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LDRC LIBELLETTER

January 1996

PA S.CT. DENIES REVIEW OF SPRAGUE $24 MILLION AWARD

The Pennsylvania Supreme Court has refused to review the judgment in favor of Richard Sprague in his seemingly endless legal pursuit of Philadelphia Newspapers. The verdict of $34 million -- $2.5 million in compensatory, $31.5 million in punitives -- was reduced by $10 million in punitives by a panel of the Superior Court. This is the result of a second trial between Sprague and Philadelphia Newspapers. Philadelphia Newspapers is currently reviewing its appellate options.

LDRC BULLETIN — DAMAGE AWARDS

The cases reported on this page are reminders that large damage awards in libel cases are a significant problem. To date, the largest damage award affirmed on final appeal was $3,050,000 in *Brown & Williamson v. CBS*, in 1983 in the Seventh Circuit.

The LDRC biennial damage survey will be published in the LDRC BULLETIN in the next few weeks. It will cover trials in 1994-95, update cases previously reported upon and offer some comparisons with prior years back to the 1980's.

If you do not have a subscription to the quarterly LDRC BULLETIN, sign up NOW! Call LDRC at 212-889-2306, fax us at 212-689-3315, or send in the form attached to this issue of the LDRC *LibelLetter*.

This year's BULLETIN will also contain updates of LDRC's surveys of independent appellate review and motions to dismiss. Plus articles on new legal developments and the Supreme Court term.

Tortious Interference: A Note from Sandra Baron

By now you should have received a copy of the memo prepared by David Schulz and Hilary Lane of Rogers & Wells and myself, "Tortious *Interference: A Practical Primer for* Media Practitioners." We hope that it will be of some service in acquainting you with the tort and in spurring thought about the claim and its defenses. We also hope that you will send LDRC comments on the Primer, additional thoughts and arguments, and any decisions, briefs, and other litigation materials on the subject that might be useful to others.

In the most recent edition of the *Columbia Journalism Review*, dated Jan/Feb 1996, Lawrence K. Grossman, former President of NBC News and PBS, has written a thoughtful and very detailed account of the CBS incident that provoked all of the current interest in the tort of interference with contractual relations. I commend it to you. — Sandra Baron

NY APPELLATE DIVISION AFFIRMS $11 MILLION OF PROZERALIK VERDICT

The New York Appellate Division, Fourth Department, has affirmed an $11 million compensatory damage award, while vacating the $500,000 punitive damages award, against Capital Cities Communications in a libel action brought by a Buffalo restaurateur mistakenly identified by the local broadcaster as the victim of an organized crime beating. *Prozeralik v. Capital Cities Communications, Inc.*, 1995 WL 761418 (N.Y.A.D. 4th Dept., Dec. 22, 1995) (*Prozeralik II*).

The panel, without discussion, affirmed that plaintiff had met his burdens on falsity and actual malice, and disposed of Capital Cities' other appellate arguments without lengthy analysis.

Plaintiff's compensatory award included $6 million for harm to reputation, $3.5 million for emotional and physical injury, and $1.5 million for out-of-pocket financial losses. Among its arguments, Capital Cities had attacked the award, and most particularly the $9.5 million for non-economic harm, as grossly excessive

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CALIFORNIA APPELLATE COURT UPHOLDS $3.3 MILLION LIBEL VERDICT AGAINST ZSA ZSA GABOR AND HUSBAND

The California Court of Appeal for the Second Appellate District upheld a total jury verdict of $3.3 million against actress Zsa Zsa Gabor and her husband, Frederic Von Anhalt, for defamatory statements Gabor and Von Anhalt made to German publications about actress Elke Sommer. *Sommer v. Gabor*, No.B082456, Calif. Ct. App, Second Dist., Div. 7, filed December 8, 1995; 95 Daily Journal D.A.R. 16327.

The verdict, the largest yet upheld against private individuals, includes $800,000 in presumed damages and $450,000 in punitive damages against Gabor, and $1.2 million in presumed damages and $850,000 in punitive damages against Von Anhalt. Both parties stipulated at trial that plaintiff Sommer had suffered no special damages. The issue of punitive damages was bifurcated from the other issues in the case and tried after the jury returned a verdict against defendants on liability and general damages.

The defamatory statements at issue stemmed from comments Gabor and

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LDRC GOES ONLINE

As an initial step toward establishing a presence in cyberspace, LDRC recently entered into an agreement with Lexis Counsel Connect to establish a private bulletin board on its system. The agreement, which also provides a modest discount to LDRC members who join Counsel Connect in 1996, will permit the following activities:

° Ongoing discussion of issues of current interest. Members will be able to read and respond to current discussion threads as well as to initiate new discussions by posting their own messages on the bulletin board.

°A site from which members can download articles from recent *LibelLetters* and other topical materials, for example, the recent article on Tortious Interference by Sandra Baron, Hilary Lane, and Dave Schulz.

°An e-mail address. LDRC members belonging to Counsel Connect can instantaneously transmit messages to LDRC, including Brief Bank, Expert Witness, or other queries.

Members having the Windows version of Counsel Connect can also transfer computer files with all codes intact— which would, for example, permit articles to be submitted to the *LDRC LibelLetter*, or a brief to the Brief Bank, literally in seconds.

LDRC members not belonging to Counsel Connect can reach LDRC via e-mail using our E-Mail address: SBARON00@counsel.com.

We are excited about entering the online world and believe that this will increase the speed and ease with which we are all able to communicate on matters of common concern. Indeed, within one hour of the initial posting announcing the private area, LDRC had its first two replies, from Holly Bernand, of member firm Johnston Barton, and Jack Weiss, of member firm Stone, Pigman, Walther, Wittmann & Hutchinson. For members who may be entering cyberspace a bit more slowly, what follows is a brief introduction into the activities that the new private area will support.

Reading and Posting Messages

All LDRC members who currently belong to Counsel Connect have been identified and been listed among those permitted entry into the LDRC private area. (In the numerous cases in which more than one attorney at an LDRC member firm belongs to Counsel Connect, all such individuals have been listed, regardless of whether their area of which is media law. If there are attorneys in your firm who do not wish access to the LDRC area, let us know and we will remove them from the list.)

After logging onto Counsel Connect, click on "Private" on the 14-button menu and then select "LDRC Discussion Group" under "Subscriber's Private Areas." This brings up a listing of all discussion threads. A plus sign appearing in a box next to the thread indicates that there have been replies to the initial comment.

To read the entire discussion thread, highlight and then "select" it (or double click on the thread). Alternatively, you can obtain a list of all replies to the initial comment by highlighting it and clicking "expand." All subsequent comments appear below the initial comment in chronological order. Double clicking on any comment will enable you to read that comment, as well as all subsequent replies. You can append your own comments by clicking on "reply," entering a response, and then clicking on "done" followed by "send." Your response is now added to the discussion thread, in chronological order. (You also have the option of responding privately; just check the "Private Reply" box before sending your message.)

If you wish to initiate a new thread, instead of highlighting and selecting an ongoing thread click on "comment" after opening the LDRC Discussion Group Enter your comment on the blank screen that appears and post it by clicking "done," followed by "send" on the next screen. Be sure to enter a subject at the top of your comment, as this is how it will be identified on the opening screen.

E-Mail

In addition to reading, commenting on, and initiating conversation threads, LDRC members can e-mail messages and files to LDRC using our Counsel Connect address. Members who belong to Counsel Connect can e-mail LDRC by clicking on the "Mail" button on the 14-button menu, selecting "send," followed by "Network," and then searching for "Baron Sandra." Double click on the name or click on "Add" to add it to the window. Then click on "okay," which brings up the "Mail Manager" window. Type your message and then click "done," followed by "send."

LDRC members not belonging to Counsel Connect but having online access through other systems can reach LDRC via its Internet address ("SBARON00@Counsel.com").

Transfer of Computer Files

LDRC members with the Windows version of Counsel Connect can transfer computer files along with e-mail. Follow the same steps as for sending an e-mail but click on "attach" in the Mail Manager screen and use your mouse to identify the desired file. Click on "okay" (or "add file" if you would like to transfer more than one file), followed by "done," and send. Files that have been attached to members' e-mail is "detached" by using the process in reverse.

All computer code that is contained in the file (whether it be for a word-processed document, a spreadsheet, or a database) is retained in the transferred file. While transfer of files is also possible using the DOS version of Counsel Connect or online systems other than Counsel Connect, all computer codes must first be stripped from the document (i.e., it must first be saved in

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COLORADO APPELLATE COURT RECOGNIZES CAUSE OF ACTION FOR INTIMATE PRIVATE FACTS

In a non-media case, brought by an associate against his former law firm and its name partner, a Colorado appellate court has formally recognized the tort of invasion of privacy for the revelation of private, intimate facts. *Borquez v. Robert C. Ozer, P.C.*, No. 93CA1805, 19 BriefTimes Reporter 1579 (Colo. App. 1995).

The panel noted that Colorado, while generally recognizing the tort for invasion of privacy, has never specifically recognized the "tort of 'unreasonable publicity given to the private life of another,'" although more than 30 jurisdictions have done so. With that said, the court "conclude[d] that Restatement Section 652D provides sufficient authority for resolution of the issues before us." 19 BriefTimes Reporter at p. 1581.

