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LDRC Libel Defense Resource Center

LIBELLETTER

November 1995

SDNY: PUBLISHER NOT LIABLE FOR DEFAMATORY INNUENDO NOT ENDORSED

By Elizabeth A. McNamara and Sharon L. Schneier

Judge Shira A. Scheindlin of the United States District Court for the Southern District of New York recently ruled that a publisher cannot be held grossly irresponsible for publishing a defamatory innuendo or implication "unless it intended or endorsed that interference." *John Chaiken and Marilyn Chaiken v. The Village Voice*, 1995 WL 617149 (S.D.N.Y. Oct. 20, 1995). Although other courts have applied this standard to defamation claims predicated on defamatory implication or innuendo, this is the first decision from a New York federal court which addresses the issue.

(Continued on page 9)

ABC WINS EAVESDROPPING/ INTRUSION SUIT

A United States District Court judge for the Central District of California has granted summary judgment to ABC in a suit based upon alleged unlawful taping, video and audio, of a conversation with a flight attendant who flew with O.J. Simpson on his now infamous flight to Chicago. *Deteresa v. American Broadcasting Companies*, SA CV - 95-528-LHM (EEx)(C.D. Cal. Nov. 7, 1995).

An ABC associate producer went uninvited to the woman's home and while outside the front door, told her

(Continued on page 16)

LDRC ANNUAL DINNER

Harry M. Johnston III: Chair Emeritus

The LDRC Annual Dinner was held on Thursday, November 9, and was a lovely and moving event. The evening opened with comments by Chad Milton and Sandra Baron as LDRC Chair Harry Johnston, who is retiring from Time Inc. and as Chair of LDRC to pursue his study of jazz piano and other projects, was presented with a metronome, a gift for "a man of Time, a man of music." A transcript of Sandy and Chad's comments, along with

(Continued on page 2)

TORTIOUS INTERFERENCE WITH CONTRACT

While covered in the LDRC 50-STATE SURVEY: MEDIA PRIVACY AND RELATED CLAIMS, tortious interference with contract is likely not a claim that has occupied much attention of the media or its lawyers -- until recently. But the decision of CBS to abort an interview with a former Brown & Williamson executive and the resulting publicity has generated curiosity in media lawyers, clients, and, most likely, potential plaintiffs' lawyers.

Brown & Williamson has sued the CBS "60 Minutes" source in Jefferson Circuit Court, Kentucky by complaint filed on November 21, 1995, with claims of theft, fraud and breach of contract.

In a press release issued by Brown & Williamson, the company contended that the source, Jeffrey Wigand, a former vice president of research and development for Brown & Williamson, was out for nothing but personal gain by selling himself as an expert witness in lawsuits against the company at the same time he received severance payments and outplacement help from the company. Dr. Wigand, a chemist, worked from 1988-1993 at the tobacco company and now teaches high school in Louisville, Kentucky. His identity became known after the New York Daily News obtained and printed extended excerpts from a transcript of the interview Dr. Wigand did with "60 Minutes" correspondent, Mike Wallace.

[According to the reports in the New York Daily News, Dr. Wigand told Mike Wallace that he had participated in research on a "safer" cigarette, development of which was later

(Continued on page 17)

TORTIOUS INTERFERENCE WITH CONTRACT

LDRC, WITH THE ASSISTANCE OF DCS MEMBERS, HOPES TO PUBLISH IN THE NEXT MONTH AN ANALYSIS OF THIS CLAIM, DEFENSES, AND THE INTERSECTION WITH FIRST AMENDMENT PRINCIPLES. **PLEASE SEND LDRC ANY DECISIONS, ANY IDEAS OR ANALYSIS THAT YOU MIGHT HAVE ON THIS TORT TO ASSIST US IN THIS EFFORT.** IT IS IMPORTANT FOR ALL OF US TO SHARE WHAT WE KNOW IN ORDER TO BEST PUT THIS TORT INTO PERSPECTIVE.

LDRC ANNUAL DINNER

(Continued from page 1)
Chair Emeritus.

Notes on Justice Blackmun Available

Dinner was followed by the presentation of the LDRC *William J. Brennan Jr. Defense of Freedom Award* to Justice Harry A. Blackmun. Included in the Dinner program was an introductory tribute to Justice Blackmun written by Justice Brennan and an analysis of Justice's Blackmun's First Amendment record written by Professor Burt Neuborne of New York University School of Law, both of which are included with this month's *LibelLetter*.

The award presentation included brief introductory remarks by Cam DeVore and Luther Munford on various aspects of Justice Blackmun's jurisprudence. *Transcripts of those* remarks as well are attached to this month's *LibelLetter*.

Thanks to Sol Watson and Committee

LDRC wants to thank Solomon Watson IV, General Counsel of the New York Times Company Foundation, who chaired the LDRC Award/Annual Dinner Committee, and the members of the *Committee for all of their help in* making the Dinner a success. The Committee included: Douglas Jacobs, Robert Hawley, David Kohler, Mark Morril, Luther Munford, Robert Sugarman, Kenneth Vittor and Richard Winfield.

The Justice was introduced as well by his daughters, Sally Blackmun, an attorney, and Susan Blackmun, a writer. They gave moving tribute to, and truly delightful insight into, Justice Blackmun and the First Amendment. It was the first time the Justice had been celebrated in such a fashion, and it clearly touched him deeply. His talk on the Court wove gentle anecdote with sharp insight into the institution, his role in it, public life, and the meaning of success.

NURSING HOME IS PUBLIC FIGURE

The Rhode Island Supreme Court has affirmed the lower court's ruling that a nursing home qualifies as a public figure in its libel suit against a local television station. In *Harris Nursing Home, Inc., v. Narragansett Television Inc., et al.*, No. 95-52-M.P. (R.I. Oct. 30, 1995)(order ruling Plaintiff is a public figure), plaintiff, a nursing home, is suing the owner and operator of the television station and a former reporter, alleging a broadcast on October 25, 1991, falsely suggested problems, such as abuse and neglect, existed in the nursing home.

Determining the public figure standard should apply, the court relied heavily on the fact that due to the nature of the nursing home business, the plaintiff has voluntarily subjected itself to public attention, comment and criticism: "We find that the plaintiff by virtue of its business venture has placed itself into the public domain." Nursing homes, being part of the health care industry, are regulated, monitored and inspected by both the federal and state government. In addition, the general public has a strong interest in nursing homes because they may become beneficiaries of the nursing home's services.

Two other jurisdictions have also held nursing homes to the public figure standard. In Illinois, the appellate court ruled for the public figure standard in *Halpern v. News-Sun Broadcasting*, 53 Ill. App. 3d 644, 368 N.E. 2d 1062 (1977). The Michigan Court of Appeals held a nursing home to the same standard in *Bortell v. Citizens for Better Care*, 6 Med. L. Rptr. 1797, Mich. Ct. App. (1980).

In This Issue . . .

- Updates, p. 3
  - -Stratton Oakmont v. Prodigy
  - -Auvil v. CBS "60 Minutes"
  - -The Telephone Consumer Protection Act : The Chair King v. Houston Cellular Corp.
  - -Society of Professional Journalists Code of Ethics: Redux
  - -One More Shield Law
- Supreme Court Update, p. 4
- More California SLAPP, p. 4
- Court Dismisses All But One Claim in Scientology Suit, p. 5
- NJ Judge Dismisses Novel Lawsuit Against Newspaper, p. 6
- NJ Expands Fair Report Privilege, p. 7
- America On-Line, p. 8
- ABC Wins Dismissal of Radio Talk Claim, p. 9
- Notes From LDRC Annual Meeting, p. 11
- Georgia Rejects Challenge to Disparagement Statute, p. 12
- LDRC Defense Counsel Section Annual Meeting, p. 13

UPDATES

1. *STRATTON OAKMONT V. PRODIGY*

Stratton Oakmont Inc. v. Prodigy Services Co., 23 Media L. Rep. 1794 (NY Sup. Ct. May 25, 1995)

LDRC reported last month that a settlement was reached between the parties in this litigation. Defendant-Prodigy still has pending, however, a Motion for Reconsideration, asking the trial court to vacate a prior partial summary judgment decision in favor of plaintiffs, and grant summary judgment to Prodigy in this libel suit. As previously reported, the New York State trial judge made news last summer by finding that Prodigy would be held liable as a publisher for statements made by an anonymous individual on a bulletin board available on the Prodigy Service. See *LDRC LibelLetter*, June 1995, p.1. Prodigy had argued that the bulletin board was managed by an independent contractor and that Prodigy could be held liable only as a distributor, both positions rejected by the trial court's decision.

While Stratton Oakmont has now filed papers with the court agreeing with Prodigy's assessment of the facts in the case, the court has yet to act. The court is, of course, under no obligation to follow the wishes of the parties. Stratton Oakmont has said as well that it will seek a voluntary discontinuance of the action, but has seemingly also agreed to hold off in doing so at least until the trial judge has reversed his decision or, if he fails to do so, until Prodigy has had an opportunity to appeal the judge's decision.

2. *AUVIL V. CBS "60 MINUTES"*

Appellants' petition for rehearing was denied by order of the Ninth Circuit dated October 27, 1995. No. 93-35963 (9th Cir. Oct. 27, 1995) As reported in the *LDRC LibelLetter* of October, 1995, p.1, the Ninth Circuit upheld dismissal of this class action product disparagement suit brought in the district court for the Eastern District of Washington, based upon plaintiffs' failure to meet their burden on the issue of falsity.

3. *THE TELEPHONE CONSUMER PROTECTION ACT: THE CHAIR KING V. HOUSTON CELLULAR CORP.*

Civ. Action No. H-95-1066 (S.D.Tex. Nov. 2, 1995)

A United States District Court in Texas ruled that while federal courts have jurisdiction over matters relating to 47 U.S.C. §227, the Telephone Consumer Protection Act of 1991 ("TCPA"), intrastate activity is excluded from the scope of TCPA.

In *The Chair King, et al., v. Houston Cellular Corp., et al.*, No. H-95-1066 (D. Tex., Nov. 2, 1995), plaintiff seeks to represent a class of individuals and entities, located in metropolitan areas in Texas, who received unsolicited advertisements by facsimile ("fax") from defendants, persons and entities, also in Texas, who used fax machines, computers or other devices to send these unsolicited advertisements. Defendants set forth three main arguments in their motion to dismiss, which was denied in part and granted in part by the court.

The court found, however, that TCPA only deals with interstate activity. Recipients of unsolicited fax advertisements sent intrastate would not have a cause of action under TCPA.

Defendants' final argument was the Act is unconstitutional because it violates the First Amendment and Due Process by restricting speech and imposing a damage limit that exceeds actual damages. The court, without discussion, rejected these arguments as "not persuasive."

In addition to plaintiff's claim under 47 U.S.C. §227, plaintiff brought a cause of action for negligence, invasion of privacy, and trespass to chattels. Plaintiff argued that unsolicited faxes invade the recipient's privacy, force the recipient to bear some of the costs of defendants' advertising, and cause a nuisance by tying up the recipient's fax, thereby preventing the recipient from carrying on with their business. The court dismissed the invasion of privacy and civil conspiracy claims. However, the court did not dismiss the claim of trespass to chattels.

Defendants have now moved to dismiss the case for failure to state a federal claim.

