *Touma v. St. Mary's Bank*, 712 A.2d 619 (N.H. 1998) (special damages not recoverable because plaintiff failed to prove a loss in profits caused by the foreclosure ad).

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.⁵ According to the 1998-99 MEDIA LIBEL SURVEY, eight jurisdictions do not permit punitive damages in defamation cases.⁶ Ten states impose statutory limitations on punitive damage awards⁷ and 15 states limit punitive damages through retraction laws.⁸

In *Le Marc's Management Corp. v. Valentin*, 349 Md. 645, 709 A.2d 1222 (1998), the Maryland Supreme Court, overruling prior cases, held that punitive damages can be awarded to a public figure only upon showing, by clear and convincing evidence, that the defendant had actual knowledge of falsity. Reckless disregard, including entertaining serious doubt as to truth, is insufficient.

In a significant development, Florida adopted Standard Jury Instructions for punitive damage claims in defamation suits. Standard Jury Instructions- Civil Cases (No. 97-2) 706 So.2d 283 (Fla. 1998). The instructions provide that where the subject matter is one of public concern, the plaintiff must prove constitutional "actual malice" and common law "ill will." Only "ill will" is required where the subject matter is not of public concern. The court also provided an optional bifurcated process for the jury's consideration of the issues of (i) whether there is liability for punitive damages, and if so (ii) the amount of damages to be awarded.

In connection with its statutory limit on punitive damages, the Georgia Supreme Court adopted a "bright line rule" requiring both a charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact in order to avoid the \$250,000 cap on

⁵ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (requiring actual malice to recover punitive damages, at least when matters of public concern are at issue); and *BMW v. Gore*, 116 S. Ct. 1589 (1996) (Due Process Clause of the 14th Amendment prohibits "grossly excessive" punitive damages in civil suits).

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

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

⁸ Alabama, California, Connecticut, Florida, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, North Carolina, Tennessee and Utah.

punitive damages. *McDaniel v. Elliott*, 269 Ga. 262, 497 S.E.2d 786 (1998).

In *MMAR Group, Inc. v. Dow Jones & Co.*, 987 F.Supp. 535, 25 Media L. Rep. 2537 (S.D. Tex. 1997), the court held the following to be insufficient for the awarding of punitive damages against the corporate defendant: (1) the reporter did not have a journalism degree (but had eight years of business journalism experience, so was not “unfit”); (2) deputy managing editor testified at trial that he believed the article to be substantially true (held not to be a “ratification”); (3) editor did not ask questions regarding the sourcing of an allegedly false and defamatory statement; and (4) the newspaper did not retract allegedly false statements.

Libel Proof Plaintiff

In a media case, a Texas appellate court applied an analysis similar to the libel proof plaintiff doctrine, thus appearing to endorse the doctrine’s underpinnings. *Swate v. Schiffers*, 975 S.W.2d 70 (Tex. App. - San Antonio 1998, n.w.h.) The court upheld a grant of summary judgment, in part because plaintiff’s reputation had been severely damaged by prior press coverage and plaintiff could not prove that his reputation was harmed by defendant’s publication, even if the statements at issue were false.

8. Procedural Matters

Retractions/Corrections

The Seventh Circuit affirmed a dismissal for failure to make a sufficient retraction demand as required under Wisconsin’s retraction statute. *Milsap v. Stanford*, 139 F.3d 902 (unpublished), 26 Media L. Rep. 1602 (7th Cir. March 9, 1998).

In another decision, a Florida court resolved the previous open issue as to whether a journalist, as opposed to the newspaper or broadcast entity, must be served with a retraction demand, reversing a denial of a motion to dismiss and holding that even a part-time columnist is entitled to the protection of the Florida retraction statute. *Mancini v. Personalized Air Conditioning & Heating*, 23 F.L.W. D85 (Fla. 4th DCA 1997).

Statute of Limitations

In Louisiana, a federal court ruled that a suit was time-barred given that plaintiff knew his name had been published in other writings regarding the Kennedy assassination, but testified that he had not become aware of the particular writing at issue until after the statute had run because he regarded such matters as “nonsense” and “he deliberately stay[ed] away from that stuff.” *Martens v. Davis*, 1998 U.S. Dist. LEXIS 7476 (E.D. La., May 12, 1998). A Colorado court, however, held that a suit over statements made to the police, subsequently discovered because of republication in a newspaper, would not be time-barred because the statements could not reasonably have been discovered earlier. *Burke v. Greene*, No., 97CA0894, 1998 LEXIS 158 (Colo. App. June 11, 1998).

In the District of Columbia, the one year statute of limitations for libel actions was applied to claims of emotional distress and negligence claims based on allegedly libelous reports. *Mittleman v. U.S. Dept. of Treasury*, 997 F. Supp. 1 (D.D.C. 1998). Similarly, in *Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F.Supp. 220, 226 (D.Kan. 1996), the court held that an expired claim for defamation cannot be recharacterized to form a tortious interference claim.

A Florida court ruled that an amended complaint asserting a defamation count after the two year statute of limitations had run, "relates back" to the defamation claim of the original timely filed complaint, even though an intervening amended complaint had dropped the defamation claim. *Kartell v. New Horizons of the Treasure Coast, Inc.*, 1998 Fla. App. LEXIS 5613 (Fla. 4th DCA).

Finally, in a defamation suit against a talk-radio host, a New York federal court refused to allow a plaintiff to amend his complaint after the statute of limitations had run to add claims against other individuals who participated in the broadcast but who were not identified in the original complaint. *Jewell v. WABC-AM Radio*, 97 Civ. 5617 (S.D.N.Y. Sept. 30, 1998) (statements by other participants introduce new set of operational facts).

Motions to Dismiss

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

A Connecticut federal court dismissed a complaint that failed to state who heard the allegedly defamatory statements, when they were made and the context in which they were made. *Croslan v. Housing Auth. for City of New Britain*, 974 F.Supp. 161 (D.Conn. 1997). See also *Acciaviti v. Professional Services Corp.*, 982 F.Supp. 69 (D. Mass. 1997) (dismissing complaint that failed to describe any potentially relevant communications).

A New York trial court ruled that on a motion to dismiss the court is not limited to the pleadings but may consider extrinsic matter. *Weiser v. Gannett Suburban Newspapers*, 25 Media L. Rep. 2175 (Sup. Ct. 1996). In *Weiser*, the court considered the alleged defamatory article and relevant police and court records submitted by defendant on the motion and determined that the article was substantially true.

Relying upon First Circuit precedent, a Maine federal court held that "plaintiffs are limited to the statements alleged in the Complaint and may not allege as defamatory any additional statements unless and until they amend their Complaint." *Veilleux v. National Broadcasting Co., Inc.*, 1998 U.S. Dist. LEXIS 8056 (May 29, 1998). In *Melendez Vega v. El Vocero*, 97 JTS 139 (1997), however, the Puerto Rico Supreme Court held that a plaintiff can sue over a series of articles without specific pleadings about individual articles in the series when the basic allegation of defamatory falsity is common to all articles in the series.

Summary Judgment

According to the 1998-99 MEDIA LIBEL SURVEY, 30 jurisdictions favor summary judgment in defamation cases,⁹ 4 disfavor summary judgment,¹⁰ with the remaining 20 jurisdictions holding to a neutral standard.¹¹

For example, a Georgia court held that “summary judgment relief is especially appropriate in defamation actions implicating the First Amendment, where the evidence shows that a complainant offered no evidence as to an essential element of his case.” *Blomberg v. Cox Enters.*, 228 Ga. App. 178, 491 S.E.2d 430, 25 Media L. Rep. 2342 (1997); *see also Southall v. Little Rock Newspapers, Inc.*, 332 Ark. 123, 964 S.W.2d 187 (1998) (on summary judgment in case involving the actual malice standard, trial court must apply a heightened standard of review and determine whether the evidence could support a reasonable jury’s finding that actual malice was shown by clear and convincing evidence).

An Oklahoma court ruled that a media defendant must show that there is no issue of fact with respect to reckless disregard even though the plaintiff bears a clear and convincing burden of reckless disregard at trial. *Johnson v. The Black Chronicle, Inc.*, 1998 OK CIV APP 77. In *Johnson*, the court held that “self-serving” affidavits of the publisher and reporter that they had no knowledge that the publication was false would be considered as evidence of lack of reckless disregard on summary judgment, and in the absence of conflicting evidence could sustain a judgment; but such affidavits would not be adequate for summary judgment in the face of even circumstantial evidence that they knew the publication was false.

In Tennessee, an appellate court indicated that summary judgment was “well suited” to defamation claim where issues of status of plaintiff and whether plaintiff’s proof meets “actual malice” test are presented. *Tomlinson v. Kelly*, 969 S.W.2d 402 (Tenn. App. 1997).

Similarly, a Louisiana court held that defamation claims are “inordinately susceptible to summary adjudication due to the constitutional considerations involved in defamation actions, regardless of whether the defendant is or is not a member of the news media.” *Bell v. Rogers*, 698 So.2d 749 (La. App.2d Cir. 1997). In 1997, Louisiana amended its summary judgment procedure, so that if the movant will not bear the burden of proof at trial, the movant need only point out to the court that there is an absence of factual support for one or more of the elements essential to the

⁹ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, New Jersey, New York, Ohio, Puerto Rico, South Carolina, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

¹⁰ Alaska, Michigan, New Hampshire and New Mexico.

¹¹ Delaware, Florida, Guam, Kansas, Kentucky, Maryland, Missouri, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virgin Islands and Virginia.

adverse party's claim thereby shifting the burden to the adverse party to produce sufficient factual support. *See also Tomubbee v. River Parishes Guide*, 702 So.2d 971, 26 Media L. Rep. 1348 (La. App. 5th Cir. 1997), *cert. denied*, ___ S.Ct. ___, (1998) (amendment can be applied retroactively).

Texas also enacted a new summary judgment procedure. A party, "after adequate time for discovery," can make a "no evidence" summary judgment motion on the ground "that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." Tex. R. Civ. P. 166a(I). This new rule is significant in that it does not require the offering of evidence by the moving party, unlike other summary judgment procedures in Texas. The motion "must state the elements as to which there is no evidence," and the motion must be granted unless the nonmovant produces evidence sufficient to raise a genuine issue of material fact. This new provision is a supplement to existing Texas summary judgment practice, not a replacement of old rules. The early consensus is that this new rule effectively "federalizes" summary judgment practice in Texas. In what is believed to be the first appellate decision on the new rule, a court held that in a public figure case, plaintiff must produce evidence of actual malice to preclude summary judgment. *Galveston Newspapers Inc. v. Norris*, No. 01-97-01381 (Tex. App. 1998). Also in recent months, Texas appellate courts have proven very effective in dismissing libel cases against media defendants on review of summary judgment motions. *See, e.g., WFAA-TV, Inc. v. McLemore*, 41 Tex.S.Ct.J. 1394 (Tex. 1998), *HBO v. Harrison*, 1998 WL 724768 (Tex.Ct.App. Oct. 8, 1998), *KTRK v. Fowkes*, No. 01-96-01290-CV (Tex.Ct.App. Sept. 30, 1998).

Appellate Review

The Ninth Circuit, discussing its task of reviewing de novo a jury's verdict in favor of Clint Eastwood, stated with respect to credibility determinations: "Put another way, we must figure out, as best we can from the cold record, which evidence the jury accepted as credible, and which it discarded. Then we must determine whether the believed evidence establishes actual malice." *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1252, 25 Media L. Rep. 2198, 2201 (9th Cir. 1997). The court also noted: "This is no doubt difficult business. Without a transcript of the jury's deliberations, we can only guess which facts (aside from those essential to the verdict) it must have believed."

The Fifth Circuit confirmed that de novo review of the issue of actual malice is required, but also added that independent appellate review does not extend to preliminary fact findings and credibility determinations made by the trier of fact. *Clarke v. Stalder*, 121 F.3d 222, 232 (5th Cir. 1998) (citing *Peter Scalmandre & Sons, Inc. v. Kaufman*, 113 F.3d 556 (5th Cir. 1997), *on reh'g*, 154 F.3d 186 (5th Cir. 1998)).

Similarly, the Arkansas Supreme Court held that independent review "of the whole record to insure the judgment does not constitute a forbidden intrusion on the field of free expression" applies only to a review of the issue of actual malice, "not to the determination of libel." *Southall v. Little Rock Newspapers*, 332 Ark. 123, 964 S.W.2d 187, 26 Media L. Rep. 1815 (1998).

Prior Restraint

In *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997), the Ninth Circuit affirmed a preliminary injunction restraining a union from using the term "Rats" in a banner reading "THIS MEDICAL FACILITY IS FULL OF RATS," which was displayed in front of a hospital during a labor dispute. The union contended that the term "rats" was common nomenclature for non-union workers. The court reasoned that the sign conveyed intentionally a different meaning, that the hospital was rodent infested and was an "unprotected fraudulent misrepresentation of fact." *Id.* at 1237. The court rejected the union's argument that the preliminary injunction was an unconstitutional prior restraint on speech, concluding that "the First Amendment does not protect fraud." *Id.* at 1239. Judge Kozinski dissented: "Not only is this the first case to affirm a labor injunction, it is the first ever (so far as I am aware) to uphold a preliminary injunction against speech covered by *Sullivan*. Because *Sullivan* speech always involves matters of public interest, I had assumed that damages after trial on the merits is the high water mark of available relief." *Id.* at 1240.

Jurisdiction

In *Blumenthal v. Drudge*, 992 F.Supp. 44, 26 Media L. Rep. 1717 (D.D.C. 1998), the court ventured into the uncharted thicket of Internet law and found sufficient contacts between California defendant Matt Drudge and the District of Columbia to exercise personal jurisdiction over Drudge in a defamation suit arising from the posting of the *Drudge Report* on America Online. The court cited defendant's web site that enables browsers to email defendant directly, that defendant emailed the report to subscribers within the District, and that the subject matter of Drudge's web site consisted primarily of "inside the Beltway" political gossip and rumor; all of which suggested that Drudge knew the effect of his allegedly defamatory statements would be felt within the District of Columbia. *Id.* at 56. Implicitly drawing a distinction increasingly blurred by the Internet, the court also refused to consider Drudge a media defendant, declining to extend to the gossip columnist the protection afforded news gatherers under previous interpretations of the D.C. long arm statute. *See also Barge v. Knight Ridder Corp.*, 25 Media L. Rep. 1658 (D. Minn. 1997), *aff'd*, 1998 WL 196764 (8th Cir. Apr. 24, 1998) (unpublished) (Minnesota's long-arm statute limiting exercise of jurisdiction in defamation and privacy cases barred action against out-of-state defendants that published articles in *The Seattle Times* and also available on Lexis-Nexis and Westlaw).

But in another Internet case, a D.C. federal court dismissed for lack of personal jurisdiction a claim based on allegedly defamatory material posted on a "passive" America Online bulletin board. *Mallinckrodt Med., Inc. v. Sonus Pharm., Inc.*, 989 F. Supp. 265 (D.D.C. 1998)

In *Noonan v. Winston Co.*, 135 F.3d 85, 26 Media L. Rep. 1363 (1st Cir. 1998), the court ruled that jurisdiction would offend due process where an allegedly defamatory advertisement was aimed solely at the French consumer market and only a few hundred magazines containing the advertisement were distributed to retail magazine outlets in the Boston area.

A Maine federal court held that it had personal jurisdiction over a California corporation without any office or employees in Maine, but whose statements were printed in a newspaper article written, researched and laid-out in Maine. *Scott v. Jones*, 984 F.Supp. 37 (D. Me. 1997).

Choice of Law

In *Wilson v. Slatalla*, 970 F.Supp. 405, 25 Media L. Rep. 2281 (E.D. Pa. 1997), the court concluded that in a defamation suit plaintiff's domicile generally has the greatest interest in vindicating plaintiff's reputation interest. Thus, the court applied Pennsylvania's negligence standard rather than New York's gross irresponsibility standard. In *City of Rome v. Glanton*, 958 F.Supp. 1026 (E.D. Pa. 1997), *aff'd without op.*, 133 F.3d 909 (3d Cir. 1997), the court applied Pennsylvania law to defamatory statements made to an Italian newspaper concerning a Pennsylvania domiciliary.

The Seventh Circuit in *Cook v. Winfrey*, 141 F.3d 322, 26 Media L. Rep. 1586 (7th Cir. 1998) held that "in multistate defamation cases, Illinois cases indicate that 'the applicable law is that of the victim's domicile, period.'"

9. Other Noteworthy Issues

Enforcing Foreign Libel Judgments

In *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230, 25 Media L. Rep. 2473 (1997), Maryland's highest court refused to recognize and enforce a libel judgment obtained in England. The Maryland court recited the State's fealty to First Amendment-based policies absent in Great Britain and recognized the ascendancy of First Amendment values in defamation cases generally.

Criminal Libel Statute

The Nevada Press Association filed a lawsuit challenging the constitutionality of Nevada's criminal libel statute. Under the challenged law, truth is a complete defense to civil libel but is a defense to criminal libel only if the truthful statement was published "for good motive and for justifiable ends." In October 1998, Nevada's Attorney General stipulated to a judgment declaring the law unconstitutional, including a permanent injunction barring enforcement. *Nevada Press Association v. Del Papa*, CV-S-98-00991 (1998).

Agricultural Disparagement

As reported in the 1998-99 MEDIA LIBEL SURVEY, thirteen states¹² have so-called agricultural disparagement statutes, creating a cause of action for false statements regarding the safety of

¹² Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota and Texas.

agricultural products. In the much publicized case brought by Texas cattlemen against Oprah Winfrey, a judge ruled that live cattle were not sufficiently “perishable” to fall within the Texas statute, and thus the court did not reach the issue of the law’s constitutionality. *Texas Beef Group v. Winfrey*, 26 Media L. Rep. 1498 (N.D. Tex. 1998).

On a related note, in *Granada Biosciences, Inc. v. Barrett*, 958 S.W.2d 215 (Tex. App. – Amarillo 1997, petition filed), the court reversed in part a summary judgment for defendants, holding that the plaintiff’s petition had alleged business disparagement (without using the term) and defendants’ motion for summary judgment was insufficient because it presented a defense against a libel claim. (The court did not explain which element or elements defendants failed to disprove.). The TEXAS SURVEY reports a potential tension in Texas law involving libel and the common law cause of action for business disparagement, noting that recent Texas cases have not defined the distinctions between the torts in a logical fashion.

B. FINDINGS OF THE LDRC 50 STATE SURVEY 1998-99: MEDIA PRIVACY AND RELATED LAW

1. False Light

Recognition

According to the 1998-99 MEDIA PRIVACY AND RELATED LAW SURVEY, currently 34 jurisdictions recognize the false light tort.¹ In seven of these jurisdictions, however, the tort has not been applied in the media context.² Nine other jurisdictions have explicitly rejected the tort,³ one more than was reported last year.