The claim was brought after the associate told the name partner, who was thought to be homophobic, that he needed a day off in order to take an AIDS test, having just learned that his companion had been diagnosed with AIDS. The plaintiff asked Ozer, also named as an individual defendant, to keep the information confidential, but assist plaintiff in finding another attorney to cover certain matters over the next day. Ozer allegedly told others in the firm, and within two days, all of the employees and shareholders in the firm knew of plaintiff's private life. Five days later, Ozer fired the plaintiff.

The suit was brought under the anti-discrimination provisions of the Denver Code and anti-discrimination provisions of state law. The court re-cast the case, and ultimately charged the jury at trial with a discriminatory discharge and an invasion of privacy claim. Plaintiff won on both claims, with an award of $20,000 in compensatory and $40,000 in punitive damages awarded on the privacy claim.

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WISCONSIN COURT EXTENDS JOURNALIST'S PRIVILEGE TO NON-CONFIDENTIAL SOURCES

By James A. Friedman
Jeffrey J. Kassel

The Wisconsin Court of Appeals recently recognized that the journalist's qualified privilege against testifying in civil proceedings applies even when the testimony involves information garnered from non-confidential sources. In *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995), the defendant doctor in a medical malpractice action served subpoenas on two Milwaukee Magazine reporters seeking documents and records concerning the malpractice action compiled by the journalists while researching an article about the doctor's controversial therapeutic techniques. The Wisconsin Court of Appeals reversed the trial court's order requiring the journalists to comply with the subpoenas based on the journalist's privilege under the First Amendment and Article I, section 3 of the Wisconsin Constitution.

Wisconsin, unlike a majority of states, does not have a shield statute protecting journalists from having to testify and produce documents in court actions. Since 1971, however, the Wisconsin Supreme Court has recognized that the First Amendment offers journalists qualified protection against revealing information gained from confidential sources in criminal proceedings. *See State v. Knops*, 183 N.W.2d 93 (Wis. 1971). Seven years later, in *Zelenka v. State*, 266 N.W.2d 279 (Wis. 1978), the court found that the First Amendment privilege recognized in *Knops* remained valid after the U.S. Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and held that the privilege is also embodied in Article I, section 3 of the Wisconsin Constitution.

To overcome the privilege for confidential sources, the Wisconsin Supreme Court required a showing that the information was both necessary and unavailable from other sources. In its most recent decision applying the privilege, *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 335 N.W.2d 367 (Wis. 1983), the court quashed subpoenas issued to the Green Bay Press-Gazette by a criminal defendant because the defendant had failed to show that the reporters possessed information relevant to his defense.

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WISCONSIN COURT EXTENDS JOURNALIST'S PRIVILEGE

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The *Kurzynski* case was the first Wisconsin decision to examine whether the journalist's privilege applies in civil cases when the testimony involves non-confidential sources. The magazine's reporters had interviewed some of the parties in the pending malpractice action and their witnesses, as well as other patients and physicians who gave their opinions about the defendant's controversial techniques. The doctor's broad subpoenas sought virtually everything the reporters had learned in the course of preparing the article.

The reporters invoked the qualified privilege and moved to quash the subpoenas. The trial court, while narrowing the scope of permitted examination to the parties and their expert witnesses, rejected the journalists' argument and ordered them to give testimony and produce documents regarding their interviews.

The Wisconsin Court of Appeals reversed the trial court's order. The court defined the issue as "the extent to which parties to civil litigation may have discovery of non-party journalists." *Kurzynski*, 538 N.W.2d at 557. It began by reviewing Wisconsin Supreme Court precedent concerning the journalist's privilege. The court concluded that journalists are protected against testifying in court proceedings by both the First Amendment to the United States Constitution and Article I, section 3 of the Wisconsin Constitution, and that "the scope of the qualified journalist's privilege is the same" under both constitutions. *Id.* at 559.

The court acknowledged that no reported Wisconsin case had previously examined the privilege in civil actions. Accordingly, the court looked for guidance in two recent Ninth Circuit decisions -- *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993) and *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) -- that addressed the journalist's privilege in civil cases involving non-confidential sources. Based on these federal cases, the court found the privilege applicable in civil cases and ruled that the privilege "requires a balancing between, on the one hand, the need to insulate journalists from undue intrusion into their news gathering activities and, on the other hand, litigants' need for every person's evidence." *Kurzynski*, 538 N.W.2d at 559. Significantly, the court held that "this balancing is required irrespective of whether the journalist's information was obtained in return for a promise of confidentiality." *Id.*

The Wisconsin court adopted from *Shoen* a three-part test for applying the privilege in civil cases involving non-confidential sources:

> [W]here information sought is not confidential, a civil litigant is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege . . . by a nonparty only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an important issue in the case.

Id. at 559-60, quoting *Shoen*, 48 F.3d at 416.

The court emphasized that test requires "that there must be a showing of actual relevance; a showing of potential relevance will not suffice." *Id.* That heightened showing is necessary, the Court explained, to ensure that the burden on journalists' time and resources in responding to subpoenas will be imposed only when demonstrably necessary and that litigants do not "resort to newsgatherers' files and knowledge with the hope . . . that something will 'turn up.'" *Kurzynski*, 538 N.W.2d at 560.

The defendant in *Kurzynski* argued that he was entitled to question the journalists about their conversations with the parties or their experts to look for statements that might be used to impeach those witnesses. The Court of Appeals found this argument insufficient to establish that the magazine had any information that was "clearly relevant to an important issue in the case." And because the defendant had not asked any of the parties or their witnesses about their conversations with the journalists, the court also held that the defendant had not shown that he had exhausted all reasonable alternatives for the information he sought from the magazine. The defendant did not seek review of the Court of Appeals' decision by the Wisconsin Supreme Court.

Mr. Friedman is an associate and Mr. Kassel is a partner at LaFollette & Sinykin, which represented Milwaukee Magazine and the two journalists in the reported case.

COLORADO: PRIVATE FACTS

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The appellate panel, using Restatement (Second) of Torts Section 652D (1976) to establish the elements of the claim, agreed that information regarding plaintiff's sexual conduct, and his exposure to AIDS, were private facts. And that disclosure of this information, due to the stigma attached to both facts, would be objectionable to a reasonable person. Further, the information was not a matter of legitimate public concern.

More troublesome was the issue of "publicity": was communication to the public at large required or was publication within the law firm sufficient? The court concluded that the latter was sufficient when the disclosure is unreasonable and is made to people with whom the plaintiff has a special relationship.

The court rejected defenses of waiver (not given beyond Ozer) and qualified privilege (abused by scope of disclosure).

SECOND CIRCUIT: ACCESS TO JUDICIAL RECORDS

In a second appeal regarding access to a report submitted by a court-appointed officer to a federal district court, the U.S. Court of Appeals for the Second Circuit addressed the standards to be used when balancing the public's presumptive right of access to the report against competing law enforcement and privacy interests (*United States v. Amodeo*, CA2, No. 95-6086 (2nd Cir. December 8, 1995).

The report contained the results of an investigation by the court officer, who was appointed pursuant to a civil consent decree to investigate alleged corruption in Local 100 of the Hotel Employees & Restaurant Employees International Union. As part of her inquiry, the court officer examined the activities of various service providers to Local 100, including the appellant here, Local 100's former legal counsel from 1983-91, Meyer Suozzi, English & Klein, P.C.. The partner at Meyer, Suozzi, principally responsible for representing Local 100 was current White House Deputy Chief of Staff Harold Ickes.

The Second Circuit previously had held that the report was a judicial record to which the public had a presumptive right of access and remanded the case to the district court to evaluate the competing law enforcement interests asserted by the court officer and the privacy interests claimed by Ickes' prior law firm, Meyer, Suozzi (*United States v. Amodeo*, 44 F.3d 141 (2nd Cir. 1995)). On remand, Judge Robert P. Patterson of the U.S. District Court for the Southern District of New York ordered that the report be released with redactions to accommodate law enforcement concerns voiced by the court officer. *United States v. Amodeo, SDNY, No. 92 Civ. 7744, (RRP) (May 3, 1995).*

On this second appeal the Second Circuit needed to "address the standards to be used in balancing the presumption of access to the report against Meyer, Suozzi's objections." Slip op. at p.4 The Second Circuit found that the presumption of access to judicial records is rooted in the need for the independent federal courts to have a measure of accountability to the public. The weight of the presumption, the appeals court held, is governed by the role of the material sought in the federal court's exercise of its Article III judicial powers and the value of the information to the public in monitoring the court's performance.

Describing a continuum of relevance to the monitoring process, the Second Circuit stated that the weight of the presumption is "especially strong" where a document played a role in a court's performance of core Article III conduct, such as the determination of litigants' substantive rights. "As one moves along the continuum," the court explained, "the weight of the presumption declines." The appeals court concluded that where documents play no role in the performance of Article III duties "the weight of the presumption is low."

The panel noted that a great many statements and documents generated in litigation had little or no bearing on Article III judicial power. The report here at issue, the court finds, was on "the periphery of the adjudicative process." Slip op. at p. 14. It was not filed at the request of the district court or in connection with any specific action of that court, but primarily to assure the court that the court officer was doing what she was appointed to do.