4. *SOCIETY OF PROFESSIONAL JOURNALISTS CODE OF ETHICS: REDUX*

According to Editor & Publisher, the Society of Professional Journalists has determined at its recent annual convention in St. Paul, Minnesota, to table a proposed new ethics code and continue to debate the issue of whether or not to revise the existing code until their convention next year. See *LDRC LibelLetter, July*, 1995 p. 11, appendix. The debate at this convention ranged from various substitute proposals of varying lengths and degrees of specificity, to a debate as to whether or not the Society should impose sanctions for alleged violations of its code.

5. *ONE MORE SHIELD LAW*

In last month's *LibelLetter* we reported that twenty-eight states and the District of Columbia have statutory shield laws. It has been brought to our attention that twenty-nine states, in fact, have such laws. South Carolina's statute, SC ST Sec. 19-11-100, was left out of our consideration.

SUPREME COURT UPDATE

Petition denied: *National City, Calif. v. Rattray*, 51 F.3d 793, (9th Cir. 1994), *cert. denied*, 64 U.S.L.W. 3240 (10/03/95, No. 94-2062). (See *LibelLetter*, August 1995 at p. 2.) The Supreme Court has denied review in a case in which the Ninth Circuit Court of Appeals held that a libel plaintiff need only prove falsity by a preponderance of the evidence, rather than by clear and convincing evidence, in meeting his burden of proof on this element of his case.

The United States Court of Appeals for the Ninth Circuit had affirmed in part and reversed in part the verdicts for defendants in an action for discrimination, invasion of privacy and defamation.

The action brought by plaintiff, who was a former police officer, arose out of remarks made by the chief of police of the defendant city after the plaintiff resigned his position and filed an invasion of privacy action in response to being secretly taped as part of a sexual harassment investigation. The chief of police was quoted as saying that there was, "clear, convincing and strong information and evidence," that plaintiff lied.

The Ninth Circuit affirmed the jury verdict for the defendants on the discrimination claim. The panel reversed the district court's directed verdict for the defendants on the invasion of privacy claim, based upon its reading of the Cal. Penal Code Section 633 as it applied to the use of listening devices in police internal rather than criminal investigations. Furthermore, the Ninth Circuit affirmed the district court's original grant of a new trial on the defamation claim because the clear weight of the evidence was against the original jury finding of actual malice.

In doing so, however, the Court of Appeals reversed the district court's subsequent grant of defendant's motions for summary judgment, stating that it was error to hold the plaintiff to the "clear and convincing" standard of evidence on the issue of falsity. Falsity, the court held, unlike actual malice, need only be proved by a preponderance of the evidence.

The question presented by the petition was: Did the Ninth Circuit err in holding that public official who brings defamation action need only prove falsity of allegedly defamatory statement at issue by preponderance of the evidence in light of this court's imposition of "convincing clarity" standard of proof in *New York Times Co. v. Sullivan*, and Second Circuit's view that falsity must be proven by clear and convincing evidence?

MORE CALIFORNIA SLAPP

The California Court of Appeals recently affirmed the lower court's ruling that to prevail over a special motion to strike a SLAPP suit, a plaintiff must present evidence that will be admissible at trial. In *Evans v. Unkow, et al.*, 95 Daily Journal D. A. R. 13369 (Oct. 6, 1995), plaintiff, a member of the Board of Directors of the East Palo Alto Sanitary District, sued ten individuals for defamation resulting from a notice of intention to circulate a petition to recall the plaintiff. Under the Code of Civil Procedure §425.16, subdivision (b), the plaintiff has the burden of proof that he will probably prevail on the claim when opposing a motion to strike. Here, the information and belief that the plaintiff presented was inadequate to satisfy the burden of proof because the averments would be inadmissible at trial and therefore could not be used to show the plaintiff would probably prevail on the claim.

In addition, the court ruled that the defendants, since they successfully defeated plaintiff's appeal, are entitled to recover their attorney's fees. If a defendant is successful on his or her special motion to strike a SLAPP suit, he or she is entitled to recover costs and attorney's fees. (Code Civ. Proc., §425.16, subd. (c).) According to this court, appellate attorney fees are recoverable by a successful defendant-respondent since appellate recovery is not precluded by the statute.

COURT DISMISSES ALL BUT ONE CLAIM IN SCIENTOLOGY SUIT AGAINST *TIME*

In *Church of Scientology International v. Time Warner, Inc., et al.*, 92 Civ. 3024 (S.D.N.Y.) (PKL), Judge Peter K. Leisure on November 14, 1995 granted all aspects except one of the summary judgment motions of defendants Time Warner, Inc., Time Inc. Magazine Company and Richard Behar in a libel action brought by the Church of Scientology International.

In its May 6, 1991 edition, Time magazine published a cover story written by reporter Richard Behar concerning Scientology. The Church of Scientology International brought a libel action, challenging several passages from the article.

In ruling on defendants' motion to dismiss in 1992, the District Court dismissed the claims relating to two of the challenged statements on the ground that the statements were not "of and concerning" the plaintiff Church of Scientology International. *Church of Scientology International v. Time Warner, Inc.*, 806 F. Supp. 1157 (S.D.N.Y. 1992)

Thereafter, the parties conducted discovery regarding the allegation of actual malice and other issues, but not regarding the issue of truth or falsity. Upon completion of that limited discovery, defendants moved for summary judgment on the ground, among others, that the Church (an admitted public figure) could not satisfy its burden of proving actual malice.

Following the analysis of *Tavoulareas v. Piro*, 817 F.2d 762, 794 (D.C. Cir.) (*per curiam*), *cert. denied*, 484 U.S. 870 (1987), the District Court separately examined each of four groups of challenged statements to determine whether a reasonable jury could find actual malice with respect to that statement by clear and convincing evidence. With respect to three of the four groups of statements at issue, the Court held that summary judgment would be granted in Time's favor.

The Court dismissed claims relating to the article's report that "the church survives by intimidating members and critics in a Mafia-like manner," its quotation of the executive director of the Cult Awareness Network stating that "Scientology is quite likely the most ruthless, the most classically terroristic . . . cult the country has ever seen," and its report that "[t]hose who criticize the church -- journalists, doctors, lawyers and even judges -- often find themselves . . . framed for fictional crimes, beaten up or threatened with death."

Also dismissed were claims based on the Article's report of Scientology's relationship to the suicide of a Scientologist and the article's discussion of one individual's claim that he was ordered by the church to kill his psychologist and himself after his arrest.

Having reviewed the record with respect to all of these statements, the District Court held that no rational jury could find by clear and convincing evidence that Time published the statement with actual malice. Without discussion, the court declined to dismiss the single remaining claim challenging the article's statement that "One source of funds for the Los Angeles-based church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world."

Judge Leisure made clear that the fact that the actual malice issue focuses on a defendant's state of mind does not preclude summary judgment -- "A libel suit cannot be allowed to get to the jury, at enormous expense to the defendant, based on mere assertions of malice by the plaintiff." *Slip op.* at 3. The Court explained: "Because the freedoms guaranteed by the First Amendment are designed to ensure that debate, not litigation, is vigorous, the subjective nature of the test of liability cannot create a bar to summary disposition of libel suits." *Id.* at 3-4.

The Court rejected plaintiff's attempt to demonstrate actual malice by a claim of alleged bias, based in part on the fact that reporter Behar had previously written another article critical of Scientology, that Behar supposedly had a fixed, negative view of the church, "never changing any view about the Church, never accepting anything a Scientologist said and uniformly ignoring anything positive he learned about the Church." *Slip op.* at 5-6 (quoting Plaintiff's Memorandum of Law). Quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991), Judge Leisure distinguished between actual malice and "the concept of malice as an evil intent or motive arising from spite or ill will.'" *Slip op.* at 5.

Judge Leisure then observed that "[t]he speaker's belief in his statements, even his exaggerations, enhances, rather than diminishes, the likelihood that they are protected from libel attack by the First Amendment." *Id.* Indeed, Judge Leisure explained, "malice in the sense of hatred or ill-will is often indicative of lack of the actual malice required under *New York Times*, and therefore would tend to undermine, not support plaintiff's case." *Id.* at 6.

The Court stated that, under *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 682 (1989), "the combination of inadequate investigation with bias on the part of the publisher can give rise to an inference of actual malice." *Slip op.* at 6. Without addressing the merits of plaintiff's allegations of bias, the Court held, "plaintiff has failed to demonstrate the correlative circumstance of inadequate investigation to make its evidence of bias probative of actual malice, rather than probative of lack thereof. Without a showing of inadequate investigation, bias merely confirms the publisher's firmly-held belief in the allegedly defamatory statement." *Slip op.* at 6-7.

Judge Leisure's analysis of the relevance of an allegation of reporter bias as bearing on actual malice was thus

(Continued on page 6)

NEW JERSEY JUDGE DISMISSES NOVEL LAWSUIT BROUGHT AGAINST NEWSPAPER UNDER STATE ANTI-DISCRIMINATION LAW

By Gregory L. Diskant and Douglas J. Widmann

In what is believed to be the first decision of its kind in the state, a New Jersey judge recently rejected an African-American plaintiff's attempt to hold a newspaper liable under the state's anti-discrimination law for the content of the paper's news reporting and editorial commentary. The decision is another rejection by the courts of efforts by plaintiffs to use creative pleading to make end-runs around the constitutional protection afforded traditional media torts, such as libel and intentional infliction of emotional distress.

Judge David J. Schroth of Mercer County Superior Court dismissed a discrimination lawsuit against *The Daily Princetonian* -- an independent student-run daily paper covering the Princeton University community -- for printing allegedly racially biased articles and editorials about the plaintiff, a former university student active in campus affairs. In an unpublished bench ruling, the judge ruled that the discrimination lawsuit was really a disguised libel suit and as a result should be subject to the same procedural and constitutional hurdles as a libel case, even though the plaintiff's complaint only plead civil rights claims.

In dismissing the case against *The Princetonian*, Judge Schroth ruled that the plaintiff's complaint failed to satisfy the one-year statute of limitations for libel claims in New Jersey. The lawsuit was filed over a year and nine months after publication of the most recent of the articles and editorials about the plaintiff.

Judge Schroth also ruled that the complaint failed to allege the falsity of the articles and the fault -- either actual malice or negligence -- of *The Princetonian*'s reporters and editors responsible for the articles. The plaintiff, an African-American former president of the Princeton student government, had claimed only that the published articles and editorials were racially "biased" and contained "negative comments" about him. The plaintiff also claimed that the articles "aided and abetted" ongoing harassment of the plaintiff by Princeton University officials by "nurturing [their] racist suppositions."

The case, *McDonald v. Princeton University Board of Trustees et al.*, No. L-5628-94 (Mercer County Superior Court), was brought against a number of Princeton University officers and deans as well as *The Princetonian*. The plaintiff sued under a provision of the state Constitution and under New Jersey's Law Against Discrimination, N.J.S.A. § 10:5-12, which provides a civil cause of action against educational institutions and any persons who aid and abet violations of the law. Judge Schroth's June 1995 bench ruling dismissed only the case against *The Princetonian*; the lawsuit against the remaining defendants is proceeding as a discrimination case.

The plaintiff, Paul L. McDonald, graduated from Princeton University in 1993. While a student there, he was elected president of the undergraduate student government. McDonald alleged in his complaint that university officials and *The Princetonian* conspired to deny him of equal protection of the law and equal educational opportunities, causing him great emotional distress.