South Carolina became the ninth jurisdiction to explicitly reject false light in *Brown v. Pearson*, 483 S.E.2d 477 (S.C. Ct. App. 1997) (per curiam), in which the South Carolina Court of Appeals clarified any confusion concerning the recognition of the tort in a case concerning a report of sexual harassment and abuse by the pastor of a church.

While the Minnesota Supreme Court recognized a claim for invasion of privacy for the first time on July 30, 1998 in *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 26 Media L. Rep. 2175 (Minn. 1998), the court held that the common law only recognized three of the four privacy torts: intrusion upon seclusion, misappropriation of name or likeness, and public disclosure of private facts. False light invasion of privacy was rejected by the court because of First Amendment concerns. The court agreed with the Texas Supreme Court's reasoning in *Cain v. Hearst Corp.*, 878 S.W.2d 577, 22 Media L. Rep. 1511 (Tex. 1994) (rejecting false light in Texas), finding that "the risk of chilling speech is too great to justify protection for this small category of false publication not protected under defamation."

A number of cases were also dismissed by courts reaffirming that the particular jurisdictions in which they sit do not recognize false light; New York, *Cerasani v. Sony Corporation*, 991 F. Supp. 343, (S.D.N.Y. 1998) ("New York law has no common-law right of privacy embracing such claims as 'false light'"); Ohio, *Reeves v. Fox Television Network*, 983 F. Supp. 703, 25 Media L. Rep. 2104 (N.D. Ohio 1997) (summary judgment on plaintiff's false light invasion of privacy claim because Ohio

¹ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virgin Islands, Virginia, and West Virginia.

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

³ Massachusetts, Minnesota, New York, North Carolina, Ohio, South Carolina, Texas, Virginia, and Wisconsin.

does not recognize this tort); Massachusetts, *Ayash v. Dana-Farber Cancer Institute*, 7 Mass L. Rptr. 176 (Mass. Super. 1997) (refusing to recognize false light claim under Massachusetts law).

On the other hand, the Mississippi Supreme Court, in a non-media case, stated that it had “implicitly recognized” false light. *Cook v. Mardi Gras Casino Corp.*, 697 So. 2d 378 (Miss. 1997). The court found, however, that the plaintiff, who was suing over the publication of her photograph in a newspaper announcing that she won \$235,000 at the defendant casino, did not state a claim.

Significant Media Cases

In *Russell v. ABC*, 1997 WL 598115, 26 Media L. Rep. 1012 (N.D. Ill., Sep. 19, 1997), a district court in Illinois, dismissed a false light claim against ABC arising out of a hidden camera investigation. In *Russell*, the plaintiff, the manager of a retail seafood store, challenged a segment of ABC’s *PrimeTime Live* that discussed the “tricks of the trade” for selling seafood. In particular, the plaintiff claimed that ABC placed her in a false light by implying that she instructed her employees to lie to customers about the age of the fish and to sell as cooked fish which is too old to sell as fresh. The U.S. District Court for the Northern District of Illinois dismissed the claim on summary judgment, holding that ABC’s voice-overs were protected by the First Amendment as reasonable, subjective interpretations of the plaintiff’s own words and because the plaintiff could not satisfy her burden to prove actual malice on ABC’s part by clear and convincing evidence.

In *Seale v. Gramercy Pictures et al.*, 964 F. Supp. 918 (E.D. Pa. 1997), *aff’d*, 156 F.3d 1225 (3rd Cir. 1998), a false light and right of publicity suit filed by former Black Panther Party Chairman Bobby Seale against the producers of the film, “Panther,” the defendants won a bench trial. Seale had claimed that two particular scenes in the film depicted him in a false light. In one scene, he complained that he was depicted as engaging in illegal gun buying. In the second, he complained that he was inaccurately portrayed as losing a leadership struggle to Eldridge Cleaver.

In its decision, the court first determined that “Panther” was a “docudrama” rather than a “documentary” film. A docudrama is a film presenting “a dramatic recreation or adaptation of actual events”, the court stated, citing J. Thomas McCarthy, *The Rights of Publicity and Privacy*. The court next noted that “Panther” portrayed Seale’s public activities, and that as a celebrity who voluntarily placed himself in the public eye, Seale had less privacy than others, at least as to reporting of his public activities. Finally, the court noted that Seale’s action could only be sustained if there was a major misrepresentation of his character, history, activities or beliefs, which a reasonable person would find seriously offensive, and that, as a public figure, Seale could not recover absent a finding of *New York Times* actual malice.

With regards to the two contested scenes, the court found that the first scene did not depict Seale in a false light because its content would not support Seale’s interpretation of it. The court found that the second scene, however, did not depict Seale in the light he deserved. Judgment was nonetheless entered for the defendants, however, because the court found the record devoid of clear and convincing evidence of actual malice. See *Misappropriation, infra*, for a discussion on Seale’s right of publicity claim.

Media defendants were also successful in another Eastern District of Pennsylvania false light case — *Osby v. A & E Television Networks et al.*, 1997 WL 338855 (E.D. Pa. 1997). In *Osby*, the plaintiffs were filmed walking through an airport during a segment of the television program “Seized by Law,” concerning law enforcement officers seizing the personal property of people suspected of drug trafficking. Specifically, the program contended that African Americans were far more likely to be stopped and searched by law enforcement officers than white people. The court found plaintiffs’ claims for false light invasion of privacy doomed on the same bases as justified summary judgment for defendants on plaintiffs’ libel claims — no reasonable viewer could conclude that the program depicted plaintiffs as drug dealers.

In *Cowras v. Hard Copy*, Docket No. 3:95CV99 (D. Conn. September 29, 1997), the U.S. District Court for the District of Connecticut, in granting summary judgment for the defendants on the plaintiff’s claim of false light invasion of privacy, held that the defendant television and communications companies’ failure to interview the plaintiff personally or to conduct an investigation to confirm the truth of the statements about the plaintiffs’ filing a concocted police brutality claim before broadcasting the story did not rise to the level of reckless disregard sufficient to satisfy the actual malice standard.

Courts also ruled in favor of the media in a number of cases because plaintiffs failed to satisfy the elements of the tort. In two cases the courts found the statements were not highly offensive; *Polsby v. Spruill*, 25 Media L. Rep. 2259 (D.D.C. 1997) (alleged depiction in a novel of a fictionalized version of the plaintiff as a “heroine” would not be highly offensive to a reasonable person, even if the heroine committed individual actions that could be characterized as illegal (such as burglarizing an office)), *aff’d*, 1998 WL 202285 (D.C. Cir. March 11, 1998); and *Mozzochi v. Hallas*, 1998 WL 19910 (Conn. Super., Jan. 6, 1998) (comments made by a newspaper publisher about a public figure in an editorial would be recognized by the ordinary reasonable person as opinion and not a statement of fact, and did not constitute “such a major misrepresentation of [Mozzochi’s] character, history, activities or beliefs that serious offense may reasonably be taken by a reasonable man in his position”). While in another the court found the plaintiff failed to properly allege falsity; *Kirchner v. Greene*, 691 N.E.2d 107, 26 Media L. Rep. 2032 (Ill. App. Ct. 1998) (false light claim recognized against syndicated newspaper columnist and newspaper, but dismissed for failure to allege falsity of statements in columns), *appeal denied*, 699 N.E.2d 1032 (Ill. 1998).

Non-Media False Light Decisions

A number of non-media false light claims were also dismissed because plaintiffs failed to satisfy the elements of the tort. For example, courts frequently found that plaintiffs failed to demonstrate that the allegedly actionable statements were widely publicized; *Podgurski v. Grey*, 1998 WL 26408 at *6 (D. Conn., Jan. 6, 1998) (failure to demonstrate publication to the public at large will result in the dismissal of the claim); *Silk v. City of Chicago*, 1997 WL 790598 (N.D. Ill. 1997) (“[n]o case supports the claim that a statement which is made solely within a plaintiff’s ‘workplace community’ is false light invasion of privacy without some proof that the statement was either publicized outside the workplace community to the public at large OR disseminated to such a large audience that the statement would inevitably reach the public at large”); *Hart v. Seven Resorts*,

Inc., 947 P.2d 846 (Ariz. Ct. App. 1997) (publication to a third person or a small group of persons would *not* create false light liability, but noted in dictum that publication in even a small newspaper or magazine, or a statement in an address to a large audience, would suffice), *review dismissed*, 955 P.2d 534 (Ariz. 1998).

See also, Haydu v. Meadows, 1997 WL 139466 (Conn. Super., March 13, 1997) (publication is a necessary element of a cause of action for invasion of privacy by false light); *Pace v. Bristol Hospital*, 964 F. Supp. 628 (D. Conn. 1997) (former employer's dissemination of information regarding circumstances of former employee's discharge to a discrete number of management personnel, interested co-workers and an independent contractor did not rise to the level of "publicity" necessary to maintain a claim for false light invasion of privacy); *Beauchamp v. Morton*, 1997 U.S. Dist. LEXIS 7528 (W.D. Mich. 1997) (in a suit arising out of a traffic stop the false light claim was dismissed because there were no facts to indicate that the police officer publicized any information about the plaintiff to any third party); *Davis v. Smart Corp.*, 1997 WL 786763 (N.D. Miss., Dec. 8, 1997) (in a suit arising out the release of the plaintiff's medical records revealing her suicide attempt in response to a subpoena related to a child custody proceeding, the court held that the publicity requirement required plaintiff to "allege that the matter was communicated to the public at large, or to so many persons that the matter must be regarded as one of general knowledge, rather than merely being communicated to a small group").

In Mississippi, the Supreme Court dismissed a false light claim on the grounds that the statements were not highly offensive. *Cook v. Mardi Gras Casino Corp.*, 697 So. 2d 378 (Miss. 1997). In *Cook*, the plaintiff objected to the payout of a \$235,000 jackpot over twenty years, instead of a lump sum. She also claimed the casino put her in a false light when it published her photograph in a state newspaper above a notice announcing her good fortune. The supreme court affirmed the trial court's dismissal, commenting on the offensiveness element; "it is doubtful that a reasonable person would be offended that others knew that she had won a large sum of money. In any case, a reasonable person who did not want the fact publicized would not pose for a picture as [the plaintiff] did." *Id.* at 382-83.

Failure to properly allege falsity also led to the dismissal of a false light claim. *Stein v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374 (Utah App. 1997) (video which was edited to make interviewees appear as if they were describing sex with their spouses as disgusting could not support private facts claim because "[n]o reasonable viewer would treat the production as a factual commentary on plaintiff's sex life or any other private matter").

Finally, two false light decisions commented upon the identification requirement of the tort. In *Sullivan v. Conway*, 959 F. Supp. 877 (N.D. Ill. 1997), *aff'd*, 1998 WL 668414 (7th Cir., Sep. 30, 1998), the court stated that the "publicity forming the basis for a false-light claim must be reasonably capable of being understood as singling out, or pointing to, plaintiff." While in *In re New York Life Ins. Co. Agents' Class Claimants Solicitation Litigation*, 1997 U.S. Dist. LEXIS 5897 (E.D. La. Apr. 25, 1997), the court suggested that a group "false light" claim may be actionable if a group is sufficiently small. In the case the court held that the plaintiff's allegation that defendants

falsely publicized that plaintiff insurance agents defrauded clients sufficiently stated a cause of action for invasion of privacy, and that despite the fact that the defendant did not refer to plaintiffs by name, the size of the affected group "might be sufficiently small" to impose liability on defendants.

2. Private Facts

Recognition

According to the 1998-99 MEDIA PRIVACY SURVEY, 41 jurisdictions currently recognize a claim for publication of private facts,⁴ (two more than in last year's SURVEY), although in seven of these jurisdictions the tort has not been applied in a media context.⁵ Additionally the tort has specifically been rejected in four jurisdictions.⁶

In a non-media decision, the Minnesota Supreme Court has recognized a cause of action for invasion of privacy after decades of rejecting any privacy claim. In *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 26 Media L. Rep. 2175 (Minn. 1998), the plaintiffs were two women who were photographed naked together in a shower while on vacation. Despite the fact that they were told that Wal-Mart's photo lab would not print the picture because of its "nature," the women later heard from acquaintances who said that they had seen the photograph and questioned their sexual orientation. The district court dismissed the privacy claims that were filed based upon the state's repeated refusal to recognize privacy claims. The Minnesota Supreme Court, however, in a 5-2 decision, held, without considering the merits of the plaintiffs' claims, that three out of the four privacy claims were present in Minnesota common law — "intrusion upon seclusion, appropriation, and publication of private facts."

In Washington, the state's Supreme Court specifically recognized claims for public disclosure of private facts in four non-media consolidated cases. *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998). While Washington appellate courts have frequently referred to invasion of privacy torts in various settings, including media cases, no case had ever been permitted to proceed to trial. In *Reid*, the families of four decedents alleged that employees of the Pierce County Medical Examiner's Office had taken or obtained photographs of their next of kin and showed them to others without consent of the families. In one case, the niece of former Washington governor Dixie Lee Ray alleged that employees of the county showed photos of the governor's corpse at cocktail parties. The court cited the *Restatement (Second) of Torts* § 652D with approval and held that publication of private facts is actionable in Washington. In addition, the court rejected the plaintiff's argument that damages were unavailable because any right to privacy belonged to the decedent, not his or her

⁴ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, 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.

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

⁶ Nebraska, New York, North Carolina, and Virginia.

relatives. Relying on a statute establishing the confidentiality of autopsy reports, the court reasoned that immediate relatives have a privacy interest in maintaining the dignity of the deceased which could have been violated by the conduct alleged in these cases.

In contrast, the Indiana Supreme Court cast doubt over the viability of a private facts action in Indiana. *Doe v. Methodist Hospital*, 690 N.E.2d 681 (Ind. 1997). Discussing at length the Indiana Constitution's truth-in-defense-of-libel provision, the Supreme Court, in a plurality decision, declined to recognize "on the facts of this case" that public disclosure of private true facts may form the basis of a civil action. Two justices concurring in the result, however, in a strongly worded separate opinion, wrote that, contrary to the plurality, Indiana has long recognized the private facts action and that the questions raised about its viability were unnecessary to the decision in this case. All of the justices concurred in the result, which upheld summary judgment for the defendant on the basis that no "public disclosure" had occurred.

Significant Media Cases

In *Shulman v. Group W Productions*, 955 P.2d 469 (Cal. 1998), a divided California Supreme Court affirmed the dismissal of private facts claims in the so-called "fly along" case in which the plaintiffs sued over media presence at the scene of their automobile accident and during the flight to a hospital. The court definitively held that the publication of "newsworthy" information, or information about a "matter of public concern," cannot — as a matter of law — be the subject of a private facts claim. In so doing, the court held that, so long as the subject matter of a given publication or broadcast involves a matter of public concern, the inclusion of even a "private" fact remains nonactionable if it bears a "logical nexus" to the newsworthy subject. Applying the test to the facts of the case, the court held that the broadcast video depicting the plaintiff's injured state and the audio showing her disorientation and despair were "substantially relevant to the segment's newsworthy subject matter."

In *Doe v. Berkeley Publishers*, 496 S.E.2d 636 (S.C. 1998), *cert. filed*, 67 U.S.L.W. 3156 (June 15, 1998) (No. 98-325), the South Carolina Supreme Court affirmed a directed verdict for the defendant in a case involving a newspaper's publication of the identity of a person who was the victim of a homosexual rape while incarcerated in county jail. The Supreme Court held, as a matter of law, that the incident in question was a matter of public interest rather than a private fact. The court also rejected the argument that it was for the jury to decide whether publishing Doe's name as the victim of sexual assault was a matter of public significance. "Under state law, if a person, whether willingly or not, becomes an actor in an event of public or general interest, 'then the publication of his connection with such an occurrence is not an invasion of his right to privacy.'" *Id.*, 329 S.C. at 414 (quoting *Meetze v. The Associated Press*, 230 S.C. 330, 337, 95 S.E.2d 606, 609 (1956)).

In *Veilleux v. NBC*, 1998 U.S. Dist LEXIS 8056 (D.Me. May 29, 1998), a Maine federal court permitted a private facts claim to go to the jury in a case involving an NBC report on the trucking industry. The claim was brought by truck driver, Peter Kennedy, who along with his employer brought suit against NBC alleging they were duped into cooperating with NBC on what was promised to be a "positive" story on the trucking industry. During the preparation of the report,

which included NBC reporters accompanying Kennedy on a cross-country haul, Kennedy disclosed that he had failed a drug test prior to departure. In denying NBC's motion for summary judgment, the court found that Kennedy's positive results on a random drug test were not, as a matter of law, an issue of legitimate public concern or "newsworthy." Further, despite the fact that Kennedy, himself, disclosed the positive result, the court found that an issue of fact existed as to whether he "knowingly and intelligently consented to the publication of the drug test." Kennedy alleged that he revealed the information only after being assured that it would be kept "off the record," but was later questioned on camera about the test results as part of an interview. At trial, the jury returned a verdict of \$525,000 against NBC on the misrepresentation, libel, privacy, and emotional distress claims.

In *Schuler v. McGraw-Hill Companies, Inc.*, 989 F. Supp. 1377, 25 Media L. Rep. 2409 (D.N.M. 1997), *aff'd*, 145 F.3d 1346, 26 Media L. Rep. 1604 (10th Cir. 1998), the court held that a *Business Week* magazine article discussing plaintiff's sex change did not constitute publication of private facts because plaintiff had sought publicity at the time of her sex change. The court reasoned that even though the plaintiff shunned publicity several years later, her sex change is still a matter of public record. Further, the court found that the mention of plaintiff's sex change was not "gratuitous, but was central to the article's thesis."

In *Reeves v. Fox Television Network*, 25 Media L. Rep. 2104 (N.D. Ohio 1997), plaintiff's arrest was videotaped and aired as part of a "COPS" television show on Fox. The court granted summary judgment to the defendant on plaintiff's claim for invasion of privacy by publication of private facts because (1) the arrest was a matter of legitimate public concern and (2) the broadcast did not discuss or reveal any personal or private information (i.e., family information, medical history, prior criminal history, etc.) about plaintiff unrelated to his arrest for felonious assault.

In *Briggs & Stratton v. National Catholic Reporter Publishing Co.*, 978 F. Supp. 1195, 26 Media L. Rep. 1503 (E.D. Wis. 1997), the court dismissed a number of claims for public disclosure of private facts, based upon the alleged disclosure of the plaintiffs' religious affiliations, because the facts allegedly disclosed were not sufficiently private. The court found that, "[p]ublication of a person's religious affiliation, standing alone," is not an invasion of privacy under § 895.50, *Wis. Stats.*

The U.S. District Court for the District of Connecticut also dismissed a private facts action because the plaintiff did not have an expectation of privacy in *Cowras v. Hard Copy*, Docket No. 3:95CV99 (D. Conn. September 29, 1997). In *Cowras*, the court held that a police department was not liable for invasion of right to privacy for releasing and publicizing a video of plaintiff's booking to the media, which showed the plaintiff beating himself in an attempt to concoct a police brutality claim, because the video served a legitimate law enforcement purpose, the story was newsworthy and involved a legitimate public concern, and because the video surveillance did not take place in an area in which the plaintiff had a legitimate expectation of privacy.

