LDRC Libel Defense Resource Center

BULLETIN

SUMMARY JUDGMENT UPDATE: PART I — PRACTITIONERS' ROUNDTABLE

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INTRODUCTION

For almost a decade and a half the Libel Defense Resource Center has been at the forefront in tracking developments and trends in the various stages of defamation and related media litigation. Although its periodic reports of trial outcomes and damage awards have perhaps gained the greatest notoriety, many other LDRC litigation studies have also undertaken to contribute to a more comprehensive understanding of the nature and ramifications of all aspects of defamation litigation. Central among these, early LDRC studies attempted to empiricize the results of pretrial motions -- including both motions to dismiss (or demurrers) and motions for summary judgment. See LDRC BULLETIN No. 8 at 1-61 (September 30, 1983) (motions to dismiss); LDRC BULLETIN No. 4 (Part 2) at 2-35 (September 15, 1982) (motions for summary judgment); LDRC BULLETIN No. 12 at 1-37 (December 31, 1984) (same); LDRC BULLETIN No. 19 at 1-45 (May 31, 1987)(same).

The first of the three previous LDRC summary judgment studies addressed initial concerns over footnote 9 to Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979), which had seemed to question the appropriateness of summary judgment in motions where constitutional "actual malice" was the dispositive issue. Nonetheless, LDRC found that in 110 motions made during the post-Hutchinson period 1980 through 1982, three out of four were granted in favor of the media defamation defendant. The second LDRC summary judgment report, a followup study of 136 motions made during the period 1982 through 1984, found only a slight slippage -- to a 74% win rate overall -- concluding that summary judgment continued to be "the rule rather than the exception in defamation litigation." Finally, in the third of LDRC's earlier summary judgment studies, which covered the period immediately up to the Supreme Court's pivotal decision in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), LDRC's review of an additional 143 motions, finding an almost identical defense win rate of 76%, concluded that the fallout from Hutchinson footnote 9 had not been severe and expressed optimism that, with the seemingly more favorable approach to summary judgment adopted in Anderson, the future might portend an even "greater degree of success" for media defendants.

With this BULLETIN LDRC returns to the subject of summary judgment with a two-part update report. A major empirical study is well under way that will cover all motions made and reported in the post-Anderson period, bringing LDRC's prior empirical findings up-to-date through December 31, 1994. These statistical findings -- with the full panoply of tables, charts and case lists -- will be published on July 31, 1995 in LDRC BULLETIN No. 95-3. In this BULLETIN, in order to round out LDRC's update study of summary judgment, and in order to move the analysis beyond a merely empirical presentation, LDRC has invited several leading practitioners -- all members of the LDRC's Defense Counsel Section's Committee on Prepublication Review and Pretrial Procedures -- to share their practical insights into this critical phase of media defense litigation for the benefit of BULLETIN readers.

Participants in the practitioners' roundtable panel were:

HENRY ABRAMS is a general partner with Weinberg & Green in Baltimore, Maryland. Mr. Abrams has concentrated on the defense of defamation and reporter's privilege claims for the past twelve years and serves as the firm's representative to the LDRC Defense Counsel Section. He is also the principal author of the Maryland chapter of the LDRC 50-STATE LIBEL SURVEY.

DANIEL C. BARR is a partner with Brown & Bain in Phoenix, Arizona. Mr. Barr has represented print and broadcast news media in defamation and privacy cases throughout Arizona and California. He is also an author of the Arizona chapter of the LDRC 50-STATE LIBEL SURVEY.

JONATHAN E. BUCHAN is a partner with Smith Helms Mulliss & Moore in Charlotte, North Carolina. He actively represents print and broadcast media in defamation and related cases, including *The Charlotte Observer*, *The* (Greensboro) *News and Record*, *The Fayetteville Observer-Times*, Jefferson Pilot Communications, Inc. (WBTV) and WFMY Television. He is also an author of the North Carolina chapter of the LDRC 50-STATE LIBEL SURVEY.

SUSAN GROGAN FALLER and RICHARD M. GOEHLER are both partners with Frost & Jacobs in Cincinnati, Ohio. Ms. Faller and Mr. Goehler, who have expertise in counseling media clients as well as in litigating cases when disputes arise, head up the firm's First Amendment and Media Law Practice Group, with clients in Ohio, Kentucky and Florida. Clients served by the practice group include radio and television broadcasters, newspaper, magazine and book publishers and authors. They are also co-authors of the Ohio chapter of the LDRC 50-STATE LIBEL SURVEY.

JON L. FLEISCHAKER has been a partner with Wyatt, Tarrant & Combs in Louisville, Kentucky since 1970. Mr. Fleischaker and the firm have extensive experience representing media outlets in the areas of defamation, invasion of privacy, open records, open meetings, access to courts, and other matters relating to communications law. He has represented *The Courier-Journal* and Louisville Times Company, several television and radio outlets, The Associated Press, United Press International, Kentucky Press Association, the *New York Times*, Capital Cities/ABC, McGraw-Hill, and numerous smaller daily and weekly publications throughout Kentucky and surrounding states. He is also the author of the Kentucky chapter of the LDRC 50-STATE LIBEL SURVEY.

DAVID S. KORZENIK is a partner in the New York City firm of Miller and Korzenik, specializing in intellectual property, media law and litigation. He has been representing *Spy Magazine* doing their pre-publication review for the past nine years. He has represented book publishers, advertisers, producers and other magazines, among them *Vibe* and *Emerge*. He is an adjunct professor at the Benjamin Cardozo School of Law where he has been teaching courses in Media and Entertainment Law for the past six years.

JOYCE S. MEYERS is a shareholder in the Philadelphia, Pennsylvania firm of Miller Dunham Doering & Munson. In more than a decade of media defense work, Ms. Meyers has

represented radio and television stations, newspapers and magazines in libel and related cases. The majority of these cases have been won as a result of pretrial motions. A recent success was a summary judgment in favor of Ziff Communications Company, publisher of *PC Magazine*, in a trade libel case.

ROBERT D. NELON is a shareholder of Andrews Davis Legg Bixler Milsten & Price in Oklahoma City, Oklahoma. The firm's communications law section, which Mr. Nelon heads, represents local and national media clients, including regular representation of KFOR-TV (NBC affiliate), KWTV (CBS affiliate), Oklahoma Association of Broadcasters, Oklahoma City Radio Council, and Donrey Media Group; and, as their needs have required, Capital Cities/ABC, CBS, Dow Jones & Co., Gannett, and Time Warner. His litigation practice in the media law area routinely involves pretrial motions. He is also the author of the Oklahoma chapter of the LDRC 50-STATE LIBEL SURVEY.

DOUGLAS R. PIERCE has been a partner in the firm of King & Ballow in Nashville, Tennessee since 1989. He has served as general counsel for the Tennessee Association of Broadcasters since 1988. Mr. Pierce is a frequent speaker to reporters, editors, news directors, and media organizations concerning First Amendment matters. King & Ballow has a nationwide practice representing media clients in various legal matters, including First Amendment matters.

NEIL L. SHAPIRO is a partner with Landels, Ripley & Diamond in San Francisco, California where he heads up the firm's Media Law Practice Group. For the last 20 years he has regularly provided counseling, pre-publication/broadcast review, and litigation services to the San Francisco Chronicle and KRON-TV (NBC affiliate), and has represented numerous publishing and broadcasting interests in libel, privacy, public record and court access, and intellectual property litigation, including CBS, Univision Television Group, McGraw-Hill, HarperCollins, The Putnam Berkley Group, Random House, Bantam, Doubleday Dell, and several newspapers and television and radio stations. Mr. Shapiro is also the co-preparer of the Ninth Circuit chapter of the LDRC 50-STATE LIBEL SURVEY.

DON C. TEMPLIN is Chair of the trial department of Haynes and Boone, a firm with offices in 5 Texas cities. Mr. Templin has represented media clients since 1975 and regularly does pre-publication review of magazine and newspaper articles. He has defended over 20 different publishers or broadcasters in libel and privacy actions. He is also the co-preparer of the Texas chapter of the new LDRC 50-STATE PRIVACY SURVEY.

LDRC: ***It is a pleasure to have access to such a distinguished and diverse group of media defense practitioners. As you all are well aware, and as prior LDRC empirical studies have confirmed, the name of the game in defamation defense litigation has generally been to avoid jury trial at almost any cost short, of course, of the inappropriate compromise or settlement of non-meritorious claims. Pending publication in the next BULLETIN of LDRC's updated empirical findings regarding the incidence and success of summary judgment motions, we***

thought it would be exceptionally helpful for our BULLETIN readers if a group of experienced practitioners like yourselves could provide insights into the non-empirical -- and perhaps more practical -- aspects of defamation and related litigation as they relate to the structuring of a defense with an eye toward the making of a pretrial motion for summary judgment. Our discussion will largely track the defense of such claims from their inception through appeal.