Troubling, however, is what the court says in dicta: its analysis of where materials fall on the continuum of the presumption. Evidence introduced at trial, quite correctly, carries an "especially strong" presumption of access. Slip op. at p. 9. Discovery materials, in contrast, the court states, "play no role in the performance of Article III functions" and, as a result, "lie entirely beyond the presumption's reach." Slip op. at p. 10.

While documents that underlie a court's decision to dismiss a case seemingly should be available, the court also suggests that where a *district court has denied a summary* judgment motion, the access right is less strong because it is not a final determination of the litigants substantive legal rights. Of course, that ignores the fact that the public cannot monitor the performance of the courts if all they see are motions granted, but not those denied.

The court looks at whether the motive of the person seeking access should have impact on the weight given the presumption, concluding the it is generally irrelevant, at least where the press is seeking material for news reporting. Personal motives, such as an individual vendetta or competitive interest might be considered in the analysis, however.

Once the weight of the presumption is determined, the court can address the considerations against disclosure. Here, the considerations were the law enforcement concerns expressed by the court officer who authored the report, and the privacy interests expressed by Ickes law firm.

As to privacy concerns, the court felt that the first consideration was "the degree to which the subject matter is traditionally considered private rather than public" -- e.g., financial records of wholly business, illnesses vs. management conduct in a publicly held company. Slip Op. at p. 17-18.

The nature and degree of injury from disclosure is to be weighed, along with the sensitivity of the information and the seeker's intended use of it, the reliability of the information to be disclosed, and whether the subject has had a chance to response.

In this instance, in addressing the

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SECOND CIRCUIT: ACCESS TO JUDICIAL RECORDS

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factors to be balanced against the presumption , the Second Circuit found that the district court's redacations to the report satisfied any law enforcement concerns involved. When evaluating the privacy interests asserted, the appeals court divided the report into two parts. It found that Part I, which consisted of unsworn accusations concerning Ickes' representation of Local 100, was unintelligible as redacted and that its release would be more likely to mislead than inform the public. Part 2, the appeals court revealed, contained little hearsay and essentially described the law firm's role as legal advisor to Local 100. The Second Circuit noted that the expectation of privacy generally involved in matters regarding a lawyer's representation of a client is diminished where the client is a public body, such as a labor union. In such circumstances, the court held, an attorney acts as a fiduciary and might reasonably expect some public scrutiny. The court also noted that any privacy expectation in the report was further diminished because both the attorney-client privilege and the work product doctrine had been waived. The Second Circuit reversed the district court's unsealing of Part I of the report and remanded the matter to the district court to reconsider the decision to release Part 2 in light of its opinion.

On this second remand, the district court declined to release Part 2 of the report. The court held that the adverse effects upon law enforcement interests, although minimal, when coupled with the privacy interests of innocent third parties outweighed the weak presumption in favor of access to Part 2. (*United States v. Amodeo*, SDNY, No. 92 Civ. 7744 January 11, 1996 (RRP)). Discussing the privacy interests asserted by Meyer, Suozzi in Part 2, Judge Patterson stated that Part 2 reflected law firm decisions not normally made public, that Meyer, Suozzi potentially would be injured by public discussion of part 2 without an adequate opportunity to respond, and that the subject matter of Part 2, the extent or lack of Meyer, Suozzi's knowledge of its clients' organized crime associations, is traditionally considered to be private.

LDRC wants to thank Lisa Sleboda, an associate at Gibson, Dunn & Crutcher, for her assistance with this article.

SUPREME COURT UPDATE

Cert. denied:

1. *Turf Lawnmower Repair Inc. v. Bergen Record Corp.*, 139 N.J. 392, 655 A.2d 417, 23 Media L. Rep. 1609 (N.J.Sup.Ct. 1994), *cert. denied*, 64 U.S.L.W. 3455 (01/09/96, No. 95-424). *See LibelLetter May, 1995, p.1.*

The Supreme Court has let stand a New Jersey Supreme Court decision which held that in libel actions brought by businesses, the actual malice standard would be applied when the allegedly defamatory statements, if proved, would constitute a violation of the New Jersey Consumer Fraud Act. The questions presented by the petition were: (1) Does New Jersey Supreme Court decision that permits media defendants to create their own defense and control the applicable standard in defamation cases based on their own allegations designed to create public controversy violate plaintiff's right to equal protection of the law? (2) Did court's refusal to consider individual plaintiff's libel claim as distinct from that of corporate plaintiff violate his right to equal protection of the law?

2. *Vail v Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 649 N.E.2d 182, 23 Media L. Rep. 1881 (Ohio Sup.Ct. 1994), *cert. denied*, 64 U.S.L.W. 3455 (01/09/96, No. 95-491). *See LibelLetter June 1995, p.1.*

The Supreme Court has also denied certiorari in a case involving Ohio's state constitutional protection for opinion. The Ohio Supreme Court held below that Ohio courts, when determining whether speech is protected as opinion, must consider the totality of the circumstances, including whether the statement is verifiable, the general context of the statement, as well as the broader context in which the statement appeared. In so doing the court ruled that the average reader would have accepted the statements at issue which appeared in an editiorial column and stated that, among other things, the plaintiff, a political candidate, "doesn't like gay people," as opinion rather than fact. The questions presented by the petition were: (1) May Ohio Supreme Court lawfully disregard the U.S. Supreme Court's holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and adopt a broad opinion privilege in libel cases purportedly based on separate state constitutional provision that is more restrictive as to speech than First Amendment? (2) Do First Amendment and Fourteenth Amendment's Due Process Clause require that state provide reasonable means to vindicate reputational interests adversely affected by publication of defamatory falsehoods that are actionable under the standard adopted by the Supreme Court in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) and reaffirmed in *Milkovich v. Lorain Journal Co.*?

WALDHOLTZ v. WALDHOLTZ: THE WONDERFUL SAGA OF ENID and JOE

By Jeffrey J. Hunt

She is the former Utah corporate lawyer turned congresswoman who gained national attention last December with the tragic tale of the wife who loved too well, and the husband who fleeced her and her father of more than $4 million.

He is the husband from Pittsburgh who, after learning the FBI was on his tail, drove to Washington's National Airport and disappeared, only to give himself up a week later to face allegations of bilking his mother, grandmother, wife, and father-in-law of millions of dollars.

The bizarre saga of congresswoman Enid Greene Waldholtz, once a rising star in the Republican freshman class, and her husband and alleged con man, Joe, is proof that reality is, indeed, stranger than fiction. Not all the action, however, was confined to the political arena. Just three days after Joe disappeared, Rep. Waldholtz filed for divorce in Salt Lake City, Utah. In the press release announcing the divorce, she stated, "I want this man tracked down, arrested and punished for what he has done to me, my family, and the people of Utah."

Days later, Rep. Waldholtz's lawyer moved for and obtained an *ex parte* order sealing her divorce file. Not surprisingly, the Utah news media objected to the closure, and immediately filed motions to intervene and to vacate the closure order. Motions were filed by both Salt Lake City's daily newspapers -- the *Salt Lake Tribune* and *Deseret News* -- as well as the Associated Press, ABC-affiliate KTVX-TV, NBC-affiliate KSL-TV, and KSL-Radio.

During a hearing last month, District Judge William A. Thorne ruled in favor of the media intervenors and vacated the closure order that he had previously entered. Judge Thorne further ruled that the public's access to Rep. Waldholtz's divorce proceedings and records shall be no different than the public's right of access to any other divorce matter that had not been sealed. Finally, Judge Thorne required Rep. Waldholtz's counsel to give the media prior notice of any future attempts to seal any document or record, or close any proceeding in *Waldholtz v. Waldholtz*.

Relying on *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny, the media intervenors argued that the public and press have a constitutional presumption of access to the Waldholtz divorce proceedings and court records. The media intervenors argued that Rep. Waldholtz had failed to satisfy the stringent procedural and substantive requirements necessary to close judicial proceedings and records. In addition, the media intervenors asserted a common law and statutory right of access to the proceedings and records.

Much of the media attention on Rep. Waldholtz had focused on the origin of the $1.8 million in personal funds she infused into her campaign during its final weeks -- money that financed a last-minute advertising blitz which most political observers believed was critical to Waldholtz's win over incumbent Democratic Rep. Karen Shepard. When asked by reporters during the campaign where the money had come from, Rep Waldholtz would reply only that she and Joe had been "blessed." (Indeed they had -- it turned out the money had come from Enid's father, a retired stockbroker, in apparent violation of federal campaign finance laws.)

In their motions seeking access, the media intervenors noted the irony of Rep. Waldholtz's pledge to make "full disclosure" concerning her tangled personal and campaign finances while the first action taken in her divorce proceeding, where such finances would be untangled, was to seal the court file from public view. The media intervenors further argued that the significant positions of authority Joe Waldholtz occupied on both Rep. Waldholtz's campaign and congressional staffs (campaign treasurer and congressional aide/advisor), and the apparent unsupervised authority he exercised in those positions, had made her divorce proceeding a matter of legitimate public interest.

In response to the media intervenors' motions, Rep. Waldholtz made personal appeals to the publishers of the *Salt Lake Tribune* and *Deseret News* to respect her personal privacy and that of her infant daughter, Elizabeth, and abandon their quest for access to her divorce proceeding and court file. She wrote each of the publishers personally, proposing that the public could have access to certain divorce records pertaining to "matters regarding responsibility for debts or joint property," while the rest of the file, particularly records relating to custody of Elizabeth, would remain sealed.

