LDRC BULLETIN

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THE TEXAS INTERLOCUTORY APPEAL STATUTE

ALSO: SUPREME COURT REPORT - 1998 TERM
A Report on Petitions for Certiorari to the U.S. Supreme Court

PART A. THE TEXAS INTERLOCUTORY APPEAL STATUTE

PART B: SUPREME COURT REPORT - 1998 TERM

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EDITOR'S NOTE

In this issue, the BULLETIN publishes an account of the impact of the Texas interlocutory appeal statute, which, since late 1993 has permitted interlocutory appeals as of right of denials of motions for summary judgment in media libel and related cases. As Tom Leatherbury's study details, the result has been the disposition on summary motion at the appellate level of a remarkable number of cases. These cases, found to lack legal merit by the appellate courts, otherwise likely would have gone through a full trial only to be reversed on appeal or settled when defendants could not withstand the costs or risks of litigation. Interlocutory appeals and an earlier disposition of cases have avoided that waste of judicial and party resources, in addition to the greater sense of clarity and principle introduced by the appellate decisions to the area.

LDRC offers a description of how the new legislation came to be and how it ultimately was enacted into law. Only a handful of states — New York, Arkansas and now Texas — offer this avenue of relief. The hope, of course, is that media entities and their counsel across the country can broach the idea in their states, providing a much-needed escape valve from costly, time-consuming and chilling litigation.

In addition, the study contains detailed summaries of most of the cases decided under the new Texas law and a survey of practitioners who have used it. We thank Tom Leatherbury, of Vinson & Elkins, and Lee Levine, of Levine, Sullivan & Koch, for their efforts to bring this study to our members.

In the second part of this BULLETIN, LDRC publishes its annual report on the certiorari petitions filed in the Supreme Court in libel and privacy cases this past Term. In contrast to the last many years, when it has been silent in the areas of libel and privacy, the Court this term issued two opinions directly impacting the media. In *Wilson v. Layne* and *Hanlon v. Berger*, the Court may have effectively ended the possibility of media ride-alongs into private homes, finding that law enforcement officials can be held liable for Fourth Amendment violations when they invite the media into a private home to witness the execution of a warrant. Left to future courts and decisions was the extent of the reach of the Fourth Amendment, if any, beyond entry into private homes.

Introduction
By Tom Leatherbury

From my first experience with the Libel Defense Resource Center in the early 1980s, I have seen LDRC as a clearinghouse, a trendspotter, and a trendsetter. As a young lawyer, mired in the seemingly endless minutiae of discovery responses and depositions in Dallas, LDRC publications and conferences provided me with a broader, better context for my work in representing libel defendants. I saw and heard that my peers and friends in Seattle, Phoenix, Chicago, Atlanta, New York, and Washington, D.C. sometimes were grappling with the same or similar issues in their cases. In the forums LDRC provided, we could thrash out these issues, learn from each other, and provide our clients with better, more effective representation.

Through this LDRC BULLETIN about the Texas interlocutory appeal statute, LDRC continues in its roles as clearinghouse, trendspotter, and trendsetter. As a clearinghouse, LDRC has brought together accomplished Texas libel defense lawyers to share their collective experience under this deceptively simple, but obviously effective, statute which has been on the books only since September 1993. The positive trends spotted by the authors are unmistakable: unmeritorious claims disposed of efficiently; trial costs avoided; public and private resources conserved; constitutional values protected and preserved. Together with Dick Winfield's viewpoint column, "Interlocutory Appeals as of Right: The Time Has Come," 17 COMMUNICATIONS LAWYER 18 (Spring 1999), we hope this Bulletin provides you with the information you may need to be a trendsetter, to try and replicate the Texas statute in your state. Perhaps, if we work together, this resource may even provide the basis for procedural reform in the federal system. That would truly be a trend worth setting that would benefit us all.

The Texas statute was born out of a sense of frustration with the existing procedural rules. As one of the lawyers who argued defendants' unsuccessful motion for summary judgment in *Feazell v. A.H. Belo Corp.*, who later, after a six-week trial, heard the jury return its $58,000,000 verdict before some of the jurors went to celebrate at Mr. Feazell's victory party, and who was not able to see the appeal of that verdict through because of settlement pressures, it is impossible to describe that sense of frustration found in the law offices, the newsrooms, and the boardrooms across the state in the early 1990s. Overcoming some traditional reluctance to approach the legislature, Belo and the coalition it assembled accomplished what some called unthinkable or impossible in securing passage of this legislation in 1993. The results have been remarkable, as you will see when you read on.

Special thanks go to Dick Winfield, Sandy Baron, and Lee Levine for sparking the idea for this LDRC BULLETIN, to all of the authors for their time and talent, and, as always, to Gayle Sproul, the editor with patience surpassing that of any Biblical or mythical figure.

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Texas Libel Interlocutory Appeal Statute
by Michael J. McCarthy

The triggering event for A.H. Belo Corporation's interest in securing additional statutory procedural safeguards in Texas libel cases was the *Feazell v. WFAA-TV and A.H. Belo* case decided in early 1991. In *Feazell*, the trial judge wrestled with Belo's summary judgment motions over two days of argument, ultimately deciding, after agonizing about it overnight, to send the case to trial. The case was tried in Waco, Texas, the jurisdiction where Feazell had previously served as district attorney, with the jury pool drawn from Waco and the surrounding rural parts of McLennan County. The result was a $58,000,000 jury verdict against Belo, $41,000,000 of which was punitive damages. Belo invariably prosecuted its libel cases to the final appellate level, including the United States Supreme Court, when required. However, because of the size of the *Feazell* judgment (which was fully insured), the insurance companies were unwilling to fund the appeal through the Texas appellate courts. Accordingly, for financial reasons, the case was settled.

After this unpleasant and inequitable experience, Belo decided some innovative relief was in order. The conclusion we reached, with help from Belo's Texas libel defense counsels, was that *Feazell's* bizarre result and numerous other Texas cases, like Harte-Hanks' *Srivastava v. KENS-TV*, and the sizable expenses of pretrial discovery and trial, could be avoided if Texas' rules of civil procedure included an efficient interlocutory appeal "as of right" from denials of defendants' summary judgment motions in libel cases. Therefore, Belo set out to accomplish this legislative result.

Fortunately, Belo had several things going for it in preparing this legislative initiative. First, there was already in existence an interlocutory appeal statute, designed to cover several special litigation circumstances, such as the appointment of a receiver or trustee, the decision to certify or not to certify a class, the grant or the refusal of a temporary injunction, and the denial of a summary judgment based on a claim of immunity by a state or municipal employee. Thus, no special carve-out statute, solely for libel cases, was required; we simply added libel cases as a sixth exception to the existing statute. *See* Appendix.

Second, and most importantly, there is no libel plaintiffs' bar in the state of Texas or any organized group of libel lawyers. The Texas Trial Lawyers' Association, therefore, had no significant constituency to protect. Belo had several meetings with the Association in Austin, prior to introducing the legislation, explaining the rationale for the interlocutory appeal. After its own internal review, the Association ended up viewing the proposed legislation as potentially helpful to plaintiffs' litigation strategies. If a plaintiff won a case on interlocutory appeal, it would likely strengthen its position in proceeding further with the case or, more likely, negotiating a favorable settlement for its client. Also, the legislation does not prevent libel plaintiffs from filing lawsuits; it is nothing more than a procedural remedy. And this narrow exception, solely for libel appeals, posed little possibility of inspiring any greater tort reforms.

Third, Belo was able to form an influential coalition of print and broadcast companies which have operations in Texas, such as Gannett, Harte-Hanks, Cox, and CapCities, which then owned the *Fort Worth Star-Telegram*. The Texas Daily Newspaper Association, the Texas Association of Broadcasters, and Texas Press Association also joined the coalition. While the media coalition

companies were more than willing to lend their names, Belo found that there was little interest in contributing to the substantial expenses incurred in working for the legislation. The Texas Legislature meets every other year and there are a small number of highly-skilled and well-known government relations lawyers in Austin who will add a company's legislative proposal to their list of legislation to lobby through the legislature; hence, the fees charged by these lawyers are high. Belo ended up paying the lion's share of the mid-six figures fee for three excellent government relations lawyers who agreed to give the Belo coalition's bill a high priority during the 1993 legislative session.

Fourth, the Belo coalition was able to convince a highly-regarded Texas senator, Jim Turner (now a U.S. Congressman), and an equally highly-regarded representative, David Cain (now a state senator), to sponsor the bills in their respective chambers. By having their imprimatur on the Belo coalition's bills, it ensured that the bills would be given every consideration, as well as expedited through the legislative maze during the short six months of the Texas biannual legislative session.

As the legislation was being drafted, we commissioned several lawyers and paralegals to research and prepare a detailed report covering (1) the appellate procedures of all of the 50 states, focusing on states which have any sort of interlocutory appeal procedure, as of right or discretionary with the trial judge; (2) the number of libel cases over the last few years lost at the trial level and subsequently won on appeal, which back then was close to 85%; and (3) the historical experiences of a few states, such as New York, which have interlocutory appeal procedures as of right. We also contacted several members of the Texas Supreme Court, and a few well-known trial lawyers, who were part of a special Supreme Court Rules Committee charged with suggesting streamlined civil procedure rules. From the committee's standpoint, the most attractive aspect of the proposed interlocutory appeal legislation was that it would permit appellate courts to eliminate claims which have constitutional or other legal infirmities prior to the public expense of a full trial. The Rules Committee saw no problem with the legislation, although it did not, understandably, enter the legislative fray on the bill.

The argument about judicial economy weighed strongly in favor of the interlocutory appeal procedure. This argument, along with the historical federal and state Constitutional protections for Texas media (which we demonstrated were being procedurally impaired), had the most appeal on public interest grounds for passing the legislation.

As discussed more fully herein, the interlocutory appeal statute in Texas has already served the state's interest well in trying only those libel cases where the legal issues to be resolved have already been reviewed and refined, if required, on an appellate level. And it certainly has served well the interests of Texas media companies which historically have had more than their fair share of significant libel cases.

Michael J. McCarthy is the Executive Vice President and General Counsel of A.H. Belo Corporation, a national media company which includes WFAA-TV in Dallas, KHOU-TV in Houston, KENS-TV in San Antonio, KVUE-TV in Austin, The Texas Cable News Network, The Dallas Morning News, The Eagle in Bryan-College Station, and the Arlington Morning News in its Texas properties.

The Nuts & Bolts of the Texas Interlocutory Appeal Statute Available to Libel Defendants

by Paul C. Watler and John T. Gerhart

What does the interlocutory appeal statute provide?

The interlocutory appeal provision available to libel defendants was initially added to the existing interlocutory appeal statute in 1993 as TEX. CIV. PRAC. & REM. CODE § 51.014(6). Renumbered as TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6) in 1997, the statute allows a defendant to appeal from an interlocutory order that:

> denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73 [the Texas libel statute].

Who may take an interlocutory appeal?

Section 51.014(a)(6) grants an interlocutory appeal right only to libel defendants, not to libel plaintiffs. The interlocutory appeal remedy is available to both media defendants and non-media defendants whose remarks are included in a news broadcast or article.

What motions are appealable?

The motion for summary judgment must be based, in whole or in part, on free speech/free press grounds or statutory privileges and defenses, such as fair report, available to libel defendants under the Texas libel statute, Chapter 73 of the Texas Civil Practice & Remedies Code. The denial of a libel defendant's motion for summary judgment with respect to other "pendent" claims, such as intentional infliction of emotional distress, tortious interference, trespass, and invasion of privacy is also properly appealable under the statute.

What was the effective date of the statute?

Section 51.014(6) became effective on September 1, 1993. Its enabling legislation was contradictory: one section stated that the act did not apply to pending cases, but another provision stated that the act applied to appeals from interlocutory orders entered on or after the effective date. Courts interpreting the statute's effective date generally resolved this confusion by applying the statute only to claims filed on or after September 1, 1993.

Can the trial court proceed to try the case while the appeal is pending?

Before 1997, the answer to this question was unclear. In 1997, the legislature added a provision to § 51.014 for an automatic stay pending interlocutory appeal. Section 51.014(b) states that an interlocutory appeal shall have the effect of staying the commencement of a trial pending resolution of the appeal. The 1997 amendment applies to all cases commenced on or after June 20, 1997 and to cases commenced before the effective date, but in which a trial is to begin on or after June 20, 1997. While an interlocutory appeal is pending, the trial court retains jurisdiction of the case and may make further orders, provided it does not interfere with or impair the jurisdiction of the appellate court or affect any relief sought or that may be granted on appeal.

How quickly are interlocutory appeals decided?

Under the Texas Rules of Appellate Procedure, an appeal from an interlocutory order will be accelerated. TEX. R. APP. P. 28.1. The notice of appeal must be filed within twenty days after the judgment or order is signed, instead of the thirty days allowed in appeals from final judgments. TEX. R. APP. P. 26.1(6). In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. TEX. R. APP. P. 28.3. The appellate court may also allow the case to be submitted without briefs. TEX. R. APP. P. 28.3. The length of time it takes to actually decide the appeal, of course, varies from case to case between Texas's fourteen intermediate courts of appeal. Discretionary review by the Texas Supreme Court may follow.

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The Need for the Statute: The Rarity of Summary Judgment
by Alan Greenspan

Libel litigation in Texas before the enactment of the interlocutory appeal statute can be separated into two periods. During the first period, summary judgment was virtually impossible for a defendant to obtain. During the second period, summary judgment for a defendant was theoretically possible, but nevertheless quite unusual. The demarcation between the first and second period is the Texas Supreme Court's landmark decision in *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989).

The first period was characterized by the notion that actual malice, inasmuch as it depends upon the defendant's subjective belief at the time of publication, can never be negated on summary judgment. Many decisions outside the libel context had held that subjective standards were not the fodder for summary judgment because, at trial, a jury may well disbelieve the defendant's self-serving statements about his state of mind. Moreover, the law in Texas had always been clear that summary judgments should be reserved for only the plainly frivolous cases. Accordingly, the attitude of Texas judges was that libel cases were to be decided by juries.

A perfect illustration of typical judicial attitudes is the case of *Bessent v. Times Herald Printing Co.*, 709 S.W.2d 635 (Tex. 1986), *overruled by Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989). In *Bessent*, the plaintiff was a former head of the Dallas Division of the Department of Public Safety's Narcotics Section. At the time of the particular publication, Bessent was under investigation for planting narcotics on suspects and for committing acts of police brutality. *The Dallas Times-Herald* published a story slightly changed from a UPI story in which Bessent was characterized as having been fired for planting narcotics and brutality. *The Times-Herald* filed a motion for summary judgment based upon the wire service defense, supported by an affidavit attesting to the reliability of UPI and asserting that the story was published with the subjective belief that it was, in all respects, true.

The trial court granted *The Times-Herald's* motion, and Bessent appealed. The Dallas Court of Appeals affirmed in an unpublished opinion. Bessent pursued his case by applying for a writ of error to the Texas Supreme Court. In a two-page opinion, and without hearing oral argument, the Texas Supreme Court reversed and remanded. According to the Court, the affidavit filed by *The Times-Herald* failed to meet one technical aspect of the test for summary judgment evidence under the Texas Rules of Civil Procedure. Those rules require that an affidavit of an "interested party"must be one that "could have been readily controverted." Because the assertions were based upon facts "under the control of the newspapers' employees," they could not have been readily controverted. The case was remanded to the trial court for trial. At trial, *The Times-Herald* conceded that the article was false, but again urged that it had been published without actual malice. The jury agreed, and a defense verdict was obtained.

Situations like the one in *Bessent* were all too common until the Texas Supreme Court decided *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989). The *Casso* case arose from a dispute between two candidates for Mayor of McAllen, Texas. Casso, the challenger, sued Brand, the incumbent and victor, claiming that the latter had defamed him. Summary judgment was granted by the trial court, but then reversed by the intermediate appellate court. The defendant thereupon sought

review in the Texas Supreme Court where, *inter alia*, he asserted two grounds. First, he claimed that the United States Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), "federalized" summary judgment in libel cases and required a plaintiff to carry the burden of interposing evidence sufficient to "support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence." *See id.* at 254-56. The Texas Supreme Court rejected this argument, finding that *Anderson* addressed only the procedure under Rule 56 of the Federal Rules of Civil Procedure and not substantive libel law.

Casso next argued that his affidavit was sufficient under Texas civil procedure to negate actual malice. Amazingly, the Supreme Court agreed, although Casso's summary judgment affidavit was nearly identical to the affidavit submitted by *The Times-Herald* in *Bessent* and by the defendant in another case where summary judgment was rejected. *See Beaumont Enterprise & Journal v. Smith*, 687 S.W.2d 729 (Tex. 1985), *overruled by Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989). In *Casso*, though, the Supreme Court acknowledged that "there is a recognition that courts must give 'careful judicial attention to summary judgment motions in the context of the first amendment.'" *Casso*, 776 S.W.2d at 557-58. Previous decisions, according to the Court in *Casso*, were "insensitive" and treated defamation defendants "more harshly" than other litigants. Thus, the *Casso* Court announced a new approach to summary judgments in libel cases. Overruling both *Bessent* and *Beaumont Enterprise & Journal*, the Court held that summary judgment was proper when based upon the uncontroverted affidavit testimony of the defendant regarding his or her lack of actual malice. *Id.* at 558-59.

Casso was hailed as a landmark decision by the Texas libel defense bar. From the standpoint of the Texas Supreme Court's decisions, it marked a sea change. Indeed, since *Casso*, the Texas Supreme Court has upheld every defense summary judgment in a libel case where a media defendant supported the motion with an affidavit stating that he entertained no doubts regarding the truth or falsity of the publication at issue.