INITIAL CASE EVALUATION

LDRC: *Starting at the beginning, let me ask you what tactical, strategic and/or procedural steps do you take during the initial case evaluation to best position the defense to assure the success of a motion for summary judgment?*

FALLER/GOEHLER:

The primary focus of our initial case evaluation includes an identification of potential defenses which may exist to the claim and an analysis whether any such defense may form the basis of a dispositive motion to dismiss and/or motion for summary judgment.

SHAPIRO: For us too the primary initial step is the search for a dispositive defense which can be presented by motion. If the claim presents a defense of privilege which can be raised strictly on the pleadings, that will be done. If not, the claim is evaluated to determine whether or not there are other defenses as to which there are either no disputed material issues of fact, or where the disputed issues of material fact can be established and thus made undisputed. In that circumstance, discovery is aimed at removing any such factual dispute.

NELON: The initial review of the publication or broadcast at issue and detailed interviews of the reporter, news management, and the client's other key personnel usually reveal the most probable basis for defending the case and the likely grounds for summary judgment. Usually, they also reveal any deficiencies in investigating or reporting that will likely be the focus of the plaintiff. Sometimes those deficiencies can be "cured" before discovery begins. For example, if the reporter has failed to document that an event pertinent to the defamation claim has occurred, but it is clear that the event did occur, the documentation can be gathered quickly. Post-publication investigation may help support a summary judgment argument that the publication is substantially true without providing the plaintiff with any useful evidence that the reporter was at fault for failing to document the event in the first place. The initial review and interviews are important, too, for identifying whether reporter's privilege questions that could impact the ability to move for summary judgment will be involved.

TEMPLIN: In evaluating a case for possible summary judgment, often the most important question is whether or not to take limited discovery of the plaintiff prior to filing the motion. After considering the basis for a summary judgment motion (i.e., public figure plaintiff or statutory or common law privilege), the next issue is normally to pin down the plaintiff as to exactly what he or she claims was defamatory. If the plaintiff's allegations are vague as to what portion of a written document or broadcast are defamatory, then it may be necessary to depose the plaintiff and ask exactly what he claims are false, defamatory statements of fact. Sometimes, this can be done by interrogatories or by filing special exceptions, but these are usually not as satisfactory as a deposition. Another argument in favor of deposing the plaintiff prior to filing a summary judgment motion is that a good deposition will limit the plaintiff's options insofar as filing an affidavit in opposition to the summary judgment. Also, in a number of limited purpose public figure cases, it is necessary to obtain summary judgment evidence from the plaintiff in order to establish that the plaintiff is a public figure.

PIERCE: Because of the strong likelihood that a motion for summary judgment will be available when a media client is sued for libel or related torts, it is important to plan discovery with an eye toward an eventual motion for summary judgment. This can sometimes present a conflict with conducting discovery that may be necessary for trial. For example, defense counsel may be placed in the position of realizing that certain depositions should be taken for trial preparation, while at the same time understanding that taking those depositions will only educate plaintiff as to matters that could create a genuine issue of material fact that would defeat summary judgment.

Many of the judges and magistrate judges here in the Federal District Court for the Middle District of Tennessee have begun a case management process for cases that will allow discovery to conclude for purposes of filing summary judgment motions, then staying all further discovery pending the resolution of a summary judgment motion, and then allowing additional discovery for purposes of trial preparation in the event that the summary judgment motion is denied. State court practice in this area often achieves the same result, although without a stay of discovery pending the summary judgment motion.

FLEISCHAKER:

Obviously, the answer to how to position the case for summary judgment depends on the type of case, the facts of the case, the form of the case, the identity of the parties, the identity of counsel, and the identity of the judge. Removal should be considered if available. There are instances in which a motion to dismiss should be considered for the purpose of educating the judge and the other side. We have found that motions to dismiss, even if unsuccessful initially, set the stage for successful summary judgment motions later.

BARR: We also seek to remove cases to federal court if there is diversity because most Arizona state court judges do not have law clerks, so there is a greater chance our summary judgment papers will be considered more carefully in federal court. If no diversity exists, we decide whether to "notice" the trial judge (Arizona provides one free strike, unlike most other jurisdictions) if we believe our current judge is hostile to our media client or will not read the motion papers carefully.

MEYERS: The first step we undertake is to attempt to limit claims and issues by moving to dismiss claims based on statements that are not capable of defamatory meaning or that are clearly subject to a constitutional or common law privilege. It is also important to establish plaintiff's public figure status, if possible. Early investigation should focus on independent evidence to support the truth of statements based on information from confidential sources or statements that were not adequately investigated or documented before publication.

ABRAMS: In a typical media defense, I conduct a fairly aggressive motions practice, generally filing both a motion to dismiss and a motion for summary judgment. One of my principal objects is to cut off the plaintiff's case before discovery, to avoid expense, interference with newsroom business, and the investigation and development of conflicting factual disputes. I also send out extensive discovery requests with any answer in order to put the opposing party on notice at the earliest opportunity of the seriousness of defense efforts and the intense scrutiny that the opposing party will face as the case moves forward.

At the outset, I conduct extensive interviews with all individuals involved, asking, where possible, that those individuals prepare memoranda to me giving as much detail as is available about the underlying events. I verify insurance coverage; deal with the insurance company as early as possible if there are potential non-covered claims or individuals (such as stringers); and try to the maximum extent possible to assure all the participants that there will be insurance coverage or some form of indemnification for their actions. As a general matter, I instruct that no notes, drafts, tapes, film or video be destroyed. I review that material immediately to determine whether these items will prove helpful to the case and whether the defense can rely on these documents or, alternatively, whether a shield law privilege should be asserted.

KORZENIK: I find the cases that are often the least suitable for summary judgment are those in which the plaintiff has had numerous contacts either with the reporter or with the research or editorial staff. Obviously, in such cases the plaintiff is in a position either to deny that he/she said certain things to the reporter or to claim that he/she furnished certain facts to the reporter/researcher -- facts which were allegedly ignored.

In the initial case evaluation, it is therefore particularly important to assemble

first an inventory of the base of data and research that the defendant/media had at the time of publication and then to make an inventory of all communications between the plaintiff (or plaintiff's friendly witnesses) and the media/defendant. This will facilitate an evaluation of the extent to which the plaintiff's pre-publication contacts with the media/ client may have compromised a motion for summary judgment. It is then important to determine the degree to which these contacts -- these potential "questions of fact" -- can be confined, "cauterized" and eliminated (i.e. through the use of tapes, letters, or well planned discovery).

Needless to say, once a plaintiff has managed to get into the "pre-pub./editorial kitchen," summary judgment will be less feasible unless the substance of these communications is easily proven or otherwise limited. These inventories of (1) editorial data at time of publication and (2) adverse communications, can provide the building blocks for summary judgment or for a program of discovery designed to eliminate factual questions to support a post-discovery motion for summary judgment.

To Move or Not to Move?

LDRC: ***In your practice do you ever find that there are media defamation or related cases in which your initial evaluation, or later developments, suggest that a motion for summary judgment should not be made?***

NELON: I cannot recall a case in which we did not move for summary judgment.

MEYERS: In our practice as well, I cannot recall a case in which a decision was made not to move for summary judgment.

BUCHAN: Nor can I.

FLEISCHAKER:
Nor I.

BARR: Nor I.

SHAPIRO: Virtually every media case presents the opportunity for either a dispositive motion for summary judgment, or a motion for partial summary judgment or for summary adjudication of issues. I cannot recall a case in which neither possibility was presented.

FALLER/GOEHLER:
We have filed a motion for summary judgment and/or motion to dismiss in every

media libel case to date. Our experience has been that during the initial case evaluation, we are generally able to identify some basis to support a dispositive pretrial motion.

TEMPLIN: The only media cases which I have handled in which a summary judgment motion was not made are cases which were disposed of prior to the filing of summary judgment. In a case in which there is no privilege to invoke the actual malice requirement for the plaintiff and in which there appears to be potential liability, it would not make sense to file a motion for summary judgment. More likely, there would be an attempt to settle that case, hopefully for some nominal amount. In defending a newspaper against one suit brought by an elected public official, we decided to wait on summary judgment because we believed that the plaintiff could be compelled to disclose information by deposition that would discourage him from pursuing the lawsuit. In fact, the plaintiff initially refused to answer those particular questions and after the court granted a motion to compel, the plaintiff voluntarily filed a non-suit.

PIERCE: Except in those cases where we have been able to obtain a dismissal on a motion to dismiss and therefore did not need a motion for summary judgment, we have not handled any case in which a summary judgment motion was not made. There may certainly be cases, however, where a motion for summary judgment will clearly be unsuccessful, and only serve to educate the other side as to the weaknesses of his or her case that plaintiff can correct for trial. In such cases, counsel may chose not to file a motion for summary judgment. On the other hand, a motion for summary judgment may cause plaintiff to disclose information he or she would not have otherwise disclosed, and therefore, such a motion can assist the defense even if it is unsuccessful.

ABRAMS: Although I too have never handled a case in which a decision was made not to file a motion for summary judgment, I have handled a variety of cases in which we never reached that stage in the proceeding, due either to our success at the motion to dismiss stage, or an early evaluation of problems with the case that led to a quick settlement, preferably without the payment of any money.

