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LDRC LIBELLETTER

December 1994

CANADIAN SUPREME COURT: PUBLICATION BANS

By Brian MacLeod Rogers

Publication bans during criminal proceedings should suddenly become a much scarcer commodity in Canadian courtrooms, after a period when they seemed to be all too omni-present.

Relying on the Canadian Charter of Rights and Freedoms, on December 8, 1994 the Supreme Court of Canada struck down a controversial publication ban that had prevented the television broadcast of a major docudrama show and set out new rules that will apply to all future cases. The court reformulated the traditional common law test for publication bans previously relied on in Canada, in order to give greater weight to freedom of expression concerns. As well, the court clarified procedures for challenging bans, which should quickly put the appeal of the notorious publication ban in the Karla Homolka/Paul Bernardo case before the Supreme Court of Canada itself.

Unlike the United States, publication bans are commonplace at various stages of criminal proceedings in Canada. Under the federal Criminal

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Thank you, Professor Zimmerman!

New York University Law Professor Diane Zimmerman spoke at the LDRC Annual Dinner in November on the *Immuno v. Moor-Jankowski* opinion and on opinion speech more generally. She has provided LDRC with a written copy of her remarks, which we want to pass along to the LDRC membership. LDRC wants to express its appreciation again for Diane's participation at the Annual Dinner.

Eavesdropping: A Conflict of Laws

LDRC asked Stuart Pierson of Davis Wright Tremaine in Washington to put together some thoughts on a difficult issue: conflict of laws in eavesdropping contexts. A memorandum from Stuart is attached to this month's *LDRC LibelLetter*. If you have any thoughts on the subject, comments or additions to Stuart's memo, please send them on to LDRC.

And a checklist of issues for advising on use of hidden cameras/ hidden microphones/hidden identities and ride-alongs is included in this edition of the LDRC LibelLetter, starting at Page 3. Again, if you have any thoughts, comments or additions on our memo, please send them to LDRC.

PAULA CORBIN JONES v. PENTHOUSE:

An Injuction Granted/An Injunction Lifted

On November 29, 1994 Judge Peter K. Leisure of the Southern District of New York, acting on an *ex parte* application, granted a temporary restraining order enjoining the publication of semi-nude photographs of Plaintiff Paula Corbin Jones in the January 1995 issue of *Penthouse* magazine and restraining any further statements, press releases or dissemination of other information on or about the photographs. Judge Leisure was convinced after receiving argument from the defendants to vacate the restraining order on December 1, 1994.

Plaintiff Jones alleged and Judge Leisure initially accepted that the injury to her reputation and the invasion of her privacy that would result from the

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Judge Mikva on *Moldea*

By Professor Stephen Wermiel

A member of the three-judge D.C. Circuit panel in *Moldea* v. *New York Times Co.* (*Moldea II*), 22 F.3d 310, last May has provided unusual insight into the surprising turnabout in that case which involved the fact\opinion distinction in libel cases. Abner J. Mikva, who left the D.C. Circuit in September 1994, to become White House Counsel, said the *Moldea* decision was necessary because the U.S. Supreme Court's decision in *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990), "failed to stress the importance of context" and "needed reinterpreting."

Judge Mikva discussed the case in a speech at the Fifth annual Georgia Bar, Media and Judiciary conference held in Atlanta in October 1994. He explained that because he had left the bench and because the Supreme Court had denied Dan Moldea's petition for certiorari, he was able to discuss the case.

Mr. Moldea's libel suit charged that his reputation was damaged by a review in the *The New York Times Book Review* which said that his book, *Interference: How Organized Crime Influences Professional Football*, contained "too much sloppy journalism." The D.C. Circuit panel consisted of Judges Mikva, Harry Edwards and Patricia Ward. Judges Edwards and Wald initially concluded in February 1994 that the book review contained statements that could be proven true or false, and that under *Milkovich* the case should be allowed to go to trial. *Moldea I*, 15 F.3d 1137. Judge Mikva dissented.

"What explains this?" Judge Mikva asked in his speech. "Why would Judges Edwards and Wald -- widely known for their commitment to First

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Judge Mikva on *Moldea*

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Amendment principles -- issue a ruling which I believe, and many others believed, had provided a troubling standard, and had inexplicably failed to take account of the protection from defamation actions which the common law and the First Amendment historically have provided for works of artistic and literary criticism?"

Partially answering his own question, he warned, "I think I can say that a feeling is abroad among some judges that the Supreme Court has gone too far in protecting the media from defamation actions resulting from instances of irresponsible journalism," he said. "I've been a judge for 15 years, and now that I've taken off my robes, one of the first things I must say is -- Watch Out! There's a backlash coming in First Amendment doctrine."

Although he said Judges Edwards and Wald were not part of the backlash, Judge Mikva added, "*Moldea I* does reflect an inclination among judges in favor of helping plaintiffs -- on the margin -- in defamation actions."

Three months after the first decision, Judges Edwards and Wald reversed themselves, issued a revised opinion, *Moldea II* 22 F.3d 310, and granted summary judgment to *The New York Times*. They concluded that their earlier decision had failed to consider the context of the "sloppy journalism" comment in a book review that is a traditional forum for expression of literary opinion.

In between the two decisions, Judge Mikva said in his speech, "I never said a word to Judges Edwards or Wald about it. . .I never teased them one bit about the favorable reaction my dissent had met with in comparison to their opinion." He said the two judges decided to grant the petition for rehearing without any prompting from him.

Judge Mikva said that "the *Milkovich* ruling set the stage for *Moldea*. Unless judges place a sufficient emphasis on context, book reviews, literary criticism, and political column-writing obviously will become more susceptible to charges of defamation than was previously the case. This is precisely what happened in *Moldea I*. . . ."

The *Moldea II* decision, he said, began "the work of stretching *Milkovich*." He said, "It breaks off commentary and literary review from the Supreme Court's 'context-deficient' treatment of ordinary libel under *Milkovich*."

The full text of Judge Mikva's speech will be published in the Georgia State University Law Review, Vol. 11, No. 2, in February 1995.

Stephen Wermiel is an associate professor of law at Georgia State University College of Law in Atlanta.

MINUTES FROM THE DCS ANNUAL BREAKFAST MEETING HELD ON NOVEMBER 10, 1994 ARE ATTACHED TO THIS ISSUE OF THE *LDRC LibelLetter*

And Another Libel Suit Against the Computer Bulletin Board

A claim against a computer bulletin board service has been included in a libel suit brought in the United States District Court for the Southern District of Florida and filed in September 1994. It was the second such suit (at least of which we are aware) filed this fall. The defendants include Capital Cities/ABC, Inc., The Kansas City Star Company and one of its reporters, Datatimes Corporation, and Prodigy Services Corporation. The suit, brought by Gul Jaisinghani, who established and operates companies that engaged in fundraising for state Veterans of Foreign Wars.

The libel claim is based upon an article that initially appeared in *The Kansas City Star*, and was made available to subscribers by Datatimes Corporation, an on-line computer service which, according to the complaint, carries *The Kansas City Star*. The complaint alleges that Prodigy permitted a Prodigy Service user to transmit a message on a Prodigy service repeating the allegedly defamatory statements contained in the article on a Prodigy service.

UPDATES

** *Masson v. Malcom*. Reported last month that Dr. Masson had filed a motion for a new trial. That motion has since been denied and Dr. Masson has filed a Notice of Appeal with the Ninth Circuit.

** *Prozeralik v. Capital Cities, Inc.* Reported last month that a jury returned a verdict against Capital Cities, awarding plaintiff $11 million in compensatory damages and $500,000 in punitive damages. Capital Cities/ABC plans to file a motion for judgment notwithstanding the verdict.

HIDDEN CAMERAS/HIDDEN MIKES/HIDDEN IDENTITIES RIDE-ALONGS
Some Thoughts From Experience on Advising Clients

Changing technology has given the media new opportunities and methods for gathering the news. These new technologies may also be considered more aggressive and intrusive than traditional news-gathering, and as a consequence, lead to lawsuits.

LDRC asked lawyers who are frequently required to give counsel on the new techniques to help us compile a checklist. What follows are issues that can emerge and/or areas of law for consideration when a reporter wants to employ these techniques in producing his/her story. This is by no means a complete list. Rather it is intended as a starter-kit of the issues that lawyers and journalists discuss.

I) HIDDEN TAPE EQUIPMENT/HIDDEN IDENTITY

The reporter wants to use a hidden camera and microphone as well as hiding his own identity in the course of researching an investigative report.

WHAT ARE THE FACTS OF THE STORY?

Everyone wants to know in as much detail as possible what the facts of the story are, who the targets of the investigation are, who else is likely to be captured on tape (audio or video) other than the subject and why...all of the common sensical questions that any lawyer wants answers to in connection with a newsgathering or reporting analysis.

While it may not have much to do with the purest legal analysis, practical experience suggests that the likelihood of a claim (and a jury's reaction) can be affected by the location of the taping (e.g., a subject's home vs. his open-to-the-public business), whether the subject is one suspected of wrongdoing (vs. an innocent who may have information relevant to the report), which only undercover reporting techniques can reveal, whether the reporter has identified the subject based upon significant other newsgathering and primary reporting or is using hidden taping in what might be characterized as a fishing expedition, whether the story will be easy or difficult to justify as newsworthy, etc.

Privacy law, a key body of law with respect to these newsgathering techniques, may be an analytical mess full of subjective criteria and elements, but that is probably why experienced counsel find that it rarely hurts to start with the intuitive feel of the story and the target of the newsgathering.

When a reporter plans to hide his or her identity, counsel is undoubtedly going to want to know whether it is a situation that the reporter is entitled to be in simply as a member of the public (e.g.,, as a consumer in a store, an applicant at an employment agency or real estate agency) versus one that would not be open to the reporter absent active misrepresentation.

It is probably a safe assumption that the least deception used the better. Simply failing to reveal ones identity as a reporter rather than having to create an entirely new one -- the omission vs. the affirmative misrepresentation -- may generate a greater comfort level and thus may be worth exploring.

Because undercover or hidden newsgathering techniques can generate a host of legal issues, even if the claims brought are not winnable, media lawyers do, where appropriate, ask their clients whether there are other options for obtaining information.