Notwithstanding the very strong precedent from the Texas Supreme Court, trial courts do not always share the Court's "special sensitivity" to the First Amendment and the chilling effect that libel actions, even those without merit, can have on free speech and freedom of the press. *See Casso*, 776 S.W.2d at 558. As a result, before the passage of the interlocutory appeal statute, libel defendants suffered two stunning defeats at the hands of juries. In 1990 in *Srivastava v. KENS-TV*, the jury handed down a $29,000,000 defeat. In 1991 in *Feazell v. A.H. Belo*, the jury awarded the largest libel verdict in United States history at the time — $58,000,000.[1] Both of these verdicts came after motions for summary judgment were denied. Both cases led to settlements. One can only guess how the outcome of these cases might have changed had an interlocutory appeal been possible.

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[1]The verdict was $17,000,000 in actual damages and $41,000,000 in punitive damages. Additionally, there were four or five other individuals who had been mentioned in the same broadcasts whose cases had not gone to trial at the time of the *Feazell* verdict. All of these claims were resolved by settlement after the *Feazell* verdict.

How the Statute Was Enacted: The Legislative History

by Ron Kessler and Kirte Kinser

Why was the statute necessary?

The statute was needed to preserve constitutional protections against meritless suits challenging First Amendment rights and to address dispositive issues with the utmost judicial efficiency. Texas publishers and broadcasters had been rocked by two enormous verdicts of $29,000,000 and $58,000,000 in cases in which they firmly believed summary judgment should have been granted. Before the early 1990s, the largest Texas libel verdict had been in the $2,000,000 range and had been reversed and rendered on appeal. Traditional state court procedures were just not working in cases involving First Amendment rights.

What legal research was done before framing the legislation?

Our research included an extensive review of interlocutory appeal statutes of each state enacting same, analysis of jury verdicts and appellate decisions relating to the probability of incorrect denials of summary judgment by the trial court, review of court statistics, interviews of various court officials and attorneys in other states with interlocutory appeal statutes, and analysis of defamation decisions.

What problems did you anticipate in the legislature?

We anticipated opposition from the plaintiffs' trial bar. We met in advance of the legislative session with the Texas Trial Lawyers' Association to explain the merits of the proposed interlocutory appeal statute. We also anticipated some concerns about judicial economy and piecemeal litigation, which we tried to defuse by meetings with certain appellate justices and with members of the Texas Supreme Court Rules Advisory Committee.

How did you find sponsors for the legislation?

We looked for strong, knowledgeable legislators who had a good reputation for integrity and commitment to the cause. As Mike McCarthy notes in his piece, we succeeded in finding Senator Jim Turner and Representative David Cain. Both of these legislators did a superb job as sponsors. Both have moved on to higher office: Senator Turner to the United States House of Representatives, and State Representative Cain to the State Senate.

What problems did you actually encounter?

Because of our advance work with the Texas Trial Lawyers' Association, we did not encounter opposition from the trial bar. We did face issues concerning the effect of the legislation

on pending litigation. For example, one state representative was the plaintiff in a pending libel case. There was a great deal of discussion about the effective date of the legislation.

Was there testimony? If so, who testified?

We obtained testimony from the Dean of the University of Texas Law School, several small newspaper publishers, officials from A.H. Belo Corporation, and recognized First Amendment attorneys.

Who in the industry backed the legislation?

A.H. Belo Corporation, Texas Association of Broadcasters, Texas Daily Newspaper Association, the Texas Press Association, Texas Appellate Fairness Coalition, The Fort Worth Star-Telegram, The El Paso Times, Harte-Hanks, the Austin American Statesman, the Waco Tribune, other publishers and media outlets, The Texas Civil Justice League (a more general tort reform group), and First Amendment attorneys all supported the passage of this legislation.

How did you deal with the plaintiffs' bar?

While there is no organized plaintiffs' libel bar in Texas, we hired people with strong relationships with the organized plaintiffs' lawyers group, the Texas Trial Lawyers' Association. We also initiated open and frank discussions with the plaintiffs' bar early in the process and kept them fully apprised of progress with the legislation.

How did the proposed legislation change during the process?

The legislation was somewhat narrowed in its scope. The principal change was that it was redrafted to apply only to cases, not to motions for summary judgment, filed after the effective date of the statute.

What lessons did you learn and what would you do differently if you had it to do over again?

We learned that obtaining the passage of legislation is never easy and that the process is fraught with unexpected, unknown, and uncertain events. The legislative process will obviously vary from state to state, but there is no substitute for thorough preparation, open communication, and commitment.

Ron Kessler and Kirte Kinser are partners in the Austin and Dallas offices, respectively, of Locke Liddell & Sapp. Both were instrumental in the legislative effort that led to the passage of the Texas interlocutory appeal statute affecting libel cases.

The Texas Case Law Experience Under the Statute
by Julie Ford and Bill Ogden

Interlocutory appeals from denials of summary judgment have proven very effective in disposing of unmeritorious libel claims. Since the law was enacted in 1993, 20 interlocutory libel-related appeals have been reported by the Texas Courts of Appeals. Five of those cases were disposed of on procedural grounds. Of the 15 cases to reach the merits, 13 cases resulted in judgments for media defendants, while only two claims were found possessing sufficient merit to be remanded for trial.

Predictably, most of the defendants' appellate wins were on the issue of actual malice — an exacting standard of proof which has always received more favorable consideration in appellate courts than in trial courts. Just as predictably, the two losses on the merits were cases decided on issues of substantial truth, where the appellate court found the question a closer call, and remanded the case for trial.

From the standpoint of the media defendant — and from those sources and news subjects quoted in the media — the efficacy of the statute is beyond question. Its fairness and constitutionality have been upheld. As discussed elsewhere in this paper, the mere availability of the interlocutory appeal as an interim remedy has also facilitated settlement of a number of libel claims in addition to those incorporated in the case reports.

This section collects the cases reported through June 1999 under the Texas interlocutory appeal law. The cases are grouped by issues presented. The earliest cases considered questions regarding the effective date of the statute. Several cases considered constitutional challenges to the interlocutory appeals law, all of which have found the statute constitutional. A significant number of cases raise issues of appellate jurisdiction, including whether an interlocutory appeal can be filed by libel plaintiffs or by non-media defendants, and whether the appellate court's jurisdiction extends to "pendent" claims such as tortious interference and intentional infliction of emotional distress. Other appeals have resulted in decisions on the issues of truth, actual malice, or statutory privilege.

1.
Questions Concerning the Effective Date

The enabling legislation for § 51.014(6) stated that the act "shall not apply to any *matters in litigation* prior to the effective date" of September 1, 1993. The same legislation, however, also specifically stated that the act applies only to appeals from *interlocutory orders* entered on or after the effective date. This spawned confusion, which easily could have been avoided by greater clarity in statutory drafting.

H & C Communications, Inc. v. Reed's Food International, Inc., 887 S.W.2d 475 (Tex. App.--San Antonio 1994, no writ), involved an appeal in which the libel suit had been filed before the effective date of the legislation (September 1, 1993), but the motion for summary judgment was filed

after the effective date. The media defendants argued they were entitled to an interlocutory appeal because the trial court had denied their motion for summary judgment after the effective date of the statute. Noting that the enabling legislation was "not a model of clarity," the appellate court disagreed, and dismissed the appeal for want of jurisdiction.

Time Warner Entertainment Co., LP v. Hebert, 916 S.W.2d 47 (Tex. App.--Houston [1st Dist.] 1996, *dism'd on appellant's motion*, 1996 Tex. App. LEXIS 1027 (Tex App.--Houston [1st Dist.] Mar. 14, 1996), involved a suit against multiple defendants based on an HBO documentary. The plaintiffs sued several defendants before the effective date of the statute, but joined Time Warner Entertainment Company, LP *after* the effective date of the statute. An interlocutory appeal was perfected after summary judgment was denied as to all defendants. The court held that the original defendants were not entitled to an interlocutory appeal, but that Time Warner was entitled to perfect its appeal, since it had not been joined until after the effective date of the statute. *See Grant v. Wood, infra.*

Hearst Corp. v. Patino, 1996 Tex. App. LEXIS 4605 (Tex. App.--San Antonio Oct. 9, 1996, no writ). Patino sued Hearst for libel arising from an article published in the *Laredo Morning Times*. In August 1996, the trial court denied Hearst's motion for summary judgment, and Hearst filed an interlocutory appeal pursuant to § 51.014(6). Because the underlying lawsuit had been filed before September 1, 1993, the court of appeals dismissed the media defendant's appeal for want of jurisdiction.

Grant v. Wood, 916 S.W.2d 42 (Tex. App.--Houston [1st Dist.] 1995, orig. proceeding). Plaintiff sued HBO, Time Warner, and others for libel and other alleged torts based on the documentary, "America Under Cover: Women On Trial." This single broadcast has resulted in multiple appellate proceedings. *See also HBO v. Huckabee*, 1998 Tex. App. LEXIS 5399 (Tex. App.--Houston [14th Dist.] Aug.27, 1998, no pet.); *HBO v. Harrison*, 983 S.W.2d 31 (Tex. App.--Houston [14th Dist.] 1998, no pet.). Time Warner moved for summary judgment, but the trial court refused to rule on the motion for the *express* purpose of preventing an interlocutory appeal because the judge did not want the trial of the case to be postponed "another two years" while on appeal. Time Warner petitioned the court of appeals for mandamus relief. The appellate court held that the refusal to rule on Time Warner's motion in order to preclude a statutory interlocutory appeal constituted a clear abuse of discretion. The court further found that Time Warner had no adequate remedy at law because its right to an interlocutory appeal would be moot after the trial court rendered a final judgment, and Time Warner would have thus lost the benefit intended by the legislature when it passed the interlocutory appeal provision. The appellate court conditionally granted mandamus relief, ordering the trial court to rule on the motion for summary judgment.

The dissent argued that Time Warner was not entitled to an interlocutory appeal because the lawsuit had been filed before September 1, 1993, the effective date of the statute. Time Warner, however, had not been joined as a defendant until after that date. The dissent considered the issue of Time Warner's right to an interlocutory appeal as jurisdictional and inappropriate for review on mandamus. When the trial court complied with the appellate court's order, it predictably denied Time

Warner's motion for summary judgment, and Time Warner perfected an interlocutory appeal. The same panel that had granted mandamus relief to Time Warner was then confronted with the jurisdictional question it had previously avoided. The court ruled that it had jurisdiction to hear the interlocutory appeal because Time Warner had not been sued until September 20, 1993. *See Time Warner Entertainment Co. v. Hebert, supra.*

2.
Constitutional Challenges

In two separate cases, one Texas Court of Appeals has dealt with constitutional challenges to the interlocutory appeal law. The statute has been declared constitutional against an equal protection challenge, and against state constitutional challenges based upon the proscription against local or special laws and the requirement in the state constitution guaranteeing "open courts" to all citizens.

KTRK Television, Inc. v. Fowkes, 981 S.W.2d 779 (Tex. App.--Houston [1st Dist.] 1998, pet. denied). In the course of investigating the propriety of city building inspectors taking free lunches from persons who required building permits, KTRK-TV sought a number of public documents and inspection reports from city information manager Gordon Fowkes. Unhappy with the slow pace at which records were forthcoming, KTRK's reporter called on Fowkes's superior and complained that documents were intentionally withheld, resulting in a profanity-laced confrontation. After the meeting, the city assigned another employee to assist KTRK in obtaining the requested information. In the resulting broadcast, KTRK reported that its complaint of records being withheld led to the "reassignment" of Fowkes and that Fowkes's "access to building department computers had been limited." Fowkes sued for an assortment of defamation-related torts, and the trial court granted KTRK partial summary judgment on all tort claims except libel and tortious interference.

On KTRK's interlocutory appeal, Fowkes raised three constitutional challenges to the interlocutory appeal statute. In response to each, the Court held: (1) that the interlocutory appeal law did not violate the state constitutional proscription against local or special laws, since there was a reasonable basis for separately classifying media defendants, and since the law operated equally within that class; (2) that the interlocutory appeal law did not violate the state constitutional provision guaranteeing "open courts," since it did not impose unreasonable financial barriers and since the restrictions imposed were outweighed by valid public interests, and (3) that the interlocutory appeal law did not violate equal protection. The Court went on to hold that it lacked jurisdiction to consider cross-points on appeal brought by the defamation plaintiff, since the right of appeal was only granted to media defendants. Citing *Delta Air Lines, Inc. v. Norris, infra,* the Court again concluded that it had jurisdiction on interlocutory appeal to consider claims other than the libel claims, such as tortious interference, because KTRK's summary judgment motion was based "in whole or in part" on free speech grounds. On reaching the merits, the Court then concluded that statements in the broadcast, while not totally accurate in every detail, were nonetheless substantially true, and rendered judgment in favor of the media defendants.

Evans v. Dolcefino, 986 S.W.2d 69 (Tex. App.--Houston [1st Dist.] 1999, no pet.). This interlocutory appeal arose from the same KTRK television broadcast that was involved in *KTRK v. Fowkes, supra.* The broadcast concerned allegations of improprieties on the part of building inspectors who received free lunches from restaurant operators who required building permits. Plaintiffs were three city inspectors who were filmed by an undercover camera eating free at a local restaurant. After the broadcast, the three inspectors were investigated and reassigned to the parks and recreation department. One inspector received a reprimand and two received temporary suspensions. The Civil Service Commission upheld the disciplinary actions. The inspectors sued the broadcaster for libel, intentional infliction of emotional distress, tortious interference and negligence/gross negligence. On motion for summary judgment, the trial court granted summary judgment as to two of the three plaintiffs, but denied summary judgment on the claims of one inspector. On interlocutory appeal, the Court of Appeals again held that the interlocutory appeal law was constitutional and that jurisdiction was limited to a review of claims brought by media defendants, not by libel plaintiffs. The Court then examined the summary judgment record and found that all of the statements were substantially true or were constitutionally protected opinion. The Court then exercised ancillary jurisdiction to deal with the claims of intentional infliction of emotional distress, tortious interference, and negligence and agreed with the broadcaster that those pendent claims must also fail since the libel claims failed. Judgment was rendered for the broadcaster on all claims.

3.
Jurisdictional Issues

A series of cases has explored the parameters of appellate jurisdiction under the interlocutory appeal law. These cases hold that the statute grants an interlocutory appeal only to libel *defendants*, not to libel plaintiffs. The cases also reaffirm statutory language allowing interlocutory appeals by non-media defendants when those defendants appear as sources whose remarks are included in a news broadcast or article. Finally, the cases have made clear that when the interlocutory appeal raises a constitutional defense to a libel claim, the appellate court may also review summary judgment denials of "pendent" claims based on the same speech, whether cast as claims for tortious interference, conspiracy, breach of contract, or intentional infliction of emotional distress.

Delta Air Lines, Inc. v. Norris, 949 S.W.2d 422 (Tex. App.--Waco 1997, writ denied). Delta Airlines had a baggage and mail handling agreement with Norris. During the term of the agreement, the United States Postal Service began suspecting mail theft and began an investigation of some Norris employees. An armed raid at the Delta mail facilities involved the Postal Inspection Service, the Secret Service, the Immigration and Naturalization Service, and the Texas Department of Public Safety, and predictably, attracted media attention. After the raid, Delta canceled Norris's contract and made statements that were repeated in the news media to the effect that Norris "failed to meet our standards under the agreement," adding that Delta was intolerant of any action by contractors "that involves illegal acts." Norris sued Delta for defamation and business disparagement, and, when the trial court denied Delta's motion for summary judgment, Delta pursued an interlocutory appeal. The Court of Appeals held that it had jurisdiction because Delta's criticisms had been reprinted by

the news media. On review, the Court found that the statement that Norris failed to meet contractual standards lacked defamatory meaning and that the statement that Delta was "intolerant of illegal acts" either did not directly refer to Norris, or if it did, was nonetheless substantially true. The Court then went on to hold it had jurisdiction to consider Norris's pendent claims of breach of contract, good faith and fair dealing, and tortious interference because Delta's motion for summary judgment had been based "in whole or in part" on free-speech claims. The Court concluded that Delta was entitled to summary judgment on all claims except breach of contract and tortious interference, which were remanded for trial.

Galveston Newspapers, Inc. v. Norris, 981 S.W.2d 797 (Tex. App.--Houston [1st Dist.] 1998, pet. denied). The Galveston newspaper wrote a series of articles dealing with allegations of mismanagement, inadequate operating procedures, and improper financial expenditures in the Galveston Housing Authority (GHA). Plaintiff Norris, Executive Director of GHA, sued the newspaper, complaining that the articles accused him of mismanagement and fraud and implied he was guilty of theft. The newspaper moved for summary judgment on a "no evidence" standard, meaning that the plaintiff, after adequate time for discovery, could raise no evidence of a fact issue on the essential elements of actual malice or substantial falsity. When the trial court denied the newspaper's summary judgment, this interlocutory appeal followed. The Court held that it had jurisdiction over the interlocutory appeal, both as to the libel claim and the related tortious interference claims. It was undisputed that Norris was a public official for purposes of *New York Times* analysis. The Court reviewed the affidavits, found there was legally insufficient evidence to raise a fact issue on actual malice, and rendered judgment for the newspaper on all claims.

