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LDRC Libel Defense Resource Center

LIBELLETTER

January 1995

Rape Victim Identification Law Ruled Unconstitutional by Florida State Supreme Court

Picking up where the U.S. Supreme Court left off in *Florida Star v. B.J.F.*, the Supreme Court of Florida affirmed decisions of the trial and district courts in *State of Florida v. Globe Communications Corp.*, 1994 WL 68400, (*aff'g*) 622 So.2d 1066, and declared Florida Statute 794.03, which made it a misdemeanor to publish the identity of a rape victim, "facially invalid under the free speech and free press provisions of both the United States and Florida Constitutions." The case was brought by the criminal complainant in the highly publicized William Kennedy Smith rape trial.

The statute, which provided criminal sanctions against the press for printing or broadcasting the identity or indentifying information about a victim of a sexual offense in an instrument of mass communication, gained notoriety among the media bar after *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Florida Star*, the defendant newspaper was charged under the statute, despite the fact that the identity of the victim had been obtained lawfully, through police records mistakenly distributed in the police press room. The Supreme Court struck down the award of civil damages finding the statue's application in that case was unconstitutional, but using reasoning that would have rendered it unconstitutional in virtually all circumstances of publication of legally obtained information.

In *State v. Globe Communications*, the prosecutors conceded that the statute was not constitutional as applied to the Globe. The only issue on appeal, which was requested by the Florida Attorney General, was the facial constitutionality of the provision, which remained unchanged by the Florida legislature since *Florida Star*.

The Florida Supreme Court held that a state may not automatically impose liability for the publication of lawfully obtained, truthful information. Following the reasoning of the U.S. Supreme Court, the Court held that the statute was overbroad with regard to its "broad sweep of the negligence per se standard." Under this per se theory of negligence, liability would follow automatically from publication, without a discrete determination of whether the prohibition on publication is justified under the particular circumstances presented. In the opinion, the state Supreme Court underscored some of the ironies that applying the statute to media present. The per se liability would follow, said the court, "regardless of whether the identity was already known throughout the community; whether the victim has voluntarily called attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern."

The court also affirmed the holding that the statute's lack of a scienter requirement "engendered the perverse result that truthful publications [challenged under this cause of action] are less protected by the First Amendment than even the least protected defamatory

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TORT REFORM: Check Your State Legislature

The American Tort Reform Association ("ATRA") is reporting that the election results last November may result in the introduction, and adoption, of so-called "tort reform" legislation in a number of jurisdictions. Congress, with its new Republican majority and a commitment to certain tort reform provisions in the Contract with America, may also have such legislation on its agenda.

Much of this legislation will have little or no impact on the practice of libel and privacy law. And we are unaware of anyone discussing tort reform provisions with a special eye toward speech related claims. But it would be worthwhile for media companies and media counsel to keep an eye out for such legislation, particularly as it appears in local legislatures. Certain issues being discussed, such as limits on punitive and non-economic harm damages, limits on contingency fee arrangements and penalties for frivolous litigation, could be relevant.

Jim Stewart, of Butzel Long and a member of the Defense Counsel Section Tort Reform Committee, has done a quick summary of some of the basic provisions on tort reform taken from "Contract with America". These

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Seventh Circuit Panel Reverses and Affirms in ABC Eye Clinic Case

A panel of the Seventh Circuit, Judge Posner writing, has reversed the dismissal of a libel suit against ABC brought by the subjects of a prime time news magazine investigative report, while affirming the dismissal of the newsgathering claims: (1) trespass, (2) invasion of privacy, (3) violation of federal and state eavesdropping statutes, and (4) fraud. *Desnick v. ABC*, 1995 U.S. App. Lexis 454 (7th Cir. 1/10/95).

The suit arose out of an expose aired on *Prime Time Live* about the Desnick Eye Center, an ophthalmologic practice in four midwestern states that performed

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Time Wins Summary Judgment in Libel Case on Standard of Care Without Subjecting Its Reporter to Deposition

By Gregory L. Diskant and Steven A. Zalesin

In March 1992, as Bill Clinton emerged as the leading Democratic presidential candidate and as the national press converged on Arkansas to unearth any scandal, big or small, in his past, a man named Terry Reed approached Time magazine reporter Richard Behar with a sensational tale. According to Reed, the State of Arkansas had been used as a training base for pilots in the Reagan administration's effort to assist the contras in Nicaragua. Reed said Clinton had been a participant in the operation, which involved Oliver North, guns, drugs and cash, and that the State had received 10 percent of the proceeds. Reed claimed to have personally participated as a pilot and to have discussed the entire operation with Clinton while Clinton smoked marijuana (he said Clinton inhaled).