The lawsuit complained of the allegedly racist treatment of McDonald by Princeton University deans in academic and disciplinary matters, as well as in more public controversies related to McDonald's tenure as student government president. During his presidency, McDonald was a vocal opponent of the Princeton University administration's handling of racial and minority issues. *The Princetonian* printed a number of news stories on controversies in which McDonald was involved, and the paper also published editorials commenting on McDonald's position on various campus issues.

Judge Schroth, in rendering his decision to dismiss the case against *The Princetonian*, said that all *The Princetonian* had done was cover the controversies in which McDonald was involved. "They wrote good things about Paul McDonald and they wrote bad things about him, and . . . they disagreed with him on occasion and they agreed with him on occasion," Judge Schroth said. "If anything, it's a libel action. It's not a discrimination case. That is simply a guise to avoid the statute of limitations which has run." The judge also noted that "it would appear that Mr. McDonald chooses to get involved in controversies, but doesn't like it when everybody isn't on his side."

Mr. Diskant is a partner and Mr. Widmann an associate at Patterson, Belknap, Webb & Tyler LLP, which represented The Daily Princetonian in the reported case.

SCIENTOLOGY SUIT

(Continued from page 5)

consistent with that of then-District Court Judge Pierre N. Leval in *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984) ("A previously formed belief rebuts as much as it establishes constitutional malice as it tends to demonstrate sincerity.").

The defendants Time Warner, Inc., Time Inc. Magazine Company and Richard Behar are represented by Floyd Abrams, Dean Ringel, David G. Januszewski and James R. Oswald of Cahill Gordon & Reindel, and Harry M. Johnston, III and Robin Bierstedt of Time Inc.

NEW JERSEY EXPANDS FAIR REPORT PRIVILEGE

By John Langel, Mark Stewart and Ed Rogers

A New Jersey appellate court recently expanded protection for political coverage in *Orso v. Bergen Record Corp., et al.*, No. A-003875-94T5, __ A.2d __, 1995 WL 619320 (N.J. Super. A.D. Oct. 18, 1995), holding that New Jersey's fair report privilege protects reports of defamatory charges by one public official against another even when the charges are made in a private interview rather than a public proceeding. The Court also ruled that a newspaper does not act with actual malice when it prints a balanced account of the controversy caused by the accusations, even if it does not believe the accusations are true.

The case resulted from an article in *The Record* covering a local political dispute fueled by a borough councilman's allegations, made in a private interview with a reporter, that the borough's police chief and his deputies had mishandled arrests and police department property. After reporting the charges, the article noted that they were unsubstantiated, that the police officials denied wrongdoing, and that local and federal law enforcement officials believed the charges to be untrue.

The police officials sued *The Record* and the councilman for libel, claiming that the republication rule rendered *The Record* liable for reporting the councilman's defamatory charges. Plaintiffs also asserted that the article's expressions of skepticism about the charges showed that *The Record* acted with "actual malice," i.e., that it knew or recklessly disregarded that the charges were false. *The Record* moved to dismiss, contending that the fair report privilege and the neutral reportage doctrine protected its accurate and balanced report of the controversy.

The trial court denied the motion, noting that the fair report privilege ordinarily applies only to public proceedings based on the so-called "agency rationale" -- that the newspaper is merely reporting what the public could see and hear for itself. The trial court then concluded that, even assuming the privilege protects reports of private interviews with public officials on subjects within their official duties, discovery was required to determine whether the article met this requirement. Concerned that discovery itself would chill political coverage, *The Record* moved for leave to appeal.

The Appellate Division granted *The Record*'s motion and reversed on the merits. It held that the fair report privilege protects a newspaper for reporting defamatory remarks made by one public official against another during a private interview with a reporter. In so ruling, the Court based the privilege not just on the agency rationale but also on the broader concept of the "public's interest in learning of important matters." *Slip Op.* at 5-6. It reasoned that an accusation by one public official against another is newsworthy simply because it was made at all and, if false, gives the public "'a valuable insight into the character' of the accuser." *Slip Op.* at 6 (quoting *DiSalle v. P.G. Pub. Co.*, 544 A.2d 1345, 1362, 15 Media L. Rep. 1873, 1887 (Pa. Super. 1988)). The Court held that *The Record* could invoke the privilege because the article fairly and accurately reported the charges and "the context in which they were made." *Slip Op.* at 8.

The Appellate Division then addressed the relationship between the fair report privilege and the actual malice standard. The Supreme Court had previously ruled in *Dairy Stores v. Sentinel Publishing Co.*, 516 A.2d 220, 233, 13 Media L. Rep. 1594, 1604 (N.J. 1986), that a libel defendant who acts with actual malice cannot invoke a qualified privilege. *The Record* argued that the fair report privilege is an exception to this rule.

As a republication privilege, the fair report privilege differs from other qualified privileges, which protect the original publication of defamatory remarks. Those privileges seek to protect the value of the underlying statements, i.e., to encourage government officials to speak freely or to encourage whistleblowing by employees, a value which is diminished if not eliminated when the statements are made with actual malice. The fair report privilege, by contrast, seeks to protect the value of the report itself, so that the public can make up its mind as to the truth of the material reported. It's value — to report certain newsworthy statements — is not diminished if the newspaper does not believe the statements are true.

Accepting this distinction, the Court concluded that the fair report privilege, "if not an absolute privilege, is much broader than many other conditional privileges." *Slip Op.* at 5. It then held that it need not decide whether actual malice qualified the fair report privilege, finding that even if the privilege was so qualified, the article itself precluded a showing of actual malice as a matter of law. In the Court's words, "[t]here is no indication . . . that appellants ignored any available information concerning the charges and allegations, or that they were less than thorough in reporting their inability to verify or confirm the assertions. The context of the article when viewed in its entirety reflects not actual malice and/or negligence, but rather full and fair media exposition of a matter of obvious public interest and importance." *Slip Op.* at 13.

Thus, the Court made clear that the actual malice inquiry in the fair report context turns not on a newspaper's belief regarding the accusations themselves but rather on its conduct in reporting them. Because this issue could be decided solely on the article and the pleadings, the Court concluded that "discovery would have served no useful purpose in this case," *Slip Op.* at 13, noting its concern about the chilling effect that discovery in libel actions can have on newspapers. Accordingly, it reversed the trial court and directed summary judgment for *The Record*. The Court did not address the defendant's neutral reportage argument.

The *Orso* decision should have important practical effects for political coverage. It provides an additional layer of protection to the widespread

(Continued on page 8)

AMERICA ON LINE

At the NAA/NAB/LDRC Conference in September, there were various references to a libel lawsuit against America On Line, one in which the plaintiff was seeking from AOL the identity of the AOL subscriber who had placed an allegedly defamatory comment on an AOL bulletin board. The suit was initiated by the Caribe Inn, a Caribean scuba diving business allegedly defamed by "JennyTRR" on a bulletin board devoted to scuba diving.

The litigation was actually a discovery device, required, according to AOL counsel, under Illinois law in order to allow the plaintiff to ascertain the identity of the party that plaintiff actually wanted to sue. No actual libel suit has been filed against the computer on-line service provider or the bulletin board manager.

It is AOL's position, however, that in response to valid subpoena or other lawful and proper process, it will provide a litigant with such information as is authorized under the Electronic Communications Privacy Act, 18 U.S.C. 2702 *et seq.* It is AOL policy to notify the subscriber of the subpoena or other legal process and that AOL will comply with it by the given date thereby affording the subscriber the opportunity to come in and seek to quash the subpoena or otherwise deal directly with the party issuing the subpoena.

The process here, instituted as a motion for order for discovery, was seeking the identity of a subscriber posting on a bulletin board managed by an independent contractor. AOL understands, however, that the third party which manages the bulletin board does not have the information that would allow it to identify the posting member; only AOL can process that information.

But AOL does take the position that with respect to that board, it is acting as no more than a distributor -- the electronic equivalent of a newsstand, or more accurately perhaps, a newsboy, who knows who gets the paper and takes responsibility for getting the document to the subscriber, but does not take responsibility for what is in the paper itself.

AOL responds in a similar fashion to process served with respect to boards and other material it provides itself, rather than through third party managers. And in the case of criminal subpoenas, the ground rules are set forth in the Electronic Privacy Act.

AOL notes that it gets several civil and criminal subpoenas per week. It will only provide subscriber information in response to valid process. Few instances of process have come as a result of alleged libel. Claims regarding use of screen names that may infringe upon trademark or related rights are more common, as are claims regarding distribution of copyrighted materials.

To date, the putative plaintiff in the discovery action against America On Line has not brought suit against the subscriber for libel.

For an argument in favor of anonymity in cyberspace, see WIRED, October 1995, an article by Tom W. Bell, a professor at the University of Dayton Law School, "Anonymous Speech: Imagine combining free speech with your right to privacy."

NEW JERSEY EXPANDS FAIR REPORT PRIVILEGE

(Continued from page 7)

layer of protection to the widespread practice of interviewing public officials. It also enables a newspaper to avoid a finding of actual malice in this context by presenting both sides of the controversy in a balanced fashion, thus obviating the need for costly and disruptive discovery on the reporter's state of mind normally required by the actual malice test. The decision therefore recognizes the practical realities of political coverage, and accords legal protection to good journalism.

John Langel, Mark Stewart and Ed Rogers are attorneys with Ballard Spahr Andrews & Ingersoll of Philadelphia, PA and Camden, NJ, which represented The Record in this action.

LDRC WISHES TO ACKNOWLEDGE FALL INTERNS JOHN MALTBIE, OF BROOLYN LAW SCHOOL AND SHAWN REICHEL, OF BENJAMIN N. CARDOZO LAW SCHOOL, FOR THEIR CONTRIBUTIONS TO THIS MONTH'S *LIBELLETTER*

ABC WINS DISMISSAL OF RADIO TALK LIBEL CLAIM

A New York trial judge has dismissed a defamtion action arising out of comments made by CapCities/ABC radio talk show host Jay Diamond, during his late night talk show, based upon a determination that the statements at issues were nothing more than expression of protected opinion. *McIntosh v. Capital Cities/ABC, Inc. et al.*, Index No. 13620/95 (N.Y. Sup. Ct. Kings Co. Oct 27, 1995)

Plaintiff, a medical doctor, is a member of an organization known as the Committee to Eliminate Media Offensive to African People. He writes a column, "Media Watch", in a publication called The Daily Challenge. He has been highly critical of defendant's views. Indeed, the statements at issue in this suit were made by defendant in response to plaintiff's column published the day before in which plaintiff asserted that defendant Diamond was known for his "established dishonesty" and was an "insecure dumbbell of no accomplishment."

Defendant Diamond responded by commenting that plaintiff was an "imbecile" and had written lies about defendant, that plaintiff must have gotten his medical degree from the proverbial Cracker Jacks box, and that plaintiff had a "phony M.D. degree," along with a number of vitupretive remarks about the organization in which plaintiff was a member.

Plaintiff sued based upon the statement regarding his holding a "phony M.D. degree."

Defendants argued that the comment was an expression of protected opinion. Applying criteria from New York cases, which in turn drew from *Ollman v. Evans*, the court agreed that the speech was protected.

While the precise meaning of the words could be ascertained, and the comment could be objectively verified as either true or false, an evaluation of the statement in context -- that is, reviewing the broadcast as a whole -- led to the conclusion that the statement would not be taken as fact. The average listener, the court concluded, would hear only heated invective.