AUDIO

- ◇ ***Federal Wiretap Statute*** **18 U.S.C. Sec. 2510, et seq.**
- ◇ ***Federal Comunications Act, Sec. 605,47 U.S.C. Sec. 605***
- ◇ ***State law on audio recording and broadcast.***

Does state law require "one-party" consent or "all party" consent in the secret recording of a private conversation? What are the exceptions? Is violation of the audio recording laws a criminal violation? Are the disclosure statutes or provisions different from the recording statutes and how have the courts interpreted this difference? Are the laws of two different states implicated?

"One party consent" or "all party consent". In the Federal Wiretap Statute (18 U.S.C. Sec. 2510 et seq.), as well as many state statutes, consent to the audio-taping by one party to the conversation may be sufficient. In other states, consent to the taping by all parties to the conversation may be required. There are exceptions built into virtually all of these statutory provisions and though often not applicable to journalistic endeavors, they are obviously worth reviewing.

◆ Because "all party consent" laws may apply only to situations where there is legitimate expectation of privacy, check the case law on how that expectation of privacy is defined. Can the reporter create a situation for the taped conversation so that there will be no expectation of privacy? (For example, can the reporter find a public area with a number of others in earshot to do the taping, or can the reporter have the conversation with "strangers" present to ensure that it's a semi-public situation. Note that the fact that the taping takes place in a public place may not, in and of itself, be enough; e.g., a conversation in whispers in the corner of a parking lot.) The presence of employees of the subject does not necessarily make it a semi-public situation.

◆ Remind the crew that they may need to turn off the recording device if the situation changes or when leaving the semi-public area.

Wireless microphones are regulated, and their use is limited, by the FCC. 47 C.F.R. Sec. 15.9. If wireless microphones are being used, the situation may require an analysis akin to "all party consent".

Telephone conversations.

◆ Check the federal statutes noted above and state law.

◆ State law varies on the recording of telephone conversations.

◆ Check the law of both states if the reporter and source are in two different states.

◆ 47 C.F.R. Sec. 73.1206: Broadcast of Telephone Conversations. FCC regulation provides that before a broadcast entity broadcasts a conversation live or tapes it for later broadcast, it must inform all parties to the call of its intention. Exempted are conversations where the caller is presumed to know from the circumstances that the call is being, or is likely to be, broadcast; e.g., a call-in program.

◆ And see: In re Use of Recording Devices in Connection with Telephone Service, 2FCCR 502 (1987); 86 FCC2d 313 (1981) (imposing "beep tone" and other requirements, the violation of which constitute violation of telephone company tariffs.)

VIDEO

What are the circumstances of the video recording? In general with video recording consider state law on trespass, consent, misrepresentation, privacy, and libel.

Surveillance Statutes.

◆ Some states have specific statutes on video surveillance. Simply taking the pictures might violate the law in a situation where there is an expectation of privacy.

◆ Has case law expanded audio recording laws to include video recording (by calling the video image a communication, for example) and are there then concerns about one-party or all-party consent?

Trespass. **Check state trespass laws.**

◆ Where will the camera and crew be located? Will it be technical or criminal trespass? Will there be actual harm or damage to the property owner as a result of the trespass? What constitutes damages in order to support a trespass claim (e.g., does injury from the publication count; is damage to the property required)?

● Will the recording take place in a home or business? Home situations have tended to generate more litigation and therefore may require a higher level of concern. ("Home" may include institutional residences such as nursing homes, hospitals, prisons and so on. If the institution asks the crew to sign a location release form, advise the crew to review it carefully.) If taping on federal property specific laws may govern.

Privacy. The potential legal issues are intrusion, public disclosure of private facts and false light.

◆ Are the privacy rights in the state codified?

◆ Some intrusion into seclusion concerns must be considered at the time of the recording, and not simply at the time of decision to broadcast. (These concerns are very fact specific. An example would be a hidden camera recording a patient undressing.)

◆ Statutory and case law on public disclosure of private facts and false light can generally be considered during the decision to broadcast rather than before the decision to record.

◆ Consider the impact of the location (for example, home or office) on the likelihood of a claim for intrusion into seclusion.

EQUIPMENT

◆ The use of **wireless microphones** in recording conversations is regulated by the FCC. 47 C.F.R. Sec. 15.9 limits the use of wireless microphones in many situations without obtaining the consent of all parties.

◆ Consider the impact of using high powered or enhanced video and audio equipment (which allow the crew to "hear" or "see" what they otherwise could not) on the risk of a claim for intrusion into seclusion.

HIDDEN IDENTITY

Misrepresentation and Fraud

◆ What is the state case law and statutory law on misrepresentation? Fraud? State law in this area tends to be very fact specific, so consult it carefully if the reporter needs to have fictional characteristics. Various contexts will require analysis of different statutes; for example, laws regarding false statements to law enforcement or laws about fraud in a particular industry.

Forms.

◆ Check state and federal law carefully before filling out any government forms, giving a social security number, or when giving information for government benefits such as Medicare or Food Stamps. Are the penalties civil or criminal?

◆ Does the form require a signature verifying that the information is true under oath or pain of

of perjury?

◇ For credit applications, check state and federal bank statutes.

◇ Counsel are generally more comfortable when a reporter is in a situation in which any member of the public could be, such as a customer in a store or as a consumer of service. Hidden identities may run the gamut from simple failure to identify oneself as a reporter to an entirely false resume, with counsel comfort level running a similar gamut.

◇ Most difficult: reporter gains access denied ordinary individuals by posing as, for example, utilities meter reader.

LIBEL

In deciding whether or not to broadcast, consider the impact on the risk of libel which may result from the nature of footage from a hidden camera. Some plaintiffs have claimed that merely their presence in this type of footage conveyed false and defamatory implications.

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II) RIDE-ALONG

A reporter and crew want to join a legitimate law enforcement agency during a bust, execution of a search warrant, an inspection, or other such form of official business that may require entry on to another's property. The issues include trespass, intrusion, publication of private facts, sometimes infliction of emotional distress.

CREW IDENTIFICATION

Recent court decisions suggest that it is prudent to take steps so that the crew members unmistakably differentiate themselves from the law enforcement officials whom they're accompanying.

CONSENT

Consent to entry and the question of what constitutes consent may be a key issue.

Implied or express consent. The course least likely to engender a claim is to obtain express consent, written or on videotape, before entering the premises. News organizations have taken the position that consent is implied if the crew is not asked to leave in a situation where the recording is not surreptitious and personnel are clearly identified as being members of the media. Further, many news organizations maintain that if the subject keeps talking to the person they know to be a reporter, this would in fact pass the test for implied consent as long as the subject is not legally incapable of granting consent. Consent, or lack of consent, has been the issue in a number of recent suits; therefore, a thorough analysis of the most recent law is undoubtedly prudent.

Withdrawal of consent. Different news organizations have different standards on whether and when consent to invasion of privacy can be withdrawn. Some organizations assume, as a practical matter, that consent to invasion of privacy may be withdrawn any time before publication or broadcast. Though there may have been consent to the intrusion, consent to publication of the material may be seen as a

different issue. Other news organizations maintain that consent is a contract and they argue reliance. Contract and reliance arguments have generally been successful in convincing people to consent to broadcast.

Exit. Crews are generally advised to leave the premises immediately if asked to leave. They can then go to a public spot, such as the sidewalk, and shoot from there.

Location. Ride-alongs into a business setting may pose less risk of a claim than ride-alongs into a home setting because of the different level of expectation of privacy. Disruption of the business operation – entry by officials may be the key reason for that -- and publication of an official action against a business may provoke a claim.

Trespass. What are the state's trespass laws and are they likely to apply to the given factual situation? Is the potential trespass criminal or civil?

It is best to avoid property damage and to create as little disruption (in addition to that created by the government employees) as possible.

Federal Civil Rights Law (§1981 et seq.) Keep track of how courts are handling these claims.

Subpoenas: Ride-alongs may complicate the defense against a subpoena for outtakes, notes, etc.

LDRC would like to acknowledge the efforts of Kate Tapely, an intern at LDRC this past summer from Columbia Law School, who contributed greatly to the research and writing of this article.

MARK YOUR CALENDARS AND SAVE THE DATE!
NAA/NAB/LDRC Libel/Privacy Conference
September 20-22, 1995
Tysons Corner, VA

404 Park Avenue South, 16th Floor
New York, New York 10016

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LDRC would urge LDRC members to notify the LDRC Executive Director of any new cases, opinions, legislative and other developments in the libel, privacy and related claims fields. LDRC welcomes submissions from LDRC members for the *LDRC LibelLetter.*

LDRC members are encouraged to make copies of the *LDRC LibelLetter* for distribution to colleagues within their organization.

Lanham Act: Not A Privacy Statute

In *Cromer v. Lounsbury*, 1994 WL 592270 (S.D.W.Va. Oct. 14, 1994), Judge Faber in the Southern District of West Virginia ruled that only commercial interests, not purely personal rights of privacy, are protected under Section 43(a) of the Lanham Act. The suit was brought by former patients against their chiropractor. They had agreed to appear in the chiropractor's television ads, but said they were surprised and distressed when the ads falsely stated they had recovered from their ailments as a result of his services. They brought claims under the Lanham Act for false advertising, as well as state law claims.

Upon defendant's motion the court dismissed the Lanham Act claims. The court said the Lanham Act protected only commercial interests against false advertising. The court held that plaintiffs' asserted interests were "purely personal," "not at all commercial" and, therefore, beyond the scope of Lanham Act protection. The plaintiffs lacked standing to sue.

Plaintiffs argued that the Lanham Act's language on its face gave them standing to sue. 15 U.S.C. § 1125(a)(1) provides:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such persons with another person or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's

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Sanctions: Judge May Order For False Accusation Against The Court

In an unusual matter, Judge John S. Martin, Jr., of the Federal District Court for the South District of New York, has ordered counsel for plaintiff in a Lanham Act/Sections 50-51 New York Civil Rights Law suit to show cause why counsel's charge that the court's decision in the case granting defendants' motion for summary judgment was "crooked and corrupt" should not result in Rule 11 sanctions. Responding to the charges, the judge found that plaintiff's counsel, Roger Bruce Feinman of New York City, had made false accusations in probable violation of the Code of Professional Responsibility and Rule 11 of the Federal Rules of Civil Procedure.