Behar spent a month intensively investigating the story, interviewing over 30 witnesses about Reed's allegations and his past, and eventually concluding that Reed was a con man and liar. His article in Time was entitled "Anatomy of a Smear" and it exposed Reed's allegations as false. A year later Reed sued Time and Behar for libel.

Although Behar's article was meticulously researched, establishing a truth defense would have been an extraordinarily complicated and difficult task, taking us from the jungles of Nicaragua to the archives of the CIA. We focussed instead on a standard of care defense and quickly came to the conclusion that summary judgment would eventually be granted either on actual malice or on New York's Chappadeau standard (gross irresponsibility). Our goal, however, was more ambitious. Could we win summary judgment without having Time's reporter deposed? After Herbert v. Lando, could we persuade a court that there was no genuine issue of material fact about the reporter's state of mind without ever letting the plaintiff question the reporter?

Behar is an award-winning reporter who had done a major cover piece for Time on the Church of Scientology. The article had led to two libel suits (which are still ongoing) in one of which he had been deposed for twenty-seven days. More libel suits like that one would eventually turn Behar into a professional witness instead of a reporter. Accordingly, our strategy in the Reed case from the outset was to find a way to win summary judgment without unduly diverting the reporter from his job.

That mission was made substantially easier by the fact that Behar had tape-recorded virtually all of his interviews. As we reviewed them after the lawsuit was filed, it became clear that all the information and all the quotations in the article were firmly based on taped interviews whose accuracy it would be difficult to challenge. Even Behar's state of mind -- his growing doubt about Reed and his stories -- was clearly expressed on the tapes as Behar spoke to witness after witness and found Reed's allegations falling apart. We decided to take the initiative in the litigation to bring it to an end on our terms.

Shortly after the answer was filed, we requested a conference with Judge Whitman Knapp, to whom the case had been assigned. We explained that virtually the entire reporting record was tape-recorded and that we believed that, once we produced that record, we would be in a position to move for summary judgment. We offered to produce voluntarily the reporter's entire file (except for a limited amount of confidential information), including all his notes, drafts, documents, the reporter's tapes and transcripts of the tapes. We would then move for summary judgment.

Judge Knapp approved the plan and we made our voluntary production in August 1993. That same month we moved for summary judgment on the standard of care, based on an overwhelming record of information collected by Behar that included Reed's own lawyer calling him a "psychopathic liar," five former employers accusing him of theft and vehement denials from everyone allegedly involved in the contra operation. We supplemented the tape-recorded evidence with affidavits from several critical witnesses supporting the accuracy of Behar's reporting.

Reed responded by filing a motion seeking discovery and suggesting that perhaps the tapes were doctored. Judge Knapp gave Reed the opportunity to have an expert examine the tapes, but otherwise ordered him to respond to the motion on the merits. Reed could explain in his responding papers what additional discovery he needed, and why.

When Reed eventually responded in April 1994, he had dropped his challenge to the tapes and he offered no affidavits from any witnesses disputing the contents of any of the tape-recorded interviews. Instead, he repeated his claim that he needed to depose a host of Time employees and a variety of other sources who had some tangential involvement in the facts.

After oral argument of the summary judgment motion, Judge Knapp agreed to permit Reed to take a single deposition of the witness he identified as his most important. That witness was an Arkansas investigator named Bill Duncan, a one-time confidential source for Behar who had later revealed himself. At deposition, Duncan testified that he believed all of Reed's outlandish allegations, but conceded that he had provided Behar with no corroboration for any of them and that, in truth, he had no corroboration for any of them.

The parties briefed the significance (or lack of it) of Duncan's deposition. Then, having provided Reed an opportunity to establish a case, if he had one, Judge Knapp granted Time's motion for summary judgment on January 6, 1995. Judge Knapp found that summary judgment was warranted either under the actual malice standard, if Reed were a limited purpose public figure, or under New York's Chappadeau standard, if he were not. In the meantime, Reed had turned himself into something of a minor celebrity by writing a book, Compromised, in which he expanded on his allegations, including claiming to be

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TORT REFORM: Check Your State Legislature

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provisions also now appear in "The Common Sense Legal Reforms Act", H.R. 10, introduced on January 4, 1995 by Representative Henry J. Hyde (R-IL), Chairman of the House Judiciary Committee. One major set of provisions deals only with securities claims, and is not summarized here. We have included the summary of the products liability proposal, however, because it has provisions that may prove precedential in setting limits in other areas.