The publishers politely rejected Rep. Waldholtz's offer. In a letter responding to Rep Waldholtz's proposal, *Deseret News* Publisher Wm. James Mortimer wrote that the "allegations of criminal conduct, deception and betrayal you have leveled against your husband have made the nature of that relationship a matter of legitimate public scrutiny."

On the same day that Rep. Waldholtz told her story of deception and betrayal during an extraordinary five-hour press conference, her lawyers were in Court attempting to convince Judge Thorne to adopt Rep. Waldholtz's "compromise" and limit access to certain records in the divorce file. The Judge refused the request and unsealed the file.

Despite Enid blaming him for all of her campaign finance irregularities and accusing him of "questionable lifestyle choices" (something Enid has refused to elaborate on), Joe seems resolute. In a recent radio interview, he professed his continued love for Enid and a desire to reconcile.

Jeffrey J. Hunt is a partner in the DCS member firm of Kimball, Parr, Waddoups, Brown & Gee, and represented KSL-TV, KSL-Radio and the Deseret News in seeking access to the Waldholtz proceeding.

ATTORNEYS' FEES AWARDED IN *MATUSEVITCH*

Vladmir Telnikoff, who won a British libel suit against Vladimir Matusevitch but later lost a § 1983 action brought by Matusevitch to bar its enforcement in the United States, learned recently that attempting to collect judgments granted under Britain's regressive libel laws is not only difficult but may be extremely costly as well. On December 15, 1995, a magistrate judge awarded Matusevitch more than $200,000 in legal fees as the prevailing party in the § 1983 suit.

The British action resulted from a letter written in February 1984 by Matusevitch to the London *Daily Telegraph*. *See LDRC LibelLetter* (June 1994, at p. 3). Telnikoff, a Soviet dissident living in London, brought a libel suit against Matusevitch, a Soviet Jewish emigre and U.S. citizen also living in London. Although Matusevitch initially won in lower court, where his statements were held to be "fair comment" as a matter of law, the House of Lords reversed and remanded for a jury trial, leading to a $416,000 judgment in 1992. *See LDRC LibelLetter* (November 1994, at p. 4).

In April 1994, Telnikoff filed suit to enforce the judgment in state court against Matusevitch, who was living in Maryland at the time. Matusevitch responded by bringing an action for declaratory relief under § 1983 in federal court in Maryland to bar enforcement of the British judgment. The case was subsequently transferred to the District Court for the District of Columbia, where, in April 1995, Matusevitch was granted summary judgment on the ground that enforcement of the British judgment would be repugnant to U.S. public policy. Specifically, Judge Urbina noted that because British libel law requires the defendant to prove truth and does not require the plaintiff to prove fault, recognition of the British judgment would have deprived Matusevitch of rights guaranteed under both the United States and Maryland Constitutions. *See LDRC LibelLetter* (February 1995, at pp. 1, 12).

The latest development in the case occurred on December 15, 1995, when Magistrate Judge Deborah Robinson, applying § 42 U.S.C. § 1988 (under which courts have discretion to award attorneys' fees to the prevailing party in a § 1983 action) granted Matusevitch's motion for attorneys' fees in the amount of $234,560.56. *Matusevitch v. Telnikoff*, Civ. Action No. 94-1151 (D. D.C. 1995).

The court rejected Telnikoff's contention that § 1988 was inapplicable because the original grant of summary judgment did not refer to § 1983, observing that Matusevitch's complaint had been brought under § 1983 and that the claim had been granted in its entirety. *Slip op.* at 4–5. Telnikoff's argument that § 1983 was not triggered because his attempt to enforce the British judgment was a purely private matter and did not involve state action was dismissed as an attempt to relitigate the merits of the underlying action. *Id.* at 5–6.

Finally, the court rejected Telnikoff's various arguments that the specific attorneys' fees being claimed were unreasonable.

PROZERALIK VERDICT

(Continued from page 1)

arguing that the largest jury award ever upheld by a New York court in a libel action was $725,000, 7% of the award involved in the case at hand. *See, Calhoun v. Cooper*, 614 N.Y.S.2d 762 (2nd Dep't 1994) (a non-media case). Capital Cities argued that such damages were intended to compensate, not enrich, and that in this case, the damages were utterly unsupported by the evidence in the record. The Court rejected these arguments 3-2, stating simply that the award did not "deviate materially from what would be reasonable compensation." *Prozeralik II*, 1995 WL at *1, *citing* CPLR 5501 (c).

The court did, however, reduce the amount of the original jury verdict of $11.5 million by vacating the jury's award of $500,000 in punitive damages finding that the evidence was "insufficient to establish that the false statements concerning plaintiff were made 'out of hatred, ill will, spite, criminal mental state or that traditionally required variety of common-law malice.'" *Prozeralik II*, 1995 WL at *1, *citing Prozeralik v. Capital Cities Communications*, 82 N.Y.2d 466, 480 (N.Y. Ct. App. 1993) (*Prozeralik I*).

In a partial dissent, Judge Lawton and Judge Doerr, who also dissented in *Prozeralik I*, take issue with the size of the compensatory award, finding that the non-economic harm elements "deviate materially from what would be reasonable compensation." Rather than affirming the jury's award, the dissenters would have granted a new trial on the issue of compensatory damages unless Prozeralik stipulated to accept awards of $500,000 for injury to reputation and $250,000 for emotional and physical injury. *Prozeralik II*, 1995 WL at *2.

The court agreed with Capital Cities that plaintiff's counsel improperly stated in the presence of the jury that a defense witness was the subject of a federal grand jury investigation. The court held, however, that the improper comment by plaintiff's counsel and other alleged improprieties were harmless.

Other issues rejected included arguments that the testimony of plaintiff's experts on journalistic standards and linguistics should have been excluded, especially in light of the fact that the case turned upon a determination of actual malice, the panel finding that the trial judge "did not abuse her discretion in permitting expert testimony." *Prozeralik II*, 1995 WL at *1.

This is the second trial in this case. The first trial resulted in an $18.5 million jury verdict which was remitted by the trial judge to $15,487,525 million ($4 million for emotional harm and injury to reputation, $1,487,525 million for economic harm, and $10 million in punitives), affirmed by the Appellate Division, but subsequently reversed and remanded by the New York Court of Appeals based upon an error in instructing the jury on the issue of falsity.

Capital Cities has indicated that it will pursue an appeal to the Court of Appeals, New York's highest court.

TAX CONSEQUENCES OF SETTLEMENTS

The United States Tax Court has recently ruled on the tax consequences to a plaintiff of a judgment and subsequent settlement on his claims of libel, privacy and tortious interference with employment claims, as well as the attorneys fees he incurred. *Bagley v. Commissioner of Internal Revenue*, Docket No. 531-93, 105 T.C. No. 27 (U.S. Tax Ct. Dec. 11, 1995). The petitioner, Mr. Bagley, joined in this proceeding by Mrs. Bagley, is the former plaintiff in a suit against Iowa Beef Processors, Inc. See *Bagley v. Iowa Beef Processors, Inc.*, 797 F.2d 632, 13 Media L. Rep. 1113 (8th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

LDRC membership, if engaging in settlement negotiations, may find this determination by the Tax Court is a factor raised by the plaintiff.

The facts concerning the specifics of the award vs. the settlement amounts are somewhat complicated, but plaintiff received $150,000 compensatory and $500,000 punitive damages, pre-and post-judgement interest, and costs, on his tortious interference with present employment claim, paid on a jury verdict in his favor. And in the face of a pending retrial on his other claims, IBF settled with plaintiff for $1.5 million. The settlement amount, the court found, was not based upon any formula or calculation and was characterized as "damages for personal injuries, including alleged damages for invasion of privacy, injury to personal reputation including defamation, emotional distress and pain and suffering." IBP had stated during the negotiations that it would not pay for punitive damages, although the parties were aware of the fact that the jury in the first trial awarded significant punitive damages for the libel and invasion of privacy claims -- 5-1 and 6-1 ratios respectively with compensatory damages.

Petitioners-Bagleys had excluded all of the amounts received from both the judgment and the settlement from their taxable income, except the interest received on the interference with employment claim. The IRS took the position that the punitive damage award and $1.3 million of the settlement (which the IRS deemed punitive damages), were not excludable from income as damages received on account of personal injuries or sickness under section 104(a)(2), I.R.C.

Acknowledging that express language in an agreement is usually binding for tax purposes if entered into in an adversarial context at arm's length and in good faith, the court further noted, however, that the analysis must necessarily take into account all of the circumstances surrounding the settlement. Facts such as the joint drafting of the agreement, lack of a specific statement regarding punitives, that IBP must have considered the possibility of punitive damages from a retrial, among others, led the court to conclude that $500,000 of the settlement should be allocated to punitive damages.

The court then found that, contrary to its prior decisions on the matter, as a result of the recent Supreme Court decision in *Commissioner v. Schleier*, 515 U.S., 115 S.Ct. 2159 (1995), punitive damages received in a personal injury suit were not automatically excludable from income. Any damages that were not compensatory but punitive in nature were not excludable from gross income under 104(a)(2).