Rogers v. Cassidy, 946 S.W.2d 439 (Tex. App.--Corpus Christi 1997, no writ). Cassidy, the San Benito City Attorney paid part-time on retainer, sued Rogers, a private citizen who had written letters to the district attorney and the county elections administrator, charging that Cassidy violated election laws by allowing two candidates to use her law office as their campaign headquarters. The letters described Ms. Cassidy's alleged "campaign irregularities," which Mr. Rogers concluded "would be considered unethical and could possibly violate sections of Chapter 39 of the Penal Code." Cassidy sued for libel, claiming that five statements in the two letters were defamatory per se. One of the five statements had been reprinted in local newspaper articles. Both Cassidy and Rogers moved for summary judgment, and when the trial court denied both motions, both parties appealed. The Court of Appeals held that it had jurisdiction over Rogers's appeal, because he was "a person whose communication appears in or is published by the electronic or print media," citing TEX. CIV. PRAC. & REM. CODE § 51.014(6). The court concluded that it lacked jurisdiction over Cassidy's appeal because the statute did not allow an interlocutory appeal (or cross-appeal) by libel plaintiffs. The court then held that Cassidy was a public official for purposes of the *New York Times* standard, even though her status as "city attorney" was essentially a part-time retainer position. After determining that *New York Times* applied, the Court concluded that Rogers's affidavit was sufficient to negate actual malice as a matter of law and rendered judgment that Cassidy take nothing.

Other cases that also considered issues of pendent jurisdiction or jurisdiction to determine a plaintiff's interlocutory appeal include ***American Broadcasting Cos. v. Gill***, 1999 Tex. App. LEXIS

4449 (Tex. App.--San Antonio June 16, 1999, no pet.) (dismissing claims for trespass, abuse of process, tortious interference, and invasion of privacy as well as defamation); ***Evans v. Dolcefino***, 986 S.W.2d 69 (Tex. App.--Houston [1st Dist.] 1999, no pet.); and ***KTRK Television, Inc. v. Fowkes***, 981 S.W.2d 779 (Tex. App.--Houston [1st Dist.] 1998, pet. denied).

One case stands for a self-evident jurisdictional limitation: the media defendant cannot appeal if it *wins*. In ***New Times, Inc. v. Wheeler***, 1998 Tex. App. LEXIS 2494 (Tex. App.--Dallas Apr. 29, 1998, pet. denied), the *Dallas Observer* was sued over an article about urban rehabilitation by a real estate developer who claimed the article falsely implied building code violations and bribery. In an ambiguous ruling, the trial court granted partial summary judgment in favor of the *Observer*. Several months later, plaintiff amended his petition, raising new claims that had not been addressed in the earlier summary judgment motion. The *Observer* appealed the partial summary judgment, arguing that the new petition either did not raise fact issues or those issues were not supported by the pleadings, and that the amended petition was not before the court and could not be considered. The appellate court construed the *Observer's* motion for summary judgment as addressing relief only on *one* claim in the plaintiff's original petition, and failing to address other allegations in the petition. Since the trial court had effectively granted all relief requested by the *Observer*, the appeal was dismissed for want of jurisdiction.

4.
Actual Malice

The greatest benefit of the interlocutory appeal law can be found in those cases that raise the issue of actual malice. This is consistent with expectations. Actual malice is a difficult and exacting standard, requiring proof of knowing falsity or reckless disregard which must be established by clear and convincing evidence, and which the appellate court is bound to affirm only on an independent review of the record. As is often the case, jury findings of actual malice fail to withstand appellate scrutiny. The interlocutory appeal law, while certainly a benefit to media defendants, benefits all parties by moving these cases more expeditiously and further benefits the court system as a whole by conserving trial court resources for other claims.

In the following interlocutory appeals, the appellate courts' reversal of the denial of summary judgment was based on the actual malice standard, holding that the media defendants had established the absence of malice as a matter of law.

WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998), *cert. denied*, 119 S.Ct. 1358 (1999). This libel case arose out of news coverage on the failed raid of the Bureau of Alcohol, Tobacco and Firearms (ATF) on the Branch Davidian Compound near Waco, Texas. Plaintiff McLemore was a local television reporter who claimed he was libeled when federal agents blamed unnamed "local reporters" for compromising raid security. A *Houston Chronicle* reporter repeated these claims without identifying any local reporter by name. WFAA reported the claims in a newscast that identified Mr. McLemore. The trial court granted summary judgment as to the newspaper (apparently on the grounds of "of and concerning") but denied summary judgment for WFAA. On

interlocutory appeal, the Waco Court of Appeals affirmed the denial of summary judgment, holding in the process that the plaintiff, who was a local television reporter, was not a public figure. The Texas Supreme Court reversed and rendered judgment for WFAA, holding that McLemore was a limited purpose public figure, and that the summary judgment record conclusively negated actual malice as a matter of law.

American Broadcasting Cos. v. Gill, 1999 Tex. App. LEXIS 4449 (Tex. App.--San Antonio June 16, 1999). Several members of the Gill family, some of whom had been officers, directors, and insiders at the failed Gill Savings Association, sued ABC and others over a Day One news program about the RTC's bailout of the savings and loan industry. In an opinion which stands as an exemplar of independent appellate review, the San Antonio Court of Appeals painstakingly analyzed 39 broadcast statements and more than 50 "newsgathering" statements alleged to be defamatory and actionable. The Court of Appeals dismissed all of plaintiffs' claims, holding that each statement was either true, non-actionable opinion, not defamatory, not "of and concerning plaintiffs," or not made with actual malice. This is an opinion well worth reading to understand the detailed evidence and argument that the Court of Appeals found compelling.

HBO v. Huckabee, 1998 Tex. App. LEXIS 5399 (Tex. App.--Houston [14th Dist.] Aug. 27, 1998, no pet.). This interlocutory appeal reversed the denial of summary judgment in a libel suit brought by a state district judge regarding the 1992 HBO documentary "Women On Trial." The broadcast dealt with claims of judicial bias and unfair treatment by four women who lost custody battles in Texas Family Courts. Judge Huckabee claimed that the broadcast falsely described certain rulings he made and either stated or implied that he was guilty of improprieties or judicial misconduct. The trial court denied summary judgment, and HBO appealed. The Court of Appeals conducted an extensive review of the summary judgment affidavits, noting the numerous sources reviewed or interviewed for details in the broadcast, together with the affidavits of the reporters and producers attesting that they believed the broadcast was a truthful summary of the cases in question. The court held that Judge Huckabee was required to offer specific, affirmative proof to show that HBO either knew the publication was false or entertained serious doubts as to its truth. The fact that legal problems put the film on hold, that the film was under continuous legal review, and that the producer demanded and received indemnification did not amount to proof of actual malice. Similarly, constant rewrites and editorial disagreements concerning interviews or information to be excluded from the broadcast did not equate to actual malice as a matter of law. After citing to the independent, more stringent requirements for liability under the Texas state constitution as opposed to the federal constitution, the Court of Appeals unanimously rendered judgment in favor of HBO.

HBO v. Harrison, 983 S.W.2d 31 (Tex. App.--Houston [14th Dist.] 1998, no pet.). This libel claim was brought by a court-appointed psychologist concerning the same "Women On Trial" HBO broadcast at issue in *HBO v. Huckabee, supra*. Mr. Harrison, a psychologist in private practice, had been appointed by the court to make rulings and recommendations concerning child custody in some of the case histories criticized in the HBO broadcast. The order appointing Mr. Harrison gave him authority to determine parental visitation rights. On interlocutory appeal from the trial court order denying HBO's motion for summary judgment, the Court of Appeals held that Mr. Harrison

was a public official for purposes of the *New York Times* standard, since his order of appointment effectively ceded the court's judicial power to him. The court then reviewed the summary judgment affidavits under the actual malice standard, held that Harrison was unable to show "specific, affirmative proof" to raise a fact issue on malice, and rendered judgment in favor of HBO.

Freedom Communications, Inc. v. Brand, 907 S.W.2d 614 (Tex. App.--Corpus Christi 1995, no writ). The mayor of McAllen sued the *McAllen Monitor* for libel, alleging that editorials published in the newspaper had impliedly accused him of criminal conduct and dishonesty in office. The editorials quoted remarks made by the mayor in public meetings, some of which were made to the paper's reporter. The mayor alleged that his comments were taken out of context and that the paper had failed to investigate further and had compared him to a former South Texas politician who had been convicted of criminal offenses. The newspaper moved for summary judgment on the grounds of privilege, First Amendment and the Texas Constitution, and no actual malice. The motion was denied by the trial court. When the paper filed an interlocutory appeal, the denial of summary judgment was affirmed. Several months later, the paper filed a second motion for summary judgment, which was also denied. The paper appealed again, asking the appellate court to consolidate the second appeal with the first. The appellate court vacated the first opinion and consolidated the two cases. After disposing of procedural issues not relevant here, the appeals court then held that the newspaper's second motion for summary judgment adequately raised the issue of no actual malice. Reviewing the proof submitted with the second summary judgment motion and response, the court of appeals held that the newspaper had refuted actual malice, reiterating that failure to investigate, without more, cannot establish actual malice, and that a libel plaintiff cannot recover solely on the basis of statements taken out of context.

San Antonio Express-News v. Dracos, 922 S.W.2d 242 (Tex. App.--San Antonio 1996, no writ). Dracos, a reporter and news commentator at KENS-TV in San Antonio, was the host of a highly-rated news segment, "Eyewitness Wants to Know," with an accusatory format. Dracos wrote a letter to the station's general manager, complaining of his treatment by the news director. The station treated his letter as a letter of resignation, which it accepted immediately. The *San Antonio Express-News* published a story about Dracos's departure, including comments from the assistant news director and the news director. After reading the article, Dracos wrote to station management, stating that he objected to his letter being treated as a letter of resignation, that he had not quit his job, that the remarks given by the station to the newspaper were damaging to his career, and asking for a retraction. Dracos then sued the newspaper, its reporter, and the television station for libel. The media defendants filed motions for summary judgment. The television station's motion was granted, but the motions brought by the newspaper and its reporter--on grounds of substantial truth, no actual malice, and no defamatory meaning--were denied. The newspaper defendants then filed an interlocutory appeal. The appellate court found that the complained-of statements were not defamatory as a matter of law because they did not accuse Dracos of a crime, of unethical conduct, or of any act that Dracos did not have a right to do. The court also held that the article was true or substantially true. Noting the irony of a libel suit brought by a highly-visible host of a program described as a "fine example of the power and freedom of a vigorous free press," who had access to "the self-remedy of rebuttal," the court of appeals found Dracos to be a public figure — as he had

stipulated in another libel suit against the *Express-News* several years earlier — and the uncontroverted affidavit of the newspaper reporter and other summary judgment evidence established that the article had been published without actual malice. The trial court's denial of the newspaper defendants' motion for summary judgment was reversed, but the court of appeals noted in passing that a statement can be libelous by implication, which is not the majority view in Texas.

Other interlocutory appeals decided on the actual malice standard include ***Galveston Newspapers, Inc. v. Norris***, 981 S.W.2d 797 (Tex. App.--Houston [1st Dist.] 1998, pet. filed), and ***Rogers v. Cassidy***, 946 S.W.2d 439 (Tex. App.--Corpus Christi 1997, no writ).

5.
Truth and Privilege

Other cases have disposed of interlocutory appeals by reaching the defenses of truth or statutory privilege. Again as expected, cases hinging on the defense of substantial truth are the closest cases. The two summary judgment denials which were affirmed on interlocutory appeal both implicated the defense of substantial truth, and in both cases, the appellate court held that a fact issue was presented as to the truth of the broadcast or article.

KTRK Television, Inc. v. Felder, 950 S.W.2d 100 (Tex. App. --Houston [14th Dist.] 1997, no writ). KTRK broadcast a news report about a teacher at a middle school plagued with frequent controversy, after the station learned that parents were complaining that the teacher had physically threatened and verbally abused children with behavioral problems. The teacher sued the station and two on-air reporters for libel and other torts. KTRK moved for summary judgment on the grounds of substantial truth and privilege. The trial court denied the summary judgment motion, and KTRK filed an interlocutory appeal. The court of appeals held KTRK's affirmative defense of truth to be dispositive of the libel claim and rendered judgment that the plaintiff take nothing. All other causes of action were precluded because the court or appeals found them to be based on statements in the broadcast and thus indistinguishable from the libel claim.

TSM AM-FM TV v. Meca Homes, Inc., 969 S.W.2d 448 (Tex. App.--El Paso 1998, pet. denied). Meca was a local home builder involved in controversy when a rock retaining wall collapsed, causing boulders, debris, and a cement truck to tumble into several neighboring backyards. The ensuing local news broadcast reported (erroneously) that Meca had illegally built a 40-foot retaining wall when it was only permitted to build a 10-foot retaining wall, and that city officials would probably bring criminal charges. In fact, the wall which collapsed had been constructed in accordance with the city permit. The city did not pursue legal action against the contractor, but the contractor sued TSM for libel. When the trial court denied both parties' motions for summary judgment, both parties appealed. The Court of Appeals held that it lacked jurisdiction to consider the libel plaintiffs' cross-appeal, since the statute only conferred jurisdiction over interlocutory appeals by libel defendants. On review of this record, however, the Court held that substantial truth

was not established as a matter of law, that Meca was not a public figure, and that TSM failed to establish conclusively the application of a public interest privilege. Denial of the summary judgment was affirmed, and the case was remanded for trial.

Oxychem Corp. v. Elovitz, 1998 Tex. App. LEXIS 3378 (Tex. App.--Corpus Christi June 4, 1998, no pet.). In 1992, butadiene was accidentally released from Oxychem's Corpus Christi plant, and Oxychem offered to pay for the medical treatment of exposed persons. Oxychem learned that one of the treating physicians was inflating fees and issued a press release that it would no longer pay for patients to be treated by this doctor, citing his "questionable billing practices." The doctor sued for defamation. Oxychem moved for summary judgment, asserting that the doctor was a public figure and that the statements were not defamatory as a matter of law, and further asserting the defenses of truth and privilege. The motion was denied, and no appeal bond was filed. Several days later, the Board of Medical Examiners concluded that the doctor had engaged in unprofessional conduct. Based on this finding, Oxychem filed a "Motion to Reconsider Summarily Dismissing Elovitz [*sic*]," which was also denied. Oxychem then filed an interlocutory appeal. The plaintiff challenged the appellate court's jurisdiction on the ground that Oxychem had waived its right to an interlocutory appeal by not filing a timely appeal bond for the *first* denial of summary judgment. The appellate court treated Oxychem's Motion to Reconsider as a *second* summary judgment motion, and, because Oxychem had an appeal bond that was timely in relation to the date of the trial court's denial of that motion, the court found that it had jurisdiction to hear the appeal. Because the sole ground asserted in the motion to reconsider was the affirmative defense of truth, the appellate court would not consider additional grounds for summary judgment asserted in Oxychem's first motion. The court of appeals affirmed the trial court's denial of summary judgment, holding that a finding in the order of the Board of Medical Examiners that the doctor had "not admitt[ed] that he has violated the Medical Practices Act . . . but chosen to avoid the expense . . . of litigation in this forum," constituted a "controverted finding of fact," which precluded summary judgment on the affirmative defense of truth.

The only interlocutory appeal to be decided on grounds of the statutory fair report privilege is ***Texas Monthly, Inc. v. Transamerican Natural Gas Corp.***, 1998 Tex. App. LEXIS 4685 (Tex. App.--Houston [1st Dist.] July 23, 1998, no pet.). This case involved an article published by *Texas Monthly* magazine entitled "The King of Bankruptcy," which concerned plaintiff Jack Stanley and his company, Transamerican Natural Gas Corporation. The article described trial testimony that raised allegations of fraud by Stanley. Plaintiffs alleged that 11 specific statements in the article were false and defamatory. The trial court granted defendants summary judgment as to four statements, but denied summary judgment as to the remaining seven statements. *Texas Monthly's* interlocutory appeal concerned only the seven statements upon which summary judgment had been denied. The Court of Appeals conducted a thorough review of the summary judgment record, which included considerable testimony and detail from the bankruptcy trial made the subject of the article. The court determined that the article was privileged under the Texas fair report statute, which exempts media defendants from liability for publishing fair, true and impartial accounts of judicial proceedings. TEX. CIV. PRAC. & REM. CODE § 73.002. The trial court noted that the privilege afforded "considerable latitude" to media defendants and rendered judgment in favor of the publisher.

This case could present an issue that was probably not anticipated by drafters of the interlocutory appeal statute. Since the trial court granted *Texas Monthly* summary judgment on four of the statements at issue, and since plaintiffs could not take an interlocutory cross-appeal, trial court proceedings technically remained pending as to those four statements. If *Texas Monthly* ultimately prevails on the seven statement made the basis of the interlocutory appeal, it may still be faced with a second appeal as to the original partial summary judgment rendered in its favor. In other words, final resolution of all issues could require two appeals.

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Practitioners' Survey: Of Pigs and Hogs
by David Donaldson and Tom Williams

In addition to surveying the case law, LDRC also attempted to determine the practical impact of the interlocutory appeal statute in Texas, and to do so, surveyed several Texas libel practitioners. The survey suggests strongly that the interlocutory appeal statute has been a positive development for the defense of libel actions in Texas.