I certainly can imagine cases in which a motion for summary judgment would be strategically inappropriate. There are undoubtedly cases where you are facing plaintiff's counsel that is not well informed in the law of defamation or has not properly prepared factually and you wish to avoid educating plaintiff or its counsel as to the law or relevant facts for development at trial. This is more likely in a state rather than federal court proceeding and it is more likely that a federal court jurist will have a better grip of the legal issues involved to render an appropriate decision on motion.

In addition, I often sense a greater bias against motions for summary judgment

in state court proceedings, as a result of state law considerations and because, in Maryland, one typically does not get a single judge assigned throughout the case. Consequently, state judges are not nearly as personally invested in the outcome of their rulings.

KORZENIK: In one case that I can recall we did not move for summary judgment. I took over the defense of an action brought by a private figure on the eve of trial. The case was many years old; minimal discovery had been taken by both sides. A limited motion for summary judgment had been made by previous counsel years before without result. The trial assignment judge was extremely hostile to any motion practice that would delay trial. While a summary judgment motion was in fact quickly prepared in case it might become useful, plaintiff's lack of deposition discovery, our extensive "unnoticed" investigative efforts and our productive efforts to find witnesses, led me to conclude that pressing for summary judgment would reveal too many of the surprises that awaited plaintiff at trial.

Plaintiff was, in fact, blind-sided several times at trial. After two weeks of trial, plaintiff dropped demands for money and withdrew the action with an exchange of statements of mutual respect by both parties. A poll that the jurors took among themselves afterward revealed that none were sympathetic to plaintiff's case. Surprise is still an important factor in trials; and if a plaintiff has not done adequate discovery of the reporters, there are sometimes advantages to proceeding without such a motion -- especially if the court is unreceptive. In short, it is sometimes best not to educate an ill-prepared plaintiff.

Motions to Dismiss or Demurrers

LDRC: ***In terms of your evaluation of the relationship between motions to dismiss or demurrers and the motion for summary judgment, under what circumstances have you concluded that a motion to dismiss or demurrer might be more effective or appropriate -- at least initially -- than a motion for summary judgment? And have you found that your motions to dismiss have been more or less successful than summary judgment motions -- assuming both motions can be made, seriatim, in your jurisdiction?***

SHAPIRO: Where defenses appear from the four corners of the initial pleading, a motion to dismiss is appropriate and is less expensive than a later motion for summary judgment. Such defenses could include the presence of an absolute privilege, the lack of defamatory content, the argument that the alleged defamation is simply opinion (as defined by Milkovich), or where the allegations establish that plaintiff must prove constitutional malice but because of some fact contained in the pleading clearly cannot do so.

I find motions to dismiss to be neither more nor less successful than summary judgment motions. Rather, the former should only be attempted where a claim or a part of a claim can be disposed of simply on the basis on how it is alleged, while the latter should be used when evidence must be marshalled to prove the absence of a material issue of disputed fact. As to seriatim motions, there is no such preclusion in the state or federal courts in California.

BARR: We have moved to dismiss when the challenged language is not defamatory or is covered by an absolute privilege. We also have succeeded on motions to dismiss for untimely service, statute of limitations and failure to name the correct parties. I have not found motions to dismiss to be any more, or less, effective than motions for summary judgment.

NELON: We have moved to dismiss in cases where the wrong defendant has been named or a defendant has not been served, the plaintiff is deceased, or the complaint shows an obvious failure to state a claim (e.g., on its face, the publication or broadcast is privileged). With notice pleading requirements, we have experienced only a few cases in which a motion to dismiss is useful. With our limited experience it is hard to judge, but the standards applied in Oklahoma make it more difficult to obtain an early dismissal than summary judgment. It all depends, of course, on the merits of the respective motions. In Oklahoma, you may make both motions or even file more than one summary judgment motion if appropriate.

BUCHAN: If there are multiple plaintiffs, some of whom are private figures not central to the publication, this may be a good opportunity to narrow the case at an early stage to public figure plaintiffs. Also, when a statute of limitation defense is apparent on the face of the complaint and exhibits thereto, a Rule 12(b)(6) motion is effective. We have been quite successful with Rule 12(b)(6) motions on issues of defamatory meaning and whether the publication is "of and concerning" a particular plaintiff. We can make them seriatim in North Carolina. If we could not, it would make sense to wait until summary judgment unless the outcome at the notice to dismiss stage was pretty certain.

TEMPLIN: Texas does not have a demurrer practice, but does allow "special exceptions." Special exceptions can result in the dismissal of a case where the plaintiff is unable or unwilling to plead facts which would set forth a cause of action. Special exceptions are appropriate only where the defect appears on the face of the plaintiff's petition. The advantages of filing special exceptions over summary judgment are that you can obtain a hearing more quickly and that the plaintiff cannot respond that he or she needs discovery before submission of special exceptions to the court for hearing. The disadvantage is the remedy: the plaintiff can replead and thereby avoid dismissal; only in those cases in which it is impossible for the plaintiff to replead can special exceptions be successfully used

to dismiss a case.

I have used special exceptions where there was a good limitations defense and I knew that the plaintiff could not plead that the statements had been made less than one year prior to the date upon which suit was filed. I have also used special exceptions to have the court strike causes of action which are not recognized by Texas courts, as a matter of law. Summary judgment motions are more effective than special exceptions in Texas because of the limited scope of the special exceptions, as I have previously described. In federal court practice, a 12(b)(6) motion to dismiss is almost never appropriate because of the very strict standard by which courts judge such a motion.

PIERCE: Motions to dismiss are particularly appropriate where plaintiff's counsel is unfamiliar with the pleadings requirements for libel actions, and therefore motions to dismiss, even if on procedural grounds alone, can have the effect of discouraging some plaintiff's counsel and eventually causing them to give up. In our experience, motions to dismiss have been very successful. We have had just as much success with motions to dismiss as we have had with summary judgment motions. Our jurisdiction does not prohibit making both motions to dismiss and motions for summary judgment seriatim.

MEYERS: We would certainly consider a motion to dismiss in cases where there is a valid jurisdictional defense, the complaint establishes a statute of limitations bar, the statement at issue is not capable of defamatory meaning, or the statement is clearly privileged. This depends on the case. Recent successes with motions to dismiss involved (1) lack of federal jurisdiction in a case in which plaintiff tried to include a defamation claim against a newspaper in a civil rights case against a police department, and (2) a defamation claim that was really a case of trade libel. In the latter case, the court dismissed the defamation claim but allowed the plaintiff to amend to assert trade libel. This change in the definition of the cause of action paved the way for a later successful motion for summary judgment when the plaintiff was unable to prove actual pecuniary loss.

ABRAMS: As previously mentioned, I always look for the opportunity to file a motion to dismiss, both for substantive and strategic purposes. A motion to dismiss helps educate me as to the quality of the opposition. It also puts the opposition on notice that a vigorous defense will be mounted. Motions to dismiss seem particularly important in connection with political plaintiffs or political lawsuits, where the court is most likely to be sensitive to First Amendment concerns. Motions are also appropriate to establish the applicability of common law qualified or absolute privileges. At the least, this establishes the standard of fault that the plaintiff must meet.

Motions to dismiss are also recommended more in federal than state court

proceedings, because you have a single judge assigned throughout the matter and you are anxious to educate that judge on a continuing basis and encourage a point of view favorable to your client. In both state and federal courts in Maryland, you are entitled to file these motions simultaneously or seriatim. In addition, under appropriate circumstances, you are entitled to file multiple motions, both for summary judgment, and, more rarely, to dismiss (i.e. a motion to dismiss followed by a motion for judgment on the pleadings). Typically, motions to dismiss are less successful than summary judgment motions, because courts wish to give plaintiffs the opportunity to develop their claims. However, I do not believe that guideline prevails in media defamation actions, where there is often some favorable First Amendment sentiment that weighs in on the side of the defense, even at the earliest stages.

FALLER/GOEHLER:

We have found that a motion to dismiss may be more appropriate when the grounds for the motion are based on "pure legal defenses" such as statute of limitations and/or absolute privilege. In addition, we have filed motions to dismiss based on arguments such as lack of defamatory content or statement of verifiable fact (particularly when the statements are in the nature of rhetorical hyperbole). Overall, we have had more success with motions for summary judgment. We have found that motions to dismiss can be effective for purposes of educating the court on the important First Amendment considerations at issue in the case, however. We are not precluded in either state or federal courts in Ohio from making both motions, but we find that motions to dismiss are rarely granted, at least without affording the plaintiff the opportunity to amend.

