LDRC Libel Defense Resource Center

BULLETIN

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INSIDE THIS ISSUE

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EDITOR'S NOTE

This issue of the LDRC Bulletin, No. 10, is the first of four Bulletins that will be published by LDRC in 1984. Due to intensive work simultaneously underway on several major LDRC projects, the publication of this year's Bulletins has fallen behind schedule. However, as these several projects near completion, we expect rather quickly to get back on schedule. Bulletin No. 11, featuring a comprehensive two-year update of LDRC's 1982 Trials, Damages and Appeals Study, should be published by the end of August. Bulletin No. 12, including a systematic two-year update of LDRC's Summary Judgment Study, should be published by the end of September. Bulletin No. 13 will then be published by year end.

This Bulletin features several new items of note. The article on LDRC's study of state pattern jury instructions is the first in a series of reports and publications from LDRC's Jury Project. Special thanks go to Bridget Asaro, LDRC's executive intern and a third-year student at Brooklyn Law School, for her assistance with the pattern jury analysis. Excellent assistance in the preparation of the Bulletin was also provided by James Dobbins, a second-year student at Fordham Law School (Brief Bank Bibliography); by Andrew Gold, a second-year student at Cardozo Law School (Law Review Library Bibliography); by Christopher Mahon, a second-year student at NYU Law School (Gertz III); and by Susan Reiss, a second-year student at Cardozo Law School (Supreme Court Report).

IMPORTANT REMINDERS TO LDRC BULLETIN SUBSCRIBERS

1. BULLETIN INDEX: All 1984 Bulletin subscribers will receive an Index to LDRC Bulletins No. 1-10. The Bulletin Index is currently being completed and will be sent to subscribers before the end of the summer.

2. BULLETIN BINDER: Those of you who ordered special binders for your collection of backissues will also be receiving the binders, along with the Bulletin Index, by the end of the summer. BULLETIN SUBSCRIBERS WHO HAVE NOT YET ORDERED BINDERS, OR WHO WISH TO ORDER ADDITIONAL BINDERS, MAY DO SO BY USING THE ORDER FORM ENCLOSED, or by sending a check to LDRC for $17.50 per binder.

3. BULLETIN BACKISSUES: Subscribers using the Bulletin Index and/or the Bulletin Binder may well need to order backissues of the Bulletin to complete their collection. This can be done using the enclosed order form. Or contact Carmen Portuguez or Rhonda Zangwill at LDRC for ordering and price information. Also, complete bound sets of the Bulletin with Index, are available at a special discount price. Consult the enclosed order form.

LDRC JURY PROJECT: PRELIMINARY REPORT ON STATE PATTERN JURY INSTRUCTIONS REVEALS SERIOUS DEFICIENCES IN COVERAGE

LDRC has recently completed, as a part of its Jury Project, a preliminary study of state pattern jury instructions. The LDRC study found that state pattern jury instructions are substantially deficient in their coverage of defamation, privacy and related issues. Although more than eighty percent of the states have some kind of pattern instructions and almost half of the states' pattern instructions cover some defamation and privacy issues, few of these adequately reflect the constitutionalization of libel law as mandated by New York Times v. Sullivan and Gertz v. Robert Welch, Inc. This finding reemphasizes the need for a major effort to revise and reform defamation instructions as one vital step in attempting to reverse the media's unacceptably poor record in defending libel claims that are tried before juries.

The deficiencies found by the LDRC pattern jury instruction study include some of the most central constitutional and procedural issues in defamation and privacy law today. Thus, for example, in reviewing state pattern jury instructions LDRC found that:

--As many as 6 states' pattern instructions totally fail to reflect any of the fundamental changes in libel law mandated by New York Times v. Sullivan and Gertz v. Robert Welch, Inc.;

--As few as 8 states' pattern instructions even attempt to define the Times concept of actual malice, including reckless disregard;

--As few as 3 states instruct on the state's standard of fault applicable under Gertz to private plaintiffs;

--As few as 7 states reflect the Gertz limitations on punitive damages;

--Only 1 state adequately reflects the Gertz limitations on presumed damages;

--As few as 4 states reflect a shift of the burden of proof of falsity to the libel plaintiff; and

--State pattern jury instructions are also deficient to varying degrees in their coverage of constitutional opinion, clear and convincing evidence, privacy, and other related torts.