1. Loser Pays Rule

The Loser Pays Rule requires the unsuccessful party in a diversity suit to pay the attorney fees of the prevailing party. However, the bill limits the size of recovery to the amount expended on attorney fees by the losing party.

2. Honesty in Evidence

The Common Sense Legal Reforms Act intends to amend Rule 702 of the Federal Rules of Evidence regarding expert witness testimony. This reform states that expert testimony is not admissible in a Federal Court if (1) it is not based on "scientifically valid reasoning" and/or (2) if the expert is paid a contingency fee.

3. Products Liability

The reforms intend to create a uniform products liability law with regard to punitive damages, joint and several liability, and fault-based liability for product sellers.

Punitive damages will only be awarded if established by "clear and convincing evidence" that the harm suffered was a direct result of malicious conduct. Further, punitive damages will be limited to three times the actual harm (economic damages) or up to $250,000, whichever is greater.

The reforms intend to abolish joint liability for non-economic losses (mental distress, pain and suffering, etc.) and hold defendants liable only for their own portion of the harm.

Product sellers will only be liable for harm caused by their own negligence. Product sellers will be held liable for manufacturer errors when the manufacturer cannot be brought to court or lacks the money to pay a settlement.

4. Attorney Accountability

The new reforms will recommend that states enact laws requiring attorneys, in contingency fee cases, to disclose (a) the actual duties performed for each client; and (b) the precise number of hours actually spent performing these duties.

The bill also amends Rule 11 of the Federal Rules of Civil Procedure by restoring mandatory sanctions for improper conduct of attorneys. Further, the bill intends not only to sanction the attorney but to compensate injured parties.

5. Prior Notice

Under the proposed reforms, a plaintiff must transmit written notice to the defendant of the specific claims involved and the actual amount of damages sought at least 30 days before bringing suit.

6. Legislative Checklist

The new reforms intend to limit confusing legislation. It intends to achieve this by requiring that Committee reports address the following issues: preemptive effect, retroactive effect, authorization for private suits, and applicability to the federal government.

There are reports compiled by ATRA that suggest that certain states are likely to see tort reform legislation in the near term that the media should be aware of even if they are not initially contemplated as speech claim applicable.

1. **California:** Punitive damages limits, as well as legislation dealing with discovery and frivolous litigation. Governor Pete Wilson, in his State of the State Address, called for a number of tort reform provisions, including limits on punitive damages.

2. **Illinois:** Punitive damages limits.

3. **New Jersey:** Approved already by the Senate, the bills that will go to the Assembly include provisions on the burden of proof for punitives and on joint and several liability. None of these may be written to include speech claims.

4. Texas: ATRA reports that pro-tort reform candidates won increased number of seats in the legislature and that Governor Bush campaigned on the issue of tort reform.

ATRA concludes that tort reform prospects are more likely at this juncture as well in Indiana, Kansas, Michigan, Montana, Nevada, Oregon, West Virginia, Wisconsin and Wyoming.

Again, much of the legislation that ATRA and its state organizations are interested in will have no interest to media and its counsel -- except that many media may be inclined to editorialize about the issues, and perhaps not very positively -- but it probably behooves media counsel to keep track of what the relevant state legislatures are doing with respect to certain key issues, such as limits on punitive and non-economic harm damages.

LDRC has, through the materials that we received from ATRA, the name and contact information for state tort reform organizations if any LDRC members wish to obtain more information on the legislative activity in a given state. Just give LDRC a call, or call ATRA itself at (202) 682-1163.

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UPDATES

1. *Philip Morris Companies, Inc. v. American Broadcasting Companies, Inc.*

¤¤ The Circuit Court for Richmond, Virginia has denied ABC's Demurrer. The case, which has raised a number of significant discovery issues -- one of which was reported on in the December issue of the *LDRC LibelLetter* and is updated below -- will now go forward into discovery.

At issue was what, if anything, was defamatory about the ABC News *Day One* broadcast. ABC argued that Philip Morris' position, taken in its opposition to various discovery requests, was that the broadcast contended the tobacco companies added extraneous nicotine to cigarettes in large quantities. If that was the gist of the broadcast, ABC said, the broadcast was not defamatory.

The court found, however, that Philip Morris, despite its contrary position in discovery, had alleged that the broadcast made claim that tobacco companies not only added nicotine, but did so with the motive of hooking smokers to the product -- charges that both sides would agree were defamatory. It also rejected ABC's argument, finding that even a charge of adding nicotine to cigarettes standing alone would be defamatory because of the association of nicotine with health problems.