Not only was there an on-going debate between Diamond and the plaintiff, where name calling was hardly limited to defendant's side of the aisle, but the radio program itself tended to be controversial in nature, provoking heated responses from listeners. It was the kind of context in which the audience anticipated the use of epithets, fiery rhetoric or hyperbole: "The content of this kind of radio program is often more inflammatory than illuminating."

Gregory L. Diskant and Kim Sweet of LDRC member Patterson Belknap Webb & Tyler represented the defendants in this action.

SDNY: PUBLISHER NOT LIABLE FOR DEFAMATORY INNUENDO NOT ENDORSED

(Continued from page 1)

With facts eerily prescient of recent events in Israel, this libel action arose out of an article written by Robert I. Friedman ("Friedman"), a freelance reporter for the *Voice*, and published as the cover story in the November 12, 1985 edition of the *Voice* entitled "In the Realm of Perfect Faith: Israel's Jewish Terrorists." Friedman, who had also been named as a defendant in the action, had been dismissed form the action several years earlier.

The Article reported on the then upcoming trial of members of the "Jewish underground" who had committed acts of violence against West Bank Arabs, and the ideological and financial support provided to them by the American Jewish community. As part of his research for the article Friedman traveled to Hebron, the home of several suspected "underground" members. Before introducing the individuals and events that are the subject of the Article, Friedman explores in the Article's introductory paragraphs the impetus and ideology of Jewish settlement generally on the West Bank and particularly in Hebron. It is only in this context that the plaintiffs John and Marilyn Chaiken, new immigrants to Hebron from Massachusetts, are discussed.

In these few paragraphs, the Chaikens discuss their views on moving to Israel and the settlers' rights to live there to the exclusion of the Arabs, reflecting what the Court characterized as a series of "virulent anti-Arab sentiments and actions." Friedman first recounts Mr. Chaiken's response to those who say it is unethical to force Arabs to leave: "Well, I say Western European values are bullshit. The messiah will come. There will be a Jewish kingdom. Jews will be the spiritual bosses of the world . . . . You can't create a messianic Jewish state with 1.9 million Arabs!" John Chaiken is then described as boasting of an incident when he and other armed settlers took over a mosque to give his son a ritual haircut.

Mrs. Chaiken explains the religious underpinnings to their relocation to Hebron: ". . .It's not enough to merely live in the Land of Israel, 'you have to live in the realm of perfect faith'," and is described as admonishing and slapping an Arab boy for selling combs on the site of a marker commemorating the murder of a Jewish settler, then commenting that "Arabs are worse than niggers, but not by much."

Having used the Chaikens as the backdrop for the religious ideology behind the Jewish terrorist movement, the Article then focuses on the Jewish underground and its terrorist activities. Thus, by way of transition, immediately following the excerpts from the Chaikens' interview, the Article states: "[s]ettlers like the [Chaikens] have turned the more than 114 settlements that now dot the West Bank into hothouses for the growth of terrorism." The remainder of the Article, which ran for several pages, discusses specific acts of terrorism and profiles West Bank settlers involved in terrorist activities.

The Chaikens maintained that the incidents depicted and their quotes in the

(Continued on page 10)

SDNY: PUBLICATION NOT LIABLE FOR DEFAMATORY INNUENDO NOT ENDORSED

(Continued from page 9)

Article were manufactured or taken our of context. After years of discovery, Judge Scheindlin found that the *Voice* was entitled to summary judgment since there was no showing that it acted in a grossly irresponsible manner in publishing the Article, and specifically found that the *Voice* was not grossly irresponsible in failing to foresee the alleged defamatory implication contained in the Article that the Chaikens are terrorists.

Judge Scheindlin did not definitively rule on the threshold inquiry of whether the Article could be read to imply the defamatory meaning argued: that the Chaikens are terrorists. The decision notes, however, that the title of the Article -- "In the Realm of Perfect Faith: Israel's Jewish Terrorists" -- which juxtaposed a quote from Mrs. Chaiken, and the transition sentence -- "[s]ettlers like the Chaikens have turned more than 114 settlements that now dot the West Bank into hothouses for the growth of terrorism" -- could be read to "imply that the Chaikens are somehow involved with the anti-Arab violence detailed in the rest of the article." Nevertheless, the Court held that the *Voice* cannot be found grossly irresponsible on that basis since there was no evidence that the *Voice* "intended to imply the Chaikens were terrorists" and "it would be speculation to assume that the *Voice* realized that such an implication was possible."

By adopting the standard set here -- that the evidence must show the publisher "intended or endorsed the interference" -- Judge Scheindlin's decision is consistent with courts throughout the country that have been unwilling to sustain libel by implication claims except in extremely narrow circumstances. Indeed, even in cases where the plaintiff is a private figure courts have required some showing that the press was aware of, or because of its obviousness, should have been aware of, the implication. To establish any less rigorous standard and to find a publisher responsible for an inadvertent implication without the slightest showing that they were aware of, intended, or endorsed it, the *Voice* argued, is to effectively do what *Gertz* prohibits: impose liability without fault.

Also noteworthy in the context of this case was the Court's reaffirmance of New York law, which holds that a publisher has no duty to recheck its reporters' reporting, or confirm statements with a source prior to publication, absent evidence that should have alerted the publisher to specific concerns with the Article. Specifically here, in the context of an article about Jewish extremism, Judge Scheindlin found that notwithstanding the fact that the Article contained offensive and extreme statements by the Chaikens -- "Arabs are worse than niggers, but not by much" -- and similarly appalling actions -- slapping an Arab child -- they were not so "inherently implausible" that the *Voice* should have independently verified the statements with the Chaikens prior to publication.

Similarly, the Court rejected plaintiff's argument that Friedman's alleged anti-Israel or anti-Jewish bias should have required the *Voice* to verify his reporting. While noting that the record, at the time the Article was published, did not support plaintiff's argument, the Court held that, in any event, since the gross irresponsibility test is an objective one, Friedman's subjective beliefs or purported ill will toward Jews was irrelevant to the *Voice*'s liability.

What was perhaps most instructive about this case but not discussed in the Court's summary judgment decision were the numerous discovery issues that arose in the -- as Judge Scheindlin aptly characterized it -- "extensive and often bitter discovery period." Among those issues were the discoverability of the *Voice*'s counsel's notes of its pre-publication review of the Article (not discoverable), the *Voice*'s counsel's communications about the lawsuit with the *Voice*'s insurance company (not discoverable), and the scope of discovery into post-publication matters (allowed as to limited matters for two years after publication).

DCS MEMBERS:

Please send us corrections, changes and updates to your listings in the DCS Membership Directory.

Send the information to LDRC, Attn: Melinda Tesser before the end of December.

Thank you.

NOTES FROM THE LDRC ANNUAL MEETING
November 9, 1995

Harry M. Johnston, III, Chair of the LDRC Executive Committee, opened the annual meeting by welcoming the board and briefly reviewing some of the high points of the year, chief among them being the *LDRC LibelLetter*. The biennial NAA/NAB/LDRC Conference was another great success, as was the publication of the second volume of the *LDRC 50-State Survey: Media Privacy and Related Law*. Media and Defense Counsel Section membership both increased from the prior year and year to date income has exceeded budget.

Sandra Baron, LDRC Executive Director, began her report by describing LDRC as a clearinghouse, a focal point, that gathers information from its members, and then returns it, with value added. Highlights of the past year included publication of the monthly *LDRC LibelLetter*, two volumes of the LDRC 50-STATE SURVEY, and four issues of the LDRC BULLETIN, including a 10-year study of the results of motions for summary judgment. Other major publishing projects were completed by DCS Committees, with the Jury Instructions Committee and the DCS Cyberspace Committee producing an updated Jury Instructions Manual and a series of articles on cyberspace, respectively, for inclusion in the materials for the biennial conference.

With respect to anticipated highlights for 1996, Sandra Baron pointed to continued monthly publication of the *LDRC LibelLetter*, reminding everyone that LDRC is always in the market for articles. A new *LibelLetter* Committee, chaired by Peter Canfield, was established in 1995, the membership for which was chosen with an eye towards diversity, both regional and between outside and inhouse counsel. Among studies planned for the BULLETIN are updates of the damages, independent appellate review, and motion to dismiss studies, with the goal being to update all studies biennially. Also under discussion is a major new study of complaints, examining the number of complaints being filed against the media, the plaintiffs, and the nature of the claims. Among potential areas of coverage for the BULLETIN was an article on commercial speech, due to the extent of recent Supreme Court activity, and surveys of libel and privacy issues in the employment context.

Other projects for 1996 include establishment of a joint DCS and Media Member committee for advertising issues, with an eye toward the possibility that LDRC could meet the needs of that community as well. Articles on advertising could be assembled either in a looseleaf publication or included in one of the BULLETINS.

LDRC has been working with the ABA Forum Committee on the creation of an international law "50-State Survey." Outlines were sent to a number of overseas preparers, primarily in Western Europe. Completed Surveys are now arriving and will be ready for editing by Sandra and others in November. Outlines from additional countries will be added over time. Sandra noted that 1995 had brought the DCS its first international members, Blake, Cassels & Graydon in Toronto and Stephens Innocent Solicitors in London. Overall, the DCS added 40 firms in 1995, to 165 members. Media membership was also up by six firms, for a total of 77 in 1995.

A review of the 1995 financial figures showed that income was essentially up in all categories. Expenses exceeded budget in telephone and postage costs, a function of communicating with an increased membership, and staff, a function of the hiring of Michael Cantwell. The latter cost was offset by a reduction in the general counsel's budget, as Mike shifted from an associate outside counsel to an inhouse role.

Finally, Sandra concluded by reiterating the essentially cooperative nature of the organization and underlined the need that all members continue to keep LDRC informed as to new developments and ideas.

Peter Canfield reported on the *LibelLetter*, observing that it was now firmly off the ground. He noted that the advisory committee had been helpful in identifying areas of coverage and suggested that the DCS Committee on New Developments in the Law will also help in that regard in the coming year.

Chad Milton reported positive results on new membership, but also expressed concern that consolidation in the business had the potential to result in the loss of some members. Noting that the main media membership is relatively mature, he identified several potential areas of expansion, including advertising, international, cable, and telephone companies. He suggested the appointment of committees to identify and approach these companies and asked for volunteers. Any members with ideas/suggestions or a willingness to serve on such committees should contact Chad.

Bob Hawley reported that the major event in the transition turned out to be a nonevent, as LDRC, after an extensive search for a new

(Continued on page 12)

GEORGIA REJECTS CHALLENGE TO DISPARAGEMENT STATUTE: ON PROCEDURAL GROUNDS

Georgia Courts refused, on procedural grounds, to rule on a facial challenge to the constitutionality of the state's "product disparagement" statute. Passed in 1993, the statute, Official Code of Georgia Annotated (O.C.G.A.) § 2-16-1, creates a private cause of action for the "willful or malicious dissemination" of false information to the public suggesting that any food or commodity is unsafe. The statute says information may be presumed to be false "if it is not based upon reasonable and reliable scientific inquiry, facts, or data."

Two environmental groups challenged the statute as violative of state and federal free speech guarantees. *Action for a Clean Environment et al. v. State of Georgia*. The lawsuit argued that the statute would have a chilling effect on the ability of the environmental groups to inform the public about harmful foods and other products.