The charges were made by counsel in a letter to another court handling a related case. The letter itself did not amplify on the factual basis for counsel's charge. Plaintiff's counsel also, however, filed a motion with Judge Martin seeking his recusal. Judge Martin concluded that the factual assertions in counsel's affidavit submitted in connection with that motion were either barred by laches or simply false. Counsel, for example, asserted that Judge Martin had a brother who would be familiar with negative views about counsel. Judge Martin has no such brother. In addition to providing no basis for recusal, the facts alleged, to the extent they were also the ostensible underpinning for counsel's charges of corruption against the court, provided no basis for those charges either.

The court felt, however, that it was necessary to address plaintiff's "vicious and unfounded" attacks. The court said the prohibition against making false accusations against a judge touched the very core of the judicial process. And unwarranted public statements by an attorney that a judge had criminal motives weakened and eroded the public's confidence in an impartial adjudicatory process. The court found plaintiff's false allegation in violation of DR 8-102(b) of the Code of Professional Responsibility, which prohibits the making of "false accusations against a judge or adjudicatory officer." He

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Sanctions: Attorney-Plaintiff Must Pay

In an opinion of a California State appellate panel in the Fourth Appellate District, designated as "not to be published", the court upheld a sanctions award against plaintiff, attorney C. Brent Scott, in his libel suit against another attorney, Joel Krissman. Both the California Supreme Court and the U.S. Supreme Court, acting this Fall, have declined to review the case. Scott brought an action, captioned *Scott v. Krissman*, charging Krissman with interference with contract and defamation after Krissman gave one of Scott's clients a "second opinion."

The client, seriously injured in a work place explosion, hired Scott to represent him in a personal injury suit. The client asked to hear attorney Krissman's opinion about the case. Krissman spoke of his own firm's experience in handling industrial accident litigation. Krissman said that to his knowledge Scott had never handled such a big case. The client said he never doubted Scott's ability and decided to remain with Scott. After the client told Scott about the conversation with Krissman, Scott was concerned that the client might leave him. Scott socialized with the client and took him on vacations. Ultimately Scott settled the client's case favorably. Scott also filed suit against Krissman. At the close of Scott's case at trial, the court granted a nonsuit in favor of Krissman and his firm under California Code of Civil Procedure § 581c(a). Later the court awarded $218,229.10 in sanctions against Scott composed of (1) legal fees paid to law firms representing Krissman's firm; (2) professional time spent by Krissman and other members of his firm in the matter; and

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The Uniform Correction Act

AN OPEN LETTER TO LDRC MEMBERS December 1994

LDRC can take a share of the credit for having both secured withdrawal of the Uniform Defamation Act and having encouraged the Uniform Law Commissioners to adopt a beneficial Uniform Correction Act. That was step one.

The next step is to get the Uniform Correction Act enacted in state legislatures. That job falls to each of us.

The Uniform Law Commissioners' staff have identified the following states as strong potentials for early and favorable legislative action: Colorado, New Mexico, Illinois, Indiana, New Jersey, Nebraska, North Dakota, Idaho, Minnesota and Connecticut.

Our job is to work with the Uniform Law Commissioners in these and other states, to encourage them to introduce the bill and to render whatever support we can to secure enactment.

Because of the fine reputation of the Uniform Law Commissioners and the fact that this is, after all, a uniform act, the ULC Commissioners in each state should remain out front. This should remain a ULC bill; the appropriate degree of overt media support is likely to vary in each state.

We suggest the following action program in each state, notably in those key states mentioned above:

1. Brief your media clients about the merits of the UCA. The accompanying question-and-answer article represents a useful brief for your clients.
2. Encourage those clients to support enactment of the UCA in your legislature. Encourage them to contact their local press or broadcast association and ask that UCA be put on its agenda.
3. Encourage business, trade and industry groups to support the bill. The UCA covers non-media claims as well as media claims. As a consequence, business groups concerned about libel and related claims, primarily in the employment area, have a significant interest in the UCA.
4. Contact your state's ULC Commissioners and work with them in support of their legislative program.
5. Lobby your governor and legislature to enact the bill as is.

Media organizations in each state will be responsible to pursue legislative strategies leading to enactment. The national ULC staff and LDRC will provide backup information to the extent available.

Media organizations owning newspapers, magazines or broadcasters in the key states should encourage them to take an active role to obtain enactment.

Publishers and broadcast licensees in each state should encourage state associations of publishers and broadcasters to support the bill.

Local media associations should stay in close contact with state ULC Commissioners.

Finally, we should all work to encourage these media organizations and associations, particularly in the key states, to actively support the ULC Commissioners and to lobby the legislature to enact the UCA as is.

You can obtain a copy of the Uniform Correction or Clarification of Defamation Act from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, Tel: (312) 915-0195 Fax: (312) 915-0187 or from LDRC.

Some state legislators will introduce the UCA in their legislatures as early as January 1995. This will begin the process of enacting this important legislation on a state-by-state basis. It is possible that the issues of "tort reform" generally may have a priority in a number of legislatures in their next sessions. Such an agenda may afford opportunities to introduce UCA as a related legislative item. Certainly UCA is entirely consistent with "tort reform" and if presented at the same time as other proposals may not generate the same opposition as it would standing alone. It is up to us get behind this effort.

Richard N. Winfield
Barbara W. Wall
Sandra S. Baron

Richard N. Winfield, a partner at Rogers & Wells, and Barbara W. Wall, Vice President and Senior Legal Counsel at Gannett, are spearheading an ad hoc effort to work with the Uniform Law Commissioners to help monitor developments and guide the UCA through the legislative process.

Cromer v. Lounsbury

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goods, services, or commericial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The court said, however, that the Lanham Act's stated purpose was to protect persons engaged in commerce from certain acts of unfair competition. While reviewing opinions applying to section 43 to require in some false advertising cases that the plaintiff be a competitor of the defendant, the court noted that, at the least, the opinions required a commercial interest be at stake.

The court noted that, although plaintiffs' interests were beyond Lanham Act protection, they could come under state misappropriation law.

Sanctions: Judge May Order For False Accusation Against the Court

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forwarded a copy of his decision to the Grievance Committee of the Southern District and the Disciplinary Committee of the Appellate Division, First Department. And the court asked plaintiff's counsel to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure for false and unsubstantiated statements made about the Judge in counsel's affidavit.

In the underlying lawsuit, the plaintiff, Robert Groden, an author, sued Random House after his picture appeared in an advertisement for a book published by Random House on the JFK assassination. The ad, which Random House placed in *The New York Times*, featured the photos of plaintiff and five other authors below the headline, "GUILTY OF MISLEADING THE AMERICAN PUBLIC." The ad also said, "ONE MAN. ONE GUN. ONE INESCAPABLE CONCLUSION." It urged, "READ: CASE CLOSED BY GERALD POSNER." Plaintiff alleged the ad violated Sections 50-51 of the New York Civil Rights Law, constituted false advertising in violation of the Lanham Act and falsely implied that plaintiff endorsed the views of the others pictured.

The court granted defendants summary judgment, finding the use of the photo was permissible under New York Civil Rights Law because it was incidental to describing and selling the book. The court found that plaintiff's false advertising claim failed because a jury could not reasonably interpret the ad as containing factual material capable of being proven true or false -- using an analysis drawn from libel cases on opinon. And it said there was no evidence from which a jury could infer that plaintiff endorsed the views of the others pictured. That opinion, issued August 22, 1994, *Groden v. Random House, Inc.*, can be found at 22 Med. L. Rptr. 2257.

The court did not address the issue that was dispositive in *Cromer* (see article on page 8) of whether or not plaintiff was protecting a commercial interest.

Scott v. Krissman

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(3) expert witness fees.

On appeal, the court affirmed the nonsuit ruling. With respect to the defamation claims, the court held Krissman's statements did not constitute slander under California Civ. Code § 46. The statute in relevant part requires injury to business reputation which, in the court's view, plaintiff failed to prove. In addition, the court said that Krissman's statements were subject to a qualified privilege under California Civ. Code § 47, subd. (c). The statute provides that statements are privileged if they are made without malice to a "person interested" at the request of a "person interested." The plaintiff has the burden of proving malice in the common law sense. The court held Krissman's statements were privileged, because he made them to an interested party at the request of an interested party, and Scott had failed to prove malice.

The California Code of Civil Procedure at § 128.5 authorizes the imposition of sanctions for actions which are brought in bad faith and are frivolous. A frivolous action may be one brought "for the sole purpose of harassing an opposing party." The appellate court reiterated some of the trial court's reasons for imposing sanctions. Without seeing any written discovery from Krissman's firm, Scott deposed a number of the firm's employees who had no knowledge that Krissman spoke to Scott's client. The depositions took place at an inconvenient location. Scott testified at trial that he knew that the client would not leave him. He filed suit to stop firms from rendering second opinions. He said that for a $150 filing fee, a lawsuit was a good way to get the defendant's attention. He wanted to "teach the defendants a lesson." The appellate court said evidence supported the conclusion that Scott's action was meritless and brought in bad faith.

(Continued on page 11)

Scott v. Krissman

(Continued from page 10)

The U.S. Supreme Court denied *certiorari* in the case this Fall. Two points of note about that petition: (1) Alan Dershowitz was counsel of record on the *certiorari* petition; and (2) one of the two questions presented for review was whether, under the Fifth and Fourteenth Amendment Due Process clauses, state law may authorize a trial judge to impose sanctions against an attorney for proceeding to trial with a lawsuit even though the lawsuit survived motions for summary judgment and the evidence presented at trial substantially conformed to the evidence presented in the motions.

LDRC wants to acknowledge our fall interns -- Diana Silverman, Joanna Kyd and Charles Glasser -- for their enormous contributions to LDRC, and especially for their participation in the writing of many articles in the last several issues of the *LDRC LibelLetter*. Ms. Silverman is in her third year at Brooklyn Law School and will continue internship duties at LDRC from time to time, as will Mr. Glasser, who is in his second year of New York University Law School. Ms. Kyd is in her second year at Benjamin N. Cardoza Law School.