Of note was the fact that the court also rejected ABC's contention that it should give higher scrutiny to pleadings and to a demurrer in a case implicating First Amendment protected speech. All that was required here, the court stated, was that the defendant be given notice of the true nature of the claims.

Also of note, the court rejected ABC's argument that the First Amendment should place a bar on punitive damages in a public figure/media defendant case because media should not be punished for exercising free speech rights afforded under the Virginia and U.S. constitutions. The court stated that it could find no authority or support for such an argument and that there was no commitment under either constitution to protect "malicious falsehoods."

¤¤ The December *LDRC LibelLetter* reported on the motions pending to prevent, or at the least delay, discovery by Philip Morris of third party credit card, airline, hotel, telephone and other companies in Philip Morris' search for ABC's confidential source. That motion was argued on January 6, 1995. A decision is pending.

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2. *Sprague v. Walter*

The panel of the Superior Court of Pennsylvania, which in November *reduced by $10 million in punitive* damages the $34 million verdict against Philadelphia Newspapers, has now granted Philadelphia Newspapers' application for reargument/reconsideration of its decision. Philadelphia Newspapers had also sought, in the alternative, rehearing *en banc*. The panel, in granting the application, vacated its initial decision filed November 22, 1994, in which it affirmed the $2.5 million compensatory award, but ordering that a new trial be held unless the plaintiff accepted a remittitur reducing the punitives. The panel has not sought new briefing, nor has it scheduled any oral argument. This case comes to the Superior Court, Pennsylvania's intermediate appellate court, after a second trial.

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3. *Doe* v. *Daily News*

A Brooklyn Supreme Court ruled two weeks ago that The New York Daily News may not obtain access to the police and medical records of the plaintiff in the now-well publicized libel action, *Jane Doe v. Daily News, L.P.*

As reported in last month's *LibelLetter*, McAlary and the newspaper are being sued over published reports that cast doubt on the truthfulness of her claims of being raped in a New York park. Despite defense argument that access to such records is needed for defense of the civil action, Judge Gilbert Ramirez held that releasing the records to the defendants "could prejudice the rights of a suspect" in the rape case. Because discovery in the civil litigation has not yet begun, the defense should first rely upon deposition of the plaintiff and McAlary's sources for the allegedly libelous story.

Ramirez left open the possibility that McAlary may in the future show good cause for disclosure under guidelines of the Freedom of Information Law.

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4. *Rhinehart v. Seattle Times*

In case you missed it, the case brought by The Aquarian Foundation and its leader, Keith Milton Rhinehart, which spawned the Supreme Court opinion in *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), has been dismissed, its dismissal affirmed by the Washington State appellate court (59 Wash.App.332, 798 P.2d 1155, 18 Med.L.Rep. 1106), and *cert* denied by the United States Supreme Court, (115 S.Ct. 578) (1994). Among the reasons for dismissal was the plaintiffs refusal to comply with discovery requests, including those for its membership lists, donation records, and the videotape of the performance (written about in the articles) at the Washington State Penitentiary even under a protective order indicating that the documents could only be used for purposes of this litigation. Most of this material, and a protective order were at issue in the Supreme Court decision.

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Time Wins Summary Judgement

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an eyewitness to a 1991 bunker meeting between Clinton, Oliver North and William Barr (George Bush's last attorney general) in which Barr promised Clinton the presidency on behalf of the CIA.

Terry Reed and his allegations have not disappeared, and indeed are still given some credence on The Wall Street Journal's editorial page. But Judge Knapp's opinion has confirmed that Time's expose of Reed as a smear artist was based on a "thorough examination" of the facts and published in good faith, and Behar has been able to continue his reporting without undue distraction.

The above article was written by Gregory L. Diskant and Steven A. Zalesin, partners at Patterson, Belknap, Webb & Tyler, which represented Time in Reed v. Time Warner, Inc., et al., 93 Civ. 2249 (WK). For members who are interested, LDRC has copies of the briefs they filed in support of the District Court's discretion to order summary judgment without allowing the plaintiff discovery.

NY Media Committee to Present Fair Trial/Free Press Rountable

The O.J. Simpson case will be the starting point for an examination of free trial/free press issues in a presentation put on by the Media Law Committee of the New York State Bar Association on Thursday, January 26, 1995. The program, entitled "A FAIR TRIAL FOR O.J. AND FREEDOM OF SPEECH -- ARE THEY INCOMPATIBLE: Do the Media and Counsel have a Responsibility to the Criminal Justice System?" will be at the Marriott Marquis, 1535 Broadway, New York City, at 2:30 P.M.