Last year, a state Superior Court Judge in Fulton County in Atlanta granted the state's motion to dismiss the lawsuit, ruling that the state has no enforcement authority under the statute and is, therefore, not a proper party to defend the constitutionality of the law. (Fulton County Superior Court, Civil Action E-27136, Sept, 2nd, 1994) In May 1995, the Georgia Court of Appeals affirmed, 3-0, finding that there was no justiciable controversy in the facial challenge. *Action for a Clean Environment et. al. v. State of Georgia*, 457 S.E.2d 273 (May 4, 1995). On September 5, 1995, the Georgia Supreme Court denied a petition for certiorari.

LDRC ANNUAL MEETING

(Continued from page 11)

headquarters, signed a new lease at its old location, which provided increased space at only slightly increased cost. Another important event was the completed transition from the general counsel to executive director model, with Michael Cantwell moving inhouse as associate director. Henry Kaufman continues to serve as general counsel, but on a project-by-project rather than a retainer basis. The new model provides LDRC with greater flexibility in moving in the directions earlier suggested by Sandy.

Finally, Bob also reported that the Executive Committee proposed changing LDRC's name. The reason: "libel" is not inclusive enough, as LDRC currently is involved in a whole host of activities in which libel issues are not presented. On the theory that our primary mission is assisting media organizations in the defense against a variety of torts, the Executive Committee was tentatively recommending a name shift to Media Defense Resource Center. Such a rechristening would also potentially make us more attractive to a number of organizations that do not see themselves as victims of libel suits.

Henry Kaufman reported that the year had been very successful on LDRC's substantive projects, much of which had already been touched on. He noted that the second volume of the SURVEY was successful not only substantively but institutionally, as the identification of a new network of preparers had been responsible for the some of the growth in the Defense Counsel Section. Henry also discussed the growing computerization of LDRC's empirical data, with all studies performed during the past two years now included on various databases, a factor that will greatly streamline the updating process in future years.

With the terms of all members of the Executive Committee expiring this year, the Chair asked the membership to consider the election of the new Executive Committee. In order to preserve continuity, an amendment to LDRC bylaws had been adopted in 1994 providing for staggered terms, with three members to be elected in 1995 to serve for two years and two members to serve for one year. Thereafter each member elected will serve a two-year term. All current members of the board had agreed to run for new terms, with the exception of Harry Johnston who, as most members are now aware, is both retiring from Time Inc. and stepping down as chairman of the LDRC board. Harry, however, has agreed to remain on the board as Chair Emeritus. The Executive Committee nominated Bob Hawley to succeed Harry as chair and nominated Robin Bierstedt, of Time Inc., to join the board, each for two-year terms. Also running for a two-year term was Peter Canfield, with Chad Milton and Blair Soyster running for one-year terms. All were elected unanimously by voice vote.

The meeting concluded with a lengthy discussion of the proposed name change. Although there was unanimous agreement that it was an appropriate time to change the name and that "libel" was no longer sufficiently inclusive, concern was expressed over the potential of critics to disparage LDRC's work product if issued under the name of "media defense." Several alternatives were proposed, including First Amendment Research Center, Information Defense Center, First Amendment Research Institute, and Communications Law Research Center. It was decided to defer a decision to allow additional suggestions to be put forward.

NOTES FROM LDRC DEFENSE COUNSEL SECTON ANNUAL MEETING NOVEMBER 10, 1995

Cam DeVore, Defense Counsel Section President, opened the annual DCS meeting by remarking on the LDRC Annual Dinner of the previous evening, at which Justice Harry Blackmun had received the *William J. Brennan Jr. Defense of Freedom Award*. All present agreed that the evening had been a success, not only substantively but in terms of the new setting for dinner, having shifted from the Waldorf to the Sky Club. There was unanimous agreement that LDRC should make the shift permanent.

Cam reported on the highlights of the prior night's Annual Media Membership Meeting, noting both Harry Johnston's retirement as Chair and Bob Hawley's election as Harry's successor and the proposed name change. Attendees were asked for reactions and any ideas regarding a new name. While there was agreement that the name change would be useful, concern was expressed that the new name not be overly broad, one of the advantages of "libel defense" being its sharp focus.

Cam also urged that the essence of the Defense Counsel Section is activity. He observed that numerous areas remain to be covered and are in need of volunteers.

Sandra Baron, LDRC Executive Director, reported on the highlights of the previous year and the plans for the upcoming year, emphasizing the interactive nature of the process, with LDRC drawing on the expertise of its membership to produce material of benefit to the membership. She underlined that the organization is at its strongest when all of its members are engaged in some project.

Highlights of the publication program included the introduction of the 50-STATE SURVEY: MEDIA PRIVACY AND RELATED LAW, the publication of a 10-year update of summary judgment motions in the BULLETIN, and the Cyberspace articles and the Jury Instruction Manual prepared for the Biennial Conference, and the Conference itself. In addition, during the current year, LDRC has responded to dozens of requests from members, nonmembers, journalists, faculty and students.

Publications planned for next year include updates of the damages, independent appellate review, and motion to dismiss studies, with an effort to be made in the future to update all of LDRC's traditional surveys every two years. Also planned is a new empirical survey on complaints filed against media. With the help of Media/ Professional and Employers Reinsurance, and possibly Mutual of Bermuda, a base sample will be created and evaluated over time. It is hoped to analyze what types of plaintiff are bringing the claims, what claims, and in which courts. Also under consideration are mini-surveys on libel and privacy issues in the employment context.

Membership highlights of the year included the growth of the Defense Counsel Section, both numerically and geographically. DCS added 40 new firms during the past year, including firms in Toronto and London, making the DCS truly international.

Sandy concluded by noting that the LDRC is always looking for new briefs, experts and jury instructions for LDRC litigation files; decisions, legislative proposals and other materials for the LDRC *LibelLetter*; and any suggestions as to services or projects that LDRC should consider undertaking in 1996 and beyond.

DCS Committee Reports

Cam DeVore asked for Committee Reports. Dan Waggoner, Co-chair of the Conference and Education Committee, began his report on the 1995 NAA/NAB/LDRC Conference held in Tyson's Corner, Virginia, by relating that he'd been asked why, given its repeated success, we didn't hold the conference annually. He had responded that one of the reasons it has been so successful is that it is held biennially. Once again, the conference was sold out, and has shown a profit, a portion of which is to be turned over to LDRC.

Lee Levine reported on the progress of the Advisory Committee on New Developments. Borrowing a sports metaphor, he noted that the Committee had set up Eastern, Central, and Western Divisions, with vice chairs John Hart (Dow, Lohnes), Jack Weiss (Stone, Pigman), and Bruce Johnson (Davis Wright Tremaine), respectively, and Bob Sack (Gibson, Dunn) serving as minister without portfolio. Each of the vice chairs has appointed a group to keep their ears to the ground, reporting back on any new developments. As information comes in, it will be reported to the complete membership.

Sandra Baron reported on the Brief Bank Committee, noting that there are now more than 300 briefs

(Continued on page 14)

LDRC DEFENSE COUNSEL SECTON ANNUAL MEETING

(Continued from page 13)

indexed on the LDRC database, in addition to an even greater number of older briefs on index cards. A major goal for next year is to identify and obtain the briefs from cases in which relevant and significant issues have been briefed. Although some may be identified by *Media Law Reporter* searches, members were urged to send materials in unsolicited.

Michael Kovaka reported on the newly formed Cyberspace Committee, now just 7 months old. Working in conjunction with a subcommittee of the New York State Bar Association Committee on Media Law chaired by Steve Lieberman, a series of articles were prepared for inclusion in the Conference materials. A major goal in the coming year is to get LDRC a home page on the World-Wide Web, which would permit us to make all information — newsletter, bulletins, indices — available on line.

Guylyn Cummins reported on the progress of the Expert Witness Committee. She emphasized the importance that members not only respond to all requests for information on expert witnesses they have used, but also try to identify potential new experts. A good potential source of new experts is former industry members who are now retired and in academia. She noted that the plaintiff's personal injury bar in San Diego has computerized all information regarding defendant's experts, allowing them instant access to all deposition testimony. Cam DeVore offered anecdotal evidence of the tremendous benefit that can result from good expert witness information, when he was called by Chip Babcock for a request for any information on a plaintiff's expert who had been a newsman in the Northwest. After bit of digging Cam came up with a number of the witnesses' prior statements on the need for expansive protections of the media, which needless to say were somewhat at odds with his trial testimony.

Robert Raskopf reported on the Jury Instruction Committee, reviewing the process of updating the Jury Instruction Manual for the Tyson's Corner Conference. LDRC intern Charles Glasser had contacted DCS members in various states to obtain materials from recent trials, and had organized the instructions at LDRC and for the Committee. These were edited by Dan Barr, John Buchan, David Klaber, Duane Bosworth, Donald Templin, Robert Nelon, and Tom Julin. Bob also reported that Holly Bernard is currently working on a Model Jury Instructions for Alabama.

Peter Canfield reviewed the genesis of the *LDRC LibelLetter*, begun as a means of establishing regular communication among the membership but since transformed into a publication that allows members to keep up to date on important substantive developments in the law. He stressed the importance of alerting Sandy Baron/LDRC of any significant new developments, so that these can be recommunicated to the rest of the membership.

Susan Grogan Faller reviewed the work of the PrePublication/ PreTrial Committee. In 1995, the Committee had assisted in the preparation of the Summary Judgment Roundtable, published in the LDRC BULLETIN 95(2). Their next major project is a review of Alternative Dispute Resolution. They are currently looking into existing mechanisms, such as the Northwest News Council and Minnesota News Council, and are in the process of developing a model for situations in which ADR might serve the needs of both sides. The key to the program is that it be neither mandatory nor forced.

Dick Rassel reviewed the activities of the Tort Reform Committee, which has divided the country into six regions so as to keep close track of legislative developments around the country. He urged the need for assistance from all members in keeping the Committee informed. New developments will be reported in the *LDRC LibelLetter*.

Tom Kelley reviewed the work of the Trial Techniques Committee, currently involved in preparing a model trial brief. The idea for such a model may be traced to work begun but never completed in the 1980s that would have provided guidance on pretrial instructions, summation, bifurcation of trials, and serialized verdict forms. The need for such a model derives from time pressures on lawyers as they prepare for trial. The current project would include sections on both keeping evidence out (e.g., Blair Soyster's in limine motion) and getting it in (e.g., bad acts, character), causation issues, and possibly some jury instruction issues. He hopes to complete the project by the end of the year, although some of the collaborators are behind in turning in their sections.

Tom Leatherbury reviewed the smashing success in developing the DCS membership, with 40 new members having joined in 1995. The creation of a New Membership

(Continued on page 15)

LDRC DEFENSE COUNSEL SECTON ANNUAL MEETING

(Continued from page 14)

Committee, he noted, will be an enormous improvement over the prior procedure under which recruitment had been left to LDRC (i.e., Sandy Baron and Henry Kaufman). He asked everyone to review the lists of DCS and media members to identify any missing members. He looks forward to the Section increasing to 200 members by next year.

Uniform Correction Act

Barbara Wall and Dick Winfield reported on the legislative progress of the Uniform Correction Act. The bill passed in North Dakota, defeating proposed amendments that would have destroyed uniformity.

The bill has been introduced in the District of Columbia. It has the support of members of the Washington media, including the *Washington Post* and Fox Broadcasting. Dean Perlman, chairman of the Uniform Law Commissioner's drafting committee, testified during legislative hearings in support of its adoption.