WACO: MEDIA v. MEDIA SUIT

Not only has the failed ATF raid of the Branch Davidian compound given rise to novel claims for alleged newsgathering torts, as reported in the July, 1994, issue of the *LDRC LibelLetter*, but the Davidian raid also has spawned media vs. media litigation. A Waco television reporter who reported live from the scene of the raid claims he was libeled by news reports of a law enforcement investigation of a suspected tip-off to the cult.

On the day of the raid, reporter John McLemore of KWTX-TV, the CBS affiliate, in Waco and his cameraman followed ATF agents onto the cult compound. McLemore reported live from the scene during the ensuing gunbattle in which four agents were killed and 20 wounded. Seventeen members of the cult were shot to death. In dramatic footage broadcast worldwide, a KWTX cameraman shot video of the ATF agents attempting to enter a second floor window amid a hail of gunfire that seriously wounded one of the agents.

In the aftermath of the raid, questions arose as to how the cult knew of the impending enforcement action. Reporter Kathy Fair of the *Houston Chronicle* appeared on ABC's *Nightline* with Ted Koppel two days after the gun battle. She told Koppel during a live interview:

[I]t may be too early to answer the question just what role the media may have played in the tragedy, whether the media bears any responsibility for the deaths of anyone....But unofficially and off the record I think many officers will tell you they blame the media, particularly the local media, for the tragedy that occurred here....[T]hat's a strong belief I think they that they have not shared publicly yet, is that they think they were set up.

In answer to Koppel's next question, "Set up by whom?", Fair added, "My sources have told me they think they were set up by at least one reporter and perhaps one local law-enforcement official."

The following day, WFAA-TV, the ABC affiliate in Dallas, reported on Fair's remarks and the emerging controversy about the source of a suspected tip-off to the cult. A segment by reporter Valeri Williams included video of an ATF news conference in which the question was posed of whether the agency suspected "it was a media tipoff." As WFAA-TV reported, ATF spokesman Dan Hartnett stated, "We don't have any information on that."

After reporting Fair's *Nightline* comments that some law enforcement officials suspected they were set up by members of the local news media, WFAA-TV used video of McLemore reporting from the scene on the day of the raid. The report concluded with the observation that "if reporters covertly tipped the cult to gain a story ... they could be found guilty of obstruction of justice."

A month after the fatal fire that the ended the Davidian stand-off, McLemore applied for a job at WFAA but was turned down. Months later, without any prior demand letter or notice, McLemore sued A. H. Belo Corporation (parent of WFAA-TV, Inc) and reporter Valeri Williams on the first anniversary of the raid on the Davidian compound.

McLemore also sued the Houston Chronicle and reporter Kathy Fair and later joined the American Spectator magazine which published an article in the summer of 1993 that identified McLemore as the source of the cult-tipoff. McLemore seeks the recovery of $5 million in actual damages and $10 million in punitive damages.

Among other defenses, the defendants have asserted that McLemore is public figure who cannot prove actual malice and that the fair report privilege protects the defendants' reporting. The case is pending in state court in Waco.

The Belo defendants are represented by Paul Watler of the Dallas firm of Jenkens & Gilchrist, the Chronicle defendants by Bill Ogden of Ogden, Gibson, White & Brooks of Houston and the American Spectator by David Donaldson of George, Donaldson & Ford of Austin. The plaintiff is represented by Aubrey Williams and Felipe Reyna of Waco.

PAULA CORBIN JONES v. PENTHOUSE

(Continued from page 1)

continued dissemination of photographs, *taken by a former boyfriend in 1987*, warranted the imposition of a TRO. The order issued was extremely broad, barring not only publication of the photographs, but any promotion, advertising, or discussion of the *photographs by defendants or anyone* acting on their behalf.

Ms. Jones is the plaintiff in a well-publicized claim of sexual harassment against President Clinton. The photographs were published by *Penthouse to illustrate an article about* Ms. Jones and her reputation among certain ex-boyfriends and family members.

Defendants in the case were Mike Turner, the ex-boyfriend and *photographer who provided the* photographs to *Penthouse*, and Penthouse International, Ltd.. The TRO actually prevented certain previously scheduled television interviews with Mike Turner from occurring and *delayed some publicity mailings from Penthouse* before it was lifted two days later.

The complaint asserts three causes of action: (1) violation of Sections 50 and 51 of the New York State Civil *Rights Law, a statutory prohibition on* use of an individual's name or likeness without their prior written consent for purposes of advertising or trade; (2) private facts invasion of privacy; and (3) breach of an oral agreement between Plaintiff and Turner not to display, disseminate or show the photographs to anyone other than Plaintiff and Turner.

In an opinion issued from the bench on December 1, after hearing argument from counsel for both parties and reviewing an *amicus* brief filed on behalf of many members of the publishing community, Judge Leisure determined that although the element of irreparable harm could be met (indeed, according to the court, the defendants did not contest the issue), Plaintiff had "failed to establish either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation." (Transcript at p. 52)

The court recognized that New York does not provide for a cause of action for invasion of privacy other than that provided under Sections 50 and 51 of the Civil Rights Law. As to those statutory provisions, New York courts have consistently held them inapplicable to articles on newsworthy events or matters of public interest and to any photographs accompanying such an article unless the photographs have no real relationship to the article. The court found that the photographs at issue here had a relationship to an article that itself met the matter of public interest criteria.

In addition, the court noted that to enjoin a publication – to obtain a prior restraint – the plaintiff must establish not only the traditional elements of the test for seeking an injunction, but also that the prior restraint will be effective and that no less extreme measures are available. Because hundreds of thousands of copies of the magazine had already been shipped prior to issuance of the TRO and because there had been already significant news coverage on the photographs, including display of the photographs themselves, the court concluded that a restraint simply would not be effective.

While the injunction was lifted, the case may continue as Ms. Jones has sought $15 million in compensatory and $15 million in punitive damages, an accounting of all earnings from the sale of the photographs and/or granting of interviews in connection with the photographs, as well as a permanent injunction against the defendants from future display, dissemination, sale, etc. of the photographs and has sought return of all copies of the photographs.

Counsel for the defendants are Victor A. Kovner, Elizabeth A. McNamara and Robert D. Balin of Lankenau Kovner & Kurtz. Counsel for amici curiae was Lee Levine of Ross, Dixon & Masback. Amici curiae included Advance Magazine Publishers, Inc., Capital Cities/ABC, Inc., The Daily News, Magazine Publishers of America, Inc., News America Publishing, Incorporated, Random House and The Reporters Committee for Freedom of the Press.

SEASONS GREETING AND BEST WISHES FOR THE COMING YEAR TO ALL OF OUR MEMBERSHIP
THANK YOU FOR YOUR SUPPORT!
LDRC

Canadian Publication Bans

(Continued from page 1)

Code, bans are readily obtainable in respect of bail hearings and preliminary inquiries, covering evidence and submissions made. More limited bans are available to protect the identities of sexual complainants and some witnesses, as well as young offenders. In the Homolka/Bernardo case, the judge presiding over Karla Homolka's trial for her role in the deaths of two teenage girls who had been sexually assaulted and murdered, restricted attendance in the courtroom eliminating all U.S. media and banned publication of all evidence in the case. Publication bans of trial proceedings, unlike those prior to trial, are rare and are usually for very limited periods of time. The order was sought by the prosecution, over the objection of Paul Bernardo's lawyer, even though the stated purpose for the order was to preserve Bernardo's fair trial rights. Bernardo's trial for his role in the killings is now scheduled to begin in May 1995, nearly two years later. That order, made July 5, 1993, was appealed to the Ontario Court of Appeal in February 1994, where media counsel were subjected to critical questioning and hostile comments by the five judge bench. That court reserved its decision pending the Supreme Court of Canada's ruling in the judgment released on December 8.

That case, Dagenais v. Canadian Broadcasting Corporation, stemmed from a publication ban preventing the CBC from broadcasting a two part docudrama called "The Boys of St. Vincent" in December 1992. The program presented a fictional account of sexual and physical abuse of youths in a Catholic institution and subsequent criminal proceedings. Four former Christian brothers facing various sexual charges in four separate jury trials in Ontario to take place over the ensuing eight months (one trial was under way and almost over) applied to stop the broadcast, saying their trials would be prejudiced. The original judge accepted the applicants' arguments that their fair trial rights were paramount and that a delay of the broadcast until the trials were over was of relatively little consequence. She even made the ban Canada-wide and prohibited any publication relating to the program or even the proceedings for the ban itself. The order came into effect 5:00 p.m. Friday, December 4, with the broadcast scheduled for the following Sunday and Monday. An immediate indirect impact was felt by virtually every daily newspaper in Canada, all of which featured the highly publicized program in their TV listing magazines and TV reviews being distributed with Saturday's papers.

The very next afternoon, in an extraordinary Saturday afternoon session, the Ontario Court of Appeal narrowed the order so that it applied only to broadcasts in Ontario and by a Quebec television station near where one of the trials was taking place. The ban on publication about the program and the proceedings was lifted. As the court put it, "the risk of denying the respondents a fair trial far outweighs any inconvenience which the appellant, Canadian Broadcasting Corporation, may suffer by not airing the film when it proposed to do so. No pressing need was shown why the film had to be aired before the conclusion of the four trials. The film will still be timely when it is shown at a later date and the interests of justice dictate postponing its airing rather than running the risk attendant upon showing it at the time proposed".

The Supreme Court of Canada rejected this approach and set aside the original order in its entirety. In its procedural analysis, the court found that the case should not have been heard at all by the Ontario Court of Appeal but should have come directly to the Supreme Court of Canada where leave to appeal must be sought. This procedural ruling dictates that the Homolka/Bernardo publication ban appeal should now be heard in the Supreme Court, despite the lengthy proceedings in the Court of Appeal in that case heard in February 1994. (The Court of Appeal had reserved its decision pending the S.C.C.'s decision in Dagenais v. CBC.)

The most important aspect of the case on the merits is the application of Charter protection for freedom of expression to the previously unassailable common law approach to publication bans and the court's ruling that free expression rights rank equally with fair trial rights in assessing whether a ban should be issued. Previously, courts had always found fair trial rights to be paramount.