FLEISCHAKER:

Under circumstances in which there are uncontestable defenses, such as public record privilege or pure opinion, a motion to dismiss may be in order. However, you have to think twice about a motion to dismiss for failure to allege elements of a claim, such as actual malice, because of the ease of amendments and the unavoidable consequence of educating your opponent. I have found motions to dismiss to be very successful. Of course, such a motion does not have to fully resolve a case to be successful. Educating the judge, dispensing of certain issues, informing the opposition of the seriousness of the case and his or her difficulty in prevailing are all factors. We have often filed affidavits as a part of a motion to dismiss, which technically transfers it into a summary judgment motion. Such affidavits, however, should not contain facts or allegations that the other side can easily contest.

KORZENIK: I have found that motions to dismiss can be extremely valuable because they often draw out the plaintiff; they help identify his theory of attack; and they can force the plaintiff to be more specific and, perhaps, to narrow and limit the focus of his case. Some states such as California seem to be extremely tolerant of a plaintiff's

efforts to replead. Thus, it may not be uncommon for plaintiffs to replead as many as four times before they finally identify what their case is really about. But even this process will often push plaintiffs into making commitments and taking positions that may prove costly to them later on. And, their commitments to certain legal positions may help the defense to improve its summary judgment posture when that stage is at hand.

I also am of the view that motions to dismiss should always be made even if they include some grounds that might be more appropriate for summary judgment. This is especially so when in federal court under Rule 12(b) or in New York State courts under Rule 3211(c) where the court will consider a conversion to a motion for summary judgment. I find that courts are quite receptive to this conversion option in defamation cases and that such motion to dismiss conversions can often produce efficient and relatively rapid dispositions in a defendant's favor.

Motions for Partial Summary Judgment

LDRC: ***Are there particular situations in which you have determined only to move for partial summary judgment?***

SHAPIRO: If there clearly are disputed issues of material fact preventing complete summary judgment, but where some real benefit can be obtained by partial summary judgment or summary adjudication of issues, we make such a motion. The risk of losing credibility with the court in seeking relief which is clearly not available -- complete summary judgment -- militates against seeking such relief. There is little benefit in making a motion one cannot win, particularly at the cost of one's credibility.

MEYERS: When there are obvious issues of fact in dispute as to part of the case, I agree that a partial motion for summary judgment can be useful to narrow and simplify the issues for trial.

FLEISCHAKER: We have filed motions for partial summary judgment, but only with the intent to file subsequent motions on the remaining portion of the case. There are cases in which it has been very helpful to try to dispose of certain elements, including punitive damages, without dealing with the entire case.

ABRAMS: I often seek partial summary judgment. The main reasons are to substantially narrow the scope of damages involved or to isolate issues so that juries and jurists do not hear and do not become confused or prejudiced by collateral matters that are irrelevant but nonetheless psychologically harmful. I have found that gaining

partial summary judgment also enhances settlement prospects by putting the plaintiff on the defensive.

FALLER/GOEHLER:

If the initial case evaluation indicates that complete summary judgment is unlikely, due to certain disputed material facts, a partial summary judgment motion may, nevertheless, be considered on the remaining claims. We have also filed motions for summary judgment on less than all available theories in the interest of judicial economy, reserving our rights to file further motions on other theories. We have seen the remaining claims voluntarily dismissed when summary judgment was granted in our favor on key claims.

BARR: I have sought partial summary judgment where I thought -- because of disputed material facts -- we would lose on some issue that precluded summary judgment on the whole case, and I did not want to jeopardize losing on issues we should win on in the event the court denied the entire motion.

TEMPLIN: I have been involved in non-media cases, where no specific privilege was involved, where I felt that while part of the case was appropriate for summary judgment, other parts involved fact questions which could not be resolved in that manner. I agree that filing a summary judgment for the entire case in such circumstances would have harmed the defendant's credibility with the court for those parts of the case that were appropriate for summary judgment.

KORZENIK: If you know that you are heading for a trial you might seek partial summary judgment in order to influence the shape and feel of the trial. Sometimes, however, it is worth keeping in play some of the plaintiff's more outrageous claims because (a) they injure the plaintiff's credibility or (b) they permit you to bring into evidence certain testimony that will injure the plaintiff's position generally and which might not otherwise get in.

NELON: In our jurisdiction a private figure case (Oklahoma has a professional negligence standard of fault) may not be ripe for summary judgment on liability but may offer possibilities for summary judgment on punitive damages. We have filed or have opposed partial summary judgment motions addressed to whether the publication or broadcast involved a matter of public concern, whether some but not all of the allegedly defamatory statements made were substantially false, and whether part of the publication or broadcast was privileged. In cases involving multiple reports on the same issue, we have moved for summary judgment as to all broadcasts, arguing that they must be construed together to determine whether any of them were actionable but recognizing that the court would probably separate them out and reserve for trial any individual news report with respect to which factual issues remained.

Pre-Discovery Motions

LDRC: ***Whether or not to take discovery before a summary judgment motion is made can take on tactical importance in defending defamation or related claims. Under what circumstances have you chosen to press pre-discovery summary judgment motions, what degree of resistance have you found from the plaintiff in such cases, and were their arguments successful with the trial judge?***

MEYERS: I cannot recall filing a summary judgment motion without discovery.

NELON: I also do not recall any cases in which we have made a summary judgment motion prior to discovery. We have opposed one pre-discovery motion which, based on affidavits from the plaintiff and his witness, asked the court to determine that the broadcast did not involve a matter of public concern. (The motion was originally granted; but under Oklahoma practice the ruling was interlocutory, and it was vacated by the judge who tried the case after the judge who granted the motion recused himself.)

BARR: I too do not recall filing a pre-discovery summary judgment motion. We have had success, however, with summary judgment motions filed soon after the receipt of plaintiff's mandatory disclosure statement and before any other discovery has occurred. In Arizona, mandatory disclosure statements must be exchanged within 40 days after the filing of the answer or any other responsive pleading.

BUCHAN: We have done so only with regard to statute of limitations issues when Rule 12 (b)(6) was not available because the publication date was not apparent from the complaint and had to be established with documentary evidence.

SHAPIRO: I have filed pre-discovery summary judgment motions only when I needed to establish certain facts which were not really subject to dispute, but which were not set forth in the plaintiff's complaint. For example, where a libel claim is made against a number of defendants, one of whom simply distributed the alleged libel in either printed or electronic form (such as a television network affiliate which simply re-transmitted the network's programming) and it is possible to establish the fact of such simple re-transmission without knowledge of or control over the content. The level of success achieved is directly related to the incontestability of the facts shown by declaration, with or without additional documentation. Generally, plaintiffs do object to such a motion proceeding without discovery, but where the court finds the facts proven by affidavit or declaration inherently credible (such as the role of a network television affiliate in the re-transmission of a signal originating from the network), and where the plaintiff cannot actually point to any evidence, the court may be prevailed upon

to accept the uncontested or uncontestable nature of the fact proven.

TEMPLIN: I have filed summary judgment motions prior to any discovery where I felt that the language alleged to be defamatory was clear and unequivocal and was not defamatory. I have also filed a summary judgment motion prior to any discovery where there was a limitations defense. In another instance, where publication of the allegedly defamatory material was privileged because it came from public records, I have filed a summary judgment motion without deposing the plaintiff. In one of the three instances I described, the plaintiff sought discovery and I did not object (this motion related to the non-defamatory language). In the other two instances, the plaintiff dismissed his lawsuit.

Typically, if a plaintiff objects to proceeding to summary judgment without discovery, the court will allow discovery. While I have not had to make the argument in front of the court in a summary judgment case involving libel, it is possible to persuade Texas judges not to allow discovery if (1) the discovery would be particularly burdensome or expensive and (2) a court can be convinced that the discovery would *in no event* relate to the subject of the summary judgment motion.

PIERCE: We have had success with pre-discovery summary judgment motions where the story in question relates to a previous court proceeding or events that were resolved by a court proceeding, and therefore, these court proceedings had a collateral estoppel effect in the subsequent libel action. Under such circumstances, a motion for summary judgment may be successfully presented to the court by merely obtaining materials and testimony that can be obtained apart from the libel lawsuit. In our experience plaintiffs have not objected to the pre-discovery motions.

FLEISCHAKER:

The same considerations apply to the question of pre-discovery motions as apply to motions to dismiss. Again, any affidavit should relate to facts that are uncontestable. We have had substantial success with pre-discovery motions. We have had cases dismissed, cases substantially limited, and cases in which the opposing parties recognized the difficulty of his or her case and voluntarily withdrew. Some plaintiffs have objected, of course. The response of the court has been favorably influenced by, in no particular order: (1) the absence of material, contested facts; (2) recognition of the primary importance of First Amendment protection for news media and need to quickly resolve such cases; and (3) the clear applicability of privileged situations, such as reliance on public records or absence of facts relating to actual malice.

ABRAMS: I have often filed pre-discovery summary judgment motions, typically but not always accompanied by affidavits going to the elements of truth, opinion,

privilege or fault. Again, my bias is in favor of such motions generally, for a variety of the strategic reasons previously discussed and because I believe that most media defamation cases are won at the motions stage, rather than before the jury. As a general matter, I would not file a pre-discovery summary judgment motion without first having exhausted the possibility of a motion to dismiss. At the very least, following that procedure preserves my right to multiple motions and, hopefully, narrows the range of legal issues in dispute. Particularly in matters involving politics, the electoral process, obvious opinion/editorial comment, and privilege, pre-discovery motions for summary judgment are helpful, and often succeed.

