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# LIBEL DEFENSE RESOURCE CENTER
# 2000 JURY INSTRUCTIONS MANUAL

FOR DEFENSE COUNSEL ONLY

November 2000

# INTRODUCTION

In 1984, the Libel Defense Resource Center ("LDRC") initiated a jury instructions project in response to the disturbing number of libel jury verdits against media defendants. The primary goal of the project was to provide defense counsel with guidance on formulating more effective jury instructions. The LDRC prepared jury instructions manuals in 1985 and 1995 that highlighted jury instructions from significant defamation cases.

This year, the LDRC Jury Instructions Committee (the "Committee"), chaired by Daniel C. Barr, a partner in the firm of Brown & Bain, P.A., has prepared a 2000 Jury Instructions Manual (the "2000 Manual"). In updating the 1995 manual, the 2000 manual has added selected jury instructions from 14 cases tried since 1995, including Food Lion v. ABC, Amedure v. Schmitz and MMAR Group, Inc. v. Dow Jones & Co. The 2000 Manual is available through the LDRC and features proposed and actual jury charges selected by Committee members from the cases on file at LDRC, as well as editorial comments by the Committee members regarding the jury instruction topics. The 2000 Manual includes jury instructions given or proposed in trial courts in 15 states and 12 federal circuits.

## Committee Members

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|---|---|
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While the charges included in the 2000 Manual were selected for their legal soundness as well as their congruity with the interests of media defendants, some of the included instructions may be overly complex or contain language that is case specific. In addition, some charges in the 2000 Manual are not entirely favorable to media defendants or underscore matters and issues that require attention by media defendants. Therefore, the charges in this 2000 Manual should not be considered "model" or recommended instructions, nor are the topics inclusive of every issue in a libel case for which a jury instruction may be advisable.

This manual also contains an update by Robert Raskopf, of White & Case of his 1995 article entitled "An Overview of Supreme Court Defamation Opinions: 1985-1995." Bob was assisted by Shannon Jost and James Sullivan of White & Case in producing "An Overview of Supreme Court Defamation Opinions: 1985-2000."

It is hoped that media defense counsel will continue to contribute to the LDRC their proposed and actual jury instructions as well as any comments and suggestions about drafting jury instructions that they believe would be beneficial to LDRC members.

## How to Use the Manual

This manual is organized by key legal issues, including elements of libel, standards of liability, defenses, damages, miscellaneous libel issues and non-libel torts. The table of contents should enable the reader to locate issues of interest. For each issue, selected jury instructions, identified by source, illustrate approaches used by different courts and attorneys to charge the applicable points of law to the jury.

Charges are identified by case name, followed by the designation "C" if actually given by the court or "D," "P," or "J" if requested by the defendant, plaintiff or jointly by the defendant and plaintiff but not used by the court in whole or in part. The instructions from Westmoreland v. CBS are labeled "C," but are in fact simply the court's final draft of proposed instructions, because the case was settled before being submitted to the jury. For information more completely identifying the cases from which selections are included in the manual, the reader may refer to the table of cases.

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# Overview Of Supreme Court Defamation Opinions: 1985 - 2000

by Robert Lloyd Raskopf

Since our last publication of this handbook in 1995, there have been no Supreme Court decisions with significant direct implications for defamation jury instructions. Therefore, we include in substantial part our previous analysis of the relevant Supreme Court jurisprudence, with added comments herein concerning recent interpretations of those decisions by the lower courts. In addition, we address below the Supreme Court's continued examination of punitive damages awards and their relationship to compensatory damages, which is of particular note in view of the apparent disturbing trend toward larger damages awards by juries against media defendants.

## I. Private Figure - Public Concern: Plaintiff Must Prove Falsity

The Supreme Court, in its 1986 decision, *Philadelphia Newspapers, Inc. v. Hepps*, held that private figures suing media defendants for publishing matters of public concern must prove falsity as well as fault. Prior to *Hepps*, although public figure plaintiffs were required under *New York Times Co. v. Sullivan* to show falsity to prevail, some states, such as Pennsylvania, had codified the common law presumption that defamatory statements were presumptively false in cases involving private figures.

The defendant newspaper in *Hepps* reported that a franchise owner had connections with organized crime and had improperly influenced local government. The trial court held that Pennsylvania's codification of the common law presumption of falsity was unconstitutional and therefore instructed the jury that the plaintiff had to prove falsity to prevail. However, on direct appeal to the Pennsylvania Supreme Court, that court reversed, holding that once the plaintiff demonstrated the requisite fault, there was a presumption of falsity, which the defendant had the burden to rebut. The United States Supreme Court reversed the Pennsylvania Supreme Court, finding that the statute in question, as applied, violated the First Amendment and that private figure plaintiffs, in matters of public concern must prove the falsity of the allegedly libelous statements to hold media defendants liable for defamation.

Although the *Hepps* Court stated that, in general, public figures have a greater burden of proof than private figures and that, in matters of public concern, both private and public figures have the burden of proving falsity in cases against media defendants, the Court did not address whether the burden of proving falsity required a clear and convincing or preponderance of the evidence standard. Indeed, in *Harte-Hanks Communications, Inc. v. Connaughton*, decided three years after *Hepps*, the Supreme Court noted that "[t]here is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence." While the trial court in *Harte-Hanks* had instructed the jury to use the preponderance of the evidence standard to determine whether the challenged statements about the public figure plaintiff were false, the Supreme Court decided to "express no view on this issue."

While the Supreme Court has yet to designate the standard of proof required to prove falsity, media defense counsel have requested and trial courts have instructed that private figure as well as public figure plaintiffs must prove falsity by clear and convincing evidence.

Example #1 (Excerpt) of Jury Instruction on Falsity and the Burden of Proof (Public Figure):

> [P]laintiff must prove . . . that any defamatory message or impression you find [defendant] conveyed was false. Plaintiff must prove the falsity of any message or impression by clear and convincing evidence. No matter how defamatory a message or impression may be, no matter what the defendant's motive in writing or publishing it, if the plaintiff fails to prove by clear and convincing evidence that the message or impression is false, you must render a verdict for the defendant.

Example #2 of Jury Instruction on Falsity and the Burden of Proof (Private Figure):

> An essential element of libel is that the statement published was false. Consequently, if the statement was in fact true, there can be no libel, regardless of defendant's motivation.
>
> The plaintiff has the burden of proving by clear and convincing evidence all of the facts necessary to establish that each statement is false.
>
> If the plaintiff fails to meet his burden of proving falsity, the defendants cannot be held responsible for libel even if the plaintiff was damaged by statements made by the defendants and even if defendants knew that plaintiff would be damaged.

Would the existence of a shield law have any effect on plaintiff's burden to prove falsity? Apparently not, according to the Court's dicta in *Hepps*. Shield laws generally permit members of the media to refuse to divulge their confidential sources -- arguably making it more difficult for plaintiff to satisfy his or her burden of proving falsity. Nonetheless, while the reach and impact of the Pennsylvania shield law was not before it, the Court stated that, "[i]n the situation before us, we are unconvinced that [Pennsylvania's] shield law requires a different constitutional standard than would prevail in the absence of such a law."

To prevent such a de-facto shifting of the burden of proof from plaintiff to a defendant invoking the protection of a shield law, the trial court in *Desai v. Hersh* specifically instructed the jury that it could not draw any inferences from the fact that the defendant refused to divulge his confidential sources.

Example #1 of Jury Instruction Against the Drawing of Inferences from an Assertion of a Shield Law:

> You are instructed that [defendant] had a privilege under the [shield law of the State] not to reveal names of his confidential sources. You are to draw no inferences from the fact that [defendant] refused to reveal his

confidential sources. This fact is not evidence that [defendant] knew his statements were false or that in fact had serious doubts as to the truth of these statements.

Example #2 of Jury Instruction Against the Drawing of Inferences from an Assertion of a Shield Law:

[State] law gives the press a right to keep their sources confidential, and you are not to infer anything from not knowing the identity of the confidential sources involved in this case.

## II. Public Figure Plaintiff Must Prove More Than Extreme Departure from Professional Standards to Show Actual

In the 1989 decision of *Harte-Hanks Communications, Inc. v. Connaughton*, the Supreme Court reaffirmed that public figure plaintiffs must prove more than an extreme departure from professional standards to demonstrate actual malice in cases against media defendants. In *Harte-Hanks*, the defendant newspaper published a story about plaintiff Connaughton, a candidate for public office. The article stated that the plaintiff, to win the election, had bribed a grand jury witness to make allegations about plaintiff's opponent. The *Harte-Hanks* jury unanimously found, as did the Ohio Court of Appeals, that the media defendant disregarded the unequivocal denials of witnesses who had contradicted the one questionable witness upon whose interview the defendant based its story and chose not to review readily available taped interviews of a critical fact witness. Under these circumstances, the district court found, and the Supreme Court affirmed, that while a newspaper's motive in publishing or failure to investigate will not support a finding of actual malice, the defendant's purposeful avoidance of the truth sufficed to prove actual malice.

The *Harte-Hanks* Court, quoting then Circuit Judge Ruth Bader Ginsberg, also stated that lawyers should instruct the jury in "plain English" throughout the course of the trial concerning the "actual malice" requirement to ensure that the *New York Times* standard is properly applied.

Example of Jury Instruction on Extreme Departure from Professional Standards (Reckless Disregard):

Even an extreme departure from accepted professional standards of journalism will not suffice to show reckless disregard. Reckless disregard is not shown by lack of due care, nor by gross negligence. Rather, there must be clear and convincing evidence that defendant published knowing that [the statements were] probably false.

Example #1 (Excerpt) of Jury Instruction on Actual Malice:

What you are deciding . . . is known in the law as Constitutional malice, also referred to as actual malice. Mere negligence, carelessness,

> mistake, or a simple misinterpretation on the part of the Defendant does not establish actual malice. Plaintiff must demonstrate actual malice by showing with clear and convincing evidence that the Defendant realized that its statements were false or that it subjectively entertained serious doubt as to the truth of the statements. Plaintiff shall have met his burden of establishing actual malice by clear and convincing evidence if he demonstrates that the Defendant made the false broadcast with a high degree of awareness of probable falsity, or, that it must have entertained serious doubt as to the truth of its statement.

As a jury's understanding of actual malice can easily be confused with common law malice, which is defined as hatred, ill will or spite towards the plaintiff, it is particularly important for defense counsel to ensure that jury instructions on actual malice are in "plain English." Example #2 below illustrates an approach adopted by one trial court to communicate, in plain English, the actual malice standard required by *New York Times*:

> Example #2 (Excerpt) of Jury Instruction on Actual Malice:
>
> > The focus of this inquiry is on the defendant's attitude toward the truth or falsity of the publication, not on the defendant's attitude toward the plaintiff . . . .
> >
> > You may consider all or any part of the following in deciding whether plaintiff proved by clear and convincing legal evidence of actual malice:
> >
> > (A) Were portions of the broadcast made up or the product of the defendant's imagination;
> >
> > (B) Was the broadcast so unbelievable that only a reckless person would have broadcast it;
> >
> > (C) Were there obvious reasons to doubt the truth of an informant or the accuracy of his reports;
> >
> > (D) Were words deliberately quoted out of context so as to result in a false and defamatory representation of fact;
> >
> > (E) Was the broadcast the result of deliberately omitting matters known to the defendants.

Where a court, in a public figure case, is inclined to formulate an actual malice charge incorporating reference to professional standards of journalism, defense counsel should make a concerted effort to ensure the inclusion of a charge explicitly underscoring

that even an extreme departure from accepted professional standards of journalism is insufficient to prove actual malice.

## III. Plaintiff Must Show that Alteration of Quotation Resulted in Material Change in Meaning

In 1991, the Supreme Court squarely addressed the falsity of quotations in *Masson v. New Yorker Magazine, Inc*. The *Masson* Court held that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.*, unless the alteration results in a material change in the meaning conveyed by the statement." On the other hand, the Court restricted the flexibility of the writer by holding that an alteration of a quotation is not protected, even if it is a "rational interpretation" of a statement, if a reasonable reader would think the quotation was a verbatim repetition of the statement.

Example #1 (Excerpt) of Jury Instruction Requiring Material Change in Meaning:

> [Y]our inquiry does not end if you find . . . that plaintiff did not make these . . . statements. In order to prove "falsity," you must then determine if the defendants materially changed the meaning of any statements you determine that plaintiff did in fact make, and if they published the statements with knowledge of their falsity or with reckless disregard as to their truth or falsity.

Example #2 of Jury Instruction Requiring Material Change in Meaning:

> Correction of grammar or syntax by itself may not necessarily prove falsity as that term is used in deciding whether the author acted with actual malice.
>
> Indeed, a deliberate alteration of the words uttered by the plaintiff does not necessarily prove falsity for purposes of deciding actual malice, unless the alteration results in a material change in the meaning conveyed by the statement. A material change is one which would reasonably be expected to change the meaning of the statement in the mind of a reasonable and prudent person.

The *Masson* Court also confirmed that minor inaccuracies in quotations do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified" or unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." The "gist or sting" construction in a quotation context corresponds to that found in traditional falsity analyses.

Example #1 of Jury Instruction on "Gist or Sting":

> To support a claim for defamation, the communication must be

false.

> One or more of the statements made by [defendant] must be false in a material way. Insignificant inaccuracies of expression are not sufficient. Moreover, you must view the broadcast in its entirety and determine whether the gist or sting or substance of the broadcast was true. If you find that the broadcast contained only minor inaccuracies, or if you find that the broadcast was true in substance, you must return a verdict in favor of [defendant].

Example #2 of Jury Instruction on "Gist or Sting":

> How do you tell whether falsity is significant or insignificant? To help you make this distinction, you should think about the gist or the sting of the particular defamatory message or impression. What is it about the message or impression that makes it defamatory? What aspect of the message or impression brings contempt, scorn, hatred or ridicule on a plaintiff, or lowers his estimation in the eyes of the community? That aspect of the message or impression can be described as its gist or sting. The message or impression must be false as to such aspect of the message or impression for plaintiff to have proved substantial falsity.

The *Masson* Court also echoed its admonition in *Harte-Hanks*, that jury instructions should refer to the "publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity" in lieu of using the readily misconstrued term "actual malice."

## IV. No Separate "Opinion" Privilege

In *Milkovich v. Lorain-Journal Co.*, the Supreme Court determined that under the First Amendment there is no absolute constitutional protection for statements of opinion. The real issue, stated the *Milkovich* Court, is whether a reasonable factfinder could conclude that the statements at issue contain assertions of facts capable of being proved false. Plaintiff Milkovich, a high school wrestling coach, sued a newspaper and the defendant paper's sports editorial columnist for publishing an editorial which implied that Milkovich lied under oath in a judicial proceeding. The Court reversed the Ohio Court of Appeals, which had held that the defendants' statements were constitutionally protected opinion. The Supreme Court's holding in *Milkovich* effectively prohibits reflexive determinations by Courts as to the applicability of the opinion privilege, requiring careful analysis in evaluating whether challenged statements are based on provably false facts.

The *Milkovich* defendants, in invoking the opinion privilege, had relied upon an apparent opinion-fact dichotomy found in dicta in *Gertz*: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." The *Milkovich* Court, opining that the above *Gertz* dicta had "become the opening salvo in all

arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question," rejected the defendants' proposed opinion-fact dichotomy. In doing so, the *Milkovich* Court recast *Gertz* as having equated "opinion" with "idea," in conformance with Justice Holmes' view that there should be a "free marketplace of ideas," and emphasized that *Gertz* was not intended to create a "wholesale defamation exemption for anything that might be labeled 'opinion.'" The *Milkovich* Court also held that the "general tenor" of a statement and the context within which it is found is relevant, but nonetheless concluded that defendants' article, which had appeared in a sports editorial column, did not qualify for the privilege.

While the potential ramifications of the *Milkovich* holding upon the opinion privilege are substantial, subsequent cases appear to have reduced the adverse impact of *Milkovich* in various ways, including by recognizing a broader opinion privilege under state constitutions, by continuing to give serious weight to the context in which a statement is made, by invoking the fair comment doctrine as an alternative basis of protection, by employing the "rhetoric or hyperbole" exception, and by interpreting *Milkovich* to hold that opinions are constitutionally protected when based on disclosed facts.

While separating fact from opinion is generally considered a question of law for the court to decide, resolution of the fact-opinion question, except under the clearest of circumstances demonstrating no underlying factual assertions, has been deemed appropriate for a jury to determine. Media defense counsel should make every effort to ensure that the court determines this issue as a question of law.

Example #1 of (Pre-*Milkovich*) Jury Instruction on Opinion:

> Plaintiff must prove by a preponderance of the evidence that any statement or meaning or meanings found to have been conveyed by one or more of the television broadcasts were factual in nature and not expressions of opinion.
>
> You may not find for [plaintiff] on the basis of an opinion because opinion cannot be proved true or false.
>
> In determining whether the meaning or meanings conveyed were factual in nature or an expression of an opinion, you are to consider all the circumstances surrounding the television broadcast as well as the context and content of the broadcast.

Example #2 of (Post-*Milkovich*) Jury Instruction on Opinion:

> A published opinion is not defamatory unless it conveys to the recipient a provably false assertion of a fact or facts. You must determine, from the totality of the circumstances whether such an interpretation was in fact conveyed. If such an interpretation was not conveyed, the expression or statement, though published, does not constitute defamation.

## V. Punitive Damages

### A. Punitive Damages Must Bear a Relation to Compensatory Awards

Several jurisdictions have judicially or statutorily banned punitive damages in defamation cases because of First Amendment concerns. In jurisdictions that permit punitive damage awards in defamation cases, the key issue is the relationship between punitive damages and the compensatory damages awarded by the jury. Since the last publication of this manual in 1995, the Supreme Court has expanded on and clarified its previous trilogy of cases addressing punitive damages, although still in a context unrelated to defamation or other media related claims. The Supreme Court's most recent clarifications are embodied in *BMW of North America, Inc. v. Gore*. The following discussion provides a brief background of the jurisprudence that forms the foundation for the holding in *BMW*.

In *Pacific Mutual Life Ins. Co.* v. *Haslip*, decided in 1991, the jury had awarded Haslip $200,000 in compensatory damages and $840,000 in punitive damages. Writing for the Court in affirming the punitive damages award, Justice Blackmun found that this ratio between the types of damages "may be close to the line . . . of constitutional impropriety." Concurring in the judgment, Justice Scalia went further, proposing that the First Amendment may be construed as a bar against any punitive damages.

While in *Haslip* it appeared that the Court may have been signaling a more restrictive approach to excessive punitive damages awards, in the 1993 decision of *TXO Production Corp. v. Alliance Resources Corp.*, the Supreme Court affirmed a punitive damages award of $10 million where compensatory damages totaled only $19,000. Perhaps this unfortunate result can be attributed somewhat to a jury instruction in *TXO*, stating that "the wealth of the perpetrator" could be considered and that "the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances."

Then, in the 1994 case of *Honda Motor Co. v. Oberg*, the Court reversed a punitive damages award of $5 million that was over five times the compensatory damages awarded in the case. Justice Stevens, in holding that Oregon's denial of judicial review of the size of punitive damages awards violated the Fourteenth Amendment's Due Process Clause, noted that one justification for the Court's decision was that jury instructions "typically leave the jury with wide discretion in choosing the amount . . . [creating] the potential that juries will use their verdicts to express biases against big businesses." This passage echoes the words of Justice Powell in *Gertz*, in which he wrote that "juries must be limited by appropriate instructions" to prevent them from "assess[ing] punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" and from "selectively punish[ing] expressions of unpopular views." Although the Court reversed an "excessive" punitive damages award, the decision did little to clarify the boundaries of the "excessive" territory.

In 1996, the Court again addressed the issue of punitive damages, and specifically the "permissible" relationship between compensatory and punitive damages, in *BMW*. The Supreme Court, on appeal from an Alabama Supreme Court decision granting $2 million dollars in punitive damages based on actual harm of $4,000, found that a 500:1 ratio between punitive damages and actual damages was "grossly excessive" and transcended

the constitutional limit. The Court held that a damage award "must be supported by the State's interest in protecting its own consumers and its own economy." Applying this analysis, the Court found that the Alabama Supreme Court's decision would have punished BMW for conduct that had no impact on Alabama or its residents and was lawful in the states – outside Alabama – in which it occurred. As in *Honda Motor*, Justice Stevens, writing for the majority, reasoned that excessive punitive damages awards violate the Due Process Clause of the Fourteenth Amendment.

Determining that the essential inquiry for lower courts in assessing the constitutionality of damages awards is to assess whether the defendant had fair notice of (1) the conduct that would subject him to punishment and (2) the severity of the penalty the State could impose for such conduct; the Court provided three "guideposts" to assist lower courts in making this determination.

First, the Court held that punitive damages must be related to the degree of reprehensibility of the defendant's conduct, and suggested that acts that involve a violent crime or those that demonstrate "intentional malice" may be considered the most reprehensible. Other factors, such as whether the harm inflicted is purely economic in nature and whether the defendant is a recidivist, may also be relevant to this analysis. Although defamation, even in the most extreme case, probably does not qualify as a violent crime, the level of a defendant's malice, particularly if it involves common law malice, could form the basis for an increase in the level of punitive damages under this analysis. Thus, media counsel should continue to propose jury instructions that clarify the distinction between "actual" and "common law" malice and ensure that jury instructions concerning punitive damages are appropriately limited.

The second "guidepost" as to the reasonableness of a punitive damages award, according to the *BMW* decision, is the ratio between the punitive damages and the actual harm inflicted on the plaintiff. Following its mandate in *Haslip* and *TXO*, the Court confirmed that although there is no "mathematical bright line" for courts to look to when assessing the constitutionality of a damage award, a comparison between the compensatory award and the punitive award is significant. However, a relatively higher ration could be appropriate when (1) a particularly egregious act results in only minor economic damages; or (2) the injury is hard to detect and non-economic harm cannot easily be determined. In this regard, media defense counsel should be vigilant as to perceived difficulties in measuring actual harm caused to plaintiffs.

Finally, *BMW* instructs that courts should consider how a punitive damages award compares to the civil or criminal penalties that could be imposed for comparable misconduct. Under this analysis, courts should "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue."

Subsequent lower and appellate court decisions indicate varied applications of the *BMW* "excessive" damages analysis. In *Lee v. Edwards*, the court found that a $200,000 punitive damages award in a § 1983 civil rights action was excessive, and directed that the award would be reduced to $75,000 if the plaintiff agreed to remittitur. Addressing the second *BMW* factor, the court noted that a § 1983 claim may be "particularly egregious" but yield nominal compensatory damages. Thus, in determining the appropriate damage award proportions, the court compared the resulting punitive damages award with that of other civil rights cases to determine an appropriate ratio.

In another 1996 case, remanded by the Supreme Court to the Tenth Circuit to be decided in light of *BMW*, the Tenth Circuit held that a $30 million punitive damages award was excessive in view of a compensatory damages award of $269,000 to remedy tortious interference with business relations. The court determined that the maximum constitutionally permissible punitive damages award under the *BMW* analysis would be $6 million, and directed the Oklahoma district court to grant a new trial if the plaintiff did not accept remittitur. In so holding, the *OXY* court determined that because a wealthy defendant may "act oppressively and force or prolong a litigation simply because it can afford to do so and a plaintiff may not be able to bear the costs and delay," it is appropriate to consider "the costs of litigation to vindicate rights" in justifying a punitive damages award.

In 1999, the Eleventh Circuit affirmed a district court opinion in *Johansen v. Combustion Engineering* that had been reconsidered on remand from the Supreme Court in view of the *BMW* decision. Drawing a distinction between reducing a jury verdict under remittitur and performing a "constitutional reduction" in damages, the appellate court held that it was constitutionally permissible for the district court to have reduced a $45 million punitive damages award to $4.35 million without granting plaintiff the option of a new trial. The court based this distinction on its finding that a remittitur is warranted when the court determines that the jury's award is unreasonable on the facts, while a "constitutional reduction" is a determination that, as a matter of law, the Constitution does not permit such rewards. Of particular note, however, the appellate court let stand the 100:1 ratio of punitive damages to actual damages that had been determined by the district court on remand, characterizing the disparity as being "at the upper limits of the Constitution," but "justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy."

Given this progression of cases, it remains imperative at trial for media defense counsel in libel actions to strive for an instruction that clearly sets forth the law governing the relationship between compensatory and punitive damages. Sometimes, a state's pattern jury instruction works against the defendant. In New York, for instance, Pattern Jury Instruction No. 3:30 continues to state that punitive damages "need bear no relationship to . . . compensatory damages" and that "[t]here is no exact rule by which to determine the amount of punitive damages." In light of this instruction, media defense counsel need to argue convincingly that the familiar pattern jury instruction should be replaced with an instruction that emphasizes the "guideposts" set forth in *BMW*.

Even in jurisdictions that permit the awarding of punitive damages in defamation cases, media defense counsel should request a charge that such damages may not be awarded upon a mere finding of actual malice, but rather also require a finding of common law malice. In *Prozeralik v. Capital Cities Communications, Inc.*, New York's highest court rejected the trial court's instruction, which allowed an award of punitive damages solely upon a finding of actual malice, because the judge's instruction was inaccurate. The *Prozeralik* court noted that actual malice does not "measure up to the level of outrage or malice underlying the public policy which would allow an award of punitive damages" and indicated that only where a defendant's common law malice, i.e., hatred, ill will or spite toward the plaintiff personally, is also demonstrated, may punitive damages be awarded. Following remand, the New York Supreme Court, Niagara County, entered judgment for

both compensatory and punitive damages. The media defendant again appealed, and the appellate court vacated the punitive damages award because plaintiff failed to establish that the false statements concerning plaintiff were made with common law malice.

Example (Excerpt) of Jury Instruction on Punitive Damages:

> [T]o be entitled to an award of punitive damages [plaintiff] must prove that the Defendant's newscasts were broadcast with actual malice, and that Defendant acted with what the law refers to as common law malice. . . . Plaintiff's entitlement to such an award is dependent upon his also proving by clear and convincing evidence that Defendant['s] . . . broadcasts . . . were made with common law malice . . . . common law malice is established where the Defendant's wrongdoing has been intentional and deliberate and has the character of outrage frequently associated with crime. There must be circumstances of aggravation or outrage, which is spite or malice or a fraudulent evil motive on the part of the Defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton. If you find that any of Defendant's broadcasts were made with actual malice, and that its conduct was, under the circumstances, outrageous, malicious, wanton, reckless, or in willful disregard for the Plaintiff's rights, you may award . . . punitive damages.

Notwithstanding the long road to eliminating the punitive damages award in *Prozeralik*, defense counsel should request a similar instruction.

### B. Private Plaintiffs in Matters of Private Concern Do Not Have to Show Actual Malice to Recover Presumed and Punitive Damages

Restricting the protection for certain libel defendants, the Supreme Court, in a 1985 decision, *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, held that a private figure plaintiff did not have to demonstrate actual malice to recover presumed or punitive damages where the allegedly defamatory statement was of a private concern. The *Dun & Bradstreet* Court decided that speech on matters of purely private concern, as the Court deemed the matter in *Dun & Bradstreet* to be, had reduced constitutional value, as opposed to matters of public concern – therefore, state interest in compensating private individuals for injury to their reputation outweighed the need for protection of speech through the actual malice standard.

In so holding, the Court distinguished *Dun & Bradstreet* from *Gertz v. Robert Welch, Inc.*, noting that *Gertz* was particularly concerned with private figures involved in matters of public concern and confirming that in matters of public concern, a showing of actual malice was required to justify an award of punitive damages.

Subsequent to *Dun & Bradstreet*, media defense counsel have successfully argued, and should continue to assert, that the Court's holding is limited to non-media defendants.

## VI. Conclusion

The past fifteen years have demonstrated, unsurprisingly, that the law of defamation is far from settled. Given the delicate and complex balance struck by the Court between the "legitimate state interest in compensating private individuals for wrongful injury to reputation" and the "vigorous exercise of First Amendment freedoms," a state of flux is perhaps unavoidable. Nonetheless, as the holding in *Milkovich* instructs, media defense counsel must remain vigilant, including through a concerted effort to persuade courts to adopt more effective jury instructions in defamation cases, to ensure that First Amendment freedoms and society's interest in "'uninhibited, robust, and wide-open' debate on public issues" do not become secondary considerations.

## JURY INSTRUCTIONS

### VII. INTRODUCTION MATERIAL

#### A. Role of the First Amendment.

Editor's Note: *These instructions discuss the balance struck by New York Times v. Sullivan and its progeny between an individual's interest in protecting his reputation and society's interest in a free press. The Street instruction briefly discusses why a public official has a greater burden to prove liability and explains to the jury that a public official must prove actual malice by clear and convincing evidence. The Lasky and Lehman instructions are modifications of the jury instruction used in Sharon v. Time, Inc. Lasky is tailored to a public figure plaintiff and briefly explains how a person becomes a public figure. The third and fourth paragraphs of the Lehman instruction tell the jury that erroneous statements and falsehoods are inevitable in journalism and must be protected to some degree against liability to guard against self-censorship and a diminution of our First Amendment rights. The proposed jury questions and instruction in Merco Joint Venture do the same.*

Now, again, I'd ask you to just put your questionnaire down for a minute and listen to some of the things I'm going to have to say about this. I believe that you will better understand this second question if you keep in mind something that I told you at the beginning of this case, and that is that the law regarding defamation suits by public officials has attempted to balance two interests which are important in our society, both of which are entitled to equal protection. On the one hand, the law recognizes the legitimate interest of any person, including a public official, to be protected against the publication of false, defamatory statements about him. On the other hand, the law recognizes that it is important to all of us in a free democracy that there should be free, open discussion in the press of the actions of our public officials. If the press incurred liability whenever a report about a public official turned out to be false, regardless of whether the publisher knew when it was published that the report was false or had serious doubts about its truth, the press might be afraid to risk critical commentary and we, the public, would be less informed.

For public officials, the law strikes a compromise that protects a measure of the public official's interest in a remedy against false defamation but protects also the public's

interest in being able to read and hear open discussion of the performance of public officials in the press. Under this compromise which the law has formulated, the public official retains the right to bring a libel action for false, defamatory statements of fact about him, but he must prove more than merely that the statement was false. He must also prove that a defendant published the false, defamatory statement knowing it to be false or with serious doubts as to its truth. That legal compromise also imposes on the public official plaintiff a more demanding burden of proof than is customary in other civil cases. This compromise requires public official plaintiffs to prove to you by clear and convincing evidence that defendants published a false, defamatory statement knowing it to be false or with serious doubts as to its truth. And that's why you'll see the clear and convincing evidence burden of proof set forth in question two.

-- Street v. Philadelphia Newspapers, Inc. (C)

You will better understand the rules of law about which I am now informing you if you keep in mind that this case involves a balancing of values, both of which are important in our society. Under certain conditions the law of New York grants plaintiffs the right to recover damages for false, defamatory statements that injure their reputations. I will explain these terms in detail in a few moments.

On the other hand, the United States Constitution guarantees freedom of speech to individuals and the press. This constitutional guarantee entitles the press to publish critical statements about people, and protects the press from liability for such statements, except if, under the standards I am about to describe, the statements are of such a nature and are made under such circumstances as to deprive the persons who make them of protection.

In this case, the statements on which suit has been brought relate to Mr. Lasky, who is a public figure. This is a special term used by the law to describe persons who, by their own action, have achieved general fame and notoriety, and in so doing, have invited attention to and comment about themselves. The law affords the press particularly broad protection in these circumstances, in order to avoid inhibiting comment and debate.

To recover even for a false and defamatory statement (as I will define those terms for you), a public figure such as Mr. Lasky must establish by clear and convincing evidence that the statement was made with what I will refer to as "constitutional malice"--that is, with knowledge that the statement was false or with serious and subjective doubts about its truth or falsity.

4 Modern Federal Jury Instructions 91.01; See Sharon v. Time, Inc., No. 83 Civ. 4660 (ADS) (S.D.N.Y. 1985) (jury charge); Newton v. National Broadcasting Co., Dkt. No. CV-LV-81-180, MDC, trial trans., vol. 33 at 7013-14 (D. Nev. Dec. 10, 1986).

-- Lasky v. ABC (C)

You will better understand these instructions and the rules of law about which I am

informing you if you keep in mind that this case involves a balancing of values, both of which are important in our society. Under certain conditions, the law of New York State grants plaintiffs the right to recover for false, defamatory statements of fact which injure their reputations. The law in effect recognizes that the reputations of individuals are sometimes important enough to warrant legal protection.

On the other hand, the law of New York and our federal Constitution guarantee to individuals, and particularly to the press, which, of course, includes Adweek, freedom of speech. Because of these state laws and constitutional protections, even though a writer, editor, or publisher may have libeled a particular person, that is, published a false and defamatory statement of fact which actually injured plaintiff's reputation, the vital interest of the public in being timely informed about newsworthy matters may require that a person's right not to be libeled has to give way to the writer's, editor's, and publisher's protected constitutional right to report information freely to the public, even if the information may be incorrect in some respect.

Erroneous statements and falsehoods are inevitable in a free press and must be protected to some degree if the free press is to have the "breathing space" that it needs to survive. Thus, the Constitution and the State of New York recognize that imposing legal liability for even negligent errors in the press would run the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. To put it another way, our law recognizes that a rule which compelled a publisher to guarantee the accuracy of its factual assertions could lead to intolerable self-censorship as the only alternative to liability.