Survey Methodology

To assess practitioners' views about the interlocutory appeal statute, a brief questionnaire was sent to all Texas members of the Libel Defense Resource Center's Defense Counsel Section, as well as to certain other attorneys who have handled libel cases since the statute was enacted, including one who almost exclusively represents plaintiffs. The questionnaire asked each respondent if he or she had ever handled a libel case in which the defendant took an interlocutory appeal from the denial of a motion for summary judgment, and if so, the results. The questionnaire asked if the respondent had ever found the availability of interlocutory appeal to have affected either the likelihood of a settlement or the terms of a settlement, and finally asked respondents if they considered the availability of the interlocutory appeal process to be positive, negative, or of no effect for the defense of libel cases

Survey Results

As to the frequency of interlocutory appeals, several respondents reported no personal experience with the statute, and several other respondents have been involved in only one case. The largest number of interlocutory appeals handled by any one respondent was four. Of the cases handled by the responding attorneys, the media defendant prevailed in the great majority of the cases (one respondent represented a media defendant that was unsuccessful in its interlocutory appeal, one respondent reported a case still pending, one respondent reported settling two cases while the interlocutory appeals were pending, and one respondent reported a case in which the appeal was dismissed on procedural grounds).

All of the respondents considered the availability of an interlocutory appeal to be a positive development in the defense of libel suits. Several respondents who had taken successful interlocutory appeals reported that in the absence of the statute, the case undoubtedly would have gone to trial or would have required the payment of a moderate to substantial amount of money to settle despite the merits of the actual case.

Several different reasons, many of them obvious, were given to support the conclusion that the statute helps the meritorious media defendant. The most commonly cited reason — and one that is certainly obvious — is that an interlocutory appeal of the denial of a motion for summary judgment gives the defendant "two bites at the apple": the appeal may, of course, be successful, but even if it is unsuccessful and the trial results in a plaintiff's verdict, the defendant may then appeal the verdict as well.

Another frequently cited reason is the factor of time: the taking of the interlocutory appeal naturally delays the trial date (assuming the appeal is unsuccessful and a trial follows), and that often works in the defendant's favor, particularly in more marginal plaintiffs' cases, where the plaintiff may lose some of the zeal with which the case was prosecuted when the offending story was still fresh in the plaintiff's mind.

Finally, several respondents pointed out that the statute is an important safeguard in cases where it is not realistic to expect the trial judge to grant summary judgment regardless of the merits of the motion; in those cases, the defendant knows it can take the issues to an appellate court before incurring the burden and expense of a trial.[1]

The respondents gave mixed answers with respect to the effect of interlocutory appeal on settlement. Several respondents said they had seen no effect. However, some respondents reported that they were able to settle cases for nominal sums (or, in one case, for the publication of a "clarification" without payment of money) prior to filing a motion for summary judgment because the plaintiff knew that if the defendant's motion for summary judgment were denied, the defendant would take an interlocutory appeal which, at minimum, would significantly delay the ultimate resolution of the case and likely would result in dismissal of weak cases.

At least two respondents cautioned defense counsel against taking an interlocutory appeal if the defendant lacks solid grounds for appeal. One respondent said that he was concerned that indiscriminate use of the interlocutory appeal statute would lead to a body of unfavorable case law; another noted that a plaintiff who survives an interlocutory appeal will be unlikely to settle the case on terms acceptable to the defendant, thinking, as this respondent put it, "that there is nothing between the Plaintiff and the goal line." However, the only respondent who reported handling an unsuccessful interlocutory appeal for a media defendant found that the plaintiff's attitude about the case remained unchanged after the interlocutory appeal. This case is still pending in the trial court.

The respondent who primarily represents plaintiffs concurred with the defense attorneys' view that the statute is helpful to media defendants, calling it "a tremendous defense hammer." He noted that by the time a libel plaintiff "has been through discovery and depositions [the plaintiff] is ready for closure [and] the thought of having the matter drag out longer is a big hammer."

What Would We Do Differently?

The Texas experience with the interlocutory appeal statute has been so positive that it is difficult to identify any major item that would improve what is already a very effective statute. But, like any piece of legislative sausage, there are some aspects that could be tweaked to make it even more effective. For example, the Texas statute had an effective date that made it apply only to cases

[1] The reasons it may be unrealistic to expect to win an apparently meritorious motion for summary judgment are varied, but can include a judge's disposition to "let juries decide" cases, political pressures, relationships with certain attorneys, hostility toward the press generally and/or the defendant specifically, and other factors.

that were filed against parties after the effective date of the statute. Because the interlocutory appeal is merely a procedural change that would not affect the substantive rights of the parties, a better approach would have been to apply the new interlocutory appeal remedy to cases that were currently pending but in which motions for summary judgment that would qualify under the statute had not yet been filed or heard. This would have avoided some of the questions that arose with the interlocutory appeal statute when new parties were added after the effective date of the new procedure.

Two other improvements might prove valuable. One would involve more explicitly stating that a statutorily created defense to libel which may not be grounded in the constitution also qualifies for interlocutory appeal. While some of the constitutional reasons for permitting an interlocutory appeal would not be present in that situation, the practical issues of wanting to determine and dispose of claims as quickly as possible argue in favor of recognizing interlocutory appeal for those issues as well. On a related issue, the interlocutory appeal statute should also make it explicit that if there is a basis for the interlocutory appeal, any other grounds for summary judgment, including those which standing alone would not be eligible for interlocutory appeal, may also be brought forward and adjudicated by the appeals court. The Texas statute has been interpreted to apply in this fashion, *see KTRK Television, Inc. v. Fowkes*, 981 S.W.2d 779 (Tex. App.--Houston [1st Dist.], 1998 pet. denied); *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422 (Tex. App.--Waco, 1997, writ denied), but the statute might have been worded more explicitly.

While these improvements would have made the interlocutory appeal statute even more attractive, any effort to pass an interlocutory appeal statute will depend on the state's peculiar legislative and political process. These proposed "tweaks" are not so valuable that they should override the practical political advantage of being able to argue that a proposed new statute for another state is exactly like the Texas statute. If it is politically easier to pass the interlocutory appeal statute by simply mirroring what Texas now has, the merits of the statute are so significant that any additional garnishes are not worth the effort. As we say in Texas, "Pigs get fat, hogs get slaughtered."

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APPENDIX

TEX. CIV. PRAC. & REM. CODE § 51.014. Appeal From Interlocutory Order

(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(1) appoints a receiver or trustee;

(2) overrules a motion to vacate an order that appoints a receiver or trustee;

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivisions of the state;

(6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article 1, Section 8, of the Texas Constitution, or Chapter 73;

(7) grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code; or

(8) grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.

(b) An interlocutory appeal under Subsection (a) shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal.

SUPREME COURT REPORT — 1998 TERM
A REPORT ON PETITIONS FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

For the first time since 1989, the Supreme Court accepted for review and decided cases in the area of media privacy — taking on two cases involving the controversial newsgathering technique known as the "ride-along." As a practical matter, these decisions will probably provide law enforcement with enough "guidance" to end a broad range of media ride-alongs.

In *Wilson v. Layne*, the Court held that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties was not in aid of the execution of the warrant." While the Court noted "the need for accurate reporting on police issues," it found that that need "in general bears no relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant." Notwithstanding this analysis, the Court ruled by an 8-1 vote (Justice Stevens dissenting) that the officers were qualifiedly immune from suit because the law on this issue was not sufficiently clear at the time they executed the warrant. *See infra* p. 49.

In a short per curiam opinion in *Hanlon v. Berger*, the Court held that the complaint — which was based on CNN's presence during the execution of a search warrant of the plaintiffs' Montana "ranch with appurtenant structures, excluding the residence" — sufficiently alleged a Fourth Amendment violation under *Wilson*. The case was remanded to the Ninth Circuit for further proceedings consistent with *Wilson*. *See infra* p. 49-50 . In a harsh opinion, the Ninth Circuit had held that CNN was a "joint actor" with federal law enforcement officials and thus could be liable for a Fourth Amendment violation. Interestingly, the Court did not accept for review CNN's certiorari petition, which sought review of this issue. On remand, CNN's position may now also be ripe for reconsideration.

This past term, the Court considered and denied 16 other petitions in libel and privacy cases. Of these 16 petitions, only one was brought by a media defendant appealing a jury damage award. The Court declined to hear the *Globe's* appeal of a $1.7 million award. *Globe International v. Khawar*. *See infra* p. 54.

The Supreme Court also denied certiorari in an unusual Lousiana case, *Time Warner Entertainment Co. v. Byers* — the so-called "Natural Born Killers" case. The state court decision cleared the way for a claim to proceed against the producers and director of the film on the strength of the bare allegations in the complaint that they intended to incite lawless action. *See infra* at 64.

The Court also declined to hear a petition filed at the end of the 1997 Term from a coalition of media entities seeking access to hearings involving the invocation of executive and attorney-client privilege in connection with the Independent Counsel's investigation of President Clinton. In *Dow Jones v. Clinton*, the D.C. Circuit held that the media has no First Amendment right of access to hearings that are ancillary to grand jury proceedings, nor to the documents involved in such hearings. *See infra* at 58.

On the other hand, the Court will review a Ninth Circuit decision that held unconstitutional a California statute that prohibits commercial use of arrestees' addresses, but permits law enforcement agencies to disclose such information for "scholarly, journalistic, political, or governmental purpose." *Los Angeles Police Department v. United Reporting Publishing Corp.* *See infra* at 63.

The Court will also review a decision that struck down a requirement in the Communications Decency Act that cable operators scramble adult programming to eliminate signal bleed. The lower court held that the requirement was a content-based restriction that violated the First Amendment because it was not the least restrictive means of advancing the government's interest in protecting children from offensive programming. *United States v. Playboy Entertainment Group, Inc.* *See infra* at 70.

An interesting petition for certiorari was filed but not acted upon in *Central Newspapers, Inc. v. Johnson.* A Louisiana appellate court ruled that two newspapers could be held liable for publishing the contents of a taped telephone call between public officials that was played at a press conference. The newspapers published the contents of the recording after it was played at a public news conference by a political opponent who claimed she received the tapes anonymously. Louisiana's wiretapping law provides in part that "no person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation" of the act -- establishing what appears to be a strict liability standard. *See infra* p. 54-55.

In other areas, the Court struck down a federal law banning radio and television advertising of gambling, reversing the Fifth Circuit's decision. *Greater New Orleans Broadcasting Ass'n v. United States.* *See infra* p. 59-60. In a unanimous opinion, the Court held that the statute did not directly further a government interest and was overbroad. In *Buckley v. American Constitutional Law Foundation*, the Court affirmed the Tenth Circuit's holding that certain of Colorado's access controls on its ballot initiative petitions violate the First Amendment's freedom of speech guarantee. The Court held that the requirements significantly inhibit communication with voters about proposed political change and are not warranted by the state's interests. *See infra* p. 61-62.

In this connection, the Court accepted for review a case with important implications to the current debate over campaign financing. In *Shrink Missouri Government PAC v. Adams*, the Eighth Circuit struck down a Missouri law that limited individual contributions to candidates for state-wide office to $1,075. The court held that the state failed to provide sufficient evidence that the limits served a compelling interest. More importantly, the court held that even if the state did provide evidence to show a compelling interest, the $1,075 limit was too low as a matter of law to allow meaningful participation in political speech. *See infra* p. 62-63.

LDRC has published an annual report on certiorari petitions filed in libel and privacy cases for the past 14 Terms. Summaries of petitions disposed of this Term involving libel, privacy and other First Amendment issues of interest, follow.

Key findings on certiorari petitions in the area of libel and privacy law during the 1998 Term:

1. ***Two Petitions Granted this Term***. The Supreme Court accepted for review and decided two cases involving media privacy issues. This was the first time since 1989 that the Court issued a decision in this area. The last media privacy case decided before this Term was *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). The Supreme Court has not reviewed a libel case since its 1991 decision in *Masson v. New Yorker Magazine*, 111 S. Ct. 2419 (1991). Over the 14 Terms studied by LDRC, the Court has granted certiorari in only 14 of the 303 privacy and libel petitions filed (4.6%).

Eighteen (18) petitions in total in libel and privacy cases were ruled on this Term, up from last year's 13, which was the smallest number of petitions in the 14 Terms studied by LDRC. The highest number of petitions was 37 in the 1988 Term.

2. ***Media vs. Non-Media***. Of the total of 303 petitions in the 14 Terms studied 180 (59.4 %) were media cases; 123 (40.6%) were nonmedia cases. Over the 14 Terms studied, the Court has granted petitions in 11 of 180 media cases (6.1%) versus only 3 of 123 nonmedia cases (2.4%), suggesting that the Court is modestly more willing to hear libel and privacy cases involving the media than in such cases without a media party.

3. ***Federal vs. State***. In the 1998 Term, 11 of the 18 libel and privacy petitions (61.1%) were appeals from federal court decisions. In the 1997 Term, 6 of the 13 libel and privacy petitions (46%) were appeals from federal court decisions. Cumulatively from 1985 - 1998, 39.6% (120 of 303) of the libel and privacy petitions were from federal courts. Including the two ride-along cases decided by the Court this term, over the 14 Terms studied, the Court has granted 8 of 120 petitions (6.6%) from federal courts versus 6 of 182 (3.2%) of them from state courts.

4. ***Final vs. Nonfinal Judgments***. The majority of libel and privacy petitions this Term, as is normally the case, were made from final judgments. "Final judgment" as used in this study includes dismissal of a complaint, grant of summary judgment, denial of a motion for a new trial and other rulings by the appellate courts that dispose of all issues on a claim. *See, e.g.*, 28 U.S. §1291 and Fed. R. Civ. P. 54 (b). Of the 18 libel and privacy petitions disposed of in the 1998 Term, 14 were from final judgments. Over the 14 Terms studied, only 10.2% (31 of 303) of petitions filed were from nonfinal judgments. Over the 14 Terms studied, the Court granted 12 of 271 (4.4%) of libel and privacy petitions from final judgments and 2 of 32 (6.2%) from nonfinal judgments.

5. ***The Issues***. Privacy was the most frequently raised issue among the 1998 Term petitions, appearing in 6 cases. Government immunity and plaintiff's status were each raised three times. Actual malice was raised in 2 cases. The other issues raised were collateral estoppel, damages, defamatory meaning, fraud, hyperbole, implication, jurisdiction, privilege, section 1983 liability, summary judgment and wiretap law.

Over the past 14 Terms, the most frequently petitioned issues were actual malice (68 cases), opinion and hyperbole (49 cases), plaintiff status (43 cases) and privileges (35 cases).

TABLE 1: CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES: 1985–1998 TERMS

TERM	MEDIA CASES			NONMEDIA CASES			ALL CASES		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
1998	0	11	0.0	2[1]	5	28.5	2	16	11.1
1997	0	7	0.0	0	6	0.0	0	13	0.0
1996	0	14	0.0	0	14	0.0	0	28	0.0
1995	0	10	0.0	0	12	0.0	0	22	0.0
1994	0	7	0.0	0	14	0.0	0	21	0.0
1993	0	7	0.0	0	11	0.0	0	18	0.0
1992	0	11	0.0	0	6	0.0	0	17	0.0
1991	0	11	0.0	0	11	0.0	0	22	0.0
1990	3[2]	11	21.4	1[7]	5	16.7	4	16	20.0
1989	2[3]	10	16.7	0	9	0.0	2	19	9.5
1988	2[4]	22	8.3	0	13	0.0	2	35	5.4
1987	1[5]	11	8.3	0	11	0.0	1	22	4.3
1986	0	21	0.0	0	3	0.0	0	24	0.0
1985	3[6]	16	15.8	0	0	—	3	16	15.8
TOTAL	11	169	6.1	3	120	2.4	14	289	4.6

[1] *Wilson v. Layne*, 67 U.SL.W. 4322 (5/24/99); *Hanlon v. Berger*, 67 U.SL.W. 4329 (5/24/99) (vacated and remanded).

[2]*Cohen v. Cowles Media*, 111 S.Ct. 2513 (1991); *Jones v. American Broadcasting Companies, Inc.*, 59 U.S.L.W. 3275 (10/9/90, No. 89-1952)(vacated and remanded); *Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991).

[3]*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Immuno A.G. v. Moor-Jankowski*, 58 U.S.L.W. 3834 (6/28/90, No. 89-1760) (vacated and remanded).

[4]*Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

[5]*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[6]*Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986); *Schiavone Construction Co. v. Time Inc.*, 477 U.S. 21 (1986).

[7]*International Society for Krishna Consciousness v. George*, 59 U.S.L.W. 3635 (3/18/91, No. 89-1399) (vacated and remanded).

TABLE 2A: CERTIORARI PETITIONS IN LIBEL/PRIVACY CASES BY PETITIONER: 1985–1998 TERMS

PETITIONS FILED BY DEFENDANTS

TERM	MEDIA ACTION			NONMEDIA ACTION			TOTAL		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
1998	0	2	0.0	1[1]	2	33.3	1	4	20.0
1997	0	1	0.0	0	1	0.0	0	2	0.0
1996	0	3	0.0	0	3	0.0	0	6	0.0
1995	0	2	0.0	0	5	0.0	0	7	0.0
1994	0	0	—	0	3	0.0	0	3	0.0
1993	0	2	0.0	0	1	0.0	0	3	0.0
1992	0	2	0.0	0	2	0.0	0	4	0.0
1991	0	2	0.0	0	5	0.0	0	7	0.0
1990	0	2	0.0	1[2]	2	33.3	1	4	20.0
1989	0	2	0.0	0	3	0.0	0	5	0.0
1988	2[3]	8	20.0	0	4	0.0	2	12	14.3
1987	1[4]	6	14.3	0	6	0.0	1	12	7.7
1986	0	6	0.0	0	2	0.0	0	8	0.0
1985	2[5]	4	33.3	0	0	—	2	4	33.3
TOTAL	5	42	10.6	2	39	4.8	7	81	7.9

[1] *Hanlon v. Berger*, 67 U.SL.W. 4329 (5/24/99) (vacated and remanded).