The LDRC Jury Project was initiated in response to highly unfavorable results experienced by media defendants in the majority of libel jury trials. As part of this project, LDRC is in the process of preparing a manual of jury instructions dealing with defamation, privacy and related torts. The LDRC Jury Instruction Manual will include effective past charges, pertinent state pattern jury instructions and current case law, where relevant. Based upon this material LDRC may also attempt to draft "model" or recommended instructions which will be of maximum benefit to media defendants while still being acceptable to the courts.

State Pattern Instructions--Background Information

As a first phase of developing a jury instructions manual, LDRC gathered state by state information on existing pattern jury instructions (PJI's). PJI's, as referred to in this study, are jury instructions which, typically, have been promulgated by some kind of specially-appointed committee, working under the auspices of a well-recognized, law-related group in the particular jurisdiction. PJI's considered in this study, for example, have generally been promulgated by either the state's Supreme Court, the state's Bar Association, or some kind of Judge's Association.

There are 42 sets of PJI's promulgated by such recognized state entities or bar groups currently extant in the United States. Of these 42 promulgated PJI's, 41 are state PJI's, the 42nd covering the District of Columbia. Two additional sets of pattern-like jury instructions are also worthy of mention. In West Virginia, there exists a privately-compiled, privately-published set of instructions, known as Instructions for Virginia and West Virginia edited by E.L. Abbott and E.S. Solomon. These are not, however, officially recognized or promulgated. There also exists a set of jury instructions for the federal courts, entitled

Federal Jury Practice and Instructions, 3rd ed., by E. J. Devitt and C.B. Blackmar. While these are also privately-authored and published and are also not officially promulgated or recognized, the Devitt and Blackmar instructions are frequently used in federal practice and, in fact, have been, to a greater or lesser extent, semi-officially used in certain jurisdictions that do not themselves have their own formal PJI's, such as the Virgin Islands.

There are four basic types of formally-promulgated PJI's. In a small number of jurisdictions PJI's are considered "mandatory" -- i.e., if there is a pattern instruction provided on the particular legal issue it must be used as the jury instruction on that issue. A second type of PJI is "recommended" -- i.e., it is put forward as an appropriate instruction that should be used when applicable, but that is not considered mandatory. Third, there are PJI's that are best characterized as "advisory" -- that is, they are offered for consideration as "guides" in the formulation of appropriate instructions but are neither considered mandatory nor formally recommended for use. Finally, there are some PJI's that are merely "illustrative," for want of a better term -- i.e., while these PJI's are promulgated by some recognized authority, they do not purport to be officially endorsed and, in fact, are expressly stated to be neither required, recommended nor even to be used as formal guides.

Of the 42 jurisdictions that have PJI's, almost half of the jurisdictions, 19, do not include coverage of defamation issues. Of the 23 PJI's* that do cover defamation, 3 sets are mandatory (Colorado; Missouri and New Mexico); 7 are recommended (Alabama; California; Florida; Idaho; Iowa; Michigan and Wisconsin); 8 are advisory (Connecticut; Maryland; New York; Kansas; Mississippi; New Jersey; Pennsylvania and the District of Columbia); and 5 are illustrative (Alaska; North Carolina; North Dakota; Utah and Virginia). (The unofficial West Virginia and Federal instructions also include defamation issues.) Only 5 jurisdictions** (4 PJI's plus the federal

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* A bibliographic listing of each of these 23 sets of defamation PJI's is set forth at the end of this report.

** A bibliographic listing of each of these 5 sets of privacy instrutions is set forth at the end of this report.

instructions) also cover certain related privacy issues. Finally, a small number of PJI's also appear to cover one or more related editorial tort claims.

Overview of Deficiencies in PJI Coverage

In this initial phase of LDRC's jury instructions study, we have reviewed defamation PJI's to determine their basic scope of coverage of fundamental legal issues, and to ascertain in basic but essential ways whether these instructions do or do not reflect current legal or constitutional developments. This review revealed that more than half of all U.S. jurisdictions do not have pattern jury instructions that cover legal issues pertinent to media defamation or related claims. Moreover, a closer look even at those jurisdictions that do have pertinent PJI's indicates that the deficiency of PJI's does not extend simply to lack of basic coverage. For of those PJI's that do touch upon defamation and related issues to some extent, few adequately reflect current law and governing constitutional standards.

Initially, LDRC has surveyed 10 key legal and constitutional issues to determine the extent to which available defamation PJI's reflect current constitutional and common law standards. In a later phase of this project, LDRC will undertake to analyze in greater depth the actual language of specific PJI's, and of instructions actually given in recent libel trials, in an attempt further to illuminate such deficiencies and to begin the process of correcting such deficiencies by formulating the most effective possible instructions for media defendants on such key legal issues in defamation and privacy cases.