Allowing writers, editors, and publishers to avoid liability only by proving the truth of all defamatory statements does not accord adequate protection to the First Amendment liberties that I have discussed. The First Amendment requires that we protect some falsehoods in order that we may ultimately protect important speech and communication.

New York Times v. Sullivan, 376 U.S. 254 (1964; Gertz v. Robert Welch, 418 U.S. 323 (1974); court's charge in Sharon v. Time, Inc., 83 Civ. 4660 (S.D.N.Y. 1985); court's charge in Hepps v. Philadelphia Newspapers, Inc., No. 36 May Term 1976 (Pa. Ct. of Common Pleas, Chester Co. 1981).

-- Lehman v. A/S/M Adweek (D)

"Clear and convincing evidence" means the measure or degree of proof which produces in your mind a firm belief or conviction as to the truth of the allegations sought to be established. This is a higher standard of proof than the usual "preponderance of the evidence" that an alleged fact is true, then you may not find that fact to be true by clear and convincing evidence.

The First Amendment to the United States Constitution provides for the protection of certain rights extremely precious in our society by guaranteeing freedom of the press,

speech, assembly and religion. The freedoms guaranteed by the First Amendment are essential freedoms in a democracy like ours. The guarantees of freedom of speech and press are not for the benefit of the press so much as for the benefit and protection of all of us. Television broadcasts are within the constitutional free press and free speech guarantees.

Each of us has only limited time to inform ourselves about the issues and problems that affect our lives. We depend on the press and other news media (including television) to inform us about society's problems and controversial issues. Without such information, most of us would be unable to vote intelligently or to form opinions on matters of public interest. Therefore, freedom of speech and press assures that we can maintain an open and free society.

If the law were to impose liability on the news media simply because a statement or report is false and defamatory, there would be a real danger that the news media would be discouraged from exercising their constitutional rights. It is for this reason that we require the plaintiff in this case, Merco Joint Venture, to prove something beyond falsity and defamatory meaning – namely that the defendants broadcast with a high degree of awareness of probable falsity.

In the abstract, it may not seem "fair" to you that the law prohibits the plaintiff from recovering damages even when it may have proven that information broadcast was false and defamatory. But "fairness" is not at issue in this case. Our law reflects the founding fathers' view that our nation is best served by permitting the news media and its reporters the freedom to make mistakes, so long as they do not know the information they are publishing is probably false. Thus, you may not answer the above question "Yes" as to any of the defendants unless you are clearly convinced that they published with a high degree of awareness that their information was probably false.

-- Merco Joint Venture v. Kaufman (D)

**B. Libel/Slander Defined**

Editor's Note: *The instructions from Sharon, Ross and Calhoon all define defamation by what it is and, more importantly, what it is not. All three instructions tell the jury that unpleasant, uncomplimentary or embarrassing statements are not necessarily defamatory, nor are statements that hurt the plaintiff's feelings. The Calhoon instruction defines what is defamatory of an individual versus what is defamatory of a corporation. The Prozeralik, MMAR and Gray instructions concisely define defamation. The Malson instruction defines slander.*

A communication is defamatory if it tends to expose a person to hatred, ridicule or contempt – that is, if it tends to harm the reputation of that person so as to lower him in the estimation of the community or to deter others from associating or dealing with him. Not every unpleasant or uncomplimentary statement is defamatory. A publication that is

unpleasant, offensive, or embarrassing, or that hurts the plaintiff's feelings, is not necessarily defamatory. To be defamatory, a statement must tend to bring plaintiff into disrepute, or must tend to prejudice the plaintiff in the eyes of a substantial part of the community.

-- Sharon v. Time, Inc. (C)

Defamation is an invasion of the interest in reputation of a person resulting from libel or slander. In this case, plaintiff seeks to recover damages for defamation from libel.

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or disgrace, or which causes such party to be shunned or avoided, or which has a tendency to injure such party in such party's occupation.

A statement that is merely unpleasant, annoying or embarrassing to a party, or merely hurts his feelings is not defamatory.

Western Broadcast Co. v. Times Mirror Co., 14 Cal. App. 3d 120, 125, 57 P.2d 977 (1936) (words are not defamatory merely because they are "unpleasant or hostile" toward an individual; Washburn v. Wright, 261 Cal. App. 2d 789, 799, 88 Cal. Rptr. 224 (1988) (to establish defamation it is not sufficient that the words, if believed, would stimulate "strong feelings of distaste" in some members of the community); Gang v. Hughes, 111 F. Supp. 27, 29-30 (S.D. Cal. 1953), aff'd. 218 F.2d 437 (9th Cir. 1954) (to establish defamation "[i]t is not sufficient, standing alone, that the language is unpleasant and annoys or irks plaintiff, and subjects [her] to jests or banter, so as to effect [her] feelings[.]"); Sanford, Libel & Privacy (1987) at 77-78 ("[s]tatements that only annoy, embarrass, hurt feelings, are unpleasant . . . are not libelous[.]") (footnotes omitted.)

-- Ross v. Santa Barbara News Press (D)

The first question for you to decide as to each broadcast is whether Defendant's statements were defamatory. A statement is defamatory if it tends to expose the Plaintiff to public hatred, contempt, ridicule, or disgrace. That is, if it would tend to lead the average person in the community to form an evil or bad opinion of the Plaintiff. A statement is also defamatory if it tends to discredit the Plaintiff in the conduct of his occupation, profession, trade, or office.

-- Prozeralik v. Capital Cities Comm., Inc. (C)

The first element of their defamation claim which the plaintiffs must prove is that the statements in the news reports about which they complain are defamatory to the plaintiffs. A statement is defamatory to an individual if it is likely to expose him to public hatred, contempt, or ridicule, or tends to deprive him of public confidence, or could injure him in his occupation or profession. A statement is defamatory to a corporation if it tends

to harm the reputation of that corporation so as to directly affect its credit or property or cause it monetary injury.

Not every unpleasant or uncomplimentary statement is defamatory. It is not enough that the broadcasts were unpleasant to or annoyed the plaintiffs, or irked them, or subjected the individual plaintiff to jest or banter so as to affect his feelings, nor is it enough that the plaintiffs might have preferred that the broadcasts not have occurred. In order for you to find that statements in the broadcasts were defamatory, you must find that they tended to lower the opinion held of the plaintiffs in the minds of reasonable viewers of the broadcasts.

In determining whether any statements in the broadcasts are defamatory, you must look at the news report as a whole to decide whether, in the context of the whole report, a statement is or is not defamatory.

-- Calhoon v. Palmer Comm. Inc. (C)

To "defame" or to make a "defamatory statement" means to make a statement that tends (i) to injure a person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury, (ii) to impeach any person's honesty, integrity, virtue, or reputation and thereby expose the person to public hatred, ridicule, or financial injury, or (iii) to injure or harm a particular business. In judging whether a statement is defamatory or has the potential to defame, you must construe the statement as a whole in light of the surrounding circumstances and in the context of the entire Article, giving to all the words contained therein their ordinary meaning as read and construed by an average reader of ordinary intelligence.

-- MMAR Group v. Dow Jones Co., Inc. (C)

Slander is a false or malicious unprivileged publication, other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted or punished for crime.

2. Imputes in him the present existence of an infectious, contagious or loathsome disease.

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.

4. Imputes to him impotence or want of chastity; or

5. Which, by natural consequences, causes actual damage.

-- Malson v. Palmer Broadcasting Group (C)

"Statements couched as opinions which are capable of being proven true or false may constitute libel; conversely, statements couched as opinions which are not capable of being proven true or false may not constitute libel."

-- Merco Joint Venture v. Kaufman

Under Texas law, libel is a defamation expressed by broadcasting, which tends to injure a living person's reputation and thereby exposes the person to public hatred, contempt, or ridicule, or financial injury, or to impeach any person's honesty, integrity, virtue or reputation and thereby expose the person to pubic hatred, ridicule or financial injury.

Although the definition of libel speaks in terms of a person, it applies to a corporation as well.

To determine whether a statement is defamatory, it must be construed in light of the surrounding circumstances and judged upon how a person of ordinary intelligence would perceive the entire statement. You, as a Juror, must not do anything to extend the effect or the meaning of the language used in the broadcast.

Statements couched as opinions which are capable of being proven true or false may constitute defamation; conversely, statements couched as opinions which are not capable of being proven true or false may not constitute libel.

-- Kastrin v. CBS Inc. (C)

As I have stated, the first element of plaintiff's claim that he must prove is that the statement had a defamatory meaning. Again you are reminded that you must consider each statement separately as to whether it has a defamatory meaning.

A statement is defamatory if it injures a person's reputation, or exposes him to public hatred, contempt or ridicule or renders him odious, contemptible or ridiculous.

In determining whether a statement is capable of defamatory meaning, the words should be taken in their ordinary sense and as they would be generally understood and read in the context in which they appear.

Plaintiff has the burden of proving the first element of his claim – defamatory meaning – by a preponderance of the evidence as to each statement.

-- Gray v. St. Martin's Press (D)

**C. "Libel Proof" Plaintiff**

Editor's Note: *The Ross instruction is elegant in its simplicity and directs the jury to the concept that a libel case focuses on the plaintiff's reputation. The three instructions proposed by the defense in the Padilla case invite the jury to consider whether (1) the plaintiff's past reputation was so bad that it could not be further harmed, (2) the truth not contained in the story is as damaging or more damaging to the plaintiff than the false statements contained in the story and (3) the plaintiff's reputation was more damaged by the true statements in the article than by the false statements.*

The interest of the plaintiff in a libel case is his reputation. In determining the amount of damage that a plaintiff has incurred because of a libelous publication, you must take into account the plaintiff's prior reputation. If you find in this case that the reputation of the plaintiff has already been damaged or tarnished by adverse events or publicity prior to publication of the articles, then you may consider such proof in determining any amount to be allowed as damages, if any.

Smoky v. Record Pub. Co., 185 Cal. 565, 567, 198 P.2d 1 (1921) (evidence of plaintiff's "bad reputation" is admissible to mitigate his damages); Hearne v. DeYoung, 132 Cal. 357, 362 (1901) (same); R. Sack, Libel, Slander, and Related Problems, at 358-59 (1980) ("[t]he fact the plaintiff already has a bad reputation will tend to show that his reputation has not been substantially affected by additional derogatory communication").

-- Ross v. Santa Barbara News Press (D)

In determining whether statements made by Conroy Chino and broadcast by KOAT defamed Roberta Padilla, you must examine Robert Padilla's reputation and determine whether the statements injured her reputation. You may find that at the time of the broadcast Roberta Padilla had such a bad reputation for embezzling that the statements concerning embezzling made by Conroy Chino and broadcast by KOAT did not further harm her reputation. If you so find, you must return a verdict in favor of Conroy Chino and KOAT as regards their statements about embezzling.

You may find that at the time of the broadcast Roberta Padilla had such a bad reputation for lying that the statements concerning lying made by Conroy Chino and broadcast by KOAT did not further harm her reputation. If you so find, you must return a verdict in favor of Conroy Chino and KOAT as regards their statements about lying.

Restatement (Second) of Torts 559; Cardillo v. Doubleday & Co., Inc., 518 F.2d 638, 639 (55 U.S.L.W. 2281 (D.N.J. 1986)); Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 928-29 (C.D. Cal. 1982).

* * *

If you find that the statements made by Conroy Chino and broadcast by KOAT were false and damaging to Roberta Padilla's reputation, you must then decide if the false

statements were more damaging than true statements would have been. If you find that the truth would have been as damaging as the false statements, or more damaging, you must return a verdict in favor of Conroy Chino and KOAT.

See, e.g., Restatement (Second) of Torts 559; Karkala v. W.W. Norton & Co., 618 F. Supp. 152, 155 (S.D.N.Y. 1985). ("A reader would have no better impression of [the plaintiff] even if his version of the truth were substituted for the author's . . . assuming arguendo that the complained statements are inaccurate, they are not damaging").

* * *

You may find that some of the statements contained in the broadcast were true while others were false. If so, you must then decide which statements were more damaging to Roberta Padilla's reputation – the true statements or the false ones. If you find that the true statements damaged Roberta Padilla's reputation so much that the false statements added no further meaningful injury, then you must return a verdict in favor of Conroy Chino and KOAT.

Gertz v. Welch, 418 U.S. 323, 347 (1974); Marchiondo v. Brown, 98 N.M. 394, 403, 649 P.2d 462, 471 (1982); Restatement (Second) of Torts §§ 558 and 559; Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303 (2d Cir. 1986); Schiavone Construction Co. v. Time, Inc., 646 F. Supp. 1511, 55 U.S.L.W. 2281 (D.N.J. 1986).

-- Padilla v. KOAT TV (D)

**D. Burden of Proof/Clear and Convincing**

Editor's Note: *The Desai and Galley instructions discuss the conceptual difference between preponderance of the evidence and clear and convincing evidence. The Frey instruction compares these two evidentiary standards with a third standard with which jurors are more familiar -- proof beyond a reasonable doubt -- to give the jurors a reference point to understand the preponderance and clear and convincing standards. The Westmoreland, Masson, Dalbec and Prozeralik instructions all apply the evidentiary standards to the elements of the tort. These four instructions split on plaintiff's evidentiary burden of proving falsity. The Westmoreland, Dalbec and Prozeralik instructions all state that plaintiff must prove falsity by clear and convincing evidence. The Masson instruction (which is the most recent instruction) provides that plaintiff must show falsity by a preponderance of the evidence.*

You must be concerned not only with the rules of law I give you but also with what the law calls the burden of proof. The phrase "burden of proof" refers to the obligations to persuade you.

It is used in two senses: first, it identifies which party must persuade you; second, it describes how firmly you must be convinced before you may render a verdict in favor of

the party who bears the burden of proof. As to the first question – which party must persuade you – the burden of proof is on the plaintiff, Mr. Desai. That means if Mr. Desai has not convinced you of any issue, you must find for Mr. Hersh on that issue.

The second question is: how firmly must you be convinced before you may find for Mr. Desai on any issue?

Mr. Desai has to prove certain aspects of his claim by what the law calls a "preponderance of evidence," and one aspect by what the laws calls "clear and convincing evidence."

What do we mean by a "preponderance of the evidence?" Something has been demonstrated by a fair preponderance of the evidence if, after considering all the relevant evidence, you find it more probable than not that it is true.

Clear and convincing evidence is a higher standard to meet than proof by a preponderance of the evidence. To be "clear and convincing" the evidence must leave no substantial doubt in your mind. Clear and convincing evidence is proof that establishes in your mind not only that the existence of a fact is probable but that it is highly probable.

In considering whether Mr. Desai has proved each element of his case, you must apply the appropriate burden of proof. I will now instruct you concerning those elements that Mr. Desai must prove to you, and the burden of proof that applies to each.

-- Desai v. Hersh (C)

The phrase "burden of proof" refers to the obligation to persuade the jury.

It is used in two senses: first to identify which party must persuade the jury; secondly, it sets the standard of how firmly convinced the jury must be before it may render a verdict in favor of the party who bears the burden of proof.

As to the first question, the burden of proof is on the plaintiff. That means – if the plaintiff has not convinced you of any issue, you must find for the defendants on that issue. And if plaintiff does not prove every element to you, you must award the verdict to the defendants.

The second question is: how firmly must you be convinced before you may find for the plaintiff on any issue? The answer is not the same for each of the elements. I just listed for you the five elements that plaintiff must prove in order to win your verdict. As to the first two and the last, there is one standard; as to the third and fourth, falsity and the defendants' state of mind, there is another.

As to the question (i) whether the statements made by the broadcast had a defamatory meaning, (ii) whether those statements were about General Westmoreland, and (iii) whether his reputation was harmed or damaged by those statements, plaintiff must

prove those elements to you – "by fair preponderance of the evidence."

What do we mean by "a fair preponderance of the evidence?" A fact has been demonstrated by a fair preponderance of the evidence if, after considering all the relevant evidence, you find it more probable than not that the fact is true. You judge this by the quality and persuasiveness of the evidence.

If the evidence persuades you that a questioned fact was more likely true than not, then the party who has the burden of proving that fact has met his burden of proof as to that fact. If, however, the evidence is evenly balanced between the parties so that you cannot decide whether the fact is true or not, then the party who has the burden of proof has failed to meet his burden and you must find that fact against him.

As to the third and fourth elements – whether the broadcast's statement was false – and whether the defendants published with the prohibited state of mind, plaintiff must prove these elements to you by "clear and convincing evidence."

Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence. Clear and convincing proof leaves no substantial doubt in your mind. It is proof that establishes in your mind not only that the existence of a fact is probable but that it is highly probable. Clear and convincing proof must be strong and compelling proof, not merely proof that the existence of a fact is more likely than not. On the other hand, it is not as high a standard as the prosecutor must meet in a criminal case, where a criminal defendant may not be convicted unless the jury finds him guilty beyond a reasonable doubt. You should understand these words as carrying their everyday meaning. You may find for plaintiff only if his proof is clear and convincing.

-- Westmoreland v. CBS (C)

In order to recover in this case, plaintiff must prove each of the following elements. If you find plaintiff has proved an element as to some but not all of the challenged quotations, you may continue with your application of these elements only as to the quotation or quotations that satisfied the previous element.

First, Mr. Masson must prove by a preponderance of the evidence that one or more of the five challenged quotations defamed him.

Second, Mr. Masson must prove by a preponderance of the evidence that one or more of the challenged quotations is a false quotation as I will define it for you in a moment.

Third, Mr. Masson must prove by a preponderance of the evidence, that the defendant was aware at the time of publication that the challenged quotations defamed the plaintiff.

Fourth, Mr. Masson must prove by clear and convincing evidence that, at the time of publication, the defendant:

a. knew the quotation was false, or

b. published the quotation with reckless disregard as to truth or falsity.

Reckless disregard as to truth or falsity means that the defendant must have in fact had serious doubts about the truthfulness of the statement at the time of publication.

Fifth, Mr. Masson must prove by a preponderance of the evidence that the false, defamatory quotation caused him to suffer damages.

Proof by "clear and convincing" evidence requires a higher degree of proof than does proof by a preponderance of the evidence. Clear and convincing evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

-- Masson v. New Yorker (C)

Plaintiffs must prove each of the elements of their claims of defamation and for invasion of privacy by clear and convincing evidence. Clear and convincing evidence or proof by convincing clarity involves a degree of belief greater than the burden of proof by a fair preponderance of the evidence which you have heard the court explain in regard to other claims plaintiffs have made. Clear and convincing evidence requires proof that is "strong, positive, and free from doubt," and "full, clear, and decisive." It may also be described as "clear, precise, and indubitable," "unmistakable and free from serious doubt," and "proof which persuades the trier of fact "that the . . . contention is highly probable."

Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E. 2d 161, 175 (1975); DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318, 323 (1980); Manuel v. Fort Collins Newspapers, Inc., 599 P.2d 931, 933 (Colo. App. 1979), rev'd on other grounds, 631 P.2d 1114 (Colo. 1981).

-- Galley v. Seattle Times Co. (D)

The news report which is the subject of this litigation was broadcasted by WLWT-TV5 on the 11:00 p.m. newscast on December 12, 1989. WLWT-TV5, Channel 5, is owned and operated by the defendants, Multimedia, Inc. and Multimedia Entertainment,

Inc.

Plaintiff, H. Garrett Frey, claims that the statements made about him in the December 12, 1989 Channel 5 broadcast were false and that Channel 5 not only failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the broadcast, but that the defendants' broadcast about him on December 12, 1989 on Channel 5 was made with actual malice. Defendants deny these claims.

In this case, your job as Judges of the facts is to determine whether the plaintiff, H. Garrett Frey, has proved by the degree of proof required by law certain issues of fact.

There are three degrees of proof: 1) Proof by the preponderance of the legal evidence; 2) Proof by clear and convincing evidence; and 3) The highest degree of proof, which applies to criminal cases, is proof beyond a reasonable doubt and is defined as proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

This case is a civil case. You will, therefore, be concerned with the first two degrees of proof 1) "by a preponderance of the legal evidence"; and 2) "by clear and convincing legal evidence."

Proof by a "preponderance of the legal evidence," is proof by the greater weight of the legal evidence; that is, legal evidence that you believe because it outweighs or overbalances in your minds the legal evidence opposed to it and because it is more probable, more persuasive, or of greater probative value. If the weight of the legal evidence is equally balanced or if you are unable to determine which side of an issue has been proved by a preponderance of the legal evidence, the party who has the burden of proof has not established such issue by a preponderance of the legal evidence.

Proof by "clear and convincing legal evidence" is that measure or degree of proof which produces in your mind a firm belief or conviction that the facts sought to be established are true. Clear and convincing legal evidence requires proof which is more than a mere "preponderance of the legal evidence," but not to the extent of such certainty as is required by the degree of proof "beyond a reasonable doubt" applicable in criminal cases.

-- Frey v. Multimedia, Inc. (C)

To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence in the case, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

If you find that the credible evidence on a given issue is evenly divided between the parties, then you must decide that issue against the party having this burden of proof. That is because the party bearing this burden must prove more than simply equality of evidence – he must prove the element at issue by a preponderance. On the other hand, the party with this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof – that what the party claims is more likely true than not true – then the element will have been proved by a preponderance of the evidence.

* * *

It is plaintiff's burden to persuade you by "clear and convincing evidence" that the statement in question was false. If you conclude that Mrs. Dalbec has failed to establish her claim of falsity by clear and convincing evidence, you must decide against her on the issue you are considering.

What does "clear and convincing evidence" mean? Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence, where you need believe only that a party's claim is more likely true than not true. On the other hand, "clear and convincing" proof is not as high a standard as the burden of proof applied in criminal cases, which is proof beyond a reasonable doubt.

Clear and convincing proof leaves no substantial doubt in your mind. It is proof that establishes in your mind, not only the proposition at issue is probable, but also that it is highly probable. It is enough if the party with the burden of proof establishes his claim beyond any "substantial doubt," he does not have to dispel every "reasonable doubt."

Sand et al., Modern Federal Jury Instructions, #73-3; Anderson v. Texas, 441 U.S. 418 (1979); Sharon v. Time, Inc., 83 Civ. 4660 (S.D.N.Y. 1985) (jury charge); Disner v. Westinghouse Electric Corp., 726 F.2d 1106, 1111 (6th Cir. 1984); Callahan v. Westinghouse Broadcasting Co., Inc., 372 Mass. 582, 363 N.E.2d 240, 243-44 (1977); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161, 175 (1975).

-- Dalbec v. Gentlemen's Companion, Inc. (D)

The Plaintiff has the burden of proof and must prove to your satisfaction each element that I will describe to you by the legal standards which I will now set forth. One of those standards involves the fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you jurors find to be worthy of belief. A preponderance means the greater part of such evidence. Now, that does not mean the greater number of witnesses or the greater time taken by either side. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and the effect that it has on your minds.

The law requires that in order for the Plaintiff to sustain his burden of proof, that

the evidence that supports his claim must appeal to you more nearly representing what took place than that opposed to his claim. If it does not, ladies and gentlemen, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must decide the question in favor of the Defendant. If the evidence favoring the Plaintiff--Plaintiff's claim outweighs the evidence opposed to it, then you must decide in favor of the Plaintiff.

Now, with reference to the issues of falsity and actual malice, Plaintiff has the burden of proving those elements by clear and convincing evidence. Clear and convincing evidence is a more demanding standard of proof than a fair preponderance of the credible evidence standard of proof. Clear and convincing evidence is evidence that satisfies you that there is a high degree of probability that when Defendant made the statements, Defendant knew that they were false or acted with reckless disregard of whether they were true or false.

-- Prozeralik v. Capital Cities Comm., Inc. (C)

I shall shortly instruct you on the elements of Plaintiffs' claims. First a few words about the meaning of burden of proof in this case.

Plaintiffs have the burden of proving their claims for defamation and false light invasion of privacy by what is called "clear and convincing" evidence. That means that plaintiffs have to produce evidence which, considered in light of all the facts, leads you to believe that what plaintiffs claim is highly probable. That is, Plaintiffs' evidence must be so clear, direct and convincing as to enable you to come to a clear conclusion of the truth of the precise facts in issue. If plaintiffs fail to meet this burden, your verdict must be for defendants.

Those of you who have sat on criminal juries have heard of proof beyond a reasonable doubt. That requirement does not apply to a civil case and you should therefore put it out of your mind. Likewise, some of you have sat as jurors in civil cases wherein the "preponderance of evidence" or "more likely than not standard" applied. That standard does not apply to the defamation or invasion of privacy claims in this case.

-- Paul v. The Hearst Corporation (C)

## VIII. PUBLICATION

Editor's Note: *The Lansdowne instruction tells the jury that a publication is a communication made to someone other than the person defamed. The Prozeralik instruction combines the definition of publication with the plaintiff's burden of proof to show that the defendant published the statements.*

Plaintiff must prove by a fair preponderance of the credible evidence that the Defendant published or broadcast the statements, meaning that the Defendant communicated the statements to someone other than the Plaintiff.

-- Prozeralik v. Capital Cities Comm., Inc. (C)

An action for defamation has as its purpose giving an injured party or Plaintiff a chance to clear his good name. A libel, very simply, is a written defamation.

A defamation is a false publication causing injury to a person's reputation or exposing him to public hatred, contempt, ridicule, shame, or disgrace or affecting him adversely in his trade or business.

Publication is a communication made to one other than the person defamed. There must be some publication of the defamation. A publication is false when it is not substantially true.

-- Lansdowne v. Beacon Journal (C)

## IX. OF AND CONCERNING

Editor's Note: *A critical element of any libel claim is that the publication complained of be "of and concerning" the plaintiff.*

### A. Generally

Yet another "element" of the libel claim that each plaintiff must prove is that the statements complained of were, in fact, reasonably understood by the reader as referring to that particular plaintiff. Some of the statements at issue in this action do not mention any of the plaintiffs by name. Rather, they are general statements about certain categories of religious organizations or about individuals involved in such organizations. Each plaintiff must prove by a preponderance of the credible evidence that the average reasonable reader would have understood that each of the statements in the book were, in the words of the law, "of or concerning" that particular plaintiff, and that the statements were, in fact, so understood by some readers. This means that a statement must be made about the plaintiff personally for him to recover on the basis of that statement.

If you find that certain statements are false and defamatory, but you also find that those statements do not refer to a particular plaintiff personally, that plaintiff cannot recover, and you must return a verdict for the defendants. It would not be sufficient if the statement simply disparaged a group of which a particular plaintiff was a member, if a reader would not reasonably understand the statement as referring to any particular member of the group. As the size of a group increases, it becomes less likely that a general statement would reasonably be understood to refer to any one individual or any one corporation which is included in the group.

Some statements at issue refer to one plaintiff by name, but do not mention the others. Here, again, you must determine whether an average reasonable reader would interpret – and did interpret – that statement as referring to each named and unnamed plaintiff.

-- New Testament Missionary Fellowship v. E.P. Dutton & Co. (D)

The plaintiff must also prove that the article was published of and concerning him. The plaintiff must demonstrate that the language in the article alleged to have been libelous was understood by members of the community to refer to him.

In determining whether the article was of and concerning the plaintiff, you must examine the full significance and meaning of the article and determine that the article was calculated to lead persons reading it to believe it was referring to the plaintiff.

-- Lansdowne v. The Beacon Journal Publishing Company (C)

The second element of plaintiffs' defamation case is the requirement that each of them prove by clear and convincing evidence that the false and defamatory information was of and concerning the particular plaintiff. Each plaintiff must submit convincingly

clear proof that the allegedly libelous statement refers to that particular plaintiff personally. The identification of the plaintiff as a target of that statement must be certain and apparent from the words themselves, after you have invested the words of the article with their natural and obvious meaning but not extended those words by implication or by the conclusions of the plaintiff. A plaintiff cannot by implication identify himself or herself as the target of an alleged libel if the allegedly libelous statement does not point to him or her. It is not necessary that the plaintiff be mentioned by name, however, you must be able to conclude from reviewing the article that the article is aimed against that plaintiff.

-- Galley, et al. v. Seattle Times Company (D)

Plaintiff must also prove by a preponderance of the evidence that the defamatory message or impression broadcast by ABC was, in the words of the law "of and concerning" him. This means that the defamatory message or impression must have been a message or impression about Mr. Lasky personally. It is insufficient if the message or impression concerned a group of which Mr. Lasky was a member. The defamatory message or impression must have been broadcast about Mr. Lasky personally for him to prevail on this issue.

In sum, plaintiff prevails on this issue if you find that plaintiff has established by a preponderance of the evidence that, taking the program as a whole, the average viewer would have understood it to convey the defamatory message or impression about him that he has alleged. If you do not so find, then your verdict must be for the Defendant on this issue.

-- Lasky v. ABC (C)

As the second element, plaintiff must prove, also by a preponderance of the evidence, that the defamatory statement of the broadcast was, in the words of the law, "of and concerning" him. This means that the defamatory message must have been a message about General Westmoreland personally.

It would not be sufficient if the statement accused a group of which the plaintiff was a member. For example, it would not be sufficient if the broadcast accused the military, the Army, MACV or military intelligence. Nor would a statement be defamatory of the plaintiff merely because it accused officers for whom he was responsible as their commander. The defamatory statement must be made about the plaintiff personally for him to prevail on this issue.

-- Westmoreland v. CBS (C)

The second element that plaintiff bears the burden of proving as to each statement is that the statement is "of and concerning" the plaintiff.

Three of the statements - the statements about dictating memoirs, overcharging and the phone calls - name the plaintiff and thus, those three statements are "of and concerning" the plaintiff.

Two of the statements - the ones concerning the Spanish office and Zeller - do not name the plaintiff.

You will recall that Statement 4, which refers to the Spanish office, reads as follows:

> "And the Gray and Company employees in Spain were to be convinced that the office was used as a money laundering operation for the Reagan administration's private intelligence network."

The statement does not state who may have used the Spanish office as a money laundering operation. To meet his burden of showing that that statement was "of and concerning" him personally, the plaintiff has the burden of proving that that statement was intended to refer to him, not to Gray & Company or someone else who may have used the Spanish office for money laundering and that readers understood the statement as referring to plaintiff personally.

You will recall that the Statement 5, which refers to Mr. Zeller, reads as follows:

> "One Gray and Company executive in a position to know said that Gray and Company was making payments to Zeller."

In order to find that this statement is "of and concerning" the plaintiff, you must determine first, that it was intended to refer to him personally, rather than Gray and Company and second, that persons who read the statement understood it to refer to plaintiff personally, rather than to Gray & Company.

The plaintiff must prove by the preponderance of the evidence that these two statements were "of and concerning" him.

The five elements of a libel claim are interrelated. To recover, plaintiff has the burden of proving that the particular portion of the statement that he claims is defamatory was both false and "of and concerning" the plaintiff, that the defendant knew that that particular portion of the statement was false or had a high degree of awareness that it was probably false and that plaintiff suffered damage to his reputation as a result of that particular portion of the statement. In other words, plaintiff has to prove all five of the elements with respect to the portion of the statement that he claims is defamatory.

-- Gray v. St. Martin's Press (D)

In order to be defamatory of a specific plaintiff, the challenged statement must be "of and concerning" that specific plaintiff. It is not sufficient if the statement simply

referred to a group of which a plaintiff was a member, if a reader would not reasonably understand the statement as referring to any particular member of the group. As the size of a group increases, it becomes less likely that a general statement would reasonably be understood to refer to any one individual or any one corporation which is included in the group.

Some statements at issue refer to one plaintiff, but do not mention the others. Here, again, you must determine whether an average reasonable reader would interpret – and did interpret – that statement as referring to each named and unnamed plaintiff.

-- Kastrin v. CBS Inc. (D)

The second "element" of the libel claim which must be proven by plaintiff is the publication by defendant of statements "of and concerning" A.J. Faigin. That is, plaintiff must prove that the statements he complains about were about him personally. I instruct you that plaintiff may not recover against defendant for any statements published in *Armed & Dangerous* which were not reasonably understood by the readers of *Armed & Dangerous* to refer to plaintiff personally. Plaintiff must prove this element by a preponderance of the evidence.

-- Faigin v. Kelly (D)

The first element of her claim which the plaintiff must prove is that the statements in the news reports about which she complains are about her and are defamatory to her. Defamation is considered personal. Therefore, Virginia Malson cannot recover for defamatory statements, if any, that KFOR-TV made about her husband, Glenn Malson, or about M&M Drum Company. A statement broadcast by KFOR is defamatory to the plaintiff if you find that viewers reasonably understood the statement in the news reports to refer to Virginia Malson and to accuse her of some wrongdoing with respect to industrial discharge from M&M Drum Company.

It is stipulated by the parties that the broadcasts in question did not mention plaintiff, Virginia Malson, by name. This does not exclude the findings that the broadcasts in question actually were of and concerning the plaintiff, Virginia Malson.

Plaintiff, Virginia Malson, by the greater weight of the evidence must prove that the broadcasts in question were of and concerning her.

-- Malson v. Palmer Broadcasting (D)

**B. Fiction**

The magazine piece in issue does not name the plaintiff. In order to recover, therefore, the plaintiff must show, by a preponderance of the evidence, that the writing was published of and concerning her.