Legal fees, both hourly and contingency fee, were entitled to be considered as itemized deductions, but not as a deduction from the amount included in income.

LDRC WISHES TO ACKNOWLEDGE THE CONTRIBUTIONS OF LDRC INTERNS JOHN MALTBIE AND BILL SCHREINER TO THIS ISSUE OF THE *LIBELLETTER*.

LIBEL VERDICT AGAINST ZSA ZSA GABOR AND HUSBAND

(Continued from page 1)

Von Anhalt allegedly made to a German reporter in an impromptu interview in a hotel where Gabor and Von Anhalt were staying. The statements -- including assertions that Sommer, who was born and maintained a residence in Germany, was broke, had been forced to sell her house in Hollywood, lied about her age, hung out in sleazy bars, and made money by selling handknit sweaters -- were included in the reporter's article along with Sommer's denials of their truth. The article appeared in a popular German magazine with minimal circulation in California.

Von Anhalt later allegedly made similar remarks to a German newspaper correspondent in an interview in Los Angeles, which were printed in a major German daily newspaper with a minuscule circulation in California. The article, a gossip column, was one of several in recent years in which Gabor and Sommer had made harsh comments about each other.

Both Gabor and Von Anhalt denied making the statements attributed to them in the magazine and Von Anhalt denied virtually all that were attributed to him in the newspaper. Both basically testified at trial that they didn't know if the statements were true or not.

At trial, Sommer introduced evidence showing that the statements were not true. She put on the reporters for the publications, who apparently testified that the content of the statements they reported were made by the defendants.

As for damages, she presented testimony from a publicist describing how an actress of her caliber relies on favorable publicity for future work -- and that Gabor's and Von Anhalt's statements would harm her future ability to get work. She presented evidence that she received fan letters with offers of financial assistance at her German home. Additionally, Sommer asserted she felt physically ill and needed two sessions

(Continued on page 10)

LIBEL VERDICT AGAINST ZSA ZSA GABOR AND HUSBAND

(Continued from page 9)

with a psychiatrist as a result of the statements, and was allowed to testify about the effect of the articles on her German, elderly and unwell mother and how her mother's reactions affected Sommer herself.

On appeal, the defendants argued that German law, not California law, should have been applied to the issues of damages, and that under German law, Sommer could not recover either presumed or punitive damages. Moreover, defendants argued that the damage award was excessive, that the jury instructions were incorrect and prejudicial, and that Sommer's testimony about the articles' effects on her mother was incorrectly admitted as evidence.

The appellate court rejected appellant's argument that German law should be applied. The court stated that Gabor and Von Anhalt's counsel raised a conflicts of law issue near the end of the trial (noting that it had also been raised in a reply brief on defendants' motion for judgment on the pleadings filed just before trial), suggesting at that point that German law governed liability. Whether liability or damages, the court found that counsel had failed to provide adequate evidence of the particulars of German law to either the trial or the appellate court.

Moreover, the court found, counsel had failed to argue the appropriate conflicts of law analysis at the trial court level -- California having adopted a governmental interest analysis and counsel having argued a situs of publication, place of the wrong, analysis -- the court also noted that counsel failed to present evidence or to establish in their appellate briefs Germany's interest in the suit, assuming that it, in fact, had law different from California law.

Appellant's argument that the damages were excessive also failed to move the Second Appellate District panel. The appellate court gave great deference to the trial court's failure to reduce the award after the verdict, and refused to find that the award was "so grossly disproportionate to the injury that [it] may be presumed to have been the result of passion or prejudice," *Sommer* at 16330. The court characterized defendants' appellate attacks on the evidence as "nothing more than challenges to the credibility of the witnesses and the inferences to be drawn from their testimony." *Id.* at 16331.

The appellate court found sufficient the publicist-expert's testimony and evidence of consoling fan letters, indicating that some fans must have believed that Gabor's and Von Anhalt's statements were true. Furthermore, the court refused to disturb the jury's finding that the statements were made with actual malice based on defendants' testimony that they did not have any basis for knowing whether the statements were true or false, and obviously finding the journalists' testimony that defendants made the statements at issue to be true.

The court also rejected appellant's contentions that several jury instructions, including those regarding future damages, statements defamatory on their face, and defendant's knowledge of the falsity of the statements, were given in error. It rejected as well a general appeal that the instructions were confusing to the jury.

Additionally, the appellate court held that Gabor's and Von Anhalt's statements were actionable:that they were defamatory and were not opinion because they were provably false (Sommer produced bank records and testimony of her solvency, for example). Also, the court held that Sommer's testimony about the effect of the statements on her elderly mother was not prejudicial to the defendants, "although [the appellate court] acknowledge[d] that it is difficult to posit a theory of relevancy of the foregoing evidence." *Id.* at 16333.

Defendants plan to ask the California Supreme Court this month to review the case.

LDRC GOES ONLINE

(Continued from page 2)

"ASCI" format).

Downloading Material

To download material from the LDRC Bulletin board using the Windows version of Counsel Connect, "select" the document(s) desired. You then have the option of either printing it or saving it to a file on your hard disk or a folder within Counsel Connect. Note that it may take several minutes to "load" the file and that until the file is loaded, the options under "File" are grayed out and cannot be selected.

Downloading material using the DOS version of Counsel Connect is accomplished in the same fashion, although when saving it to a file you must name the path (whereas in Windows you would use the mouse to create the path). Full details on downloading are available in the Counsel Connect User's Guide.

Questions and Support

If you have questions regarding the above instructions or have difficulty accessing the LDRC private area, you should consult your Counsel Connect "User's Guide" or contact customer service at Counsel Connect or Michael Cantwell at LDRC.

NOTICE:

The Committee on Media Law of the New York State Bar Association is presenting a panel of journalists, lawyers, polical and public officials, on the subject:

"Are the Media -- And the Libel Laws -- Fair to Public Figures?"

The event is scheduled for January 25, 1996, 2:30-4:30, at the New York Marriott Marquis, 1535 Broadway, New York City, New York.

CASES WORTH A NOTE

A NEW TWO PART TEST FOR LIBEL PER SE IN ILLINOIS

A federal district court judge for the Central District of Illinois held in a recent decision that in order for a plaintiff to meet the definition of libel per se it must not only show that the language at issue meets the appropriate categories, but that the language is sufficiently defamatory as to justify the imposition of presumed damages. *Management Services of Illinois, Inc. v. Health Management Systems, Inc.*, No. 95-3276 (C.D.Ill. December 4, 1995).

The suit involved two corporate litigants in a non-media claim. Plaintiff sued for statements made by its former sub-contractor, the defendant, to plaintiff's client. After plaintiff terminated the defendant for failure to perform adequately, the defendant sought to obtain the business directly from the client, making statements in writing that plaintiff claimed were knowingly false and defamatory.

Noting that in Illinois the law no longer recognizes a distinction between libel and slander law rules, the court first applied traditional slander per se concepts to libel. Because the writing involved a corporation and not an individual, the court found that "the writing must first 'assail the corporation's financial or business methods or accuse it of fraud or mismanagement.'" Were the plaintiff to be an individual, the court stated in a footnote, the more traditional four per se categories of sslander per se would be applied.

But merely finding that the writing falls into these categories is insufficient under Illinois law, the court found. In addition, and because the rationale for presumed damages in per se cases was that the severity of defendant's activity virtually guaranteed injury to the plaintiff's reputation, the court must find that the defendant's conduct was "so severe or obviously and naturally harmful to [plaintiff] that serious reputational injury was highly likely or virtually certain such that proof of actual damage is justifiably dispensed with." Slip Op. at p. 11.

In this case, while the language met the per se category for a corporation, the court found that harm to plaintiff's reputation could have only occurred with its client, and that such harm was unlikely due to the long-standing relationship between plaintiff and the client. Plaintiff could not meet the per se requirements and would have to prove special damages.

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N.Y. COURT FINDS AUCTION HOUSE IS PUBLIC FIGURE

An auction house, whose auction of the art collection of an insolvent bank was both advertised and received advance media attention, was held to be a limited purpose public figure for purpose of criticism of the handling of the auction. The opinion, by a New York appellate panel was on an appeal as to certain of the defendants' motions for summary judgment.

In *Parlato v. Curry*, No. 1270 (N.Y.A.D. 4 Dept. November 15, 1995), the court, stating that "[t]he essential element in determining public figure status is 'that the publicized person has taken an affirmative step to attract public attention' (*James v. Gannett Co.*, [40 N.Y.2d 415, 422]", found that plaintiffs, 'by voluntarily thrusting themselves into the limelight in seeking media attention for the auction, became public figures [cites omitted]." Slip Op. at p. 3

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PROTECTED OPINION FOUND IN ILLINOIS EMPLOYMENT CASE

Using the *Ollman* criteria, and other pre-*Milkovich* decisions, an Illinois appellate court held that the statements from an employment interview evaluation were protected opinion. Further, the court suggests that under the fourth Ollman factor, the social context in which the alleged defamatory statements were made – "because some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact" -- the social context of employment interview evaluations may be a context which suggests subjective opinions. *Quinn v. Jewel Food Stores*, Inc., No. 1-93-2991 (Ill.App. 1 Dist. Nov. 22, 1995)

Plaintiff sued his former employer after he learned that a management interview evaluation in his personnel file contained statements that he felt cost him both of the two franchise operations for which he had applied. Plaintiff had participated in a management program, of defendant, but had been denied a management position. He continued to work for defendant for seven years following the denial. He asked defendant to send the franchising entities his personnel file, but was unaware of the contents of the management interview evaluation.