[2] *International Society for Krishna Consciousness v. George*, 59 U.S.L.W. 3635 (3/18/91, No. 89-1399) (1991).

[3] *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

[4] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[5] *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

TABLE 2B: CERTIORARI PETITIONS IN LIBEL/PRIVACY CASES BY PETITIONER: *1985–1998 TERMS*

PETITIONS FILED BY PLAINTIFFS

TERM	MEDIA ACTION			NONMEDIA ACTION			TOTAL		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
1998	0	9	0.0	1[1]	3	25.0	1	12	7.6
1997	0	6	0.0	0	5	0.0	0	11	0.0
1996	0	11	0.0	0	11	0.0	0	22	0.0
1995	0	8	0.0	0	7	0.0	0	15	0.0
1994	0	7	0.0	0	11	0.0	0	18	0.0
1993	0	5	0.0	0	10	0.0	0	15	0.0
1992	0	9	0.0	0	4	0.0	0	13	0.0
1991	0	9	0.0	0	6	0.0	0	15	0.0
1990	3[2]	9	25.0	0	3	0.0	3	12	20.0
1989	2[3]	8	20.0	0	6	0.0	2	14	12.5
1988	0	14	0.0	0	9	0.0	0	23	0.0
1987	0	5	0.0	0	5	0.0	0	10	0.0
1986	0	15	0.0	0	1	0.0	0	16	0.0
1985	1[4]	12	7.7	0	0	—	1	12	7.7
TOTAL	6	127	4.5	1	80	1.2	7	208	3.2

[1] *Wilson v. Layne*, 67 U.SL.W. 4322 (5/24/99).

[2] *Cohen v. Cowles Media*, 111 S.Ct. 2513 (1991); *Jones v. American Broadcasting Companies, Inc.*, 59 U.S.L.W. 275 (10/9/90, No. 89-1952); *Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991).

[3] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Immuno A.G. v. Moor-Jankowski*, 58 U.S.L.W. 3834 (6/28/90, No. 89-1760).

[4] *Schiavone Construction Co. v. Time Inc.*, 477 U.S. 21 (1986).

TABLE 3A: CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM AND FINALITY OF JUDGMENT: 1985–1998 TERMS

FINAL JUDGMENTS

TERM	FEDERAL COURTS			STATE COURTS			ALL CASES		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
1998	1[1]	7	12.5	0	7	0.0	1	13	7.1
1997	0	5	0.0	0	7	0.0	0	12	0.0
1996	0	10	0.0	0	15	0.0	0	25	0.0
1995	0	6	0.0	0	14	0.0	0	20	0.0
1994	0	8	0.0	0	10	0.0	0	18	0.0
1993	0	6	0.0	0	12	0.0	0	18	0.0
1992	0	4	0.0	0	12	0.0	0	16	0.0
1991	0	6	0.0	0	10	0.0	0	16	0.0
1990	2[2]	4	33.3	2[3]	10	16.7	4	14	22.2
1989	0	7	0.0	2[4]	12	14.3	2	19	9.5
1988	1[5]	15	6.3	1[6]	18	5.3	2	33	5.7
1987	1[7]	9	10.0	0	11	0.0	1	20	4.8
1986	0	8	0.0	0	15	0.0	0	23	0.0
1985	1[8]	9	10.0	1[9]	4	20.0	2	13	13.3
TOTAL	6	104	5.4	6	157	3.6	12	260	4.4

[1] *Wilson v. Layne*, 67 U.S.L.W. 4322 (5/24/99)

[2] *Jones v. American Broadcasting Companies, Inc.*, 59 U.S.L.W. 275 (10/9/90, No. 89-1952); *Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991).

[3] *Cohen v. Cowles Media*, 111 S.Ct. 2513 (1991); *International Society for Krishna Consciousness v. George*, 59 U.S.L.W. 3635 (3/18/91, No. 89-1399).

[4] *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Immuno A.G. v. Moor-Jankowski*, 58 U.S.L.W. 3834 (6/28/90, No. 89-1760).

[5] *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

[6] *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

[7] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[8] *Schiavone Construction Co. v. Time Inc.*, 477 U.S. 21 (1986).

[9] *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

TABLE 3B: CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM AND FINALITY OF JUDGMENT: 1985–1998 TERMS

NONFINAL JUDGMENTS

TERM	FEDERAL COURTS			STATE COURTS			ALL COURTS		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
1998	1[1]	2	33.3	0	1	0.0	1	3	25.0
1997	0	1	0.0	0	0	0.0	0	1	0.0
1996	0	1	0.0	0	2	0.0	0	3	0.0
1995	0	0	—	0	2	0.0	0	2	0.0
1994	0	1	0.0	0	2	0.0	0	3	0.0
1993	0	0	—	0	0	—	0	0	—
1992	0	0	—	0	1	0.0	0	1	0.0
1991	0	2	0.0	0	4	0.0	0	6	0.0
1990	0	0	—	0	2	0.0	0	2	0.0
1989	0	0	—	0	0	—	0	0	—
1988	0	0	—	0	2	0.0	0	2	0.0
1987	0	0	—	0	2	0.0	0	2	0.0
1986	0	1	0.0	0	0	—	0	1	0.0
1985	1[2]	0	100.0	0	3	0.0	1	3	25.0
TOTAL	2	8	20.0	0	21	0.0	2	29	6.4

[1]*Hanlon v. Berger*, 67 U.SL.W. 4329 (5/24/99).

[2]Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

TABLE 3C: CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM: 1985–1998 TERMS

ALL JUDGMENTS

TERM	FEDERAL COURTS			STATE COURTS			ALL CASES		
	Grants	Denials	% Granted	Grants	Denials	% Granted	Grants	Denials	% Granted
1998	2	9	22.0	0	7	0.0	2	16	11.1
1997	0	6	0.0	0	7	0.0	0	13	0.0
1996	0	11	0.0	0	17	0.0	0	28	0.0
1995	0	6	0.0	0	16	0.0	0	22	0.0
1994	0	9	0.0	0	12	0.0	0	21	0.0
1993	0	6	0.0	0	12	0.0	0	18	0.0
1992	0	4	0.0	0	13	0.0	0	17	0.0
1991	0	8	0.0	0	14	0.0	0	22	0.0
1990	2	4	33.3	2	12	14.3	4	16	20.0
1989	0	7	0.0	2	12	14.3	2	19	9.5
1988	1	15	6.3	1	20	4.8	2	35	5.4
1987	1	9	10.0	0	13	0.0	1	22	4.3
1986	0	9	0.0	0	15	0.0	0	24	0.0
1985	2	9	18.2	1	7	12.5	3	16	15.8
TOTAL	8	112	6.6	6	177	3.2	14	289	4.6

TABLE 4: CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES BY ISSUE: 1985-1998 TERMS

ISSUE	GRANTS	DENIALS	% GRANTED
Actual malice	4[1]	63	5.9
Attorneys' fees	0	3	0.0
Breach of contract	1[2]	0	100.0
Collateral Estoppel	0	1	0.0
Commercial appropriation	0	1	0.0
Commercial speech	0	3	0.0
Communications Decency Act	0	1	0.0
Damages	1[3]	19	5.0
Defamatory meaning	0	4	0.0
Discovery	0	3	0.0
Due process/equal protection	0	8	0.0
Employment	0	6	0.0
Emotional distress/outrage	1[4]	2	33.3
Falsity (Burden of Proof)	1[5]	12	7.7
Fraud	0	1	0.0
Government immunity	0	5	0.0
Gross irresponsibility	0	4	0.0
Hyperbole	0	6	0.0
Independent appellate review	1[6]	13	7.1
Implication/innuendo	0	4	0.0
Intentional interference	0	1	0.0
Incremental harm	1[7]	0	100.0
Jurisdiction	0	7	0.0
Jury instructions	0	4	0.0
Labor/preemption	0	7	0.0
Of and concerning	0	4	0.0
Opinion	3[8]	41	7.1

TABLE 4: CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES BY ISSUE: 1985-1998 TERMS

ISSUE	GRANTS	DENIALS	% GRANTED
Plaintiff status	0	43	0.0
Privacy	3[9]	27	10.0
Privilege (common law and statutory)	0	36	0.0
Procedure	1[10]	4	33.3
Public interest	0	11	0.0
Publication/republication	0	3	0.0
RICO	0	1	0.0
Section 1983	0	5	0.0
Shield law	0	2	0.0
Slander of title	0	1	0.0
SLAPP statutes	0	1	0.0
Substantial truth (gist or sting)	1[11]	8	11.1
Summary judgment	1[12]	8	11.1
Wiretap	0	1	0.0
TOTAL	19[13]	372[13]	4.8

[1]*Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991).

[2]*Cohen v. Cowles Media*, 111 S.Ct. 2513 (1991)

[3]*International Society for Krishna Consciousness v. George*, 59 U.S.L.W. 3635 (3/18/91, No. 89-1399), but note that the sole purpose for the "grant" was for remand in reconsideration of damages in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

[4]*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[5]*Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

[6]*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

[7]*Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991).

[8]*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Immuno A.G. v. Moor-Jankowski*, 58 U.S.L.W. 3834 (6/28/90, No. 89-1760); *Jones v. American Broadcasting Companies, Inc.*, 59 U.S.L.W. 275 (10/9/90, No. 89-1952); but note that two of these "grants" were for the sole purpose of remand for reconsideration in light of *Milkovich*.

[9]*Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Wilson v. Layne*, 67 U.SL.W. 4322 (5/24/99); *Hanlon v. Berger*, 67 U.SL.W. 4329 (5/24/99) (vacated and remanded).

[10]*Schiavone Construction Co. v. Time Inc.*, 477 U.S. 21 (1986).

[11]*Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991).

[12]*Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

[13]Because many petitions presented more than one issue, grants and denials of issues is higher than total petitions filed.

TABLE OF CASES

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A. Libel and Privacy Cases — 18

1. U.S. Supreme Court Judgments — 2

Wilson v. Layne, 141 F.3d 111, 26 Media L. Rep. 1545 (4th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3321 (U.S. Nov. 9, 1998) (No. 98-83), *judg. aff'd.*, 67 U.S.L.W. 4322, 1999 WL 320817 (U.S. May 24, 1999); *see LDRC LibelLetter*, Nov. 1998 at 25, June 1999 at 1. Without deciding whether a media ride-along violated the Fourth Amendment, the Fourth Circuit held that law enforcement officers who allowed media members to accompany them into a home during the execution of a warrant were qualifiedly immune since at the relevant time it was not clearly established that such actions were impermissible. A *Washington Post* reporter and photographer accompanied Maryland law enforcement agents as they executed an arrest warrant for fugitive felon Dominic Wilson. Wilson's parents, who brought suit, were photographed in their nightclothes during the search for their son. He was not at the house, no arrest was made, and the *Post* never published its photographs.

Question Presented: Do law enforcement officers executing a warrant violate clearly established Fourth Amendment principles when they bring members of the press into a private home without the occupants' consent?

Supreme Court Holding: In a unanimous opinion by Chief Justice Rehnquist, the Court held that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aide of the execution of the warrant." The Court expounded on the Fourth Amendment principle of respect for the privacy of the home, holding that third parties may accompany officers when they execute a warrant only when those third parties "directly aid" the police in achieving their purpose. Although the Court acknowledged that the media's first-hand observation of governmental conduct serves an important purpose, it is not of sufficient importance to justify the media's presence inside the home.

By a vote of 8-1, the Court affirmed the Fourth Circuit's decision that the officers were entitled to qualified immunity because the law on this point was not clear at the time they invited the *Washington Post* to accompany them into the Wilsons' home. Justice Stevens dissented, arguing that even in the absence of specific rulings in the ride-along context, general Fourth Amendment principles should have made it clear to any law enforcement officer that providing such access to the media would violate a homeowner's Fourth Amendment rights.

Hanlon v. Berger, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), *cert granted*, 67 U.S.L.W. 3321 (U.S. Nov. 9, 1998) (No. 97-1927), *judg. vacated and remanded*, 67 U.S.L.W. 4329, 1999 WL 320818 (U.S. May 24, 1999); *see LDRC LibelLetter*, Mar. 1996 at 11, Nov. 1997 at 21, Mar. 1998 at 23, Nov. 1998 at 25, June 1999 at 1. The Ninth Circuit held that law enforcement officers are not entitled to qualified immunity in a lawsuit alleging they violated the Fourth Amendment by permitting a CNN media crew to film and record the execution of a search warrant on the plaintiff's property. The plaintiffs sued CNN and Fish & Wildlife agents who searched their Montana ranch and appurtenant structures for evidence of poisoned wildlife. CNN personnel did not enter the plaintiffs' house, although an agent who entered the house with the Bergers' consent was

wearing a CNN microphone. CNN later broadcast a portion of the filmed search. Berger was ultimately convicted of misdemeanor charges as a result of the search.

Questions Presented: (1) Did the Ninth Circuit properly rule that law enforcement officers violated clearly established law, and thus were not entitled to qualified immunity, when at the time they acted there was no decision by the U.S. Supreme Court or any other court so holding, and only lower court decisions addressing the issue had found the same conduct did not violate the law? (2) Do law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they allow members of the news media to accompany them in order to observe and report on their conduct in properly executing a valid warrant?

Supreme Court Holding: The Court issued a short per curiam opinion vacating the judgment and remanding it for further proceedings consistent with the Court's holding in *Wilson v. Layne*. The Court ruled unanimously that the facts in the Bergers' complaint were sufficient to "allege a Fourth Amendment violation" under the decision in *Wilson*, although the Court did not explain whether the allegations concerning CNN's presence on the Bergers' land, as distinct from the entry of the official wearing a hidden microphone in their house, would be enough to constitute a violation. Eight of the justices held that the law enforcement agents were entitled to qualified immunity because the law on ride-alongs was unclear at the time of the search. As in *Wilson*, Justice Stevens dissented on this issue.

2. Media Defendants — 11

a. Favorable Libel/Privacy Decisions Left Standing — 7

Berger v. CNN, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3299 (U.S. Nov. 2, 1998) (No. 98-38); *see LDRC LibelLetter*, Nov. 1997 at 21. In the same Ninth Circuit decision holding law enforcement and the media potentially liable for violating the Fourth Amendment, the court dismissed plaintiffs' wiretap claims against CNN. The court found that, where there was a written contract between law enforcement officials and the news media defendants whereby the media was permitted to record a search of the plaintiffs' ranch for subsequent commercial broadcast, the provision of the Federal Wiretap Act which permits a person acting "under color of law" to intercept wire, oral, or electronic communication when such person is a party to the communication or when another party thereto has given consent prior to interception, insulated defendants from liability.

Questions presented: (1) Does the media violate the 1986 Electronic Communications Privacy Act (Wiretap Act) by surreptitiously recording conversations via a hidden microphone worn by a law enforcement agent who enters a private residence which is beyond the scope of the search warrant's authority? (2) Is the media entitled to perpetually republish or sell video and audio recordings, or is an injunction appropriate when there is a final judicial determination that the media unlawfully obtained the video and audio recordings in violation of the Constitution or laws of the United States or of an individual state?

Dodds v. American Broadcasting Co., 145 F.3d 1053, 26 Media L. Rep. 1705 (9th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3457 (U.S. Jan. 19,1998) (No. 98-601); *see LDRC LibelLetter*, June 1998 at 9. The Ninth Circuit affirmed summary judgment to defendant ABC in a libel suit by a California state court judge depicted in a *PrimeTime Live* segment on judicial disciplinary processes. The court found that the judge, Bruce Dodds, failed to establish that ABC acted with actual malice in reporting that Dodds often used a crystal ball to support his decisions, because the defendants had relied on several sources regarding the use of the crystal ball and confirmed its presence in the judge's chambers. The court also held that Dodds did not prove with convincing clarity that ABC intended to convey the allegedly defamatory implication that he actually used the crystal ball to make his decisions.

Question Presented: Must a sitting judge defamed by implication in a television news journal broadcast demonstrate the defendant's intent to convey a defamatory implication under the Ninth's Circuits' subjective standard, when a defamatory implication is inescapable and the result of conscious choices made by the defendant in combining audio and visual elements of the program?

Doe v. Berkeley Publishers, 496 S.E.2d 636 (S.C. 1998), *cert. denied*, 67 U.S.L.W. 3300 (U.S. Nov. 2, 1998) (No. 98-325). The South Carolina Supreme Court ruled that a newspaper's printing of the name of a prison rape victim was not an invasion of privacy, since the commission of violent crimes within jails is a matter of public significance, and under South Carolina law, whenever a person becomes an actor in an event of public or general interest, publication of his or her connection with the event is not an invasion of privacy.

Questions presented: (1) Does the First Amendment permit a newspaper to publish the name of a rape victim when that person's identity is obtained through an unofficial disclosure--an insider-employee at the jail? (2) May the state of South Carolina, in reliance on *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), prohibit publication of a rape victim's name when that name has not been publicly released?

Gibson v. Rivera, unpublished (Cal. Ct. App. Mar. 2, 1998), *cert. denied*, 67 U.S.L.W. 3361 (U.S. Nov. 30, 1998) (No. 98-313). The California Court of Appeals dismissed a lawsuit by a talk show guest who alleged he was fraudulently induced to appear on a show where he was defamed by accusations of sexual harassment. Although the court ruled that plaintiff was a private figure, it held that allegedly defamatory speech involving a matter of public concern (sexual harassment) requires a private figure plaintiff to prove either (1) actual malice or (2) that defendants had obvious reasons to doubt the veracity of the accusations made against them, but engaged in a purposeful avoidance of truth. The Court also held that constitutional limitations on the defamation cause of action barred the actor's claims for fraud, conspiracy, negligent misrepresentation, and promise without intent to perform, all of which were based on the same allegedly defamatory statements.