The issues reviewed as part of this initial phase of the LDRC jury instruction project were: (i) basic consideration of Times and Gertz; (ii) the Times actual malice standard, including treatment of "reckless disregard"; (iii) the private figure fault standard under Gertz; (iv) burden of proof as applied to truth or falsity; (v) punitive damages; (vi) presumed damages; (vii) opinion; (viii) clear and convincing evidence; (ix) privacy; and (x) general coverage of related torts. As noted, in each category, to a greater or lesser extent, existing PJI's were found to be substantially deficient.

(i) Basic Consideration of Times and Gertz

Remarkably, 6 of the 23 PJI's that cover defamation fail in any way to reflect the pervasive effects of New York Times v. Sullivan and Gertz v. Robert Welch, Inc. They simply have not been revised to take these landmark cases into consideration.* Thus, out of all U.S. jurisdictions, only 17 PJI's cover defamation in a way that reflects, at least to some degree, the constitutionalization of libel law that has occurred over the past twenty years. (Pattern jury instructions from the District of Columbia and patterns based on Federal law also deal with current constitutional standards, to varying degrees, as does the set of instructions from West Virginia.)

(ii) Actual Malice Under Times

Although the Times "actual malice" standard is certainly the most fundamental constitutional development in libel law over the past twenty years, it is astounding to realize that only 13 of the 23 PJI's that cover the defamation issue include instructions that refer, either explicitly or definitionally, to "actual malice." Moreover, only 8 of these 13 states attempt to define the correlative "reckless disregard" component of the actual malice test. In sum, LDRC's review of defamation PJI's reveals a widespread failure adequately to cover or define this governing, core concept of constitutional protection in defamation law.

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* In fact, the inadequacy of current PJI's is frankly acknowledged in several jurisdictions. For example, explanatory notes preceding Virginia's PJI's and Connecticut's PJI's contain warnings that they do not reflect Times, and an introductory comment to Alaska's PJI's acknowledges that a reevaluation of the effects of Times and Gertz is only partially complete in that state.

(iii) Private Figure Standards of Fault Under Gertz

An almost equally startling finding concerns the inadequacy or lack of coverage by PJI's of the private figure fault standard under Gertz. The necessity of proof of "fault" is at the core of the history of the constitutionalization of libel law. The Supreme Court in Gertz required that the states abandon the common law rule of strict liability, permitting them to adopt standards of conduct for cases of alleged defamation of private plaintiffs but only so long as they do not provide for liability without "fault." Nonetheless, a review of defamation PJI's reveals that only 3 of 23 jurisdictions -- Florida, New Mexico, and the District of Columbia -- have pattern instructions on the fault standard applicable to private plaintiff/media defendant cases.

That only 3 states deal with this issue in their pattern jury instructions seems particularly puzzling when one considers that the courts in as many as 10 of the 23 defamation PJI jurisdictions have now definitively adopted a standard of fault under Gertz, according to the LDRC 50-State Survey. PJI drafters in those jurisdictions therefore could easily frame an appropriate instruction to reflect that governing legal standard. (See key findings of the LDRC 50-State Survey 1983: Current Developments in Media Libel and Invasion of Privacy Law as summarized in LDRC Bulletin No. 9 at 1-12.) Ironically, the PJI in 1 of the few states that has promulgated a Gertz fault instruction -- Florida -- has incorporated a standard that, at least according to the 50-State Survey Findings, incorrectly characterizes the governing fault standard in that state. Thus, the Florida PJI instructs a "negligence" standard. However, that very issue is still currently pending before the Florida Supreme Court, with the defendants in those pending cases arguing strenuously that Florida law already has adopted, or should adopt, a fault standard more demanding than mere negligence. (See 50-State Survey 1983 at 135 (Florida Survey Report).)

(iv) Burden of Proof of Truth or Falsity

LDRC's study also demonstrates that few states with PJI's have yet effectively reflected the highly significant shift of burden of proof as to falsity -- or the burden of proof to negate truth -- in a constitutional libel action. At common law truth was a defense to be pleaded by the defendant and proved by a preponderance of the evidence. However, since Times, a plaintiff -- at least one who is a public figure or public official -- almost certainly has the burden of pleading and proving falsity. In this regard, LDRC has documented a definite and rapid change over the past few years of the law regarding the burden of proof of truth or falsity in libel actions. Thus, according to the 50-State Survey, as many as 31 jurisdictions have moved to the imposition on the plaintiff of the burden of proving falsity, with another 2 states moving in that direction.