The court specifically rejected the "clash model", in which fair trial rights are pitted against freedom of expression for the media. Calling that approach more suited to U.S. jurisprudence, the court pointed out that these rights are not always in conflict and there are a variety of factors pro and con for publication bans that need to be considered in any particular case. These include the efficacy of bans in light of television and radio broadcasts and computer networks operating internationally: "In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing". Consequently, the court pointed to the need to consider the availability of reasonable alternative measures when assessing whether a publication ban is necessary, expressing confidence in the ability of jurors to disabuse themselves of information they are not entitled to consider at trial.

Chief Justice Lamer (for five of the nine judges, with two others concurring on the merits) set out the following general guidelines for future cases:

(a) the media should be granted standing according to the usual rules (prior notice to the media affected may be required by the judge);

(b) the potential publication at issue should be reviewed, if possible;

(c) the onus is on the party seeking the ban to justify it by proving:

(i) the proposed ban is necessary as reasonably available and effective alternative measures cannot achieve the objective,

(ii) the ban is as limited (in scope, time, content etc.) as possible, nd

(iii) the salutary and deleterious effects of the ban are proportional (ie. the benefits are at least equal to the cost, in terms of the rights affected);

(Continued on page 14)

The Anonymous Libel Plaintiff

A libel plaintiff who was also an alleged victim of a sexual assault, has succeeded in convincing a New York State Supreme Court Judge to restrict disclosure by defendants of her name or identifying information about her received in discovery. In addition, the Court, on plaintiff's initial ex parte application, temporarily sealed the file, limiting access only to parties and their counsel. Although this order was seemingly modified by the Court's recent ruling, the file is, nonetheless, still under seal.

In *Jane Doe v. Daily News, L.P.*, plaintiff sought an order directing that (1) all papers filed in the action, and all court records, refer to her as "Jane Doe" and be sealed to the extent her actual name, address or employer appear in such papers; (2) access to court documents be restricted to counsel, parties and those who have obtained a court order allowing access; and (3) disclosure of her name, address and employer be conditioned on adherence to a confidentiality agreement. The defendants, the *Daily News, L.P.*, publisher of the *Daily News*, and columnist Mike McAlary, agreed that plaintiff be permitted to proceed as "Jane Doe" and agreed to file papers which revealed her name under seal, while filing redacted copies on the public record. Defendants, however, objected to the sealing of the entire record and to any restrictions on their learning and then using her name in investigating the facts of the case. According to the defendants, such restrictions would unduly impede their ability to defend the action and, further, would constitute an unlawful prior restraint.

The complaint stems from Mike McAlary's series of articles published last April. In those articles, McAlary, based on police sources, reported that plaintiff's claim to be a victim of rape appeared to be a hoax. According to McAlary's sources, a motivation to fabricate the rape was plaintiff's desire to promote an upcoming rally at which she promised to give a statement about rape. The plaintiff was not actually identified by name in the article -- indeed, it would appear that the *Daily News* and McAlary did not know the plaintiff's name until after the litigation was commenced – but was described as a Brooklyn-based lesbian activist. The plaintiff is seeking $2 million in compensatory damages, and $10 million in punitive damages, on claims of libel and intentional infliction of emotional distress.

The plaintiff's motion was based on the application of Section 50-b of the New York Civil Rights Law, a provision that was amended in 1991 to provide for confidentiality of the identity of victims of sexual offenses. It provides specifically that court files or other documents in the custody of public officers or employees which identify such a victim shall not be made available for public inspection. The court interpreted this provision to apply to the papers in this case, finding that the public's right to information about the case could be sufficiently satisfied by access to a redacted court file. Thus far, however, the order has been interpreted by the clerk's office as a direction to maintain all of the papers in the case under seal.

Preventing disclosure of information obtained from discovery was permissible, the court found, under the Supreme Court's ruling in *Seattle Times v. Rhinehart*, 467 U.S. 33 (1984) where, as here: "Plaintiff has demonstrated that good cause exists here for imposing some form of restraint upon defendants. To allow defendants the unrestricted right to reveal the plaintiff's identity and other information learned from court files and through discovery processes would violate the Civil Rights Law and would subject plaintiff to undue embarrassment and harassment."

A footnote to the decision notes that while the motion was sub judice, the defendants learned the identify of the plaintiff. The court recognized in the opinion that it could not prevent defendants from disseminating the plaintiff's name if the name was learned other than through such judicial process as discovery. Defendants indicated that they intended to have investigators canvass plaintiff's neighborhood to establish various facts in the case. The court -- mixing principles somewhat -- asked the defendants "in good faith to adhere to journalistic custom and practice and withhold the names of plaintiff, a reported victim of a sex offense from being reported in the press and unnecessarily disclosed to the public for the same policy reasons which led the Legislature to enact Civil Right Law Section 50-b...."

Canadian Publication Bans

(Continued from page 13)

(d) the judge must consider all other options and find that there is no reasonable and effective alternative available;

(e) the judge must consider all possible ways to limit the ban and must limit it as much as possible; and

(f) the judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited, in order to ensure that the positive and the negative effects of the ban are proportionate.

How this new approach turns out in practice remains to be seen. However, it represents a very significant step away from the traditional role of Canadian courts to zealously protect their own proceedings and preserve fair trial rights at all costs. In the Homolka/Bernardo case, the entire population of Canada has been hermetically sealed (supposedly) from reports of Karla Homolka's trial held in July 1993, in order to be able to find twelve impartial jurors for her husband Paul Bernardo's trial almost two years later. Homolka is expected to be the prosecution's main witness at that trial. She received a 12-year sentence on manslaughter charges, following a joint submission, in a half-day trial. How she pleaded to the charges can't be published under the ban.

Brian MacLeod Rogers is a member of the firm Blake, Cassels & Graydon in Toronto, Ontario.

MINUTES OF ANNUAL MEETING OF LDRC DEFENSE COUNSEL SECTION
NOVEMBER 10, 1994

List of attendees attached.

I. Call to Order

A quorum being present, the meeting was called to order by Defense Counsel Section President Eugene L. Girden.

II. Election and Installation of Officers

Mr. Thomas S. Leatherbury was elected by acclamation to a two-year term as DCS Treasurer. P. Cameron DeVore then assumed office as the new DCS President; James E. Grossberg assumed the office of Vice President; and Laura R. Handman assumed the office of Secretary.

III. Amendment of DCS Bylaws

By a unanimous vote, the DCS approved an amendment to Section IV. 2 of the DCS Bylaws substituting the words "every two years" for the words "each year."

IV. Executive Director's Report

DCS Executive Director Sandra Baron reported to the DCS membership regarding the projects and activities of LDRC during the past year. She noted initially that LDRC's principal purpose is to serve as a clearinghouse and focal point for organizations and counsel involved in the defense of libel and related claims. The organization's goal is to gather and disseminate as much useful information and materials as possible and to facilitate their effective use by libel defendants and their attorneys.

She noted that the 1994-95 edition of the LDRC 50-State Survey of Current Developments in Media Libel and Invasion of Privacy Law was expanded to include a compendium on state eavesdropping statutes. She also noted that LDRC is embarking on preparation of a second volume of the 50-State Survey reporting current developments in the law regarding non-libel claims against the news media.

Ms. Baron stated that LDRC staff, in conjunction with Defense Counsel Section members, are attempting to prepare more complete files on expert witnesses and jury instructions, as well as a larger and more comprehensive Brief Bank. In addition, LDRC has begun regular publication of its new Libel Letter. Ms. Baron invited the DCS membership to submit articles for, and comments regarding, the publication.

Ms. Baron reported that as a result of funds provided by the National Association of Broadcasters and the Newspaper Association of America from the proceeds of last year's biennial Libel Conference, LDRC has purchased computers and is preparing a new program for the Brief Bank. It is possible that telephone dial-in capabilities may be added as well, Ms. Baron noted.

Ms. Baron reported that LDRC has been asked by the National Law Journal to permit the LDRC Bulletins to be put on line through a new electronic service being offered by the journal. The National Law Journal has also offered to create a private forum for LDRC and DCS members as part of the service. Subscribers to the electronic service pay a fee of $10 per month and a $10 per hour usage charge.

Ms. Baron further reported that the DCS has obtained twenty-four new members over the past year, and that both 50-State Survey sales and attendance at the annual LDRC banquet has risen. She noted as well that attendance at the annual DCS breakfast more than doubled this year over the past year.

Ms. Baron stated that the cooperation and involvement of DCS members is essential to the health of LDRC, and she invited the membership to increase its involvement by keeping LDRC informed on significant legal developments, and by submitting to LDRC additional briefs for the Brief Bank, model jury instructions, names of experts, and significant court opinions. She noted that LDRC will be disseminating to DCS members forms for litigation logs to identify libel, privacy and related cases in which the members are involved.

V. Report of General Counsel

LDRC General Counsel Henry Kaufman reported to the membership that LDRC publications, including the 50-State Survey and Quarterly Bulletins, are now being published on a timely basis. He noted that practitioners' round-tables on damages and appellate review were added to recent editions of the Bulletin, and that LDRC's staff is already at work on the initial 1995 Bulletins to prepare a follow-up study on summary judgments, including an additional practitioners' round-table. Mr. Kaufman invited the membership to submit ideas for future Quarterly Bulletins.

Mr. Kaufman reported that the 1994-95 edition of the 50-State Survey has already been distributed, and that, for the first time, the Survey had been formatted by computer, improving the quality control, consistency, and turn-around time for publication.

Mr. Kaufman explained that the second 50-State Survey volume to be prepared by LDRC in the coming year will focus on so-called

"weird" torts, other news-gathering problems, and other issues more properly treated in a second volume. LDRC plans to publish the second volume in or around June 1995, according to Mr. Kaufman, who noted that the new volume will give DCS members who participate in preparing it further "networking" opportunities. He stated that LDRC hopes to establish a second network of preparers for the new volume to compliment the network that prepares the current 50-State Survey. He noted that it will be a challenge to locate preparers for the new volume in states that have few or no DCS members.

Ms. Baron noted that the 1995 DCS Directory will be circulated in January or February 1995. Everyone should give LDRC any changes to their listings.