In order to so find, you must determine that the article was intended to refer to the plaintiff and that it is reasonably probable that members of the public who read the article would understand it as referring to her. A libel may be published of an actual person by a story that is intended to deal with fictitious characters, if the characters or pilot bear resemblance to actual persons and events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person. It is not enough that the readers of a story recognize one of the characters as resembling an actual person, unless they reasonably believe that the character is intended to portray that person.

If the work is reasonably understood as portraying an actual person, it is not decisive that the author did not so intend. The fact that the author or publisher states that the work is exclusively one of fiction and in no sense applicable to living persons is not decisive if readers actually and reasonably understand otherwise. Such a statement, however, is a factor to be considered by the jury in determining whether readers did so understand it.

In determining whether the passages complained of were reasonably understood as statements of fact about the Plaintiff, Kimberli Jayne Pring, you must consider the story as a whole. You must not dwell upon isolated parts of the story. Instead, you should give to each part its proper weight so that the scope, content and object of the whole story is considered and given that meaning which would be placed on it by persons of average intelligence and understanding.

In determining whether the passages complained of were reasonably understood as statements of fact about the plaintiff, Kimberli Jayne Pring, you are to consider what the statement, in its plain and natural meaning and construed in its usual sense, meant to the person or persons who read it. You must make this determination without regard to how the Defendants intended the passages to be understood.

-- Pring v. Penthouse (C)

## X. PLAINTIFF'S STATUS

### A. Public Figure Plaintiff

Editor's Note: *The issue of whether a plaintiff is a public figure is ordinarily a question of law to be determined by the trial court. There have been rare cases in which trial courts have submitted this issue to the jury for determination.*

Before there can be any liability on the part of a defendant, there must be a showing of fault on the part of that particular defendant. The degree of fault that plaintiffs must show depends upon the status of the particular plaintiff. Accordingly, as an initial matter, you must determine whether each of the plaintiffs holds the status of a "public figure" or "private figure." I will explain this important distinction to you in some detail.

The distinction between a "public figure" and a "private figure" is significant because the level of constitutional protection appropriate to defamation of a public person is higher and requires that a public figure may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Like public officials who run the risk of closer scrutiny, public figures may, because they have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved, invite attention and comment from the press.

In connection with this issue, you are instructed that a person or organization which is ordinarily not a public figure may become a public figure for limited purposes if that person or organization assumes a special prominence in the resolution of a public controversy or seeks attention in an attempt to influence the outcome of a controversy. An individual is not necessarily a public figure merely because he is the subject of a lawsuit, but he may involuntarily become a limited public figure for the purpose of a particular issue where he injects himself into a controversy and thereby becomes involved in a matter of public concern.

In determining whether a plaintiff should be deemed a public figure, you may consider such factors as whether that plaintiff has held press conferences, has written articles about the controversy, has been quoted in the press, has spoken publicly, has engaged in practices that were likely to attract public scrutiny, or has otherwise been the focus of public attention in a particular area of controversy.

However, if you find that a plaintiff has not thrust himself into a particular public controversy – such as a controversy over practices of a particular religious organization or a controversy involving parents who seek the return of their children from religious organizations or deprogramming – then that plaintiff should be deemed a "private figure."

-- New Testament Fellowship v. E.P. Dutton & Co. (D)

In connection with this issue, you are instructed that a person who is ordinarily not

a public figure may become a public figure for limited purposes if that person assumes a special prominence in a public controversy. An individual is not necessarily a public figure merely because he is the subject of a lawsuit, but he may involuntarily become a limited public figure for the purpose of a particular issue where he injects himself into a controversy and thereby becomes involved in a matter of public concern.

In determining whether a plaintiff should be deemed a public figure, you may consider such factors as whether that plaintiff has been quoted in the press, has engaged in practices that were likely to attract public scrutiny, or has otherwise been the focus of public attention in a particular area of controversy.

However, if you find that a plaintiff has not thrust himself into a particular public controversy – such as the controversy in this case, that is, factors involved in awarding an advertising account – then that plaintiff should be deemed a "private figure."

-- Lehman v. A/S/M Communications, Inc. d/b/a Adweek (D)

One of the issues which you are to determine is whether or not the plaintiff is a public figure. That is required because the level of constitutional protection appropriate to defamation of a public person is higher and requires that a public figure may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Persons who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, may be classed as public figures. Such persons may enjoy significantly greater access to channels of effective communication and have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Like public officials who run the risk of closer scrutiny, public figures may, because they have assumed roles of especial prominence in the affairs of society, or occupied positions of persuasive power and influence, or have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved, invite attention and comment.

However, with respect to a private individual, he or she has not assumed an influential role in ordering society, or by voluntary, purposeful activities has not attracted public attention or has not achieved general fame or prominence, so that he or she risks closer public scrutiny than might otherwise be the case. While an individual may achieve such pervasive fame or notoriety that he or she becomes a public figure for all purposes, it is also possible that an individual has voluntarily injected himself or herself into or is drawn into a particular public controversy and thereby has become a public figure for a limited range of issues. In either case, such persons have assumed special prominence in the resolution of public questions and are public figures.

Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public

figure in all aspects of his or her life.

-- Pring v. Penthouse (C)

Do you find from a preponderance of the evidence that with regard to the subject matter of the February 25, 1980, article in Information Systems News, Levine became a limited "public figure?"

Check one answer:

"Was a limited public figure" ___
"Was not a limited public figure" ___

CMP has the burden of proof as to this issue.

In connection with this issue, you are instructed that a person who is ordinarily not a public figure may become a public figure for limited purposes if that person assumes a special prominence in the resolution of a public controversy, seeks publicity from the news media or seeks to engage the public's attention in an attempt to influence the outcome of a controversy. An individual is not necessarily a public figure merely because he is the subject of a lawsuit, but may involuntarily become a limited public figure for the purpose of a particular issue where he injects himself into the forefront of a controversy and thereby becomes involved in a matter of public concern.

-- Levine v. Gutman (C)

The plaintiff herein is not a public official nor a public figure. A publisher of defamatory falsehoods about an individual who is neither a public official nor a public figure is liable in damages for actual injury to the individual when the assertion of the falsehood is the result of the publisher's negligence and when the substance of the assertion makes a substantial danger to reputation apparent. The standard to be applied in determining such negligence is the conduct of the reasonably careful publisher in the community or in similar communities under the existing circumstances.

-- Haskell v. Stauffer Communications, Inc. (C)

The law affords the press particularly broad protection where the plaintiff in a defamation lawsuit brought against a media defendant is a public figure. To recover even for a false, defamatory statement, a public figure such as plaintiff must establish by clear and convincing evidence that the statement was made with "actual malice," that is, with knowledge that the statement was false or with a reckless disregard for its truth or falsity.

Given that I have determined that Mr. Paul is a public figure and the broad protection afforded to the press when reporting on public figures, you cannot find in favor of Mr. Paul on his claim of libel unless he proves each of the following elements:

(a) the statement made by defendants about Mr. Paul had a defamatory meaning (I shall define what that means shortly);
(b) someone who read the statement understood its defamatory meaning;
(c) the statement actually was about Mr. Paul;
(d) the person who read the statement as defamatory understood the statement to apply to Mr. Paul;
(e) the statement was substantially false;
(f) the statement was not privileged (I shall explain what that means shortly);
(g) the defendants made the statement with actual malice, which I will define for you, in making the statement; and
(h) Mr. Paul suffered actual harm as a result of that statement.

Mr. Paul has the burden of proving each of these requirements.

-- Paul v. Philadelphia Magazine (D)

**B. Private Figure Plaintiff**

You are instructed as a matter of law that in defamation cases involving private persons, the Plaintiff must prove by clear and convincing evidence that the Defendant was guilty of negligence. In order to demonstrate negligence, the Plaintiff must prove by clear and convincing evidence that the Defendant did not act reasonably in attempting to discover the truth or falsity or defamatory character of the publication.

A newspaper and their reporters or news distributors are held to the standard and experience normally possessed by members of their profession. Although not conclusive, you may consider whether, based upon the standards of professional publishers, the defendant had reasonable grounds for believing that the statement made was true, whether a reasonably careful professional reporter would or should have checked upon the accuracy or defamatory character of the publication and whether the check . . . was thorough enough that a reasonably careful reporter would have been justified in concluding that the statement was substantially true.

Milkovich v. News-Herald, 15 Ohio St. 3d 292 (1984); Embers Supper Club, Inc. v. Broadcasting Co., 9 Ohio St. 3d 22 (1984); Lansdowne v. Beacon Journal Publishing Company, 32 Ohio St. 3d 176 (1985).

-- Lansdowne v. Beacon Journal (D)

## XI. DEFAMATORY MEANING

Editor's Note: *Defamatory meaning, or proof that a publication is "defamatory" or "libelous," is subject to a wide variety of formulations in giving instructions, although the gist of these approaches is essentially quite similar. Also, although at least three distinctive concepts are involved in such charge language -- defamatory meaning; meaning to the average reader or viewer; and meaning in the context of the work as a whole, including all aspects of the allegedly libelous publication or broadcasts -- in many instances all of these factors are lumped together without completely distinguishing among them. A sampling of this variety of relatively similar approaches is reflected in the first three sections below. For completeness, a charge of "innocent construction" is also provided, although today this standard rarely governs. Finally, certain special considerations are set forth in Section E. These include charge language excluding opinions and matters of public record from that which can be considered defamatory.*

### A. Generally

A communication is defamatory if it tends to expose a person to hatred, ridicule or contempt – that is, if it tends to harm the reputation of that person so as to lower him in the estimation of the community or to deter others from associating or dealing with him. Not every unpleasant or uncomplimentary statement is defamatory. A publication that is unpleasant, offensive, or embarrassing, or that hurts the plaintiff's feelings, is not necessarily defamatory. To be defamatory, a statement must tend to bring plaintiff into disrepute, or must tend to prejudice the plaintiff in the eyes of a substantial part of the community.

-- Sharon v. Time, Inc. (C)

A defamatory publication is one which tends to expose another person to contempt, to harm the person's reputation or to discourage others from associating or dealing with him.

In deciding whether the publication is defamatory, you must consider its plain and obvious meaning.

-- Marchiondo v. Journal Publishing Co. (C)

In order to defame another by language, the words printed must be defamatory or disparaging words. To have a defamatory effect, the language used must relate to the individual's conduct or character. The language must be such as would harm or destroy the individual's good name or reputation, or to disgrace him. Language is not to be forced or tortured in defamation cases in order to make it actionable. You must consider each statement plaintiff claims is defamatory in the context of the article as a whole. It is to be taken in its plain and ordinary sense. The person using the words must be presumed to have used the words in their ordinary import.

The fact that a person may be able by reading between the lines of a statement, to

discover some defamatory meaning therein is not sufficient to make it defamatory. In other words, if the language is not reasonably capable of conveying to the ordinary mind a defamatory meaning, there is no defamation.

-- DiGregorio v. Time, Inc. (C)

As I have stated, the first element of plaintiff's claim that he must prove is that the statement had a defamatory meaning. Again you are reminded that you must consider each statement separately as to whether it has defamatory meaning.

A statement is defamatory if it injures a person's reputation, or exposes him to public hatred, contempt or ridicule or renders him odious, contemptible or ridiculous.

In determining whether a statement is capable of a defamatory meaning, the words should be taken in their ordinary sense and as they would be generally understood and read in the context in which they appear.

Plaintiff has the burden of proving this first element of his claim – defamatory meaning – by a preponderance of the evidence as to each statement.

-- Gray v. St. Martin's Press (D)

A statement is "defamatory" if people in the community understand the words in it, in their normal usage, to harm the plaintiff's reputation or expose him to public hatred or ridicule. Examples of defamatory statements include those which falsely assert that plaintiff has committed a crime; that plaintiff is unfit to perform the duties of his employment; or that plaintiff lacks integrity or is dishonest in performing the duties of his employment.

-- Gray v. St. Martin's Press (C)

A communication is defamatory if any portion of it tends to so harm the reputation of that person as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. It is not necessary that the defamatory statement be the primary focus of the communication in order for the plaintiffs to succeed on their claim. The plaintiffs may recover on the basis of even a small portion of a communication, if it is defamatory. It is not a defense that that portion is not the primary focus of the communication or that other portions may be sympathetic to the plaintiff.

A communication is defamatory of a person if it tends to so harm the reputation of that person as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. Words are not defamatory merely because they are annoying or embarrassing to the person referred to in the communication.

-- Paul v. Hearst Corporation (C)

To "defame" or to make a "defamatory statement," means to make a statement that tends (i) to injure a person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury, (ii) to impeach any person's honesty, integrity, virtue, or reputation and thereby expose the person to public hatred, ridicule, or financial injury, or (iii) to injure or harm a particular business. In judging whether a statement is defamatory or has the potential to defame, you must construe the statement as a whole in light of the surrounding circumstances and in the context of the entire Article, giving to all the words contained therein their ordinary meaning as read and construed by an average reader of ordinary intelligence.

-- MMAR Group Inc. v. Dow Jones & Co. (C)

You are instructed that a statement is defamatory if it tends to (1) injure a living person's reputation and thereby expose him to public hatred, contempt or ridicule, or financial injury, or (2) impeach a person's honesty, integrity, virtue, or reputation and thereby expose him to public hatred, ridicule, or financial injury.

In deciding whether a statement is defamatory, you must construe the statement as a whole in light of the surrounding circumstances and in the context of the entire broadcast, giving to all the words contained in the broadcast their ordinary meaning as heard and construed by an average viewer of ordinary intelligence. You must not do anything to extend the effect or the meaning of the language used in the broadcast.

Not every unpleasant or uncomplimentary statement is defamatory. A statement that is abusive, unpleasant, offensive or embarrassing, or that hurts a person's feelings is not necessarily defamatory. A person's own reaction to the broadcast has no bearing on his reputation.

Nor is a statement defamatory because the plaintiffs would prefer that the broadcast had not occurred.

-- Kastrin v. CBS Inc. (D)

Defamation is communication to a person of false information tending to expose another living person to public hatred, contempt, or ridicule or to deprive another of the benefits of public confidence and social acceptance.

-- Haskell v. Stauffer Communications, Inc. (C)

A communication is defamatory of a person if it tends to so harm the reputation of that person as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. Words are not defamatory merely because they are annoying or embarrassing to the person referred to in the communication.

-- Paul v. Philadelphia Magazine (D)

To determine whether a statement is defamatory, it must be construed in light of the surrounding circumstances and judged upon how a person of ordinary intelligence would perceive the entire statement.

A statement is "disparaging" if, when heard as a whole, it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and (a) the publisher of the statement intends the statement to cast the doubt; or (b) the listener's understanding of the doubt was reasonable.

-- Merco Joint Venture v. Kaufman (C)

Not every critical or uncomplimentary statement is considered defamatory under the law. To be defamatory, the statement of fact must tend to injure the plaintiff's reputation. An assertion that is merely unpleasant, offensive or embarrassing or merely hurts someone's feelings is not defamatory. To be defamatory, a statement must tend to bring Mr. Faigin's reputation into disrepute.

Second, in order to be defamatory, the statement must communicate some fact about the person. It is not sufficient if it merely asserts a low opinion of the person. For example, if a newspaper or book said of me that I was a lazy or stupid judge or that my decisions were foolish or irresponsible, that would not be defamation; I could not base a lawsuit on it. If on the other hand it said that I had taken a bribe or had decided cases based on whether the lawyers were my friends, that would be accusing me of bad acts. It would be a defamatory statement of fact and could be the basis of a lawsuit for defamation. You may only base a verdict for plaintiff on statements which a reasonable person could have understood to have communicated verifiable, factual assertions concerning Mr. Faigin. In other words, statements must be provable as false before they can be the basis of a libel suit. In determining what factual assertions the book makes about Mr. Faigin, you must look at the book as a whole and must consider the context in which the statements were made, including analyzing the words used, the setting, and the larger social context – including that *Armed & Dangerous* is Mr. Kelly's autobiography.

In bringing this lawsuit, Mr. Faigin has identified to you what he contends were the defamatory statements about him. You must decide whether these specific statements in the book made any factual assertions about him.

-- Faigin v. Kelly (D)

A communication is defamatory if it tends to harm the reputation of another so long as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

-- Stecco v. Moore (D)

Defamation is language or conduct that tends to injure the plaintiff's reputation, or tends to diminish the esteem, respect, goodwill, or confidence in the plaintiff, or that excites derogatory feelings or opinions about the plaintiff.

-- Pollution Control Industries v. Howard Publications

A published statement is defamatory if it tends to injure the reputation of that person so as to expose him to public hatred, contempt and ridicule. Not every unpleasant or uncomplimentary statement is defamatory. A publication that is unpleasant, offensive, or embarrassing, or that hurts the plaintiff's feelings, is not necessarily defamatory. To be defamatory, a statement must tend to bring plaintiff into disrepute, or must tend to prejudice the plaintiff in the eyes of a substantial part of the community.

-- Schafer v. Time, Inc. (D)

The first element of her claim which the plaintiff must prove is that the statements in the news reports about which she complains are about her and are defamatory to her. Defamation is considered personal. Therefore, Virginia Malson cannot recover for defamatory statements, if any, that KFOR-TV made about her husband, Glenn Malson, or about M&M Drum Company. A statement broadcast by KFOR is defamatory to the plaintiff if you find that viewers reasonably understood the statement in the news reports to refer to Virginia Malson and to accuse her of some wrongdoing with respect to industrial discharge from M&M Drum Company.

Not every unpleasant or uncomplimentary statement is defamatory. It is not enough that the broadcasts were unflattering to or annoyed the plaintiff, or irked her, or subjected her to questions, or to jest or banter so as to affect her feelings, nor is it enough that the plaintiff might have preferred that the broadcasts not have occurred. In order for you to find that statements in the broadcasts were defamatory, you must find that they intended to lower the opinion held of the plaintiff in the minds of reasonable viewers of the broadcasts.

In determining whether the statements in the broadcasts are defamatory, you must look at the news reports as a whole to decide whether, in the context of the whole report, a statement is or is not defamatory.

-- Malson v. Palmer Broadcasting (D)

Not every unpleasant or uncomplimentary statement is defamatory. A publication that is unpleasant, offensive or embarrassing, or that hurts Dr. Rogal's feelings is not necessarily defamatory. In deliberating whether Dr. Rogal has met his burden of proving defamation, you must not give any consideration to whether he suffered annoyance, embarrassment or discomfort as a result of the broadcast he complains about. His own reaction has no bearing upon his reputation. To be defamatory, a statement must tend to shatter the standing of a person in the community of respectable society. Bogash v. Eklins, 405 Pa. 437, 440 (1962).

-- Rogal v. ABC (C)

**B. Context**

**1. Print**

You are to consider the statements Mr. Faigin claims were defamatory statements of fact in the context of the book as a whole. You should consider what the words would reasonably mean to the average reader. You must not strain the words of the passages to reach a defamatory meaning. You are, of course, free to take into consideration the common and ordinary meanings of the words used and the context of the statements. Bear in mind that your deliberations are governed solely by what you yourselves believe to be the meaning of the language used. As explained in more detail earlier, plaintiff must prove this element by a preponderance of the evidence.

-- Faigin v. Kelly (D)

In determining whether the publication defamed the plaintiff, you must consider the publication by the defendant as a whole, and not single out isolated parts of the whole publication; and you must give proper weight to each part, so that, in interpreting the positioning of the headline, photograph, and published words, content and object of the whole publication, as published, must be considered and such meaning may be placed on it as would naturally be given to it by persons of average intelligence and understanding.

-- Marchiondo v. Journal Publishing Co. (C)

In reading the paragraph at issue, you must give its language a plain, natural, unstrained meaning, putting yourself in the position of the average reader. You need not determine that all of Time's readers interpreted the statements in a defamatory manner, but only that the average reader of Time Magazine would have understood the statements in a defamatory matter. You must also consider defendant's statements in their context, which in this case includes the Article as a whole, including its accompanying photographs, title and subtitle, as well as the Kahan Commission Report, to which the paragraph at issue refers. That inferences are to be drawn from the context of a statement does not diminish its force as a possible libel. In addition to what is literally stated, you should consider what the statements imply. The words of the paragraph at issue, considered in the abstract, are not defamatory in their literal sense. The issue before you, however, is whether the same words, read in context, imply a defamatory meaning.

-- Sharon v. Time, Inc. (C)

In reading defendant's articles, the articles must be read as a whole and the words given their natural and obvious meaning. The headlines, sub-headlines, pictures and captions in the articles must be construed in the context of the articles when read as a whole.

-- Gertz v. Robert Welch, Inc. (C)

Plaintiff must also prove that the statements about which he complains are

"defamatory." By defamatory, I mean that a statement tends to expose a plaintiff to public hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of right-thinking people. Not every unpleasant or uncomplimentary statement is defamatory. A publication that is unpleasant, offensive or embarrassing, or that hurts the plaintiff's feelings, is not necessarily defamatory. It is not sufficient if the plaintiff, feeling embarrassed, is so distraught that he claims he is uncomfortable going to work because he fears people will make fun of him. To be defamatory a statement must tend to bring plaintiff into disrepute, or must tend to prejudice the plaintiff in the eyes of a substantial part of the community or must deter others from associating or dealing with him. In this connection, the relevant community for determining defamatory meaning is those reasonable or right-thinking readers of Adweek who read the article at issue. Nichols v. Item Publications, 309 N.Y. 596 (1956); Menchner v. Chesler, 297 N.Y. 94 (1947); Terwilliger v. Wands, 17 N.Y. 54 (1958); Kimmerle v. N.Y. Evening Journal, 262 N.Y. 99 (1933).

You have heard, and you may consider, testimony about what the statements complained of may have meant to previous persons. But ultimately you must decide this issue of defamatory meaning on how the average reader of Adweek would have understood those statements read in their proper context, as they are used in the article at issue. The plaintiff must prove that the average reader understood these statements to be defamatory. If the plaintiff fails to do this, your verdict must be for the defendant. James v. Gannett Co., 40 N.Y.2d 415, 386 N.Y.S.2d 871 (1976); Tracy v. Newsday, 5 N.Y.2d 134, 182 N.Y.S.2d 1 (1959); Sidney v. MacFadden Newspaper Pub. Co., 242 N.Y. 208 (1926); Heaphy v. Westchester Rockland Newspapers, Inc., 47 A.D.2d 922, 367 N.Y.S.2d 52 (2nd Dep't 1975), aff'd, 40 N.Y.2d 861, 387 N.Y.S.2d 1009 (1976).

-- Lehman v. A/S/M Communications, Inc. (D)

Language is not to be forced or tortured in defamation cases in order to make it actionable. You must consider each statement plaintiff claims is defamatory in the context of the article as a whole. It is to be taken in its plain and ordinary sense. The person using the words must be presumed to have used the words in their ordinary import.

The fact that a person may be able by reading between the lines of a statement, to discover some defamatory meaning therein is not sufficient to make it defamatory. In other words, if the language is not reasonably capable of conveying to the ordinary mind a defamatory meaning, there is no defamation.

-- DiGregorio v. Time, Inc. (C)

In determining whether a statement is defamatory, it must be read in the context of the article as a whole. You must give the phrase "slip-and-fall lawyer" the interpretation that the words actually bear. You may not change the language or give it a meaning not expressed by the words actually used. The words must be given their ordinary meanings and must be considered in the context of the entire article. The use of

catchy phrases or hyperbole does not render statements defamatory that would otherwise be nonactionable.

-- Paul v. Philadelphia Magazine (D)

You should consider the words in the articles in their plain meaning, and you should determine what the articles intended to say from the plain meaning and plain effect of these words.

-- Pollution Control Industries v. Howard Publications (D)

**2. Broadcast**

The law imposes on plaintiffs the burden of proving that the broadcast was in fact understood in a defamatory sense by the average reasonable viewer. This means that you are not to seize on any one word, phrase or image, or to consider only one part of the broadcast. You must consider the whole of the broadcast in order to determine whether it is defamatory.

Obviously, words, statements and images may mean different things to different people. You must render your verdict in favor of the defendants unless plaintiffs have proved by a preponderance of the evidence that the false statements were understood in a defamatory sense by the average reasonable viewer.

In resolving the question whether the broadcast was defamatory, you are to consider the common and ordinary meaning of the words used in the context of the news report.

-- Machleder v. Diaz (C)

The first element of the libel claim that must be proven is that the broadcast had a defamatory meaning with respect to plaintiff Irving Machleder, in other words that the broadcast exposed him to hatred, ridicule, or caused him to be shunned, or avoided, or lowered him in the estimation of the community, or deterred others from associating or dealing with him. In the case of plaintiff Flexcraft Industries, the broadcast must be proven to have caused it pecuniary business injury.

In the case of Irving Machleder, it should be noted that the fact that a statement may be unpleasant, offensive, embarrassing or even hurtful of his feelings does not necessarily mean that it is defamatory.

The law imposes on plaintiffs the burden of proving that the broadcast was in fact understood in a defamatory sense by the average reasonable viewer. This means that you are not to seize on any one word, phrase or image, or to consider only one part of the broadcast. You must consider the whole of the broadcast in order to determine whether it is defamatory. Obviously, words and statements may mean different things to different

people. You must render your verdict in favor of the defendants unless you find from the evidence that plaintiffs have proven by a preponderance of the evidence that the false statements were understood in a defamatory sense by the average, reasonable viewer.

In resolving the question whether the broadcast was defamatory, you are to consider the common and ordinary meaning of the words used in the context of the statements. But bear in mind that your deliberations are not to be governed solely by what you yourselves believe to be the meaning of the language used, nor indeed, by how you personally believe the defendants intended their language to be understood by viewers, or how plaintiffs understood it. The test is what you find from all the evidence that the average, reasonable viewer who heard the words actually understood them to mean. You must give the words their fair and natural meaning when read in context. I emphasize again, that you must consider all the words of the broadcast and not focus solely on those which one or the other of the parties claims are at the heart of the case. You must also consider not only the words and images used in the portions of the broadcast filmed at Avenue P in Newark but also the words used in the opening and close of the report as broadcast from the studio.

-- Machleder v. Diaz (D)

Under Texas law, libel is a defamation expressed by broadcasting, which tends to injure a living person's reputation and thereby exposes the person to public hatred, contempt, or ridicule, or financial injury, or to impeach any person's honesty, integrity, virtue or reputation and thereby expose the person to public hatred, ridicule or financial injury.

Although the definition of libel speaks in terms of a person, it applies to a corporation as well.

To determine whether a statement is defamatory, it must be construed in light of the surrounding circumstances and judged upon how a person of ordinary intelligence would perceive the entire statement. You, as a juror, must not do anything to extend the effect or the meaning of the language used in the broadcast.

Statements couched as opinions which are capable of being proven true or false may constitute defamation; conversely, statements couched as opinions which are not capable of being proven true or false may not constitute libel.

-- Kastrin v. CBS Inc. (P)

**C. Average Reader or Viewer**

In determining whether or not the article being sued upon in fact defamed the plaintiff, the law requires you to determine how the average reader of the article understood the article when it was published. If you conclude that the article might have been understood in more than one way, then you must determine which way the average

reader would have understood the article.

The average reader is not someone with special training in the law or with special knowledge of the issues and facts dealt with in the article. The average reader is a reasonable person of ordinary intelligence, education and background who would be representative of those who actually read the article. The average reader would therefore have understood the article in the light of the fair and natural meaning of the article, taken as a whole.

-- Marchiondo v. Journal Publishing Co. (C)

The defamatory nature of a false and unprivileged broadcast must be determined by the natural and probable effect of the broadcast on the mind of the average viewer. Consequently, if the average viewer would regard it as a defamatory broadcast, it may be slanderous on its face even though it is susceptible of innocent meaning.

-- Galloway v. CBS (C)

For a communication to be defamatory need not tend to prejudice the Plaintiff in the eyes of everyone in the community or all of his associates, not even a majority of them. It is enough that the communication would tend to prejudice the Plaintiff in the eyes of a substantial and respectable minority of them, and that it is made in a manner that makes it proper to assume that it will reach those people. On the other hand, it is not enough that the communication would be derogatory in the view of a single individual or a very small group of persons, if the group is not large enough to constitute a substantial minority.

-- Pring v. Penthouse (C)

Thus, to prove the first element of the action, the plaintiffs must convince you, the jury, by a fair preponderance of the evidence that the article or articles were defamatory. You the jury will make that finding.

In other words, the plaintiffs must prove to you by a fair preponderance of the evidence that the average readers of the Inquirer, among whom the articles were intended to circulate, understood the article or articles to be defamatory – as I have defined the word “defamation” to you.

The test to be applied in your consideration of the second element is not whether you the jury find the articles to be defamatory – which in order to reach the second element you will have already done, the test is, rather, the effect the articles are fairly calculated to produce – that is, the impression the article or articles you have found to be defamatory – in your consideration of the first element – would naturally engender in the minds of average persons among whom the articles were intended to circulate.

In the event you do not find that the plaintiffs have proved by a fair preponderance

of the evidence that the average persons among whom the articles were intended to circulate understood an article or articles to be defamatory, then the plaintiffs of course have failed to prove the second element of their cause of action and your deliberations will then cease and you will return verdicts in favor of the defendants and against the plaintiffs.

You will note that in the first element you are required to consider whether you the jury find the articles to be defamatory. The second element you will remember. The second element, you put on a different hat. You then determine whether average readers among whom these articles were intended to circulate would understand them to be defamatory. First you, then the average readers. You will see that become apparent.

A publication that is merely unflattering, annoying, irksome or embarrassing, without more, is not defamatory. A defamatory publication is one, remember, which tends to injure the reputation.

In your determination of whether the articles P-1 through P-5 are defamatory, I instruct you that the articles must be read as a whole. Particular words must be given their ordinary meaning and must be read in the context of the entire article or group of articles. You may not pick out and isolate particular words or phrases and determine whether, considered alone, they are defamatory.

-- Hepps v. Philadelphia Newspapers, Inc. (C)

Your task is to determine whether persons who actually read the magazine reasonably understood the phrase at issue to be defamatory. To do this, you must decide what an actual reader correctly, or mistakenly but reasonably, understood the publication to have meant.

Therefore, Mr. Paul has the burden of proving to you that the persons who read the magazine actually understood it as being defamatory, and if you are not convinced that an actual reader reasonably understood the publication as being defamatory, you must find for the Metro Corp. defendants in this case.

If you find that Mr. Paul has proven by clear and convincing evidence that the phrase "slip-and-fall lawyer" had a defamatory meaning, you will next consider whether he has proved that it was so understood – not by you the jury – but by persons among whom the article was circulated. In other words, Mr. Paul must have proven to you by clear and convincing evidence that the average reader of the story "The Man Behind the Curtain," which was published in the April 1997 *Philadelphia Magazine*, understood the phrase at issue to be defamatory, as I have defined that word to you.

If you find that Mr. Paul failed to prove that the phrase at issue was understood by average readers to be defamatory, your deliberations will cease and you must return a verdict in favor of the Metro Corp. defendants.

-- Paul v. Philadelphia Magazine (D)

In looking at the two questions I have just summarized, namely whether the book conveyed any of the factual assertions Mr. Faigin alleges and whether they were defamatory, you are to consider how the average reader would have understood the passages at issue. Because language often has different meanings, the law imposes upon Mr. Faigin the burden of proving that the words of which he complains were understood by the average reader to contain defamatory facts. You are to consider the statements Mr. Faigin claims were defamatory statements of fact in the context of the book as a whole. You should consider what the words would reasonably mean to the average reader. You must not strain the words of the passages to reach a defamatory meaning. You are, of course, free to take into consideration the common and ordinary meanings of the words used and the context of the statements. Bear in mind that your deliberations are governed solely by what you yourselves believe to be the meaning of the language used. As explained in more detail earlier, plaintiff must prove this element by a preponderance of the evidence.

-- Faigin v. Kelly (D)

1. You may not find that the Metro Corp. . . defendants are liable for defamation unless plaintiff proves by a preponderance of the evidence that the phrase at issue was reasonably understood by readers of Philadelphia Magazine in a defamatory way.

2. Your task is to determine whether persons who actually read the magazine reasonably understood the phrase at issue to be defamatory. To do this, you must decide what an actual reader correctly, or mistakenly but reasonably, understood the publication to have meant. Therefore, Mr. Paul has the burden of proving to you that the persons who read the magazine actually understood it as being defamatory, and if you are not convinced that an actual reader reasonably understood the publication as being defamatory, you must find for the Metro Corp. . . defendants in this case.

-- Paul v. Philadelphia Magazine Publication (D)

**D. Innocent Construction**

Before you can determine whether written words published are libelous, you are required to innocently construe the words used.

When innocently construing the words used, you must strip from such words all innuendo so that the words alone stand as the sole accusation concerning the person.

-- Gertz v. Robert Welch, Inc. (C)

A publication is libelous if it falsely accuses a living person of a crime involving moral turpitude or tends to expose him to hatred, contempt, ridicule, or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or to injure him in his business or occupation.

It is for you, the jury, to determine whether the publication in this case was libelous and whether it was so understood by its readers.

In determining whether the publication was or was not libelous, you must consider the advertisement as a whole, in the sense in which it would ordinarily be read, in the context in which it appeared and in light of the circumstances surrounding its publication.

One who publishes a libelous statement about a living person is liable to such person for such damages as he may actually suffer from the publication, unless the publication is true or is protected by a privilege, as defined for you in another instruction.

If you find that the statement published in this case was libelous, and was so understood by its readers, you must then consider whether or not it was true or privileged.