Questions presented: (1) Does the decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), prevent assertion of a common law fraud claim if plaintiff is unable to show constitutional malice when a person is fraudulently induced to appear on a live television talk show? (2) Does *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986), or any other case, require that the private figure plaintiff demonstrate constitutional actual malice to recover proven compensatory damages caused by defamation?

Jaisinghani v. Capital Cities/ABC Inc., *cert. denied*, 67 U.S.L.W. 3525 (U.S. Feb. 22, 1999) (98-1019); *see LDRC LibelLetter*, May 1997 at 8. The Eleventh Circuit affirmed without opinion a Florida district court's dismissal of the plaintiff's defamation suit against Capital Cities/ABC over an article published in *The Kansas City Star* on statute of limitations grounds. The court held that the complaint is subject to California's one-year limit rather than Florida's two-year limit because Florida law borrows the statute of limitations of the state in which a claim arises. The court also rejected plaintiff's claim that Missouri's two-year statute of limitations should apply because, while Missouri was the location of publication, that fact standing alone was not sufficient to render Missouri the state with the most significant relationship to the claim. The court ultimately regarded the plaintiff's libel claim as arising in California. In making this determination, the court focused on the plaintiff's domicile in California, where he had lived most of the time and was indicted and tried, rather than Florida, where he lived temporarily at the time of publication, or Missouri, the location of defendant publisher.

Questions Presented: (1) When a publisher writes and publishes an article about a businessman with connections in different states, and the article is circulated nationally and on the Internet, does the law where the publisher is located normally govern the defamation action by the businessman against the publisher? (2) Does a person change their domicile immediately upon change in their physical residence coupled with intent to remain there indefinitely at the time of arrival?

McLemore v. WFAA-TV, 978 S.W.2d 568, 26 Media L. Rep. 2385 (Tex. 1998), *cert. denied*, 67 U.S.L.W. 3613 (U.S. Apr. 5, 1999) (No. 98-1286); *see LDRC LibelLetter*, Dec. 1994 at 11, Apr. 1999 at 6. The Texas Supreme Court granted summary judgment to WFAA in a defamation suit brought by a local television reporter who reported on the raid of the Branch Davidian compound in Waco, Texas. Plaintiff claimed he was libeled when WFAA connected him in a newscast with allegations by federal agents that unnamed "local reporters" were responsible for compromising raid security. The court held that the plaintiff became a public figure by virtue of reporting live from the raid and giving numerous interviews about his role in the raid. The court then found that the record negated actual malice as a matter of law.

Questions Presented: (1) In a defamation case, what does it mean for one to "voluntarily inject himself" into public controversy? (2) In a defamation case, what must occur for one to become an involuntary public figure?

Metropolitan Transportation Authority v. New York Magazine, 136 F.3d 123, 26 Media L. Rep. 1301 (2d Cir. 1998), *cert. denied*, 67 U.S.L.W. 3230 (U.S. Oct. 5, 1998) (No. 97-2020); *see LDRC LibelLetter*, Mar. 1998 at 8, Nov. 1998 at 26. The Second Circuit affirmed a preliminary injunction against New York's Metropolitan Transit Authority ("MTA") barring it from canceling an ad appearing on the side of NYC buses for *New York Magazine*. The ad satirized Mayor Rudolph Giuliani by promoting *New York Magazine* as "Possibly the only good thing in New York Rudy hasn't taken credit for." The Mayor's office asked that the ad be pulled as a violation of New York Civil Rights Law §§ 50-51 prohibiting the use of a person's name or likeness for commercial purposes without consent. The court held that advertising space on the outside of city buses was a designated public forum. Therefore a prior restraint on the ad bears a presumption of unconstitutionality even if the ad is deemed to be commercial speech.

Questions Presented: (1) Whether, contrary to *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), advertising space on public transit facilities is an unlimited public forum that must display any advertisement unless the transit authority is able to demonstrate that rejection of the advertisement is an action that is narrowly tailored to serve a compelling state interest? (2) Whether, contrary to *Central Hudson v. Public Service Comm'n*, 447 U.S. 57 (1980), a transit authority's refusal to display a commercial ad on its vehicles is a prior restraint, so that the agency must receive prior judicial approval of the decision not to display the ad?

Polsby v. Spruill, 25 Media L. Rep. 2259 (D.C. Cir. 1997), *cert. denied*, 67 U.S.L.W. 3361 (U.S. Nov. 30, 1998) (No. 98-524); *see LDRC LibelLetter*, Oct. 1997 at 1. The D.C. Circuit Court of Appeals summarily affirmed summary judgment to the author of a novel against whom plaintiff physician had brought a variety of interrelated tort claims (libel, false light, publicity, misappropriation, and emotional distress), all based on her unsupported claim that the novel was based on her life.

Among the questions presented: (1) Do current procedures in the D.C. Circuit, which permit motions for summary affirmance to be granted without giving the appellant the opportunity to raise issues on appeal and to file an appeal brief, deny appellants due process and equal protection under the law, violating the intent of the statute which created the federal circuit courts of appeal? (2) Does an individual become a public figure by agreeing to testify at a congressional hearing, and does reading what an author has written in public thereby place that writing in the public domain?

Schuler v. McGraw-Hill, unpublished, (10th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3362 (U.S. Nov. 30, 1998) (No. 98-705); *see LDRC LibelLetter*, July 1997 at 16, May 1998 at 14. The Tenth Circuit affirmed the district court's dismissal of an action for defamation and a variety of other torts relating to the publication of an article about a small company and its former chairman and CEO. The court concluded (a) that the article at issue did not include any false statements of fact on which to base the defamation and false light claims, (b) that the claim for publication of private facts was without merit because there had been previous journalistic discussion of the plaintiff's sex and name change on which the claim was based, and (c) that the plaintiff's claim for intentional infliction of emotional distress was not valid, since the article did not contain defamatory falsehoods or indications of outrageous conduct.

Questions presented: (1) Is an American citizen's right to protect her reputation entitled to equal protection of law as against media attacks? (2) Can a trial court deny a citizen's right to and demand for a jury trial, and determine matters of fact, innuendo, insinuation, and malice that are clearly within the purview of a jury to decide?

b. Unfavorable Media Libel/Privacy Decisions Left Standing — 2

Cable News Network Inc. v. Berger, *(Berger v. Hanlon)*, 129 F.3d 505, 25 Media L. Rep. 2505 (9th Cir. 1997), *cert. denied*, 67 U.S.L.W. 3732 (U.S. June 1, 1999) (No. 97-1914); *see LDRC LibelLetter*, Mar. 1996 at 11, Nov. 1997 at 21, Mar. 1998 at 23, Nov. 1998 at 25. The Ninth Circuit held that members of the media involved in the planning, observation, and filming of the execution of a search warrant could be liable for Fourth Amendment violations as joint government actors due

to the government's active involvement with the media's news gathering activities, and the mutual benefits derived from the media's interest in television footage and the government's interest in publicity. CNN accompanied federal Fish & Wildlife agents who searched the plaintiffs' Montana ranch looking for evidence of poisoned wildlife. CNN personnel did not enter the plaintiffs' house, although an agent who entered the house with the Bergers' consent was wearing a CNN microphone. CNN later broadcast a portion of the filmed search. Berger was ultimately convicted of misdemeanor charges as a result of the search. *See also* discussion of *Hanlon v. Berger supra* at 49.

Questions Presented: (1) Do members of the news media engage in "joint action" with the government, sufficient to subject them to liability for constitutional violations as if they were government actors, when for independent newsgathering purposes they arrange to observe and are present when government law enforcement agents execute a search warrant? (2) Do law enforcement agents violate the Fourth Amendment when they permit the news media to observe, for independent newsgathering purposes, the execution of an otherwise proper search warrant?

Globe International Inc. v. Khawar, 965 P.2d 696, 26 Media L. Rep. 2505 (1998), *cert denied*, 67 U.S.L.W. 3705 (U.S. May 17, 1999) (No.98-1491); *see LDRC LibelLetter*, Mar. 1995 at 11, June 1996 at 1, Oct. 1996 at 19, June 1997 at 20, Nov. 1998 at 1, May 1999 at 10. The California Supreme Court affirmed a jury verdict for the plaintiff in a defamation suit against the *Globe* for publishing an article that recounted allegations made in a book that the plaintiff was the real killer of Robert Kennedy. That the plaintiff was photographed near Kennedy moments before the assassination was insufficient to render him a voluntary or involuntary public figure; he was never a suspect in the government's investigation, did not publish his views on the assassination, and never sought to influence public discussion about the assassination. With regard to recounting the allegations from another book, the court held that California does not recognize the neutral reportage privilege in private figure cases. The court also held that the jury finding of actual malice to support an award of punitive damages was supported by clear and convincing evidence, specifically the presence of obvious reasons to doubt the book's accuracy and failure to use readily available means to verify the accuracy of the book's claim.

Questions Presented: (1) When a media defendant makes an accurate report of allegations in a book by a best-selling author about a matter of utmost public concern, may a finding of actual malice be based on the court's own view that the book's allegations were "highly improbable" and therefore should have been investigated by the media defendant before reporting the book's allegations? (2) When an individual is drawn into a public controversy, should that individual be deemed a public figure for the limited purpose of media reports about that controversy, regardless of whether the individual voluntarily invited comment and criticism by injecting himself into the controversy?

c. Petition Filed But Not Acted Upon — 1

Central Newspapers, Inc. v. Johnson, 722 So.2d 1224 (La. Ct. App. 1998), *petition for cert. filed*, 68 U.S.L.W. 3021 (U.S. June 30, 1999) (No. 99-42); *see LDRC LibelLetter*, Jan. 1999 at 19, Apr. 1999 at 45, July 1999 at 39. A Louisiana appellate court ruled that two newspapers may be held liable under state wiretapping law for publishing the contents of a taped telephone call between public

officials. The law provides in part that "no person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation" of the act. The newspapers published the contents of the recording after it was played at a public news conference by a political opponent who claimed she received the tapes anonymously.

Question presented: Does the First Amendment protects newspapers from liability under state "wiretapping" laws when they accurately report information of public concern that a source--not a newspaper--acquires by unlawful interception?

2. Non-Media Defendants — 5

a. Favorable Libel/Privacy Decisions Left Standing — 3

Gold v. Harrison, 962 P.2d 353, 26 Media L. Rep. 2313 (Hawaii 1998), *cert. denied*, 67 U.S.L.W. 3586 (Mar. 22, 1999) (No. 98-1182); *see LDRC LibelLetter*, Mar. 1996 at 5, Dec. 1996 at 9, July 1998 at 9. The Hawaii Supreme Court, affirming a grant of summary judgment for former Beatle George Harrison, held that his alleged defamatory statement was rhetorical hyperbole. Plaintiffs, who had obtained an easement across his property, alleged that Harrison defamed them in a statement to media that "I'm being raped by all these people.... My privacy is being violated." The court also held that since the plaintiffs' attorney made no attempt to distinguish this case from decisions establishing constitutional protection for rhetorical hyperbole, the trial court did not abuse its discretion in finding that the claim was frivolous and imposing sanctions against the attorney.

Among the Questions Presented: (1) Does the First Amendment automatically protect speech from a defamation suit merely because the speech is claimed to be classified or categorized as "rhetorical hyperbole" without regard to the meaning of the speech, or alternatively, is there constitutional privilege under the First Amendment to use "rhetorical hyperbole" regardless of whether the meaning is defamatory? (2) Does imposition of sanctions on an attorney have a chilling effect on the exercise of the First Amendment rights of the attorney acting on behalf of his clients?

Hoult v. Hoult, 157 F.3d 29 (1st Cir. 1998), *cert. denied*, 67 U.S.L.W. 3772 (June 21, 1999) (No. 98-1699); *see LDRC LibelLetter*, Nov. 1998 at 10. The First Circuit affirmed the dismissal of a defamation action on collateral estoppel grounds. In what is obviously an unusual case, a father alleged he was defamed by his daughter's letters to professional organizations alleging that he had raped her as a girl. His suit was collaterally estopped because his daughter has previously obtained a general verdict against her father in a civil suit for assault and battery, intentional infliction of emotional distress and breach of fiduciary duty based on her recovered memories of abuse. Although the general verdict did not specifically determine that she was raped, for collateral estoppel purposes it was a necessary component of the decision.

Among the Questions Presented: Should a judgment of dismissal of complaint in this action under doctrine of collateral estoppel (issue preclusion) be reversed or vacated because only relevant evidence in earlier action was uncorroborated testimony concerning memories of sexual abuse and their recovery, previously long "repressed," now "recovered" in psychotherapy, when trial judges made no determination of record in either earlier or later action that such testimony, either of

purported victim or her scientific expert, or both, related to "scientific knowledge" as that term is discussed in *Daubert*?

Operation Rescue National v. United States, 147 F.3d 68 (1st Cir. 1998), *cert. denied*, 67 U.S.L.W. 3275 (Jan. 19, 1999) (No. 98-525). The First Circuit affirmed summary judgment in favor of the U.S. as substitute party in a defamation suit originally brought against Senator Edward Kennedy. Federal tort claim immunity under the Federal Tort Claims Act and the Westfall Act extended to defamation claim against legislator who was acting in his capacity as officer or employee of the United States.

Questions Presented: (1) Did Section 3 of Westfall Act, which amended definition of "Federal agency" in 28 U.S.C. § 2671 by adding to its categories "the judicial and legislative branches," expand federal tort claim immunity to include members of Congress? (2) Under Federal Tort Claims Act ("FTCA"), as amended by Westfall Act, is member of Congress immune from common law defamation lawsuit when attorney general certifies, without express statutory authorization respecting members of Congress, that member was acting as officer and employee of United States? (3) If Westfall Act did expand scope of FTCA immunity to cover members of Congress for tort of defamation, does Congress possess constitutional authority to grant its members immunity beyond that conferred on them by speech or debate clause?

b. Unfavorable Libel/Privacy Decisions Left Standing — 2

Davis v. Shavers, 495 S.E.2d 23 (Ga. 1998), *cert. denied*, 67 U.S.L.W. 3234 (U.S. Oct. 5, 1998) (No. 98-108) The Georgia Supreme court held that statements made in a recall petition are not absolutely privileged for purposes of a libel action by the targeted official. According to the court, the state recall provision "provides for only limited judicial review of the legal sufficiency of the recall application, and prohibits discovery or evidentiary hearings and any determinations of the truth of the statements in the application." As a result, the procedure is "political" in nature, not "judicial" or even "official." Leaving "public officials with no remedy for allegedly libelous statements made with actual malice in the context of a procedure having only the slightest hint of a judicial nature" is contrary to public policy, the court added.

Question presented: Are statements that were made in petition for recall application, pursuant to Georgia Recall Act, and that are relied upon by elected public official as sole basis for libel action, afforded absolute privilege by First Amendment?

Ziemke v. Almog, 689 A.2d 158 (N.J. Super. Ct. App. Div. 1998), *cert. denied*, 67 U.S.L.W. 3230 (U.S. Oct. 5, 1998) (No. 97-1910). The New Jersey appellate court upheld a jury award of $5.5 million in compensatory and punitive damages for injury to reputation, financial loss, and emotional distress. The award was commensurate with evidence of defendants' wealth and represented an acceptable ratio between compensatory and punitive damages, especially because of the defendants' outrageous conduct, which included repeated publication in Israel and the United States of accusations of theft and an extramarital affair. The court also found that the defendants had waived their right to complain about punitive damages because they had not taken advantage of the trial judge's invitation to demonstrate excessiveness.

Among the Questions presented: (1) Under the First Amendment, can the New Jersey court impose millions of dollars in punitive damages, resulting in the loss of home, business, savings, and other assets, because of defamatory speech? (2) If New Jersey has a legitimate government interest in deterring defamatory speech, is that deterrence interest so strong that it outweighs the interest of a foreign country in determining how its citizens should be compensated?

B. Certiorari Petitions in Other Areas of Interest — 33

1. Access — 4

a. Review Denied — 4

Albuquerque Journal v. Gonzales, 150 F.3d 1246 (10th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3469 (Jan. 25, 1999) (No. 98-831). The Tenth Circuit held that the news media has no First Amendment, common law, or statutory right of access to vouchers submitted to the district court by appointed defense counsel under the Criminal Justice Act, 18 U.S.C. § 3006A ("CJA"). Nor do they have the right of access to documents provided as support vouchers or to related sealed motions, orders, or transcripts. According to the court, the trial court abused its discretion under the CJA by ordering unconditional release of the sealed backup documents at the end of defendants' sentencing hearings.

Questions presented: (1) Despite decisions to the contrary by the Second, Ninth, and Eleventh Circuits, are hearing transcripts, motions, orders and other materials filed with a district court under CJA merely "administrative," non-judicial documents to which the public enjoys no qualified First Amendment right of access? (2) Does CJA's statutory scheme — under which CJA materials, in words of regulation promulgated by the Administrative Office of U.S. Courts, "[g]enerally ... should be made available" to the public, at least by the time "all judicial proceedings in the case are completed" — nevertheless require continued confidentiality of those materials such that the district court in the present case had no discretion to unseal them, even after the termination of prosecution?

El Vocero de Puerto Rico v. Puerto Rico (P.R. Sept. 26, 1997), *cert. denied*, 67 U.S.L.W. 3229 (U.S. Oct. 5, 1998) (No. 97-1876); *see LDRC LibelLetter*, Apr. 1998 at 13. The Supreme Court of Puerto Rico held that under Puerto Rico's Victims and Witnesses Protection Act, 25 L.P.R.A. 972-973c, and P.R.R.Crim.P. 131, a trial court did not err in closing the courtroom during the testimony of a 14-year-old complainant in a statutory rape case, except to a reporter who was present at an earlier preliminary hearing.