Another value to a pre-discovery motion for summary judgment is that it puts the other side to the immediate burden of either admitting that it lacks the facts necessary to support its complaint or, alternatively, producing the facts and affidavits upon which it relies. This tends to lock in the plaintiff at an early stage, thus narrowing the opportunity for fishing-expedition discovery and locking the plaintiff in to a single story before the plaintiff has the opportunity to develop a factual record in the case. The answer to whether a plaintiff objects depends entirely upon the circumstances of the individual case. As a practical matter, however, there is very little to lose by floating a pre-discovery motion for summary judgment in appropriate cases where it is more a matter of law then a matter of fact in dispute. In such cases an objection based on the need for further discovery is either inappropriate or, at the least, puts the plaintiff at a psychological disadvantage with the court.

FALLER/GOEHLER:

The circumstances involving the filing of a pre-discovery summary judgment motion are very similar to circumstances which exist when a motion to dismiss is filed. Usually, a legal defense such as statute of limitations or absolute privilege exists and a motion for summary judgment, rather than a motion to dismiss, is necessary because certain facts outside the facts alleged in plaintiff's complaint must be established through other means such as affidavit or public record. We have filed pre-discovery motions for summary judgment on the theory that discovery is unnecessary if the motion is granted on the basis of undisputed facts not warranting discovery procedures.

Unless an agreement can be reached with plaintiff's counsel, our experience has been that it is very difficult to proceed with a pre-discovery motion. Typically, plaintiff's counsel will object to proceeding on a motion for summary judgment without discovery. In addition, our experience has been that the courts are reluctant to proceed on a motion for summary judgment without at least some discovery being afforded to plaintiff's counsel. Our experience has been that the best approach to use to attempt to convince the court to allow the motion to proceed without discovery is an argument that the parties will save substantial

litigation costs and expenses and the court will not be burdened with discovery disputes.

KORZENIK: In several cases in which I have attempted prediscovery motions for summary judgment, they have succeeded -- admittedly all in New York State. In my experience, defendants have a better chance of winning prediscovery summary judgment by making a motion to dismiss backed by affidavits that invite the court to do a conversion to a motion for summary judgment. This can be especially valuable and efficient when you have both grounds for dismissal addressed to the pleadings and also grounds for (or on the cusp of) summary judgment. Plaintiff will then have to come forward with responsive affidavits or enhance their risk of facing a conversion. In this setting, a judge will often see the merits of conversion and plaintiff's clamor for discovery will, quite properly, be to no avail.

My experience is that a motion to dismiss aimed at conversion somehow frames the key issues in such a way as to make a plaintiff's demand for discovery less compelling. This can be particularly so where there are special defenses such as "invitation and consent" that lend themselves well to summary disposition and which may just as well be included in the motion to dismiss. The motion to dismiss component will also clear away the defective causes of action while the summary judgment conversion component will clear away the remaining substantive of claims. At minimum, you will draw out the plaintiff's position -- not just legally but also in the form of affidavits -- thus gaining valuable information. But, more often, through this type of "omnibus" motion you can obtain an efficient and rapid termination of a case. In sum, defense counsel should not yield to the shibboleth that plaintiffs are "entitled to discovery" when the case may be eliminated at the threshold on the basis of certain focused issues.

Supporting Discovery

LDRC: ***Speaking of discovery, what types of discovery have you found to be particularly important or significant to winning a summary judgment motion?***

FLEISCHAKER:

Two items of discovery are in my view pre-eminent: (1) plaintiff's deposition; and (2) full and complete preparation of defendant witnesses to be deposed by plaintiff.

FALLER/GOEHLER:

We too find that probably the most significant discovery necessary for winning a summary judgment motion is the plaintiff's deposition. Of course, if other

discovery can prove truth beyond question, that is key.

PIERCE: In our experience generally the only discovery that has been necessary has been the deposition of plaintiff; however, as a general practice, that deposition does not take place until interrogatories and document requests have been answered by plaintiff.

SHAPIRO: I agree that the plaintiff's deposition is probably the most important single discovery effort in preparing a successful summary judgment motion. Public record documents, if any are applicable, are also most helpful. Depositions of third-party witnesses generally create issues of fact, rather than remove them, and I find that written discovery from the plaintiff is only occasionally helpful.

TEMPLIN: Prior to moving for summary judgment, it is important to establish exactly what language the plaintiff claims is defamatory. Also, in a case in which there is a question as to whether or not the plaintiff is a limited purpose public figure, I agree that it is almost always necessary to obtain from the plaintiff facts which would establish the publicity given to the plaintiff and the plaintiff's actions which have injected him into a public controversy (if any).

NELON: My experience has been that the most useful discovery has been paper discovery directed to the plaintiff (interrogatories, document requests, and requests for admissions) followed fairly quickly (if possible, before the reporter or news management are deposed) by a deposition of the plaintiff. The plaintiff's deposition seems to be the most critical part of the process. We have effectively used the plaintiff's deposition to tie him down on what statements in the publication or broadcast are false, why he believes them to be false and what the truth about them may actually be, and who the people are who can supply needed information to support a summary judgment motion. The plaintiff's deposition can also be useful in establishing grounds for arguing that the publication or broadcast contains non-actionable judgmental statements ("opinion"), or that the plaintiff has no reasonable basis to contend that the defendant was at fault. See, e.g., Metcalf v. KFOR-TV, Inc., 828 F. Supp. 1515 (W.D.Okla. 1992)(summary judgment granted on various grounds on all but one of twenty-three statements in multiple broadcasts about the plaintiff).

BUCHAN: I have found quite useful formal and informal discovery on matters relative to the "public figure" issue, particularly requests for production of documents from plaintiff related to plaintiff's role as a general purpose or vortex public figure, followed by requests to admit information to support plaintiff's public figure status.

MEYERS: Discovery that has helped win summary judgments has included: (1) evidence to establish plaintiff's public figure status, such as prior publications about plaintiff;

(2) public records subpoenaed from public agencies to establish truth or fair report privilege; and (3) plaintiff's business records, to establish absence of pecuniary loss in a trade libel case.

ABRAMS: I focus on: (1) discovery regarding sources of information; (2) discovery regarding basis of plaintiff's claim; (3) discovery regarding plaintiff's status as a public figure/official or the presence of privilege; (4) discovery regarding evidence of fault; and (5) discovery regarding truth of allegedly defamatory material; and (6) probing discovery on nature and extent of plaintiff's damage claims and effect of publication on plaintiff's physical, mental and financial well-being.

BARR: Deposing the plaintiff; obtaining (if you don't have them already) public documents that support your client's story; having your client well enough prepared for his deposition (assuming the plaintiff takes it before filing its responsive brief) that you may use the transcript, as opposed to an affidavit, as proof of lack of actual malice on the motion for summary judgment.

LDRC: ***Also speaking of discovery, to what extent have the new federal rules on mandatory disclosure already affected your summary judgment practice in defamation and related media cases? And to what extent do you expect that they may affect summary judgment practice in the future?***

ABRAMS: It is too soon to tell.

FLEISCHAKER:

The new federal rules have had no effect that we can see at this time. Frankly, we do not expect that they will affect our summary judgment practice in the future.

FALLER/GOEHLER:

To date, we have had very little experience with the new federal rules on mandatory disclosure in our jurisdiction. On the other hand, since, as stated previously in our roundtable discussion, we have had the greatest success with summary judgment motions following some discovery, we do not anticipate a significant impact or affect on our summary judgment practice in the future resulting from mandatory disclosure.

SHAPIRO: I have had little experience with the new federal rules in libel cases to date, but I doubt that they will have much effect on summary judgment practice in the future. Where the motion can now be made without discovery, they will have no effect; where discovery is required, the key piece of discovery in my view is the deposition of the plaintiff which is really unaffected by the early disclosures.

PIERCE: The United States District Court for the Middle District of Tennessee has opted out of the new federal rules on mandatory disclosure. However, this federal court has adopted a process of case management which includes disclosure requirements similar to those required by the new federal rules. To date, our district's case management rules have not had an effect upon the one summary judgment motion we have filed since those rules went into effect. However, it may be anticipated that early disclosure will more often than not give the advantage to the less prepared party, which is often the plaintiff.

TEMPLIN: I have not had any libel cases filed in federal court since the new mandatory disclosure rules have been in effect. However, I can see several issues that will be raised when that happens. Normally, you would prefer to get to the summary judgment stage with as little discovery as possible having been given up by the defendants; amended rule 26(a) will make that more difficult. In addition to disclosing documents that are relevant to the plaintiff's claims (such as perhaps drafts are reporter's notes), the Rule also requires name, address, telephone number and the subject of possible testimony for individuals "likely to have discoverable information relevant to the disputed facts ... ." For this purpose, what do you do about confidential sources? Perhaps you list them as "source A," "source B," etc. This would certainly having the unfortunate effect of highlighting the issue for the plaintiff, at a stage where the defense would like to ignore any confidential source issue and get right to summary judgment.