If you find that the statement was not libelous or was not understood by its readers as being libelous, you must return a verdict for the defendant.

-- Williams v. Seattle Times (C)

**E. Special Considerations**

Further, the plaintiff must establish by a preponderance of the evidence that the broadcast statements were defamatory as I have explained that term to you.

A broadcast is not defamatory if it reports only that a person did things that you would not have done or things that you or other people might disapprove of. Also, a broadcast is not defamatory if it reports matters that are of public record, such as that a person has been convicted of a crime. Neither does the fact that a broadcast might be unpleasant or embarrassing make it defamatory. Nor may a mere expression of opinion (based on disclosed facts or undisclosed non-defamatory facts) be the subject of an action for defamation.

The essence of defamation is falsity. In other words, the plaintiff has the burden of establishing that the broadcast statements were false. The defendants do not have the burden of proving the truth of the statements.

If you find that the plaintiff has failed to prove by a preponderance of the evidence (1) that the broadcast statements were of and concerning her, and (2) that they were both false and defamatory, then you must return a verdict in favor of the defendants.

-- Boddie v. ABC (C)

## XII. FALSITY

Editor's Note: *The charges below are categorized into two sections: "plaintiff's burden of proof" and "falsity/substantial truth defined." Regarding burden of proof: The Supreme Court has held that the plaintiff has the burden of proving falsity in private figure cases, at least when the speech involves issues of "public concern". Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). The charges below, with one exception, do not address the standard of proof for proving falsity. However, an argument can be made that in actual malice cases, falsity must be proven by clear and convincing evidence since actual malice must be proven with clear and convincing evidence and falsity is arguably a necessary element of actual malice. Regarding falsity defined/substantial truth: The Supreme Court has indicated that as a constitutional matter, "truth" only means "substantial truth." Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991). Falsity may become increasingly important in the wake of the decision of Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). Certain commentators believe that by diminishing the "opinion" defense, Milkovich may shift litigation away from the fact-opinion dichotomy toward issues of truth and falsity. Actionable parody must be "a false statement of fact." In Hustler Magazine v. Falwell, 485 U.S. 46 (1988), the Supreme Court ruled that the First Amendment precluded recovery for parody which could not be understood as "a false statement of fact."*

### A. Plaintiff's Burden of Proof

An essential element of libel is that the statement published was false. Consequently, if the statement was in fact true, there can be no libel, regardless of defendant's motivation.

The plaintiff has the burden of proving by clear and convincing evidence all of the facts necessary to establish that each statement is false.

-- Ross v. Santa Barbara News Press (note: clear and convincing standard of proof is normally appropriate only in actual malice cases) (D)

It is the plaintiff Nellie Mitchell's burden to prove that the publication was false. If you cannot determine whether the publication was true or false, your verdict should be for the defendant.

-- Mitchell v. Globe (C)

If Dr. Rogal has failed to meet his burden of proving falsity, as I have used that term, then your deliberations will cease and you will return a verdict in favor of ABC and Mr. Stossel and against Dr. Rogal on this claim.

-- Rogal v. ABC (C)

You must remember that there is no burden on ABC to convince you of the truth

of any statement in its broadcast. ABC was free to offer proof of truth, but, by doing so, it did not assume the burden of convincing you of truth. The burden remains on the plaintiff to convince you that ABC falsely made statements about him.

-- Lasky v. ABC (C)

**B. Falsity/Substantial Truth Defined**

The first "element" which the plaintiffs must prove is the material falsity of any defamatory statement that you find the defendants published. No matter how defamatory a statement may be, no matter what the defendants' motive in writing or publishing it, if the plaintiffs fail to prove that the statement is materially false, you must render a verdict for the defendants. Fairley v. Peekskill Star, 83 A.D.2d 294, 445 N.Y.S.2d 156 (2d Dep't 1981).

You should remember that there is no burden upon the publisher and the individual defendants to convince you of the truth of the statements. The defendants are free to offer evidence that the statements are true, but by so doing they do not assume that burden of convincing you. The burden remains on plaintiffs to convince you that statements complained of are false.

If a statement is substantially true, the plaintiffs have failed to prove its falsity, even though they may have proved it false in insignificant details. How do you tell whether falsity is significant or insignificant? To help you make this distinction, you should think about the "gist," or the "sting" of the particular defamatory statement. What is it about the statement that makes it defamatory? What aspect of the statement brings contempt, scorn, hatred or ridicule on the plaintiffs or lowers their estimation in the eyes of the community? That aspect of the statement can be described as its "gist" or "sting." The statement must be false as to this aspect of the statement for plaintiff to have proved substantial falsity.

Fairley v. Peekskill Star Corp., 83 A.D.2d 294, 297, 445 N.Y.S.2d 156, 159 (2d Dep't 1981); Rinaldi v. Holt Rinehart & Winston, 42 N.Y.2d 369, 379, 397 N.Y.S.2d 943, 952, cert. denied, 434 U.S. 969 (1977).

-- New Testament Missionary Fellowship v. E. P. Dutton & Co. (D)

To prove defamation, Dr. Rogal must prove that the statements in the broadcast are false. No matter how defamatory a statement may be, no matter what ABC's motive in broadcasting it, if Dr. Rogal has failed to prove that the statement was false, you must render a verdict for ABC. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

To prove falsity, Dr. Rogal must prove a defamatory statement in the broadcast was false in a significant way. If the statement is substantially true, Dr. Rogal has failed to prove its falsity, even though he may have proved it false in insignificant details. Letter Carriers v. Austin, 418 U.S. 264 (1974); 42 Pa.C.S. S 8342; Bobb v. Kraybill, 354 Pa.Super. 361, 511 A.2d 1379 (1986).

How do you tell whether falsity is significant or insignificant? To help you make this distinction, you should think about the gist of the particular defamatory statement. What is it about the statement that makes it defamatory? What aspect of the statement brings contempt, scorn, hatred or ridicule on Dr. Rogal, or lowers his estimation in the eyes of his community? The statement must be false as to this aspect of the statement for Dr. Rogal to have proved substantial falsity. That is, there can be no recovery if the broadcast produces the same effect on the mind of the average viewer that the precise truth would have produced. Williams v. WCAU-TV, 555 F. Supp. 198, 202 (E.D. Pa. 1983).

You must remember that there is no burden on ABC to convince you of the truth of any statement in its broadcast. ABC was free to and did offer proof of truth, but, by doing so, it did not assume the burden of convincing you of truth. The burden remains on Dr. Rogal to convince you that ABC and Mr. Stossel falsely made statements about him.

-- Rogal v. ABC (C)

A publication is false when it is not substantially true. The truth or falsity of a publication is based on its natural and obvious meaning taking into consideration the publication as a whole. A publication should be considered substantially true if the word for word truth would produce the same impact or effect on the reader as the statement which was made – that is, if the main point of the statement is true.

-- Lansdowne v. Beacon Journal (C)

One or more of the statements made by Conroy Chino and broadcast by KOAT must be false in a material way. Insignificant inaccuracies of expression are not sufficient. Moreover, you must view the broadcast in its entirety and determine whether the gist or sting or substance of the broadcast was true. If you find that the broadcast contained only minor inaccuracies, or if you find that the broadcast was true in substance, you must return a verdict in favor of Conroy Chino and KOAT.

-- Padilla v. KOAT TV (D)

To prove falsity, plaintiff must prove that a defamatory statement was false in a significant way.

If the statement is substantially true, the plaintiff has failed to prove its falsity, even though he may have proved it false in insignificant details.

How do you tell whether falsity is significant or insignificant? To help you make this distinction, you should think about the gist, or the sting of the particular defamatory statement. What is it about the statement that makes it defamatory? What aspect of the statement brings contempt, scorn, hatred or ridicule on plaintiff, or lowers his estimation

in the eyes of his community? That aspect of the statement can be described as its gist or sting. The statement must be false as to this aspect of the statement for plaintiff to have proved substantial falsity.

-- Lasky v. ABC (C)

The issue of truth or falsity arises only with respect to the specified defamatory message or impression about plaintiff that you find was made by the broadcast. Plaintiff cannot prevail by proving falsity in other aspects of the broadcast. He is entitled to prevail on the issue of falsity only if he proves that the specified defamatory message or impression conveyed about him in the broadcast was false.

-- Lasky v. ABC (C)

To prove falsity, plaintiff must prove that a defamatory statement was false in a significant way

If the statement is substantially true, the plaintiff has failed to prove its falsity, even though he may have proved it false in insignificant details.

How do you tell whether falsity is significant or insignificant? To help you make this distinction, you should think about the gist, or the sting of the particular defamatory statement. What is it about the statement that makes it defamatory? What aspect of the statement brings contempt, scorn, hatred or ridicule on plaintiff or lowers his estimation in the eyes of his community. That aspect of the statement can be described as its gist or sting. The statement must be false as to this aspect of the statement for plaintiff to have proved substantial falsity.

Let me give you a crude illustration. Suppose a newspaper writes of me that in 1983 together with Jones and Smith, and armed with a .45 revolver, I robbed a branch of the Chemical Bank on Broadway. I bring a libel suit. The jury finds that I did indeed rob a bank, but the other facts in the story were inaccurate: It was in 1982, not 1983; my colleagues were Harris and Thomas, not Jones and Smith; I was armed with a .38 and not a .45; it was the Chase and not the Chemical; it was on 3rd Avenue, not on Broadway. I suggest the jury might properly find that although I had proved falsity in many insignificant details, I had not proven significant falsity. As to the aspect of the newspaper story that was defamatory – the gist or sting of the libel – the accusation that I robbed a bank – that part was true. The defamatory statement was therefore substantially true. The details found to be untrue were insignificant. They did not contribute in any important way to the defamatory nature of the statement. They were not the gist or sting of the libel.

-- Westmoreland v. CBS (C)

A statement must be substantially false in order to be libelous. Plaintiffs Irving Machleder and Flexcraft Industries have the burden of proving that the alleged defamatory

statements about them broadcast by CBS were in fact substantially false. The plaintiffs must prove more than merely literal falsity. They must prove the falsity of the substance of any factual claims relating to them which were made in the broadcast. It is not required that everything be absolutely or technically accurate; if the publication is substantially true or if the gist of the publication is correct, it is not libelous. Immaterial variances and defects of proof on minor matters are to be disregarded in determining substantial falsity. The defendants have denied that the statements published by them were substantially false. It is not defendants' burden to prove that the broadcast is substantially true; rather, plaintiffs must prove that the broadcast was substantially false. If you find that plaintiff Flexcraft has failed to prove by clear and convincing evidence that the broadcast was substantially false, you must render your verdict for defendants. If you find that plaintiff Irving Machleder has failed to prove by a preponderance of the evidence that the broadcast was substantially false, you must render your verdict for defendants. This is irrespective of whatever adverse consequences you may find the statements caused Flexcraft Industries and whatever the motives of the defendants in broadcasting the report.

If you find that plaintiffs have failed to establish that the broadcast was substantially false, I charge you to find for defendants. If on the other hand, you should find that the broadcast was not substantially accurate then, but only then, you must go on to consider whether Irving Machleder and Flexcraft Industries have met their respective burdens of proving that the statements were made with the requisite fault as I shall define the term for you.

-- Machleder v. Diaz (D)

"False" means that there is a substantial variance between the facts as reported in the broadcast and the facts themselves. In order for such a substantial variance to exist, the mind of an ordinary listener or viewer must be affected by the statements in the broadcast in a manner that is different from the manner in which the facts themselves would affect the mind of an ordinary listener or viewer. If the effect on the mind of an ordinary listener or viewer when listening or viewing the broadcast as a whole would be the same as the facts themselves, then any variance between the two should be disregarded. Statement that is substantially true cannot be false.

-- Merco Joint Venture v. Kaufman (C)

## XIII. OPINION

Editor's Note: *Expressions of opinion enjoy complete constitutional protection. Unless a plaintiff can prove a false factual connotation, there will be no action in libel. It is not, however, always easy to figure out what is an assertion of fact and what is an expression of opinion. While Milkovich and Hepps are helpful in clarifying the basis for the constitutional protection, the Supreme Court has not set forth a specific test for differentiating between fact and opinion. The common law privilege of fair comment still may supplement the constitutional theory as established most definitively by Milkovich.*

*As the jury instructions included below indicate, even if an expression of an opinion is colorful, caustic, uses parody or is hyperbolic, it is still likely protected under the First Amendment. This is true even if such statements have damaged the reputation of the plaintiff. The central inquiry remains – Is the allegedly defamatory statement verifiable?*

A threshold question which you must determine is whether the statements complained of are statements of fact or expressions of opinion. If you find the statements complained of to be statements of opinion, then you must return a verdict for the defendant regardless of any other of your findings. This is so because a statement is not defamatory if it would be taken by the average reader or listener as a matter of opinion. The distinction between a factual statement and an opinion is not always easy to draw. On this point, as on all other elements, plaintiff has the burden of proving to you that a statement was taken as an assertion of fact, not opinion.

As long as the statement is an opinion, even the use of inflammatory, caustic and irritating terms is not libelous. For example, a statement that a writer earned the friendship of an editor by drinking with him each day and retained his position by virtue of that drinking relationship is a statement of opinion because the fact upon which it was based – daily drinking with the editor – is stated.

You must determine whether the statements involved in this action have been proven to be statements of fact or whether they are statements of opinion. In making this determination, you must consider the nature and content of the article or broadcast taken as a whole. You must also consider the setting and the circumstances of the publication and the specific audience to whom the statements were addressed.

-- Lehman v. A/S/M Adweek (D)

In order to be defamatory, there must have been a false statement which a reasonable person could have understood to have communicated facts concerning the plaintiff. If there is no statement which can be reasonably understood to have been a representation of facts concerning the plaintiff, then there can be no defamation and you must return a verdict in favor of the defendants. The burden is on the plaintiff to show that the broadcast in question was reasonably understood by one or more listeners as describing actual facts about the plaintiff or actual events in which the plaintiff

participated. In making the determination of whether the broadcast could be understood as containing facts about the plaintiff, you must consider the broadcast as a whole, and not just a particular sentence. In addition, you must also consider the context and tone of the broadcast.

-- McCarnan v. WAMS Radio Station (J)

Plaintiff must prove by a preponderance of the evidence that any statement or meaning found to have been conveyed by one or more of the broadcasts at issue was factual in nature and not an expression of opinion. You may not find for the plaintiff on the basis of opinion because opinion cannot be proved true or false.

To find for the plaintiff, the statements must be verifiably false. In determining whether the meaning or meanings conveyed were factual in nature or an expression of opinion, you must consider all the circumstances surrounding the broadcast, as well as the context and content. The plaintiff must then prove by clear and convincing evidence that the statements or meanings he complains of are false.

-- Newton v. NBC (C)

A statement is not defamatory if it would be taken by the average reader as a matter of opinion. The distinction between a factual statement and an opinion is not always easy to draw. On this point, as on all other elements, plaintiffs have the burden of proving to you that a statement was taken as an assertion of fact, and was not opinion. Thus, in order to find that a libel has been published by defendants, you must find that the book contains a false and defamatory statement of fact, or that it implies the existence of defamatory facts in the author's possession which are not disclosed or available to the public.

As long as the statement is an opinion, even the use of inflammatory, caustic and irritating terms is not libelous. For example, the statement that an organization or someone is a "crook" may be a protected expression of opinion as long as it does not refer to a specific act in the nature of an indictable offense. Similarly, statements that groups have engaged in "Nazi-style anti-Semitism" or "spiritual Fascism" have in the past been held by the courts to be protected expressions of opinion.

It is for you to determine, along with the other determinations you are to make, whether the statements involved in this action have been proved to be statements of fact or whether they are statements of opinion. In making this determination, you are to consider the nature and content of the book taken as a whole. You must also consider the probable expectancies of the audience to whom the statements were addressed and the setting and circumstances of the publication.

-- New Testament Missionary Fellowship v. E.P. Dutton & Co. (D)

Each plaintiff must prove by a preponderance of the evidence that any challenged statement is factual in nature and is not merely an expression of opinion. A plaintiff

cannot recover on the basis of the publication of an opinion because an opinion cannot be proved true or false. In determining whether any statement in the broadcast is factual or an expression of an opinion, you should consider the common usage of the specific language, whether the statement is capable of being objectively proved true or false, and the context and content of the broadcast in which the statement appears.

If the statement is an opinion or if it is hyperbole or exaggerated language, even the use of inflammatory, caustic, and irritating terms is not defamatory.

-- Kastrin v. CBS Inc.

. . . [I]n order to be defamatory, the statement must communicate some fact about the person. It is not sufficient if it merely asserts a low opinion of the person. For example, if a newspaper or book said of me that I was a lazy or stupid judge or that my decisions were foolish or irresponsible, that would not be defamation; I could not base a lawsuit on it. If on the other hand it said that I had taken a bribe or had decided cases based on whether the lawyers were my friends, that would be accusing me of bad acts. It would be a defamatory statement of fact and could be the basis of a lawsuit for defamation. You may only base a verdict for plaintiff on statements which a reasonable person could have understood to have communicated verifiable, factual assertions concerning Mr. Faigin. In other words, statements must be provable as false before they can be the basis of a libel suit. In determining what factual assertions the book makes about Mr. Faigin, you must look at the book as a whole and must consider the context in which the statements were made, including analyzing the words used, the setting, and the larger social context – including that *Armed & Dangerous* is Mr. Kelly's autobiography.

In bringing this lawsuit, Mr. Faigin has identified to you what he contends were the defamatory statements about him. You must decide whether these specific statements in the book made any factual assertions about him.

-- Faigin v. Kelly (D)

## XIV. FAULT

Editor's Note: *While fault standards in defamation vary with the identity of the plaintiff, some level of fault on the part of the defendant must be shown. Prudent defense counsel should be aware of the applicable fault standards in their state, as there is some variance outside of the rules established by New York Times v. Sullivan and progeny.*

*Exactly what acts constitute negligence, gross irresponsibility, or actual malice in a libel context is not always clear. Clear and thorough jury instructions, probably with examples, are especially important in the fault context given the somewhat nebulous nature of the legal standards at issue.*

### A. Negligence

Plaintiffs are required to prove by clear and convincing evidence that the defendant was negligent in publishing false and defamatory information. To establish negligence, each plaintiff must show that when publishing the false and defamatory statement, the defendant knew, or in the exercise of reasonable care, should have known, that the statement was false or would create a false impression in some material respect. Even if you find that the defendant published something that was false, you may not assume from that fact that the defendant was negligent. Each plaintiff must prove more than an innocent mistake. Instead, each of the plaintiffs must show that the defendant did or failed to do something that a reasonably careful person under similar circumstances would do to ensure the accuracy of what it published.

It is not enough in itself to establish negligence that plaintiffs told the defendant that certain statements were not true before the article was published. You must consider the totality of the writer's knowledge in determining whether he had a reasonable basis for believing the truth of the statements contained in the article.

-- Galley v. Seattle Times Co. (D)

I charge you that the question of whether the defendants acted negligently in publishing the non-privileged articles requires you to determine whether the defendant acted reasonably in checking on the truth or falsity or defamatory character of the communication before publishing. Thus, negligence in the context of a defamation action is best measured in terms of the particular defendant's state of mind by asking whether he or she had reasonable grounds for believing that the communication was true.

As to the articles in question, I charge you that the defendants cannot be held liable for negligence in making the alleged defamatory publications if you find that neither that particular defendant's knowledge of the facts or the nature of the language used would put a reasonable person on notice of the need for further investigation.

It was the duty of the defendants to use only the ordinary care of a reasonable person under like circumstances, and if this defendant used such care, then your verdict

must be in favor of the defendants, even if you find the statements about which the plaintiffs complain were false and defamatory.

Negligence means the failure to exercise reasonable or ordinary care; that is, such care as a reasonably prudent person would exercise under the same or similar circumstances. Therefore, negligence is the failure to do what a reasonably prudent person would have done under the same or similar circumstances, or, the doing of something which a reasonably prudent person would not have done under the same or similar circumstances. If you find the defendants did what ordinary and reasonable persons would have done under like circumstances, then you may not find that the defendants are guilty of negligence.

In deciding whether the defendants were guilty of negligence in publication, you must consider the information which was known or could reasonably have been discovered by the defendants prior to the publication of any alleged defamatory statement. You may not consider events which occurred after such publication or information which the defendants could not have reasonably discovered in the exercise of ordinary care.

-- Taylor v. New York Times (D)

You are instructed as a matter of law that the plaintiff must prove by clear and convincing evidence that the defendant was guilty of negligence. In order to demonstrate negligence, the plaintiff must prove by clear and convincing evidence that the defendant did not act reasonably in attempting to discover the truth or falsity or defamatory character of the publication.

Negligence is failure to use ordinary care. Every person is required to use ordinary care to avoid injuring another person. Ordinary care is the care that a reasonably careful person would use under the same or similar circumstances. In determining the circumstances in which the newspaper and the reporter were acting, you are entitled to consider evidence of what would constitute ordinary care in the context of accepted journalistic practices.

A newspaper or its reporters are held to the standard of skill and experience normally possessed by members of their profession. You may consider whether, based upon the standards of professional publishers, the defendant had reasonable grounds for believing that the statement made was true, whether a reasonably careful professional reporter would or should have checked upon the accuracy or defamatory character of the publication and whether the check, if made, was thorough enough that a reasonably careful reporter or editor would have been justified in concluding that the statement was substantially true.

-- Lansdowne v. Beacon Journal (D)

When I use the word “negligence” in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by

the evidence in this case.

-- Mitchell v. Globe International Publishing, Inc. (C)

In order to prove the fourth element of the defamation claim in this case, because of the First Amendment Constitutional protection given to free speech, the plaintiff must prove by a preponderance of the evidence that the allegedly false and defamatory broadcast was written and broadcast negligently – that is, written and broadcast by the defendants without the exercise of reasonable care on their part to determine whether the defamatory statements in the broadcast were true or false.

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use in the circumstances of this case. Negligence may consist of either doing something a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

Plaintiff has to prove something more than an innocent mistake. Plaintiff must prove by a preponderance of the evidence that the defendants did not have a reasonable basis for broadcasting the statements alleged to be false and defamatory or that the defendants did not take reasonable care to see that nothing substantially false was broadcast.

-- Rogal v. ABC (D)

The plaintiff herein is not a public official nor a public figure. A publisher of defamatory falsehoods about an individual who is neither a public official nor a public figure is liable in damages for actual injury to the individual when the assertion of the falsehood is the result of the publisher's negligence and when the substance of the assertion makes a substantial danger to reputation apparent. The standard to be applied in determining such negligence is the conduct of the reasonably careful publisher in the community or in similar communities under the existing circumstances.

-- Haskell v. Stauffer Communications, Inc. (C)

In order to prove his defamation claim in this case, because of the First Amendment Constitutional protection given to free speech, the plaintiff must prove by a preponderance of the evidence that the allegedly false and defamatory photograph was published negligently -- that is, published by the defendant without the exercise of reasonable care on its part to determine whether the defamatory statements in the broadcast were true or false. In other words, to prevail plaintiff must prove something more than an innocent mistake.

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use in the circumstances of this case. Negligence may consist of either doing something a reasonably careful person would not do under like circumstances or failing to do something that a reasonable careful person

would do under like circumstances.

-- Schafer v. Time, Inc. (D)

If you find that KFOR-TV's news reports contained a defamatory statement or statements concerning the plaintiff which are substantially false and not privileged, then you must determine whether the plaintiff has proved by the greater weight of the evidence that KFOR-TV, acting through its staff and employees, including the defendant Brad Edwards, was negligent in broadcasting the false and defamatory statements in the news reports.

Negligence, for the purposes of this case, means the failure on the part of KFOR-TV to exercise that degree of care in preparing the news reports and broadcasting them which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances.

In determining whether or not the defendants were negligent, you should take into account the peculiar needs of the electronic broadcast media, including the need to report matters of news interest as quickly as possible and within the limited time available, both for the preparation of the news report as well as its presentation on the air.

There are two issues you must resolve in considering whether the defendants were negligent. The first issue is whether KFOR-TV had a reasonable basis for its news report. The fact that a news report contains a statement that is false, or the fact that a false statement in a news report is defamatory (if you should find those to be the facts in this case) are not, standing by themselves, evidence of negligence. A television station is not expected to be perfect or infallible, and it is not the absolute guarantor of the truth of the information it broadcasts. KFOR-TV is not legally responsible for the broadcast of information that turns out later not to be true, unless the broadcast of untruthful information results from the failure to use the degree of care in preparing the news report or broadcasting it which ordinarily prudent broadcasters would use in similar circumstances.

The second issue you must resolve is whether KFOR-TV was negligent, as that term is defined for you, in failing to anticipate that reasonable viewers would understand the news reports to accuse Virginia Malson of wrongdoing with respect to industrial discharge from M&M Drum Company (if you find that reasonable viewers in fact understood the reports that way).

Unless you find in favor of the plaintiff on both issues of negligence, your verdict must be for the defendants.

-- Malson v. Palmer Broadcasting (D)

**B. Actual Malice**

A broadcast is made with actual malice if, based on all the evidence, the broadcast was made with knowledge that it was false or with reckless disregard of whether it was false or not.

Knowledge that it was false means the defendants were aware, prior to the time that the broadcast was made, that it was false. Reckless disregard of whether it was false or not means that prior to the broadcast, the defendants entertained serious doubts as to the truth of the broadcast or that the broadcast was made with a high degree of awareness of its probable falsity.

The focus of this inquiry is on the defendants' attitude toward the truth or falsity of the publication, not on the defendants' attitude toward the plaintiff. You must focus on the attitude of the defendants regarding the truth or falsity of the broadcast.

You may consider all or any part of the following in deciding whether plaintiff proved by clear and convincing legal evidence actual malice:

(a) were portions of the broadcast made up or the product of the defendants' imagination;
(b) was the broadcast so unbelievable that only a reckless person would have broadcast it;
(c) were there obvious reasons to doubt the truth of an informant or the accuracy of his reports;
(d) were words deliberately quoted out of context so as to result in a false and defamatory representation of fact;
(e) was the broadcast the result of deliberately omitting matters known to the defendants?

-- Frey v. Multimedia, Inc. (C)

The plaintiff, in this case, is a public figure and accordingly may not prevail in this action unless he proves by clear and convincing evidence that the broadcast in question was made with actual malice. To establish actual malice, plaintiff is not required to prove hatred, ill-will or a desire to injure. "Actual malice" as defined in this charge means that defendants had a high degree of awareness that one or more listeners to the station could reasonably have understood the broadcast to convey facts about the plaintiff or that defendants acted with reckless disregard as to whether one or more listeners to the station could reasonably have understood the broadcast to convey facts about the plaintiff.

-- McCarnan v. WAMS Radio Station (J)

The plaintiff must prove by clear and convincing evidence that, at the time of publication, the defendant published the challenged quotations with knowledge that they were false or with reckless disregard for whether they were false.

A reckless disregard for the truth requires more than a departure from reasonably prudent conduct. In order to find that a defendant acted with reckless disregard, you must find that there is clear and convincing evidence which permits the conclusion that a defendant in fact entertained serious doubts as to the truth of one or more of the challenged quotations. This is a subjective standard. There must be clear and convincing

evidence which permits the conclusion that this defendant actually had a high degree of awareness of probable falsity of the alleged defamatory statements.

Even an extreme departure from accepted professional standards of journalism will not suffice to show reckless disregard. Reckless disregard is not shown by lack of due care, nor by gross negligence. Rather, there must be clear and convincing evidence that defendant published knowing that one or more of the five challenged quotations was probably false.

A publisher has no duty to investigate before publishing even when a reasonably prudent person would have done so, and failure to do so is not sufficient to establish reckless disregard. However, once a publisher undertakes to investigate the facts underlying the article, including the facts underlying the challenged quotations, and learns facts that give it obvious reasons to doubt the truth of the quotations, but elects to publish anyway, you may consider that evidence of whether the publisher acted with reckless disregard.

Reckless disregard may also be found where there are obvious reasons to doubt the veracity of the writer or the accuracy of the statements.

A plaintiff may demonstrate reckless disregard by the publisher of an author's work if there is clear and convincing evidence that the publisher, through its editors or employees, in fact and subjectively, had obvious reasons to doubt the accuracy of the challenged quotations and that it acted in a way so as to purposefully avoid the truth.

In considering whether the writer acted with reckless disregard as to truth or falsity, you may consider whether there is clear and convincing evidence that she fabricated one or more of the challenged quotations.

In considering whether either the writer or the publisher acted with reckless disregard, you may also consider whether they knew of evidence that was truly contradictory to any of the five challenged quotations.

Neither these pieces of evidence, standing alone, is sufficient to establish reckless disregard, but this evidence can be considered along with other evidence.

You may consider circumstantial evidence when considering whether one or both defendants in fact had serious doubts about the truth of the challenged quotations attributed to plaintiff.

In determining an author's state of mind, you must evaluate her state of mind at the time the articles were published and not her state of mind after the articles were published. However, you may consider her conduct or statements after the articles were published as evidence regarding her state of mind at the time of publication.

-- Masson v. New Yorker (C)

What you are deciding is known in the law as constitutional malice, also referred to as actual malice. Mere negligence, carelessness, mistake, or a simple misinterpretation on the part of the defendant does not establish actual malice. Plaintiff must demonstrate actual malice by showing with clear and convincing evidence that the defendant realized that its statements were false or that it subjectively entertained serious doubt as to the truth of the statements. Plaintiff shall admit this burden of establishing actual malice by clear and convincing evidence if plaintiff demonstrates that the defendant made the false broadcast with a high degree of awareness of probable falsity, or that it must have entertained serious doubt as to the truth of the particular statements.

-- Prozeralik v. Capital Cities Comm., Inc. (C)

Concerning the issue of actual malice, constitutional guarantees of freedom of speech require that in order for a public official to recover for even false defamatory statements concerning him, he must prove by clear and convincing evidence that the statements were made by the defendants with actual malice, that is, with knowledge that such statements were false or with reckless disregard of whether they were false or not. Reckless disregard, in this sense, is a high degree of awareness of the probable falsity of the statements made.

That the defendant was or might have been negligent in making the statements does not constitute actual malice. Defendant's conduct is not to be measured by whether a reasonably prudent person would have made the defamatory statements, or would have investigated more before making the statements. Mere failure to discover misstatements is insufficient to show the recklessness required for a finding of actual malice. Nor is the fact that the defendant bore or might have bore ill-will toward the plaintiff sufficient in itself to establish actual malice, since, despite his hostility, the defendant may not have known of the falsity of the statements which he made, and may not have made the statements with a high degree of awareness of their probable falsity.

For you to find the defendant made the statements complained of with actual malice, you must find that the defendant in fact had actual knowledge of their falsity, or alternatively, had such a high awareness of their probable falsity to the point where he, in fact, had serious doubts as to the truth of the statements.

-- Wade v. Stocks (D)

Because of the constitutional protection afforded by the First Amendment to writers-editors and publishers in reporting to you, the public, about matters of general interest, the law requires plaintiffs to prove by clear and convincing evidence that the defendants, at the time of publication, actually knew that the statements were false, or the defendants had a high degree of awareness of the probable falsity of the statements. This is what is meant by the short-hand term, "prohibited state of mind."

Now what does this mean?

The first branch – knowing falsity – is easy enough to understand. It means more or less the same thing as telling an intentional lie. This standard would be satisfied if a particular defendant either knew or believed a statement to be false when he published it.

The second branch – awareness of probable falsity – is more complicated. That state of mind is shown if a defendant actually recognized that the statement was probably false, but went ahead and published it ignoring or disregarding the probability of falsehood.

* * *

I want to talk a little bit more about this "prohibited state of mind." A public figure plaintiff who must prove a prohibited state of mind has a heavy burden of proof in a libel suit. I will now offer you some guidance in your deliberations concerning the defendant's state of mind.

A mistake made in interpreting events, documents or statements does not constitute enough to establish the prohibited state of mind, nor does a showing that defendants published some facts believed to be true that were harmful to plaintiff, while omitting others that were favorable.

On the other hand, reliance on previous news reports without doubts regarding their accuracy shows an absence of the prohibited state of mind.

An alleged bias or ill-will by the defendants against plaintiff does not by itself constitute the prohibited state of mind. I instruct you that such a bias or predisposition, if shown, does not establish the prohibited state of mind. Indeed, it should be considered by you only insofar as it is connected with evidence that defendants published statements they knew to be false or published with a high degree of awareness that those statements were probably false.

-- New Testament Missionary Fellowship v. E.P. Dutton & Co. (D)

You must not confuse constitutional malice as I have defined it with more common definitions of malice, such as ill-will or hatred. Plaintiff cannot prevail merely by proving that defendant or its employees were motivated by ill-will, prejudice, hostility, hatred, contempt or even a desire to injure. If you find that any of defendant's employees who were responsible for the content of the broadcast were so motivated toward the plaintiff, you may consider such state of mind as evidence that the employee might have published defamatory statements about the plaintiff knowing they were false or with a high degree of awareness of the likely falsity of the statements. But hostility, disapproval or other forms of ill-will do not as such establish constitutional malice; a reporter may despise someone but nevertheless publish only what he believes to be the truth in writing about that person.

Therefore, while you may consider ill-will or other relevant forms of bias, plaintiff must still establish constitutional malice in the sense in which I have defined it in order to prevail.