LDRC's review of PJI's, however, indicates that few jurisdictions have yet reflected this constitutionally-mandated shift of burden in their PJI's. Thus, of the 23 defamation PJI's, 13 do not even cover burden of proof, although the issue of burden is a pivotal one in defamation litigation, and one with clear constitutional implications. Only 10 of the defamation PJI's deal at all with the issue of burden of proof and of these, only 4 correctly and definitively place the burden of proving falsity on the plaintiff, as mandated by Times; 6 of the 10 do not. The inadequacy of these 6 PJI's on the burden of proof issue can to some extent be explained by the underlying failure of these states to have adequately reflected the constitutionally-required shift in burden of proof. Thus, as many as 5 of these 6 jurisdictions having PJI's dealing with burden of proof still place the burden of proving truth on the defendant, according to the 50-State Survey. The PJI in the 6th state, Alaska, arguably covers the burden issue but does so in a manner that is as confusing as the current state of Alaska's law on the issue. The 50-State Survey had found that the burden issue is "unclear" in Alaska. Nonetheless, particularly where the state's underlying law is merely out of date, there is certainly no excuse for PJI's slavishly to reflect an out of date and clearly incorrect statement of the law.

(v) Punitive Damages

The effect of Gertz on all aspects of recoverable damages has been pervasive. Gertz has had a particularly great impact, needless to say, on the law of punitive damages in defamation actions against media defendants. Gertz held, inter alia, that no defamation plaintiff -- public or private -- may recover punitive damages unless actual malice has been proven. Only 10 of the 23 defamation PJI's offer instructions on punitive damages. 2 of these 10 PJI's entirely fail to reflect the constitutional actual malice requirement, but instead only require proof of common law malice in order to support an award of punitive damages. 1 other jurisdiction, New York, offers a common law instruction for use in non-media defendant cases only, although an introductory commentary appears to recognize Gertz limits on punitive damages in media cases. Of the remaining 7 PJI's, 3 jurisdictions adequately reflect Gertz, but do not also provide for proof of common law malice -- a parallel requirement that should be incorporated and can be of assistance to media defendants in many cases. Only 4 sets of PJI's offer punitive damage instructions dealing with both common law and actual malice. Finally, it is interesting to note that the standards set forth in these punitive damage PJI's do not for the most part conform to their jurisdiction's governing legal standards at least as delineated in the 50-State Survey.

(vi) Presumed Damages

Since Gertz, damages are not to be presumed in defamation actions, at least unless actual malice is proven. Although as many as 12 of the 23 defamation PJI's deal with presumed damages in one manner or another, only 1 of these PJI's clearly sets forth, as part of the instruction itself, the Gertz requirement that presumed damages may only be granted, if at all, where actual malice has been established. In light of this near-total absence of the actual malice requirement as an integral component of these presumed damages charges, one is relegated to searching the comments accompanying the various charges for any reflection of a recognition that actual malice must be proved before damages may be presumed or that Gertz had any impact on this area at all. But even utilizing the comments accompanying each PJI,

only 3 states hint at acknowledging the Gertz actual malice requirement. 2 of these 3 states appear to properly acknowledge that presumed damages may only be granted where liability is based on a showing of actual malice. The 3rd, Alaska, while offering a presumed damage charge, indicates in a comment that although the authors of the PJI's recognize the Gertz limitations on presumed damages the Alaska courts have not yet specifically addressed this question. The remaining 8 of the 12 PJI's concerning presumed damages indicate that such damages are allowable only in cases of libel per se. While such a concept may arguably be an appropriate limitation as a matter of common law practice, failure to include the Gertz limitations on presumed damages renders these charges constitutionally inadequate.

(vii) Opinion

Gertz has also had a sweeping affect on the opinion privilege in the context of defamation. The dictum in Gertz that: "Under the First Amendment there is no such thing as a false idea. However malicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of ideas," seems to have paved the way for widespread recognition of a constitutional protection of opinion. In as many as 32 jurisdictions, as reflected in the 50-State Survey, such a constitutional opinion privilege has been recognized. Interestingly, LDRC's review of PJI's documents that none of the 32 jurisdictions that recognize constitutionally-protected opinion, according to the 50-State Survey, have PJI's on opinion reflecting this recognition. It is true that in most, if not all, cases the application of the constitutional opinion privilege would (at least in the first instance) be for the judge and not a jury to decide. Nonetheless, there may arise cases in which a court cannot determine as a matter of law whether a particular statement is one of fact or opinion. In such case it would certainly be necessary for the court to instruct as to opinion since, under Gertz, liability cannot constitutionally be imposed unless, inter alia, the jury finds the existence of a false and defamatory statement of fact. The jury must be instructed to limit its consideration to statements of fact, and how to distinguish between fact and opinion. Finally, if one does not accept the notion that Gertz entirely eliminated the related privilege of "fair comment," there may also remain the need to instruct the jury as to that important common law privilege. Yet only 4 of the 23 states with defamation PJI's offer instructions on the privilege of fair comment.