Among the panelists will be two prosecutors, Brooklyn District Attorney Charles Hynes and New York County Sex Crimes Prosecution Unit Chief Linda Fairstein; defense attorneys Jack Litman and Theodore Wells; Judge Harold Rothwax; and representing the media, former New York Times Executive Editor Max Frankel; Court-TV President Steven Brill; WCBS-TV News Director Jerry Nachman; Richard Kaplan, Editor of the tabloid *Star*; and First Amendment specialist Floyd Abrams. Also on the panel will be Sheldon Silver, Speaker of the New York State Assembly, who is a key figure in the cameras in the courtroom debate in New York State. The current law allowing for camera access in New York will sunset five days after this program.

Among the other issues to be discussed, many in the light of the Simpson case, will be leaks to the press, gag orders, prior restraints, access to pre-trial hearings, jurors and voir dire, and the reporter's privilege. George Freeman, Assistant General Counsel of the New York Times, will be the moderator.

Admission is open to the public. A $20 entrance fee can be paid at the door.

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

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Desnick v. ABC: The Seventh Circuit

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more than 10,000 cataract operations a year. ABC's report contended, among other things, that the clinic performed unnecessary surgery on Medicare patients and rigged certain tests and records so as to justify such surgery. Plaintiffs were two of the clinic physicians shown in the report and the Desnick Eye Center itself.

Libel Claims: Dismissal Reversed

While certainly much of the news report could be characterized as defamatory, the libel claims stemmed solely from the report's contention that the clinic's "glare machine", a testing device, had been tampered with by clinic technicians so as to ensure that elderly patients showed signs of cataract problems.

The panel refused to accept a lower court determination that the libel claim, on the face of the pleadings, could not be understood to be "of and concerning" the two doctor plaintiffs although the doctors were not specifically accused of tampering with the glare machine. While recognizing that the inference that the two doctors, shown in the report examining patients, was "not inevitable", it was "sufficiently probable" as to allow them to sue.

The panel also refused to accept the district court's judgment that in the face of all of the other allegations in the expose, none of which were sued upon, the allegation of tampering with the machine did not increase the damage to the reputations of the doctors and the clinic. While the court characterized the analysis of this issue as one related to "substantial truth", in the end the court refused, on a bare record of the pleadings alone, to rule that no incremental harm was done plaintiffs as a result of the material at issue in the litigation.

With discovery, the court noted, the defendants may be able to show that the statements are either true and/or that the doctors and clinic are guilty of so much wrongdoing that the charge is, indeed, of insignificance. But the panel was reluctant to dismiss the claims on the pleadings alone.

Newsgathering Claims Dismissed

The panel did accept the district court's dismissal of the newsgathering claims. Underlying several of the claims was the fact that in preparing the report, ABC had sent seven individuals into the clinic with hidden cameras and mikes to be examined and diagnosed by the clinic staff. In addition, according to the complaint, the producer of the piece had gained entry into the clinic by promising Dr. Desnick that the piece would be about cataract surgery generally and not just his clinic, would involve no surreptitious taping nor "ambush" interviews, and that it would be "fair and balanced". From this allegedly false set of promises, and the undercover taping, arose five claims. One of the claims, breach of contract, was not dismissed by the district court. However, plaintiffs had taken a voluntary dismissal of the claim in order to bring the appeal.

On the first of these claims, trespass, the court of appeals engaged in an interesting analysis of why certain consents to enter property obtained through fraud are not litigable and others are, concluding that only those invasions of the specific interests protected under trespass are actionable. Thus, for example, a restaurant is seeking business. It expects strangers to come in, sit down, and order a meal. A misrepresentation by a critic as to his purpose for entering and ordering a meal is thus distinguishable from the person who misrepresents himself as a meter reader for the gas company to invade an individual's home where strangers are not generally invited.

In this case, like the restaurant, the offices were open to the public and patients were sought. The services provided by the plaintiffs were professional, not personal; the space invaded professional and not private; and no activities of the offices were disrupted. The court concluded that there was "no invasion of a legally protected interest in property or privacy"..."it was not an interference with the ownership or possession of land."

Similarly, with respect to the invasion of privacy claims, no legitimately private activities were infringed as a result of defendants' activities. There were no intimate facts revealed: the conversations recorded were all with the testers sent in by ABC.