Among the Questions presented: (1) Did the court below err by letting stand the closure of a jury trial to the press and public during the testimony of a minor sex crime victim when the closure order was issued (a) without giving petitioner opportunity to be heard; (b) without requiring

the Commonwealth to present evidence to justify the closure; (c) without setting forth specific facts justifying the closure, or considering burdensome alternatives; and (d) without actually giving due consideration to the fact that the press and public had been allowed, without objection, to remain in the court during the victim's testimony at the preliminary hearing stage? (2) Can the trial judge summarily close a jury trial to the press and public, allowing only the continued presence of those members of press who had attended the preliminary hearing of the same criminal prosecution?

Dow Jones v. Clinton, 26 Media L. Rep. 1660 (D.C. Cir. 1997), *cert. denied*, 67 U.S.L.W. 3230 (U.S. Oct. 5, 1998) (No. 97-1959); *see LDRC LibelLetter*, July 1998 at 34. In a suit brought by a coalition of media entities to obtain access to hearings involving the invocation of executive and attorney-client privilege in connection with the Independent Counsel's investigation of President Clinton, the Court of Appeals for the District of Columbia ruled that the news media has no First Amendment right of access to hearings that are ancillary to grand jury proceedings, nor to the documents involved in such hearings.

Question presented: Did the Court of Appeals err in holding that the First Amendment provides no right of public access to judicial hearings that are ancillary to grand jury proceedings and involve matters of substantial public importance and interest, such as the legal validity of president's assertions of executive and attorney-client privilege?

Snyder v. Ringgold, unpublished (4th Cir.1998), *cert. denied*, 67 U.S.L.W. 3229 (U.S. Oct. 5, 1998) (No. 97-1865); *see LDRC LibelLetter*, Apr. 1998 at 10, Oct. 1998 at 36. The Fourth Circuit held that a city police department's press officer was qualifiedly immune from a reporter's § 1983 lawsuit based on her allegation that the officer singled her out for restricted access to information because he objected to the substance of her reporting. The court held that police official did not violate any clearly established right of access.

Questions presented: (1) May a government official constitutionally deny a news reporter access to information he makes available to other members of the media because he does not approve of the substance of her reporting? (2) Is the Fourth Circuit required to follow this court's holding in determining qualified immunity, or can it re-establish standards used prior to this court's decision in *United States v. Lanier*, 520 U.S. 259, 65 U.S.L.W. 4232 (1997)?

2. Commercial Speech — 4

a. Judgment Reversed — 1

Greater New Orleans Broadcasting Association v. United States, 149 F.3d 334 (5th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3456 (U.S. Jan. 15, 1999) (No. 98-387), *judg. rev'd*, 67 U.S.L.W. 4451; *see LDRC LibelLetter*, Jan. 1999 at 28, June 1999 at 21. The Fifth Circuit affirmed the district court's finding that a federal statute banning radio and television advertising of gambling, 18 U.S.C. § 1304, is narrowly tailored to fit the government objectives of discouraging participation in commercial gambling and assisting those states that choose to restrict gambling, so that it does not unduly burden speech, and thus does not violate the First Amendment.

Question presented: May the federal government, consistent with the First Amendment, undertake to suppress lawful casino gambling by banning truthful, non-misleading broadcast advertising for such gaming?

Supreme Court Holding: In a unanimous decision, the Court held that the statute did not directly further a government interest and was overbroad thereby failing the third and fourth prongs of *Central Hudson Gas & Elec. Corp. v. Public Service Commissioner*, 447 U.S. 557 (1980). *Central Hudson*'s four-part test asks (1) whether the speech at issue concerns lawful activity and is not misleading and (2) whether the asserted governmental interest is substantial; and, if so, (3) whether the regulation directly advances the governmental interest asserted and (4) whether it is not more extensive than is necessary to serve that interest.

The parties agreed that the speech at issue concerned lawful activity and was not misleading and that the asserted government interest was substantial. With regard to the third prong, however, the Court rejected the link between advertising and increased overall demand as alleged by the government, reasoning that much of the advertising simply affects market share. The Court also questioned the causal link between broadcast advertising of casinos and compulsive gambling. Most significantly, the Court considered the challenged restriction within the context of the government's entire statutory scheme, finding the overall regulatory regime to be "so pierced by exemptions and inconsistencies" such as exempting Indian casinos "that the Government cannot hope to exonerate it."

With regard to the fourth prong, the Court made clear that the government's failure to regulate conduct as a means of achieving its asserted interests undermined its position. The Court offered a list of non-speech regulations that "could more directly and effectively alleviate" the problems the advertising ban allegedly sought to eliminate. These included a prohibition or supervision of gambling on credit and a limitation on the use of cash machines on casino premises. The Court emphasized the fundamental nature of the right to free speech, explaining that, while the government may have had valid reasons for imposing commercial regulations on Indian and non-Indian businesses, it does not follow that there is justification for "abridging non-Indians freedom of speech more severely than the freedom of their tribal competitors."

The Court explained further that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct", implicitly overruling *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328 (1986). The Court also relied on the principle espoused in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), that the lines drawn between permitted and prohibited speech must bear a meaningful relationship to the particular interest asserted. It further cautioned that differential treatment of speakers conveying virtually identical messages is "in serious tension with the principles undergirding the First Amendment."

The decision, written by Justice Stevens for 8 members of the Court, expresses unified support for substantial protection of commercial speech under a strong *Central Hudson* test. Justice Thomas, concurring, would have provided even stronger protection for commercial speech.

a. Review Granted — 1

Los Angeles Police Department v. United Reporting Publishing Corp., 146 F.3d 1133 (9th Cir. 1998), *review granted*, 67 U.S.L.W. 3468 (U.S. Jan. 25, 1999) (No. 98-678); *see LDRC LibelLetter*, July 1999 at 37, Feb. 1999 at 17. The Ninth Circuit applying the *Central Hudson* test, *see supra*, ruled that a California statute that prohibited the release of public information about arrestees for commercial purposes infringed the First Amendment. California Government Code §6254(f) allowed the release of arrestee information for "scholarly, journalistic, political, or governmental purpose," but expressly prohibited the release of the same information for commercial purposes. United Reporting publishes arrestee information to clients such as attorneys, insurers, drug and alcohol counselors and driving schools. Although the Ninth Circuit held that United Reporting's provision of information to clients was a "pure economic transaction," it held that the statute violated the third prong of *Central Hudson* because it did not directly and materially advance the government's purported interest in protecting arrestees' privacy when the statute permitted information to be released to the press.

Question presented: Does the government violate the First Amendment when it releases arrestees' and crime victims' records but forbids their commercial use?

b. Review Denied — 2

United States v. Players International, 988 F.Supp. 497 (D.N.J. 1998), *cert. denied*, 67 U.S.L.W. 3436 (U.S. Jan. 11, 1999) (No. 98-721). The Court held that an exception-ridden regulatory scheme banning broadcast advertising for "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance," 18 U.S.C. § 1304, 47 C.F.R. § 73.121, violates the First Amendment as applied to truthful, non-misleading broadcast ads for non-Indian casino gambling.

Question presented: Does 18 U.S.C. § 1304 violate the First Amendment as applied to broadcast advertisements for legal casino gambling?

Cal-Almond Inc. v. Department of Agriculture (9th Cir. 1997), *cert. denied*, 67 U.S.L.W. 3230 (U.S. Oct. 5, 1998) (No. 97-1935). The Ninth Circuit, on remand from the U.S. Supreme Court for reconsideration in light of *Glickman v. Wileman Brothers & Elliot Inc.*, 65 U.S.L.W. 4597, 117 S. Ct. 2130 (1997) (holding that compelled payments for generic agricultural advertising does not violate First Amendment), remanded to the district court with instruction to dismiss a claim brought by almond growers over a program compelling contributions to an almond marketing fund.

Question presented: (1) Does the federal agricultural marketing order that confers or withholds against a monetary assessment on the basis of the content of the handler's own brand advertising violate the First Amendment?

3. Copyright — 2

a. Review denied — 2

West Publishing Co. v. Matthew Bender & Co., 158 F.3d 693 (2d Cir. 1998), *cert. denied*, 67 U.S.L.W. 3732 (U.S. June 1, 1999) (No. 98-1500); *see LDRC LibelLetter,* June 1999 at 39. The Second Circuit affirmed a grant of summary judgment of noninfringement to legal publisher Matthew Bender, holding that its use of West's "star pagination" in a CD-ROM product to indicate page breaks within West's printed versions of court opinions does not infringe West's copyrights. The court found that Matthew Bender's products were not substantially similar and therefore did not create infringing copies of West's arrangement of cases. The court also held that the use of star pagination would not result in contributory infringement because of substantial non-infringing uses of the CD-ROM products.

Questions Presented: (1) Does the 1976 Copyright Act protect the original arrangement of factual or public domain material from a competitor who uses digital computer technology to replicate that arrangement? (2) Does the 1976 Copyright Act protect comprehensive information about a compilation's original arrangement from electronic copying that permits a copy of the entire original arrangement to be replicated and displayed? (3) Does the 1976 Copyright Act protect work from comprehensive and damaging commercial use even though the copyright owner has conceded that particular, limited use of the work is "fair"?

West Publishing Co. v. HyperLaw Inc., 158 F.3d 674 (2d Cir. 1998), *cert. denied*, 67 U.S.L.W. 3732 (U.S. June 1, 1999) (No. 98-1519); *see LDRC LibelLetter*, June 1999 at 39. The Second Circuit affirmed a bench trial decision that HyperLaw's use of West's enhancements to judicial opinions was permitted because West's case reports did not demonstrate sufficient originality and creativity in the selection and arrangement of material to be copyrightable. The court held that the district court did not clearly err in finding that the selection and arrangement of parties, court, date of decision, and attorney information, and the inclusion of subsequent procedural developments and alternative parallel citations were not protected by copyright.

Questions Presented: (1) Does the author of a compilation or derivative work fail to meet the standard for originality set forth in *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), if the author's contributions are nontrivial and reflect numerous editorial judgments in choosing, from among several possibilities, which facts to select and/or how to arrange included facts? (2) Does the Copyright Act require that the author of a textual derivative work, based on pre-existing public domain work, make changes that substantially alter the "substance and flow" of the underlying work? (3) Does the respondent, seeking declaratory judgment denying copyright protection to tens of thousands of different derivative works, meet its burden of proof if it offers into evidence only statistically insignificant, nonrepresentative sampling of those works? (4) What is the proper standard of review when an appellate court reviews a finding of copyright originality based on undisputed facts?

4. Election Law — 4

a. Judgment Affirmed — 1

Buckley v. American Constitutional Law Foundation Inc., 120 F.3d 1092 (10th Cir. 1998), *cert. granted*, 66 U.S.L.W. 3554 (U.S. Feb. 23, 1998) (No. 97-930), *judg. aff'd*, 67 U.S.L.W. 4043 The Tenth Circuit held that a Colorado statutory scheme, requiring among other things, that initiative and referendum petition circulators be registered voters, violates the First Amendment because the statute is not narrowly tailored to advance a compelling state interest. The court also struck as unnecessarily burdensome the statute's personal identification badge requirement and the requirement that monthly reports be filed disclosing the names of all paid circulators.

Question presented: May Colorado constitutionally regulate the process of circulating initiative petitions by requiring: (1) that petition circulators who are to verify the signatures of petition signers are be registered electors; (2) that petition circulators wear identification badges; and (3) proponents of the initiative file reports disclosing amounts paid to circulators and identity of petition circulators?

Supreme Court Holding: In a decision that was 9-0 on the issue of identification badges and 6-3 on the requirement that circulators be registered voters and the filing of monthly reports, the Supreme Court, in an opinion by Justice Ginsburg, held that Colorado election law requirements (1) that initiative petitions circulators be registered voters, (2) that circulators wear identification badges disclosing their names, and (3) that initiative proponents periodically report names and addresses of all paid circulators and amounts paid to each circulator are unconstitutional. The court held that these requirements burden core political speech by diminishing the pool of potential circulators and depriving them of anonymity at the moment they seek to communicate their message to voters and are not warranted by state's interests in administrative efficiency, fraud detection, and informing voters.

With regard to the registered voter rule, the Court said that the state's interest in reaching law violators was already served by the unchallenged requirement that circulators' names and addresses be listed on affidavits that are attached to petitions at the time they are submitted to the state. The Court also noted that the plaintiffs did not challenge the state's right to require that all circulators be residents, a criterion that would achieve the state's goal without burdening potential circulators whose "choice not to register [to vote] implicates political thought and expression."

The Court reasoned further the affidavit requirement is a less intrusive means of identifying circulators than the badge requirement and would not subject the circulators to "heat of the moment" harassment. It was noted that the restraint on speech here was more severe than that at issue in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 63 U.S.L.W. 4279 (1995), which struck down an Ohio law that barred distribution of anonymous campaign literature. Deeming the connection between the state's asserted interest in informing the public of the identities of the initiative's backers and the paid circulator disclosure requirements "tenuous," the Court held that the reporting requirements "failed exacting scrutiny."

Justice Thomas concurred in the judgment, indicating that the three regulations failed under a strict scrutiny analysis. Justice O'Connor, joined by Justice Breyer, concurred on the issue of identification badges but dissented on the issues of required voter registration and the filing of

monthly reports, finding that these regulations further legitimate state interests and are "vitally important to the integrity of the political process." Chief Justice Rehnquist concurred on the issue of identification badges, but dissented on the remaining issues and would uphold the disclosure and voter registration requirements as "legitimate restrictions placed by Colorado on the petition circulation process."

b. Review granted — 1

Shrink Missouri Government PAC v. Adams, 161 F.3d 519 (8th Cir. 1998), *review granted sub. nom Nixon v. Shrink Missouri Government PAC*, 67 U.S.L.W. 3468 (U.S. Jan. 25, 1999) (No. 98-963). The Eighth Circuit struck down a Missouri campaign finance law that limited individual contributions to candidates for state-wide office to $1,075 (with lower limits set for offices with less than 100,000 constituents). The court held that the state failed to provide sufficient evidence that the limits served a compelling interest, such as avoiding actual or perceived corruption. More importantly, the court held that even if the state did provide evidence to show a compelling interest, the $1,075 limit was too low as a matter of law and therefore it impermissibly restricted meaningful participation in political speech.

Question presented: Did the court err in declaring that Missouri's campaign contribution law which exceed limits expressly provided in *Buckley v. Valeo*, 424 U.S. 1 (1976), violates the First Amendment?

c. Review denied — 2

Fischer v. Florida (Fla. Dist. Ct. App., Jan. 23, 1998), *cert. denied*, 67 U.S.L.W. 3270 (U.S. Oct. 19, 1998) (No. 98-354). The Florida district court affirmed a Florida Elections Committee ruling that a candidate for office acted with actual malice when she disseminated false statements about her opponent.

Question presented: Can Florida impose punishment upon candidates for political office for statements made in the course of political campaign that do not, as a matter of law, violate the standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964)?

NAACP, Los Angeles Branch v. Jones, 131 F.3d 1317 (9th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3229 (U.S. Oct. 5, 1998) (No. 97-1840). The Ninth Circuit ruled that neither the Equal Protection Clause nor the First Amendment is violated by a state law that gives the county board of supervisors discretion to determine whether candidates who choose to include candidate statements in the official sample ballot and voter registration booklets distributed to all registered voters prior to an election are required to reimburse the county for the actual costs of including these statements.

Questions presented: (1) Do lower court rulings, upholding a $50,000 voter pamphlet fee which effectively operates as a ballot access restriction, conflict with the Supreme Court's rulings in *Bullock v. Carter*, 405 U.S. 134 (1972) and *Lubin v. Panish*, 415 U.S. 709 (1974), in which candidate filing fee barriers were invalidated as violative of the Equal Protection Clause? (2) Does a $50,000 voter pamphlet fee, which excludes voters and candidates from an integral part of Los Angeles County's judicial election process, violate the Equal Protection Clause? (3) Does a $50,000

voter pamphlet fee, which prevents voters from receiving information about the qualifications of those judicial candidates who are unable to pay the fee, violate the First Amendment?

5. Freedom of Information Act — 1

a. Review Denied — 1

Thompson v. Department of Navy, (D.C. Cir. 1998), *cert. denied*, 67 U.S.L.W. 3321 (U.S. Nov. 9, 1998) (No. 98-423). The D.C. Circuit Court affirmed the district court's finding that, pursuant to deliberative process and privacy exemptions of Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 (b)(5) and (6), the Navy properly withheld materials relating to preparation of senior Navy officials for press conferences following 1989 explosion aboard USS Iowa. The court also affirmed the finding that the Navy had not waived any privacy interests by previously disclosing such information publicly.

Questions presented: (1) May executive privilege, as incorporated into FOIA, 5 U.S.C. § 552(b)(5), properly be invoked to deny investigative journalist access to documents that may reveal misconduct or malfeasance by officials of U.S. Department of Navy simply because, by happenstance, they were generated during discussions about media inquiries? (2) Could U.S. Department of Navy freely relitigate propriety of its claim of executive privilege when identical claim was rejected previously by another district court in civil discovery dispute?