Unfairness or one-sidedness does not in itself establish the prohibited state of mind. Under libel law, there is no obligation to be fair or to present both sides of the story. When a newspaper, book or broadcast comments on the actions of a public figure, as long as it acts honestly and in good faith by not publishing false matter knowingly or with serious and subjective doubts about truth or falsity, it has no obligation under libel law to act fairly, present both sides, seek out witnesses favoring the other side, give equal advantage to witnesses on the other side or even publish their statements. There is no legal obligation even to interview the subject of its criticism. How a broadcaster chooses to act in these respects is a matter of its editorial policy; in these matters it is free to act in whatever manner it thinks best.

* * *

You may not act in the role of super-editor or T.V. critic and base your decision on whether you think the broadcast would have been better or fairer if it had been investigated or presented in a different manner.

The libel law concerns itself with truth and honesty, not with fairness. The obligation of the libel law is not to publish false defamatory matter knowingly or with serious and subjective doubts about truth or falsity. You may consider factors of unfairness only to the extent they support a finding of knowing falsity of a finding of publication with serious and subjective doubts about truth or falsity. The issue you are to decide is whether the plaintiff has shown such knowing falsity or serious and subjective doubts about truth or falsity.

* * *

During the trial, the plaintiff has claimed that even if the broadcast did not say anything about him that was explicitly defamatory, the broadcast left a defamatory impression about him. If you should find that the average viewer would understand that the broadcast conveyed one or more of the impressions that the plaintiff has claimed, and that impression is false, then you must consider whether any employee of the defendant with responsibility for the content of the broadcast conveyed that impressions with the knowledge of the falsity of that impression or with serious and subjective doubts about that impression's truth or falsity. In this regard, you should determine whether or not the defendant believed, at the time of the broadcast, that the broadcast conveyed what the plaintiff claims it conveyed. In other words, if you find that the broadcast conveyed an impression, then and in order for you to find for the plaintiff, he must prove by clear and convincing evidence that an employee of the defendant with responsibility for the content of the broadcast acted with knowledge of falsity or with serious doubts as to the truth of the impression conveyed, and you must also find that the impression was actually intended by a responsible employee of the defendant to be conveyed by the broadcast. If one or more of the responsible employees of the defendant did not believe at the time of the

broadcast that the broadcast gave the impression the plaintiff claims, then the defendant could not have broadcast an impression with knowledge of falsity or serious and subjective doubts about its truth or falsity.

As I have instructed you, in order to find for the plaintiff, you must find, among other things, that the defendant acted with knowing falsity or with serious and subjective doubts about the truth or falsity of the broadcast.

How do you answer that question for the defendant which is a corporation and does not have a state of mind? To determine this for the defendant, you look at the beliefs of the persons the defendant charged with responsibility for the content of the broadcast. If you find that any of them aired the broadcast knowing that it was false or having serious and subject doubts about its truth, then you may find that the defendant did also. If none of them did, then the defendant did not, even though other employees might have believed that the broadcast was false. Defendant is answerable for the state of mind only of those persons to whom the defendant gave responsibility for the content of the broadcast.

The defendant may be found liable only if you find that one of the people I have described above proceeded with the broadcast despite knowing that it was false or having serious and subjective doubts about its truth. If that state of mind has not been established on the part of one of those persons, it cannot be attributed to the defendant.

-- Lasky v. ABC (D)

To recover for defamation, plaintiffs must also prove actual malice on the part of the defendants by clear and convincing evidence. Actual malice exists when one publishes defamatory material intentionally or recklessly.

A person intentionally publishes a defamatory communication when he or she knows that it is false or that it places the subject in a false light, as I will define that term for you.

A person recklessly publishes a defamatory communication when he or she does so with disregard for whether it is true or false, i.e., when he or she does so despite serious doubts about the truth of the communication or when he or she possesses a high degree of awareness of its probable falsity but publishes it anyway. Serious doubt and/or the possession of a high degree of awareness of probable falsity may be inferred from relevant circumstantial evidence of the state of mind of the person who published the defamation. Testimony by that person denying serious doubt and/or a high awareness of its probable falsity does not automatically defeat proof of recklessness, but rather is to be weighed with all the other evidence of that person's state of mind.

-- Paul v. The Hearst Corporation (C)

In order to establish actual malice on the part of the defendant, the plaintiffs must prove, by clear and convincing evidence, that the defendants published the material in question with knowledge that it was false, or with reckless disregard for whether it was

false or not.

* * *

A failure to exercise due or reasonable care in ascertaining the truth of a published statement does not, standing alone, constitute reckless disregard for whether that statement was false or not. Rather, the evidence must show that the defendants in fact entertained serious doubts as to the truth of each of the statements at issue.

In resolving the issue of reckless disregard, you may give due consideration to the facts you find the defendants knew at the time they published the statements together with all other circumstances such as the reliability or lack of reliability of the defendant's informants and the additional sources of information available to the defendants and known by the defendants to be available.

* * *

Evidence tending to establish that the defendant harbored ill will toward the plaintiff prior to the publications in question may be considered only upon the issue of whether the defendant published the materials in question with knowledge that they were false or with reckless disregard of whether they were false or not.

* * *

The Defendants' failure to employ any reliable investigatory methods or the Defendants' lack of any effort to independently verify any disputed or questionable factual assertions may be considered by you as evidence of the Defendants' actual malice.

-- Pollution Control Industries v. Howard Publications

In order to demonstrate actual malice, plaintiff must demonstrate more than just negligence by a preponderance of the evidence. He must prove by clear and convincing evidence that the challenged statements were made by the defendant with knowledge that such statements were false or with reckless disregard, that is, a high degree of awareness of the probable falsity of the statements made. Actual malice is not measured by whether a reasonably prudent person would have made the defamatory statements, or would have investigated more before making the statements. Mere failure to discover misstatements is insufficient to show the recklessness required for a finding of actual malice.

For you to find that the defendant made the statements complained of with actual malice, you must find that the defendant in fact had actual knowledge that the statements were false, or alternatively, had such a high awareness of the statements' probable falsity to the point where he, in fact, had serious doubts as to the truth of the statements. This is a subjective standard that requires that plaintiff show by clear and convincing evidence defendant's state of mind at the time of publication. He must demonstrate that defendant had knowledge of falsity or entertained serious doubts as to truth.

* * *

Plaintiff may not attempt to demonstrate actual malice in the abstract. He must demonstrate actual malice *in conjunction* with the statements that he claims are false defamatory of him. Put another way, plaintiff must demonstrate by clear and convincing evidence that defendant had knowledge that the specific statements that he complains of were false or had serious doubts about their truth at the time of publication.

As applied to this case, this legal requirement means that Michael Schafer must

prove by clear and convincing evidence that the photograph of him published by Time Inc. was published with knowledge that it was false or with serious doubts about its truth.

* * *

The Defendant published a correction regarding the misidentified photograph that plaintiff is complaining of in this action. You may interpret publication of a correction as evidence that the Defendant did not publish the identification of the photograph with actual malice.

* * *

Reliance on a reporter's reputation for good journalism can show lack of actual malice by a publisher.

-- Shafer v. Time, Inc. (D)

* * *

Of course, in order to determine if damages can be presumed in this case you must first understand the term "actual malice." A publication is made with actual malice if it is made with knowledge that it is false or with reckless disregard of whether it is false or not. In order to demonstrate actual malice, plaintiff must demonstrate more than just negligence by a preponderance of the evidence. He must prove by clear and convincing evidence that the challenged libel was made by the defendant with knowledge that such statements were false or that the defendant acted with reckless disregard of their falsity. Reckless disregard is a high degree of defendant's awareness of the probable falsity of the statements made.

Unlike negligence, actual malice is not measured by whether a reasonably prudent person would have made the defamatory statements, or would have investigated more before making the statements. Actual malice is a subjective standard that requires that plaintiff show by clear and convincing evidence defendant's state of mind at the time of publication.

Plaintiff may not attempt to demonstrate actual malice in the abstract. He must demonstrate actual malice in conjunction with the portion of the article that he claims is false and defamatory of him. Put another way, plaintiff must demonstrate by clear and convincing evidence that defendant had knowledge that the specific statements that he complains of were false or had serious doubts about their truth at the time of publication.

-- Schafer v. Time, Inc. (C)

The failure to more fully investigate the basis for a particular statement, or the reliance upon a source who may have been hostile toward plaintiff, or the reliance upon a confidential source, or even ill will, bias, spite, or prejudice toward plaintiff are, standing alone, insufficient to establish either a knowledge of the falsity of, or a reckless disregard for the truth or falsity of the statement. However, you may consider such evidence, when take together and viewed as a whole (and by making appropriate inferences from that evidence), for the purpose of determining whether a defendant knew a statement was false or acted with reckless disregard for whether it was false or not.

-- Gray v. St. Martin's Press (C)

**C. Gross Irresponsibility**

Under the laws of New York, a publisher may not be held liable for publishing matters arguably of public concern, as I have decided this editorial reply is, unless plaintiff can show, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner. Gross irresponsibility implies willful or intentional misconduct. It is defined as the thoughtless disregard of consequences which may result from an act, and as indifference to the rights of others. Thus, you may not find against the defendant publisher, unless you decide that it acted in a grossly irresponsible manner.

-- Dalbec v. Gentleman's Companion, Inc. (D)

## XV. DEFENSES

Editor's Note: *Whether a statement initially is the subject of a privilege, especially an "absolute" privilege, should be a question of law for the court. If a privilege is conditional and therefore can be overcome by a showing of actual malice or some other factor spelled out in state or common law, the court should decide whether the privilege applies in the first instance, leaving to the jury the question of whether the privilege has been overcome. Nevertheless, some courts will submit the entire issue to a jury and even in those courts where the submission is limited, explanation of the nature of the privilege may help the defendant.*

### A. Absolute Privilege

A television station has a privilege to make accurate reports of information contained in the records of government agencies, such as the State Racing Commission, the FBI (Federal Bureau of Investigation), or the Magistrate Court for Santa Fe County. If the television station accurately reports information from these government records, the television station is not liable for defamation even if the information in the records is false. This privilege is designed to allow the news media to keep citizens informed about their government. Therefore, if you find that Defendants accurately reported information contained in government records, such as the State Racing Commission or the FBI, then you must find in favor of the Defendants, regardless of whether the information was true or false. The television report does not have to repeat word for word what is in the government records; it is enough that the broadcast report fairly summarized the information in the government records.

-- Padilla v. KOAT TV (C)

Editor's Note: *Although this instruction is phrased to apply to invasion of privacy, the same form of instruction can be and often is given as part of a defamation charge.*

You are instructed that the press is privileged to publish accurate accounts of judicial proceedings. Any proceeding before a judge can form a basis for this privilege. If you find that the statements made by Conroy Chino and broadcast by KOAT concerning Roberta Padilla were an accurate account of the judicial proceeding in which Roberta Padilla admitted that she was guilty of embezzlement, then you must find Conroy Chino and KOAT not guilty of invading Roberta Padilla's privacy.

-- Padilla v. KOAT TV (C)

Editor's Note: *The requirement in this instruction regarding attribution may be peculiar to California statutory or common law. Decisions in other states have held that attribution is not required for the judicial report privilege to apply. Some cases hold that the privilege applies where the source is an out-of-court speaker repeating the gist or substance of statements also made in court.*

If you find that any of the statements plaintiff has challenged are a fair and accurate

report of government documents – including FBI Reports and Grand Jury transcripts – reporter Sharp obtained while preparing the articles, such statements are not actionable. The only qualification on this rule is that in addition to fairly and accurately reporting on the contents of these government documents, these statements must be attributed to such documents in defendants' article. That is, you must find that a reasonable reader of the statements plaintiff challenges would realize from the articles that the information in those statements came from government documents reporter Kathleen Sharp looked at while preparing the articles. If you find that these requirements have been met – i.e., that any statement plaintiff has challenged are fair and accurate reports of government documents reporter Sharp obtained and are properly attributed in the articles – then plaintiff cannot recover any damages as to those statements, even if defendants acted with malice or negligence in publishing the statements and even if the statements are false.

-- Ross v. Santa Barbara News Press (C)

**1. Fair Report**

The law protects the publication of reports of official actions even if the statements made are untrue. Such publications are privileged under the law. You may not impose liability for publication of any such statements unless you conclude that the privilege was abused. The privilege can be abused by inaccurately reporting or summarizing. As to such statements, however, the privilege is not abused by a negligent failure to ascertain the truth, by malicious failure to ascertain the truth, or even by knowledge of falsity. The commission of a crime, prosecutions resulting from it and judicial proceedings arising from the prosecutions are without question events of legitimate concern to the public and consequently fall within the responsibility and right of newspapers to report.

-- Holding v. Muncie Newspapers, Inc. (C)

Ladies and Gentlemen of the jury, there is as I noted earlier an additional privilege available to a newspaper with respect to sources. A newspaper has a privilege to fairly and accurately summarize, or to fairly and accurately report information on file with an agency of the government, including reports, and a newspaper has a privilege to fairly and accurately summarize, or report, upon the activities and proceedings of a governmental agency. Additionally, a newspaper has a privilege to fairly and accurately publish that which appears in the public record, such as a court transcript or an opinion filed by a judge of a court. This conditional privilege is sometimes know as the Fair Report Privilege. The law recognizes that it is in the public interest that information be made available as to what took place in public affairs. Thus, the law relieves a newspaper of liability for defamation, even if that which the newspaper publishes is false and defamatory, so long as the statements made by the newspaper are an accurate and complete account or a fair summary of either an official government agency proceeding or activity or information acquired by a governmental agency. To prove the Fair Report Privilege was abused, the plaintiffs must prove by a fair preponderance of the evidence either that the defendants failed to fairly and accurately report or summarize the information concerning governmental agency proceedings or activities, or information on file with such agency, or

that the activities, or information on file with such agency, or that the defendants included exaggerated additions or embellishments to the account, or that the defendants published false and defamatory statements for the sole purpose of causing harm to the plaintiffs.

-- Hepps v. Philadelphia Newspapers, Inc. (C)

. . . Pursuant to the fair report privilege, reporting what is contained in records of judicial or other official proceedings is privileged, even when the account contains allegedly defamatory statements or would otherwise constitute an invasion of privacy, as long as the account presents a fair and accurate summary of those records or proceedings. Where the privilege applies and is not abused, the defendants are relieved of liability without regard to the truth of the statement, document or proceeding being reported.

It is for you, the jury, to decide whether the defendants abused the fair report privilege. The fair report privilege is abused only where the plaintiffs demonstrate (1) that the account is not a fair and accurate report of the content of records or reports of official actions or proceedings or (2) that the defamatory material is published for the sole purpose of causing harm to the person defamed. The plaintiffs have the burden of proving that the privilege has been abused.

You may find that the privilege has been abused and therefore, forfeited, if the report is inaccurate or unfair.

If you find that the fair report privilege has been abused by defendants, then you may find for the plaintiffs. Otherwise, you must find for the defendants.

-- Paul v. The Hearst Corporation (C)

Publication of a statement is not actionable if there is a privilege for such communication. Fair and honest reports of court proceedings are privileged and cannot support an action for libel.

Because judicial proceedings are events of legitimate concern to the public, the law grants the defendant a privilege to publish matters contained in judicial records and proceedings. The privilege exists because it is more important that the public be informed about the privileged proceeding than it is for a defamed person to have legal recourse for the publication of the defamatory material.

In order fall within the privilege, a report need not be exhaustive or precise in every detail. It may consist of an abridged or condensed statement, provided such statement is a fair one. A privileged report must be substantially accurate, which means that the report must have the same "gist" as the proceeding or court record reported on. If it is apparent from the specific or from the overall context that the article is quoting, paraphrasing, or otherwise drawing on official documents or proceedings, the report is privileged.

-- Schafer v. Time, Inc. (D)

The plaintiff cannot recover for defamation in this case if KFOR's reports about actions against M&M Drum Company or Glenn Malson taken by the City of Oklahoma City's Water and Wastewater Utilities Division convey to the viewer a substantially

accurate account of the official action. The report may be abridged or condensed, and need not be exact in every immaterial detail.

If you find the KFOR-TV's reports about the Water and Wastewater Utilities Division's actions against Glenn Malson or M&M Drum Company are substantially accurate, then to that extent the plaintiff cannot recover. The defendants bear the burden of proof on this one issue.

A substantially accurate report by the media about official proceedings is thus "privileged" under the law (1) regardless of the source of the information used by the media to prepare the report, (2) regardless whether the report contains defamatory statements, and (3) regardless whether the information disclosed by a public official or in official proceedings is accurate. In other words, the news media have no obligation to investigate the truth of any charges made or conclusions reached in official proceedings before publishing reports about the proceedings.

-- Malson v. Palmer Broadcasting Group

**B. Qualified Privilege**

You are instructed that the broadcast involved a matter of legitimate public concern, that is, problems with the licensing practices of the New Mexico State Racing Commission. Therefore, KOAT and Conroy Chino had the right or privilege to broadcast news stories about these problems. They abused the privilege if they made their statements with "actual malice," as I have defined that term to you. Accordingly, you may not find Conroy Chino and KOAT liable for defamation unless you first find that they made their statements with "actual malice," as I have defined that term to you. Mere negligence on their part is not enough.

-- Padilla v. KOAT TV (C)

I charge you that the Court has determined that all of the allegedly defamatory articles are conditionally privileged under Alabama law. Consequently, you may not find for any particular plaintiff against any of the defendants based upon any statement which such plaintiff contends is false and defamatory in these privileged articles, unless each such plaintiff proves by clear and convincing evidence that the defendant in question acted with actual knowledge of or reckless disregard of the falsity of a defamatory statement about that plaintiff.

-- Taylor v. New York Times (D)

Editor's Note: *Setting aside the issue of whether lack of privilege is an element of the plaintiff's case, this instruction regarding the public purpose behind privileges may be useful for a jury.*

The third element of plaintiffs' defamation claim is a requirement that they prove by clear and convincing evidence that the Seattle Times article of September 22, 1982, was unprivileged. A "privilege" in the law of libel, refers to the protection which the law

gives in certain situations to statements in publications which may be defamatory. The law recognizes that in some circumstances it is more important that statements be made freely, without fear of liability, than it is for a person to be compensated for whatever injury may have occurred to his reputation. In those circumstances, the law affords a "privilege" which protects persons who publish the statement from liability to any person who claims he has been damaged by the libel.

-- Galley v. Seattle Times (D)

Editor's Note: *The following two instructions are alternatives, depending upon whether or not the court finds that the statement is privileged (subject to being overcome) or whether the court leaves that issue to the jury.*

The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government. Therefore, the law grants to the Seattle Times Company and Erik Lacitis a privilege to publish matters contained in reports of official actions or proceedings, including the police incident reports and the Roth civil complaint, so long as the account published by Mr. Lacitis is accurate and complete or is a fair abridgment of the occurrence reported. In this case, those portions of the Seattle Times article that summarize the police incident reports and the Roth civil complaint are fair and accurate summaries and are protected by the fair report privilege. They cannot form the basis of defamation liability unless plaintiffs can made a further showing that Erik Lacitis and the Seattle Times Company abused that privilege.

-- Galley v. Seattle Times (D)

The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of the government. Therefore, the law grants to the Seattle Times Company and Erik Lacitis a privilege to publish matters contained in reports of official actions or proceedings, including the police incident reports and the Roth civil complaint, so long as the account published by Mr. Lacitis is accurate and complete or is a fair abridgment of the occurrence reported. A report need not be exhaustive or precise in every detail in order to fall within the privilege. It is enough if it captures the substance of the proceeding, as measured by the report's probable effect on the mind of the average reader. You must determine whether the article contains an accurate and complete report or a fair abridgment of matters contained in the police incident reports and the civil complaint. If so, such statements are privileged and cannot form the basis of defamation liability without a further showing that Erik Lacitis and the Seattle Times Company abused the fair report privilege.

-- Galley v. Seattle Times (D)

**1. Neutral Reportage**

A second question which you must determine is whether the Article is "neutral reportage," a term I will now define. You should find the Article to be "neutral reportage" only if you find that it reports statements made by third parties which are newsworthy, that is statements which relate to public issues, and that the statements are themselves worthy of public interest. The report need not be literally accurate, but the publisher must believe, reasonably and in good faith, that the story accurately conveys the information derived from sources on each side of the issue. In other words, if the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement. DeLuca v. New York News, Inc., 109 Misc.2d 341, 345-46; 438 N.Y.S.2d 199, 202-03 (Sup. Ct. N.Y. Co. 1981). I now instruct you that the Article does indeed relate to a public issue, specifically the factors involved in awarding a major advertising account. Therefore, if you find that Adweek believed, reasonably and in good faith, that the article accurately conveys the information derived from sources on each side of the issue, then you must return a verdict for Adweek.

-- Lehman v. A/S/M Adweek (D)

The doctrine of neutral reportage is a defense to a libel action. The doctrine of neutral reportage gives newspapers an absolute privilege to accurately publish statements made by the police chief or police officers concerning newsworthy events, even though the statements were untrue and the reporter seriously doubted that they were true.

-- Holding v. Muncie Newspapers, Inc. (C)

An accusation made by a third party and reported on in the press is newsworthy if it relates to public issues, personalities or programs and if the assertion or accusation is itself worthy of public interest. The report need not be literally accurate, but the author must believe, reasonably and in good faith, that the story accurately conveys the information contained in the previous statements.

-- Tavoulareas v. Washington Post (D)

Similar to opinion and fair comment, defendants also enjoy a privilege of neutral reportage. The First Amendment of the Constitution requires a privilege of neutral reportage to protect reporters and publishers from defamation liability for repeating newsworthy statements, regardless of their truth or falsity. The privilege protects the right of the public in a democratic society to be fully informed about the conduct of public figures, including statements they make.

I instruct you that what is newsworthy about the phrase "slip-and-fall lawyer" is that it was made by one responsible, prominent figure about another.

The neutral reportage privilege protects the Metro Corp. defendants irrespective of their belief in the truth or falsity of the phrase "slip-and-fall lawyer" as applied to Mr. Paul

where the statement was made by a public official or public figure who is already embroiled in public controversy levels a false charge against another public figure.

If you find that use of the phrase "slip-and-fall lawyer" in the article to refer to Mr. Paul was neutral reportage of the phrase, your deliberations must end and you must find in favor of the Metro Corp. defendants.

-- Paul v. Philadelphia Magazine (D)

**2. Fair Comment.**

Fair comment is a form of qualified privilege applied to publications relating to discussions of matters which are of legitimate concern to the community as a whole, because they materially affect interests of all the community. Comment is "fair" when based on facts truly stated and free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, and where it is an honest expression of the writer's real opinion and belief. Mere exaggeration, slight irony or wit, or touches of style which make a story readable, do not push beyond limits of fair comment.

-- Gray v. St. Martin's Press, Inc.

The doctrine of "fair comment," first recognized in New Mexico in Mauck, Stastny & Rassam, P.A. v. Bicknell, 95 N.M., 702, 625 P.2d 1219 (Ct. App. 1980), survived the New Mexico Supreme Court's decision in Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982). Mauck was discussed in Marchiondo II, id. at 403, 649 P.2d at 469, but was conspicuously absent from the list of cases overruled in part. See id. at 404, 649 P.2d at 472. The cases that were overruled in part were those dealing with the fact/opinion distinction, an entirely separate area of defamation law. Id.

The Mauck "fair comment" privilege is entirely consistent with the United States Supreme Court's decision in Gertz v. Welch, 418 U.S. 323, 347 (1974), which left to the states the question of whether a standard of fault higher than negligence should govern private defamation actions. Mauck was a post-Gertz decision and reflects a reasoned decision to apply a higher standard of fault to discussion of matters of public interest.

Most importantly, the Court of Appeals has held that the Mauck "fair comment" privilege is still viable in New Mexico. In Coronado Credit Union v. KOAT Television, 99 N.M. 233, 240, 656 P.2d 896. 903 (Ct. App. 1982), decided some five months after Marchiondo II, the court stated that the Mauck "fair comment" privilege includes not only statements of opinion but also "statements of fact, unless made with `actual' malice." The Court of Appeals has thus concluded that the Mauck "fair comment" privilege survived Marchiondo II. Decisions of the Court of appeals are binding on this Court. Alexander v. Delgado, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973).

You are instructed that the broadcast by Conroy Chino and KOAT was newsworthy, and was therefore privileged. Conroy Chino and KOAT are not liable for invasion of privacy unless you find that they abused the privilege. [They abused the privilege if they lacked belief, or reasonable grounds to believe, in the truth of their statements concerning Roberta Padilla.] [They abused the privilege if they made their statements concerning Roberta Padilla with "actual malice," as I have defined that term for

you.]

-- Padilla v. KOAT TV, Inc.

1. Similarly to opinion, defendants also enjoy a privilege of fair comment. The First Amendment to the Constitution requires a privilege of fair comment, particularly in commenting on legitimate issues of public concern relating to public figures such as Mr. Paul.

2. I instruct you that the character and qualifications of a candidate for elective public office are legitimate issues of public concern.

3. If you find that statements in the article were fair comment on these legitimate issues of public concern, your deliberations must end and you must find in favor of the Metro Corp. defendants.

-- Paul v. Philadelphia Magazine (D)

### C. Truth/Substantial Truth

Editor's Note: *This instruction may be useful where a defamation case goes to the jury on the basis of a publication or broadcast that contains both statements about which jury questions exist and other statements which are indisputably true. It draws the jury's attention to the fact that no finding for plaintiff as to liability nor damages can be based upon the truthful statement.*

You may not award any damages against KOAT for publicizing the fact that Roberta Padilla was arrested and charged with embezzlement, because this fact is true.

-- Padilla v. KOAT TV (C)

Editor's Note: *It may be also useful to repeat an instruction regarding substantial truth when discussing damages, if the court will give an additional instruction.*

You may not award damages to Plaintiff for any portions of the broadcast which were true. In particular, you may not award Plaintiff any damages caused by the exposure of the fact that Plaintiff had committed a felony, or the fact that she was arrested, or the fact that she was charged with embezzlement. Even though Plaintiff's reputation might have been damaged by this true information, and even though she might have been hurt and embarrassed by this true information, you may not award damages for these disclosures, because the law protects true statements.

-- Padilla v. KOAT TV (C)

Editor's Note: *This instruction really pertains to the plaintiff's burden rather than the defense of truth.*

Libel occurs only when there is a false statement of fact. In other words, a plaintiff cannot recover if the allegedly libelous statements are substantially true, even if the article

as a whole somehow conveys a negative tone about the plaintiff.

-- Ross v. Santa Barbara News (C)

A publication is false when it is not substantially true. The truth or falsity of a publication is based upon its natural and obvious meaning, taking into consideration the publication as a whole. A publication should be considered substantially true if the actual or word-for-word truth would produce the same impact or effect on the reader as the statement which was made; that is, if the gist of the defamation is true.

-- Lansdowne v. Beacon Journal (C)

If you find that each statement at issue was substantially true, then you must find for the defendants. It is not necessary that each statement be absolutely or mathematically true; substantial truth is all that is required.

-- Schultz v. Readers Digest (C)

It is a defense to a claim of defamation if the statement made was true.

-- Haskell v. Stauffer Communications, Inc. (C)

The defendants claim that the alleged defamatory statements were true. Truth is a complete defense to an action for defamation. If you find that an alleged statement is true, then you must find for the defendants with regard to that particular alleged defamation. Truth may be proven from any source whether the defendants knew about the information at the time of publication or not.

-- Pollution Control Industries v. Howard Publications (D)

"False" means that there is a substantial variance between the facts as reported in the broadcast and the facts themselves. In order for such a substantial variance to exist, the mind of an ordinary listener or viewer must be affected by the statements in the broadcast in a manner that is different from the manner in which the facts themselves would affect the mind of an ordinary listener or viewer. If the effect on the mind of an ordinary listener or viewer when listening or viewing the broadcast as a whole would be the same as the facts themselves, then any variance between the two should be disregarded. A statement that is substantially true cannot be false.

-- Merco Joint Venture v. Kaufman (C)

"Falsity of Statements." To prevail on his defamation claim as to a particular statement, plaintiff must demonstrate, by a preponderance of the evidence, that the statement at issue was false. It is not sufficient for plaintiff to show that a minor detail was inaccurate. If a statement is substantially true, it cannot be defamatory. The law of

defamation overlooks minor inaccuracies and, instead, concentrates on substantial truth.

-- Gray v. St. Martin's Press

**D. Consent**

If a person consents to a defamatory publication, this is an absolute defense to a libel claim by that person. An individual who consents to his remarks being published cannot complain of the adverse effect of those remarks on his reputation. The parties agree that as to these five quotations, Mr. Masson did not consent to being misquoted.

-- Masson v. New Yorker (C)

## XVI. DAMAGES EXPLAINED

### A. Actual and Compensatory

#### 1. Generally

I will now instruct you on the subject of damages. The fact that you are instructed on damages is not to be considered by you to suggest that you must consider damages. If you first find defendants liable to plaintiff in accordance with these instructions, you must, of course, determine damages. Otherwise, you must not consider damages.

-- DiGregorio v. Time, Inc. (C)

The fact that I have instructed you on damages should not be taken by you as indicating one way or the other whether plaintiff is entitled to be awarded anything. That is for you to decide.

-- McCarnan v. WAMS Radio Station (D)

If – and only if – you find that [plaintiff] has met his burden of establishing each and every one of the four elements of his claim as I have described them to you, you may consider the amount, if any, to be awarded to him.

* * *

My charge to you on the law of damages must not be taken as a suggestion that you should find for the plaintiff. It is for you to decide on the evidence presented and the rules of law I have given to you whether plaintiff is entitled to recover from defendant. If you decide he is not entitled to recover, you need go no further; your verdict will be for defendant ABC.

-- Lasky v. ABC (C)

Damages may or may not be appropriate in this case. Three types of damages may occur when a person is libeled. They are:

1) General damages, which are damages for loss of reputation, shame, mortification and hurt feelings.

2) Special damages, which are damages which a plaintiff alleges and proves to have suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he or she has expended as a result of a false statement, and no other.

3) Exemplary or punitive damages, which are damages imposed for the sake of example and by way of punishing a defendant.

To recover general or special damages, plaintiff must prove that his

damages were caused by statements published by the defendants which you have found to be libelous.

-- Ross v. Santa Barbara News Press (D)

The fact that the court has instructed you as to the proper measure of damages should not be considered as suggesting any view on the part of the court as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of the plaintiff in accordance with the other instructions.

-- Gray v. St. Martin's Press (D)

As I previously said, the fact that I have instructed you on the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance, in the event that you should find in favor of plaintiffs on the question of liability in accord with the other instructions.

-- Paul v. The Hearst Corporation (C)

The fact that I instruct you on the subject of the damages should not be taken to imply that I think the Plaintiff is entitled to damages in this case. I am required by law to instruct you in every aspect of the case regardless of my personal view of the evidence.

-- Paul v. Philadelphia Magazine (D)

You are to assume that an award made to plaintiff as damages in this case, if any award is made, is not subject to income or other tax. Should you feel the plaintiff is entitled to an award of damages, then you are to follow the instructions already given by this Court on measuring those damages, and in no event should you either add to or subtract from that award by any speculation concerning income taxes.

-- Faigin v. Kelly (D)

I will now instruct you on the subject of damages. My charge to you on the law of damages must not be taken by you as indicating one way or the other whether plaintiff is entitled to be awarded anything. If – and only if – you find that plaintiff has met his burden of establishing each and every element of his claim as I have described them to you, you may consider the amount, if any, to be awarded to him. If you decide he has not met his burden on any element of his claim, you need go no further; your verdict will be for defendant Time, Inc.

-- Schafer v. Time, Inc. (C)

**2. General Damages**

**a. Elements of General Damage**

The law of compensatory damages for libel is divided into two areas: special damages and general damages.

General damages are damages for loss of reputation, shame, mortification, hurt feelings, and emotional distress.

-- Rosenthal v. New Yorker Magazine (C)

"General damages" are damages for loss of reputation, shame, mortification, hurt feelings, and emotional distress.

-- Narula v. Santa Paula Chronicle (C)

The compensatory damages awardable in defamation actions are: (1) the injury to reputation; (2) the general falling off of business, patronage or custom; and (3) mental anguish.

In a defamation case, the assessment of compensatory damages is the province of the jury and, because there can be no definite standard to measure the amount, the amount to be awarded is a matter within your discretion.

You are instructed that if you do decide to award damages, the Defendants shall be liable to pay for harms already suffered by the Plaintiffs for any injury to reputation and loss of business, and for mental anguish, if any, of the individual Plaintiff, Scott Calhoon, but also for future injuries.

In arriving at the amount of your verdict, you may take into consideration the following factors:

1. The seriousness of the false charge;

2. The extent of the Defendants' newscasts;

3. The aggregate number of recipients of the defamatory charges;

4. The reaction of those who received the defamation;

5. The disruption those charges caused;

6. As background information, the general falling off of the Plaintiffs' business.

-- Calhoon v. Palmer Communications, Inc. (C)

If you consider the issue of damages, you may determine what amount of damages

will fairly and adequately compensate the plaintiff for the actual damages proximately caused by the broadcast. In so doing, you may consider only those actual damages which occurred in a natural and continuous sequence as a result of the broadcast. You may consider the potential items of damage in reaching your damage determination:

(A) Injury to reputation and standing in the community;
(B) Shame, humiliation and mental suffering; and
(C) Out-of-pocket loss, including lost income and lost earning capacity in the future.