In Massachusetts, a state court were dismissed a private facts claim because the court found the allegedly actionable statements were newsworthy. In *Ayash v. Dana-Farber Cancer Institute*,

7 Mass. L. Rptr. 176 (Mass. Super. 1997), the court held that newspaper articles identifying a doctor as facing statutorily-confidential hospital disciplinary proceedings arising out of the highly publicized fatal overdosing of a cancer patient were newsworthy and therefore not actionable as an invasion of privacy.

Non-Media Private Facts Decisions

In the non-media cases reported in the 1998-99 PRIVACY AND RELATED LAW SURVEY, plaintiffs' failure to prove wide public disclosure was often fatal to their claims. *See, e.g., Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997) (while company's Drug and Alcohol Testing Policy, which required, among other things, that all employees disclose and obtain approval for use of any prescription drugs, and which provided for random drug and alcohol testing of all employees may support claim for intrusion, the policy did not give rise to private facts action because the information obtained under the policy was not disseminated); *Tarka v. Filipovic*, 694 A.2d 824 (Conn. App. 1997), *cert. denied*, 697 A.2d 363 (Conn. 1997) (landlord's publication of notes referring to a tenant's psychiatric care to the landlord's attorney, to the court, and to the tenant's attorney, was not an invasion of privacy because it did not constitute circulation to the general public); *Doe v. Methodist Hospital*, 690 N.E.2d 681 (Ind. 1997) (co-worker's disclosure of another co-worker's HIV status to two other co-workers (one of whom had already known the status) does not establish the required "public disclosure" to establish an invasion of privacy claim).

See also, Alexander v. Culp, 1997 Ohio App. LEXIS 3994 (Cuyahoga Cty.) (where disclosure of plaintiff's extra-marital affair was made only to plaintiff's wife and her family, plaintiff had no claim for invasion of privacy because information not disclosed to the public "or so many persons that the information would certainly become public knowledge"); *Gross v. Taylor*, 1997 WL 535872 (E.D. Pa. Aug. 5, 1997) (holding that plaintiff failed to produce evidence of publicity, where information was disclosed by defendants to five people, including an attorney); *Rudas v. Nationwide Mutual Ins. Co.*, 1997 WL 11302 (E.D. Pa. Jan. 10, 1997) (holding that because plaintiff pled the disclosure of her harassment charge to only one individual and not to a large group, her claim must be dismissed); *Jones v. U.S. Child Support Recovery*, 961 F. Supp. 1518 (D. Utah 1997) (dissemination of private facts "to the [p]laintiff's employer and a few close relatives," found insufficient to meet the element of publicity required for private facts); *Stein v. Davidson Hotel Co.*, 1996 WL 230196 (Tenn. App. May 8, 1996), *aff'd*, 945 S.W.2d 714 (Tenn. 1997) (holding that disclosure of drug test result to small number of persons at plaintiff's place of employment was not sufficiently "public" to state a claim for public disclosure of private facts).

A substantial number of cases were also dismissed because courts found that the facts at issue were simply not private. *See, e.g., French v. United Parcel Service, Inc.*, 2 F. Supp. 2d 128 (D. Mass. 1998) (Massachusetts privacy statute is not violated by disclosure that a fellow employee drank too much at the plaintiff's house, nor by disclosure of an incident that was observed by several others, including plaintiff's supervisor); *McCaslin v. Campbell*, 108 F.3d 1382 (8th Cir. 1997) (unpublished disposition) (plaintiff could not recover on section 1983 claim against city officials for disclosing her social security account information, bank account numbers, driver's license information, previous landlords, personal references, criminal record, and previous names to local authorities investigating

a suspected fraud because the information disclosed was of public record, and the remaining information "did not involve the most intimate aspects of human affairs"); *Fincher v. State*, 1998 Ga. App. LEXIS 326 (Mar. 10, 1998) (there is no "legitimate expectation of privacy as to the investigatory report, a public record, that addressed [a state employee's] sexual harassment of a co-worker and other misconduct"); *Moore v. Cabaniss*, 699 So. 2d 1143 (La. App. 2d Cir. 1997) (details of plaintiff's medical records not private facts when plaintiff filed action for mental distress and should have known that his medical records would be discovered).

See also, *Jones v. State Farm Mut. Auto Ins. Co.*, 491 S.E.2d 830 (Ga. App. 1997) (affirming summary judgment for insurer as to plaintiff's privacy claim for release of minor's medical records based upon implied waiver of privacy right from filing of claim); *White v. Interstate Brake Products, Inc.*, 1997 WL 332066 (N.D. Miss. June 2, 1997) (no tort committed when employer told employees that fellow employee had complained about smoking in the workplace); *Kemp v. Block*, 607 F. Supp. 1262 (D. Nev. 1985) (plaintiff had no reasonable expectation that his argument with his foreman which took place in the instrument shop where they both worked would be private since the argument took place in loud voices, the foreman was in a place he had the right to be, the shop was small and lacked interior walls, and plaintiff had no right to exclude others from entering the shop while the argument was going on); *Stein v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374 (Utah App. 1997) (plaintiff's claim must fail because there was no disclosure of any factual information regarding plaintiff's private affairs — video which was edited to suggest that plaintiff's husband stated that having sex with his wife is disgusting and distasteful were not facts, and were not intended to be taken as true by viewers of the video); *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976 (Alaska 1997) (rejecting public employees' claim of privacy with respect to their time sheets, because, unlike other exempted personnel records, they simply describe employment status and contain information telling little about the individual's personal life).

Another non-media private facts claim was dismissed because the court found that the material disclosed was not highly offensive. In *Smith v. Hartford Firefighters*, 1997 WL 150654 (Conn. Super. 1997), the court found that since the plaintiff's complaint did not describe the subject matter of the surreptitiously recorded telephone conversation and relied on mere suspicion, the matter publicized could not be viewed as highly offensive to a reasonable person;

In addition, a number of the cases reported turned on whether the matter publicized was a matter of legitimate public concern. See, e.g., *Davis v. Smart Corp.*, 1997 WL 786763 (N.D. Miss., Dec. 8, 1997) (the release of the plaintiff's medical records regarding her suicide attempt was of legitimate concern in a case involving custody of her children because "the primary issue is the best interest of the child" and "the parents' mental health" is key to that interest); *Gross v. Taylor*, 1997 WL 535872 (E.D. Pa. Aug. 5, 1997) (complaints about police officers and investigations of misuse of public funds are matters of legitimate public concern); *Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997) (per curiam) (a report of sexual harassment and abuse by the pastor of a church was "of some legitimate public interest, albeit to a limited group").

In Connecticut, a number of rulings concerning the interaction of privacy interests and public

interest were handed down. In *Department of Public Safety v. Freedom of Information Commission*, 698 A.2d 803 (Conn. 1997), the Connecticut Supreme Court held that a report concerning an unsubstantiated claim that a trooper had used excessive force was a matter of legitimate public concern and its publication was not an invasion of the trooper's personal privacy under C.G.S. § 1-19(b)(2). The Connecticut Supreme Court also held that the media could have access to evidentiary portions of grievance hearings conducted by town board of education under the same statute. *Waterbury Teachers Association v. Freedom of Information Commission*, 694 A.2d 1241 (Conn. 1997). See also *Youngquist v. Freedom of Information Commission*, 1997 WL 88211 (Conn. Super. Feb. 18, 1997) (publication of the home address of a public employee is not an invasion of privacy); *Armstrong v. Freedom of Information Commission*, 1997 WL 433957 (Conn. Super. July 23, 1997) (since matters relating to the employees of public agencies are presumptively legitimate matters of public concern, the disclosure of records pertaining to an alleged sexual harassment of a Department of Corrections employee by a subordinate is not an invasion of the employee's privacy under C.G.S. § 1-19(b)(2)); and *Bona v. Freedom of Information Commission*, 691 A.2d 1 (Conn. App. 1997) (C.G.S. §§ 1-19(b)(3)(G) and 1-20(c) interpreted reasonably together, provide an exception from disclosure for law enforcement records containing uncorroborated criminal allegations during the fifteen months between the creation of the police record and the completion of the effort to review and corroborate the allegations before the record is destroyed under § 1-20(c)).

The 1998-99 SURVEY also reported a handful of cases in which plaintiffs' claims were either pre-empted or barred by privilege. See, e.g., *Emberger v. Deluxe Check Printers*, 1997 WL 677149 (E.D. Pa. Oct. 30, 1997) (private facts action over employer's contacts with an employee's supervisors and personal psychiatric counselors, in the course of an investigation into that employee's participation in an allegation of sexual harassment barred by the exclusive remedy provision of the Pennsylvania Worker's Compensation Act, 77 P.S. § 481(a)); *Morris v. Ameritech*, 1997 WL 652345 (N.D. Ill. Oct. 14, 1997) (plaintiff's claim that his employer, a local telephone company, invaded his privacy by publicly disclosing private facts about his personal life to fellow employees in the course of dismissal hearing was preempted by § 301 of the Labor Management Relations Act); and *Tomasiello v. Strachan*, 1997 WL 325827 (Conn. Super. June 5, 1997) (communications with Connecticut's Commission on Human Rights and Opportunities, a quasi-judicial agency, are absolutely privileged and cannot be the basis of a defamation claim).

In two cases, however, court found that plaintiffs did state claims for the disclosure of private facts. In *Chizmar v. Mackie*, 1998 WL 678065 (Alaska 1998), the Alaska Supreme Court held that disclosure by a doctor to a spouse of an HIV diagnosis, was "clearly a 'private fact' of which the unauthorized disclosure may 'be offensive and objectionable to a reasonable [person] of ordinary sensibilities.'" Similarly, in *Estes v. Webb*, 92-CA-00554 (Miss. Ct. App., Feb. 10, 1998) (unpublished), the Mississippi Court of Appeals found that the release of records regarding drug abuse of private, non-party individual "is both offensive and not a matter of legitimate concern to the public."

3. Intrusion

Recognition

According to the 1998-99 MEDIA PRIVACY SURVEY, currently 41 jurisdictions recognize a claim for intrusion,⁷ although the tort has not been applied in the media context in 20 of these jurisdictions.⁸ Two jurisdictions have explicitly declined to recognize intrusion,⁹ in one jurisdiction a federal court has opined that the jurisdiction does not recognize the tort,¹⁰ while in Illinois conflicting authority exists as to whether intrusion is recognized. In addition, the 1998-99 SURVEY reported that a federal district court in Mississippi “conclude[d] with confidence that the Mississippi Supreme Court would recognize a right of action [for] unreasonable intrusion upon the seclusion of another.” *Malloy v. Sears, Roebuck & Co.*, 1997 WL 170313 (N.D. Miss. Mar. 4, 1997).

In a non-media decision, the Minnesota Supreme Court has recognized a cause of action for invasion of privacy after decades of rejecting any privacy claim. In *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 26 Media L. Rep. 2175 (Minn. 1998), the plaintiffs were two women who were photographed naked together in a shower while on vacation. Despite the fact that they were told that Wal-Mart’s photo lab would not print the picture because of its “nature,” the women later heard from acquaintances who said that they had seen the photograph and questioned their sexual orientation. The district court dismissed the privacy claims that were filed based upon the state’s repeated refusal to recognize privacy claims. The Minnesota Supreme Court, however, in a 5-2 decision, held, without considering the merits of the plaintiffs’ claims, that three out of the four privacy claims were present in Minnesota common law — “intrusion upon seclusion, appropriation, and publication of private facts.”

The North Dakota Supreme Court again declined to decide whether a tort action exists for invasion of privacy. *Hougum v. Valley Memorial Homes*, 574 N.W.2d 812 (N.D. 1988). The court affirmed summary judgment dismissing a claim for intrusion, holding that, assuming without deciding that the tort of intrusion upon seclusion exists in North Dakota, the alleged intrusion did not support such a claim. The Court relied on the standards for the tort of intrusion set out in *Restatement (Second) Torts* § 652B for its analysis.

⁷ Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgin Islands, West Virginia, and Wisconsin.

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

⁹ New York and Virginia.

¹⁰ Eighth Circuit opinion interpreting North Dakota law.

Significant Media Intrusion Decisions

Ride-Alongs

In *Berger v. Hanlon*, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), *cert. filed*, 67 U.S.L.W. 3024 (June 29, 1998) (No. 98-38), the Ninth Circuit reversed a district court's grant of summary judgment on a *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) claim alleging Fourth Amendment violations by a television news and camera crew that accompanied government officials on a warrant search of a private ranch. The plaintiffs were an elderly couple living on a 75,000 acre ranch in Montana. Mr. Berger was suspected of harming eagles. After defendants Cable News Network and Turner Broadcasting System learned of a government investigation of Mr. Berger, they approached agents of the U.S. Fish and Wildlife Service. CNN entered into a written contract with the Assistant U.S. Attorney to allow it to accompany the agents on a search of the ranch. The officials allowed CNN to mount cameras on the government vehicles and wired an agent with a microphone. CNN recorded the raid, including conversations with Mr. Berger in his home. The Bergers were not told the agent was wearing a microphone or that the cameras belonged to the media. Mr. Berger was charged with violations of federal wildlife law, but was convicted only of a misdemeanor charge of using a pesticide in a manner inconsistent with its labeling.

The Bergers filed suit against the government agents and the media defendants under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging violation of their constitutional rights. They also sued the media defendants for violation of the federal wiretap statute and under state law for trespass, conversion and intentional infliction of emotional distress. The district court granted summary judgment in favor of the media defendants on all claims. The Ninth Circuit reversed, except on the federal wiretap and conversion claims. Applying the "joint action test", the court found the media defendants could be liable as government actors under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), because they were engaged "jointly in an enterprise that only the government could lawfully institute — the execution of a search warrant — for the mutual benefit of both the private interests of the media and the government officials' interest in publicity." The court reversed summary judgment on the trespass claim because Mr. Berger had not consented to the media microphone entering his home and on the emotional distress claim because plaintiffs had adequately alleged a claim for interference with both their privacy and property interests.

In *Shulman v. Group W Productions*, 955 P.2d 469 (Cal. 1998), the California Supreme Court held that while a cameraman's mere presence at an accident scene cannot be deemed an intrusion, a reasonable jury could find the use of a wireless microphone to record the conversation of an accident victim (now plaintiff) with a flight nurse and the use of a video camera to record events inside the helicopter "highly offensive," and thus actionable as intrusion. With its ruling, the court rejected the defendants' suggestion that the First Amendment precludes the imposition of intrusion liability so long as (1) the information to be gathered is related to a matter of public concern and (2) the means employed is not otherwise unlawful.

In *Wilson v. Layne*, 141 F.3d 111, 26 Media L. Rep. 1545 (4th Cir. 1998), *cert. filed*, 67 U.S.L.W. 3083 (July 7, 1998) (No. 98-83), the full Fourth Circuit considered a claim that law enforcement officers had violated the plaintiffs' rights when they permitted two newspaper reporters to accompany them during execution of an arrest warrant at the plaintiffs' home. The court affirmed a 1997 panel decision that had reversed an order denying summary judgment to several police officers, on qualified immunity grounds. The en banc Court agreed with the panel opinion that the law was not clear at the time the event occurred in 1992 whether allowing a news photographer to accompany the officers was a constitutional violation, and, therefore, the officers were entitled to qualified immunity as a matter of law. Moreover, the court appeared to recognize that such reporting serves an important public purpose: "[I]t could be asserted that facilitating accurate reporting that improves public oversight of law-enforcement activities is a legitimate law enforcement purpose because it deters crime, as well as improper conduct by law enforcement officers."

In *Reeves v. Fox Television Network*, 25 Media L. Rep. 2104 (N.D. Ohio 1997), plaintiff's arrest was videotaped and aired as part of a "COPS" television show on Fox. The court granted summary judgment on plaintiff's intrusion and trespass claims "because Plaintiff voluntarily permitted the camera crew to enter his home with the police and videotape what occurred." *Id.* at 2110. Plaintiff testified that he did not ask the police or cameraman to leave his house or ask the cameraman to stop filming at any time during the encounter. *Id.* The videotapes also demonstrated that plaintiff voluntarily opened his door and allowed the police and camera crew to enter — he chose not to object "because he felt it was to his advantage to let everyone in and allow the videotaping." *Id.* at 2112.

In a case involving related matters, *State v. Haberland*, 1 Vt. Tr. Ct. Rptr. 54 (Chittenden District Court, Docket No. 5801-11-95 CnCr (May 7, 1996)), a criminal trial court ruled that the media's presence in a private home during the execution of a search warrant, although invited by the police, implicates privacy interests protected by the Fourth Amendment. It further ruled that the media's involvement rendered the search unreasonable under the Fourth Amendment and that any evidence obtained after the media entered the defendant's home must be suppressed.

Eavesdropping/Hidden Cameras/Other Forms of Surveillance

According to the 1998-99 MEDIA PRIVACY SURVEY, currently 52 jurisdictions have eavesdropping statutes.¹¹ In 40 of these jurisdictions, however, it is not a violation of the statute, as a general proposition, if one party gives consent to the recording.¹² The other 12 jurisdictions require

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

¹² Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Guam, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

the consent of all parties, at least in delineated circumstances.¹³ For a discussion of developments concerning federal eavesdropping law see “Federal Eavesdropping Law,” *infra*.

In *Sanders v. American Broadcasting Companies, Inc.*, 52 Cal. App. 4th 543, 549, 60 Cal. Rptr. 2d 595, 598, 25 Media L. Rep. 1343 (1997), *review granted*, 938 P.2d 1 (Cal. 1997), the California Court of Appeal reversed a verdict in favor of the plaintiff based upon a “sub-tort” of “the right to be free of photographic invasion.” The case arose out of an ABC undercover investigation into a telepsychic operation. Following the broadcast, which included video captured by a hidden camera, two employees of the telepsychic operation sued for intrusion. While the jury found that the plaintiffs did not have a reasonable expectation of privacy, they followed the trial judge’s instruction that ABC could be held liable on the sub-tort photographic invasion and returned a verdict of over \$1 million. The California Court of Appeal found that there is no “sub-tort” of invasion of privacy by photography where the subject lacks an objectively reasonable expectation of privacy and reversed the judgment. The California Supreme Court has agreed to review the case.

In *Deteresa v. American Broadcasting Cos., Inc.*, 121 F.3d 460, 25 Media L. Rep. 2038 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1840, 140 L. Ed. 2d 1090 (U.S. 1998), the Ninth Circuit affirmed the dismissal of intrusion and eavesdropping claims brought by a flight attendant on the flight O.J. Simpson took late on the night of his wife’s murder against ABC. An ABC reporter went to the plaintiff’s condominium, said he was an ABC reporter and told her he wanted to interview her about appearing on television to discuss the flight. The plaintiff spoke to the reporter but did not agree to appear on television. The next morning the reporter called again to ask her to appear on television, but she declined. The reporter told the plaintiff he had audiotaped and videotaped their conversation the previous day. ABC then broadcast a five-second video clip of the interview with a voice-over providing some of the information the plaintiff had told the reporter.