6. Incitement — 2

a. Review Denied — 2

Ryan v. Connecticut, 244 A.2d 729 (1998), *cert. denied,* 67 U.S.L.W. 3235 (U.S. Oct. 5, 1998) (No. 98-185). A Connecticut appellate court ruled that a statute making it unlawful to advocate, encourage, justify, praise, or solicit killing or injuring of another person, Conn. Gen. Stat. § 53a-179a, is not unconstitutionally vague when interpreted to require intent to cause injury. The court reasoned that the statute interpreted as such falls within a category of laws prohibiting advocacy of imminent lawless action and, therefore, is not overbroad in violation of the First Amendment.

Questions presented: (1) Is a statute making it unlawful to "advocate, encourage, justify, praise, or solicit" killing or injuring of a person facially vague in violation of the 14th Amendment's due process clause? (2) Is that same statute overbroad, in violation of the First Amendment's guarantee of freedom of speech?

Time Warner Entertainment Co. v. Byers, 712 So.2d 681(La. Ct. App. 1998), *cert. denied,* 67 U.S.L.W. 3560 (U.S. Mar. 8, 1999) (No. 98-1091); *see LDRC LibelLetter*, Feb. 1997 at 9, May 1998 at 17, June 1998 at 22, Mar. 1999 at 47. The Louisiana Court of Appeals affirmed a lower court ruling that a shooting victim stated a claim against the producers and director of the movie *Natural Born Killers* for allegedly inciting a copycat crime. The court held that if the victim can

prove allegations that the perpetrators acted after viewing a movie that was intended to incite lawless activity, the movie producers could be held liable under an exception to their First Amendment rights. The court limited its ruling to peremptory exception pleading under Louisiana law, which requires courts to accept allegations of the complaint as true.

Questions Presented: (1) Did the court below err in holding that the speaker's subjective intent to produce lawless action, standing alone, provides sufficient basis for depriving speech of the protection of the First Amendment without regard to whether the speech at issue both overtly advocates imminent lawless action and also is likely to produce such action? (2) Did the court below err in holding that conclusory allegations of the speaker's subjective intent to produce lawless action are sufficient to satisfy the intent element of exception to First Amendment protection announced in *Brandenburg v. Ohio?*

7. Judicial / Attorney Speech — 3

a. Review Denied — 3

Broadman v. California Commission on Judicial Performance, 959 P.2d 715 (Cal. 1998), *cert. denied*, 67 U.S.L.W. 3434 (U.S. Jan. 11, 1999) (No. 98-770). The California Supreme Court held that public censure of a judge who commented to the press on two criminal cases over which he had presided and which were on appeal and who violated the canon of judicial conduct prohibiting judges from publicly commenting on a "pending or impending proceeding in any court" did not violate the First Amendment.

Questions presented: (1) Do the First Amendment's speech and press clauses limit the power of a state to punish a sitting judge who gives two extra-judicial media interviews and briefly references two cases no longer pending before him, but which are still on appeal, when there is no record of evidence or factual finding that the interviews could or did interfere with impartial administration of justice? (2) May the state disregard the "strict scrutiny" test or the "substantial likelihood of material prejudice" standard of *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) in punishing a sitting judge for extra-judicial speech, in favor of "general lines of analysis" for balancing speech rights of public employees articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968)? (3) Is the canon of judicial ethics that says "judges should abstain from public comment about a pending or impending proceeding in any court" impermissibly overbroad and vague under the First Amendment and the Due Process Clause?

Falanga v. Georgia State Bar, 150 F.3d 1333 (11th Cir. 1998) *cert. denied*, 67 U.S.L.W. 3652 (U.S. Apr. 26, 1999) (No. 98-1325). The Eleventh Circuit held that Georgia's categorical ban on in-person solicitation by lawyers and on acceptance of employment from solicitation by others on lawyer's behalf does not violate the First Amendment.

Questions presented: (1) Can state bar rules prohibit an attorney, under threat of disbarment, from conducting routine marketing and advertising undertaken either by the attorney herself or by the employment of marketing or public relations personnel, or would such rules be a violation of the attorney's constitutionally protected free speech rights? (2) Are challenged rules

regulating the Georgia Bar narrowly tailored time, place or manner restrictions that serve a substantial government interest and do not violate the First Amendment?

Ferrara v. Michigan Judicial Tenure Commission, 582 N.W.2d 817 (Mich. 1998), *cert. denied*, 67 U.S.L.W. 3525 (U.S. Feb. 22, 1999) (No. 98-1087); *see LDRC LibelLetter*, May 1998 at 21. A Michigan trial judge's untruthful and misleading statements to public and press regarding telephone conversations with her ex-husband that he secretly taped and made public (in which she voiced numerous racial and ethnic slurs) and her attempt to commit fraud on the court during disciplinary proceedings and her unprofessional and disrespectful conduct during each stage of the disciplinary proceedings constituted misconduct in violation of court rules and judicial canons, warranting her removal from office.

Among the Questions Presented: May a state judicial tenure commission, consistent with supremacy clause and First and 14th Amendments, base judicial removal proceedings on use of racial epithets in private conversations, including comments about public officials, without affording the accused the opportunity to seek dismissal on First Amendment grounds?

8. Negligent Hiring — 1

a. Petition Filed But Not Acted Upon — 1

Van Horne v. Evergreen Media Corp., 705 N.E. 2d 898 (Ill. 1998) *petition for cert. filed*, 67 U.S.L.W. 3684 (U.S. Apr. 3, 1999) (No. 98-1745); *see LDRC LibelLetter*, Feb. 1998 at 2, July 1998 at 15, Dec. 1998 at 9. The Illinois Supreme Court held that a media employer was not liable under Illinois negligence law for the hiring of a disc jockey who had previously engaged only in "outrageous," but non-defamatory, conduct or speech, because such a holding would discourage media employers from hiring controversial broadcasters or reporters, thus denying First Amendment guarantees their "breathing space." Accordingly, the allegation that a radio station should have known that a disc jockey who previously engaged in controversial, non-defamatory stunts would be likely to slander plaintiff on the air fails to state a cause of action for negligent hiring.

Questions presented: (1) Does the First Amendment shield media employers from liability for negligently hiring, supervising, and retaining a disc jockey and demand stricter scrutiny than would be applied to enforcement of these torts against other persons or organizations? (2) Does the First Amendment's "breathing space" also require stricter scrutiny of pleading and proof requirements in enforcing laws of general application, such as negligence, against a media defendant?

9. Prior Restraint — 2

a. Review Denied — 2

Kabir v. Silicon Valley Bank, unpublished (Cal. Ct. App. June 16, 1998), *cert. denied*, 67 U.S.L.W. 3598 (U.S. Mar. 29, 1999) (98-1124). The California Court of Appeals held that

preliminary injunctions enjoining the defendants from further distributing copies of a newsletter containing allegedly false and defamatory statements about the plaintiff are not unconstitutional prior restraints of the defendants' First Amendment rights because the speech involved was false and defamatory. The Court of Appeals also held that the failure to require the plaintiffs to post an undertaking was harmless error and not a basis for reversing the injunction, since the defendants failed to show damages as a result of the injunction.

Questions Presented: (1) Does an injunction issued by California courts violate petitioners' First Amendment rights and Fourteenth Amendment rights of due process? (2) Is the court's order an abuse of discretion that violates statutory requirements of California Code of Civil Procedure §529, which mandates that the court require an undertaking on the part of successful applicant for injunctive relief? (3) Did the court's failure to clarify preliminary injunction orders result in a violation of petitioners' Fourteenth Amendment due process rights

State-Record Co. v. Quattlebaum, 504 S.E.2d 592, *cert. denied*, 67 U.S.L.W. 3613 (U.S. Apr. 5, 1999) (No. 98-1035); *see LDRC LibelLetter*, Apr. 1999 at 31. The South Carolina Supreme Court affirmed a temporary restraining order barring media dissemination of the contents of a surreptitiously recorded, privileged conversation between a criminal defendant and his attorney. The Court held that the order met the stringent requirements for valid prior restraint of First Amendment rights under *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). Specifically, the court found that publicity stemming from dissemination of the recording might impair the defendant's Sixth Amendment right to a fair trial, and that this danger would be avoided by a restraining order preventing prospective jurors from learning the contents of the conversation. The court also concluded that other measures would not ensure the protection of the defendant's right to a fair trial.

Question Presented: Did the trial court violate free press rights--secured by the First and Fourteenth Amendments and this court's decision in *Nebraska Press Association v. Stuart*--when it imposed a prior restraint on publication of the contents of the tape, in view of claims that there was no evidence in the record to support the finding and no specific finding that measures other than prior restraint would fail to protect the criminal defendant's right to a fair trial?

10. Prisons — 1

a. Review Denied — 1

Amatel v. Reno, 156 F.3d 192 (D.C. Cir. 1998), *cert. denied*, 67 U.S.L.W. 3784 (U.S. June 24, 1999) (No. 98-1452). The D.C. Circuit held that a statute prohibiting the Bureau of Prisons from distributing or making available commercial material that contains pictorial depictions of nudity, § 614 of Pub. 104-208, is rationally related to rehabilitative values and does not violate the First Amendment.

Questions presented: (1) Did the court of appeals err by altering the carefully balanced, multi-faceted test established by this court in *Turner v. Safley* applying to challenges to prison regulations that impact fundamental constitutional rights, that is by expressly reducing the test to a rational basis review, which is in conflict with at least four other circuits? (2) Did the court of

appeals err in upholding, under *Turner*, without any evidentiary support, a federal statute that flatly bans receipt by federal prisoners of a disfavored category of protected speech, despite a complete absence of any indication that such a ban was requested or needed by prison officials entrusted with the security and rehabilitation of federal prisoners?

11. Public Forum — 3

a. Review Denied — 3

Children of the Rosary v. Phoenix, 154 F.3d 972, 26 Media L. Rep. 2228 (9th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3715 (U.S. May 24, 1999) (No. 98-1433). The Ninth Circuit affirmed a lower court's refusal to issue a preliminary injunction to display plaintiff's exterior bus advertisement. Plaintiffs, a religious organization, challenged the municipality's policy of restricting exterior bus advertising to commercial messages. The court held that this First Amendment challenge was unlikely to succeed because *Lehman v. Shaker Heights, Ohio* strongly supports the conclusion that advertising panels are nonpublic forums.

Among the Questions Presented: (1) Does the intention to prohibit religious and political speech invalidate the content-based regulation of speech? (2) Is it constitutional for the city to limit access to its transit display spaces only to messages proposing commercial transactions, thereby excluding political and religious messages from the forum?

Marcus v. Iowa Public Television, 150 F.3d 924 (8th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3434 (U.S. Jan. 11, 1999) (No. 98-710); *see LDRC LibelLetter*, Apr. 1997 at 21.The Eighth Circuit, following *Arkansas Educational Television Commission v. Forbes*, 66 U.S.L.W. 4360 (U.S. 1998), affirmed the district court's ruling that a public television station's exclusion of third party candidates from televised debate between Democratic and Republican congressional candidates did not violate the First Amendment. The court found that their exclusion was not based on viewpoint, but on the station's reasonable determination that third party candidates were not newsworthy.

Among the Questions presented: (1) Can a state-owned public television broadcaster sponsoring candidate debates exclude third party candidates from participation in these debates if they are found by the broadcaster not to be "newsworthy," meaning, as the trial judge defined the term, "not sufficiently interesting to the network's audience and the general public"?

Southeastern Pennsylvania Transportation Authority v. Christ's Bride Ministries Inc., 148 F.3d 242 (3d Cir. 1998), *cert. denied*, 67 U.S.L.W. 3434 (U.S. Jan. 11, 1999) (No. 98-654). The Third Circuit held that the mass transit agency discriminated on the basis of content in removing anti-abortion ads, thereby violating the strict scrutiny test of the First Amendment. The court found that even though the agency reserved the right to exclude ads deemed objectionable for any reason and displayed ads for the primary purpose of raising revenue, the agency had created a designated public forum because they had accepted advertisements on a wide range of topics. The court also held that even if the agency had not created a public forum, the removal of the ads was not reasonable and therefore still in violation of the First Amendment. The agency failed to comply with its standard of

permitting advertisers of controversial ads to produce evidence in support of the ad's accuracy, even though the advertiser paid the same rate and submitted an ad with similar topics as other advertisers.

Among the Questions Presented: (1) Is government property that is not traditional public forum (e.g. parks, streets, sidewalks) to be deemed "designated" as a public forum, in the absence of specific guidelines for its use, even when the government clearly reserves absolute authority over content, thereby triggering strict First Amendment scrutiny, as the First, Third, and Seventh Circuits have held, or does government reservation of absolute authority over the content sufficiently evidence government intent not to designate a public forum, thereby triggering more deferential standard applicable to "non-public" forum, as Second and Ninth Circuits have held? (2) Does the fact that the government is acting in its role as proprietor of a commercial venture (rather than as a regulator of speech) have no impact upon the level of scrutiny applicable to the government's selection of messages based upon content, as the Third Circuit held below, or is the fact that the government is acting in its role as proprietor "especially significant," or at least "one factor," in determining the applicable level of First Amendment scrutiny, as the Second and Seventh Circuits have held?

12. Schools — 3

a. Review Granted — 1

Board of Regents University of Wisconsin v. Southworth, 151 F.3d 717 (7th Cir. 1998), *review granted*, 67 U.S.L.W. 3598 (U.S. Mar. 29, 1999) (No. 98-1189). The Seventh Circuit held that the University of Wisconsin violated the free speech rights of students by allocating mandatory student fees to campus political and ideological groups with whom the students disagreed.

Questions presented: (1) Is First Amendment offended by public university's creation of non-spatial forum for expression of diverse student speech, through its viewpoint-neutral distribution of compulsory student activity fees? (2) Is First Amendment offended by public university's funding of organizations that provide services to significant portion of student body through use of small activity fee paid by all students who chose to matriculate?

b. Review Denied — 2

Boring v. Buncombe Cty. Bd. Educ., 136 F.3d 364 (4th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3229 (U.S. Oct. 6, 1998) (No. 97-1835). High school teacher alleged she was involuntarily transferred to another school following production of controversial play. The Fourth Circuit held that because the play was part of the school curriculum, the teacher's First Amendment rights were not implicated. The selection of the play was not protected speech, and therefore, not a matter of public concern. School officials had an appropriate interest in regulating school drama productions.

Question presented: May public school officials discipline a teacher, without First Amendment considerations, based on opposition to ideas contained in curricular materials she selected regardless of whether the teacher has notice the materials might be found offensive or regardless of why the material was considered objectionable?

Boyett v. Troy State University, (11th Cir. 1998) *cert. denied*, 67 U.S.L.W. 3434 (U.S. Jan. 11, 1999) (No. 98-699). The Eleventh Circuit rejected a claim by a non-tenured state university teacher that non-renewal of his contract violated First Amendment. Teacher's complaints about funding and staffing were not matters of public concern.

Among the questions presented: (1) Do statements made by a university professor seeking university funds for his division address a matter of public concern that then subject his speech to the balancing of interests test set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)?

13. Telecommunications — 2

a. Review Granted — 1

United States v. Playboy Entertainment Group Inc., 30 F.Supp. 2d 702 (D.Del. 1998), *review granted*, 67 U.S.L.W. 3772 (U.S. June 21, 1999) (No. 98-1682); *see LDRC LibelLetter*, Jan. 1999 at 29. A three-judge district court panel held that Section 505 of the 1996 Communications Decency Act, which requires cable television operators either to fully scramble or time channel "sexually explicit adult programming or other programming that is indecent" to eliminate "signal bleed" (the partial reception of video images and/or audio sounds from a scrambled channel), is a content-based restriction on adult programmers' speech. Reasoning that there was a content-neutral alternative afforded by Section 504 of the statute, which requires cable operators to provide a blocking device to subscribers upon request and is a viable alternative when the subscribers are properly informed of its availability, the three-judge district court held that Section 505 was not the least restrictive means of advancing the government's compelling interests, these being (1) protecting children from exposure to patently offensive sex-related material, (2) supporting parental claims of authority in the household, and (3) insuring individuals' at-home privacy. Accordingly, Section 505 was enjoined as violating adult programmers' First Amendment rights.

Questions presented: (1) Does Section 505 of the 1996 Telecommunications Act violate the First Amendment? (2) Was the court divested of jurisdiction to dispose of the government's post-judgment motions under Fed.R.Civ.P. 59(e) and 60(a) by government's filing of notice of appeal while those motions were pending?

b. Review Denied — 1

Orion Communications Ltd. v. FCC, 131 F.3d 176 (D.C. Cir. 1997), *cert. denied sub nom. Biltmore Forest Radio Inc. v. FCC*, 67 U.S.L.W. 3230 (U.S. Oct. 5, 1998) (No. 97-1971). The D.C. Circuit held that the FCC acted arbitrarily in revoking plaintiff's interim authority to operate an FM radio station and granting authority to plaintiff's competitor.

Among the questions presented: Did the court's decision reversing the orders of the FCC exceed the authority of federal appeals courts to review agency actions?

14. Zoning — 1

a. Review Denied — 1

Interstate Independent Corp. v. Fayette Cty., (Ohio Ct. App. 12th Dist. Oct. 20, 1997), *cert. denied*, 67 U.S.L.W. 3229 (U.S. Oct. 5, 1998) (No. 97-1886). Ohio state court held that denial of a zoning permit to an adult video arcade was not a prior restraint on free speech rights. The arcade failed to meet lawful use requirements and was unable to show that the denial of a permit was motivated by an intent to ban protected speech.

Among the questions presented: Does the town's permit and zoning ordinance violate the First and Fourteenth Amendments when interpreted and applied so as to restrict the petitioner's business from opening anywhere within city limits?