VI. Committee Reports

1. The Advisory Committee on New Legal Developments

Slade Metcalf, Chair

This committee is to function as a network of information regarding new developments. If appropriate, DCS or the LDRC may want to undertake a closer study of a particular issue. When interesting new issues arise, please let Mr. Metcalf or Ms. Baron know. A committee meeting was to be held the day of DCS meeting.

2. Expert Witness Committee

Guylyn Cummins, Chair

The Chair described the Committee's purpose as to obtain up-to-date information about credible experts and to make that information available to DCS and LDRC members. The Committee has circulated a survey to get names and relevant information about experts in a variety of categories. When the information is obtained, computer lists will be updated. In addition, motions in limine regarding the use of experts are being collected.

Ms. Baron noted that persons who recently retired from editorial positions at client organizations might make good expert witnesses and Mr. DeVore suggested they be asked by DCS members if they would be willing to serve.

Ms. Baron also pointed out that recent expert inquiries have included experts in the area of stock house/photographic archives/art director. Any names in that area should also be passed along.

3. Jury Instruction Committee

Robert Raskopf, Chair

The Chair described the Committee as a clearinghouse for jury instructions, either actually used, proposed or merely drafted in cases around the country. The Committee has surveyed the instructions on hand at LDRC and has found instructions from 34 states but only a few since 1990. The Committee will be contacting DCS members to update its files.

A future project being contemplated is developing model instructions. Some states have pattern jury instructions. The Committee can work with local practitioners to get the state's pattern instructions revised to be as favorable as possible to the defense, consistent with current law. This was attempted by the Media Law Committee of the New York State Bar Association.

4. Prepublication Review/Pretrial Committee

Susan Grogan Faller, Chair

In the absence of the Chair, Richard M. Goehler gave the Committee report.

The Committee met on November 9, 1994 to discuss projects for 1995, which the Committee plans to finalize by year's end. The general theme will be a practitioner's roundtable discussing summary judgment and discovery issues, such as the impact of the new federal rules. The Committee is also developing workshop ideas for the bi-annual Conference.

5. Tort Reform Committee

Richard Rassel, Chair

The Chair reported that the Committee has made a strategic alliance with the Civil Justice Reform Group ("CJRG"), a well-funded organization, around similar goals, for example, punitive damages. Lobbying directly is problematic but the LDRC (and CJRG) can help others to organize in their states. The Committee will be invited to meet with their Executive Committee.

The Committee needs to be kept informed of legislative proposals moving in a DCS member's state so support can be provided.

The Chair requested that more DCS members join the Committee.

6. The Trial Techniques Committee

Thomas P. Kelley, Chair

The Chair described the Committee's work as including development and collecting model trial briefs, briefs on common evidentiary issues and pleadings involving trial management techniques (e.g., instructions, bifurcation, special interrogatories and verdicts).

The Committee asked DCS members to send copies of recent briefs on any of these issues.

The Committee is expected to be involved in the survey which Mr. Kelley prepares on recent trials.

7. Conference and Education Committee

Terence Adamson and Daniel Waggoner, Co-Chairs

Daniel Waggoner announced that the bi-annual Conference will take place September 20 and 21, 1995 at the same facility in Tyson's Corner, Virginia. Given the fact that the difference in the level of expertise between the audience and the speakers is narrow, the Conference is expected to emphasize audience participation in break-out sessions. The Committee planning the Conference includes 12-13 DCS members and in-house counsel. Some topics expected to be covered along with any new developments include newsgathering torts and cyberspace issues. The Committee does not intend to follow the model of the National Institute of Trial Advocacy. The Committee will get assistance from the Prepublication/Pretrial Committee and the Trial Techniques Committee. The Committee hopes to have more key speakers on interesting topics such as a talk from the perspective of the subject of a long investigative process by the press.

The Conference was sold-out last time with 240 people in attendance, so Mr. Waggoner urged members to register early.

Ms. Baron urged DCS members that, if their name does not appear on a committee list and they want to be on, to let herself or Mr. DeVore know.

VII. Recruiting

Mr. DeVore discussed different ways of recruiting new DCS members. For example, if a firm prepares an entry for the 50-State Survey, they should become a DCS member. Every existing DCS member should take the time to note on the information sheets provided at the breakfast or to let Ms. Baron know at a later date of other firms (and contacts in the firms) in their region

who should be urged to join DCS. Assistance from DCS members in the region in encouraging membership is anticipated.

VIII. Notes From The Front

Kelli Sager reported briefly on her efforts to keep the O.J. Simpson trial open. She discussed how the media has had to pick their battle grounds and not insist that every conference in chambers be open. Various potential disputes have been resolved informally through the court liaison and with the judge. For example, Judge Ito originally permitted only one reporter to be present for jury selection. Ms. Sager was able to get the judge to agree to permit representatives from broadcast, print and wire and to arrange an audiofeed into the pressroom.

Initially, there was contemplated a broad gag and sealing order requiring everything to be placed under seal. Alternatively, the parties also wanted to be able to place submissions under seal. Ultimately, Judge Ito ruled that only the judge can place a submission under seal and only after review.

Ms. Sager thanked members of DCS who have provided assistance in the course of the case.

IX. Miscellaneous

Ron Guttman raised the question of obtaining CLE status for the LDRC Conference. Mr. Girden suggested contacting the Copyright Society in New York who have recently obtained CLE status for the Society's annual meeting.

LIBEL DEFENSE RESOURCE CENTER

Eighth Annual Meeting of the Defense Counsel Section
November 10, 1994

Attending Firms

Alston, Rutherford, Tardy & Van Slyke
Andrews Davis Legg Bixler Milstein & Price
Armstrong Allen Prewitt Gentry Johnston & Holmes
Baker & Hostetler
Ballard Spahr Andrews & Ingersoll
Bishop, Payne, Williams & Werley L.L.P.
Buchanan Ingersoll
Burch, Porter & Johnson
Butler, Snow, O'Mara Stevens & Cannada
Butzel Long
Christensen, White, Miller
Coudert Brothers
Davis Wright Tremaine
Dow Lohnes & Albertson
Faegre & Benson
Frost & Jacobs
Gabel Hair & Taylor
George Donaldson & Ford
Gibson Dunn & Crutcher
Graham & Dunn
Gray Cary Ware & Friedenrich
Haynes & Boone
Hill & Barlow
Jackson & Walker, L.L.P.
Jenkens & Gilchrist
Kasiborski, Ronayne & Flaska
Kaye, Scholer, Fierman, Hays & Handler
King & Spalding
Kirkpatrick & Lockhart
Lankenau Kovner & Kurtz
Layton Brooks & Hecht
Lewis, Rice & Fingersh
Locke Prunell Rain Harrell
Lowenstein, Sandler, Kohl, Fisher & Boylan
Luce, Forward, Hamilton & Scripps
D. John McKay
Miller Dunham Doering & Munson
Pillsbury, Madison & Sutro
Ross, Dixon & Masback
Rogers & Wells
Shook, Hardy & Bacon
Smith Helms Mulliss & Moore
Sonnenschein Nath & Rosenthal
Squadron Ellenoff, Plesent, Sheinfeld & Sorkin
Steel, Hector & Davis
Steinhart & Falconer
Steptoe & Johnson
Townley & Updike
Venable, Baetjer & Howard
Vinson & Elkins, L.L.P.
Waggoner, Hamrick, Hasty, Montieth & Kratt
Walter & Haverfield
Willkie Farr & Gallagher
Winne, Banta, Rizzi, Hetherington & Basralian

UNDERSTANDING THE UNIFORM CORRECTION ACT

SOME QUESTIONS AND ANSWERS ABOUT THE UNIFORM CORRECTION OR CLARIFICATION OF DEFAMATION ACT

By Barbara W. Wall
and Richard N. Winfield

Q. **First, is it a press bill?**

A. What is different about the Uniform Correction Act is that it is NOT a press bill. The press did not draft it. The press did not sponsor it. The press itself was not even represented in the national body of legal experts -- the Uniform Law Commissioners -- that studied, and drafted, and debated and approved the bill.

Q. **Who are the Uniform Law Commissioners?**

A. The Uniform Law Commissioners is a collection of 300 delegates from every state appointed by their state governments. It is a prestigious body of judges, law professors and top lawyers that drafts and recommends passage of important state legislation — laws which by their nature indicate the need for uniformity from state to state — such laws as the Uniform Commercial Code, the Uniform Gift to Minors Act, and uniform child support laws. In August 1993, the commissioners met and debated the draft Uniform Correction Act. The Act passed overwnelmingly on a state by state count of 40 to 8.

Q. **Who else approved the Act?**

A. The next step was to present the Uniform Correction Act to the American Bar Association's meeting of its House of Delegates in February 1994. The American Bar Association debated and passed the Act, giving it their endorsement.

Q. **What is the need for the Act?**

A. The Uniform Law Commissioners wrote the bill because they saw a serious problem which could only be solved by state laws which were reasonable and fair and balanced and, most of all, uniform.

Q. **What were the problems?**

A. Plaintiffs were bringing libel suits, spending great amounts of money, and never getting the press to correct mistakes they made. Plaintiffs were winning some big money judgments and

seeing them very often get reversed on appeal. Most of all, the plaintiffs said the media did not set the record straight if there was a libel suit. Why? To publish or broadcast a correction would admit error and make it much easier for the plaintiff to win his libel suit. A publisher or broadcaster facing a suit would run a risk if he ran a correction. The publisher or broadcaster would have to spend a great deal of time and money to defend the libel suit. They won most of the suits, but at considerable cost.

Q. **Are there some existing correction statutes?**

A. The Commissioners found correction statutes of one kind or another on the books of about 30 states. But these laws were old, incomplete and ineffective. Few of these correction statutes made it worthwhile or safe for news organizations to run the risk of running a correction. The statutes varied widely making it next to impossible for a network, or a syndicate, or a wire service operating in several states to comply with them. Most of all, the Commissioners found, they did not work.

Q. **What did the Commissioners decide?**

A. What the public needed was a single state statute, which each state legislature could enact, so there would emerge a single standard uniform law . . . like the Uniform Commercial Code, or uniform child support law . . . but one covering corrections and clarifications.