The district court granted summary judgment on all claims and the Ninth Circuit affirmed. The Ninth Circuit held there was no violation of the California eavesdropping statute because plaintiff, who knew she was talking to a reporter, could not reasonably have expected her conversation would not be divulged to anyone else. “Under the terms of the statute, if someone does not reasonably expect the conversation to be confined to the parties, it makes no difference under the statute whether the person reasonably expects that another is listening in or not. The communication is not confidential.” The court rejected the claim under the federal eavesdropping statute because there was no evidence the reporter recorded the conversation for the purpose of committing a crime or tortious act. Finally, the court rejected the intrusion claim because unlike the facts in *Dietemann*, the reporter did not gain access to the subject’s home by subterfuge.

In *Berger v. Hanlon*, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), *cert. filed*, 67 U.S.L.W. 3024 (June 29, 1998) (No. 98-38), the media was far less successful as the Court of Appeals for the Ninth Circuit held that the media could be held liable under *Bivens v. Six Unknown*

¹³ California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Pennsylvania, Puerto Rico, South Dakota, and Washington.

Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), for accompanying law enforcement officials on a raid of a Montana ranch. The Ninth Circuit did, however, affirm the dismissal of the plaintiffs' eavesdropping claim based on the finding that the Federal Wiretap Act was not violated by the media recording of law enforcement conversations with a suspect with the consent of law enforcement.

Additionally, in a case which attracted considerable attention, *Cincinnati Enquirer* reporter, Michael Gallagher, faced both civil and criminal charges surrounding his investigative report into Chiquita Brands International. According to Chiquita's complaint, Gallagher unlawfully gained access to the company's voice-mail system in order to put together a series of articles concerning alleged abuses by Chiquita in their international business practices. In an controversial move, the *Cincinnati Enquirer* settled the case — paying \$10 million to Chiquita, issuing a formal front-page apology, and firing Gallagher — before a complaint was ever filed against it. Chiquita, however, did file a suit against Gallagher alleging defamation, violation of federal and state wiretapping statutes, trespass, conversion, civil conspiracy, fraud, and inducement to breach employee contracts and fiduciary duties. The civil action, however, was put on hold pending a state criminal investigation into Gallagher's actions. On September 24, 1998, Gallagher pleaded guilty to unauthorized access to communication and unlawful interception of wire transmission — both felonies — and faces up to two and a half years in jail.

The conflict of laws issues raised by interstate taping remain uncomfortably unresolved. In Florida, for example, a split of authority has arisen regarding the extraterritorial application of the state's Wiretap statute, Chapter 934. Both cases addressing the matter have involved the issue of whether the interception by the defendant of a telephone call in which the interceptor is in a one-party consent state and the plaintiff is in Florida is a tort within the state of Florida for purposes of § 49.193(1)(b), Fla. Stat. (1997), a provision of Florida's long-arm statute.

In *Cope v. Berger*, 5 Fla. L.W. Supp. 251 (Fla. 15th Cir. Sept. 2, 1997), a trial court held that Chapter 934 is inapplicable to the taping in New York of a telephone call to Florida that originated in New York. There, a CFO of a bank holding company with its principal place of business in Syracuse, New York, returned a telephone call of a Boca Raton, Florida, attorney. The Florida attorney alleged in his complaint the CFO, on behalf of the bank, recorded the conversation in violation of Chapter 934. In dismissing the claim, the *Cope* court concluded, "[s]ince the Florida legislature provided an absolute defense to a civil claim based upon a good faith, but erroneous, belief that federal law permitted the action, it follows that the legislature did not intend to proscribe acts involving interstate communications which were, in fact, permitted by federal law. In other words, if a subjective, but erroneous, belief that federal law permitted the action constitutes a complete defense to a civil claim, the objective and undisputed fact that federal law relative to intrastate communications permitted the action indicates the inapplicability of the statute."

The Second District Court of Appeal came to the opposite conclusion in *Koch v. Kimball*, 710 So. 2d 5 (Fla. App. Feb. 25, 1998). There, the defendant, an insurance salesperson who lived in Georgia, was required to make five three-day business trips to Florida and weekly calls to her

supervisor in Florida as part of her employment. During one of those calls, she allegedly tape recorded her supervisor, who subsequently sued her in Florida for violation of Chapter 934. The salesperson's motion to dismiss the complaint for lack of personal jurisdiction was denied, and the Second District Court of Appeal affirmed. The appellate court held that "the actual 'interception' occurs not where the communication is ultimately heard (here, Georgia), but where the communication originates (Tampa)." The court went on to hold that injury in the state was sufficient for purposes of Florida's long-arm statute. With respect to the due process analysis, the court concluded that, because the taping had been alleged to have been conducted intentionally, the salesperson reasonably could have anticipated being haled into court in Florida.

Trespass

In *Copeland v. Hubbard Broadcasting, Inc.*, 1997 WL 729195 (Minn. Ct. App. 1997) (unpublished opinion), the Minnesota Court of Appeals affirmed a \$1 award for trespass, but denied the plaintiffs' attempts to recover punitive damages or damages for emotional distress. The plaintiffs filed a trespass action against Hubbard Broadcasting for an investigative reporter's secret videotaping of a veterinarian while in their home to perform surgery on their dog. The reporter, posing as a university student considering a veterinary career, received the Copelands' permission to enter their home, did not go anywhere without their permission, and did not damage anything. After plaintiffs' attempts to amend their complaint to include claims for invasion of privacy, violation of federal and state wiretapping statutes, emotional distress and punitive damages were denied, the court awarded \$1 in damages. On appeal, the Minnesota Court of Appeals rejected the plaintiffs' arguments stating that punitive damages require proof that the defendant has knowledge of or intentionally disregards facts that create a high probability of injury to the rights or safety of others, and no evidence suggested that the reporter either knew her actions violated the Copelands' rights or acted with indifference to those rights. In addition, the appellate court also rejected the Copelands' challenge to the trial court's ruling on emotional distress because the physical manifestation of emotional distress did not rise to the level required to support a claim for emotional damages. The court also refused to reconsider the Copelands' invasion of privacy cause of action, since Minnesota had not, at the time, recognized any invasion of privacy torts.

In another Minnesota decision, *Special Force Ministries v. WCCO Television*, CX-97-2220 (October 13, 1998), an appellate court affirmed a denial of summary judgment to a Minneapolis CBS station on the basis that the affirmative misrepresentation by the reporter of her employment status, her and her references' failure to identify her as a reporter, and her use of a hidden camera created sufficient factual issues for a jury on claims of trespass and fraud. WCCO employee, Lora Johnson, applied for, and eventually obtained, a volunteer position at Special Force Ministries, an operator of care facilities for mentally disabled individuals, without ever telling Special Force that she was employed by WCCO. In addition, two references that Johnson provided, who were also WCCO employees, did not disclose Johnson's employment. Using a hidden camera, Johnson captured Special Force staff members allegedly neglecting the patients in their care. The footage was broadcast as part of a report on Special Force in November 1995.

Affirming the trial court's denial of summary judgment for WCCO, the appellate court held that under Minnesota law, a person permitted entry on to private property may become a trespasser by exceeding the scope of consent. Refusing to overrule *Copeland v. Hubbard Broadcasting*, see above, the court found that it was for a jury to decide whether Johnson exceeded the scope of her consent by secretly videotaping on the premises.

In *Berger v. Hanlon*, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), cert. filed, 67 U.S.L.W. 3024 (June 29, 1998) (No. 98-38), the Ninth Circuit reversed summary judgment on the plaintiffs' trespass claim. The district court had held that law enforcement permission was sufficient to defeat the claim, but the Ninth Circuit reversed holding that the search warrant did not justify media intrusion because the officers invited the media for newsgathering, not for law enforcement. The court also noted that the media recorded sound and images from places not covered by the warrant. The court specifically rejected the argument that media was permitted to accompany the officers on the execution of the warrant as a matter of "custom and usage."

Fraud

In *Deteresa v. American Broadcasting Cos., Inc.*, 121 F.3d 460, 25 Media L. Rep. 2038 (9th Cir. 1997), cert. denied, 118 S. Ct. 1840, 140 L. Ed. 2d 1090 (U.S. 1998), the Ninth Circuit held that an action for fraud cannot lie as to a broadcaster that fails to disclose that plaintiff is being audiotaped and videotaped, in the absence of a special relationship between plaintiff and broadcaster giving rise to a duty to disclose. The court specifically rejected the theory that the duty to disclose arose because of a proscription against unauthorized recording of confidential communications under state law.

In contrast, the a Minnesota appellate court affirmed a denial of summary judgment to a Minneapolis CBS station on the basis that the affirmative misrepresentation by the reporter of her employment status, her and her references' failure to identify her as a reporter, and her use of a hidden camera created sufficient factual issues for a jury on claims of trespass and fraud. *Special Force Ministries v. WCCO Television*, CX-97-2220 (October 13, 1998). On the issue of fraud, the court held that a reporter may have a duty to disclose her employment status "when disclosure is necessary to clarify information already disclosed, which would otherwise be misleading." Because the court found that the reporter made affirmative representations that she was unemployed, and that she further failed to disclose her true employment status, a question of fact existed as to whether the reporter's deceit proximately caused the plaintiff's claimed damages for emotional distress, humiliation and aggravated physical and mental ailments.

A Maine federal court found that NBC could be held liable on a fraudulent misrepresentation theory for breaking its promise to produce a "positive" report on the trucking industry. *Veilleux v. NBC*, 1998 U.S. Dist LEXIS 8056 (D.Me. May 29, 1998). Plaintiffs, Classic Carriers trucking company owners, Raymond and Kathy Veilleux, and their employee, truck driver Peter Kennedy, claimed that they were persuaded to cooperate with the production of an NBC *Dateline* report on the trucking industry based on assurances from the network that the report would show the "positive side" of the trucking industry. Plaintiffs sued for fraudulent misrepresentation, libel, invasion of privacy and emotional distress following the broadcast of the report which allegedly showed Kennedy

violating several service and safety regulations during a cross-country haul as well as admitting to failing a drug test. Addressing the misrepresentation claim, the court held that media representatives could be held liable for negligent misrepresentation in cases where the reliance on media promises resulted in pecuniary harms. At trial, the jury returned a verdict of \$525,000 against NBC on the misrepresentation, libel, privacy, and emotional distress claims.

Conversion

In *Berger v. Hanlon*, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), *cert. filed*, 67 U.S.L.W. 3024 (June 29, 1998) (No. 98-38), the Ninth Circuit affirmed a district court holding which rejected a conversion claim based on media videotape of the execution of the search warrant. The district court had held that sounds and images cannot be the subject of a conversion action. The appellate court agreed, noting that “images and sounds are intangible, and intangible property interests have not traditionally been subject to conversion.”

Stalking/Harassment

While no cases were reported in the media context, stalking statutes continue to be challenged on constitutional grounds and the results appear to be mixed. In *State v. Musser*, 249 Ariz. Adv. Rep. 12 (Ct. App. 1997), for example, the Court of Appeals held that A.R.S. § 13-2916, which prohibits threats and harassment by telephone, is unconstitutionally vague, while in *Fly v. State*, 494 S.E.2d 95 (Ga. App. 1997), *cert. denied*, 1998 WL 313260 (U.S. Oct. 5, 1998), Georgia’s stalking statute was upheld against a challenge that it constituted a content-based, speech restriction.

In *Salt Lake City v. Lopez*, 935 P.2d 1259 (Utah Ct. App. 1997), a defendant sought to reverse his conviction under the state’s stalking statute, which prohibits conduct which the individual knows will cause another person emotional distress among other things, by arguing that Utah Code Ann. § 76-5-106.5 (1995) was “unconstitutionally overbroad on its face and as applied to him, as well as unconstitutionally vague on its face.” The Utah Court of Appeals rejected the constitutional challenges. First, as to the overbreadth challenge, the Court found that the statute did not infringe on the defendant’s “constitutional freedoms of association and movement under the First and Fourteenth Amendments to the United States Constitution and article I, sections 1 and 15 of the Utah Constitution.” The Court of Appeals relied upon Utah law regarding intentional infliction of emotional distress to define “emotional distress” in the statute, thereby rejecting the defendant’s arguments that the statute was overbroad and vague because mere annoyance might constitute a violation of the statute. Additionally, the Court of Appeals found that the statute was narrowly drafted to place only minimal restrictions on freedom of association and movement. Noting that “[f]ree association exists on a continuum[] and can be regulated by the state for compelling interests,” the Court of Appeals rejected the defendant’s facial overbreadth challenge, stating the Court was “not persuaded that the statute infringes on a substantial amount of constitutionally protected conduct.” Second, turning to the vagueness challenge, the Court of Appeals reiterated its conclusion that emotional distress is well defined in Utah. Consequently, the Court of Appeals rejected the defendant’s vagueness challenge, finding it unpersuasive both under the plain language of the statute and as compared to the defendant’s conduct.

Significant Non-Media Intrusion Decisions

In *Thompkins v. Cyr*, 995 F. Supp. 664 (N.D. Tex. 1998), a physician who provided abortion services in Dallas was targeted by several anti-abortion groups in an attempt to stop him from performing abortions. These groups organized protests and picketing at his home, work and church. They also followed him regularly, organized surveillance of his home, and published his address and phone number in various newsletters, which resulted in numerous phone calls and letters. He and his wife received several death threats. Eventually Thompkins sued the protestors and their organizations, seeking damages based on, among other things, invasion of privacy. Defendants argued that they could not be liable for intrusion because they did not use intrusive means such as wiretaps. The court, however, found that the tort of intrusion could be based on any intrusion "physical or otherwise." The court stated that the defendants invaded the plaintiffs' privacy by watching plaintiff's home with binoculars and a camera, using a bull-horn in demonstrations outside of their house, making repeated and harassing phone calls, and interrupting the plaintiffs' Thanksgiving Dinner by rattling their gate. Although the plaintiffs argued that the constitution precluded any liability for offensive speech, the court held that imposing liability for intrusion based on focused picketing was allowed under the First Amendment since the ban on focused picketing was an allowable time, place and manner regulation. The court further concluded that the imposition of tort liability is narrowly-tailored and permissible "if it is not substantially broader than necessary to achieve the government's interest." In so doing, the court declined to impose the stricter standard for injunctions that must "burden no more speech than is necessary to serve a significant government interest."

The Fifth Circuit Court of Appeals has held that a plaintiff's allegations of sexual harassment were not cognizable as a cause of action for invasion of privacy when the plaintiff claimed that she was the victim of offensive comments and inappropriate advances. *Cornhill Inc. Plc. v. Valsamis, Inc.*, 106 F.3d 80 (5th Cir. 1997). In reaching its conclusion, the Court relied on the fact that an intrusion claim, which came the closest to fitting the plaintiff's allegations, "is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying." *But see, Gallagher v. Rapoport*, 1997 WL 240907 (Conn. Super. May 6, 1997) (plaintiff's claim that the defendant sexually assaulted her in his home constitutes an actionable claim for invasion of privacy based upon the unreasonable intrusion upon the plaintiff's seclusion).

In *Jones v. U.S. Child Support Recovery*, 961 F. Supp. 1518 (D. Utah 1997), plaintiff, a child support obligor, brought suit to recover for defendant's alleged invasion of her privacy in attempting to collect the past due child support. Specifically, defendant sent a "WANTED" poster to plaintiff's employer, plaintiff's mother and plaintiff's siblings which refer to plaintiff as a "dead beat parent" with a "well paying job" whose "own flesh and blood" "wishes his mother cared about him to send the child support which the court ordered her to contribute for his care." While the court found that the dissemination of the poster was not sufficient to satisfy the publicity element of the invasion of privacy claim, the court held that a material fact question exists as to whether the steps taken by the collection agency in an attempt to recover for the past due child support would constitute an intrusion upon seclusion. The court further held that defendant could not assert a "public records" defense on

the theory that the child support order was a matter of public record. Finally, the court found that plaintiff's failure to allege special damages as a result of defendant's collection efforts were not fatal to her invasion of privacy claim.

In *Alexander v. FBI*, 971 F. Supp. 603 (D.D.C. 1997), the district court held that allegations that the White House, First Lady Hillary Rodham Clinton, and others accessed records maintained by the FBI, "to obtain embarrassing or damaging information on former employees of the White House for partisan political purposes," survived a motion to dismiss, and collection of such information "could cause outrage, shame, or humiliation to a person of ordinary sensibilities." Mrs. Clinton argued that the claim must be dismissed based on *Wolf v. Regardie*, 553 A.2d 1213 (D.C. 1989), in which the District of Columbia Court of Appeals indicated that the tort of intrusion was not created to protect against gathering information from third parties. The federal district court, however, found *Wolf* distinguishable because it involved access to public record documents held by third parties, whereas the records in *Alexander* were potentially sensitive, personal information maintained in FBI files and, thus, "not the kind of information easily accessible or available from a public record." Furthermore, the district court noted that, with regard to information that the FBI obtained from interviewing the plaintiffs, it was reasonable to infer that when these individuals cooperated with the FBI, "they did so with the belief that their files would not be available for any purpose other than the required government clearance."

In *Washburn v. Rite Aid Corp.*, 695 A.2d 495 (R.I. 1997), the Rhode Island Supreme Court found a violation of the intrusion and unreasonable publicity prongs of the privacy statute. R.I. Gen. Laws §§ 9-1-28.1(a)(1) and (3). The defendant in *Washburn* was a pharmacy which, upon receipt of a subpoena issued by plaintiff's divorce attorney, mailed the plaintiff's prescription drug records directly to the attorney rather than complying with the strict letter of the law by bringing the health-care records to the Family Court. It should be added, however, that the *Washburn* court reiterated the rule that exemplary damages are available only if the plaintiff shows that there has been "malice-amounting-to-criminality" in the circumstances surrounding the tort or statutory violation. *Id.* at 499.

In another Rhode Island case, *Pontbriand v. Sundlun*, 699 A.2d 856 (R.I. 1997), the Rhode Island Supreme Court held that no cause of action was stated under the intrusion prong of the Rhode Island privacy statute (R.I.G.L. § 9-1-28.1(a)(1)) in which the Governor of Rhode Island released to the media the names of 900 individuals who had deposits in excess of \$100,000 at certain closed banks. The court's holding was premised upon the fact that there were "no allegations in the complaint that the information possessed by the Governor was acquired through any wrongful or improper means."