If you consider the issue of future damages, the plaintiff is entitled to the reasonable value of any loss of future earning power necessarily caused by the broadcast. In determining this amount, you may consider what the plaintiff's earning power was before the broadcast, what it would have been at the present time had the broadcast in question not taken place and what it is now.

A damaged plaintiff should not be deprived of compensation merely because he cannot prove the exact dollar amount of the damages suffered.

Damages for injury to reputation and standing in the community, as well as for shame, humiliation, and mental suffering, if any, are compensatory damages. The law fixes no precise standard for computing such damages, but leaves it to the jury's sound discretion to fix the appropriate amount therefor.

The measure of any future damage is the present loss in dollars which [plaintiff] with reasonable certainty will sustain in the future, which is capable of measurement by the present value of money.

-- Frey v. Multimedia, Inc. (C)

Compensatory damages can generally be defined as that amount of dollars which will compensate plaintiff for the loss or injury he sustained by reason of defendants' wrongful conduct. Simply, it is the amount of dollars which will make good or replace the loss proximately caused by defendants' wrongful conduct.

If you find that plaintiff has proved every element of his defamation claim in accordance with these instructions, you may award him money damages which will compensate him reasonably for any loss of reputation in the community, personal humiliation, and mental anguish which he has suffered as a proximate result or cause of these statements. You must limit your consideration to statements of fact found to be false and defamatory, and may not consider the effect, if any, of statements which are not false or defamatory.

-- DiGregorio v. Time, Inc. (C)

If you should decide in favor of the plaintiff on the question of liability, you must

then fix the amount of money which will reasonably and fairly compensate [plaintiff] for the following elements of damages proved to have resulted from the communication by the defendants:

1. Impairment of plaintiff's reputation and standing in the community;

2. Personal humiliation of the plaintiff; and

3. Mental anguish and suffering incurred by the plaintiff.

Whether any of these elements of damages have been proved by the evidence is for you to determine, although there need be no evidence which assigns an actual dollar value to the injury.

Further, sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages.

-- Marchiondo v. Journal Publishing Co. (C)

If you find that the defendants defamed plaintiff by a slander and that such slander was a proximate cause of general damages to plaintiff, in determining the amount of such general damage, you should consider, but are not limited to, the following:

1. The extent of the publicity given defendants to the slander;
2. Plaintiff's good name, reputation, and the loss thereof;
3. Plaintiff's shame, mortification, injured feelings and mental suffering;
4. Plaintiff's professional standing in the community where he practiced medicine.

* * *

The amount of damages claimed in the argument of counsel must not be considered by you as evidence of reasonable compensation.

-- Galloway v. CBS (C)

In fixing these amounts you may consider Mr. Hepps' standing in the community prior to the publication of the articles in question, the nature of the defamatory charges made against him, the extent to which such charges circulated in the community, and all of the other facts and circumstances as you the jury find them to be.

-- Hepps v. Philadelphia Newspapers, Inc. (C)

Compensatory damages must be proved as any other issue in this case; that is, the plaintiff must prove by a preponderance of the evidence the nature and extent of her damage.

If your verdict is for the plaintiff and you find she is entitled to an award of damages, you will determine from the preponderance of the evidence the amount of money which will fairly compensate her for actual injury caused by defendants.

In determining the measure of damages, if any, you shall take into consideration the nature and extent of plaintiff's injury or damage, the damage to her reputation, the outrage, mental suffering, shame, humiliation and ridicule she suffered.

-- Boddie v. ABC (C)

If you find in favor of plaintiffs with respect to liability, then the plaintiffs are entitled to be fairly and adequately compensated for all harm they suffered as a result of the false and defamatory communication published by the defendants.

The injuries for which you may compensate the plaintiffs by an award of damages against the defendants include:

1. the actual harm to the plaintiffs' reputation that you find resulted from the defendants' conduct;

2. the emotional distress, mental anguish, and humiliation that you find the plaintiffs suffered as a result of the defendants' conduct (as well as the bodily harm to the plaintiffs that you find was caused by such suffering;

3. any other special injuries that you find the plaintiffs suffered as a result of the defendants' action.

If you find that the defendants acted either intentionally or recklessly in publishing the false and defamatory communication, you may presume that the plaintiffs suffered both injury to his reputation and the emotional distress, mental anguish, and humiliation that would result from such a communication. This means you need not have proof that the plaintiffs suffered emotional distress, mental anguish, and humiliation in order to award him damages for such harm because such harm is presumed by the law when a defendant publishes a false and defamatory communication with the knowledge that it is false or in reckless disregard of whether it is true or false.

In determining the amount of an award for such presumed injury to the plaintiffs' reputation and suffering of emotional distress, mental anguish, and humiliation by the plaintiffs, you may consider the character and previous general standing and reputation of the plaintiffs in his community. You may also consider the character of the defamatory communication that the defendants published, its area of dissemination, and the extent and duration of the publication.

You may also take into account the defendants' unsuccessful assertion of the substantial truth of the defamatory communications as a matter likely to affect the

plaintiffs' reputation. You may also consider what the probable effect the defendants' conduct had on the plaintiffs' trade, business, or profession and the harm that may have been sustained by the plaintiffs as a result of that conduct.

The motive and purpose of the defendants, their belief or knowledge of the falsity of the publication, and the conduct of the plaintiffs are not to be considered by you in determining the amount of the damages to which the plaintiffs are entitled for the above-stated items.

-- Paul v. The Hearst Corporation (C)

The purpose of compensatory damages is to make the Plaintiff whole -- that is, to compensate the Plaintiff for the damage that the Plaintiff has suffered. You may award compensatory damages only for injuries, if any, that Plaintiff proves were proximately caused by the Defendants' allegedly wrongful conduct. The damages that you award must be fair compensation for all of Plaintiff's damages, no more and no less.

There is no set rule for the way damages are to be calculated in a libel case brought, as here, by a business corporation. The approach that you use in determining damages, therefore, should depend upon the nature and the extent of injury, if any, which you find from a preponderance of the evidence was proximately caused to Plaintiff by Defendants' publication of such of the statements inquired about in Interrogatory No. 1 as you may have found were false and defamatory. Plaintiff is not entitled to recover damages, if any, for any of the other statements in the Article – even though they may have been defamatory – if those statements were true or substantially true. In other words, it is *only* for injuries, if any, proximately caused by Defendants' **false and defamatory** statements, if you have found such in your answer to Interrogatory No. 1, that Plaintiff MMAR may obtain a recovery of damages.

Because there is no set rule for the assessment of damages to a business in a case such as this, you may consider all of the evidence that has been admitted before you on the subject of damages. Thus, you may consider the loss, if any, between the fair market value of MMAR immediately before and immediately after the publication of the Article that was proximately caused by any false and defamatory statements that you may have found were published in the Article, or MMAR's lost profits, if any, that were proximately caused by the publication of any false and defamatory statements that you may have found were published in the Article.

In answering Interrogatory No. 3, you are not allowed to award damages as a punishment and cannot increase the damages to penalize either Defendant. You should not award compensatory damages for speculative injuries, but only for those injuries which the Plaintiff has actually suffered. If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the Plaintiff prove the amount of its

losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

-- MMAR Group Inc. v. Dow Jones & Co., Inc. (C)

If you find the communication, or any portion of it, was defamatory and not substantially true, you must determine whether it caused actual injury to the plaintiff. To recover on his claim, Mr. Paul must have proven that the use of the phrase "slip-and-fall lawyer" caused him actual injury. If the use of the phrase did not cause any harm to Mr. Paul, he may not recover.

A false and defamatory communication is a cause of actual injury if it is a substantial factor in bringing the injury about. A false and defamatory communication is not a cause of actual injury if it has no connection or only an insignificant connection with the injury.

Although a libel plaintiff may recover for any actual injury to his reputation and standing in the community, injury to reputation cannot be presumed, and any claim of actual harm must be proven by competent evidence of a clear and convincing character. It is incompatible with First Amendment freedoms and therefore unconstitutional to presume that a plaintiff such as Mr. Paul has sustained any actual harm.

With respect to Mr. Paul's claim that he has suffered emotional injury, I instruct you that you may not find for him on this claim because he has not presented any medical testimony that he actually suffered the claimed emotional injury and that it was caused by the publication of the phrase "slip-and-fall lawyer."

-- Paul v. Philadelphia Magazine (D)

Compensatory damages can generally be defined as that amount of dollars which will compensate plaintiff for the loss or injury he sustained by reason of defendants' wrongful conduct. Simply, it is the amount of dollars which will make good or replace the loss proximately caused by defendants' wrongful conduct.

If you find that plaintiff has proved every element of his defamation claim in accordance with these instructions, you may award him money damages which will compensate him reasonably for any loss of reputation in the community, personal humiliation, and mental anguish which he has suffered as a proximate result or cause of these statements. You must limit your consideration to statements of fact found to be false and defamatory, and may not consider the effect, if any, of statements which are not false or defamatory.

-- Schafer v. Time, Inc. (D)

In determining the amount of damages, if any, you award, you may consider any evidence presented to you concerning the loss of reputation that the plaintiff may have sustained in the community, economic or business losses she experienced, embarrassment or humiliation she reasonably suffered, or any other form of harm which was caused directly by the negligent broadcast of a false and defamatory statement or statements about the plaintiff. However, you cannot award the plaintiff any actual damages for emotional or mental suffering unless you have found that she suffered a loss of reputation for which you have awarded her actual damages; and you cannot award the plaintiff any actual damages for loss of reputation unless you have found that the plaintiff personally experienced economic or other out-of-pocket loss for which you have awarded actual damages.

-- Malson v. Palmer Broadcasting Group (D)

**b. Reputational Injury**

In order to establish his right to recover, a defamation plaintiff must first prove by competent evidence that he has suffered actual injury. You may not award any damages for actual injury unless plaintiff has proven the existence of actual injury to his reputation by competent evidence, although there need be no evidence which assigns an actual dollar value to the injury.

-- Rosenthal v. New Yorker Magazine (C)

I remind you now that the foundation of an action for defamation is the injury to reputation. Hence, any award you choose to make as part of the general damages, which I just defined to you, may be only to redress consequences which followed from injury to plaintiff's reputation. In connection with the plaintiff McCoy's claimed emotional distress, I caution you, therefore, that plaintiff may be compensated by you for such ill effects only if you find that he experienced them because of the damage done to his reputation. But, if you find that his emotional suffering was caused only by his having read the libel himself, and not by the publication's impact upon his reputation, then you may not take such suffering into consideration in arriving at the amount of general damages you choose to award to the plaintiff McCoy.

-- McCoy v. Beraen Evening Record (C)

Plaintiffs' claim as to damages is that their reputations in the community were injured. Plaintiffs' damages, if any, are the reduction in the value of their reputations in the community.

-- Holding v. Muncie Newspapers, Inc. (C)

The interest of a plaintiff in a defamation suit which is protected by law is the reputation of the one alleged to have been defamed. If you find in this case that the reputation of the plaintiff had already been seriously damaged by other adverse publicity prior to the publication of the advertisement, then you may consider such proof in determining any amount to be allowed as damages herein.

-- Williams v. Seattle Times (C)

Since injury to reputation or character is the gist of an action for slander, you are instructed that you may take into consideration the plaintiffs' previous reputation in assessing what damages, if any, he has sustained. A bad reputation, as well as a good one, may be considered by you in assessing such damages.

-- Galloway v. CBS (C)

It was the duty of the plaintiff, before and at the time of the publication of the article, to use ordinary care for his own reputation. That means it was the duty of the plaintiff to be free of contributory negligence.

-- Gertz v. Robert Welch, Inc. (C)

Mr. Lasky also has the burden of establishing by a preponderance of the evidence that he suffered actual injury to his reputation -- that is, injury to his standing in the community in which he resides and works -- as a result of the ABC broadcast.

To satisfy this element of his claim, plaintiff must prove that such injury to his reputation was directly and actually caused by the ABC broadcast and not by any other factor.

You may not base your finding of injury solely on any mental distress, pain or injury to feelings that plaintiff may have suffered, and you may base a finding of actual injury only on specific evidence concerning any such alleged reputational injury.

-- Lasky v. ABC (D)

In addition to proving the other four elements that I have already described, plaintiff also bears the burden of proving by a preponderance of evidence that he suffered damage to his reputation as a result of the publication of the statement.

To recover any damages at all, plaintiff must prove by a preponderance of the evidence that his reputation was injured by the statement.

If he fails to prove reputational harm, you must find for the defendants.

If, on the other hand, he proves reputational harm, he may recover damages for

that harm as well as for any other damages that were the natural and direct result of the statement including damages for any out-of-pocket loss, humiliation and mental suffering.

If you find that plaintiff has established the other four elements of the claim but has failed to prove actual damages, you may award a nominal sum such as one dollar.

-- Gray v. St. Martin's Press (D)

One type of damage that Mr. Paul claims is damage to his reputation. You may not award this category of damages to him unless you find in his favor on his defamation claim – that is, if you find for plaintiff only on his false light claim, he may not recover damages for loss of reputation. In order to find that the statement in question harmed Mr. Paul's reputation, you must find that persons who know Mr. Paul actually read the phrase in *Philadelphia Magazine* and that their opinion of him actually was diminished specifically as a result of the publication. Injury to reputation is judged by reaction of other persons in the community and not by plaintiff's own speculation or self-estimation.

-- Paul v. Philadelphia Magazine (D)

The foundation of an action for defamation is an injury to reputation. Hence, any award you choose to make as damages may only be to redress injury to plaintiff's reputation which followed from the publication of a false and defamatory statement in *Armed & Dangerous*, and which was actually caused by that publication. In order to award damages to plaintiff, you must determine that his reputation in the community was, in fact, diminished by reason of false and defamatory statements in *Armed & Dangerous*.

Compensatory damages can generally be defined as that amount of dollars which will compensate plaintiff for the loss or injury he sustained by reason of defendant's wrongful conduct. Simply put, it is the amount of dollars which will make good or replace the loss directly caused by defendant's publication of the defamatory statement in *Armed & Dangerous*.

If you find that plaintiff has proven every element of his defamation claim in accordance with these instructions, you may award him money damages which will compensate him reasonably for any loss of reputation in the community, personal humiliation, and mental anguish which he has suffered as a direct result or cause of these statements. You must limit your consideration to statements of fact in the book found to be false and defamatory, and published with the prohibited state of mind and may not consider the effect, if any, of statements in the book which are not false or defamatory, or not made with the prohibited state of mind.

-- Faigin v. Kelly (D)

In determining the amount of any injury to plaintiff's reputation, you must evaluate the kind of reputation the plaintiff enjoyed before the publication, as compared to the kind

of reputation the plaintiff enjoyed after the publication; and whether plaintiff's reputation in the community has, in fact, actually been diminished since the publication. You may only award plaintiff damages for harm to his reputation resulting from publication of *Armed & Dangerous*.

You may not award plaintiff damages for harm to his reputation resulting from the lawsuit filed by Mr. Kelly against Mr. Faigin in 1989, or from any other action taken by Mr. Kelly other than publication of the book *Armed & Dangerous* in August, 1992.

In evaluating Mr. Faigin's reputation prior to publication of *Armed & Dangerous*, you may take into consideration the state of Mr. Faigin's practice as a sports agent just prior to publication of the book, the impact on Mr. Faigin's reputation of any lawsuits brought by former clients against Mr. Faigin and Lustig Pro Sports, and the impact, if any, on Mr. Faigin's reputation of his affiliation over several years with Greg Lustig.

-- Faigin v. Kelly (D)

The interest of the plaintiff in a libel case is his reputation. In determining the amount of damage that a plaintiff has incurred because of a libelous publication, you must take into account the plaintiff's prior reputation. If you find in this case that the reputation of the plaintiff has already been damaged or tarnished by adverse events or publicity prior to publication of the articles, then you may consider such proof in determining any amount to be allowed as damages, if any. The fact that the reputation of the plaintiff in an action for defamation is bad may serve to mitigate damages.

-- Schafer v. Time, Inc. (D)

**c. Emotional, Physical, and Other Injuries**

You are instructed that in order to recover for "mental suffering or anguish," it is necessary to show something more than mere worry, anxiety, vexation, or anger. The proof must show intense pain of body or mind, or a high degree of mental suffering.

-- Levine v. Gutman (C)

Now, the Plaintiff also seeks monetary damages for physical injury which he claims he sustained because of any of the defamatory statements broadcast by the Defendant. The Defendant claims that whatever physical injury Plaintiff may have sustained was brought about by causes other than the statements made by the Defendant. You will have to decide whether or not any defamatory statements broadcast by the Defendant were a proximate cause of physical injuries sustained by the Plaintiff. And, if so, what monetary award the Plaintiff is entitled to as compensation for such injury. An act is a proximate cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable persons would regard it as a cause of the injury. If you find that the Plaintiff did not prove by a fair preponderance of the credible evidence that he sustained emotional or physical injury, or, that the Plaintiff did prove that

he sustained emotional or physical injury but did not prove by a fair preponderance of the credible evidence that any defamatory statements broadcast by the Defendant were a substantial factor in bringing about such emotional or physical injury, then the Plaintiff would not be entitled to a monetary award for emotional and physical injury. If you find that the Plaintiff did prove by a fair preponderance of the credible evidence that he sustained emotional and physical injury, and you also find that the Plaintiff proved by a fair preponderance of the credible evidence that any defamatory statements broadcast by the Defendant were a substantial factor in bringing about such physical injury, then the Plaintiff would be entitled to a monetary award for such injury you find that the Plaintiff suffered and for conscious pain and suffering.

Conscious pain and suffering means pain and suffering of which there was some level of awareness by the Plaintiff. The Plaintiff would be entitled to recover a sum of money which will justly and fairly compensate him for his injury and for his conscious pain and suffering to date. In determining the amount, if any, to be awarded to the Plaintiff for pain and suffering, you may take into consideration the effect that the injury may have had and will have on his ability to enjoy life.

Loss of enjoyment of life involves the loss of the ability to perform daily tasks, to participate in the activities which were a part of his life before the injury, and to experience the pleasures of life. However, a person suffers the loss of enjoyment of life only if that person is aware at some level of the loss he has suffered. If you find that the Plaintiff as a result of his injuries suffered some loss of enjoyment of the ability to enjoy life, you may take that loss into consideration in determining the amount to be awarded him for pain and suffering to date.

-- Prozeralik v. Capital Cities (C)

In determining the amount of damages to allow the plaintiff, you may draw such inferences from the evidence of the nature of the injuries and the results thereof as are justified by your common experiences. Damages are not to be awarded on the basis of guesswork or speculation, nor on the basis of passion, prejudice, or sympathy, but on the basis of your assessment of what full and fair compensation should be.

If you find for the plaintiff on one or more of his defamation claims, then in determining the amount of compensatory damages to which he is entitled, you may take into consideration all of the circumstances surrounding the defamatory statement(s), the occasion on which it was made and the extent of its publication, the nature and character of the insult, the probable effect on those who heard the statement, and its probable and natural effect upon the plaintiff's personal feelings and upon his standing in the community and in business.

Your verdict should be for an amount that will fully and fairly compensate him for:

(a) any insult to him including any pain, embarrassment, humiliation,

and mental suffering that he suffered as a result;

(b) any injury to his personal and/or professional reputation; and

(c) if proven, any special damages.

-- Gray v. St. Martin's Press (C)

In order to recover for alleged mental anguish, a plaintiff must show more than mere worry, anxiety, vexation, or anger; the proof must show intense pain of body or mind, or a high degree of mental suffering.

-- Kastrin v. CBS Inc. (D)

The second damage theory argued by the plaintiff also concerns compensatory damages. If you find that the plaintiff has demonstrated the essential elements of his claim by a preponderance of the evidence then you may consider if the plaintiff has demonstrated actual damages other than damage to his reputation. These damages may include damages to compensate the plaintiff for personal humiliation, mental anguish, and suffering. In order to recover for these actual damages the plaintiff does not have to prove that the defendant acted with actual malice. However, these damages cannot be presumed. Instead, the plaintiff must prove by a preponderance of the evidence that he suffered actual injury as a direct result of false and defamatory statements that were published by the defendant. You cannot base the award on what you speculate the actual injury might be. You may only award damages if you determine that plaintiff has proven such an actual injury by a preponderance of the evidence.

-- Schafer v. Time, Inc. (C)

**3. Special Damages**

Special damages are all damages which plaintiff alleges and proves he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other.

-- Rosenthal v. New Yorker Magazine (C)

Now, the Plaintiff also seeks monetary damages for financial loss which he claims he sustained because of any of the defamatory statements broadcast by the Defendant. The Plaintiff contends that because of these defamatory statements he lost an investment in Air Niagara, Incorporated, his loans and advances to Air Niagara, Incorporated became worthless, and he incurred expense and uncollectible accounts in connection with Air Niagara, Incorporated, all in the total sum of one million four hundred sixty-nine thousand six hundred and eight dollars.

The Defendant contends that whatever financial loss Plaintiff may have sustained was brought about by causes other than the statements made by the Defendant in the broadcasts. You will have to decide whether or not any of the defamatory statements broadcast by the Defendant were a proximate cause of the financial loss sustained by the Plaintiff as he claims, and if so, what monetary award the Plaintiff is entitled to as compensation for such financial loss.

* * *

If you find that the Plaintiff did not prove by a fair preponderance of the credible evidence that he sustained the specific financial loss which he claims, or any part of the specific financial loss which he claims, or that the Plaintiff proved that he did sustain a financial loss either wholly or partly, but that Plaintiff did not prove by a fair preponderance of the credible evidence that any statements broadcast by the Defendant were a proximate cause in bringing about such financial loss, then the Plaintiff would not be entitled to any monetary award for a financial loss. If you find that the Plaintiff proved by a fair preponderance of the credible evidence that he did sustain the financial loss which he claims, either wholly or partly, and you also find that the Plaintiff proved by a fair preponderance of the credible evidence that any defamatory statements broadcast by the Defendant were a substantial factor in bringing about such financial loss, then the Plaintiff would be entitled to a monetary award that equals the amount of such financial loss actually suffered by the Plaintiff.

-- Prozeralik v. Capital Cities (C)

In addition to general or compensatory damages, you may conclude that plaintiff is also entitled to "special damages." If you find that plaintiff has demonstrated, by the requisite standards of proof, that one or both defendants is liable for one or more of the statements at issue in this case, and if you find that plaintiff has proved that he suffered actual monetary losses as a direct result of one or more of those statements, you may award him such special damages as are appropriate to compensate him for those actual monetary losses. By "actual monetary losses" I mean actual out-of-pocket losses, such as lost earnings from his business ventures which were proximately caused by one or more of the statements at issue in this case.

Here, plaintiff claims that the defamation proximately caused him to lose earnings from public relations and public affairs between October 22, 1992 and the date of trial. In order to recover those lost earnings, plaintiff must prove that one or more defamatory statements proximately caused, or was a substantial factor in bringing about, the damages sought. Stated somewhat differently, plaintiff bears the burden of proving that his inability to work at his previous level of compensation was actually caused by one or more of the statements at issue in this case. Without such proof, plaintiff cannot recover those damages. It is not enough for plaintiff simply to prove that he incurred a financial loss or that his job terminated at some point after a statement was published. He must establish a causal link between the publication of the statement and the lost income or earnings he

claims to have sustained. So, among other things, you must consider whether plaintiff's employment terminated voluntarily or whether it terminated because one or more statements at issue in this case sufficiently damaged him that he lost his ability to continue that employment.

-- Gray v. St. Martin's Press (C)

"Economic damages" means compensatory damages for pecuniary loss. "Economic damages" do not include damages for mental anguish or harm to reputation or punitive damages.

-- Kastrin v. CBS Inc. (D)

You are instructed that a person suffers specific pecuniary loss if a false and defamatory statement made with knowledge of falsity or with serious doubts about the truth played a substantial part in inducing others not to deal with that person and that person also shows a specific business opportunity that has been lost as a result of that statement.

-- Kastrin v. CBS Inc. (D)

**4. No Speculative Damages**

It is not necessary that the damages sustained by Plaintiff McCatnan be calculable to an absolute mathematical certainty. An injured party is not barred from a reasonable recovery merely because it is unable to prove its damages with absolute certainty. However, there must be some reasonable basis in fact upon which to estimate Plaintiff's damages without speculation and guesswork.

-- McCarnan v. WAMS Radio Station (C)

It is difficult to measure loss of reputation, mental anguish, and humiliation; nevertheless you may not speculate – your award must be based on the evidence and must be in an amount which is fair and adequate.

-- DeGregorio v. Time, Inc. (C)

Damages which are speculative cannot be recovered. You may only compensate plaintiff for those damages which you find were sustained as a proximate result of the December 12, 1989, 11:00 P.M. broadcast. You may not compensate him for damages which may have been caused by any other broadcast or news story, or any other event or circumstance.

-- Frey v. Multimedia, Inc. (C)

Compensatory damages must be reasonable. If you should find that the plaintiff is

entitled to a verdict, you may award him only such compensatory damages as will reasonably compensate him for such injury and damage as you find that he has sustained as a proximate result of the publication.

You are not permitted to award speculative compensatory damages. So, you are not to include in your verdict compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future.

-- Gertz v. Robert Welch, Inc. (C)

You are not permitted to [award a party] speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably certain.

However, you should compensate a party for loss or harm which is reasonably certain to be suffered by him in the future as a proximate result of the injury in question.

-- Galloway v. CBS (C)

You are not permitted to award speculative damages. This means you are not to include in any verdict compensation for prospective loss which, although possible, is wholly remote or left to conjecture and/or guess.

-- Boddie v. ABC (C)

No damages of any kind may be supposed or presumed to have occurred. As I have said, any plaintiff, if entitled to damages because he has proved all the essential elements of his claim, is entitled only to such damages as he has proved by a preponderance of the credible evidence. In this case, in which the subject matter of the statements complained of relates to public controversy, you may not speculate about such damages and you may not guess, imply or presume that any such damages have occurred. No award may be given that is more than the amount that is necessary to compensate plaintiff for any actual injury proved by competent evidence to have occurred. Unless such damage is so proven to exist, then it is your sworn duty to find that no damages have occurred.

-- Lasky v. ABC (D)

Mr. Paul is not entitled to recover damages for injuries that are too remote or speculative or cannot be attributed to the publication. Rather, he bears the burden of proving by a preponderance of the evidence that the publication was a substantial factor in bringing about any harm about which he has testified.

-- Paul v. Philadelphia Magazine (D)

If the damage incurred by the plaintiff is only the imaginary or possible result of a tortuous act, or if other and contingent circumstances preponderate in causing the injury, such damage is too remote to be the basis of recovery.

-- Schafer v. Time, Inc. (D)

To recover any compensatory damages whatsoever, the plaintiff must prove by a preponderance of the evidence that he suffered actual injury as a direct result of false and defamatory statements that were published by the defendant. You cannot base the award on what you speculate the actual injury might be. You may only award damages if you determine that plaintiff has proven such an actual injury by the preponderance of the evidence. If you do not conclude that the defendant caused plaintiff to suffer actual injury, then you must decide in favor of the defendants.

-- Schafer v. Time Inc. (D)

In considering the issue of plaintiff's compensatory damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the plaintiff's damages, no more and no less. Damages must not be based on speculation or guesswork because it is only actual damages that are recoverable. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendant.

-- Schafer v. Time, Inc. (C)

In fixing the amount of damages, if any, you must not resort to speculation or conjecture, but must base your award on the amount of damage you believe has been shown by the greater weight of the evidence to have occurred.

-- Malson v. Palmer Broadcasting Group (D)

**5. Nominal Damages**

Nominal damages are not damages in fact, but damages in name only and are allowed not as an equivalent for a wrong inflicted but in recognition of the existence of an invasion of a legal right.

Nominal damages may be awarded where the proof fails to establish facts on which a recovery of actual damages may be predicated or in a case where a party has unequivocally disclaimed actual damages.

Nominal damages are those recoverable where a legal right is to be vindicated against an invasion that produced no actual loss or where, from the nature of the case, proof as to the amount of damages has failed or has been disclaimed.

There is no specific sum that can be defined as "nominal damages," but usually one

dollar is the sum allowed.

-- Rogers v. Doubleday & Co. (D)

If you find that defendants . . . are liable for harm caused by their publication but that the harm was not substantial, and you further find that the circumstances do not justify the award of punitive damages, your award of compensatory damages in plaintiff's favor may be in a nominal or token amount.

-- McCoy v. Bergen Evening Record (D)

If you find that plaintiff . . . has not proved by a preponderance of the evidence that he suffered any significant actual injury as a result of defendant's . . . portrayal of him, you may award nominal damages. Nominal damages are not given as an equivalent for the wrong but merely in recognition of a technical injury and by way of declaring the rights of plaintiff. In reality, nominal damages are damages in name only, not damages in fact. Nominal damages are assessed in some trifling amount, such as one dollar, simply for the purpose of declaring an infraction of the plaintiff's rights and the commission of a wrong.

-- Machleder v. Diaz (C)

If you find that plaintiff has established the essential elements of the offense but has failed to prove actual damages, you may award a nominal sum such as one dollar.

-- Schultz v. Reader's Digest (C)
-- Tavoulareas v. Washington Post (D)

Damages are given as compensation for an injury done, and generally this is the measure when the damages are of a character to be estimated in money. If the injury is small, or mitigating circumstances are strong, only nominal damages are given.

If you find that plaintiff has proved all of the essential elements of a case for defamation, but has failed to prove damages sufficiently, you may award a nominal sum, such as one dollar.

-- Schafer v. Time, Inc. (D)

Compensatory damages are given as compensation for an injury done. If the injury is small, or mitigating circumstances are strong, only nominal damages are given. If you find plaintiff has proved all of the essential elements of a case for defamation, but has failed to prove damages sufficiently, you may award a nominal sum.

-- Schafer v. Time, Inc. (C)

**6. Presumed Damages**

If you find that any of the five challenged quotations are false and defamatory, then you may also award plaintiff presumed general damages, provided that you find by clear and convincing evidence that the defendant either knew that the statement was false and defamed plaintiff or published the statement in reckless disregard of whether the matter was false and defamed plaintiff.

Presumed damages are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of reasonable compensation. In making an award of presumed damages you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence.

-- Masson v. New Yorker (C)

If you determine by clear and convincing evidence that the Defendants broadcast defamatory statements with knowledge of falsity or with reckless disregard for the truth or falsity of the statements as explained in these instructions, then the law provides that compensatory damages are presumed to exist in favor of the Plaintiffs on their defamation claim. Presumed damages arise by inference of law and are not required to be proved by any evidence by the Plaintiffs.

-- Calhoon v. Palmer Communications, Inc. (C)

Plaintiff in this case seeks damages under three theories, and I will explain each theory to you separately. The first two damage theories that plaintiff argues relate to what the law calls compensatory damages. If you find that plaintiff has established all the essential elements of his claim by a preponderance of the evidence you should assess the amount you find to be justified as full, just and reasonable compensation for all of the plaintiff's damages, no more and no less.

First, plaintiff claims that he has suffered presumed damages to his reputation. To receive presumed damages the plaintiff must do more than prove the essential elements of his libel claim as I have described them to you. Under Georgia law, you may presume that the plaintiff suffered damages to his reputation and compensate the plaintiff for such damages only if the plaintiff has established the essential elements of his claim as they have been described to you by a preponderance of the evidence and you also find the following elements:

(1) you must find that the libel either imputes to the plaintiff a crime punishable by law or charges the plaintiff with being guilty of some debasing act which may exclude him from society; and

(2) you must find that the plaintiff proves by clear and convincing evidence, as that term has been previously defined, that the defendant published the libelous material with actual malice.

[definition of actual malice omitted]

Under this first damage theory you may presume that the plaintiff suffered injuries to his reputation if you find that the plaintiff proved all of the essential elements of his claim by a preponderance of the evidence, and that the libel charges the plaintiff with a crime or with a debasing act which may exclude him from society, and you find by clear and convincing evidence that the defendant acted with actual malice. If -- and only if -- you find that the plaintiff has met all of those requirements then you may presume that he suffered damages to his reputation and may compensate the plaintiff for those damages. When you assess damages to his reputation you may consider testimony concerning plaintiff's reputation prior to the publication of the alleged libel. If you find that the reputation of the plaintiff has already been damaged or tarnished by adverse events or publicity prior to publication of the article, then you may consider such proof in determining any amount to be allowed as damages, if any. The fact that the reputation of a plaintiff in a defamation action is bad may serve to mitigate damages. Conversely, of course, if you find that the reputation of the plaintiff has not been damaged by events or publicity prior to the publication of the article, then evidence of his reputation prior to publication of the article would not mitigate his damages.

-- Schafer v. Time, Inc. (C)

**7. Mitigation of Damages**

You are instructed that any person who claims damages as a result of an alleged wrongful act to another has a duty under the law to use reasonable diligence under the circumstances to "mitigate," or minimize, those damages. The law imposes on an injured person the duty not to forego reasonable opportunities he may have had to avoid the aggravation of his injuries, so as to reduce or minimize the loss or damage.

If you find the defendants or one of them is liable and that the plaintiff has suffered damages, the plaintiff may not recover for any item of damage he could have avoided through such reasonable effort. If the plaintiff unreasonably failed to lessen his damages, you should deny recovery for those damages which he could have avoided had he taken advantage of the opportunity.