Q. **What would it cover?**

A. It would cover not only the media, but also business, in fact anyone who communicates. The Commissioners found the growing and serious problem of libel suits that were piggybacked onto suits by workers against their former employers -- wrongful discharge suits. The former employee claims that he was unjustly fired and that his old employer wrote a false and defamatory reference. He tacks that claim onto his wrongful discharge suit. The former employer is reluctant to concede he made a mistake in the reference when he is facing this kind of suit. Thus, no correction or clarification of the reference.

Q. **How did the Commissioners handle the stalemate?**

A. Here is how the Uniform Law Commissioners broke the stalemate between libel plaintiffs and news organizations, and workers and their former employers. Let's focus on the media situation. The Uniform Law Commissioners looked for a formula which would encourage news organizations to run a correction if the facts warranted it. The formula had to assure news organizations that the benefits of correcting outweighed the risks. The formula had to encourage plaintiffs to ask for a correction rather than

only bring suit. The formula required carrots for both news organizations and plaintiffs.

Q. **What formula did the Commissioners conceive?**

A. The news organization which runs a correction wins a major advantage: immunity from large damages. That news organization cannot be required to pay any punitive damages or loss of reputation damages to the plaintiff. These are the big ticket items -- often running in the millions of dollars. The news organization may still face suit, but the real hazard of a multimillion dollar verdict is eliminated.

Q. **What is the defendant's carrot?**

A. That is what the Uniform Correction Act promises: no punitive damages, and no loss of reputation damages . . . in exchange for a correction. That is the carrot for the news organization.

Q. **What is the plaintiff's carrot?**

A. The Uniform Correction Act gives the libel plaintiff this carrot: if he requests a correction, and shows that the story about him was wrong, he will get a full, and fair, and timely correction. The record will be set straight, soon, which will help restore the reputation of the plaintiff. He will get the correction under the Uniform Correction Act only because of the carrot the law gives to the news organization.

Q. **Will this discourage lawsuits?**

A. Once the news organization runs the correction, the odds favor there being no libel suit. Why? Here are some reasons: The libel plaintiff got his vindication . . . the news organization set the record straight. Why bring suit? If you are a libel plaintiff, you cannot win a big score on punitive or reputation damages. All you can do is ask the jury to have the news organization pay whatever out of pocket, economic loss you can prove resulted from the publication or broadcast.

Q. **What about the First Amendment?**

A. The Act assures the news organization that it keeps all of its First Amendment protections . . . if there is a trial. With all those constitutional defenses, the news organization is still quite likely to win after trial and appeals.

Q. **What does the Act promise?**

A. What the Uniform Correction Act promises is that there will be fewer trials and fewer appeals because the Uniform

Correction Act diminishes greatly the two lures that attract libel suits: (1) the lure of money and (2) the lure of getting a plaintiff's reputation restored.

Q. **What about libel insurance premiums?**

A. If the insurers pay fewer settlements to fewer plaintiffs, pay less defense costs to news organizations and pay fewer and smaller verdicts, it seems unlikely that the insurers could RAISE their premiums.

Q. **What about killer amendments?**

A. What about the possibility that once the bill is introduced, legislators will try to tack on amendments that will hurt the press? Here is the answer: The Uniform Law Commissioners have been very successful over the years in keeping uniform acts UNIFORM. The whole purpose of a Uniform Act, whether it is for banking transactions or child support, is a single uniform standard. The Commissioners are committed to passing the bill AS IS. They have said they will work to defeat amendments that stand in the way of uniformity. Their national prestige as sponsors of the Act and their good track record, plus continued support from the press and the business community, should provide confidence that the Uniform Correction Act will remain uniform . . . in addition to being balanced and fair.

Q. **What strategy will be followed to pass the Act?**

A. The first priority will be to encourage the Commissioners . . . the delegates from some particular states, to introduce and move the bill. The Commissioners have told us that the states they have particularly in mind are those where the local commissioners have the best records in enacting Uniform Acts. The bill will NOT be introduced simultaneously in all 50 states. Instead, the ULC will roll it out in a measured, careful pace in only those legislatures most hospitable to Uniform Acts. Once we achieve success in a few states, the commissioners in other states will be encouraged to introduce and push the bill.

Q. **Who will pursue this strategy?**

A. We have formed a working group of representatives of some media organizations to monitor and support the Uniform Commissioners. All news organizations are invited to join.

Q. **How will the group operate?**

A. If the Commissioners in Colorado, for instance, introduce the bill, here is what we hope to accomplish. Work with the state broadcasters association, the publishers, news directors, editors and the business council in Colorado to support the bill. They will determine how that support should be expressed. They and the Commissioners and the Uniform Law Commissioners staff will be alert to kill any amendments that would destroy uniformity.

Q. **What should news organizations do locally?**

A. Keep us posted about whatever you hear in your legislature about whether and when the Uniform Correction Act bill will be introduced. When it is introduced, we hope to work with you to prevent amendments that would destroy uniformity and hurt news organizations.

Q. **What are the Act's implications?**

A. These are some of the things the Uniform Correction Act promises. It should cut the number of libel suits against news organizations. It should cut the premiums news organizations now pay for libel insurance policies. It should reduce lawyers' fees for defending libel suits. And most of all, it should make a sharp reduction in the amount of libel damage awards and settlement payments against news organizations.

In some key states the Uniform Law Commissioners will begin introducing the Uniform Correction Act in the state legislature. It is in our interest to get behind this effort. We should join with our natural allies — the newspapers, broadcasters, cable systems, book and magazine publishers, the business and trade associations — to support the bill.

RECORDING INTERSTATE TELEPHONE CALLS:

SO YOU THINK YOU KNOW WHAT LAW APPLIES?

By Stuart F. Pierson

If asked what law applies when a person in State A records a telephone conversation with another in State B, most lawyers would confidently say: "Well, federal law, of course!" To a point, that is right; but, in situations with the greatest potential for risk, the answer is a resounding, "Wrong!"

The applicable federal law, the "Federal Wiretap Statute", 18 U.S.C. 2510, et seq., provides only a required floor on what telephone recording is permitted.[1/] Any state can require stricter standards, and about a dozen have accepted the invitation.

Under federal law, one person may record a telephone conversation without notice to the other participants unless the recorder has a criminal or tortious purpose.[2/] In states like Maryland, Florida, and to a somewhat lesser extent California, however, a person recording a

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1/See U.S. v. Millstone Enterprises, Inc., 684 F.Supp. 867 (W.D.Pa. 1988); U.S. v. Geller, 560 F.Supp. 1309 (D.C.Pa. 1983), aff. 745 F.Supp. 49, cert. den. 105 S.Ct. 786, 469 U.S. 1109, 83 L.Ed.2d 780; Sanders v. State, 469 A.2d 476, 57 Md.App. 156, cert den. 474 A.2d 1345, 299 Md. 656 (1983); State v. Thompson, 464 A.2d 799, 191 Conn. 360, cert. den. 104 S.Ct. 999, 465 U.S. 1006, 79 L.Ed.2d 231 (1983); Com. v. Vitello, 327 N.E.2d 819, 367 Mass. 224 (1975); State v. Willis, 643 P.2d 1112, 7 Kan.App.2d 413 (1982); State v. Farha, 544 P.2d 341, 218 Kan.394, cert. den. 96 S.Ct. 3170, 426 U.S. 949, 49 L.Ed.2d 1186 (1975).

2/See 18 U.S.C. 2511(2)(d).

telephone conversation in which he is a party must get advance consent from all parties.[3/] If he does not, he has violated both the criminal and civil law of those states.

Well, you say, what if the recorder is in a "one-party" state like Virginia and the other, unknowing party is in an "all-party" state like Maryland? Should not the place of the recording govern? Though some courts have taken such a sensible approach, sadly, there is no reliable answer, particularly considering the different factors required in the variety of state conflicts-of-law rules.[4/]

As a consequence, the applicable law is so difficult to predict that the most influential factor in determining what law applies in recording interstate telephone conversations is the utterly unpredictable factor of the location of the litigation. Unreported experience indicates that the forum court will be inclined both to apply its own state law to protect its citizens from recordings made in another state, and to protect citizens of other states from recording within its state contrary to its statute.

3/ The other states with some form of all-party consent requirement are Delaware, Illinois, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania and Washington, though many of these states recognize some exceptions. Note also Georgia, which has an all-party general statute that allows any party to record her own conversation without prior consent from others.

4/See People v. Accardo, 195 Ill. App.3d 180, 551 N.E.2d 1349, 141 Ill. Dec. 821 (1990) (holding that evidence gathered by Oklahoma law enforcement officials as a result of eavesdropping, which conforms to Oklahoma law but violates the Illinois all-party consent requirement, can be used in Illinois state court against a defendant in Illinois proceedings.); But see Thomas v. Pearl, 793 F.Supp. 838 (C.D.Ill. 1992) (holding that the conflicts-of-law issue between the Iowa one-party consent requirement and Illinois all-party consent requirement need not be decided because, according to the Illinois court, eavesdropping does not occur when the person recording the conversation is either a party to the conversation or known by the participants to the conversation to be present.).

Because a plaintiff seeking to recover for allegedly wrongful recordings is likely to file in the all-party consent state, regardless of her own location during the conversation, caution suggests presuming the "highest common denominator" in such interstate recording situations.

Mustafa v. State, 591 A.2d 481 (Md. 1991), is an example. In Mustafa, a police informant in the District of Columbia recorded a telephone conversation with a party in Maryland. The District of Columbia eavesdropping statute permits recording and disclosure of the intercepted information if one party to the conversation has consented to the recording. However, the Maryland court excluded the evidence, rejecting the place-of-recording argument on the grounds that the Maryland Act precludes the admission of a communication intercepted, no matter where, under circumstances inconsistent with its all-party consent statute.

The prudent advice, therefore, when considering the risks of one-party consented telephone recording is to presume that the strictest state law will apply, regardless of where the recording takes place.