In Delaware, the bill has the support of the Delaware Chamber of Commerce. Dick Winfield noted the importance of getting the business community behind the bill. The Act is in their interests due, among other things, to its application to employment cases. According to one report, one third of all libel suits are filed against employers. Indeed, the fear of suits has led airline companies to be less than candid in their references on pilots who have left, and the public interest in removing such a chill on expression is very obvious.

Both Dick and Barbara urged members to play a visible role in supporting the UCA in their home state and passed out forms, asking for volunteers. With many state legislatures hostile to the media, the level of press involvement will vary from state to state. Cam DeVore noted that any efforts should begin with contacting the Uniform Law Commissioner in one's state.

Report on McGraw-Hill

Lastly, Laura Handman and Victor Kovner reviewed the history of McGraw-Hill prior restraint litigation, which has already produced ten briefs for the LDRC Brief Bank. Laura began by noting the tremendous support of local counsel Dick Goehler and Susan Grogan Faller, and Bob Sack, Richard Klein, Slade Metcalf, Bruce Sanford and David Marburger for amicus briefs submitted on behalf of various organizations.

Laura reviewed the procedural and substantive history of the case. She noted the difficulty in divining the nature of the judge's original order, which, despite the fact that neither the parties nor the judge treated it as such, was held to be a nonappealable temporary restraining order. Both the Sixth Circuit and Justice Stevens, acting in his capacity as Circuit Justice for the Sixth Circuit, had declined review, with Justice Stevens remanding the case for a hearing in order to develop a factual record. Among the questions facing the lawyers was the extent to which McGraw-Hill should cooperate with an evidentiary hearing focusing on how *Business Week* had obtained the documents, and how far they could go in answering questions about the source of the documents without jeopardizing the privilege or confidentiality. The location of the source was revealed to be New York, because of the need to rely upon the New York Shield Law. The latter concern became moot when Banker's Trust informed the court that they had independently identified the source.

The prior restraint raised a number of disturbing issues, which will be challenged on appeal. Critical issues include the judge's assumption that his original sealing bound not only the parties but the world, whether or not they were aware of the order, and that merely requesting such documents might be unlawful.

Victor Kovner discussed some of the specific difficulties faced in the litigation, including a trial judge eager to hold a hearing and not seemingly sympathetic to the reporters' privilege or other press positions.

ABC WINS EAVESDROPPING/INTRUSION SUIT

(Continued from page 1)

who he was and what he sought. A camera in a van on the street recorded the pair at the door. While the woman ultimately rejected ABC's request for an on-camera interview with the ABC employee, she did answer the associate producer's questions about O.J. Simpson. ABC did not use any of the audio in the broadcast, but did paraphrase some of what plaintiff said on the tape.

On the issues intrusion/privacy, the court found that "by definition," the taking of photographs standing in a public street or other public place could not constitute an invasion of privacy. There were, according to the court, "no legitimate privacy interests to protect." Moreover, the little or no expectation of privacy one could have in such a circumstance makes it unlikely that such photographing could be "highly offensive."

More interesting is the court's view of the audio taping. The court notes that while plaintiff knew that she was talking to a reporter from ABC, she did not ask that anything she said be kept confidential. The Court concluded that ABC's recording of a non-confidential conversation with a known reporter in a public place could not constitute an invasion of privacy.

Nor did the court accept that the recording of the conversation violated either the state or federal eavesdropping statutes. Without discussion, the court found that plaintiff had submitted no evidence to raise a triable issue of fact as to whether she had a "reasonable expectation of confidentiality" in the conversation, as would be required by the California, all-party consent statute.

The federal statute, a so-called one-party consent statute, allowed journalists to tape conversations in the course of their newsgathering, the court found, "as long as they did not make the tape for the express purpose of committing a crime or a tort."

Plaintiff had also alleged fraud and conspiracy to commit fraud, which the court dismissed for failure by the plaintiff to show any fiduciary relationship between her and defendants that would give rise to a duty to disclose, nor any fraudulent intent to deceive the plaintiff as required by California law. And without discussion, the court adopts defendants' points and authorities on the claim of unfair business practice.

The suit was brought by the same lawyer representing the plaintiffs in the *Kersis v. Capital Cities/ABC, Inc.*, 22 Med L Rptr 2321 (Cal Sup. Ct 1994), in which he won a judgment against ABC arising out of their secret taping of audio and video inside a psychic boiler room operation. (See *LDRC LibelLetter*, Oct. 1994 at p. 2.) That judgement is on appeal.

ABC was represented in Deteresa by Steve Perry of LDRC member firm Munger, Tolles & Olson

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TORTIOUS INTERFERENCE WITH CONTRACT

(Continued from page 1)

abandoned by the tobacco company; that the company had altered documents to remove references to the project's purpose; that the company had used a tobacco additive found to cause cancer in lab animals in its pipe tobacco; and that a Brown & Williamson executive had lied to Congress in testimony about the addictive qualities of tobacco.]

States Brown & Williamson in its press release announcing the lawsuit: "This case is about the essential quality of loyalty, trust and honesty between employees, their colleagues and employers, which are so necessary to the conduct of business and to our society overall." *Brown & Williamson also* announced that it is seeking unspecified damages and a restraining order. A Jefferson Circuit Court Judge has given Brown & Williamson a temporary restraining order barring Dr. Wigand from violating his confidentiality agreements. A hearing on a preliminary injunction was scheduled for November 27, 1995. Dr. Wigand is scheduled to testify in deposition this week in a suit against tobacco manufacturers in Mississippi.

News reports suggest that CBS, which earlier was reported to have given the source an indemnification for any libel claims, has now agreed to a broader indemnification against claims by Brown & Williamson arising out of the now leaked interview that the source did with Mike Wallace.

As of November 24, Brown & Williamson has not sued CBS, but is still considering such a suit.

Interference with Contract and Defamation Claims

Media lawyers are familiar with the fact that there have been interference with contract or prospective contractual relations claims brought against media defendants in conjunction with libel or other publication based suits. As a general proposition, these claims have not fared well for plaintiffs. An example: *Brown & Williamson v. Jacobson*, 713 F.2d 262, 9 Media L. Rep. 1936 (7th Cir. 1983).

Plaintiff, in addition to the libel claims that it successfully pursued against the CBS Chicago owned and operated station, brought a claim of wrongful interference with business relations. The Seventh Circuit panel correctly noted that any libel of a corporation could be re-asserted as an interference with business relations claim if one or more of its customers break agreements or refuse to deal further with the plaintiff as a result of the allegedly false and defamatory material published by the defendant. The panel concluded that Illinois would not allow this "end run around their rules on defamation" (at p. 1944) and dismissed the claim without even *reaching the "constitutional* implications" of such an application of the interference with contract tort.

The Seventh Circuit cited an Illinois Supreme Court decision, *Crinkley v. Dow Jones & Co.*, 67 Ill. App.3d 869, 385 N.E.2d 714 (1978), dismissing an interference claim in a similar context because there was no allegation in the case that the publisher *intended* to interfere with the plaintiff's relationship with third parties. In *Crinkley*, the Seventh Circuit noted it was a pleading point, but that in the case before it there was no reason to believe that the defendants' interest was "otherwise than to attract viewers" to its program -- insufficient under Illinois law to constitute the wrongful intention required for the tort.

Other courts too, have refused to allow plaintiffs to "end run" around libel restrictions and requirements by pleading that the allegedly false and defamatory things that defendant published constitute interference with contract. *Redco v. CBS, Inc.*, 758 F.2d 970, 11 Media L.Rep. 1861 (3d Cir.) *cert. denied*, 474 U.S. 843 (1985); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 17 Media L.Rep. 2317 (9th Cir. 1990), *cert. denied*, 111 S.Ct.1586 (1991). *See also, Dulgarian v. Stone*, 420 Mass. 843, 851-52, 652 N.E.2d 603, 609 (Mass. 1995)(Claims for defamation and interference with contract, among others, dismissed where plaintiff alleged injury from broadcast and statements made in newsgathering to a customer. With respect to interference claim there was no evidence statements made other than for purpose of journalism and reporting on an issue of public concern; thus plaintiff failed to meet its burden of proving that the interference was improper in motive or means.)

Interference With Contract Flies Solo

But the recent CBS "60 Minutes" crisis was different. The claim of interference with contract was ostensibly being analyzed on its own merit and not as an outgrowth (or really, almost a damage element) of a claim for false and harmful speech; the notion of a party to a confidentiality agreement being able to sue a publisher for allegedly knowingly publishing truthful material obtained from another party to and in violation of the agreement.

[Note: there may well have been other issues and potential claims that the CBS counsel were concerned about with respect to the interview at issue here. For example, the press has reported that the producer of the news report had given the source the right to approve the use of the interview. Among other things, therefore, CBS may well have been concerned about a breach of contract claim from the source himself.]

While not unheard of, *see Huggins v. Whitney*, Index No.127882/94 (S.Ct. N.Y.Co. 8/21/95), this use of a tortious interference claim against the media is rare enough that most media lawyers disclaimed any knowledge of prior cases. And, it is probably fair to say, most media lawyers who opined publicly over the last few weeks offered the theory that a garden variety request to interview someone, even knowing that the someone was bound by a confidentiality agreement, would not be enough to constitute tortious interference with contract.

That may well be the case. In *Huggins*, the plaintiff claimed that the

(Continued on page 18)

TORTIOUS INTERFERENCE WITH CONTRACT

(Continued from page 17)

defendants, host and producer of the television talk program "The Jane Whitney Show," interviewed and distributed the interview with his ex-wife in violation of what they knew was an existing confidentiality agreement between the ex-spouses incorporated into their Separation Agreement. The trial court, in dismissing the claim, held that a news organization could not, consistent with the First Amendment, be liable or punished because of the use of routine newsgathering techniques used to publish a newsworthy story. Moreover, under New York law, "a claim for tortious interference cannot be made where defendants' First Amendment rights outweigh the alleged harm that their actions may have produced." Slip op. at p. 8.

Restatement (Second) of Torts

The tort of interference with contract is not one of clear elements and boundaries. The Restatement (Second) of Torts (1979) Chapter 37, Sections 762-774A, talks of a tort "still in a formative stage." Indeed, it is so "formative" that "[i]nitial liability depends upon the interplay of several factors and is not reducible to a single rule; and privileges, too, are not clearly established but depend upon a consideration of much the same factors." Introductory Note, p. 5.

The Restatement notes that there is considerable disagreement as to which party has the burden of pleading and proving certain key elements of the tort, such as whether the plaintiff must show impropriety in the defendant's conduct or whether the defendant is left with the burden of justification for the interference. In some jurisdictions it is the burden of the plaintiff to prove that the interference was not only intentional ("in the sense that the defendant must have either desired to bring about the harm to the plaintiff or have known that this result was substantially certain to be produced by his conduct" -- at p. 5), but that the conduct was not justifiable. Other courts have treated justification as an affirmative defense.

Professor Harvey S. Perlman wrote in 1982 that: "The most significant disagreement concerns the burden of proof. The general rule is that the plaintiff's proof of an intentional act resulting in disruption of an economic relationship constitutes a prima facie case of liability, casting upon the defendant the burden of proving that the interference was justified." "Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine," 49 U.Chi. L. Rev. 61, 65 (1982).