In addition to concluding that the statements in the evaluation were constitutionally protected opinion, the court also found that the statements were capable of innocent construction under Illinois law, that plaintiff had not proven the special damages necessary for libel per quod, and that the defendant's publication of plaintiff's personnel file was qualifiedly privileged.

As to the qualified privilege issue, the court found that a prior employer's response to a prospective employer's inquiries is privileged as publication to a party which has an interest. The court acknowledged that Illinois courts had not directly addressed the issue, although the Seventh Circuit had found the privilege to exist.

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N.Y. CHAPADEAU STANDARD APPLIED TO NON-MEDIA DEFENDANT

A federal district court in the Northern District of New York has held that even with respect to a non-media

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CASES WORTH A NOTE

(Continued from page 11)

defendant, a private plaintiff in a libel suit where the subject of the statements involved a matter of public concern must prove that the defendant acted in a grossly irresponsible manner, *Mott v. Anheuser-Busch, Incorporated*, ___F.Supp.___ (N.D.N.Y. Dec. 29, 1995).

In New York, under the decision in *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199, 379 N.Y.S. 61, 64, 341 N.E.2d 569, 571 (1975), a private plaintiff must prove a higher degree of fault than mere negligence on the part of the defendant where the subject of the allegedly defamatory material concerns a matter of public concern, that which is "reasonably related to matters warranting public exposition." *Id.* The *Chapadeau* decision involved a media defendant and the Court of Appeals, New York's highest court, has not expressly extended the *Chapadeau* holding to non-media defendants. The court here, however, finds that the Northern District, as well as the federal court in the Southern District of New York and several lower New York state courts, have held it applicable to non-media defendants.

Quoting from Fourth Department decisions, the court states that "'as a practical matter and for reason of logic, there is more consistency and simplicity where one uniform rule governs in defamatory falsehood litigation'" and that "'private defendants are entitled to be held to the same standard as the media defendant when the publication involves a matter of public concern.'" Slip Op. at p. 8.

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CBC AND ITS REPORTERS CANNOT BE SUED FOR LIBEL IN U.S. FEDERAL COURT

A federal district court for the Southern District of New York held that it lacked subject matter jurisdiction over the Canadian Broadcasting Corporation and three of its reporters/producers in a libel suit arising out of a series of reports broadcast initially by the CBC in Canada and subsequently by CNN pursuant to a news sharing agreement with the CBC. *Bryks v. Canadian Broadcasting Corporation*, 95 Civ. 1219 (MBM)(S.D.N.Y. Dec. 1, 1995).

Federal District Court, Judge Michael Mukasey, found that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. Sections 1602-1611 (1988 and Supp. V 1993), which "'provides the exclusive source of federal jurisdiction in actions against foreign sovereigns or their instrumentalities'" (Slip Op. at p.2) governed and that plaintiff's suit for libel did not fall within any exception to the general grant of immunity from jurisdiction of the U.S. courts.

Plaintiff was seemingly living in New York at the time of the broadcasts and the suit, although the activities reported on took place in Canada and concerned events during plaintiff's residency in Manitoba, Canada. Claims against CNN remain to be litigated.

The court held that the CBC met the statutory criteria of an "agency or instrumentality of a foreign state". While the statute provided an exception to the general immunity from suit for certain claims for personal injury, it also then exempted from the exception any claims for libel.

The court proceeded to accept plaintiff's argument that the broadcast activities of the CBC could be considered as "commercial activities" under the FSIA – the type of activity normally carried on by private parties in the U.S. for commerce -- a second exception to the grant of immunity in the statute. That exception, however, contained no specific exception (the exception to the exception) for libel claims corresponding to that in the personal injury section, and plaintiff argued that there was none, citing a Ninth Circuit and a number of other federal district court decisions in support of his position.

Judge Mukasey, in a thoughtful and articulate analysis, concluded that the exception to the exception for libel (and other enumerated claims set out in the same section) applied to the "commercial activities" provision as well as to the personal injury section. To hold otherwise, he found, would result in anomalous and odd results: that one could evade the exception by simply coming within the commercial activity section, that only non-commercial activities would be exempt, and that foreign immunity would be greater than that afforded the U.S. under the Federal Tort Claims Act, upon which the FSIA was modeled.

The two reporters and the producer, as individuals acting in their official capacity, are to be deemed the equivalent of the sovereign for purposes of the FSIA and thus were also exempt from suit for libel.

The CBC and its reporters were represented by Gibson, Dunn & Crutcher, New York.

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FIFTH CIRCUIT UPHOLDS IMMUNITY FOR CONGRESSMAN IN DEFMATION SUIT

If only Hutchinson Had Sued Proxmire Today . . .

The Fifth Circuit Court of Appeals held last month in *Williams v. United States*, 1995 WL736840 (5th Cir. (Tex.)), that under 1988 amendments to the Federal Tort Claims Act (FTCA), a Congressman is an "employee" of the government and is immune to defamation suits arising out of statements the Congressman makes during interviews with the press. The court's application of the amendments to the FTCA limit the practical effect of the ruling in *Hutchinson v. Proxmire*, 5 Media L. Rep. 1279 (1979), that Members of Congress were not protected by the Constitution's Speech and Debate Clause for defamatory remarks transmitted to members of the press. At issue in this case were

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CASES WORTH A NOTE

(Continued from page 12)

statements made by Congressman Jack Brooks of Texas during a television interview about appropriations to restore the battleship Texas. During the interview, Brooks made statements about plaintiff lobbyist's actions in relation to the restoration, and the plaintiff sued Brooks for defamation. After a motion to dismiss the case failed, the U.S. Department of Justice certified that Brooks' statements were within the scope of his employment as a Member of Congress and asked that the United States replace Brooks as the defendant. The Fifth Circuit's decision upholds the district court's replacement of Brooks with the United States, and a dismissal of the case because the United States cannot be sued for defamation.

The circuit court noted that the amendments, known as the Westfall Act (28 U.S.C. §2679(d)), clearly extend the FTCA immunities to both the legislative and judicial branches, with no exception for Members of Congress. Additionally, the court found that since Brooks' statements were related to an issue of public concern -- the plaintiff's lobbying fees, received for lobbying Congress -- they were within the scope of his employment.

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PRIOR RESTRAINT REQUEST DENIED

Ordinarily, this dog-bites-man story might not be worth noting. But coming on the heels of the prior restraint against McGraw-Hill, we thought it heartening and therefore worth noting that a district court judge, seemingly without much fuss, did the right thing.

Two days before broadcast, an Oregon Federal District Court denied a temporary restraining order aimed at blocking the airing of an NBC docudrama. Plaintiff was convicted, ten years after the fact, of murdering his wife. He maintains his innocence on appeal.

Filing a complaint of defamation and false light, plaintiff argued that the two-night docudrama contained many scenes which never happened and that the sinister portrayal of him would endanger him in the prison population and would be highly prejudicial to his appellate and retrial rights.

The court correctly states that a prior restraint is the most serious and least tolerable infringement of First Amendment rights and is presumptively unconstitutional. Noting three analogous Ninth Circuit decisions in which the courts rejected requests for prior restraints, the court held that plaintiff failed to demonstrate the likelihood of success on the merits or that threats from other prisoners or jeopardy to any retrial or appeal were sufficient to halt the broadcast. (*Cunningham v. National Broadcasting Co. Inc., et al.*, No. 95-1833 (D. Ore. 11/17/95))

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TORTIOUS INTERFERENCE IN CONNECTICUT

By now you should have received a copy of Tortious Interference: A Practical Primer for Media Practitioners which was sent out earlier this month.

Illustrating the need for media awareness of these claims is a current case against the Journal Inquirer, a Connecticut newspaper, alleging tortious interference, tortious conduct of employee and slander of title. In a case which arose out of a dispute concerning plaintiff's plans to expand a housing development, the Inquirer was sued on the basis of its strong opposition to the plaintiff's proposal and receipt of Zoning Commissions approvals. The result, according to plaintiff, was the impairment or loss of relationships on the development. The Inquirer's actions included finding and then reporting that plaintiff had obtained approvals in a secret Commission meeting. The paper ran a number of articles and editorials critical of the Commission's handling of the matter.

The paper also asked police and the State Attorney, and filed a complaint with the Freedom of Information Commission, about possible wrongdoing with respect to the Zoning Commission action. The FOI Commission did find error and, under Connecticut law, declared the Zoning Commission approvals for plaintiff's project null and void.

Alleging that the newspaper "engaged in the interfering conduct with malice toward plaintiff and a desire to injure plaintiff economically and with wantonness and disregard of plaintiff's rights," plaintiff's complaint sought compensatory and punitive damages Complaint at 4.

The defendants contend that their activities — reporting, editorializing, and petitioning government agencies — are all constitutionally protected. In a recently filed motion for summary judgment, defendants argue that the facts reported were accurate; plaintiff's complaint is only with regard to opinions recognized under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), as well as the additional protections provided by Connecticut's state constitution. Other activities complained of, e.g., the FOIC complaint, defendants' argue constitute classic petitioning, also protected by the First Amendment.