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Libel Defense Resource Center Annual Dinner (1994)

Introduction: Immuno AG.: Victory at a Price

Diane Leenheer Zimmerman[1]

In 1983, Dr. J. Moor-Jankowski, editor of a prominent but small scientific journal, published a letter critical of a plan by a major company, Immuno AG., to conduct hepatitis research in wild-caught chimpanzees. The result of that decision to publish was a defamation suit against Dr. Moor-Jankowski and seven other defendants that dragged on until 1991.[2] The only defendant not to settle, Dr. Moor-Jankowski was ultimately victorious, winning a decision from the New York Court of Appeals that resoundingly reaffirmed the principle that expressions of opinion are constitutionally protected speech.[3]

As an introduction to Dr. Moor-Jankowski, the recipient this year of the William J. Brennan, Jr. Defense of Freedom Award, I have been asked to comment briefly on the legal significance of the Immuno AG. litigation and its resolution.

Immuno is important in several ways, most -- but not all -- of which are obvious. Let me start with the nonobvious. This was not a typical media case: Dr. Moor-Jankowski is a scientist and the publication he edits a highly specialized, limited circulation scientific journal. But the Appellate Division and the Court of Appeals alike understood intuitively that this was a distinction without a difference, and simply applied the same constitutional protections that it would have used if the defendant had been an editor of Newsweek or ABC News. That result, as it turns out, is not one on which someone in Dr. Moor-Jankowski's case can always count. Often, courts seem puzzled about how to treat speech by scientists and other academics for first amendment purposes. They are sometimes led off, therefore, on unproductive exercises in reinventing the first amendment wheel under such nebulous rubrics as academic freedom which may or may not result in the level of protection typically offered to the traditional press.[4] Libel is libel, no matter who is speaking, and the New York courts are to be commended in my opinion for taking the position that the professions of the speaker and the audience should not affect the governing rules.

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[1] Professor of Law, New York University School of Law.

[2] Dr. Moor-Jankowski was also sued for his criticisms, appearing in New Scientist magazine, of the use of wild-caught chimpanzees in research.

[3] Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, cert. denied 500 U.S. 954 (1991).

[4] This problem, and the Immuno case, are discussed in Zimmerman, Scientific Speech in the 1990s, 2 N.Y.U. Envir. L. J. 254 (1993).

Immuno has, however, been influential in more traditional ways as well -- that is, it has had a beneficial effect on the development of libel law in the opinion area in the period following the confusing and unsympathetic analysis of that issue by the United States Supreme Court in Milkovich v. Lorain Journal Co.[5] First, the approach of the New York Court of Appeals has emboldened other states to follow its lead in looking to their own Constitutions for expanded protections of civil liberties (in particular, freedom of speech) in the face of an increasingly grudging reception of these claims by the Supreme Court and the federal bench generally. This year, for example, the Supreme Court of Utah made extensive use of the Immuno AG. decision in concluding that the Constitution of that state protected opinion even if the federal constitution does not.[6]

Second, Immuno AG. has clearly encouraged other courts to read Milkovich as working no fundamental change in the scheme for separating fact from opinion previously set out by the Court of Appeals for the District of Columbia in Ollman v. Evans.[7] The case has been cited in several states, including Colorado,[8] Maine,[9] and New Jersey,[10] for the proposition that the proper way to decide when something is a statement of opinion rather than fact is by looking to context. This use of Immuno is not one that could necessarily have been predicted. In literal fact, the New York Court of Appeals understood Milkovich as largely undoing contextual analysis of the fact/opinion distinction. Judge Kaye read the decision as ignoring context and as accepting the characterization of "opinion" only where the speech at issue is rhetorical hyperbole, is wholly unverifiable, or rests on stated or implied factual premises that

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[5] 497 U.S. (1990).

[6] West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994). Cf. State v. Linares, 32 Conn. App. 656, 681-83, 630 A.2d 1340, 1355-56 (Conn. App. 1993) (Schaller, J., concurring) (arguing that court should look to Connecticut constitution in free speech cases).

[7] 750 F.2d 970 (D.C.Cir.), cert. denied 471 U.S. 1127 (198).

[8] Keohane v. Wilkerson, 859 P.2d. 291 (Colo. App. 1993), aff'd 882 P.2d 1293 (Colo. 1994).

[9] Lester v. Powers, 596 A.2d 65 (Me. 1991).

[10] Ward v. Zelikovsky, 136 N.J. 516, 643 A.2d 972 (1994). See also Buckley v. McGraw-Hill, 782 F.Supp. 1042 (W.D.Pa. 1991), aff'd. 968 F.2d 12 (3d Cir. 1992) (applying New York law to case brought by Pennsylvania plaintiff). Cf. Yetman v. English, 168 Ariz. 71, 811 P.2d 323 (1991) (citing Immuno for proposition that must go beyond literal language in deciding whether something is fact or opinion).

are accurate. The New York Court did opt instead to retain the form of contextual analysis outlined in Ollman v. Evans, but felt constrained in doing so to base the decision on state rather than on federal constitutional law.

This transformative reading of Immuno by subsequent courts gives, I think, an insight into the true significance of the case. Milkovich was decided shortly after the issuance of first opinion by the Court of Appeals in Immuno AG.[11] The New York Court of Appeals had ruled that the publication of the letter to the editor criticizing Immuno was, based on context and reader expectations, wholly privileged as opinion under the federal Constitution. The case taken to the Supreme Court and was remanded by it for reconsideration in light of the Milkovich ruling. Had the New York court responded at that critical moment by reversing its prior stance, it might well have been the death of any significant continuing privilege for opinion. By staying the course that New York and other jurisdictions had set pre-Milkovich, the Immuno case took on symbolic weight. I suspect that the determination of the New York court not to undo a satisfactory solution to the opinion conundrum simply because the Supreme Court missed a beat in Milkovich emboldened other states and even some lower federal courts to respond by adopting Justice Brennan's ingenious transformation of the Milkovich rout into an endorsement of Ollman v. Evans contextual analysis.

This represents an important victory for the first amendment. For some reason, the majority of the Supreme Court simply failed to grasp a truth that had gradually forced itself into the consciousness of a steadily increasing number of state and federal judges: there are lies, and there are opinions, but there are not opinions that lie.

This distinction is one that people who have not had their minds bent out of shape by the occult mysteries of libel lore tend to understand instinctively. I tried an experiment while I was writing this speech: I told the Immuno story to a gathering of sophisticated people who were neither libel lawyers nor judges. Their immediate reaction? To ask: "Why is that a libel case? How could that be libel? It's what somebody thinks." I suspect one reason Dr. Moor-Jankowski's case -- and his ultimate vindication by the New York Court of Appeals -- resonates so clearly for us is that we, too, understand that, however doctrine has tried to complicate the issue, a big difference exists between deliberate falsification or even carelessness about facts and the expression of a point of view. False statements of fact are at best a lapse from the normal standard to which we hold ourselves and others; but in our gut, we recognize that any basic protection for autonomy demands a right to draw what conclusions we will from those facts -- we are entitled to our opinion. Whether or not Dr. Moor-Jankowski (or Shirley McGreal, the author of the letter) were right about Immuno A.G. and its plans for primate research, they should not be brought into a court of law to defend themselves for giving

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[11] Immuno AG. v. Moor-Jankowski, 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989).

voice to their convictions -- a signification of their most intimate intellectual and emotional processes. The notion that a speaker can be subjected to a legal test of the intelligence or the factual defensibility of his or her beliefs is, on its face, an unattractive one -- as well it might be in a country that counts the ringing language of West Virginia State Board of Education v. Barnette[12] as part of its constitutional history.

The unfortunate repercussions that would follow from a too literal view of Milkovich was recently forced to the attention of the Court of Appeals in the D.C. Circuit in Moldea v. New York Times Co.[13] In a stunning reversal this spring, the panel that decided had first decided that Milkovich required it to treat criticisms in a book review as potentially defamatory[14] backed off and reversed course after a painful public reexamination, recognizing that its original position would render virtually any negative review fodder for the courts. The New York Court of Appeals understood the negative implication of Milkovich from the first, and for that we honor that Court, as well as Dr. Moor-Jankowski, tonight.

All of this makes Immuno AG. an important case, but let me add that this is probably more true for the media lawyers in this room than for Dr. Moor-Jankowski or Ms. McGreal. For an individuals like these who become caught up in a defamation action for speaking their minds, a win like the one in Immuno is vindication, but not an outstanding example of justice in action. Dr. Moor-Jankowski's publication is not like the ones you represent. The Journal of Medical Primatology has some 300 subscribers -- it doesn't have a legal staff or carry libel insurance. Essentially, it is a one-person operation. And although from the intermediate appellate court level on up, it seemed clear that Dr. Moor-Jankowski would win in New York -- that this was a harassment action, not a serious libel suit -- it still took seven years and hundreds of thousands of dollars in legal and court costs to prevail. The case went through four levels of appeal, from the Appellate Division to the Court of Appeals to the Supreme Court, and back to the Court of Appeals. Fortunately an effort by plaintiffs to take it back to the Supreme Court a second time failed. Justice for Dr. Moor-Jankowski would have been getting this case thrown out at the pleadings stage, not winning it after years and years and appeal upon appeal.

Is there any way to ensure that this could be the result in future, similar cases? That is not at all clear under existing law, despite increasing awareness of the problem of SLAPP suits and the drafting of statutes to protect against them. The problem is

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[12] 319 U.S. 624 (1943)(endorsing the constitutionally protected status of belief and opinion).

[13] 22 F.3d 310 (D.C.Cir. 1994).

[14] The first opinion in the case appears at 15 F.3d 1137 (D.C. Cir. 1994).

that SLAPP suits are normally defined as those brought to deter the right of public participation in government decision-making and freedom to petition. But Immuno was not a petition case; it was a criticism of a foreign corporation's research activities. Until the courts and legislatures are ready to impose a far more rigorous early screening process to all libel cases involving speech on matters of public concern, the Moor-Jankowskis and McGreals among us continue to speak at their own peril. What to do? At a minimum, the libel bar owes the public an effort to redouble its efforts to educate it about the risks of these suits -- and to urge any who intend to speak out, whatever the forum, against an adversary who wealthier and more powerful than they to get libel insurance. Universities and university professors in particular need to be made aware of their vulnerability in libel actions, and take steps to protect themselves.

Let us celebrate Immuno, and its courageous defendant tonight, but with the famous comment of the Greek king, Pyrrhus, firmly in mind. Upon defeating the Romans at Asculum in a costly battle, he remarked: "Another such victory and we are undone."