Supporting Documentation

LDRC: ***What types of documentation do you normally try to include in support of the motion for summary judgment (e.g., attorney affidavits, witness affidavits, expert affidavits, deposition transcripts or portions, other exhibits) and is the supporting documentation which you utilize influenced by whether the motion for summary judgment is a pre-discovery or post-discovery motion?***

NELON: At one time or another we have used all of the forms of documentation that you mention, as well as public records and the parties' responses to interrogatories and requests for admissions. The question of whether the motion is pre- or post-discovery does have an influence, but only to the extent that certain types of documentation would, by definition, not be available if the motion is pre-discovery. If I thought a pre-discovery motion would succeed, I would concentrate on affidavits or public records (if applicable) to support the motion.

BUCHAN: We would also use all of the types of documentation mentioned, except perhaps for attorney affidavits, depending upon the case. We have not offered expert affidavits in support of the summary judgment motion in public figure cases on

the constitutional malice issue because that could open the door to plaintiff's expert evidence, which we would assert is irrelevant and inadmissible. We find responses to discovery, especially responses to requests to admit, can be very helpful. We have not utilized pre-discovery motions except in statute of limitations defenses. We would obviously rely upon affidavits regarding publication dates in such cases.

TEMPLIN: For us summary judgment evidence would normally include affidavits from the defendants concerning the lack of actual malice, including reporter, editor and perhaps publisher. It is also necessary to include deposition testimony or other evidence of public figure or public official status of the plaintiff, if that is applicable. In one case filed by an attorney who was alleging that some fifty-eight statements in a magazine article were defamatory, we enclosed over a hundred summary judgment exhibits, consisting principally of pleadings from various lawsuits in which the plaintiff had been a party, so as to show the privilege which attached to those statements. We also included a tabular summary, which consisted of some twenty pages, in which we listed in columns each allegedly defamatory statement, the summary judgment grounds, and references to the exhibits. This complicated presentation was successful, but only because there was a judge who had some knowledge of libel law and was willing to take the time to review the evidence and determine that in fact each of the allegedly defamatory statements was covered by the appropriate evidence.

SHAPIRO: As I previously suggested, in my judgment the most effective documentation are portions of the transcript of the deposition of plaintiff, or public records where they are available and applicable. Witness affidavits are of value only where there is a need to establish a fact as to which plaintiff cannot truly raise a genuine issue. The only supporting documentation available prior to discovery would be the declaration of either a defendant or third-party witness for the purpose of establishing a fact which is not really contested, but which must be established to support the motion.

PIERCE: In our practice we have found that the types of documentation generally necessary to support a motion for summary judgment, particularly where actual malice is the applicable standard, are the affidavits of the reporters, editors, and/or news directors involved in investigating and publishing the story at issue. Assuming that the plaintiff has little information which would contradict the standard of care utilized by the media and its employees, it is effective to cite to those portions of plaintiff's deposition establishing that he or she has no such knowledge.

FLEISCHAKER:
We have never used attorney affidavits in support of our summary judgment motions. We have used at various times witness affidavits (especially if discovery is closed or they are contested), and we have relied heavily on deposition

transcripts. I have had one case in which we had expert and witness affidavits on which we relied, on which the court relied in granting summary judgment, and on which the appellate court relied in affirming summary judgment. Pre-discovery supporting documentation should only contain uncontested facts.

MEYERS: I have relied primarily on deposition testimony and documents, including public records. I have also supplemented these materials with answers to interrogatories and witness affidavits. I too have never used an attorney affidavit.

ABRAMS: I try to include witness affidavits; deposition transcripts; (rarely) expert materials; other discovery responses (such as interrogatory answers and documents produced during discovery). My decision regarding supporting documentation is indeed influenced by whether the motion is pre- or post-discovery.

FALLER/GOEHLER:
Typically, the documentation which we utilize in support of a motion for summary judgment includes transcripts of depositions, witness affidavits (primarily of the reporter and/or editor) and, if available, an independent "paper trail" supporting the truth/accuracy of the publication. Of course, these decisions are influenced by whether the motion is being made pre- or post-discovery.

BARR: If pre-discovery, then I would rely heavily on public documents. For post-discovery motions I tend to rely on deposition transcripts, public documents, and witness affidavits with supporting documentation.

Private vs. Public Figure Motions

LDRC: ***Of course, not every case is alike. For example, in terms of the nature of the plaintiff, what has been your experience with summary judgment motions in private figure cases as opposed to those involving public figures?***

NELON: We have succeeded as often with summary judgment in private figure cases as in public figure cases. Issues of substantial truth, opinion, privilege, absence of fault, and causation have all been raised in summary judgment motions involving private figures. Occasionally an issue has come up whether the publication or broadcast actually refers to the plaintiff or not. We have also had great success with summary judgment motions in public figure cases. The issues have been essentially the same as in private figure cases, although the higher standard of proof on fault sometimes changes the principal focus of the motion to the fault element.

SHAPIRO: In my experience as well private figure libel actions are virtually as susceptible

to summary judgment as are those brought by public figures. Although the standard of fault is substantially different, many judges decline to hold that a defendant did not act with constitutional malice unless the Court is also convinced that the defendant did not act unreasonably under the circumstances, a standard more applicable where negligence is the requisite level of fault. The issues most appropriate for summary judgment in private figure cases are those of privilege, opinion, and substantial truth.

FLEISCHAKER:

We have also had success in private figure cases, but obviously with no reliance on the actual malice standard in Kentucky. We have had great success with the public records privilege and some success with common law defenses such as of and concerning, group libel, the wire service defense, and whether the publication is even defamatory as a matter of law. In public figure cases we have been very successful. In addition to all the defenses used for private figures, we have of course had success with the actual malice defense and with the related concept with regard to public figures that there is substantial constitutional protection for speech. For example, courts seem to be more comfortable with the concept of opinion in the political arena than when dealing with private figures.

BUCHAN: Our only recent experience with summary judgment in a private figure action was successful. In cases in which a private figure plaintiff has made no serious attempt to demonstrate that the erroneous publication was the result of the newspaper or broadcaster's violation of established journalistic standards, we have been successful in winning summary judgment on the issue of negligence. We have also succeeded on common law qualified privilege issues. On the other hand, our experience in public figure cases has been mixed.

TEMPLIN: Summary judgment motions in private figure cases are appropriate if the language is not defamatory or if some other privilege exists. Nevertheless, clearly courts are attuned to the idea that defendants in public figure or public official cases are much more likely to obtain summary judgment than private figures.

Summary judgment grounds we have found most useful in private figure cases include the contention that the language of the publication is not defamatory; that the gist or sting of the statement made is no worse than the truth; that the statement is substantially true; and that there is a common law or statutory privilege which attaches to the statement, either because it comes from court records or other public records or because it was made in a business context, with a speaker and a listener with appropriate interests.

On the other hand, with respect to public figures, we have been very successful in Texas with summary judgment. The Texas Supreme Court has embraced U.S. Supreme Court decisions which offer full protection for media defendants in these

matters. The most effective summary judgment ground is, of course, that the statements were not made with actual malice.

ABRAMS: I believe summary judgment is much more difficult to obtain in a private figure case, unless it is a matter of paramount public concern. Grounds we have attempted to assert on such motions have included truth; opinion/rhetorical hyperbole; lack of defamatory meaning; absolute or qualified privilege; and the absence of constitutional malice (in qualified privilege cases).

On the other hand, I have been very successful with summary judgment motions in public figure cases. The three most successful grounds have been absolute privilege, qualified privilege and the absence of constitutional malice, and the absence of a false statement of objective fact.

PIERCE: Because of the much greater likelihood of obtaining summary judgment in public figure cases, discovery should be directed toward establishing by all possible means that the plaintiff is at least a limited purpose public figure. We have been successful with summary judgment, even in private figure cases, by relying upon common law defenses of privilege. With respect to public figures, courts are generally quick to accept the actual malice standard under the common sense understanding that anyone who voluntarily steps into the public light must be expected to endure more criticism and comment than private figures. For purposes of such motions we pay particular attention to explaining the detail and care utilized in publishing the story.

MEYERS: I can recall only one motion for summary judgment that we have made in a private figure action. The motion was successful, on statute of limitations grounds. As to public figures, we have made numerous successful motions on grounds including truth, insufficient evidence of actual malice, and opinion (pre-Milkovich).

FALLER/GOEHLER:

We have prevailed on summary judgment motions in private figure cases. Our successful motions have been based on defenses such as privilege, opinion (non-verifiable fact), substantial truth and statute of limitations. We have also had success with summary judgment motions in public figure cases. The grounds supporting such successful motions have been the same, e.g. privilege, opinion (non-verifiable fact), substantial truth and statute of limitations.