In *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997), an employee challenged her employer's Drug and Alcohol Testing Policy, which required, among other things, that all employees disclose and obtain approval for taking any prescription drugs, and which provided for random drug and alcohol testing of all employees. The plaintiff alleged that the policy violated her rights under the Americans with Disabilities Act (ADA), as well as her rights of privacy under Colorado law. The Court of Appeals for the Tenth Circuit affirmed the district court's finding

that the policy violated the ADA. On the state law claims, the court found that the plaintiff had raised a "substantial issue with the possibility that Colorado would uphold an invasion of privacy by intrusion on seclusion." The court remanded to the district court with instructions to, in turn, remand this issue to the state court for an "authoritative" ruling on the issue. *But see, Hart v. Seven Resorts, Inc.*, 947 P.2d 846 (Ariz. App. 1997), *review dismissed*, 955 P.2d 534 (Ariz. 1998), the Court of Appeals noted the existence of the intrusion tort under Arizona law, but held that an employer's demand that an employee take a drug test failed to rise to the level of an actionable intrusion.

In addition, courts rejected intrusion claims in the following circumstances; *Hougum v. Valley Memorial Homes*, 574 N.W.2d 812 (N.D. 1998) (observation by security guard of plaintiff, an ordained minister, masturbating in a public toilet stall was consistent with guard's work responsibilities (preventing shoplifting and vandalism) and did not, as a matter of law, constitute a tort of intrusion upon seclusion); *Tapia v. Sikorski Aircraft Div. of United Technologies*, 1997 WL 381213 (Conn. Super., June 30, 1997) (plaintiff failed to establish a prima facie case of intrusion because he failed also to allege that by entering his personal locker, the defendant discovered private affairs or concerns); *Dickson v. American Red Cross Nat'l Headquarters*, 1997 U.S. Dist. LEXIS 4838, *35 (N.D. Tex. 1997) (employer who talked to plaintiff's apartment manager about her whereabouts and observed plaintiff in a grocery store parking lot not liable for intrusion since these activities occurred in places open to the public); *St. Paul Mercury Ins. Co. v. Williamson*, 1997 U.S. Dist. LEXIS 19383 (W.D. La. 1997) (the defendants' investigation into plaintiff's activities, including photographing residences and photographing individuals walking in public, was not unreasonable where defendants' main defense against the plaintiff was that plaintiff's alleged injury was fraudulent; the defense required an investigation into plaintiff's alleged accident and claim history); *Stein v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374 (Utah App. 1997) (defendants' short video of plaintiff's spouse describing a household chore but edited to make it appear that he was describing what sex is like with plaintiff, "did not rise to the level of being highly offensive to a reasonable person").

On the other hand, courts found intrusion actionable in the following cases; *Pittman v. J.J. MacIntyre Co. of Nevada Inc.*, 969 F. Supp. 609 (D. Nev. 1997) (debtor-employee had reasonable expectation of privacy at her work during working hours which was sufficient to support claim for unreasonable intrusion upon her seclusion); *A.F.M. v. Thetford School District*, 1 Vt. Tr. Ct. Rptr. 209, 210 (Orange County Superior Court, Docket No. 39-94 OeCv (September 15, 1997)) (allegation that school officials disclosed to two people information about a student's sexual abuse allegations, despite student's family's request that the information be kept confidential until Social Services completed its investigation, states a claim for intrusion); *Smith v. Dean's & Dave's Discount Stores*, 1997 Ohio App. LEXIS 4814 (Cuyahoga Cty.) (intrusion actionable when suspected shoplifters "were detained and searched at the front of a store in full view of the customers at the store," woman's purse seized from her possession and contents "dumped" onto counter, and plaintiffs were "offered no explanation for the intrusion . . . during or after the incident"); *State v. Mott*, 8 Vt. L. Week, 13 (1997) (First Amendment's right of free speech, and the fundamental right to seek parent-child contact, are not denied by an abuse prevention order that forbade telephone and mail contact with defendant's ex-wife — there is no First Amendment right to inflict unwanted and

harassing contact on another person).

In a non-media wiretapping case, the U.S. Court of Appeals for the First Circuit noted that the Massachusetts Wiretap Act is not violated if the interception of an oral or wire communication was not in fact "secretive." *Gilday v. Dubois*, 124 F.3d 277 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2302, 141 L. Ed. 2d 161 (U.S. 1998). Thus, the Court of Appeals held that the recording and monitoring of inmates' telephone calls by the Department of Corrections was not surreptitious where inmates had been informed of the practice in advance and a prerecorded message informed both parties before the parties began their communication. Likewise, call "detailing" conducted by a common carrier for the Department of Corrections did not violate the statute under the specific facts of that case.

In *Gross v. Taylor*, 1997 WL 535872 (E.D. Pa. Aug. 5, 1997), the court acknowledged that because of the inherent difficulties in gathering evidence to support a wiretap claim under the Act, a plaintiff may not have to present direct evidence of the interception of specific conversations or material. The court held, however, that a plaintiff must still put forth more than "the barest of circumstantial evidence." The plaintiffs in *Gross* were two police officers who brought claims against the police department and others alleging that the department's use of rear seat microphones in selected patrol cars violated the state's Wiretap Act. The court granted the department's motion for summary judgment on the basis that plaintiffs' only proof that their conversations had been intercepted was that the microphones were functional and that they were installed in plaintiffs' cars.

In *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174 (1st Cir. 1997), the First Circuit Court of Appeals denied an "expectation of privacy" under the Fourth Amendment and allowed the employer to conduct surveillance through disclosed soundless video. Relying on a "plain view" analysis, the court stressed that cameras do not present an intrusion because "supervisors may monitor at will that which is in plain view within an open work area." It also rejected the argument that the cameras were recording "private" data, because whatever is shown "has been revealed knowingly by the appellants to all observers (including the video cameras). This information cannot be characterized accurately as 'personal' or 'confidential.'"

On the other hand, in *Duff Supply Co. v. Crum & Foster Ins. Co.*, 1997 U.S. Dist. LEXIS 6383 (E.D. Pa. May 8, 1997), the court held that an employee did have an intrusion claim against his employer for monitoring his private telephone calls. *See also, Morris v. Ameritech*, 1997 WL 652345 (N.D. Ill., Oct. 14, 1997) (plaintiff's claim that his employer, a local telephone company, intruded upon his seclusion in eavesdropping on his private calls from his home telephone was not preempted by § 301 of the Labor Management Relations Act); *Schmidt v. Ameritech Corp.*, 115 F.3d 501 (7th Cir. 1997) (plaintiff-employee's claim that the telephone company intruded upon the seclusion of its employee in accessing his personal home telephone records was not preempted by § 301).

4. Misappropriation/Right of Publicity

Recognition

According to the 1998-99 MEDIA PRIVACY SURVEY, 44 jurisdictions currently recognize the tort of misappropriation.¹⁴ In 10 jurisdictions the courts have not yet had the opportunity to rule on the issue.¹⁵

The protection derives from statute in 14 jurisdictions, in 9 of which the statute exists in addition to the protections provided at common law,¹⁶ while in the remaining 5 jurisdictions the statute is the sole source for protection against misappropriation.¹⁷

In a non-media decision, the Minnesota Supreme Court has recognized a cause of action for invasion of privacy after decades of rejecting any privacy claim. In *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 26 Media L. Rep. 2175 (Minn. 1998), the plaintiffs were two women who were photographed naked together in a shower while on vacation. Despite the fact that they were told that Wal-Mart's photo lab would not print the picture because of its "nature," the women later heard from acquaintances who said that they had seen the photograph and questioned their sexual orientation. The district court dismissed the privacy claims that were filed based upon the state's repeated refusal to recognize privacy claims. The Minnesota Supreme Court, however, in a 5-2 decision, held, without considering the merits of the plaintiffs' claims, that three out of the four privacy claims were present in Minnesota common law — "intrusion upon seclusion, appropriation, and publication of private facts."

Significant Media Decisions

In a twist on the usual right of publicity case, the Ninth Circuit upheld a \$150,000 jury verdict in favor of movie star Clint Eastwood and against the *National Enquirer* newspaper for publishing an article that the paper represented to be an exclusive interview with him. *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 25 Media L. Rep. 2198 (9th Cir. 1997). The gist of the claim was that Eastwood's reputation was damaged by the suggestion that he would grant an interview to a "sensationalist tabloid." The information for the story first appeared in a British tabloid and was purported to be based on an interview with Eastwood by a freelance writer. The story was previewed

¹⁴ Alabama, Arizona, Arkansas, California, Colorado (federal court), Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, West Virginia, and Wisconsin.

¹⁵ Alaska (no modern cases have ruled on the issue), Guam, Iowa, Montana, New Hampshire, North Dakota (no direct cases but addressed in dicta), Puerto Rico, South Dakota, Washington, and Wyoming.

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

¹⁷ Massachusetts, Nebraska, New York, Rhode Island, and Virginia.

on the front page of the *Enquirer* as an “Exclusive Interview” with Eastwood. The court recognized that in order to “recover damages from a news organization, for harms perpetrated by its reporting,” Eastwood must prove actual malice. After independently examining the record, the court found that while it believed a preponderance of the evidence supported the jury’s finding of actual malice, it could not conclude Eastwood established by clear and convincing evidence that the *Enquirer* published the article knowing it was false. The court, however, did find Eastwood had proven an alternative theory of liability by showing that the newspaper acted with actual malice in knowingly falsely representing to the public that it had an “exclusive” interview with Eastwood. The court found that the editors falsely suggested to the ordinary reader of their publication — as well as those who merely glance at the headlines while waiting at the supermarket checkout counter — that Eastwood had willingly chatted with someone from the *Enquirer*. Such “intentional conduct satisfies the ‘actual malice’ standard.”

In New York, a federal district court jury awarded \$100,000 to a model who sued YM Magazine for placing her picture next to an unsigned letter in such a way as to make it appear, she argued that she had authored the letter. *Messenger v. Gruner + Jahr USA Publishing*, 97 Civ. 0136 (LAK) (S.D.N.Y. February 23, 1998). The verdict followed the court’s denial of summary judgment based upon the holding that the newsworthiness exception to §§ 50-51 of the New York Civil Rights Law, New York’s misappropriation statute, could be defeated by a showing that the use of the plaintiff’s photograph was “infected with material and substantial falsity,” provided that the defendant acted with the requisite degree of fault.

In *Weber v. Multimedia Entertainment, Inc.*, 1998 U.S. Dist. LEXIS 2 (S.D.N.Y. 1998), the court reached a similar result finding on a motion to dismiss that §§ 50-51’s newsworthiness exception could be found not to apply where the plaintiff minor claimed her appearance on the *Sally Jessy Raphael Show* as a 15-year-old prostitute from Hollywood was a fictional account. The plaintiff claimed that the defendants knew that she was not a prostitute, but that they induced her to play the part and that they further induced her to forge her mother’s signature on the form consenting to her appearance on the show. The court found that while teenage prostitution was a matter of public interest, the newsworthiness exception would not apply if the plaintiff’s claims were true because the publication of the plaintiff’s image “was infected with substantial falsification or fictionalization.”

The 1998-99 PRIVACY AND RELATED LAW SURVEY also reported a handful of cases in which the plaintiffs claimed that characters which appeared in books and movies were misappropriations of the plaintiffs’ identities. In *Polsby v. Spruill*, 25 Media L. Rep. 2259 (D.D.C. 1997), *aff’d*, 1998 WL 202285 (D.C. Cir. March 11, 1998), the plaintiff brought a claim for misappropriation against the author of a novel because the novel’s account of the life of the main character allegedly paralleled her own life. The court stated that in order to prevail on a misappropriation claim, a plaintiff must show that (1) the plaintiff’s name or likeness was used by the defendants; and (2) that the “defendants derived commercial benefit from the identity of the plaintiff, the public interest in the plaintiff or from any other value associated with the plaintiff’s name or likeness.” Because the plaintiff had adduced no evidence that the defendant knew her or knew about her prior to outlining his novel, there were

more differences than similarities between the plaintiff's life and that of the novel's main character, the court determined that the plaintiff failed to establish these two elements. Moreover, the court ruled that the plaintiff had no right to her life story because plaintiff had testified before Congress concerning the events that she claimed were impermissibly related in the book. The district court also reiterated its belief that misappropriation and the right of publicity are essentially one cause of action and should be treated as a single cause of action for misappropriation.

In a similar case, plaintiff, Michael Polydoros, alleged that his image was misappropriated in a film which included a child character named Michael Palledorous, nicknamed "Squints." *Polydoros v. Twentieth Century Fox Film Corp.*, 57 Cal. App. 4th 795, 67 Cal. Rptr. 2d 305, 25 Media L. Rep. 2363 (1997), *aff'd*, 1998 WL 744431 (Cal. Oct. 14, 1998). Plaintiff alleged that the film, which was written and directed by a childhood schoolmate, appropriated his image as a child and copied some of the events of his childhood. The California Court of Appeal affirmed summary judgment for the defendant holding that the faint similarities between the plaintiff and character in fictional film did not constitute the required direct connection to satisfy a misappropriation claim.

In *Cerasani v. Sony Corporation*, 991 F. Supp. 343, (S.D.N.Y. 1998), the plaintiff, a reputed mafia figure, sued for misappropriation over "Donnie Brasco," a film about the New York mob. Plaintiff, John "Boobie" Cerasani claimed that both the publicly-released film and a preliminary version (which was shown to test audiences) violated his rights under § 51 of the New York Civil Rights Law because a character named "Paulie" in the film, who was called "Boobie" in the preliminary version, was identifiable as Cerasani. The New York federal district court dismissed the misappropriation claim stating that Cerasani could not recover for the publicly-released version of the film because his name was not used, and that he could not recover for the pre-release version of the film because a film screening, without charge, did not constitute use of Cerasani's name for "the purposes of trade."

In *Seale v. Gramercy Pictures et al.*, 964 F. Supp. 918 (E.D. Pa. 1997), *aff'd*, 156 F.3d 1225 (3rd Cir. 1998), former Black Panther Party Chairman Bobby Seale brought a right of publicity claim against the producers of the film, "Panther." Seale's claim was premised upon the use of two photographs of the actor portraying him in the film in the brochure accompanying the CD of the film's soundtrack. At a trial to the bench, the court entered a verdict for the defendants finding that the brochure contained no message that Seale endorsed, approved or otherwise was affiliated with the film or CD.

In a case which attracted considerable publicity — not only because of the legal issues involved, but because New York City's Transit Authority was accused of censorship at the behest of and to protect New York's high-profile Mayor, Rudolph Giuliani — the Court of Appeals for the Second Circuit held that the defendant Metropolitan Transportation Authority's refusal to display, on the sides of its buses, an advertisement for *New York* magazine that contained the nickname of New York City Mayor Rudolph Giuliani, violated plaintiff's First Amendment Rights. *New York Magazine v. Metropolitan Transp. Authority*, 136 F.3d. 123, 26 Media L. Rep. 1301 (2d Cir. 1998), *cert. denied*, 66 U.S.L.W. 3801 (Oct. 5, 1998) (No. 97-2020).

In a ride-along context a federal court in Ohio dismissed a misappropriation claim in *Reeves v. Fox Television Network*, 25 Media L. Rep. 2104 (N.D. Ohio 1997). In *Reeves*, the plaintiff's arrest was videotaped and aired as part of a "COPS" television show on Fox. The court granted defendants' summary judgment motion on plaintiff's claim for invasion of privacy by appropriation because "plaintiff's name and likeness has no intrinsic value. The Defendants did not include him in the "COPS" show because of his name, personality or prestige."

Significant Non-Media Misappropriation Decisions

In a case that picks up where *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395, 20 Media L. Rep. 1457 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2443 (1993), left off, the Ninth Circuit recently reversed a district court's grant of summary judgment in favor of the defendant on California statutory and common law privacy claims concerning the commercial use of two animatronic robots allegedly based on the likenesses of two actors from the "Cheers" show. *Wendt v. Host International, Inc.*, 125 F.3d 806, 25 Media L. Rep. 2345 (9th Cir. 1997). The suit was brought by actors George Wendt and John Ratzenberger, who played the characters Norm and Cliff in the hit television show. They claimed the use of the two robots (named "Bob" and "Hank") without their permission violated the Lanham Act and California's statutory and common law right of publicity. The district court granted summary judgment on all claims, but the Ninth Circuit reversed. The appellate court found that there was a triable issue of fact as to whether the robots were "sufficiently 'like'" the plaintiffs so as to violate the statute. The court also reversed summary judgment on the common law claim, rejecting defendants' argument that the robots appropriated only the identity of the characters the actors portrayed, not the identities of the actors themselves. "While it is true that appellants' fame arose in large part through their participation in 'Cheers,' an actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character."

In *Elvis Presley Enterp., Inc. v. Capece*, No. 97-20096 (5th Cir. May 7, 1998), plaintiff appealed that portion of the district court's judgment denying relief on its trademark infringement claims, its federal dilution claim, and its right of publicity claim based only upon the defendants' use of "The Velvet Elvis" service mark, as well as the district court's denial of an accounting of profits and attorneys' fees, to the Fifth Circuit. Reversing the district court, the Fifth Circuit held that defendants infringed plaintiff's marks with the use of "The Velvet Elvis" service mark and remanded the case for entry of judgment for plaintiff with respect to the infringement claim. Because all of the remedies that plaintiff sought that were preserved were available under its successful claims for trademark infringement, the Fifth Circuit did not reach plaintiff's federal trademark dilution claim or its right of publicity claim under Texas law with respect to "The Velvet Elvis" service mark.

In *Ahn v. Midway Mfg. Co.*, 965 F. Supp. 1134 (N.D. Ill. 1997), the court dismissed on summary judgment the plaintiffs' publicity claim because it was preempted by the Copyright Act of 1976. The plaintiffs alleged that the defendants violated their right of publicity by using the plaintiffs' names, persona, and likenesses in connection with a series of video games. The court stated, "a state claim is preempted by the Copyright Act if two elements are satisfied. First, the work in which the right is asserted must be fixed in a tangible form and fall within the subject matter of copyright under

§ 102 of the Act. Second, the right asserted must be equivalent to any of the rights specified in § 106 of the Act.” The first preemption element was satisfied because the plaintiffs’ images were videotaped with the plaintiffs’ consent and “choreographic works fall within the subject matter of copyright.” And the second element was satisfied, the court held, because “the right of publicity is equivalent to one of the rights in § 106 because it is infringed by the act of distributing, performing or preparing derivative works.”

In *Astaire v. Best Film & Video Corp.*, 116 F. 3d 1297 (9th Cir. 1997), *cert. denied*, 67 U.S.L.W. 3203 (Oct. 5, 1998) (No. 98-15), the Ninth Circuit held that Civil Code § 990(n), which provides for the survivability of a “personality’s” right of publicity, exempted a videotape manufacturer’s use of film clips showing performances by now-deceased Fred Astaire in its dance instructional videotapes. The court held the videotapes fell within the exemption for film and television programs even though the use of the clips was for advertising or commercial purposes.