Bear in mind that the question whether the plaintiff acted "reasonably" with respect to the mitigation of damages is one for you to decide, as sole judges of the facts. Although the law will not allow an injured plaintiff to sit idly by when he has the ability to mitigate, this does not imply that the law requires an injured plaintiff to exert himself unreasonably or incur unreasonable expense in an effort to mitigate, and it is defendant's burden of proving that the damages reasonably could have been avoided. In deciding whether to reduce plaintiff's damages due to some failure to mitigate, therefore, you must

weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant has satisfied his burden of proving that the plaintiff's conduct was not reasonable.

-- Gray v. St. Martin's Press (D)

Under the law, an injured party has a duty to undertake reasonable efforts to mitigate his or her damages. If you find for the plaintiffs, you may consider whether they met or failed to mitigate their damages.

In the eyes of the law, a wrongdoer takes his victim as he finds him, and is liable for the full extent of the injuries and damages he has inflicted, even if those damages are greater than he could have foreseen because that victim was particularly susceptible to injury due to a pre-existing disease or condition.

-- Paul v. The Hearst Corporation (C)

A person has a duty to use ordinary care to minimize his or her damages after he has been damaged. It is for you to decide whether plaintiff failed to use such ordinary care and, if so, whether any damage resulted from such failure. You must not compensate the plaintiff for any portion of his damages which resulted from his failure to use such care.

-- Stecco v. Moore (D)

You are also instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages – that is, to take advantage of any reasonably opportunity he may have had under the circumstances to reduce or minimize the loss or damages.

-- Schafer v. Time, Inc. (C)

### B. Punitive Damages

Editor's Note: *Practitioners should avoid the use of the term "actual malice" in proposed instructions about punitive damages. See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666 & n.7 (1989) (describing the term as "unfortunately confusing" and encouraging judges to use "plain English" terms such as "state-of-mind" or "deliberate or reckless falsity" instead). Some instructions from older cases which may use the term are included below because they otherwise fairly describe the law with respect to consideration of punitive damages. Instructions on punitive damages have been divided into two categories: those which require only proof of knowing or reckless disregard of truth and those which also add an element of common law malice or outrageous conduct as a prerequisite to a punitive damage award.*

#### 1. Actual Malice

In the event you find that plaintiff should recover actual damages, and if you

further find by clear and convincing evidence that the acts of the defendants' article constituted actual malice, then you may award punitive damages.

Such additional damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

The amount of punitive damages must be based on reason and justice taking into account all the circumstances including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the actual damages and injury and not disproportionate to the circumstances.

-- Marchiondo v. Journal Publishing Co. (C)

If you find that the plaintiff has established the question of essential elements of his claim and if you also find, on the basis of clear and convincing evidence that the defendant acted with actual malice, that is, with knowledge of the falsity or reckless disregard of the falsity of the material, in publishing the article in question, then you may award the plaintiff punitive or exemplary damages in addition to the actual damages assessed. Punitive damages are designed to punish the offender and serve as an example to others. Whether or not to award such damages, and the amount thereof, are matters confided to you for decision.

-- Gertz v. Robert Welch, Inc. (C)

**2. Actual Malice and Common Law Malice**

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive or exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or compensatory damages; and should further find, on the basis of clear and convincing evidence that the defendants acted with reckless disregard in publishing the writing complained of, and that the acts or omissions of the defendants were maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

* * *

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendants'

act or omission, which proximately caused the actual damage to the plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

I want to emphasize to you that in order to award punitive damages in this case, regardless of whether or not you find that the plaintiff is a public figure, you must find by clear and convincing evidence that the defendants published the passages complained of with reckless disregard as defined in these instructions.

-- Pring v. Penthouse (C)

Editor's Note: *In Lasky, the proposed instruction on actual damages required a reckless disregard finding.*

In this case, Mr. Lasky seeks punitive damages in addition to his claim for compensatory damages. Punitive damages are designed to punish a defendant or to deter future conduct. They may be considered only if Mr. Lasky satisfies each and every one of the other elements that I have previously described to you. If you find that Mr. Lasky satisfied such elements, punitive damages may only be awarded upon proof of one further element: Mr. Lasky must prove that ABC acted with an actual intent to injure him when it prepared its broadcast and did so with spite and ill will.

Any punitive damages you decide to award should bear a reasonable relationship to the actual damages that you have found, if any.

You may not award punitive damages against ABC unless you find that ABC expressly authorized or ratified the actual intent of its employees to injure Mr. Lasky, or authorized or ratified their spite and ill will, or that an officer of ABC participated in such conduct.

-- Lasky v. ABC (D)

If, and only if, you have found actual damage to reputation, you may consider awarding punitive damages.

If you find that the defendants' conduct was a substantial factor in bringing about the harm the plaintiff is alleged to have suffered and if you find that the conduct of the defendant was outrageous, you may award punitive damages, as well as any compensatory damages, in order to punish the defendant for his conduct and to deter the defendant and

others from the commission of like acts.

A person's conduct is outrageous when he acts with a bad motive or when he acts with reckless indifference to the interests of others.

Punitive damages are designed to punish conduct which is evil or wanton. Consequently, in order to impose punitive damages you must find that plaintiff's evidence goes beyond that required for compensatory damages.

To recover compensatory damages, Mr. Paul must prove with convincing clarity that the Metro Corp. defendants published false and defamatory statements about him either with knowledge that the statements were false or in reckless disregard to whether they were false or not. To recover punitive damages he must prove, in addition, that the Metro Corp. defendants acted with a bad motive or with reckless indifference to the rights of plaintiff.

-- Paul v. Philadelphia Magazine (D)

You have heard the law you need to know in order to determine if the plaintiff should be awarded compensatory damages. Although I have described two theories under which you can award compensatory damages, if you decide to award compensatory damages, you will award one sum. Now, I will provide you with instructions concerning the third and final damage theory in this case, called punitive damages. If you award compensatory damages, the law permits the jury, under certain circumstances, to award the injured person punitive damages in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct. In a libel case, you cannot award punitive damages unless you find that the plaintiff has proven by clear and convincing evidence that the defendant acted with actual malice. You will recall that actual malice exists if the defendant published the defamatory material knowing it was false or acting with reckless disregard as to its falsity.

In order to receive punitive damages the plaintiff must also demonstrate by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or entire want of care which would raise the presumption of conscious indifference to consequences. Negligence, even gross negligence, is inadequate to support a punitive damages award. In this context, malice does not mean actual malice as it has been previously defined for you. In this context, an act or a failure to act shows malice if it was prompted or accompanied by ill will, or spite, or grudge, either toward the plaintiff individually, or toward all persons in one or more groups or categories of which the injured person is a member. An act or a failure to act shows wantonness if it was done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person. An act or a failure to act shows oppression if it was done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity.

-- Schafer v. Time, Inc. (C)

If you grant compensatory damages to the Plaintiffs and determine by clear and convincing evidence that the Defendants published their statements with knowledge of falsity or with reckless disregard for the truth or falsity of the statements, then you may in your discretion assess punitive damages against the Defendants.

Punitive damages are not to be considered as compensation to the Plaintiffs, but as punishment to the Defendants, and as an example to others to deter them from like conduct. The law does not require you to award punitive damages, and if you do so, you must use sound reason in setting the amount. You should be aware that the purpose of punitive damages is to punish, and not destroy, a defendant. In determining the amount of punitive damages, you may consider the following factors:

1. The harm the Defendants' conduct has already caused and is likely to cause;

2. The degree of wrongfulness of the Defendants' conduct;

3. How long the conduct lasted and whether it is likely to continue;

4. Whether there was other similar conduct, and if so, how often it occurred;

5. How aware the Defendants were of the conduct and its consequences, and whether there were attempts to conceal the conduct;

6. Whether the Defendants benefited from the conduct, and if so, whether that benefit should be taken away;

7. The need to discourage others from similar conduct; and

8. The financial resources of the Defendants.

-- Calhoon v. Palmer Communications, Inc. (C)

In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a defendant for the conduct inquired about in Interrogatory Nos. ___ and to deter a defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages; however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party.

The factors that you may consider in awarding punitive damages, if any, are --

(a) the nature of the wrong,

(b) the character of the conduct involved,

(c) the degree of culpability of the wrongdoer,

(d) the situation and sensibilities of the parties concerned, and

(e) the extent to which such conduct offends a public sense of justice and propriety.

You may award punitive damages only for those statements, if any, which you have found were (1) both false and defamatory, (2) made with knowledge of falsity or with serious doubts about the truth, and (3) made with malice.

-- Kastrin v. CBS Inc. (D)

**C. Proximate Cause**

If you find in favor of the plaintiffs, or either of them, on their defamation claim under the instructions I have given you, then you must determine what amount of damages, if any, will fairly compensate the plaintiffs for any injury they have suffered.

The plaintiffs are not entitled to recover damages for any injury they may have suffered because of the broadcast of truthful information; they can recover only if, and to the extent, the broadcast of false and defamatory information about them through the negligence of KFOR-TV was a direct cause of the injury.

A direct cause means a cause which, in a natural and continuous sequence, produces injury and without which the injury would not have happened. For negligence, if any, of the defendants to be a direct cause you must also find that a television broadcaster using ordinary care could have foreseen that some injury to the reputation of a person or corporation in the plaintiffs' situation might reasonably result from a failure to exercise ordinary care.

-- Calhoon v. Palmer Communications, Inc. (C)

Finally, Mr. Masson must prove, by a preponderance of the evidence, that one or more of the challenged quotations caused him to suffer damage. In order for plaintiff to recover damages, any damages awarded must be found by you to have directly resulted from the quotation or quotations, if any, you have found to be defamatory as defined for you. Defendants are not responsible for any damages plaintiff may have suffered as a result of the other portions of the article, or from plaintiff's other activities or writings.

The interest of the plaintiff in a defamation suit is his reputation. If you find in this

case that the reputation of the plaintiff had already been damaged by other adverse publicity prior to the publication of the article, then you may consider such proof in determining any amount to be allowed as damages, if any.

-- Masson v. New Yorker (C)

To recover on his defamation claim, Dr. Rogal must prove by a preponderance of the evidence that negligently false statements in the broadcast caused him actual injury. If those statements in the broadcast were not the cause of harm to Dr. Rogal, he may not recover.

* * *

Although Dr. Rogal may recover for the actual injury to his reputation and standing in the community caused by a defamatory falsehood, injury to reputation cannot be presumed, and any claim of actual harm must be proved by competent evidence.

-- Rogal v. ABC (D)

Proximate result or cause means that before any award for damages may be made to plaintiff, plaintiff must prove that the harm or damage was caused or resulted from a false defamatory statement written or published by defendant. That is, it must appear that the conduct of a defendant played a substantial part in bringing about or actually causing the damage and that the damage was either a direct result or a reasonably probable consequence of the publication.

* * *

As I have instructed you, damages are proximately caused if it appears from the evidence that the publication played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the publication. You must not consider the financial circumstances of a defendant in your determination of compensatory damages since compensatory damages involve only an award for damage caused to plaintiff, nor may you consider an award of counsel fees or costs as compensatory damages.

-- DiGregorio v. Time, Inc. (C)

In addition, in order to be awarded damages, Mr. Lasky must prove that the portions of the broadcast that he has proved are false and made with constitutional malice, if any, are the parts that caused his injury. In other words, if you were to find, for example, that half of the broadcast was true, and the other was false, and that Mr. Lasky had proved only that the true statements had caused him injury, then you should award no damages to Mr. Lasky. Similarly, if you were to find that Mr. Lasky had proved that ABC had acted with knowing falsity or serious and subjective doubts about truth or falsity only with regard to a part of the broadcast that caused him no injury, then you should not award Mr.

Lasky any damages. Mr. Lasky must prove that the parts of the broadcast that caused him injury are the same parts that he has proved are defamatory, of and concerning him, false, and made with constitutional malice.

-- Lasky v. ABC (D)

Damages, if any, may only be awarded to compensate for injury actually caused a plaintiff or plaintiffs by publication of the article or articles in question. Actually caused by; the natural result of.

Damages are never presumed, Ladies and Gentlemen – are never presumed, and, in order to recover damages for injury allegedly caused by publication of the defamatory article, the plaintiff, or the respective plaintiffs must prove that the damages resulted from such publication by a fair preponderance of the evidence – that damages were caused by that publication.

* * *

Thus, you may not award Mr. Hepps damages caused by reason of injury suffered by his wife, his family, or his friends, except as such injury caused Mr. Hepps to himself suffer.

-- Hepps v. Philadelphia Newspapers, Inc. (C)

You are not to presume plaintiff suffered any injury as a result of statements he has challenged that you may find false and libelous. You are also not to presume plaintiff suffered injury if you find the tone and tenor of the articles, i.e., their overall impact, was false and libelous. Plaintiff must prove with competent evidence that any of his injuries were caused by the statements that you find are false and defamatory.

-- Ross v. Santa Barbara News Press (D)

As I have previously told you, it is the plaintiffs' burden to prove their damages were a proximate [result] of the actions of the defendants. In this respect you should consider plaintiffs were the subject of substantial publicity reporting the proceedings brought by the Attorney General. News accounts were broadcast on the radio and television, and were published in three newspapers besides the Record. Accounts of the subsequent hearings were published on two occasions in April 1979 in the Record and other newspapers, and harm to plaintiffs' reputation from these is not compensable. You shall consider only the damage, if any, to plaintiffs which occurred as a result of any libelous portions of the article of February 21, 1979, by defendants, the Bergen Evening Record Corporation and Alfredo Lopez. You shall not award damages to plaintiffs for any damages resulting from the publication in the broadcast media, and in other newspapers. Similarly, you shall consider only the damages to plaintiffs resulting from any inaccuracies in the articles published by defendants the Bergen Evening Record Corporation and Alfredo Lopez and not from the rest of the article itself, if an accurate account, even if

damaging to plaintiffs.

-- McCoy v. Bergen Evening Record (C)

If you find that plaintiff has met his burden of proving the other elements of his libel claim as to one or more statements, you should then consider what damages the plaintiff has suffered as a direct and natural consequence of the publication of those statements by themselves and not the harm, if any, suffered by plaintiff from anything else contained in The Power House.

Each statement should be considered separately in this way.

-- Gray v. St. Martin's Press (D)

For plaintiff to prevail as to a statement, he has the burden of proving that that particular statement damaged him. Therefore, if The Power House would have been equally damaging to the plaintiff's reputation without that statement, plaintiff has not met his burden of proof. Put differently, to find for the plaintiff as to a statement you must determine that the statement caused harm beyond that which resulted from what was written about plaintiff elsewhere in the book.

-- Gray v. St. Martin's Press (D)

A person who seeks damages has the burden of proving that it is more probable than not that the damages sought were caused as a direct result of the conduct of the defendant(s). Additionally, he must show the nature, extent, and amount of those damages.

The burden is on the plaintiff to prove by a preponderance of the evidence each item of damage he claims and to prove that each item was caused by the wrongful conduct of defendant(s). He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.

-- Gray v. St. Martin's Press (C)

If you find that the communication, or any portion of it, was defamatory and not substantially true, you must determine whether it caused actual injury to the plaintiffs.

In order for the plaintiffs to recover, the defendants' conduct must have been a substantial factor in bringing about the plaintiffs' injury. This is what the law recognizes as legal cause. A substantial factor is an actual, real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the event.

Actual injury can include impairment of reputation in the community, personal humiliation, mental anguish, and suffering.

A false and defamatory communication is a cause of actual injury if it is a substantial factor in bringing the injury about. A false and defamatory communication is not a cause of actual injury if it has no connection or only an insignificant connection with the injury.

-- Paul v. The Hearst Corporation (C)

You may award only those damages, if any, you find were a direct and proximate result of any statements in the broadcast which you have found to be substantially false and defamatory and made with knowledge of falsity or with serious doubts about the truth. You must not award any damage caused by any other acts, events, or circumstances.

-- Kastrin v. CBS Inc. (D)

The final element of plaintiff's case is actual injury. Plaintiff must prove that he suffered actual injury as a direct result of the publication of *Armed & Dangerous*. Actual injury is not limited to out-of-pocket losses. Rather, it includes impairment of reputation and standing in the community.

Injury is caused by the publication of the statement if it appears from the evidence that the publication played a substantial part in bringing about or actually caused the injury, or that the injury was either a direct result or a reasonably probable consequence of the publication of a statement found to be false and defamatory and of and concerning plaintiff.

When determining whether a particular statement in the book caused the plaintiff actual harm, you must distinguish injury to the plaintiff caused by that statement from injury caused by other statements in the book or from any injury that may have been caused prior to publication of the book or by factors other than the book. You may not award the plaintiff any damages for actions taken by Mr. Kelly other than the false and defamatory statements complained of in *Armed & Dangerous*.

If the statements at issue did not cause any additional harm to plaintiff beyond that caused by other factors, then you must determine that the statement did not cause plaintiff actual injury. Plaintiff must prove this element by a preponderance of the evidence.

-- Faigin v. Kelly (D)

If you find in favor of the plaintiff on her defamation claim under the instructions I have given you, then you must determine what amount of damages, if any, will fairly compensate the plaintiff for any injury she has suffered that was caused directly by false

and defamatory statements about her.

The plaintiff is not entitled to recover damages for any injury she may have suffered because of the broadcast of truthful or privileged information; she can recover only if, and to the extent, the negligent broadcast of substantially false information defamatory to her was a direct cause of the injury.

A direct cause [is that] which, in a natural and continuous sequence, produces injury and without which the injury would not have happened. For the negligence, if any, of the defendants to be a direct cause in this case you must also find that a television broadcaster using ordinary care:

(1) Would have foreseen that viewers would reasonably understand the news reports to refer to the plaintiff and not to some other person, and

(2) Would have foreseen that some injury to the reputation of a person in the plaintiff's situation might reasonably result from a failure to exercise ordinary care.

-- Malson v. Palmer Broadcasting Group (C)

## XVII. OTHER

### A. Agency

This action is brought by William Lansdowne, plaintiff against Peter Phipps, The Akron Beacon Journal, and other employees of the Akron Beacon Journal, defendants, upon the claim that defendants negligently made a false publication concerning plaintiff. It is also claimed that the false publication proximately caused injury to the reputation of plaintiff. An action for defamation has, as its purpose, giving an injured plaintiff vindication of his good name.

A corporation acts through its officers and employees. It is responsible for their acts or failures to act when they act within the scope of their employment.

It is undisputed that Peter Phipps was an employee of the defendant, Beacon Journal Publishing Company, and acted within the scope of his employment at the time in question. Therefore, anything that he did or failed to do was an act of Beacon Journal Publishing Company, Inc.

-- Lansdowne v. Beacon Journal (D)

The New York Times Company cannot be guilty of publishing alleged defamatory statements about Randy Taylor, Sr. which were motivated by knowledge of or reckless disregard of the falsity except through one of its own agents acting within the line and scope of his employment. Now in this case the plaintiffs contend that managing agents Frank Helderman or Jack Doane were motivated by such a state of mind in the publication of alleged defamatory statements, and if you do not find that Frank Helderman or Jack Doane had such a state of mind in the publication of alleged defamatory statements, then you cannot return a verdict against The New York Times Company. You may not return a verdict against The New York Times Company based upon the state of mind of LaRue Hardinger as there is no evidence that she was managing agent.

The New York times Company cannot be held liable for any alleged malicious acts of its employees as such acts were outside the scope of their employment.

The corporate defendant can only be found to have acted with fault through the acts of its agents or employees acting within the line and scope of their employment. The plaintiffs voluntarily dismissed as a defendant in this case Robert Ursul, the author of the diary series. Because of this voluntary dismissal, you may not find the corporate defendant liable due to any acts or omissions of Robert Ursul.

I charge you that you cannot find The New York Times Company subject to liability for alleged defamatory statements in the privileged articles dated April 5, 1986, April 6, 1986, April 9, 1986, April 11, 1986, April 28, 1986, or April 30, 1986, unless you find that a managing agent charged with responsibility for the content of The Gadsden Times acted with malice in making or approving the publications. For these purposes, the managing agents would be Frank Helderman, Jr. or the defendant Jack Doane. Even if

you find that LaRue Hardinger acted with malice in making the publications, you may not find that the other defendants acted with malice based solely upon their mental state.

The New York Times Company cannot be guilty of publishing alleged defamatory statements about Randy Taylor, Sr. which were motivated by malice except through one of its own managing agents acting within the line and scope of his employment. Now in this case the plaintiffs contend that managing agents Frank Helderman or Jack Doane were motivated by such malice toward Randy Taylor, Sr. in the publication of alleged defamatory statements, and if you do not find that Frank Helderman or Jack Doane had such malice toward Randy Taylor, Sr. in the publication of alleged defamatory statements, then you cannot return a verdict against The New York Times Company. You may not return a verdict against The New York Times Company based upon the malice of LaRue Hardinger as there is no evidence that she was a managing agent.

-- Taylor v. New York Times (D)

I remind you that Mr. Patrick and Mr. Dulack were never employees of defendant Dutton. They were independent contractors.

The general rule is that publisher is not liable for the fault of an independent contractor, such as a non-staff author. Only if Dutton itself acted with actual malice (if plaintiff is a public figure) or gross irresponsibility (if plaintiff is a private figure) can it be held liable to the plaintiffs, or any one of them.

-- New Testament Fellowship v. Dutton (D)

This case should be considered and decided by you as an action between persons of equal standing. A corporation is entitled to the same fair trial as is a private citizen. When a corporation is involved, it may act, of course, only through its agents and employees. In general, any agent or employees of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his or her employment or within the scope of his or her duties as an employee of the corporation.

Concerted Activity

The law recognizes that, ordinarily, anything a person can do for himself or herself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of a Defendant are willfully directed or authorized by the Defendant, or if the Defendant aids another person by willfully joining together with that person in the commission of a wrongful act, then the law holds that Defendant responsible for the conduct herself or himself. A person knowingly and intentionally assisting another to commit fraud, a trespass, or a breach of an employee's duty of loyalty would be equally liable as one who performed all of the acts

herself or himself.

-- Food Lion, Inc. v. Capital Cities/ABC, Inc.

MMAR and Dow Jones are corporations. A corporation is an entity created under law. A corporation acquires knowledge and acts only through its officers, employees, and other agents. A corporation is responsible for the knowledge acquired and acts done by its officers, employees, and other agents in the course or scope of their authority or employment. The term "course or scope of authority or employment" means any act or acts done in furtherance of the corporation's business by one or more of its officers, employees, or other agents.

-- MMAR Group, Inc. v. Dow Jones & Co. Inc.

A corporation can have knowledge, act recklessly or be negligent only if such knowledge or conduct is attributable to an employee of the corporation who was acting in the scope of his employment. An "employee" is a person in the service of another with the understanding, express or implied, that such other person has the right to direct the details of the work, not merely the result to be accomplished. An employee is acting in the "scope of his employment" if he is acting in furtherance of the business of his employer.

-- Merco Joint Venture v. Kaufman (D)

"Agency" refers to a relationship which is created when one person authorizes or consents to another person acting on his or her behalf as a representative. The person who acts as the representative is called the "agent." The person for whom the agent acts is called the "principal." The principal places his trust and confidence in the agent to represent the principal's interests in a oral and selfless manner. In this case the plaintiff was the agent. Mr. Kelly was the principal.

-- Faigin v. Kelly (D)

**B. Confidential Sources**

Editor's Note: *Few courts have determined the appropriate instructions to provide a jury concerning either the proper or improper invocation of the reporter's privilege against compelled disclosure of information. In any case where the privilege is invoked, careful consideration should be given to formulating an instruction advising the jury why relevant information was not introduced in evidence.*

You are instructed that Mr. Hersh had a privilege under the laws of the State of Illinois not to reveal the names of his confidential sources. You are to draw no inferences from that fact that Mr. Hersh knew his statements were false or that he in fact had serious doubts as to the truth of these statements.

-- Desai v. Hersh (C)

During the trial, you occasionally heard witnesses refer to confidential sources. The law recognizes that people often will not disclose information to a reporter unless they receive a pledge of confidentiality from the reporter. The law grants members of the press the right to keep their sources confidential, and reporters and their editors are privileged to refuse to disclose the names of sources. Similarly, certain information that might tend to disclose the identity of confidential sources has been deleted from some of the documents in evidence. You should not draw any adverse inference solely from the fact that a reporter or editor refused to disclose the identify of a confidential source or the information received from that source.

-- Kastrin v. CBS Inc. (D)

**C. Privacy/Related Torts**

Plaintiff claims that the publication of the advertisement, in addition to being libelous, constituted an invasion of her right of privacy under Section 51 of the New York Civil Rights Law. In New York this claim may only be sustained if it meets the specific requirements of section 51, thus, any common understanding you might have of the right to privacy should be ignored if it conflicts with these instructions.

To prevail on the claim, plaintiff must prove by a preponderance of the evidence:

First, that plaintiff's "name, portrait or picture" was used;

Second, that plaintiff is identifiable, as that term is defined for you in these instructions, from the publication of such name, portrait or picture;

Third, that the use was without plaintiff's consent;

Fourth, that the use was for advertising purposes or purposes of the trade, as those terms are defined for you in these instructions;

Fifth, that plaintiff sustained injuries as a result of this use.

Plaintiff claims that the publication of the advertisement placed her in a false light in the eyes of the public. In order to recover on this claim, plaintiff must prove by a preponderance of the evidence:

First, that publicity complained of identified plaintiff;

Second, that the publicity placed plaintiff in a false light;

Third, that the false light complained of would be highly offensive to a reasonable person;

Fourth, that defendant in publishing the advertisement knew or acted in reckless

disregard of the falsity of the advertisement and the false light in which the plaintiffs was placed.

In deciding whether the advertisement identified plaintiff, you must follow the instructions I have already given you on whether the advertisement was "of and concerning" plaintiff and whether she was "identifiable" from the advertisement.

Plaintiff Donna Dalbec also seeks to recover punitive damages for the invasion of her privacy resulting from the publication of the advertisement. Mrs. Dalbec may only recover such damages if, in addition to proving all the elements of the invasion of privacy claim, plaintiff also establishes that the advertisement was published by one or more of defendants knowing that it did not have the plaintiff's consent. If they did not know that they were acting without plaintiff's consent, then they cannot be held for punitive damages on the invasion of privacy claim. This knowledge must also be proven by clear and convincing evidence.

The mere fact that plaintiff's name may have been published in a magazine of questionable taste is not sufficient grounds to support an action for false light. The mere fact that plaintiff may be unhappy about the appearance of her name in defendant's magazine, that appearance alone nor any embarrassment caused thereby does not entitle plaintiff to recover.

Remember, the quality of Gentlemen's Companion is not an issue in this case.

In order to recover on this claim, plaintiff must show that she was clearly identifiable from the advertisement. The use of the name Donna Newbury is but one element to consider. In addition, you should consider Mrs. Dalbec's adoption and use of her husband's name since her marriage in 1971. Where the plaintiff is only known to a few intimates by the name used, you must find for defendant on this claim. You should also consider in deciding this case, the other descriptive material contained in the advertisement which purports to describe the Donna Newbury named in the advertisement. These other elements, such as age, height and weight plaintiff herself states, do not fit her. Thus, if the other characteristics listed in the advertisement lead you to believe that person named in the advertisement could not be plaintiff, then plaintiff's claim for invasion of privacy must fail.

-- Dalbec v. Gentlemen's Companion, Inc.

The right to privacy, like other personal rights, may be lost in many ways – by express or implied waiver or consent, or by a course of conduct which prevents its assertion. Moreover, the right is not absolute, it is qualified by the rights of others.

An actionable invasion of privacy exists only when the defendant's conduct is unreasonable and seriously interferes with the plaintiff's privacy interest. The reasonableness of the defendant's conduct is assessed by balancing his interest and

pursuing his course of conduct against the plaintiff's interest in protecting his privacy. Where defendant's action is properly authorized or justified by circumstance, it may be found reasonable and non-actionable even though it amounts to a slight invasion of the plaintiff's privacy.

In order to establish an invasion of privacy, plaintiff must show that the defendant published information that placed the plaintiff before the public in a false light. in order to establish liability, it is essential that the matter published concerning the plaintiff is not true.

The right of privacy is not designed to safeguard property, business, or other money interests, and the right of privacy is denied to corporations and institutions, and even to partnerships.

An actionable invasion of privacy occurs only when the defendants' conduct is unreasonable and seriously interferes with the plaintiffs' privacy interests.

Reasonable interference with an individual's right to privacy, if properly authorized and taking place under proper circumstances, is not prohibited.

More than insensitivity or simple carelessness is required for the imposition of liability for damages for invasion of privacy when the publication is truthful, accurate and non-malicious.

A tortious invasion of privacy does not occur when an individual makes a photograph or motion picture of a public site, which anyone is free to observe.

Recovery of invasion of right of privacy is only available when the plaintiffs' private affairs have been given unauthorized exposure. If plaintiffs voluntarily make appearance and invite publicity, there is no privacy right.

All awards for invasion of privacy must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

In Louisiana, in order to recover for an invasion of privacy, plaintiffs must show they have had an "actionable" claim not merely and "actual" claim. An invasion of privacy is "actionable" only when the defendants' conduct is unreasonable and seriously interferes with the plaintiff's privacy interest. To determine the reasonableness of the defendants' conduct, you must balance the defendants' interest in pursuing their course of conduct against plaintiffs' interests in protecting their privacy, if they have not waived their right to privacy.

In order for the defendants to be found liable for publication, in a false light, to amount to an invasion of privacy, plaintiffs must prove that:

A. The false light in which they were placed is highly offensive to a reasonable person and;

B. The defendants had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.

A person's privacy can be invaded only if the defendant has published matter which clearly refers to the plaintiff, that is, which uses the plaintiff's actual name or picture, and clearly identifies him.

There can be no violation of the right of privacy unless the name or likeness of the plaintiff is used in the publication.

No invasion of privacy occurs where the plaintiff's image can only be identified through independent knowledge.

There can be no invasion of privacy based on publicity which casts the plaintiff in a false light in the public eye, unless there are acts which are sufficient in themselves to familiarize the public with either the name, likeness, or other means of identifying the plaintiff.

The right of privacy protects only the ordinary sensibilities of an individual and not supersensitiveness.

-- Easter Seals v. Playboy (D)

Plaintiffs' second cause of action against the Seattle Times Company and Erik Lacitis is for "false light" invasion of privacy. One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (1) the false light in which the other was placed would be highly offensive to a reasonable person; (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed; and (3) the conduct proximately caused damages to the plaintiff.

Each of the plaintiffs bears the burden of establishing these elements of their claim by clear and convincing evidence.

In order to establish the claim for invasion of privacy, each plaintiff must first prove by clear and convincing evidence that defendants published a matter concerning that plaintiff that was false. As with plaintiffs' claim of defamation, each plaintiff must show that statements made in the article are false in some substantial way. If the article was substantially true, plaintiffs have failed to prove falsity.

In order to establish the claim for invasion of privacy, each plaintiff must also show that the publicity given to that plaintiff has placed him in a false light before the public of a kind that would be highly offensive to a reasonable person. In other words, each plaintiff must show that he or she, as a reasonable person, is justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. There must be such a major misrepresentation of the plaintiff's character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable person in his or her position.

The same privilege to report on publication of matters contained in the police incident reports and the Roth civil complaint that applies to plaintiffs' claims of defamation also applies to plaintiffs' claims for invasion of privacy.

The same privilege to report on publication of matters contained in reports of official actions or proceedings that is available to defendants in connection with plaintiffs' cause of action for defamation also applies to plaintiffs' claims for invasion of privacy.

Finally, in order to establish the claim for invasion of privacy, plaintiffs must also show that Erik Lacitis knew that the information that he published was false or that he acted in reckless disregard of the truth of falsity of that information and the false light in which plaintiffs would be placed as a result of the publication of that information. As with plaintiffs' claim of defamation, reckless disregard of truth or falsity is not proved by showing that Mr. Lacitis failed to investigate the basis for the statements made or that a more prudent person would have refrained from making such statements. Each plaintiff must show that Erik Lacitis did, in fact, entertain serious doubts as to the truth of his publication.

-- Galley v. Seattle Times Co. (C)

The Plaintiff, Nellie Mitchell, also claims damages from defendant for invasion of privacy by publicity which put Mrs. Mitchell in a false light. In order to prevail on this claim, the plaintiff has the burden of proving by clear and convincing evidence the following:

One, that the false light in which she was placed by the publicity would be highly offensive to a reasonable person, and

Two, that the defendant acted with actual malice in publishing the statements at issue in this case. Actual malice means that Globe International intended, or recklessly failed to anticipate, that readers would construe the publicized matter as conveying actual facts or events concerning Mrs. Mitchell. A finding of actual malice requires showing of more than mere negligence.

The plaintiff Nellie Mitchell has sued the defendant Globe International for invasion of privacy. One who invades the right of privacy of another is subject to liability

for the resulting harm to the interests of another.

The right or privacy is invaded by:

(1) Appropriation of the other's name or likeness; and

(2) Publicity that unreasonably places the other in a false light before the public.

In order for plaintiff to recover for invasion of privacy, plaintiff must prove that Globe International willfully invaded plaintiff's privacy and willfully exposed plaintiff to public ridicule and/or emotional distress.