[While the Restatement discusses both interference with contract and with prospective contractual relations, the current CBS situation raises only the former tort. The factors set out for the torts are basically the same, but have a different weight where there exists a contract, establishing "the greater definiteness" of plaintiff's expectations, his stronger claim to it. Section 767, comment e, p. 34. And see comment j, p. 37: "[G]reater protection is given to the interest in an existing contract than to the interest in acquiring prospective contractual relations, and as a result permissible interference is given a broader scope in the latter instance."]

The Restatement (Second) of Torts defines the tort as:

"One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." Section 766.

At a minimum, the definition of the tort raises three issues: (1) what is it to "intentionally" interfere; (2) what is "improper" interference; and (3) what is "inducing or otherwise causing the third person not to perform."

Prosser and Keeton state that the tort "presupposes knowledge of the plaintiff's contract or interest, or at least of facts which would lead a reasonable person to believe that such interest exists." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, Ch. 24, Section 129 at p. 982 (5th Ed. 1984) The Restatement commentary states that there must intent to cause the result. Section 766, comment h, p.11. The defendant must have knowledge that there is a contract with which he is interfering.

What constitutes inducement, and the element of "improper" conduct seem undoubtedly to be linked. *Prosser and Keeton* notes that there is some authority for the proposition that there should be no liability unless the defendant's interference is accomplished by unlawful means or an independent tort. That is not, however, the law in most (or perhaps, in any) jurisdictions. Section 129 at pp. 982-83.

But the Restatement comments that: "If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper." Restatement (Second) of Torts, Section 766, comment j, p. 12.

The Restatement suggests that merely conducting ones business in the usual manner -- ordinary advertising and solicitation of business is the example given; ordinary asking potential sources for information would seem to be the logical corollary -- is not restricted, even if the defendant knows of the existing contract with plaintiff. Section 766, comment m, at p. 14. Offering a special deal, however, whereby a party to a contract could breach it and defendant would somehow make him whole, is an example given by the Restatement of behavior that just might constitute tortious interference.

In Section 767, the Restatement sets out "Factors in Determining Whether Interference is Improper,"

(Continued on page 19)

TORTIOUS INTERFERENCE WITH CONTRACT

(Continued from page 18)

noting that "[i]t is in the application of this Section that the most frequent and difficult problems of the tort of interference with a contract or prospective contractual relation arise." *Prosser and Keeton* suggests that the list of factors in the Restatement are "no doubt all appropriate enough but not a list that would inspire one to predict an outcome, or decide one's rights or duties." Section 129, p. 984 n.63. The analysis is fact and situation specific.

The factors are:

(a) the nature of the actor's conduct (the "chief factor" according to comment c but not dispositive; while unlawful behavior such as violence, bribery or fraud would ordinarily make interference improper, innocent means can still be subject to liability);

(b) the actor's motive (probably becomes more important when the defendant's basic actions are not themselves unlawful, Section 767, comment d, p.33; a motive to injure another or to vent ill will on him will likely be held improper, Section 767, comment d, p.32);

(c) the interests of the other with which the actor's conduct interferes (for example, is plaintiff trying to protect with his contract a condition that might otherwise shock the public conscience so as to justify interference, Section 767, comment e, p.34);

(d) the interests sought to be advanced by the actor (is the defendant acting in order to protect the public interest affected by the contract? If so, the "relevant questions in determining whether his interference is improper are: ...whether defendant actually believes that the practices are prejudicial to the public interest, whether his belief is reasonable, whether he is acting in good faith for the protection of the public interest...and whether the actor employs wrongful means to accomplish the result." Section 767, comment f, p.35);

(e) the social interests in protecting the freedom of action of the actor and contractual interests of the other;

(f) the proximity or remoteness of the actor's conduct to the interference and;

(g) the relations between the parties (example given is whether the defendant was financial advisor to the contracting party and advised breach to protect his client, Section 767, comment i, at 36).

This is an extraordinary list of factors to be balanced in each instance, but one that certainly suggests that the ordinary reporter asking the ordinary source questions in connection with a news story honestly pursued in the public interest has little to fear from this claim, even if he knows that his source has an obligation to a third party not to speak.

This conclusion arises before one even factors in a specific First Amendment defensive analysis; e.g., *Florida Star v. BJF* and *Landmark Communications v. Virginia.*

And it takes into account the most draconian reading of *Cohen v. Cowles Media Co.*, 115 S.Ct. 2513, 18 Media L.Rep. 2273 (1991), that enforcement of laws of general applicability against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations. The Restatement factors alone allow for public interest and First Amendment policies and principles to be applied consistent with the very basic parameters of the tort.

More on the Tort Next Month...

Rather than simply set out the Restatement, however, LDRC, through the good efforts of Defense Counsel Section members, will be looking at these and other issues that arise from this tort. Among the other issues to consider within the framework of the common law tort are damage issues (e.g., are damages determined by contract measures, tort measures, including punitives, or restitution with defendant's profits as the measure) and the effect of different types of contracts on the claim.

We will publish in the next month a more critical and detailed analysis of the claim and how it intersects with First Amendment and other case law.

WORDS IN TRIBUTE TO JUSTICE BLACKMUN
LDRC ANNUAL DINNER
NOVEMBER 9, 1995

From Justice William J. Brennan, Jr.

I was delighted indeed to learn that the Libel Defense Resource Center has selected my long-time colleague and good friend, Justice Harry A. Blackmun, as this year's recipient of its Defense of Freedom award. A tireless and vigilant defender of freedom, and a dedicated protector of those often unable to protect themselves, Justice Blackmun is a worthy recipient of this distinct honor. He has taught all of us that good judgment can flourish only when fed with compassion, humanity, and dignity, and we are better for this lesson.

In his many years as a Court of Appeals Judge, and as a member of the Supreme Court, Harry Blackmun was a spirited guardian of freedom of speech. Although his contributions in the area are well-documented, I find particularly noteworthy, and indicative of his influence generally, Justice Blackmun's work in the area of commercial speech. His many fine opinions on the subject -- from his seminal decision in *Bigelow v. Virginia*, 421 U.S. 809 (1975), to his landmark opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), to his powerful concurrence in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 573 (1980) (Blackmun, J., joined by Brennan J., concurring in the judgment) -- reaffirmed a tenet central to our Bill of Rights: the freedom to speak, in all contexts, without interference from the government, is an intrinsic ingredient of a vibrant democracy.

It is a privilege and a pleasure to congratulate Harry on this richly deserved honor.

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Justice Blackmun and Free Speech:
In Praise of Listening

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It's tempting to use a Jekyll/Hyde metaphor to describe Justice Blackmun's free speech opinions. The first four years belong to Mr. Hyde. In 1971, for example, Justice Blackmun voted in favor of censoring the Pentagon Papers. In 1973, he dissented in the "Fuck the Draft" case. In 1974, he voted in favor of punishing flag desecrators.

In the fifth year, kindly Dr. Jekyll emerges. In 1975, Justice Blackmun wrote *Southeastern Promotions, Ltd. v. Conrad*, striking down the refusal to permit a performance of "Hair" in a municipal auditorium. In *Bigelow v. Virginia*, he struck down an effort to prosecute a Virginia newspaper for printing advertisements about abortion services. In 1976 and 1977, he wrote the historic free speech opinions in *Virginia Pharmacy* and *Bates v. State Bar of Arizona* that launched the commercial speech doctrine. In 1976, in *Young v. American Mini Theaters*, he dissented from the use of harsh zoning rules to restrict erotic speech. In 1980, his concurrence in *Central Hudson* resoundingly rejected behavior modification as a justification for censorship. In 1982, his concurrence in *Pico v. Island Trees* provided the crucial fifth vote protecting school libraries from efforts to remove controversial books. In 1984, in *Maryland v. Joseph H. Munson Co.*, he

invalidated laws making it difficult for controversial organizations to raise money from the public. And, in 1987, thirteen years after voting to uphold a flag desecration conviction, it was Justice Blackmun who provided the critical fifth vote holding that flag burning was protected by the First Amendment. What else but the effects of an evil potion could explain Justice Blackmun's First Amendment Odyssey?

There is, of course, some truth to the notion that Justice Blackmun's free speech views evolved significantly during his years on the Supreme Court. He remains to this day a remarkably open-minded man. If one of the attributes of youth is capacity for growth and change, Harry Blackmun was the Supreme Court's youngest member on the day he retired. A strictly "evolutionary" approach to Justice Blackmun's free speech opinions would, however, miss the depth and subtlety of his contribution to free speech theory. Justice Blackmun didn't just evolve into a more sympathetic First Amendment judge; he pioneered a new free speech perspective that treated the listener as a full partner in the speech process.

Before Justice Blackmun, Supreme Court free speech cases had tended to revolve around the speaker. Guided by the "clear and present danger" test, the Court balanced the speaker's interest in free expression against the asserted government interest in suppression. But, as Justice Blackmun's early free speech opinions attest, when a speaker's interest is perceived as thin and the government's interest is seen as powerful, strictly speaker-centered free speech rules provide inadequate protection.

Justice Blackmun's great contribution to free speech theory was to insist that the Court's analysis be broadened to encompass the listener's, as well as the speaker's, perspective. When Justice Blackmun struck down the ban on performing "Hair" in a municipal auditorium, he did so on behalf of the audience. When he protected a Virginia newspaper's right to print advertisements for New York abortion services, he did so on behalf of women who needed the information. And, when he wrote his historic opinions in *Virginia Pharmacy* and *Bates* recognizing the constitutionally protected status of commercial speech, he formally enshrined the consumer's right to know as the linchpin of commercial free speech. From and after the Justice's remarkable trilogy of *Bigelow, Virginia Pharmacy* and *Bates*, the Supreme Court's free speech universe no longer stopped at the speaker. The audience was acknowledged as a full partner in the process of communication.

But Justice Blackmun didn't stop there. He fiercely resisted efforts to paint listeners as weak souls in need of government protection. Instead, he developed the vision of a strong, competent hearer capable of coping with controversial speech. For example, in his concurrence in *Central Hudson*, he eloquently rejected the notion that government can manipulate the flow of truthful commercial information in order to "help" foolish hearers make "better" choices. In his concurrence in *Pico v. Island Trees School District*, he stressed the ability of students to confront controversial ideas in school libraries in order to form their own opinions. *In Maryland v. J.H. Munson*, he rejected the idea that the public was so gullible that it needed protection from controversial organizations.

In case after case, Justice Blackmun fought for a First Amendment designed to protect the flow of information from thoughtful speakers to competent listeners in order to permit ordinary people to make the informed and autonomous choices on which a free society and a competitive economy depend. He was an architect of freedom who successfully presided over the construction of a new wing for the First Amendment - a wing dedicated to the dignity of receiving information. As with so much of his jurisprudence, therefore, Justice Blackmun's free speech cases recognize and celebrate the needs of ordinary people. To Justice Blackmun, the First Amendment isn't the property of publishing elites or thundering divines. It belongs to the mass of Americans who enjoy it every day to obtain the information they need to make informed and autonomous choices.

May we be worthy of Justice Blackmun's faith and of the monument to freedom that he helped to build.

LDRC Transcript--Annual Dinner

Sandy Baron: It is wonderful to see all of you. Normally, it would be Harry Johnston's role to welcome you, and indeed he probably has his welcome notes in his pocket. However, as all of you probably know, Harry Johnston is retiring this year, and with that Chad and I just have a few words and a token or two.