Nor did the eavesdropping claim fare any better. Both the federal and applicable state statutes provided for one-party consent unless the purpose for doing the taping is to commit a crime or a tort or, in the state but not the federal statute, to do other injurious acts. The court concluded that the taping of the conversations with the doctors by the testers was not undertaken for the purpose of committing a crime or a tort (even if a later determination is made that the broadcast was defamatory); it was done to see whether the clinic's staff would recommend surgery to testers who did not need it. Nor was the purpose to injure Desnick and the doctors. Public disclosure of plaintiffs' misdeeds does not, the court concluded, serve as the commission of an "injurious act" for purposes of the eavesdropping statutes.

As to the fraud charge, the court noted that Illinois, unlike many other states, only allows for a cause of action based upon fraudulent promises if they are part of a "scheme to defraud" -- a distinction that the court recognized is elusive. Defining the allowable claim, the panel found that it must be egregious and part of a larger pattern of deceptions or enticements that reasonably induces reliance in a manner that the law should remedy. The promises allegedly made by the producer in this case were not actionable under that definition.

The plaintiff was a businessman who could have defended himself with a healthy amount of skepticism about the promises made by a reporter. Moreover, and in agreement with the district court, the panel found that the alleged promises,

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Desnick v. ABC

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given to gain entry into the clinic for the crew and obtain certain tape from Desnick, did not result in any material that harmed plaintiffs.

Even Tabloids are Protected

The court made a final point that is worth noting, not only because it correctly expresses the application of First Amendment protections to all manner of journalism, but because it reflects a rather cynical look at certain modern-day journalism by this Seventh Circuit panel.

The court remarked that although "[t]oday's 'tabloid' style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market" [citing the Seventh Circuit opinion in the financial interest/ syndication rule case between the networks and the FCC] is often "shrill, one-sided, and offensive, and sometimes defamatory", it is also an important part of a vigorous marketplace of ideas. It deserves and must be afforded all the First Amendment protections -- "And it is entitled to them regardless of the name of the tort...and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast." Unless some specific legally protected rights have been invaded, the fact that the behavior of the media has been "surreptitious, confrontational, unscrupulous, and ungentlemanly" will not afford plaintiffs a remedy.

Attorney Letter to Insurer Privileged

A federal district court judge in the Southern District of New York held in a recent opinion that the work-product privilege protected the contents of letters prepared by the insured's counsel and submitted to the insurance carrier as part of the policy application in which counsel described and assessed pending litigation, including plaintiffs' libel litigation. The court did not reach the issue of whether the letters were also protected under the attorney-client privilege.

The case, *Chaiken v. VV Publishing Corp.*, 91 Civ. 2102 (DLC)(S.D.N.Y. Nov. 16, 1994), was initially filed in Massachusetts state court, removed to federal court and then transferred to the Southern District of New York. Noting that work-product, unlike most other claims of privilege, is governed by federal and not state law, the court applied Rule 26(b)(3) of the Federal Rules of Civil Procedure and cited other New York federal district court decisions protecting attorney correspondence with insurers. Such material, which is not about speculative matters, but about on-going litigation is protected. Plaintiffs failed to show any substantial need or undue hardship required for disclosure of such privileged material.

There is surprising little law on this subject or the issues it raises. Thus we are pleased to report on a decision that not only comes to a seemingly correct conclusion, but states so definitively and in writing.

LDRC 50-State Survey: Current Developments in Privacy and Other Media Law Claims

As many of you know, LDRC is in the process of creating a second volume of the *50-State Survey* focussing on the privacy claims, and other non-libel claims. Among the material included will be the law on intentional and negligent infliction of emotional distress, breach of contract/promissory estoppel, prima facie tort and negligent publication. LDRC anticipates publication of the volume in June.

Development of this text arose out of the interest expressed by LDRC membership, who find the need for knowledge of the non-libel claims has grown in recent years. LDRC found that increasing the material on non-libel claims in the current *50-State Survey* would be unworkable -- the size of the *Survey* would be such that a hoist would be needed to lift it -- and that a second volume of the *Survey* would be published instead.

Next month, LDRC will be sending each of you a sign-up form for this new volume of the *50-State Survey* on non-libel claims. We hope that you will sign up to receive one or more copies for your use and that of your colleagues.

LDRC wants to thank Charles Glasser (NYU '96), an LDRC intern, for his research and writing on *Florida v. Globe Communications* and *Doe v. Daily News* for this LDRC *LibelLetter.*