In order to recover from the defendant Globe International for appropriation of likeness, the plaintiff Nellie Mitchell has the burden of proving each of the following propositions:

(1) That the plaintiff's likeness was exploited by the defendant; and

(2) That the exploitation resulted in gain to the defendant.

The gain to the defendant must be more than the gain that comes from selling additional issues of the publication in which the plaintiff's likeness was used. The exploitation of the plaintiff must be more than the appearance of the plaintiff's likeness in a publication, even if its manner of use and placement was designed to sell more copies of the publication in which it appeared.

Whether these elements have been proved is for you to determine.

In order to recover from Globe International for placing her in a false light, Nellie Mitchell has the burden of proving each of the following essential elements:

(1) That Nellie Mitchell was placed before the public in a false light;

(2) That the false light in which she was placed would be highly offensive to a reasonable person; and

(3) Globe International had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Whether each of these elements has been proved is for you to determine.

Invasion of Privacy Damages

Damages must be proved as any other issue in this case; that is, the plaintiff, Nellie Mitchell, must prove by the preponderance of the evidence the nature and extent of her damages.

If your verdict is for the plaintiff, Nellie Mitchell, and you find she is entitled to an award of damages you will determine from the preponderance of the evidence the amount of money which will fairly compensate her for actual injury caused by defendants.

In determining the measure of damages, if any, you shall take into consideration the nature and extent of plaintiff Nellie Mitchell's injury or damage, the effect upon her health, the outrage, mental suffering, shame, humiliation and ridicule she suffered.

You are not to permit bias or prejudice to enter into the consideration, nor sympathy for the plaintiff.

Damages must be reasonable. In the event your verdict is for the plaintiff, you may award only such damages as will fairly and reasonably compensate her for the injury or damage you find from a preponderance of the evidence in the case, she sustained as a result of defendant's acts.

You are not permitted to award speculative damages. This means you are not to

include in any verdict compensation for prospective loss which, although possible, is wholly remote or left to conjecture and/or guess.

The fact that I have instructed you as to the proper measure of damages should not be constructed as intimating any view of the Court as to which party is entitled to prevail in this case. Instructions as to the measure of damages are given for your guidance in the event you find from the evidence in favor of the plaintiff.

Special Instruction

An invasion of privacy derives from a wrongful intrusion into an individual's private activities.

The right of privacy is the right of an individual to be left alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public into matters with which the public is not necessarily concerned.

Invasion of privacy thus is the unwarranted appropriation of an individuals' personality, the publicizing of an individual's private affairs with which the public has no legitimate concern in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Calculated falsehoods do not, therefore, come within the immunity of the first amendment rights of freedom of the press and speech.

To summarize, the constitutional protections for speech and press prohibit recovery for false reports of matters of public interest in the absence of proof that the defendants published the report with knowledge of its falsity or in reckless disregard of the truth.

In the case, the burden of proof is upon the plaintiff, Nellie Mitchell, to prove, by a preponderance of the evidence, her assertions of an invasion of privacy, the elements of which are:

First, an unwarranted and/or wrongful intrusion by the defendants into the plaintiff's private or personal affairs with which the public had no legitimate concern;

Second, defendants published a report or article about plaintiff with knowledge of its falsity or in reckless disregard of the truth; and

Third, defendants' acts of publishing an article about Nellie Mitchell with knowledge of its falsity or in reckless disregard of the truth caused injury in the form of outrage, or mental suffering, shame or humiliation to plaintiff as an individual of ordinary sensibilities.

-- Mitchell v. Globe Int'1 Pub., Inc.

Dr. Rogal claims that the broadcast falsely created the impression that he is overeager to diagnose and treat TMJ in the pursuit of financial gain.

There are five elements or parts to Dr. Rogal's "false light invasion of privacy" claim, and Dr. Rogal has the burden to prove each and every one of the elements in order to prevail. In other words, if Dr. Rogal fails to prove each and every one of these elements, you must return a verdict for ABC and Mr. Stossel.

To establish his false light invasion of privacy claim, Dr. Rogal must prove that: (1) the "20/20" broadcast conveyed the false impression of him that he claims it conveyed; (2) the broadcast was materially false; (3) ABC and Mr. Stossel had actual knowledge of falsity or in fact entertained serious doubts as to the truth of the matters they broadcast

concerning Dr. Rogal and the allegedly false light in which he would be placed; (4) the knowingly false aspects of the broadcast placed Dr. Rogal in a false light that would be highly offensive to a reasonable person of ordinary sensibilities; and (5) as a direct result of the broadcast, Dr. Rogal sustained actual injury.

Meaning of the Broadcast

As the first element of his claim, Dr. Rogal must prove by a preponderance of the evidence that the broadcast actually conveyed to the average viewer the false impression of him that he claims it conveyed. See Corabi v. Curtis Publishing Co., 441 Pa.. 432, 447, 273 A.2d 899, 907 (1971); Sellers v. Time. Inc., 423 F.2d 887, 887-90 (3d. Cir.), cent. denied, 400 U.S. 830 (1970). If you conclude that the broadcast might have been understood in more than one way, then you must determine which way the average viewer would have understood the broadcast.

The average viewer is not someone with specialized training or with special knowledge of the issues or facts dealt with in the broadcast. The average viewer is a reasonable person of ordinary intelligence, education and background who would be representative of those who actually saw the broadcast. Lorentz v. R.K.O. Radio Pictures; Inc., 155 F. 2d 84, 87 (9th Cir. 1946).

In considering the meaning of the broadcast and whether it conveyed the false impression attributed to it by Dr. Rogal, you may not change the language of the broadcast or give it a meaning inconsistent with the words actually used. Corabi v. Curtis Co., supra, 273 A.2d at 907.

Dr. Rogal also must prove either that the material statements of fact in the broadcast concerning Dr. Rogal were false, or that the broadcast as a whole conveyed a false impression of Dr. Rogal. If the broadcast was substantially true, then Dr. Rogal cannot recover, no matter how hurtful the statements may have been to him. Larsen v. Philadelphia Newspapers, Inc., 375 Pa. Super. 66, 543 A.2d 1181 (1988); Restatement (Second) of Torts, § 652E; Machledery v. Diaz, 801 F.2d 46 ( 2d Cir. 1986).

Dr. Rogal has the burden of proving falsity by clear and convincing evidence. Philadelphia Newspapers, Inc, v. Hepps, Time, Inc, v. Hill, Peoples Bank and Trust Co. v. Mountain Home. It would not be enough here, as it would be in most other civil cases, for Dr. Rogal's evidence to be slightly more convincing than ABC's and Mr. Stossel's evidence. Here, the strong constitutional guarantees of freedom of speech and freedom of the press place a heavier burden on Dr. Rogal. Clear and convincing evidence is evidence that is highly probable, clear, explicit, and unequivocal.

As the judge told you at the beginning of the case, the burden of proof on Dr. Rogal usually is by a preponderance of the evidence – whether the evidence tips in favor of Dr. Rogal or in favor of Mr. Stossel and ABC. But on a few issues in this case, Dr. Rogal has a higher burden. He must prove that statements in the broadcast or the broadcast as a whole is false by evidence that is clearly convincing.

If Dr. Rogal has failed to prove, by clear and convincing evidence, that the broadcast created a false impression about Dr. Rogal that was substantially false, then your deliberations on the false light claim will cease, and you will return a verdict in favor of ABC and Mr. Stossel on that claim.

If you find that Dr. Rogal has proved that the broadcast was understood by average viewers to convey the allegedly false impression Dr. Rogal claims and he has

proved by clear and convincing evidence that the impression was false, you must then consider whether Mr. Stossel and ABC acted with the necessary degree of "fault" as I will now define it for you.

An essential element of any false light/invasion of privacy claim is that ABC and Mr. Stossel had actual knowledge of the falsity of the publicized matter or actually entertained serious doubts as to its truth. Rogal must also prove that ABC and Mr. Stossel had knowledge of or acted in reckless disregard of the false light in which Rogal claims he was placed by the broadcast. Id. Restatement (Second) of Torts, § 652E. This requirement is based upon Pennsylvania law as well as upon the First Amendment to the Constitution of the United States.

In order to prove the fault element of this action, Dr. Rogal must prove by clear and convincing evidence, either that the "20/20" program was broadcast with knowledge by ABC and Mr. Stossel that the broadcast was false or that ABC and Mr. Stossel in fact had serious doubts as to the truth of the program at the time it was broadcast. Bose Corp v. Consumers Union of United States, Inc., 466 U.S. 485, 511 n.30 (1984); Harte-Hanks Communication, Inc. v.Connaughton, 105 L.Ed.2d 562, 576 (1989); Restatement (Second) of Torts, § 652E(b) and Comment d.

This examination of the "fault" element of Dr. Rogal's claim therefore requires you to examine ABC's and Mr. Stossel's intent and their state of mind when they prepared and broadcast the program.

Here again, Dr. Rogal has the burden of proving the facts of his case with clear and convincing evidence. It is not enough in this case, as it is in most other civil cases, if Dr. Rogal's evidence on ABC's and Mr. Stossel's state of mind seems slightly more convincing than ABC's and Mr. Stossel's evidence. Here the strong constitutional guarantees of freedom of speech and freedom of the press place a heavier burden on Dr. Rogal. Thus, your verdict must be for ABC and Mr. Stossel unless you conclude that Dr. Rogal has proved with the convincing clarity which the Constitution demands that ABC and Mr. Stossel published the challenged statements knowing them to be false or with serious doubts as to whether they were true.

In this part of your deliberations, you must focus on what ABC and Mr. Stossel actually said in the broadcast as opposed to what Dr. Rogal claims the broadcast meant. You must determine whether ABC and Mr. Stossel actually knew that what they intended to say was false or had serious doubts about its truth. Bose Corp., 466 U.S. at 515.

In other words, for Dr. Rogal to prevail you must find that ABC and Mr. Stossel knew they were conveying the false impression Dr. Rogal asserts was made and that subjectively, in their own minds, they knew that this impression was false or had real doubts about its truth or falsity.

Highly Offensive to a Reasonable Person

It is not enough for Dr. Rogal to prove that false impressions about him were published with knowledge of falsity or reckless disregard for truth. In addition, Dr. Rogal must prove that the knowingly false light in which he was placed would be highly offensive to a reasonable person of ordinary sensibilities. Larsen v. PNI, supra, 543 A.2d at 1188; Restatement (Second) of Torts § 652E(a) and Comment c.

In determining whether serious offense would be taken by a reasonable man in the position of Dr. Rogal, you may consider any evidence tending to show that Dr. Rogal

himself was or was not seriously offended by the statements in the broadcast at the time they were made.

Minor errors do not give rise to any serious offense to a reasonable person. Dr. Rogal's privacy is not invaded when unimportant false statements are made, even if they are made deliberately. Restatement (Second) of Torts, § 652E, Comment e.

To meet his burden of proving this element, Dr. Rogal must prove that there was such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in Dr. Rogal's position. Restatement (Second) of Torts § 652E, Comment c.

Actual Injury

If you find that Dr. Rogal has proven that ABC and Mr. Stossel broadcast derogatory falsehoods that would be highly offensive to a person of ordinary sensibilities, with knowledge of falsity or subjective awareness of probable falsity, then, and only then, may you consider the next element of false light case, which I will refer to as actual injury.

To recover on his claim, Dr. Rogal must prove that the knowingly false aspects of the broadcast that are highly offensive caused him actual injury. If the broadcast was not the cause of any actual harm to Dr. Rogal, he may not recover. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974); Restatement (Second) of Torts, § 652H, Comment c.

Dr. Rogal has complained that the broadcast caused injury to his reputation and standing in the community, and that he thereby suffered severe emotional distress, mental anguish and humiliation. Such injury cannot be presumed, however, and Dr. Rogal must support any claim of actual harm by competent evidence. Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1088 (E.D. Pa. 1980).

If you find that Dr. Rogal has not proved that the broadcast itself was the cause of any actual injury to him, then your deliberations will cease and you will return a verdict in favor of ABC and Mr. Stossel and against Dr. Rogal on this count.

-- Rogal v. ABC

One who gives publicity to a matter concerning another person which places that other person before the public in a false light is responsible to that person for all harm suffered as a result of this publicity if plaintiff establishes that:

(a) he was placed in a false light;

(b) publicizing matter of this kind about a reasonable person would be highly offensive to that reasonable person; and

(c) the person giving the publicity acted with knowledge of the falsity of the matter or in reckless disregard of whether it was true or false.

Conduct which is highly offensive to a reasonable person is that which a reasonable person, in similar circumstances, would find very objectionable or which a reasonable person in similar circumstances could be expected to take with serious offense. Publicity means that the matter is communicated to the public at large or to so many persons that the matter must be regarded as substantially certain to become public knowledge.

A plaintiff is placed in a false light if a defendant knowingly or recklessly and selectively published true statements in a manner which created a false impression,

whether those statements are literally true or not. The literal accuracy of separate statements may not render a communication true where the implication of the communication as a whole was false.

-- Paul v. Hearst Comm.

False Light

1. Mr. Paul makes a second claim in this case in addition to defamation: He claims that the phrase "slip-and-fall lawyer" that was published by defendants was false as applied to his practice and placed him in a false light before the public. This claim is similar to defamation, and the same public policies that I explained to you earlier regarding a person's right to recover for publication of a defamatory statement apply to this claim too.

2. Pennsylvania law says that even if the false statement made about the plaintiff did not injure the plaintiff's reputation, the plaintiff still can recover if the statement was so outrageous as to be highly offensive to a reasonable person. At the same time, the same interests of the press to exercise their rights to make critical statements about public figures apply to this type of claim with full force.

3. To recover on a claim of false light, Mr. Paul must prove:

(a) the statement was not substantially true, as I have already explained that concept to you;

(b) the statement would be highly offensive to a reasonable person;

(c) the statement was publicized with knowledge of falsity or with reckless disregard of its falsity, as I shall explain;

(d) the statement was of a sort to cause mental suffering, shame, or humiliation to a person of ordinary sensibilities; and

(e) the statement did not report on an issue of public concern.

Burden of Proof - False Light Invasion of Privacy

The Plaintiff has the burden of proving:

1. Plaintiff was placed in a false light;

2. the false light in which the Plaintiff was placed would be highly offensive to a reasonable person; and

3. the Defendants had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed.

Your verdict will be for the Plaintiff if you decide that all of these have been proved.

Your verdict will be for the Defendant if you decide that any one of these has not been proved.

You are further instructed that such publicity must lift the curtain of privacy on a subject matter that a reasonable man of ordinary sensibilities would find offensive and objectionable; supersensitiveness is not protected.

-- Paul v. Philadelphia Magazine (D)

The right of privacy is the right to be let alone.

In order to constitute an invasion of the right of privacy, the act must be of such a nature that would cause mental distress or injury to a person having ordinary feelings and intelligence.

The right of privacy is invaded if another:

Intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns and if the intrusion would be highly offensive to an ordinary man;

Publicizes matters of a kind highly offensive to an ordinary man concerning the private life of another;

Publicizes matters which place another before the public in a false light of a kind highly offensive to an ordinary man.

-- Haskell v. Stauffer Communications., Inc.

**D. Republication**

Defendant LFP claims that it republished the advertisement from one which originally appeared in M.E.T. Personals magazine. If you credit this evidence then you may not find against LFP on the libel claim unless you also find that LFP had, or should have had substantial reasons to question the accuracy of the advertisement or the good faith of the author of it.

-- Dalbec v. Gentlemen's Companion, Inc.

The fact that a libelous statement has been published before in another publication does not necessarily relieve a defendant from responsibility for republishing that statement. However, the republisher of a work is entitled to rely upon the research of the original publisher absent a showing that the republisher had or should have had substantial reasons to question the accuracy of the article or the good faith of the reporter. Rinaldi v. Holt, Rinehard & Winston, 42 N.Y.2d 369, 397 N.Y.S.2d 943 cert. denied, 434 U.S. 969 (1977); Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 435 N.Y.S.2d 556 (1980). If you find that a plaintiff is a public figure, then the republisher cannot be liable unless he had actual knowledge that the original statement was, in fact, false or published with a belief that it was probably false. If you find that a plaintiff is a private figure, then a defendant cannot be liable unless you find that it was grossly irresponsible for him to rely on the previously published statements.

-- New Testament Fellowship v. Dutton

**E. Quotations**

Mr. Masson must prove by a preponderance of the evidence that one or more of the challenged quotations was false.

In order to prove any of the challenged quotations are false, plaintiff must prove two separate matters:

First, that he did not make the challenged statement; and

Second, he must also prove any words you find he did speak were deliberately or

recklessly altered in a way so as to effect a material change in meaning.

A meaning is not materially changed unless it has a different effect on the mind of the reader from that which the actual words would have produced.

Slight inaccuracy in details does not necessarily make a quotation false.

Minor changes to correct for grammar or syntax do not amount to falsity. In addition, when writing from notes or when translating from tape recording to the written word, a writer may edit or alter a speaker's words beyond slight corrections of grammar of syntax without the quotation being considered a false quotation, so long as the alteration does not materially change the speaker's meaning.

The omission of minor details, or the placement of quotations said at two different times or places in the same paragraph, in an otherwise basically accurate account does not give rise to a claim of defamation. Likewise, the choice or organization of material which goes into the article is a matter of editorial judgment and does not standing alone constitute evidence of falsity, as I've defined falsity in these instructions.

However, juxtaposing a series of events or statements may create a false and defamatory implication. This may be so even though the included facts or statements are correct.

--Masson v. New Yorker

**F. Fraud**

In order to prove it was damaged by fraud, Food Lion must prove, by a preponderance of the evidence, the following five things:

First: That the Defendant made a false representation of material fact.

Second: That the representation was reasonably calculated to deceive. A representation is calculated to deceive when the person who makes it knows it to be false, or makes it as a positive assertion without any knowledge of its truth of falsity.

Third: That the false representation was made with the intent to deceive. An intent to deceive is manifest when, at the time the false representation is made, the defendant intends that it be acted or relied upon by the plaintiff. Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred.

Fourth: That the Plaintiff was in fact deceived by the false representation and that the Plaintiff's reliance was reasonable. Food Lion's reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care for his own welfare, would have relied on the false promise.

Fifth: That Food Lion suffered damages as a result of its reliance on the false representation. However, in this phase of the case, Food Lion need only establish that it was damaged, not the precise dollar amount of such damage.

The measure of compensatory damages for fraud is an amount that will compensate the Plaintiff for the loss occasioned by the Defendants' fraud, or the amount which the Plaintiff is actually "out-of-pocket" by reason of Defendants' fraud. In other words, Food Lion is entitled to be placed in the same financial position as it would have been had the applications for employment not been made. For example, you may consider

items such as expenses, if any, incurred by Food Lion in hiring and training Ms. Dale and Ms. Barnett as employees in their respective positions and costs, if any, to Food Lion in placing Ms. Dale and Ms. Barnett on the payroll as employees as well as any costs in terminating them from the payroll.

-- Food Lion, Inc. v. Capital Cities/ABC, Inc.

**G. Trespass**

Every voluntary, unauthorized entry on land in the peaceable possession of another constitutes a trespass, without regard to the degree of force used and irrespective of whether actual damage is done. The parties in this case agree that at the times in question Food Lion had peaceable possession of the property and that entry in each instance was voluntary. What the parties dispute is whether entry was authorized. A jury may find that an entry was not authorized if the Plaintiff proves by a preponderance of the evidence (1) that a Defendant made a knowing misrepresentation in requesting permission to enter; (2) that the misrepresentation was made for the purpose of obtaining consent to enter and (3) that, were it not for the misrepresentation, permission to enter would not likely have been granted.

In three instances a jury may also find a trespass even though entry as an employee was not procured through misrepresentation and was originally authorized.

First: If Food Lion proves by a preponderance of the evidence that Ms. Dale or Ms. Barnett or both intentionally damaged property belonging to Food Lion;

Second: If Food Lion proves by a preponderance of the evidence that while working simultaneously as an ABC employee and a Food Lion employee, Ms. Dale, Ms. Barnett, or both breached her duty of loyalty to Food Lion as I have just explained that term for you; or

Third: If Food Lion proves by a preponderance of the evidence that while working simultaneously as an ABC employee and a Food Lion employee, Ms. Dale, Ms. Barnett, or both – for the purpose of furthering an investigation on behalf of ABC – unreasonably interfered with and unreasonably disrupted the work of other Food Lion employees, you may find that the original scope of consent was exceeded and that a trespass has occurred.

On the trespass claim, Food Lion does not contend it suffered actual damages as a proximate result of the Defendants' activities. Actual damages in a trespass case would represent a diminished value of the property and there is no claim that any of the stores was valued less at the time Ms. Dale or Ms. Barnett left than when they were hired as employees. With regard to a trespass, however, a plaintiff is entitled to receive nominal damages even if there is no proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damage incurred by the Plaintiff.

-- Food Lion, Inc. v. Capital Cities/ABC, Inc.

**H. Duty of Loyalty**

The law recognizes that an employee owes her employer a duty to follow the reasonable directions of her employer and to make a good faith effort toward performing her job requirements with the care and skill reasonably expected of persons in that

position. This duty is known as a duty of loyalty. It is breached when a person, employed by two separate employers, devotes such time and attention to the duties and responsibilities of one that she either fails to follow the reasonable directions of the other or fails to make a good faith effort toward performing the job requirements of the other with the care and skill reasonably expected of persons in that position.

The duty may also be breached with regard to the performance of specific acts when an employee, performing a specific act in a particular way for the purpose of following the directions or achieving the reasonable expectations of one employer, harms the other employer through the performance of that specific act.

To prevail on this claim, Food Lion must prove the following facts by a preponderance of the evidence:

First: That Ms. Dale or Ms. Barnett, or both breached her duty of loyalty to Food Lion; and

Second: That the breach of the duty of loyalty proximately caused Food Lion to suffer damages.

As I just instructed you with regard to the question of damages in the fraud claim, in this phase of the case Food Lion need only establish that it was damaged, not the precise dollar amount of such damage.

It will be Food Lion's burden to prove what actual damages it sustained as a proximate result of Ms. Dale and/or Ms. Barnett devoting time and attention to ABC's business when she should have been devoting time and attention to following Food Lion's reasonable directions or, otherwise, making a good faith effort toward performing the job requirements of Food Lion with the care and skill reasonably expected of persons in that position.

It would also be Food Lion's burden to prove what, if any, loss it may have suffered as a proximate result of Ms. Dale or Ms. Barnett or both performing any specific act in a particular way for the purpose of following the directions or achieving the reasonable expectations of ABC, which, in the doing, harmed Food Lion through the performance of that specific act.

-- Food Lion, Inc. v. Capital Cities/ABC, Inc.

**I. Wrongful Death**

Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful television production company would use. Therefore, by "negligence," I mean the failure to do something that a reasonably careful television production company would do, or the doing of something that a reasonably careful television production company would not do, under the circumstances that you find existed in this case.

The law does not say what a reasonably careful television production company using ordinary care would or would not do under such circumstances. That is for you to decide.

I now want to discuss with you duties owed by the Defendant to the Plaintiff.

A special relationship between parties may create a duty.

A Defendant, under the circumstances of this case, has a duty to exercise ordinary

care to protect those persons from foreseeable and unreasonable risks of harm while they are on those premises. These risks could have either been known, or should have been known, to the Defendant by exercising ordinary care.

A Defendant has a duty to take reasonable measures to protect a Plaintiff from criminal acts by a third person on or off the premises, so long as the acts were foreseeable.

The Defendant under these circumstances, may be liable if it makes a misrepresentation to another and physical harm results from an act done by the other or a third person in reliance upon the truth of the representation. There are two elements. If the Defendant: (1) intended its statement to induce, or should realize that it is likely to induce action by another or by a third person which involves an unreasonable risk of physical harm to the other; and (2) knows that the statement is false.

A Defendant has a duty under these circumstances to disclose to another a fact that it knows may justifiably induce the other to act or refrain from acting and has the further duty to exercise reasonable care to disclose to the other party matters known to it that it knows to be necessary to prevent its partial or ambiguous statement of facts from being misleading.

The Defendant has a duty to not act in a manner that either intends to affect or realizes or should realize that it is likely to affect the conduct of another or a third person in such a manner as to create an unreasonable risk of harm.

Defendant has a duty to act in a manner such that it does not intentionally and unreasonably subject another to emotional distress which it should recognize as likely to result in illness or other bodily harm, even though it had no intention of inflicting such harm and irrespective of whether the act was directed against another or a third person.

Under the concept of free speech, you cannot find the defendant negligent because of: (1) the Jenny Jones Show's decision to tape a "Same Sex Secret Crush" show on March 6, 1995; or (2) the topic of any *Jenny Jones* show taped before March 6, 1995.

The plaintiff has the burden of proof on each of the following propositions:

a. That the plaintiff was injured and sustained damages;

b. That the defendant was negligent in one or more of the ways claimed by the plaintiff, as stated to you in these instructions; and

c. That the negligence of the defendant was a proximate cause of the injuries/damages to the plaintiff.

Your verdict will be for the plaintiff, if he was injured and sustained damages, and defendant was negligent, and such negligence was a proximate cause of plaintiffs injuries and damages.

Your verdict will be for the defendant, if plaintiff was not injured and did not sustain damages; or the defendant was not negligent; or if negligent, such negligence was not a proximate cause of the plaintiff's injuries and damages.

The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.

We have a law known as the Wrongful Death Act. This law permits the personal representative of the estate of a deceased person to bring an action whenever the death of a person or injuries resulting in the death of a person have been caused by the negligence of another. In this case, Patricia Graves and Frank Amedure, Sr., the personal

representatives of the estate of Scott Amedure, the deceased, are suing Warner Bros., the defendant. Patricia Graves and Frank Amedure, Sr., are representing the Estate: Frank Amedure, Sr. (father), Patricia Graves (mother), Frank Amedure, Jr. (brother), Wayne Amedure (brother), Michael Amedure (brother), and Tina Skrine (sister). They are the real parties in interest in this lawsuit and in that sense are the real plaintiffs, whose damages you are to determine if you decide for the personal representatives of the estate of Scott Amedure.

If you decide the plaintiffs are entitled to damages, you shall give such amount as you decide to be fair and just, under all the circumstances, to those persons represented in this case. Such damages may include the following items, to the extent you find they have been proved by the evidence:

1. Reasonable funeral and burial expenses;

2. Reasonable compensation for the pain and suffering undergone by Scott Amedure while he was conscious during the time between his injury and death;

3. Losses suffered by Scott Amedure's next of kin, including Patricia Graves, Frank Amedure, Sr., Wayne Amedure, Michael Amedure, Frank Amedure, Jr. and Tina Skrine, as a result of Scott Amedure's death, including:

   a. Loss of service;

   b. Loss of gifts and other valuable gratuities; and

   c. Loss of society and companionship.

Which, if any, of these elements of damage has been proved is for you to decide, based upon evidence and not upon speculation, guess, or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. There has been some discussion that could be interpreted that you are a public conscience with a need to send a message. If this is what you feel, that would be incorrect. Your verdict must be solely to compensate for the damages and not to punish the defendant.

If you find for the plaintiffs, then in determining the damages, you may consider the length of time those damages probably would have continued, taking into consideration the number of years Scott Amedure was likely to have lived. In making this determination you may consider the mortality table which is a part of our statutes. This table shows that an ordinarily healthy person of 32 years old has a life expectancy of 39.43 years.

-- Amedure v. Schmitz

**J. Loss of Consortium**

If you find in favor of the plaintiff, the plaintiff's spouse is entitled to be compensated for the loss of the injured party's services to her and the loss of companionship of her spouse.

-- Paul v. Hearst Comm.

**K. Business Disparagement**

The plaintiff in this lawsuit claims that the defendants libeled and disparaged Merco Joint Venture and the Merco Project by and during an August 2, 1994 national television broadcast of "TV Nation."

The plaintiff complains that the defendants' actions constitute libel and business disparagement, and have filed suit seeking compensatory and punitive damages on account of the defendant's conduct.

The plaintiff claims that: (1) the defendants made or broadcast defamatory statements concerning Merco and the Merco Project; (2) these statements were false; (3) the defendants knew these statements were false or made or broadcast these statements with reckless disregard for whether the statements were true or false; and (4) the broadcasting of these statements caused harm to the plaintiff.

The plaintiff further alleges that the defendants' actions in making or broadcasting the statements constituted business disparagement.

A claim for business disparagement has five essential elements, as follows:

First: The making or broadcasting by the defendants of disparaging statements about the plaintiff;

Second: The disparaging statements must be false;

Third: The defendants knew the statements were false or were aware of their probable falsity at the time it was broadcast;

Fourth: The statements were made with a lack of privilege; and

Fifth: The disparagement proximately caused financial injury to the plaintiff.

Defendants Tristar and Kaufman claim that each of the statements made during the broadcast were and are true, or at a minimum substantially true. Tristar and Kaufman claim they did not have any reason, nor did they have doubts, as to the accuracy of any of the statements that were made in the broadcast. Specifically, Tristar and Kaufman claim they did not make or publish the broadcast or the statements in the broadcast with knowledge that any of them were false, nor did they do so with a reckless disregard as to their truth or falsity. Tristar claims that all of the statements in issue were accurate quotes of the people stating personal opinions and beliefs. Similarly Kaufman claims that all his statements were his personal opinions and beliefs.

Tristar and Kaufman also claim that plaintiff has suffered no damages as a result of the broadcast.

-- Merco Joint Venture v. Kaufman

**L. Miscellaneous**

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by the evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability

to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure to recollect, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of such witness such weight, if any, as you may think it deserves.

The plaintiff contends that she suffered mental and emotional anguish as a result of the publication of the article. You may not award any damages to the plaintiff for such mental suffering unless you first find that plaintiff's reputation has, in fact, suffered due to the publication of the article.

-- Dalbec v. Gentleman's Companion Inc.

-- Similar instructions were given in Gray v. St. Martin's Press., Inc. and Paul v. Hearst Corp.

I instruct you that under libel law, there is no obligation upon a writer, editor, or publisher to be fair or to present both sides of the story. There is no obligation to seek out interviewees favoring the other side, to give equal advantage to interviewees favoring the other side, or even to publish their statements. There is no legal obligation to interview the parties that are the subject of criticism. How a publisher chooses to act in these respects is a matter of its editorial policy; in these matters the publisher is free to act in whatever manner it thinks best.

Recognizing the importance of free, open, and robust discussion in the press on matters of public interest, the law of libel imposes no obligations of fairness or evenhandedness. The publication of commentary that flatly accuses individuals and institutions of undesirable actions, without including their denials or evidence to the contrary, is a daily event. Each of us is entitled to our own opinion as to whether this is a good or bad thing. But your opinion on that subject may not enter into your deliberations as jurors.

You may not act in the role of an editor and base your decision in this case on whether you think the book would have been better or fairer if it had been investigated or presented in a different manner. A book is not a public forum, and the plaintiffs have no right to insist upon publication of a contrary point of view.

In short, you may not find that the defendants acted with actual malice or gross irresponsibility merely because you find that they may have failed to discuss the plaintiffs' opposing point of view.

Damages for Emotional Injury

Unless an individual plaintiff establishes that he has sustained actual injury to his reputation, he cannot recover for "mental anguish." Each plaintiff must prove by a preponderance of the credible evidence that his reputation in the community was injured before you consider whether that plaintiff suffered any personal humiliation or anguish. Any claim for mental suffering is "parasitic" and compensable only after damage to reputation has been established. Moreover, those emotional damages, if any, must be caused by proven injury to his reputation.

-- New Testament Fellowship v. Dutton

You are the sole judges of the evidence and of the credibility of the witnesses. You may accept or reject any part of the testimony of any witness and you should accept only the testimony you consider worthy of belief. In determining the weight to be accorded the testimony of any witness, you may consider the demeanor of the witness while on the witness stand; his apparent candor or evasion or the existence or non-existence of any bias or interest; and whether he has previously made contradictory or conflicting statements. You may take into consideration what, if anything, the witness has to gain or lose by his testimony.

The defendants have interposed a defense of contributory negligence to the claims based upon the diary series. By this defense the defendants claim that, prior to the publication of the diary series, the plaintiffs had knowledge of certain information pertaining to the subject matter of the preceding privileged articles and deliberately or negligently withheld such information from the defendants. Defendants thus contend that plaintiffs' own negligence proximately caused or proximately contributed to cause the damages claimed by them based upon the diary series. If you are reasonably satisfied from the evidence that the plaintiffs were guilty of contributory negligence as claimed by the defendants, the plaintiffs could not be entitled to recover for any alleged false and defamatory statements in the diary articles.

The defendants' answer raising contributory negligence is an affirmative defense. Therefore, the burden is upon the defendants to reasonably satisfy you from the evidence as to the truth of all of the material allegations of this defense.

Contributory negligence is negligence on the part of the plaintiffs that proximately contributed to the alleged damages.

If you are reasonably satisfied from the evidence that a plaintiff is guilty of contributory negligence, such plaintiff cannot recover for any initial simple negligence of the defendants.

-- Taylor v. New York Times

The defendant published a correction regarding the photograph that plaintiff is complaining of in this action. The failure to publish a correction or the failure to publish a correction to the plaintiff's satisfaction is not a basis for awarding damages in a defamation action. However, you may consider the timing, content and location of the correction in connection with the question of whether it served to mitigate or lessen any damages he received from the original publication.

-- Schafer v. Time, Inc.

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