Finally, citing *Hustler v. Falwell*, the defendants argue that simply re-labeling their activities as tortious interference does not undermine the constitutional protection for the newspaper.

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LDRC Libel Defense Resource Center

January 19, 1996

TO: LDRC MEMBERSHIP

RE: ANNUAL DINNER TRANSRCRIPT

Attached is the portion of the transcript from the LDRC Annual Dinner containing Susan, Sally and Harry Blackmun's speeches.

These comments are printed solely for LDRC membership personal review and are not to be reprinted or distributed without consulting LDRC. Please also note that Susan Blackmun's material is copyrighted.

LDRC wants to thank Executive Committee member Blair Soyster and her firm, Rogers & Wells, for arranging for the transcription of the Annual Dinner proceedings.

LDRC Transcript--Annual Dinner

Luther Munford: It is my pleasure to introduce two of Justice Blackmun's daughters, who have come to be with us tonight and help us honor their father and they may even go so far as to give us some insights into free speech in the Blackmun household. Sally Blackmun is a lawyer in Orlando, Florida. She's a graduate of Wilson College and Emory University School of Law. She worked as a commercial litigator in Atlanta and is now assistant general counsel of Darden Restaurants in Orlando--they're the company that owns the Red Lobster and other restaurant chains. She and her husband, Michael Ellsbury, have two daughters.

Susie Blackmun is a free-lance writer who also lives in Orlando. She's a DePauw graduate and has worked as a research psychologist; and for many years was a professional sailboat crew member in the Atlantic and the Mediterranean. Among her accomplishments, she was one of the first women ever certified by the U.S. Navy as a scuba diver. She is also married and has one daughter.

Sally, Susie, the podium is yours.

Sally: Good evening to all of you. What fun it is to be here tonight to share this wonderful evening. Many thanks to Luther for suggesting that Susie and I come and help in this celebration honoring Dad. Luther and I go back a long way. My husband and Luther clerked for the same federal judge in St. Petersburg many years ago and Luther clerked for Dad so we go back a long way. Luther asked Susie and me to share two things with you tonight. First, a few family secrets, particularly as they might relate to First Amendment freedoms in the Blackmun household.

Susie, who's always chosen the rocky road, volunteered for that topic. We've also been asked to illustrate some of the virtues we think have made our father a great justice. Being the most serious daughter and a lawyer, I opted for that. First, I think Dad has the ability to stay in touch with the people. They serve as a reality check for him. He came from a hard working, conservative German-Welsh family. His own diligence won him a scholarship to Harvard where he worked his way through both undergrad and law school doing everything from delivering milk to driving the launch for the crew team coach, to, as he puts it, cleaning the spit off the handball courts. Once at the top, he didn't forget his humble origins. Instead he used his position of power to reach out to those less fortunate. He was mindful of the human beings behind every case reviewed by the Supreme Court: the Sioux Indians, Edwin Collins, and poor Joshua. He gave a hand-up whenever he could to young people who, like he, needed a break. He chose his law clerks not only from Ivy League schools but from small, less well-known law schools. He also accepts speaking engagements at prestigious events like this one, but he goes to the obscure place as well, like Buena Vista College in northwest Iowa. Around the Court building, he's considered the most human, down to

earth justice. He knows the names of everyone's spouses and children, and he never forgets to ask the elevator operator about his sick wife and the police officer about his cats. Or, check out his reserve seats at the Court sometimes. One never knows whom they might hold. Former baseball greats, a prison warden, Garrison Keillor, his apartment maintenance person or his grandchildren.

The second virtue, I think, is Dad is unwavering in his beliefs, one of which is the First Amendment. While he has not always been tolerant of his daughters and their opinions, as Susie will demonstrate, he's been infinitely tolerant of the abuse that comes his way as a result of the First Amendment. Dinner table conversation at our house regularly included Dad's reading of the day's mail to us. Many of the justices do not look at everything the postal system brings to their Chambers, but Dad insisted on reading every piece. Roe v. Wade alone generated over 80,000 letters. Why did he bother? Because he wanted to stay in touch with the people, to feel the heart beat of the nation. He never wanted to be isolated in that beautiful white marble palace we all know as the United States Supreme Court.

The letters lead me to virtue number three, his sense of humor. While Dad didn't often see the humor in our childhood pranks, he's had many a good laugh from the sometimes bizarre letters that come his way. I'd like to share with you some of the family's favorite examples of the First Amendment as it came back to bite one of its greatest proponents. This first letter is dated February 22, 1985. It was in response to the Court's unanimous opinion that Long Island is not an island. It came attached with an article from the "Daily News" called, the headline, as they call it, "Fantasy Island", and this is the letter:

> Dear Sir:
>
> It was with a great deal of astonishment that I read in the newspaper the fact that you nine feeble, overworked idiots have decided that you can repeal a law of nature and rule on what is and what is not an island. When Burger said you had too much work to do, I can see that he was so right. You all need a long vacation, say about 20 years. Before you made that ruling on Long Island, what you should have done is try to walk on dry land from Queens to the Bronx. Justices of the Supreme Court are above replying to criticisms from mere mortals, but if you are bucking for a discharge so that Reagan can put one of his friends in your place, you are handling it just right.

Cordially, Ely Brennan, Rego Park, New York

The second letter is undated, it was handwritten, it says:

Harry Blackmun:

> Why don't you just retire and clear the way for intelligence. We've had your left-wing crap crammed down our throats for far too long. You are worthless to the American scene. (And Dad loves this line.) Maybe the Swedes can use you. You just don't fit.
>
> One of an ever-growing cadre of Dump Blackmun Americans.

And the then third one I'll share with you. No date, no greeting:

> Now that your decrepit old ass is about to be off the Supreme Court, I hope you croak, you old bastard. You are a worthless, pathetic excuse for a Supreme Court justice. You can't die soon enough. Richard Nixon's worst mistake was not a failure to burn the tapes; it was appointment of you to the highest court in the land.

And that guy signed the letter. In addition to letters, such as these, there are of course many heartfelt moving letters thanking Dad for his years of public service and significant contributions to the nation. And many special, wonderful, and well-deserved recognition events such as this one. Thank you again for honoring Dad tonight and for including Susie and me in the celebration. And thank you, Mr. Justice, we love you and we admire you. And Susie, the floor is yours.

Susie: I'm Susie, formerly the family rebel, now I've toned down to a mere maverick. As a writer I'm used to opening a vein, as they say, so I'll take up where Sally feared to tread. Ready, Dad?

As you know, a family is not a democracy. It's more of an autocracy or perhaps a kingdom. In our family, we could say anything we liked, but the First Amendment didn't always protect us. At least it didn't protect me, but then I had a troublesome

mouth, which is why when I found myself about to sit down next to a New York Times reporter this evening, I eased on over a few seats. Dad always encouraged us to think for ourselves, but he wasn't always tolerant of our opinions and decisions. I remember a discussion we had when I was a teenager, concerning something I wanted to do that he didn't approve of. I have no recollection of the issue, but I've never forgotten his final response. "You're a big girl now, you can decide for yourself. You can choose A or you can choose B - he always talks in outlines - but if you choose B you're a damn fool."

Dad's appointment to the Court came at an awkward time in my life. I was a junior in college and messing around with the radical fringe. We wanted to America a better place. You know, just overthrow the government and take charge. We were too young and naive to know that government's don't fall without bloodshed. The establishment was the enemy and Richard Nixon was the biggest villain of all. Yet it was Nixon who appointed my Dad to the pinnacle of the legal profession. I was pretty confused about it.

After one meeting at the White House early on when Dad was still in favor there, Dad presented me with a presidential pen. You know, one of those little party favors that presidents give out to their thousands of special visitors. "Wow," I said, "a pen from Tricky Dick." Well, Dad snatched that pen right out of my hands and huffed off to his room. I never again referred to the president as Tricky Dick - in my Dad's presence, at least - but you can imagine my smugness when the Court decided unanimously that the Watergate tapes had to be turned over and that was the end of Tricky Dick. By the way, Dad eventually gave me back the pen, but during the intervening years the ink had dried up.

Roe v. Wade was a headache. All three of us girls happened to be in Washington soon after Justice Burger had assigned the opinion to Dad. During a family dinner, Dad brought up the issue. "What are your views on abortion?," he asked the four women at his table. Mom's answer was slightly to right of center. She promoted choice but with some restrictions. Sally's reply was carefully thought out and middle of the road, the route she has taken all her life. She's a lawyer. Nancy, a Radcliffe and Harvard graduate, sounded off with an intellectually leftish opinion. I had not yet emerged from my hippie phase and spouted out a far-to-the left, shake-the-old-man-up response. Dad put down his fork mid-bite and pushed out his chair. "I think I'll go lie down," he said, "I'm getting a headache."

Little did he know how monumental and long-lasting that headache would become. It consisted of more than two decades of demonstrations, hate mail, death threats and even a bullet through the living room window. Dad had to put up with freedom of speech

in its most free forms but through it all he never wavered in his belief that the decision he wrote was the correct one.