Chad Milton: I'm Chad Milton with Media Professional, and a member of the Executive Committee of LDRC. I have the obligation and the honor to mark the end of an era at LDRC. As you all just heard, Harry Johnston is retiring from Time. Harry, after fifteen years of service as Chair and benevolent monarch of LDRC, the only Chair and benevolent monarch that LDRC has ever known. Harry is retiring and setting off to pursue a long-held desire to study and perform jazz piano.

The Executive Committee toiled with Harry's announcement as only a group of semi-desperate lawyers can toil to try to keep Harry on the job. Since the LDRC by-laws kind of require that an Executive Committee member somehow represent a media organization, we had to be creative. One option was to ignore the by-laws; that would have been simple but unprincipled. Harry, as you all know well, is neither simple nor unprincipled and would have none of that. Then we considered creating a new piano defense section and considered reviving the old steering committee and calling it the tuning committee. We also considered setting up a new sub-committee on First Amendment in music to deal with those issues like defamation and violent subliminal messages in piano lounge music. Finally, as a last resort, we just begged, and Harry has agreed to stay on as the Chair-Emeritus and remain involved in LDRC activities. The new Chair of LDRC is Bob Hawley of Hearst, who, as you all know well, has a difficult act to follow.

LDRC began as an outgrowth of an ad hoc group of media lawyers, that was called the ad-hoc group of media lawyers, that met each year at this time at the PLI Communications Law Seminar to talk about stuff. Harry was one of the instigators of that group. The group began to coalesce and in 1980 reached a watershed, perhaps because of the feeling that since Herbert v. Landau had just been decided that maybe First Amendment protections weren't all that we had hoped they would be, perhaps in anticipation of the coming era of megaclaims like Westmoreland and Harry's own Sharon case. Perhaps it was just a reaction to being invited to the Playboy mansion. Whatever the reason, there was a sense of urgency in 1980 and the group gathered in Chicago. I know that some hopes were dashed when it was discovered that Hugh Hefner and the other occupants of the mansion had left for California. I checked, and the minutes don't reflect Harry's own feelings about that.

Undaunted, though, the group pressed on around Henry Kaufman, who became LDRC's General Counsel and its only staff member and on November 12, 1980, fifteen years ago, at its first meeting of the

Libel Defense Resource Center, Harry was elected Chair. In the ensuing fifteen years, Harry brought oversight and counsel for Henry's remarkable work and the LDRC flourished. Today, LDRC bears the unmistakable imprint of Harry's leadership, wisdom, and good sense. We will miss him and his leadership, but we know he has other things to offer now. And, in that regard, and as one of the hosts of the cocktail party that precedes this dinner, Harry, you have a standing invitation to come play.

Sandy Baron: Harry, with our thanks, out of appreciation and respect for a man of Time, for a man of music . . .

[applause]

It says, by the way, "With deep appreciation from Libel Defense Resource Center, Harry M. Johnston, III, Chairman, 1980 to 1995.

[applause]

Harry Johnston: Well, this is a total surprise. I'm overwhelmed by what they did, my God. In 1980, and in 1979-78, that period, it was really a period of considerable chill for the media. Megaverdicts were coming in, Alton Telegraph was being folded because of a libel judgment. Very, very scary things were happening, and I suppose along about 1977-78, a landscape, which was really pretty barren at the time. The PLI Communications Law Seminar had happened a couple of years, but otherwise there was no Media Law Reporter. There was really no gathering, no medium, for media lawyers who wanted to exchange information and techniques and successful strategies to come together and do all that. That's really what, as Chad said, the ad-hoc libel committee began to do. We became actually, as Henry Kaufman recalls, the Joint Media Coordinating Council, or JMCC, and finally the LDRC.

I feel very, very proud and honored to have been a part of an effort that really created a medium by which media defense lawyers get together at least every two years at our conferences and more frequently though our meetings to compare notes, to compare defenses, exchange information, tell each other about expert witnesses for plaintiffs, and how we can defeat them at cases. I think we have very much contained the megaverdicts and have done a splendid job. I have just been very proud to have been a part of that. My friend, Hawley, over here is a very, very ethical person; and he's going to carry on. He was elected today for two years. I mean I hope that two years becomes four and six and eight.

Anyway, thanks very much, I really appreciate it.

Cameron DeVore: Free speech is a wonderful thing, isn't it? I think most of you have your desserts, so it would be well to begin the program. I'm Cam DeVore and am Chairman this year of the Defense Counsel Section of LDRC. I am greatly honored to have the opportunity to be one of those people helping to introduce our honored guest. I'd like on behalf of all of us to welcome Justice and Mrs. Blackmun who are both with us, and also Susan and Sally. We have a family reunion at the head table, which is a lot of fun and wonderful, because I've been having a nice chat and learning things about Justice Blackmun that I've always wanted to know. And so, let's begin. On behalf of us all:

This evening we honor Justice Harry Blackmun for his humane and courageous service on our highest court. Specifically, we honor him for, among other things, his principled invention of the now-established First Amendment doctrine protecting commercial speech. First writing for the court on this subject in 1975, in Bigelow v. Virginia, Justice Blackmun did a rescue job. He rescued commercial speech and advertising from the First Amendment refuse heap in which it had languished, like obscenity, since 1942.

Then, the next year, in 1976, in a case called Virginia Pharmacy, he defined the rationale for this new doctrine. It was the essential Justice Blackmun speaking. The case turned on his deep concern for protecting the little people of our society, here older consumers forced to pay more for their prescriptions, because of a price-advertising ban in Virginia. To protect consumers, he focused First Amendment jurisprudence not just on the speaker and on the medium for the speech but on the rights of the listener, here the consumer. Thus, the Court stuck down Virginia's ban on advertising of the prices of prescription drugs.

Next year, in Bates v. Arizona Bar, he applied the new doctrine to strike down a complete ban on lawyer advertising in Arizona, again in the interest of providing consumers information about a legal clinic's low-priced legal services for "little folks." In both Virginia Pharmacy and Bates, Justice Blackmun clearly understood that most of these traditional commercial speech bans were, at some level, anti-competitive rules designed to keep price and other information out of the marketplace and to protect entrenched economic interests. This remains a central theme in commercial speech cases, as in 44 Liquor Mart v. Rhode Island, argued to the court on November 1, in a challenge to a state ban on advertising alcohol beverage prices.

It's been the genius of Justice Blackmun to blend his deep commitment to free speech and his faith in America's citizens to make their own decisions if only they are given the facts, unhampered by paternalistic government regulations allegedly

designed to protect high-sounding but often deceptive goals such as "professionalism" or "temperance."

Justice Blackmun, please accept our gratitude for your prescient addition to First Amendment jurisprudence. Happily, your commercial speech work is being carried on by your brothers and sisters on the court. Witness Justice Stevens' concurrence in Rubin v. Coors Brewing Co. this year, reiterating your arguments for strict scrutiny of commercial speech restrictions. And witness to a somewhat lesser degree Justice Kennedy's 1993 opinion in Edenfield v. Fane and his dissent this year in Florida Bar. Justice Ginsburg's opinion in Ibanez last year and Justice Thomas' opinion for eight members of the Court in Rubin v. Coors Brewing Co. The First Amendment scrutiny may not yet be strict, as you would prefer it, but thanks to you it is indeed searching. The commercial speech doctrine will be a lasting monument to both your First Amendment perspicacity and your humane spirit. Thank you for being with us.

Luther Munford: I'm Luther Munford and I've been asked to say a few words tonight in tribute not to a majority opinion but to a dissent. Great justices are, after all, known not only by their majority opinions, but also by their dissents. And I would like to just make a few remarks about Justice Blackmun's dissenting opinion in Gannett v. De Pasquale, in which he in many ways laid the foundation for what has now become a recognized right of access to court proceedings. This audience knows the Gannett case well, and some of you no doubt know it personally and perhaps slightly painfully well.

In that case, the majority of the United States Supreme Court held that the public trial guarantee in the Sixth Amendment did not confer any rights on the press or the public to a public trial and said that whatever First Amendment interests were at stake were satisfied by a trial judge's minimal balancing of interests when he closed a pre-trial suppression hearing in a criminal case and kicked a reporter out of the courtroom.

For Justice Blackmun that wasn't good enough. Joined by Justices Brennan, White and Marshall, he dissented and argued that the standard should be strict and inescapable necessity--a standard that certainly hadn't been met in that case. He based this on the explicit text of the Sixth Amendment, as informed by the historical presumption of openness in trials and, also the need in an era where ninety percent of cases never go to trial to have openness in pre-trial proceedings as well.

The decision was decided by a 5-4 vote; you might call it 4-1-4, Justice Powell concurred in the majority. The decision was really closer than 5-4 might indicate--or at least you could

suggest that. I'd like to talk about that, but I'd like to preface that observation with a story.

In 1985, John Henegan and I presented the first press access case to the Mississippi Supreme Court. As I was arguing and talking about the Gannett case and trying to deal with it, all of a sudden the face of the one of the judges lit up! He had obviously had a bright idea. He said, "Did you work for Justice Blackmun that Term?" I said, "Yes, I did." He said, "Did you write that dissent?" Well, I was kind of in an embarrassing situation. The truth is that I was not Justice Blackmun's clerk for that case, and I had very little to do with that dissent, but I certainly didn't want to distance myself from that wonderful opinion, so I sort of clumsily stumbled through it; I said "Well, I'm afraid judicial propriety precludes me from answering that question." Whereupon one of the other judges, who's known for his wisecracks, said "What is judicial propriety, some type of prior restraint?" Well, we got our writ of mandamus. It was in a public but perhaps deliberately unpublished order.

I said I was going to make an observation about the closeness of the case. You can read Justice Stewart's majority opinion; and it certainly contains the traces that suggest that it had its origin as a dissent. In fact, there's some language that I've really never seen in a majority U.S. Supreme Court opinion before--anything quite like this. In footnote 9 of the majority opinion, it says "It appears that before today, only one court has ever held that the Sixth and Fourteenth Amendments confer upon members of the public a right of access to a criminal trial." So much for careful proofreading in the Stewart chambers.

Well, although the Court never accepted Justice Blackmun's Sixth Amendment analysis, it also never disputed the history that he had marshalled, nor did it ever really quarrel with his practical reasoning. In fact, the very next Term in the Richmond Newspapers case, those considerations led the Court to recognize the First Amendment right of access to court proceedings. At that point, neither Justice Blackmun nor Justice White could resist publishing opinions which basically said "I told you so"; and Justice Blackmun even expressed his gratitude that the Court had "washed away at least some of the graffiti that marred the prevailing opinions in Gannett." Eventually, the Court extended the right not only to trial proceeding that was at issue in that case, but also pre-trial proceedings.

Justice Blackmun you may not have previously known this, but the Gannett decision has something in common with one of the most famous U.S. Supreme Court decisions, Miranda v. Arizona. Both Miranda and Gannett resulted in a "card". The police use a Miranda card to read a suspect his rights; and the press use what is

sometimes called a Gannett card, especially by Gannett reporters, to assert their rights when a judge attempts to close a courtroom. I brought one with me; and it says a lot of things. The one part that's most near and dear to the lawyers in the audience, says, "If you will grant a reasonable time, I'd like to contact my editor and the newspaper's lawyer, so that we may present our argument properly." We appreciate that.

You are here tonight to get something a lot more important than this card; but I'm going to leave it up here at the podium for you as a token of appreciation for a path-breaking dissent that has opened courtrooms around the country to public scrutiny, which, as you correctly pointed out in that opinion, is the sole of justice. Thank you.