BARR: As a practical matter, in a private figure case you must argue substantial truth or privilege in order to have a chance of winning a summary judgment motion. Grounds for such a motion would include public records privilege, fair and true report of government proceedings, and substantial truth. In public figure cases, I also argue substantial truth and/or privilege *before* I argue constitutional actual

malice. See Currier v. Western Newspapers, 855 P.2d 1351 (Ariz. 1993)(combined evidence of ill will, negligence, breach of journalistic standards and ignoring warnings of inaccuracies may create "some evidence of actual malice" that is "enough to survive a summary judgment motion"); Lewis v. Oliver, 873 P.2d 668 (Ariz. App. 1993)(holding that evidence of current and past "vindictiveness" creates a jury question on actual malice).

KORZENIK: Because of the Chapadeau standard of "gross irresponsibility," New York Courts are particularly receptive to motions for summary judgment in private figure cases. There are also available in private figure cases special issues that are often susceptible to summary disposition. On one occasion we obtained summary judgment against a private figure plaintiff on grounds of "invitation and consent". The Restatement describes the defense of "invitation" in surprisingly broad terms and there are many cases throughout the country -- especially in New York -- that construe "invitation" in an equally favorable way. There is often much to be found in a plaintiff's course of conduct which may give rise to this kind of defense.

State vs. Federal Procedure

LDRC: ***Are there are special procedural rules in your jurisdiction that you find have had an influence on your summary judgment motions? And has your state practice been influenced by the approach of the federal courts in Liberty Lobby v. Anderson?***

NELON: The appellate courts in Oklahoma do not seem favorably disposed toward summary judgment motions generally. Under existing standards in this state a summary judgment motion should be denied, even if the facts are undisputed, if reasonable persons might reach different inferences or conclusions from the undisputed facts. Nonetheless, our courts have fairly frequently upheld summary judgment in defamation and privacy cases, unfortunately often in unreported opinions that have no precedential effect. Trial courts still seem somewhat hesitant to grant a summary judgment motion, mostly because it is unfamiliar territory for them, but the success rate of media defendants remains fairly high in our state.

We cite Liberty Lobby in all briefs in federal court, and the judges invariably cite the case (usually along with Celotex) in the orders. The federal judges seem to understand and apply it without much analysis. In state court, the standard on summary judgment is completely different as I have noted, and in one recent unreported appellate case the court chided the defendant for relying on that federal authority.

TEMPLIN: Previously, Texas had a rule that discouraged the use of affidavits of parties in support of summary judgments, where the subject matter would logically be known only to the parties. The result was that it was more difficult in a public figure/public official case to obtain summary judgment than in some other case. This rule has been amended and one court has specifically noted that it should not be more difficult, even if it is not necessarily any easier, to obtain summary judgment under the Texas standard. Texas courts are careful to state that the summary judgment standards in Texas are not the federal summary judgment standards and that merely because federal courts are more apt to grant summary judgment in First Amendment cases, Texas courts should not necessarily do so. Nevertheless, I believe that courts are influenced by the fact that at trial, actual malice would have to be shown by clear and convincing evidence. While the courts do not apply this standard at summary judgment, I think they are influenced by that argument.

ABRAMS: Maryland's procedural rules are in all major respects comparable to those applicable to federal proceedings. The single greatest difference is the absence of the assignment of a single judge throughout the litigation process in state court. As previously noted, this affects the considerations as to what motions to file and when they are appropriate. The decision in Liberty Lobby has had very little effect on the outcome of summary judgment motions in my practice.

PIERCE: Although not entirely clear, Tennessee common law has been interpreted to require particularized pleading of libel actions. Such a standard may be in conflict with the general notice pleading standard of the Tennessee Rules of Civil Procedure. We have not had any cases that have clearly turned on the clear and convincing standard of proof for actual malice as articulated in the Liberty Lobby case.

FALLER/GOEHLER:
There are no special state procedural rules but Ohio courts follow Liberty Lobby. Our motions for summary judgment typically include a discussion of the Liberty Lobby standard.

BUCHAN: In North Carolina there are no special state rules; but our appellate courts have recently cited Liberty Lobby with approval.

SHAPIRO: In California there are no special state procedural rules; and in my experience Liberty Lobby has had little if any effect on our judges when considering motions for summary judgment or adjudication.

FLEISCHAKER:
There are no special state procedural rules in Kentucky; Liberty Lobby has been applied by federal courts but not in state courts.

BARR: Although we have no special state rules, Arizona courts have adopted Liberty Lobby.

MEYERS: Pennsylvania case law does not permit summary judgment based solely on affidavits, even if unrebutted. However, federal courts here have followed Liberty Lobby.

Dealing with Judicial Idiosyncracies

LDRC: ***Apart from the normal substantive and procedural considerations attendant on making a motion for summary judgment, to what extent have you found that individual judges vary in their willingness to entertain such motions? What arguments have you made -- successfully or unsuccessfully -- in an effort to prevail upon judges to give your motions serious consideration?***

SHAPIRO: Some judges lack the decisiveness to take the firm step of deciding a case on motion, and seem to want to leave every decision of note to someone else -- the jury, or a higher court. Little persuades them to develop a backbone, although some can be convinced that they hurt the plaintiff and the system by subjecting them to further proceedings when it is obvious that, at the end of the road, the defendant will prevail. Others simply don't like the media, and do not want to feel like they have given it the break of avoiding trial. With them, one can make the same argument about subjecting the plaintiff and the system to unnecessary expense and grief, but that argument is usually rewarded with a smile and the denial of the motion.

FALLER/GOEHLER:

There is no question that an individual judge's willingness or unwillingness to entertain a motion for summary judgment is a key factor for consideration in the case analysis, strategy and pre-trial evaluation. Our experience has been that judges do vary greatly both in their willingness to entertain such motions and in their procedural handling of the motions. It seems that the judges try to balance a desire, on the one hand, to allow the plaintiff every opportunity to "have his day in court" with the chilling effect of libel litigation on the media. Accordingly, we believe that we have a better chance of success when we are able to clearly show the judge that the balance should tip in favor of the media defendant and that there is no unfairness in dismissing the plaintiff's libel claim prior to trial.

FLEISCHAKER:

I also agree that the individual judge makes an enormous amount of difference. It is not so much whether the judge is pro-media as much as whether the judge

intellectually understands the legal and factual basis for the first amendment arguments. We have also found that the willingness of the judge to read cases and legal briefs is extremely important. In Kentucky, we have a very strict standard for summary judgment. While some judges cannot seem to get beyond that, we have been successful with others who have taken the time to understand the law. In this regard, we have had success in such issues as the nondefamatory nature of the publication, damages, statutory privilege, as well as first amendment issues.

ABRAMS: As a general proposition, I have found federal judges more receptive than state judges to summary judgment motions. This is, of course, a gross generalization and numerous state judges have exhibited great sensitivity to first amendment issues and the importance of a vigorous exercise of first amendment rights by the media. The arguments I have found most effective in convincing judges to give serious consideration to such motions are chilling effect; political speech which is at the core of the first amendment; and finally, economic use of judicial resources.

PIERCE: In an effort to move a reluctant judge, I believe it is important to mention the public good performed by the news media and the importance of not having a chilling effect upon the first amendment. It is, however, important not to overstate these matters to the judge because the judge's own personal experiences with the news media may not have always been pleasant.

TEMPLIN: My argument to the potentially unwilling judge might go something like this: "Judge, I know you don't normally grant summary judgments, but libel cases really are different. The Constitution and the U.S. Supreme Court compel *all* judges (at the trial and appellate levels) to give these cases particular scrutiny. The burden of proof at trial is tougher for certain issues and the appellate standard of review is even different."

Effect of Summary Judgment Motions at Trial

LDRC: ***Once the motion for summary judgment has been denied, and if the case goes to trial, have you found that having made the motion for summary judgment assisted you in subsequent motions in limine, mid-trial motions and/or post-trial motions?***

NELON: Yes. Our experience has been that filing a motion for summary judgment helps in almost every aspect of pretrial preparation and the presentation of the defendant's case. Having gathered and presented critical facts and the record support for them in the summary judgment motion helps focus preparation on key

facts and issues at trial. Motions in limine are more easily understood by the trial judge if he or she already has an overview of the case from a summary judgment proceeding. If the judge has not previously or recently tried a defamation case, the summary judgment proceeding, even if unsuccessful in terminating the case, can be used to educate the judge about legal issues that may be novel to the court. The defendant may improve the chances of getting favorable jury instructions if the court is already aware of the applicable law from the summary judgment brief.

SHAPIRO: I agree that a motion for summary judgment, even if not completely successful, tends to educate the court as to certain of the legal issues, and as to defendant's position thereon. That can often prove helpful in subsequent motions in limine or in mid-trial motions, but probably not in post-trial motions. As a general rule the fact that the Court denied summary adjudication does not act as a negative factor in subsequent motions in limine or mid-trial motions.

BUCHAN: Yes, by educating the judge at an early stage about the constitutional protections provided libel defendants and the policies behind those protections.