Many times during our childhoods and even during our adulthoods, my sisters and I were resentful that our father was too busy to spend much time with us. We had to reach middle age before we understood that the work that so consumed him was ultimately a tremendous gift to us and to our children and to our grandchildren to come. We are proud almost beyond words that Harry Blackmun is our father. Thank you for honoring him tonight.

Solomon Watson: Solomon Watson, Vice President and General Counsel to the New York Times and the Chairman of this evening's dinner.

This is an auspicious occasion. We have had comments about Justice Blackmun, not only from two excellent practitioners; we've been given a warm and, I guess, off-the-record portrait by his two daughters. There is little left for me to do this evening other than to present Justice Blackmun with the William J. Brennan, Jr. Defense of Freedom Award and to present it to you on behalf of the membership of the Libel Defense Resource Center, from all of us who share with you your views on freedom of expression. The award here is a Tiffany crystal in the form of a pyramid on a black ebony base.

MR. JUSTICE HARRY BLACKMUN: Ladies and Gentlemen, this is not the easiest assignment I've had. After what has been said and listening to Susie and to Sally and learning some things that of course never happened, forgive me if I seem what I am - a little emotional- but I hope it just demonstrates that I'm an ordinary guy after all and well, let me be sort of halfway formal and say, Mr. Chairman... I have a lot of names here but I don't think I'm going to read them off. You'll understand if I just say, friends -- I hope you will anyway.

It's a great honor to be here tonight and to be presented with this award. I was present when Mr. Justice Brennan - I still use the Mr., I can't get away from it - when Mr. Justice Brennan received the first award. Some of you were asked about him. It's a little sad to see him; he is essentially a wheel chair patient now, but he comes in at least 4 days a week and is just as bright as he can be at the start of the day. Then he wearies a little bit and by one o'clock he's ready to go home. But he's still the old William J. Brennan, Jr., as far as enthusiasm and get up and go and let's do it right, Harry, is concerned. And what a privilege it has been for me to have been associated with him and I think that's one reason I'm so very grateful for this award tonight. It bears his name and how deserving a name it is.

You know, I've never been on a podium where I could see. I always write to say, "Please have a light that will enable me to read my notes." "Oh, yes, yes, we'll have it." But I don't think they manufacture them or something. There's isn't anything. Oh, thank you, I forgot my own flashlight. I'll use this and where are the batteries?

I well remember when the first opinions on commercial speech came out and they were not particularly welcome in certain quarters of the Court. One of the members of the Court, about a week after the decision, wrote a kind of a nasty note, enclosing a full page of lawyer ads from the Washington Post. "Harry, this is what you have wrought." Sincerely. I won't tell you who was the signer, maybe you can guess. But it's nothing that I have ever regretted. I think commercial speech had it coming, and there we were.

Reference has been made to Miranda. The year that Miranda came down, one of my law clerks was rather musical. And he sang in a small group. They produced for the law clerks skit which is given every Spring, a little ditty on Miranda. It went something like this: "Save Miranda. Save Miranda. Save Miranda from the Nixon Four." I think we saved it. The Chief Justice was not amused. It was interesting. You know there are a lot of these things that are interesting around the Court. You don't always talk about them. I've always said, and said it more or less privately but around the conference table that, by gum I'm gonna write a book. That always sort of drains the blood out of them. They wonder what I'm gonna write about. Well, there's a lot of things I can write about. I've even outlined some things that I know they wish I'd expire before I ever get to it.

Mrs. Blackmun, whom everybody calls Dottie, and I have been privileged to, now in our mid-80s and neither one of us feel that old, but we've been privileged to live in every decade of the 20th century and I think the result is that we know the century rather well. We have a feel for it. The feeling sometimes is not good. We know that strides can be made in the direction of human freedom, but that we have regressed every now and then and we hope that for every two strides of progress, regression when it comes is something less than two strides. We can't go back to where we were and we have to move along. You see that Sally and Susie still have an effect upon me. Have you ever had your children give speeches about you? I haven't but....

Well the century, these days has been a difficult one, I think. It has constituted a tumultuous and, in a way, a troubling and discouraging and certainly a disappointing time. But it's always been that way. And the pendulum swings back and forth. There will be betterment and there will be a worsening period. We

can't let it discourage us. It's been exciting, I think, for us to have been on the Court for twenty-four years. And exciting because of the great stakes involved and the fact that all, I hope, has not been lost. I've been asked to comment on how it feels really to have been in the midst of conflicting forces that have had an impact on civil liberties and on free speech particularly. And I like to think that I have been active and have had some influence for the better. It's rather discouraging at times but I think in the overall prospect and I'm beginning to appreciate it now that I've been off the Court for a year, I think in the overall prospect, that movement has been ahead and not back.

I also like to feel that I have been active and have been of some slight influence at least, in areas of the law other than women's rights. Roe against Wade and Doe against Bolton, the companion case, and homosexuality, the dissent in Bowers against Hardwick - the two subjects that the media always pins around me and will force me to carry to my grave. But so what? I was speaking with Ambassador Sol Linowitz the other day and of course you know he's been the subject of great criticism in connection with the Panama Canal matter. We were sort of weeping on each other's shoulders, I guess. But he said, "Harry, it pays to be in conflict and that's what life is all about." But maybe there's some truth in that and so I don't regret the fact that we've been in the middle of some of these things.

My two nominations to the, and confirmations to the Federal bench have never involved, so far as I know, ideological considerations the way some of my successors have experienced those. I don't feel either liberal or conservative although now I'm regarded in some quarters as a flaming liberal of the Court. And John Stevens, John Paul Stevens, I should say, and I were talking about it the other day and he said, "Did you ever realize when you came on the Court, I certainly didn't when I came on in 1975, that we would be regarded as flaming liberals." It's rather fun to think about what brings this about. I do feel, I suppose I have to feel, that some Republicans surely must feel that I've been a traitor to the Republican cause and some Democrats surely must feel that I'm not to be trusted. And I therefore draw a conclusion that I can twist in the wind as I choose without being obligated to either side. And that's just exactly where I want to be.

Well, gatherings such as this and recognitions, such as you have afforded me tonight, I think make it, at least I feel, it made it worth doing. And I look back and shall look back upon those 24 years with a feeling of gratitude to people such as you and to the media for your sympathy, for your encouragement, and your support and now and then for criticism that has kept me in line. I say that with heartfelt thanks. I think I can say these additional things. Civil liberties and free speech among them are

so important in this country. They must be maintained. Now what free speech is, of course, requires a definition at times and Holmes put it well when he said that one doesn't have a right to cry fire in a crowded theater. But where are those lines to be drawn. But once defined I think, free speech can be guided and protected for all of us and our society and our law.

Last night I had another assignment and I'm going to repeat one thing that I said there last night and that was this. I referred to a case that was decided 123 years ago by your Supreme Court, Bradwell against the State of - well it was Illinois - but the title is just the State. And three justices of your Supreme Court - I like to poke that into you, you know, wrote in concurrence with Justice Bradley, and he offered these impassioned words in his concurrence in a case which concerned the right of a woman to be admitted to the State Bar of Illinois. She was a lawyer, she was qualified, she passed the bar examinations, but she was not entitled to be admitted to the State Bar because of her sex. And this is what the concurrence said: "The civil law as well as nature herself has always recognized a wide difference in the respective spheres and destinies of man and woman." Hah, that's wonderful. "Man is or should be woman's protector and defender. The nature and proper timidity - I remind Dottie of that once in a while - nature and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong or should belong to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." That's in your United States Supreme Court. Well, we've advanced a little bit from that point of view or at least we've changed or some people would say we have regressed from it, but I think it's fun to dig out these old expressions now and then and throw them at my colleagues.

I think in all this some lessons can be learned. First, one must stick with his convictions diligently. Don't vary down the line when we can help it. One will receive criticism and unfair comment and even abuse. This is the price that one pays for public activity. And I've learned it the hard way, I guess. In public life, as so many of you know, you lose your privacy. And if that is of great value to you maybe one should not get into public life. Constant vigilance is necessary at least for a time and perhaps for a long time. Courage. The Book of Micah which I also mentioned last night said this. And I like this reference: "And

what does the Lord require of you but to do justice and love kindness and walk humbly with your God." The term success has been defined in many ways. I like this one, I think it's by Ralph Waldo Emerson: "To laugh often and much. To win the respect of intelligent people and affection of children. To earn the appreciation of honest critics and endure the betrayal of false friends. To appreciate beauty. To find the best in others. To leave the world a bit better whether by a healthy child or a garden patch or a redeemed social condition. To know even one life has breathed easier because you have lived. This is to have succeeded."

I like that. I think of course it's too idealistic and unattainable but it is a worthy standard. And it is not always easy, it takes a bit of doing as I have said so many times. Well, I repeat that I am grateful for the recognition tonight and the award that has been given me in this beautiful piece of glass. And in the distinct feeling, however, I think it is bestowed upon all of us, particularly the members of the media. And in that context, I accept. I haven't anything else to say, it's too much what I've said already. But it's great to be here. And keep up your good work in this country of ours that we all love and hope will get better as we move along. Despite its warts, and there are warts all over the place, but that's what makes life interesting.

Thank you for letting Dottie and Sally and Susie be here. I've never heard them speak to me before or of me before and it wasn't easy. I guess it was a lot of fun. Thank you.