5. Intentional Infliction of Emotional Distress

Recognition

According to the 1998-99 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.¹⁸ In the remaining 20 jurisdictions, the courts have yet to address the application of the tort to the media.¹⁹

Significant Media Cases

Although intentional infliction of emotional distress has not been a particularly successful claim against the media, two New York cases against radio DJ’s have been permitted to proceed (at least beyond the motion to dismiss stage) by the state’s intermediate appellate courts. In *Roach v. Stern*, ___ A.D.2d ___ (N.Y. App. Div. 2d Dept. July 6, 1998), the appellate court reinstated an intentional infliction of emotional distress claim against radio personality Howard Stern brought by the relatives of Debbie Tay — a deceased fan and former guest. Plaintiffs filed suit over a segment in which Stern handled the cremated remains of Ms. Tay, which were brought to the studio by a friend of Ms. Tay’s who was given a portion of the remains by Ms. Tay’s sister. The appellate court reversed the trial court’s dismissal finding that “a jury might reasonably conclude that the manner in which Tay’s remains were handled, for entertainment purposes and against the express wishes of her family, went beyond the bounds of decent behavior.”

¹⁸ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Kentucky (intermediate), Louisiana, Maine (federal), Maryland, Massachusetts, Michigan (intermediate), Minnesota, Mississippi (federal), Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma (intermediate), Pennsylvania, Rhode Island (federal), South Carolina, Texas, Utah, Virginia, Washington, and Wyoming.

¹⁹ Alaska, Delaware, Guam, Hawaii, Idaho, Indiana, Iowa, Kansas, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Puerto Rico, South Dakota, Tennessee, Vermont, Virgin Islands, West Virginia, and Wisconsin.

In *Esposito-Hilder v. SFX Broadcasting, Inc.*, 236 A.D.2d 186, 26 Media L. Rep. 1541 (N.Y. App. Div., 3d Dept. 1997), the appellate court affirmed a trial court denial of defendants' motion to dismiss an intentional infliction of emotional distress claim filed in response to a radio station's "Ugliest Bride Contest." During the particular segment which gave rise to the suit, the DJ's deviated from the normal routine of the "contest," which involved picking out the "ugliest" bride from a newspaper's bridal announcements, by disclosing the plaintiff's full name, her place and position of employment (she worked for a rival radio station), as well as the identity of, and her relations with, her superiors. In its decision the appellate court rejected the defendants' First Amendment defenses holding that where (1) the plaintiff was a private individual and not a public figure, (2) the defendants' communications involved a matter of virtually no public interest, and (3) the parties were business competitors, the protections of the First Amendment were outweighed by the State's interest in compensating individuals for harm.

On the other hand, a number of cases reported in the 1998-99 SURVEY were dismissed because the plaintiff failed to show the defendant's conduct was sufficiently outrageous. In *Schuler v. McGraw-Hill Companies, Inc.*, 989 F. Supp. 1377, 25 Media L. Rep. 2409 (D.N.M. 1997), *aff'd*, 145 F.3d 1346, 26 Media L. Rep. 1604 (10th Cir. 1998), for example, the court held that a *Business Week* magazine article relating to plaintiff's sex change and transsexual status did not constitute intentional infliction of emotional distress because plaintiff's transsexual status was highly relevant to the central inquiry of the article and there was "nothing extreme or outrageous about defendant's conduct."

Similarly, in *Granada Biosciences, Inc. v. Barrett*, 958 S.W.2d 215 (Tex. App.--Amarillo 1997), *review denied*, (Oct. 15, 1998), despite the plaintiffs' argument that a reporter for *Forbes* magazine inflicted emotional distress on them by leading them to believe he was interested in correcting his allegedly false story but then rushing to publish the story without corrections, the court held that while the reporter's conduct "may be described as aggressive journalism, the summary judgment evidence established as a matter of law that [his] conduct was not extreme and outrageous."

In *Cook v. Winfrey*, 141 F.3d 322, 26 Media L. Rep. 1586 (7th Cir. 1998), the Seventh Circuit found that allegations that celebrity defendant Winfrey made potentially defamatory statements about the plaintiff, including calling him "a liar" and denying having had a relationship with him, did not constitute extreme and outrageous conduct and, accordingly, did not state a claim for intentional infliction of emotional distress. *See also, Valdez v. Domeniconi*, 6 Mass. L. Rptr. 501 (Mass. Super. 1997) (failure of broadcast company to use seven-second delay to prevent broadcast of defamatory statements by non-employees who purchased air time was not sufficiently outrageous to support claim for intentional infliction of emotional distress).

In *Reeves v. Fox Television Network*, 25 Media L. Rep. 2104 (N.D. Ohio 1997), plaintiff's arrest was videotaped and aired as part of a "COPS" television show on Fox. The court granted summary judgment on plaintiff's infliction of emotional distress claims because "plaintiff has not submitted any evidence that he has suffered severe emotional distress following the broadcasts." Plaintiff admitted that he did not seek medical treatment for any emotional distress arising from the

videotaping and broadcast; that no doctor told him that his physical condition deteriorated as a result of the broadcast; and that he had not taken any medication to treat any condition arising out of the videotaping or broadcast.

Courts also were careful to limit intentional infliction of emotional distress claims which they felt were attempts at escaping the requirements of libel law. In *Cowras v. Hard Copy*, Docket No. 3:95CV99 (D. Conn. September 29, 1997), the Connecticut District Court explained that the tort of intentional infliction of emotional distress cannot be used to circumvent the established and carefully balanced framework of constitutional and state libel law. Therefore, if the facts upon which a plaintiff's emotional distress claims are identical to the facts that support a plaintiff's defamation claim, the court must apply the stringent defamation standards to the emotional distress claims.

Similarly, the Eastern District of Pennsylvania found that where an intentional infliction of emotional distress claim springs from the same conduct as a defamation claim, the plaintiff may not circumvent the one-year statute of limitations merely by terming the claim as one for intentional infliction. *Tucker v. MTS, Inc.*, 1998 WL 67527 (E.D. Pa. Feb. 18, 1998) (dismissing as time-barred plaintiff's claim that recording artist's lyrics constituted intentional infliction of emotional distress).

Non-Media Intentional Infliction of Emotional Distress Decisions

Arkansas' "outrage" (intentional infliction of emotional distress) tort received significant attention in early April 1998 as a result of *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998). In granting the President's motion for summary judgment, the court concluded that plaintiff's state "outrage" allegations "fell far short of the rigorous standards for establishing a claim of outrage under Arkansas law." The court noted that Arkansas courts, absent physical harm, "... look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious."

In *Taylor v. Metzger*, 706 A.2d 685 (N.J. 1998), the New Jersey Supreme Court significantly lowered the bar for taking an intentional infliction of emotional distress claim to a jury. The court ruled that a racial slur uttered by a sheriff directed against a subordinate officer is not, as a matter of law, a mere insult or triviality and the fact that defendants uttered only one slur toward plaintiff does not preclude it from being extreme and outrageous, thereby reversing a lower-court's summary judgment for defendant.

In *Thompkins v. Cyr*, 995 F. Supp. 664 (N.D. Tex. 1998), a physician who provided abortion services sued various individuals and organizations who had targeted the physician for a coordinated effort to stop him from providing abortion services. The defendants had engaged in activities such as picketing his house, conducting surveillance of his house and following him, and calling on phone and mailing him numerous letters, some containing death threats. The physician and his wife sued, alleging, among other things, intentional infliction of emotional distress. After a large jury verdict for the plaintiffs, the defendants sought to set aside the judgment as a matter of law. In particular, they contended that the "outrageousness" requirement violated the First Amendment. The court disagreed, stating that, although outrageous speech is protected by the Constitution, outrageous conduct is not. The court found that focused residential picketing was outrageous per se. The court

further found that following the plaintiffs and conducting surveillance of their property was not conduct that was protected by the First Amendment.

6. Prima Facie Tort

According to the 1998-99 MEDIA PRIVACY AND RELATED LAW SURVEY, courts in New Jersey and Texas had the opportunity to explicitly adopt (or reject) prima facie tort in the past year, but declined to do so.

In *Taylor v. Metzger*, 706 A.2d 685 (N.J. 1998), the New Jersey Supreme Court issued an ambiguous opinion regarding prima facie tort. While the court acknowledged that a New Jersey cause of action for prima facie tort had been recognized by various law review articles and one Appellate Division case, the court declared that prima facie tort “should not be invoked when the essential elements of an *established* and relevant cause of action are missing,” and quoted with approval the declaration of a New York court that “[p]rima facie tort should not become a ‘catch-all’ alternative for every cause of action which cannot stand on its legs.” Holding that the trial court had properly dismissed the prima facie tort claim in the case at bar, the *Taylor* court declined to resolve whether the tort exists in New Jersey: “this case presents no opportunity for this Court to determine the applicability of a cause of action for prima facie tort.”

Similarly, in *RRR Farms, Ltd. v. American Horse Protection Ass’n., Inc.*, 957 S.W.2d 121 (Tex. App.—Houston 14th Dist. 1997, n.w.h.), the Texas Court of Appeal declined to decide whether prima facie tort is recognized in Texas.

In addition, even in those jurisdictions which recognize prima facie tort, courts have limited the tort’s applicability. In *Schuler v. McGraw-Hill Companies, Inc.*, 989 F. Supp. 1377, 25 Media L. Rep. 2409 (D.N.M. 1997), *aff’d*, 145 F.3d 1346, 26 Media L. Rep. 1604 (10th Cir. 1998), the only prima facie tort case in the 1998-99 SURVEY involving the media, for example, plaintiff made various claims including defamation, invasion of privacy, interference with business relations, intentional infliction of emotional distress and prima facie tort relating to a *Business Week* article which discussed plaintiff’s sex change. The U.S. District Court for the District of New Mexico rejected plaintiff’s claim for prima facie tort holding that the conduct alleged by plaintiff clearly fits within the contours of several traditional torts. The court further held that plaintiff is “relying on prima facie tort to evade the requirements of these more traditional torts which is not the proper use of this tort.” *Id.* at 2418.

7. Negligent Infliction of Emotional Distress

Recognition

According to the 1998-99 MEDIA PRIVACY SURVEY, 45 jurisdictions currently recognize a

cause of action for negligent infliction of emotional distress.²⁰ In 15 of these jurisdictions the tort has been analyzed in the media context,²¹ in 29 jurisdictions there have been no cases involving the media,²² and one jurisdiction has expressly rejected its application in the media context.²³ Seven jurisdictions have expressly rejected the tort in all cases²⁴ and in two jurisdictions there are no cases reported.²⁵

Significant Media Cases

In the only media case involving negligent infliction of emotional distress reported in the 1998-99 SURVEY, the U.S. District Court for the District of Connecticut held that negligent infliction of emotional distress cannot be used to circumvent constitutional and state libel law. Therefore, the court continued, if the facts upon which a plaintiff's emotional distress claims are based are identical to the facts that support a plaintiff's defamation claim, the court must apply the stringent defamation standards to the emotional distress claims. *Cowras v. Hard Copy*, Docket No. 3:95CV99 (D. Conn. September 29, 1997).

8. Conspiracy

In *Berger v. Hanlon*, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), *cert. filed*, 67 U.S.L.W. 3024 (June 29, 1998) (No. 98-38), the Ninth Circuit Court of Appeals held, in a case arising out of Montana, that a "conspiracy" between the government and the media regarding media's presence at the execution of a government search warrant on private property was sufficient to imbue the media with the requisite "state action" to support a section 1983 claim against the media.

9. Breach of Contract

While no decisions reported in the 1998-99 PRIVACY AND RELATED LAW SURVEY centered on the type of "burned source" liability of *Cohen v. Cowles*, a Maine federal court found that NBC

²⁰ Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Guam, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

²¹ California, Colorado, Connecticut, Louisiana, Maine, Minnesota, Mississippi, Montana, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, and Washington.

²² Alaska, Arizona, Delaware, District of Columbia, Florida, Guam, Hawaii, Idaho, Illinois, Indiana, Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virgin Islands, Virginia, West Virginia, Wisconsin, and Wyoming.

²³ Michigan.

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

²⁵ Kansas and South Carolina.

could be held liable on a fraudulent misrepresentation theory for breaking its promise to produce a “positive” report on the trucking industry. *Veilleux v. NBC*, 1998 U.S. Dist LEXIS 8056 (D.Me. May 29, 1998). Plaintiffs, Classic Carriers trucking company owners, Raymond and Kathy Veilleux, and their employee, truck driver Peter Kennedy, claimed that they were persuaded to cooperate with the production of an NBC *Dateline* report on the trucking industry based on assurances from the network that the report would show the “positive side” of the trucking industry. Plaintiffs sued for fraudulent misrepresentation, libel, invasion of privacy and emotional distress following the broadcast of the report which allegedly showed Kennedy violating several service and safety regulations during a cross-country haul as well as admitting to failing a drug test. Addressing the misrepresentation claim, the court held that media representatives could be held liable for negligent misrepresentation in cases where the reliance on media promises resulted in pecuniary harms. At trial, the jury returned a verdict of \$525,000 against NBC on the misrepresentation, libel, privacy, and emotional distress claims.

In *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1255 (9th Cir. 1997), the Ninth Circuit noted that the text and graphic signaling that Clint Eastwood consented to an interview with the *National Enquirer* exceeded any consent Eastwood gave to be interviewed by a freelance author unaffiliated with the *Enquirer*. In fact, the court found that the text and graphic signaling evidenced the editors actual malice and supported the \$150,000 award in Eastwood’s favor.

10. 42 U.S.C. § 1983

In a case discussed above, *see* “Ride-Alongs,” *supra*, the Ninth Circuit reversed a district court’s grant of summary judgment on a claim brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging Fourth Amendment violations by a television news and camera crew that accompanied government officials on a warrant search of a private ranch. *Berger v. Hanlon*, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), *cert. filed*, 67 U.S.L.W. 3024 (June 29, 1998) (No. 98-38). Applying the “joint action test”, the court found the media defendants could be liable as government actors under *Bivens* because they were engaged “jointly in an enterprise that only the government could lawfully institute — the execution of a search warrant — for the mutual benefit of both the private interests of the media and the government officials’ interest in publicity.”.

In *Fyfe v. Canan*, 24 Media L. Rep. 2448 (M.D. Fla. 1996), *aff’d*, 124 F.3d 1299 (11th Cir. 1997), the court held that a newspaper did not violate 42 U.S.C. § 1983 by refusing to run plaintiff prison inmate’s personal advertisement, through which he hoped to communicate with his children. The court found that the plaintiff failed to demonstrate that newspaper conspired with government to deprive him of his constitutional rights, and that the newspaper had First Amendment right to determine what it publishes.

Similarly, in *Yeo v. Town of Lexington*, 131 F.3d 241, 26 Media L. Rep. 1193 (1st Cir. 1997), *cert. denied*, 66 U.S.L.W. 3772 (U.S. June 1, 1998) (No. 97-1462) First Circuit Court of Appeals declared that the decision of the student editors of a public high school newspaper and yearbook not

to publish a parent's advertisement promoting abstinence was not "state action" for purposes of a Section 1983 claim against the town, school committee, and school officials.

11. Interference With Contract/Business Relations

According to the 1998-99 PRIVACY AND RELATED LAW SURVEY, plaintiffs achieved little success in attempting to sue the media for tortious interference with contract/business relations. In *Schuler v. McGraw-Hill Companies, Inc.*, 989 F. Supp. 1377, 25 Media L. Rep. 2409 (D.N.M. 1997), *aff'd*, 145 F.3d 1346, 26 Media L. Rep. 1604 (10th Cir. 1998), for example, the court rejected claims of interference with contractual relations after dismissing the defamation and invasion of privacy claims on which they were based. The court also suggested that "exercising [the] First Amendment right to freedom of the press" could never constitute the sort of "improper motive" or "improper means" necessary to establish an interference cause of action.

Similarly, in *Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467 (Tex. App.--Dallas 1994, writ denied), and *KTRK Television v. Felder*, 950 S.W.2d 100, 25 Media L. Rep. 2418 (Tex. App.--Houston 14th Dist. 1997, n.w.h.), the courts held that plaintiffs could not recover against media defendants for tortious interference with contract or business relations. In both cases, the courts found that the plaintiffs' tortious interference claims were grounded entirely on the facts underlying their defamation and libel claims. The courts held that the news reports in both cases were substantially true, thereby precluding plaintiffs from recovering on their tortious interference claims as a matter of law. *See also, The David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728 (S.D. Tex. 1998) (truth is an affirmative defense to tortious interference claims); *Robles v. Consolidated Graphics, Inc.*, 965 S.W.2d 552 (Tex. App.--Houston 14th Dist. 1997, n.w.h.) (disclosure of truthful, non-confidential information cannot alone constitute tortious interference).

Tortious interference claims were also raised in two media cases relating to business matters — namely, radio ownership. In *Magnum Radio, Inc. v. Brieske*, 577 N.W.2d 377 (Wis. Ct. App. 1998), the Wisconsin Court of Appeals recognized a claim for intentional interference with contract, based on the *Restatement (Second) of Torts* § 766A (1979). The plaintiff, who planned to and eventually purchased two radio stations in Wisconsin, sued for tortious interference after the defendant, who was admittedly interested in purchasing one of the stations himself, wrote a letter to the FCC objecting to the sale based on his concern that if the plaintiff purchased the stations, they would not provide adequate local news and sports coverage. The plaintiff claimed that despite the FCC's rejection of the defendant's opposition, and the approval of the sale, the defendant's actions caused it to lose revenues and incur added legal expenses. Reversing a trial court grant of summary judgment the Wisconsin Court of Appeals held that the plaintiff need not prove that the defendant's conduct prevented the plaintiff from performing a contract, the court held; rather, it is sufficient that the defendant caused the performance of the contract to be more expensive or burdensome.

On the other hand in *Zimmer Radio of Mid-Missouri, Inc. v. Lake Broadcasting, Inc.*, 937 S.W.2d 402 (Mo. App. 1997), a radio station owner brought an action for tortious interference with business expectancy against competitors for the filing of applications for new stations and counter

proposals for new allotments allegedly to impede the inauguration of competitive broadcast services by plaintiff. Plaintiff argued that defendants tortiously interfered with its reasonable expectation of upgrading the class and increasing the effective radiating power of its radio station and the corresponding increase in geographic service area, market audience, revenue and net worth of the station. The court held that the plaintiff's business expectancy was created under the Federal Communication Act, 47 U.S.C. § 414 and therefore its common law claim for tortious interference was pre-empted by federal law.