TEMPLIN: I agree; the same issues are usually still present at the directed verdict stage.

FALLER/GOEHLER:
Our experience has been that a motion for summary judgment will assist in later motions in limine and during the course of trial, particularly in preparing jury instructions.

BARR: We recently prevailed on a directed verdict in a libel case on three issues on which summary judgment had previously been denied. In denying summary judgment on one of these issues the district court called our argument "stupid, inane and frivolous." Three months later the same judge directed verdict on the issue.

PIERCE: The motion for summary judgment requires both parties to research the legal issues involved, and therefore, this research is of significant assistance in motions in limine and other trial motions and briefs.

KORZENIK: I find that summary judgment, even where denied, can be extremely valuable not only because it draws out the plaintiff's position but also because it (1) gives the defense an opportunity to educate the court and (2) educates the defense as to the way in which the court perceives the issues in the case. In short, it allows you to address directly the court's thinking in all future proceedings. Sometimes a court will deny summary judgment because it perceives factual questions that the plaintiff's proof cannot ultimately support. Sometimes these perceived issues are not issues that either of the parties have focused heavily on. Sometimes a judge

in his/her decision denying summary judgment will describe the residual questions of fact in a way that is ultimately not favorable to the way in which plaintiff would like to deliver its proof. A court's description of these factual issues in its decision on the summary judgment motion can, even if denied, be quite perilous to plaintiff and such comments by the court should be exploited fully by defendants both through the renewal of summary judgment motions prior to trial or on motions for directed verdict etc. When "DV time" approaches, a plaintiff's proof failure on these "judge defined" issues can make plaintiff amenable to extremely favorable settlements before he rests his case.

FLEISCHAKER:
Yes, such motions can be a substantial aid.

ABRAMS: Yes.

Summary Judgment Appeals

LDRC: ***If a summary judgment motion has been granted or denied, the question of an appeal may arise. How have you approached defending grants of summary judgment on appeal? And what has been your experience in attempting to pursue interlocutory appeals from denials of summary judgment?***

PIERCE: We approach appeals in defamation cases no differently than defending a grant of summary judgment on appeal for any other case. We have no experience with an interlocutory appeal of a denial of summary judgment in a libel action.

BUCHAN: I have no unique experience on the appeal issue. As to interlocutory appeal from the denial of one of our motions for summary judgment, we have no such experience. It would be extremely unlikely to be successful in this jurisdiction.

MEYERS: We defend appeals from our successful motions by arguing the correctness of the trial judge's reasoning. Interlocutory appeals are not permitted in Pennsylvania.

FLEISCHAKER:
We have not had difficulty in dealing with the concept of summary judgment in a defamation case on appeal. We have the usual problem of convincing the appellate court of the lack of any material issue of contested fact. Kentucky has no provisions for interlocutory appeals of a denial of summary judgment.

NELON: It is hard to generalize about the issue of an appeal regarding summary judgment. The approach will depend on the court's basis for granting the motion in the first place, the issues raised by the appellant, and his effectiveness in raising the

chosen issues. Our experience is somewhat limited in the appellate area; very few summary judgments have been appealed. Appeals of summary judgment granted in Oklahoma courts on motions filed after October 1, 1993 are subject to accelerated appellate review on a limited record. On the other hand, the denial of summary judgment is not appealable in Oklahoma.

SHAPIRO: I approach defending the grant of summary judgment on appeal in pretty much the same fashion as I approached making the motion in the first instance. Just as one must convince the trial court that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law, one must convince the appellate court that the trial court was right in reaching those conclusions. Given that the standard of review generally is a *de novo* one, there really is little difference in approach. Seeking interlocutory review by a writ petition is always a possibility, and occasionally can be successful, but in most instances the California appellate courts simply defer to the trial court pending trial of the action.

TEMPLIN: The summary judgment order should not specify specific grounds; that allows the appellate court to affirm on any of the grounds in the motion. Texas has only recently allowed by statute interlocutory appeals of denials of summary judgment on First Amendment grounds.

ABRAMS: Because summary judgment is most often granted on the grounds of qualified or absolute privilege, the absence of constitutional malice, or rhetorical hyperbole/opinion, summary judgment appeals typically revolve around questions of law without a substantial dispute as to the facts. Generally I try to emphasize whenever and wherever possible the importance of breathing room and the sanctity of free speech in these cases. Maryland has no special rules for interlocutory appeals of denials of summary judgment in media cases, except with respect to constitutional issues in the area of reporter's privilege and access cases, as to which expedited appeals will be granted. Interlocutory appeals are otherwise frowned upon and, in most cases, are precluded.

FALLER/GOEHLER:

We agree that, typically, the posture of defending a grant of summary judgment on appeal is very similar to presenting the motion itself. The focus is on convincing the court of appeals that the trial court was correct in concluding that there were no genuine issues of material fact and that the media defendant is entitled to judgment as a matter of law. In Ohio state court litigation, it is clear that an interlocutory appeal of a denial of summary judgment will be dismissed. However, in federal courts here there is *some* general First Amendment case authority which may be used to persuade the court to allow an interlocutory appeal.

BARR: We have no special approach to defending a granted summary judgment motion on appeal. As to interlocutory appeals, we have prevailed once in Arizona and in another case the California Court of Appeal declined to take jurisdiction of such an appeal. In Scottsdale Publishing, Inc. v. Superior Court (Romano), 159 Ariz. 72, 74, 764 P.2d 1131, 16 Med. L. Rptr.(BNA) 1033, 1034 (Ct. App. 1988), the court accepted jurisdiction in a special action after summary judgment had been denied the media defendant. The court stated that although "review ... of a trial court's denial of summary judgment is a rarity and shall remain so ... we make an exception ... in furtherance of the public's significant First Amendment interests in protecting the press from the chill of meritless libel actions."

KORZENIK: New York State is so generous with respect to interlocutory appeals that it is often wise to take up this opportunity when summary judgment motions are denied. This is particularly so, as in our state, where the appellate courts are more schooled in defamation law than some lower courts.

LDRC: ***Have you found it beneficial to attempt to resurrect the issue of denial of summary judgment in post-trial motions or on appeal?***

FLEISCHAKER: Yes, we have resurrected the issue of denial of summary judgment on appeal. Whether it has or will be a factor in the appellate court decision cannot be answered.

NELON: No. In Oklahoma, once the case is tried, the denial of summary judgment becomes a moot issue. I assume, however, some of the same issues raised on summary judgment may be raised again on a motion for judgment as a matter of law or motion for new trial. We have not had to face that issue before.

ABRAMS: In almost every case, raising summary judgment issues in post-trial motions has not proven successful. However, in an isolated few, very close cases the trial court has reversed a jury verdict on the basis of matters briefed at the summary judgment stage. Most often, however, success is then confined to appeal.

SHAPIRO: No.

TEMPLIN: No.

PIERCE: No.

MEYERS: No.

FALLER/GOEHLER:
No.

BARR: No.

Some Closing Thoughts

LDRC: ***Do you have any other thoughts regarding summary judgment motions which have not been discussed?***

FALLER/GOEHLER:
Our experience has been that courts recognize the chilling effect of libel litigation on the media and, as a result, take the pretrial motion practice and procedure very seriously under consideration. On the other hand, the courts want to allow the plaintiff every opportunity to "have his day in court" and, as a result, it appears that the motion for summary judgment will be more favorably received if presented after allowing the plaintiff a full and fair opportunity to conduct the discovery necessary to fully respond to the motion.

NELON: Perhaps my firm has been fortunate with respect to the types of plaintiffs who have brought defamation suits against our clients, or the particular facts involved, or the judges we have drawn, but I have yet to see a defamation case in which I would not file a motion for summary judgment. Few of the judges we would appear before have handled a defamation or privacy suit. The law is usually somewhat novel to them. The summary judgment motion is a useful tool to get the defendant's point of view about the facts and the law before the court. And, the state and federal judges in Oklahoma have seemed quite willing to grant summary judgment, because of the standard under the federal rules and despite the standard under the Oklahoma rules.

SHAPIRO: Because as a general rule I find summary judgment motions more successful after some discovery has been undertaken, in a couple of instances I have employed the following approach. I have suggested to plaintiff's counsel in writing that I intend to move for summary judgment based on certain specific, identified issues (such as privilege, opinion, or substantial truth), and have invited plaintiff to undertake promptly that discovery he believes necessary to meet those issues. If plaintiff is then unable to raise a truly disputed issue of material fact, but attempts to claim that he should be allowed further discovery to do so, the court is less sympathetic to his entreaties and more likely to conclude that plaintiff cannot raise such an issue of material fact and grant the motion.

TEMPLIN: We always make the points in our motion and brief that (1) a defamation case typically contains more issues of law than other types of cases and (2) that courts should be more likely to grant summary judgment because of the first amendment.

PIERCE: Because of the low regard in which juries generally hold the news media, as evidenced by the jury verdict research conducted by the LDRC over the years, summary judgment is of utmost importance and should be considered in all litigation strategy from the moment defense counsel receives a libel case.