12. Injurious Falsehood/Product Disparagement/Slander of Title

In 1998, the False Disparagement of Perishable Food Products Act, the so-called "veggie libel" law, attracted nationwide attention in the lawsuit filed by Texas cattlemen against Oprah Winfrey, HARPO Productions, Inc., King World Productions, Inc., and Howard Lyman. *Texas Beef Group, et al. v. Oprah Winfrey, et al.*, Civil Action No. 2-96-CV-208 (N.D. Tex 1998). The suit was filed in response to an April 16, 1996, *The Oprah Winfrey Show* broadcast entitled "Dangerous Food," which included a segment on Bovine Spongiform Encephalopathy ("mad cow disease"). A portion of the segment discussed the potential for "mad cow disease" in the United States. One guest in this segment was defendant Howard Lyman, a former cattle-rancher turned vegetarian who is executive director of the Humane Society's Eating with Conscience campaign. Lyman asserted the need for a mandatory ban on ruminant-to-ruminant feeding and stated that the United States is at risk of an outbreak of "mad cow disease" if the practice continued. Oprah responded by saying that Lyman's assertions "stopped [her] cold from eating another burger."

Plaintiffs alleged causes of action for disparagement under the False Disparagement of Perishable Food Products Act, business disparagement, common law libel, negligence, and negligence per se. Plaintiffs further claimed that this Oprah show caused the cattle industry to suffer millions of dollars in cattle losses and loss of confidence in beef products by many consumers. At the close of plaintiffs' case, the district court granted defendants judgment as a matter of law on all claims except common law business disparagement. The district court dismissed plaintiffs' claim under the False Disparagement of Perishable Food Products Act on the ground that plaintiffs' cattle did not constitute a "perishable food product" under the statute and that plaintiffs did not sustain their burden in proving that defendants had actual knowledge of the falsity, if any, of the statements made. *See Amended Order* dated February 27, 1998. The jury found for defendants on the remaining business disparagement claim.

Recently, several cattle owners, including a plaintiff from the first *Oprah Winfrey* case, sued Oprah Winfrey and the other defendants again in Texas state court for alleged damages resulting from the same April 16 broadcast. The claims are identical to those alleged in the first *Oprah* case, except that plaintiffs have not urged causes of action for libel or slander, presumably because the one-year statute of limitations has run. Defendants removed the action to federal court, and the case is pending before the same judge that presided over the first *Oprah* action. Defendants have filed a motion to dismiss which is currently pending.

Two other lawsuits have been filed under the Texas False Disparagement of Perishable Food Products Act. In *Burleson Enterps, Inc., et al. v. American Honda Motor Co.*, Civil Action No. 2-97-398 (N.D. Tex.), emu breeders sued American Honda over an advertisement which calls emu is "the pork of the future." Plaintiffs claim that the commercial disparaged emus as pork "[w]hen, in fact, the emu is the antithesis of pork," associated the emu industry with a pyramid scheme when its breeders "are hardworking, honest Americans," and diminished the emu market. The defendants' motion for summary judgment is pending.

In *Pat Anderton, d/b/a A-1 Turf Farm, and d/b/a A-1 Grass Co. v. James McAfee*, Cause No. 96-12667 (134th Jud. Dist. Ct. Dallas Cty., Texas), the plaintiff Pat Anderton, owner and operator of a grass sod business, sued James McAfee, Ph.D., a doctor in agronomy who specializes in turf grass management who was employed by Texas A&M university, over a news release in which McAfee stated that Anderton's sod is susceptible to disease in areas with higher rainfall or humidity and recommended against its use in the Dallas-Fort Worth metroplex. On April 8, 1998, the district court granted McAfee's motion for summary judgment and dismissed all claims made against him on the ground that the claims were barred by the doctrine of official immunity.

In other disparagement/injurious falsehood actions, courts often dismissed cases because they did not meet the traditional requirements of libel law. See, e.g., *Shears v. USA Today*, 139 F.3d 908 (9th Cir. 1998) (unpublished) (injurious falsehood claim dismissed because article and photograph not "of and concerning" plaintiff, who was neither named in article nor depicted in photograph); *Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.*, 988 F. Supp. 1341, 25 Media L. Rep. 2351 (D. Colo. 1997) (if a statement is privileged as opinion under the First Amendment, then there is no cause of action for injurious falsehood); *KTRK Television v. Felder*, 950 S.W.2d 100, 25 Media L. Rep. 2418 (Tex. App.--Houston 14th Dist. 1997, n.w.h.) ("substantial truth" standard used in defamation cases is applicable to business disparagement claims based on the same factual allegations as a defamation cause of action); *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422 (Tex. App.--Waco 1997, writ denied June 5, 1998) (same).

While libel requirements and privileges may apply to disparagement claims, one court decided that the torts are not automatically interchangeable. In *Granada Biosciences, Inc. v. Barrett*, 958 S.W.2d 215 (Tex. App.--Amarillo 1997, writ requested Dec. 5, 1997), the media defendants, *Forbes* magazine and its reporter, interpreted the plaintiffs' complaint as raising a libel claim and moved for summary judgment on this claim, raising the fair comment privilege as one defense. The court held that plaintiffs had actually sued the media defendants for business disparagement, rather than libel. Because the defendants failed to address the business disparagement claim in their motion for summary judgment, the court reversed the summary judgment for defendants, despite the defendants' contention that the legal arguments in their motion applied equally to business disparagement.

13. Lanham Act/State Unfair Competition Law

In *Seale v. Gramercy Pictures et al.*, 964 F. Supp. 918 (E.D. Pa. 1997), *aff'd*, 156 F.3d 1225 (3rd Cir. 1998), the plaintiff, a founder of the "Black Panthers," brought a Lanham Act claim against

the producers of "Panther," a film about the organization. The plaintiff's Lanham Act claim was premised upon the publication of pictures of the actor who portrayed the plaintiff in the compact disk brochure accompanying the film's soundtrack. In granting the movie producers' motion for summary judgment, the district court held that the plaintiff had failed to show either that the use of the pictures signified an endorsement of, approval of, or affiliation with the soundtrack on the part of the plaintiff, or that the public was actually deceived into believing that the plaintiff endorsed, approved, or was affiliated with the soundtrack.

In a case which bears some resemblance to the facts in *Food Lion v. ABC*, a federal district court in Virginia dismissed a Lanham Act claim brought against People for the Ethical Treatment of Animals (PETA). *Huntingdon Life Sciences, Inc. v. Rokke*, 978 F. Supp. 662 (E.D. Va. 1997). The plaintiff, a New Jersey laboratory brought suit after a PETA employee conducted an undercover investigation in a New Jersey laboratory and collected information that was subsequently issued in press releases, interviews, and a videotape in an effort to attack the laboratory's animal testing practices. The plaintiff alleged that PETA published false and disparaging statements in connection with the disclosure of trade secrets and proprietary information. The plaintiff further alleged that the "false statements, descriptions, and representations published by the defendants were made in commercial advertising or promotion, and were transported by defendants, or caused to be transported by defendants in interstate commerce." The court dismissed the Lanham Act claim, finding that PETA's speech was more properly characterized as political, rather than commercial, and that PETA's actions did not constitute "advertising or promotion" within the meaning of the Act.

14. Negligent Media Publication

The Fourth Circuit allowed a wrongful death claim against a book publisher to go to a jury in *Rice v. Paladin*, 128 F.3d 233, 25 Media L. Rep. 2441 (4th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3683 (U.S. April 21, 1998) (No. 97-1325). The court reversed the district court's grant of summary judgment in the publisher's favor in a case arising out of a triple murder by a hired "hit man," who apparently based his activity on instructions contained in *Hit Man: A Technical Manual for Independent Contractors*. Emphasizing the publication's detailed descriptions of various acts of murder and torture by quoting liberally from the text, the court held that a jury should determine whether the publisher was liable for wrongful death of the three victims under an aiding and abetting theory. The panel rejected the publisher's contention that the text engaged only in abstract advocacy of the activities described, which would receive First Amendment protection under the rationale of the line of cases following *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed.2d 430 (1969), and it held that a reasonable jury could determine that the book was published with the intent that the instructions in it actually be used to commit the various crimes described.

The court pointed to the "comprehensive and detailed" step-by-step instructions, which a jury could find had no communicative value but to train persons how to murder and engage in the murder-for-hire business, and, it also noted the publisher's "astonishing stipulations" that it had targeted the book, among others, to criminals, that it intended that the book be used in the solicitation, planning and commission of the crimes described and that the publisher has "assisted" the murderer in his

crime. On this basis, the court rejected arguments made in numerous *amici* briefs that rejecting First Amendment protection for the publisher's activity would narrow the permissible range of news reporting and publication of instruction manuals. The court indicated that it believed that rejection of summary judgment on the issue of intent was "remote indeed" without the "substantial confirmation of specific intent" presented by the evidence in the instant case. The panel "assumed" that mere "foreseeability or knowledge" that contents of a publication could be misused for criminal purposes was insufficient to impose liability, but it provided no guidance about how this distinction would be applied in practice.

Following the publication of the decision in *Rice v. Paladin*, the Louisiana Court of Appeal for the First Circuit reversed the dismissal of a negligent publication action in a suit arising out of a copycat crime spree allegedly inspired by the film, *Natural Born Killers*. *Byers v. Edmonson*, No. 95-022 (La. Ct. App. May 15, 1998). The court ruled that plaintiffs' petition pleaded cognizable causes of action for negligence and intentional tort against the movie's producers under Louisiana law. Citing *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert denied*, 66 U.S.L.W. 3686 (1998), the court held that neither the United States nor Louisiana constitutions barred the plaintiffs from pursuing the action.

In *Davidson v. Time Warner, Inc.*, 25 Media L. Rep. 1705 (S.D. Tex. March 31, 1997), a Texas federal district court dismissed a negligent publication action brought by the relatives of a police officer who was killed during a traffic stop by a man who was listening to an audio cassette containing music with violent and offensive lyrics, some of which referred to shooting police officers. The court held that playing a musical recording is not an act likely to induce a listener to violence and thus is not grounds for liability for the recording's author or publisher because any injury of this type is unforeseeable by the media defendant.

In *Bailey v. Huggins Diagnostic & Rehabilitation Center, Inc.*, 952 P.2d 768 (Colo. App. 1997), *cert. denied* (Feb. 23, 1998), the Colorado Court of Appeals held that authors or interviewees on public television programs do not owe a legal duty of due care to those members of the public who may read the book or view the program. The suit was brought by a woman who, after seeing the defendant interviewed on television and reading his book regarding the dangers of dental amalgams, visited the defendant's dental clinic and had all of her dental work removed. The amalgam was replaced, she claimed, with inferior materials. The plaintiff subsequently sued Huggins and the clinic, claiming that Huggins had negligently published false statements in his book and on television about the dangers of dental amalgams. In finding no legal duty, the court emphasized that, "the social utility of encouraging authors to address issues of public concern, and the magnitude of the burden that would be imposed upon them if a duty of care were recognized, far outweigh the private interest of any individual reader, at least in those instances, as here, in which the published work implicates no illegal conduct."

15. Negligent Retention and Hiring

In a troubling decision which may provide plaintiffs with additional avenues for recovery, an

Illinois appellate court upheld a cause of action by a plaintiff against a broadcast company for the negligent hiring, supervision, and retention of a radio personality, who had an alleged history of outrageous and irresponsible on-air stunts and comments. The court held that the plaintiff could maintain these negligence claims even in the absence of any physical injury caused by the radio personality, holding that such injury is not a required element of the claim. The court also rejected the defendant's First Amendment challenge that recognizing this cause of action would create an impermissible chilling effect because it would make broadcasters liable not for what their employee actually says, but what he might say in the future. *Van Horne v. Muller*, 691 N.E.2d 74 (Ill. App., 1st Dist. 1998), *appeal allowed*, 699 N.E.2d 1038 (Ill. 1998). The case is currently pending before the Illinois Supreme Court.

16. Related Privacy Developments

The 1998-99 PRIVACY AND RELATED LAW SURVEY also reported a few cases in which the government attempted to limit speech based upon privacy rationales. In *State of Missouri ex. rel. Missouri Highway and Transportation Commission v. Cuffley*, 927 F. Supp. 1248 (E.D. Mo. 1996), *vacated*, 112 F.3d 1332 (8th Cir. 1997), the district court addressed the state's claim that it was entitled to deny the Ku Klux Klan application to participate in the State's Adopt-A-Highway program. Among other reasons, the state had claimed that permitting the Klan's name to be displayed before the "captive audience" of highway users would violate the privacy interests of those users. The district court strongly rejected this attempt to use privacy as a rationale for silencing views, quoting *Cohen v. California*, 403 U.S. 14 (1971), for the proposition that government may not use privacy as the justification for censorship except upon "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." The Eighth Circuit vacated the district court's decision, however, upon a sua sponte determination that the district court lacked federal-question jurisdiction (since the First Amendment issue was not introduced by the plaintiff's complaint for declaratory judgment) and the case was not ripe for review (because the state had not denied the Klan's application but had merely sought declaratory judgment that it need not accept the application).

In *Coplin v. Fairfield Public Access Television Committee*, 111 F.3d 1395, 25 Media L. Rep. 1737 (8th Cir. 1997), the Eighth Circuit addressed public disclosure of private facts in a context where a government agency raised it as justification for denying a forum to one who allegedly violated another's privacy rights through public disclosure of private facts. A local talk show producer who had been banned from the city's public access television channel brought a § 1983 action alleging that the city's public access television committee and members of the city council had violated his rights under the First Amendment and Cable Communications Policy Act. The plaintiff had been banned for having hosted a live call-in segment in which, among other things, callers purported to reveal the sexual habits of unnamed neighbors at specific addresses. A magistrate judge reasoned that the statements aired on plaintiff's show were, if true, an invasion of privacy, and if untrue, defamatory. The magistrate thereof concluded that the statements aired on plaintiff's show were not constitutionally protected speech and were subject to sanction without violating plaintiff's

rights. On appeal, the Eighth Circuit noted that governmental regulation of the public disclosure of facts about private individuals is constitutional only if: "(1) any such regulation is viewpoint-neutral; (2) the facts revealed are not already in the public domain; (3) the facts revealed are not a legitimate subject of public interest; and (4) the facts revealed are highly offensive." The court noted that the defendants failed to submit evidence or even allege that the facts were not already in the public domain, were not a legitimate concern of public interest, and were highly offensive — all elements that the court implicitly found essential to a private facts violation. Accordingly, the court reversed, finding that the defendants failed to rebut a presumption that their content-based regulation of plaintiff's show was invalid.

Finally, in *New York Magazine v. Metropolitan Transp. Authority*, 136 F.3d 123, 26 Media L. Rep. 1301 (2d Cir. 1998), *cert. denied*, 66 U.S.L.W. 3801 (Oct. 5, 1998) (No. 97-2020), the Court of Appeals for the Second Circuit affirmed a district court order granting a preliminary injunction to plaintiff, the publisher of *New York* magazine. The court held that the defendant Metropolitan Transportation Authority's refusal to display, on the sides of its buses, an advertisement for *New York* magazine that contained the nickname of New York City Mayor Rudolph Giuliani, based upon a misappropriation rationale, violated the magazine's First Amendment Rights. The court held that applying CRL § 50 to enjoin the advertisement was a prior restraint on commercial speech and was more extensive than necessary to protect Giuliani's rights under CRL § 51.

C. STATUTES AND RELATED CASE LAW REPORTED IN THE 1998-99 SURVEYS

1. Anti-SLAPP Statutes

Based on the 1998-99 SURVEYS, anti-SLAPP (strategic lawsuits against public participation) laws are emerging as significant remedies against meritless libel suits. According to the SURVEYS, California, Delaware, Georgia, Massachusetts, Minnesota, New York, Rhode Island and Washington have enacted anti-SLAPP laws. Anti-SLAPP laws generally provide for the early dismissal of meritless claims, and may also provide for the recovery of legal fees.

No jurisdictions adopted anti-SLAPP legislation in the last year. An attempt to introduce anti-SLAPP legislation was defeated in the 1998 Kansas Legislature, however.

In California, the Supreme Court has granted review in *Briggs v. Eden Council for Hope & Opportunity*, 54 Cal. App. 4th 1237, 63 Cal. Rptr. 2d 434 (Cal. Ct. App. 1997), *review granted*, 942 P.2d 413 (Cal. 1997), a case in which the California Court of Appeal applied a narrow interpretation of the anti-SLAPP statute. In the meantime, however, the state legislature amended the statute, effective January 1, 1998, to expand the statute's coverage to include "any . . . conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." The amendment also provides the explicit instruction that "this statute should be construed broadly," effectively overruling the result in *Briggs*. It is not clear what effect the legislature's amendment of the statute will have on the

California Supreme Court's decision to grant review in *Briggs*.

In Massachusetts, the Supreme Judicial Court held that the state's anti-SLAPP statute (M.G.L. c. 231, § 59H) did not apply to meritorious claims with a substantial basis other than or, in addition to, a protected petitioning activity (e.g., a breach of contract claim). *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935 (Mass. 1998). In *Salvo v. Ottoway Newspapers, Inc.*, Mass. Lawyers Weekly No. 12-125-98 (Mass. Super. 1998), a Massachusetts Superior Court held that a newspaper had standing to bring a special motion to dismiss under the Massachusetts anti-SLAPP statute (M.G.L. c. 231, § 59H), but denied the motion because the plaintiff had shown that the statements sued upon were devoid of any reasonable factual support or arguable basis in law and had caused the plaintiff actual injury.

In Georgia, the Court of Appeals affirmed the dismissal, under the state's anti-SLAPP statute (O.C.G.A. § 9-11-11.1), of an action for an injunction, breach of contract and tortious interference with contractual relations by a developer against residents who actively opposed rezoning proposals. *Providence Construction Co. v. Bauer*, 494 S.E.2d 527 (Ga. App. 1997), *review denied*, (May 1, 1998).

In *Hoyt v. Spangenberg*, 1997 WL 74286 (Minn. Ct. App. 1998) (unpublished opinion), the Court of Appeals affirmed the trial court's dismissal of a defamation lawsuit where the anti-SLAPP act was involved procedurally, if not substantively. The president of a company owning a downtown building and parking ramp brought a defamation action against a neighborhood resident. The resident moved to dismiss under Minn. Stat. § 554 and for summary judgment under Rule 56; he also moved to suspend discovery pursuant to § 554. The trial court suspended discovery and granted the motion for summary judgment. The Court of Appeals affirmed, but denied attorneys fees because the defendant "did not prevail under chapter 554," but was "granted summary judgment on common law grounds." *Id.* at *4. The court declined to decide the constitutionality of § 554 for the same reason.

In New York, where a case has yet to be dismissed under the state anti-SLAPP statute, a Supreme Court judge found that an AIDS fundraising organization fit within the statutory definition of "public applicant or permittee." *Long Island Assoc. for AIDS Care v. Greene*, N.Y.L.J. Oct. 7, 1997 at 28 (Sup. Co. Suff. Co. Oct. 7, 1997) (outlining requirements of § 76-a). The judge, however, ruled that he would reserve judgment on the defendant's anti-SLAPP motion until after the completion of discovery.

Even in states which do not have anti-SLAPP statutes, courts have begun to recognize common law causes of action to combat SLAPP suits. In *DeVaney v. Thriftway Marketing Corp.*, 1998-NMSC-001, ¶¶ 51-52, 37 N.M. Bar Bull. No. 5, at 19, 28-29 (Dec. 22, 1997), for instance, the court recognized a cause of action for "malicious abuse of process" to redress injuries resulting from litigation designed "primarily for the purpose of intimidation in order to silence . . . non-tortious speech."

2. Access

Courtroom Access

In *Virmani v. Presbyterian Health Servs. Corp.*, 493 S.E.2d 310, 26 Media L. Rep. 1257 (N.C. App. 1997), *temporary stay allowed*, 496 S.E.2d 394 (N.C. 1997), the North Carolina Court of Appeals has held for the first time that the North Carolina Constitution provides the public, including reporters, a constitutional right of access to civil court proceedings, including tapes and transcripts of the proceedings and other court records. While this access right is not absolute, the presumption of open courts is a strong one and "occasion for closing presumptively open proceedings and sealing court records should be exceedingly rare."

The decision provides that before a court may close proceedings or seal records, any member of the public, including news gatherers, may object thereto and must be given a meaningful opportunity to be heard. If the court, after that hearing, closes the proceedings or seals the records, it must state its reasons, supported by specific findings. In addition, a member of the public, including journalists, may intervene under N.C. R. Civ. P. 24(b) for the limited purpose of challenging orders closing proceedings or sealing records. The case is currently on appeal to the North Carolina Supreme Court which has granted a temporary stay.

The ruling, however, applies only to state courts and not to the disciplinary tribunals of public universities. See *DTH Pub. Corp. v. University of North Carolina at Chapel Hill*, 496 S.E.2d 8 (N.C. App. 1998) (holding that the "Undergraduate Court" at UNC-Chapel Hill is not a "court" under the open courts provision of N.C. Const. art. I, § 18 and distinguishing *Virmani* on this basis), *review denied*, 1998 WL 646429 (N.C., July 8, 1998).

In *McNamara v. U.S. Dept. of Justice*, 974 F. Supp. 946 (W.D. Tex. 1997), *reconsideration denied*, 974 F. Supp. 946 (W.D. Tex. 1997), a Texas district court denied a newspaper's Freedom of Information Act ("FOIA") request seeking information concerning the conviction of a sheriff on several drug counts. The newspaper submitted a FOIA request to the Justice Department, asking that several of its component agencies search their records for information related to operation and prosecution of a narcotics conspiracy by the former sheriff, but the request was refused. The court upheld the refusal explaining that the purpose of FOIA is to allow individuals access to information regarding the operations or activities of the government, not to allow access to government files relating solely to individuals. In fact, the court pointed out, FOIA contains a specific exemption for records of information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The Vermont Supreme Court in *State of Vermont v. LaBounty*, 8 Vt.L.Wk. 201 (1997) (Caledonia-Record Publishing Co., Inc., Intervenor), refused to allow a local newspaper access to criminal pre-sentence reports, although conceding that the PSI's, as presently used, lack characteristics that dictate privacy or confidentiality absent statutory protection. The court reasoned that "the reasons for maintaining the confidentiality of PSI's have lost force, now that defendants have both access to and the right to challenge information contained in the documents." It went on to state

that “as long as PSI’s are not publicly released, press coverage of sentencings will necessarily be incomplete, and the public will learn only part of the reason for a given sentence. This lack of information may lead to public confusion and misunderstandings, as when the public knows the facts of a crime and hears the victim impact statement, but never learns the mitigating factors reported in the PSI.” However, as the legislature had dictated that PSI’s should remain confidential and as there was no First Amendment right to PSI’s, the Court ruled that it could not order public disclosure.

Cameras in the Courts

In response to recent controversies over the role of cameras in the courts, several courts have changed their rules regarding the manner in which they handle camera requests. In Texas, for example, Rule of Appellate Procedure 21 regarding recording and broadcasting court proceedings was amended. The new rule, TEX. R. APP. P. 14, allows recording and broadcasting of appellate court proceedings at the discretion of the court and subject to the stated procedures. *See* TEX. R. APP. P. 14.1-14.3. The new rule also contains a provision regarding enforcement which provides: “The court may sanction a violation of this rule by measures that include barring a person or organization from access to future coverage of proceedings in that court for a defined period.” TEX. R. APP. P. 14.4.

In Oklahoma, which has permitted the presence of cameras (still, film and video) in state courtrooms since 1978, a new version of the camera guidelines took effect in the revised Code of Judicial Conduct (5 Okla. Stat. Ch. 1, App. 4, Canon 3(B)(10)) in November 1997. The general provisions and requirements remain, but the guidelines no longer limit the description of acceptable technology. While the presence of cameras in Oklahoma courtrooms has been generally approved, the ultimate decision for any use in any particular proceeding is left to the individual judge. Express permission must be obtained from the judge and under such conditions as the judge may prescribe. Canon 3 (B)(10) provides that cameras may not be used in any state proceeding required by law to be confidential or in a criminal action until the case is submitted to a jury, unless the persons on trial have affirmatively given their consent to the cameras on the record.

In Orange County, California, where the Superior Court uses videotapes as the official transcript of proceedings, the Superior Court has at least tentatively adopted a policy of prohibiting the public from obtaining access to copies of such video tapes, although such copies are available to the litigants. This policy may become the subject of a legal challenge by interested media companies. In addition, the Superior Court in Los Angeles County has adopted a local rule restricting use of photography or electronic recording of any kind in the courthouse. Media organizations have been conferring with the court regarding the application of and possible amendment of the local rule, and regarding the designation of particular areas where recording and photography would be permitted.

In New York, the state’s procedure for admission of cameras to the courtroom, codified as § 131 of the Rules of the Chief Administrator, 22 NYCRR § 131, expired on June 30, 1997. *Effort on Cameras in Courts Dies*, N.J.L.J. July 16, 1997. In New York federal court, a district court acknowledged the benefits of televising trials, but ultimately denied Court TV’s request to broadcast the trial based on the unique circumstances which in the court’s opinion rendered televised coverage

inappropriate. *Williams v. N.Y.C. Police Dept.*, 94 Civ. 6234 (LAP), 1997 U.S. Dist. LEXIS 9094 (S.D.N.Y., Jun. 26, 1997).

Other Access Issues

In *Pierce v. St. Vrain Valley School Dist. RE-IJ*, 944 P.2d 646 (Colo. App. 1997), review granted, (Oct. 20, 1997), a school superintendent resigned after an investigation of charges of sexual harassment. The school district and superintendent entered into a confidential settlement agreement. The Court of Appeals found that the settlement agreement governing the superintendent's resignation constituted a public record, and that the parties could not "create by contract a new exception to the disclosure requirements of the Open Records Act."

In *Tapco, Inc. v. Township of Neville*, 695 A.2d 460 (Pa. Commw. 1997), the court held that police-incident reports were subject to disclosure under Right to Know Act, but other documents, such as (i) written documents, tape recordings or videotapes relating to a particular police investigation; (ii) work schedules and work orders, and (iii) proposed drafts of permits or ordinances were not subject to disclosure.

In *Kallstrom v. City of Columbus*, 1998 U.S. App. LEXIS 1941 (6th Cir. 1998), the court considered whether the plaintiff undercover police officers had a privacy interest of a constitutional dimension in certain personal information contained in their personnel files. The court found that the officers' interests in preserving their lives and the lives of their family members, as well as preserving their personal security and bodily integrity "do indeed implicate a fundamental liberty interest." Thus, disclosing the officers' addresses, phone numbers and driver's licenses, as well as the names, addresses and phone numbers of their family members encroached upon their fundamental rights to privacy, thereby requiring the court to balance the officers' interests against those of the City. The court found that the City's release of this information to criminal defense counsel in a large drug conspiracy case did not narrowly serve the City's interest in allowing public access to agency records. The information was not requested in order to shed light on the internal workings of the Columbus Police Department.

In the context of a public records dispute, the Louisiana Supreme Court held that weighing an individual's privacy rights against First Amendment considerations is not appropriate unless the individual's privacy concerns rise to the level of rights that are constitutionally protected. *Capital City Press v. East Baton Rouge Parish Metro. Council*, 696 So. 2d 562 (La. 1997). The court held that the test for determining whether one has such a constitutionally protected privacy right is "not only whether the person had an actual or subjective expectation of privacy, but also whether that expectation is a type which society at large is prepared to recognize as being reasonable." The court further emphasized that "the right of privacy is . . . limited by society's right to be informed about legitimate subjects of public interest." This discussion of constitutional privacy has been adopted by at least one Louisiana court considering invasion of privacy torts. See, e.g., *Moore v. Cabaniss*, 699 So. 2d 1143 (La. App. 2d Cir. 1997) (citing *Capital City Press*, *supra*, for holding in a private facts suit that an individual's privacy rights in his or her medical records is subject to waiver and limitation by the discovery rights of others.) Other Courts of Appeal, however, are not applying the restrictive

privacy analysis of *Capital City Press*. See, e.g., *Everett v. Southern Transplant Service, Inc.*, 700 So. 2d 909 (La. App. 4th Cir. 1997) (court found that individual privacy rights in autopsy reports outweighs the public records law requiring disclosure of such records; dissent cites *Capital City Press*), *rev'd in part*, 709 So. 2d 764 (La. 1998); *Alliance for Affordable Energy v. Frick*, 695 So. 2d 1126 (La. App. 4th Cir. 1997) (court says balancing test must be applied to determine whether individual privacy rights should outweigh public records law, but finds insufficient evidence in the record to do so); Op. Atty. Gen. 97-77 (although covered by public records law, the names and addresses of tenants of government-funded low income housing may not be disclosed because such disclosure would violate the privacy rights of the tenants).

In *Scottsdale Unified School Dist. v. KPNX Broadcasting Co.*, 937 P.2d 534 (Ariz. 1998) the Arizona Supreme Court looked to the federal Freedom of Information Act and held that birthdates of public employees are protected by a privacy interest that can be sufficient to bar disclosure of such information pursuant to Arizona's Public Records Law. A.R.S. 39-121, *et seq.* The Court vacated the opinion of the Court of Appeals, 937 P.2d 689 (Ct. App. 1997), which had held that the "private facts" rationale of *Restatement (Second) of Torts* § 652A does not apply in Arizona to bar disclosure of information contained in the public record.

3. Federal Eavesdropping Law

Procuring Electronic Communications — Elements

While affirming a district court holding that journalists' audiotaping conversations between government agents and the subjects of a search warrant was permissible under the law-enforcement exception of the Wiretap Statute, the Ninth Circuit held that because the journalists were acting with government agents "under color of law," the audio- and videotaping were violations of the subjects' Fourth Amendment rights for which recovery could be granted under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Berger v. Hanlon*, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), *cert. filed*, 67 U.S.L.W. 3024 (June 29, 1998) (No. 98-38).

In *Deteresa v. American Broadcasting Cos., Inc.*, 121 F.3d 460, 25 Media L. Rep. 2038 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1840, 140 L. Ed. 2d 1090 (U.S. 1998), the Ninth Circuit held that the mere fact of a journalist's recording for the purpose of producing a news story does not establish that the interception is criminal or tortious. The court pointed out that the plaintiff's claim of wrongful purpose must be supported by evidence that the journalist taped the conversation for the purpose of violating the state wiretap statute, invading her privacy, defrauding her, or committing unfair business practices. Where a trespass is proved, however, the tortious purpose may be established.

In addition, a number of courts have refused to recognize claims brought under the wiretap act's prohibitions. 18 U.S.C. §§ 2510-2521. See, e.g., *Gross v. Taylor*, 1997 WL 535872 (E.D. Pa. Aug. 5, 1997) (plaintiffs failed to show interception where they "have not presented any evidence substantiating any claim beyond that they were in cars with systems capable of recording"); *Wesley College v. Pitts*, 974 F. Supp. 375 (D. Del. 1997) (defendant who inadvertently read e-mail on

computer screen did not intercept the message); *U.S. v. Moriarty*, 962 F. Supp. 217 (D. Mass. 1997) (no violation of federal wiretap statute where defendant listened to electronically stored voice mail messages); *U.S. v. Miller*, 116 F.3d 641 (2d Cir. 1997) (pen register that records numbers dialed does not intercept contents of communications); *Gilday v. Dubois*, 124 F.3d 277 (1st Cir. 1997) (call detailing, which "simply captures electronic signals relating to the PIN of the caller, the number called, and the date, time, and length of the call," does not intercept contents of communications); *Lopez v. First Union National Bank of Florida*, 129 F.3d 1186 (11th Cir. 1997), *rehearing denied*, 141 F.3d 1191 (11th Cir. 1997) (complaint that alleged disclosure of stored electronic communications, but not disclosure of communications while in transmission, failed to state claim under § 2511(3)(a)).

In a case involving video surveillance, the Tenth Circuit held that the court held that silent video surveillance of a locker room did not constitute a violation of Title I of the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510-2522. *Thompson v. Johnson County Community College*, 1997 WL 139760 (10th Cir. 1997). Plaintiff further claimed that the silent video surveillance violated Fourth Amendment privacy rights under 42 U.S.C. § 1983. The court held that although persons have a legitimate expectation of privacy in their individual lockers there is no reasonable expectation of privacy in the locker area in general in this case.

Similarly, in *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174 (1st Cir. 1997), the court dismissed the plaintiff's allegations that surveillance cameras constituted an "unreasonable search" and thus violated their Fourth Amendment rights. It found that the defendant may monitor plaintiffs' work area for security purposes, by means of disclosed, soundless video surveillance, since "no reasonable expectation of privacy attends the work area," and "supervisors may monitor at will that which is in plain view within an open work area." It rejected the argument that the cameras were recording "private" data, because whatever is shown "has been revealed knowingly by the appellants to all observers (including the video cameras). This information cannot be characterized accurately as 'personal' or 'confidential.'"

Consent

A few reported cases were dismissed because of the plaintiffs' consent to the taping. *See, e.g., O'Ferrell v. U.S.*, 968 F. Supp. 1519 (M.D. Ala. 1997) (plaintiffs consented to interception by talking with knowledge agents were listening); *Pollock v. Pollock*, 975 F. Supp. 974 (W.D. Ky. 1997) (mother vicariously consented for daughter to taping telephone conversations with her father, where mother had a "good faith, objectively reasonable basis to believe that such taping was necessary," contrary to father's contention that her concern for daughter was pretextual or in bad faith), *aff'd in part, rev'd in part*, 154 F.3d 601 (6th Cir. 1998); *Gilday v. Dubois*, 124 F.3d 277 (1st Cir. 1997) (inmates who were told in interview, given guidelines, and signed forms acknowledging that their calls might be monitored, consented to their telephone calls being recorded); *U.S. v. Rohlsen*, 968 F. Supp. 1049 (D. Virgin Islands 1997) (same).

Other Exceptions

Courts also considered cases in which defendants raised additional defenses and exceptions.

Courts also considered cases in which defendants raised additional defenses and exceptions. *See, e.g., Wright v. Stanley*, 700 So.2d 274 (Miss. 1997), *reh'g denied*, 700 So.2d 331 (Miss. 1997) (custodial parent could intercept conversations between non-custodial parent and children in custodial parent's home by means of voice-activated recorder under the "business use" exception, because she could lawfully have listened to the conversation on an extension phone); *but see, Pollock v. Pollock*, 975 F. Supp. 974, 977 (W.D. Ky. 1997) (finding no statutory "safe-harbor" under extension telephone exception for mother's recording of telephone conversations between father and children), *aff'd in part, rev'd in part*, 154 F.3d 601 (6th Cir. 1998).

Disclosure

In *Peavy v. The New Times*, 976 F. Supp. 532, 26 Media L. Rep. 1435 (N.D. Tex. 1997), the constitutionality of applying the federal wiretapping statute to a newspaper publication of a transcript of an unlawfully recorded conversation of Dan Peavy, a Dallas school district trustee, about his fellow school board members was tested. The tape was anonymously delivered to other members of the board who read its contents into the record of the meeting. The newspaper obtained a transcript through the Texas Public Information Act and published it. The court relied on *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), in dismissing the claim, holding that where the information is truthful, lawfully obtained and a matter of public significance, even when the newspaper knew the conversation had been unlawfully recorded, it would be unconstitutional to impose liability.

In a related case, Peavy and his business associate Eugene Oliver brought suit against Dallas station WFAA-TV and Peavy's neighbors for allegedly taping approximately 188 telephone conversations between Peavy and others. *Oliver v. WFAA-TV Inc.*, No. 3-96-CV-3436-L (N.D. Tex. Oct. 15, 1998). The neighbors, Charles and Wilma Harman, intercepted Peavy's cordless phone call with a police scanner, and later contacted WFAA reporters with a tip on a potential news story about Peavy. The Harmans eventually gave WFAA 18 tapes containing 188 telephone conversations. Upon learning of the 1994 amendment to the wiretap act making it unlawful to intercept the radio portion of cordless telephone calls the harmsn stopped taping, but WFAA continued its investigation which culminated in award-winning reports on Peavy, his relationship with Oliver, Oliver's criminal history, and corruption in the Dallas school district. Peavy and Oliver filed suit alleging violations of state and federal wiretap laws, invasion of privacy, intentional infliction of emotional distress, conspiracy, and tortious interference with contract.

On October 15, 1998, a Dallas federal magistrate recommended that the claims against WFAA and its reporter be dismissed. Applying *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the magistrate found that WFAA lawfully obtained the tapes, the tapes contained truthful information, and that the information on the tapes involved matters of public concern. Thus, imposing liability on WFAA and its reporter for publishing truthful information would result in timidity and self-censorship. The magistrate also found that the station did not cross the line into active participation. As for the Harmans, the magistrate recommended that summary judgment be entered against them for violations of the wiretap acts and for invasion of privacy. The parties are currently awaiting the district court's decision on whether to adopt the magistrate's recommendations.

In *Boehner v. McDermott*, Civ. No. 98-594 (TFH) (D.D.C. July 28, 1998), the District Court for the District of Columbia dismissed a civil action brought by U.S. Representative Boehner against Representative McDermott for allegedly disclosing to news media the recording of Boehner's mobile-phone participation in a conference call with Newt Gingrich and other members of the House of Representatives. The court held that even though McDermott violated the statute by disclosing the recording with knowledge that it had been unlawfully made, his sharing of the tape with the media was protected by the First Amendment. The court also found that McDermott received the tape lawfully because the Wiretap Act does not criminalize *receipt* of an illegally recorded tape, that the content of the tape was a matter of public significance, and that McDermott's disclosure of the tape to the media was truthful. See also, *Ferrara v. Detroit Free Press*, __ F. Supp. __, C.A. No. 97-CV-71136 (E.D. Mich. May 6, 1998) (summary judgment granted for newspaper, but not for recording participant in conversation, where there was sufficient evidence of recorder's criminal purpose but insufficient evidence that the news paper knew or should have known of it).