(viii) Clear and Convincing Evidence

The constitution mandates that every defamation case requiring proof of actual malice be established by "clear and convincing" evidence. Such a term of art, in and of itself, cannot be meaningful to a jury (if at all) without some detailed definition or explanation. Accordingly, it seems remarkable that only 2 of the 23 defamation PJI's offer a definition of this important standard of proof. It is possible that certain state PJI's incorporate such a definition in some other more general section defining evidentiary standards. However, since the clear and convincing concept is of such great and frequent importance in defamation actions, the far better practice would be to include the special evidentiary standard in PJI's covering defamation.

(ix) Privacy

As mentioned earlier, coverage of related torts appears to be grossly inadequate in all or almost all existing PJI's. This inadequacy is most vividly illustrated as relates to the issue of privacy. Only 4 of the 23 states and the Federal instructions offer privacy instructions. Of these 4 PJI's, only 2 jurisdictions deal with all four of the traditional branches of privacy, and 1 other deals with only one of the four branches. The 4th jurisdiction covering privacy deals only with commercial misappropriation, and not with the other traditional privacy branches, despite the fact that 2 of the traditional four branches -- intrusion and right of publicity -- are recognized in this state, according to the 50-State Survey. In addition to the basic requisite elements of each of the branches of the privacy tort, only 2 of the 4 privacy PJI's deal with defenses to privacy claims, and only 1 jurisdiction has PJI's on damages in the privacy context.

(x) Other Torts

Finally, LDRC briefly surveyed other torts related to defamation. Although LDRC's information on the availability of PJI's on torts related to offensive communications is not complete, materials thus far obtained indicate that coverage is sketchy at best. Of the 8 related torts addressed in the LDRC 50-State Survey, for example, LDRC has thus far located PJI's for perhaps 2 of these torts. LDRC has been able to confirm that 2 states' PJI's deal with injurious falsehood; only Kansas covers outrageous conduct; and Alaska has a set of instructions on fraud and negligent misrepresentation. Although Oklahoma does not have defamation PJI's, products liability instructions are available.

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A final institutional note on the jury instruction project is in order. LDRC's files now contain all available PJI's on defamation and privacy. A bibliographic listing of these PJI's
follows this report. While almost all of the PJI's are published and should be available in local law libraries, some may be difficult to obtain or be unavailable in remote jurisdictions. Copies of these PJI's are available at LDRC. To supplement its collection of PJI's, LDRC is also in the process of securing jury instructions employed in actual cases from some 100 trial attorneys who have represented media defendants in recent libel trials. In addition to jury instructions as given, LDRC is also attempting to obtain requests to charge and other supporting briefs or materials, where relevant. Once these have been obtained, LDRC's files will be complete and it will be possible to evaluate in more detail the various instructions in terms of their effectiveness, and to compile those most helpful to media defendants in libel actions. Readers of the LDRC Bulletin who have such jury instructions are urged to forward them to LDRC to facilitate preparation of the LDRC Jury Instruction Manual.

Bibliographic Listing of Defamation and Privacy Pattern Jury Instructions

I. Defamation*

1. Alabama Pattern Jury Instructions Committee, Alabama Pattern Jury Instructions, Civil, §§23.00 - 23.17, Rochester: Lawyers Co-operative Publishing Co., 1974, 1982.

2. Pattern Civil Jury Committee, Alaska Jury Instructions, §§16.01A - 16.06, unpublished, 1984.

3. Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles, California Jury Instructions, Civil, 6th ed.rev., §§7.00 - 7.12, St. Paul: West Publishing Co., 1977, 1982.

4. Colorado Supreme Court Committee on Civil Jury Instructions, Colorado Jury Instructions 2d, Civil, §§22:1 - 22:26, San Francisco: Bancroft-Whitney Co., 1969, 1981.

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* This reflects the 23 jurisdictions that have PJI's covering defamation issues, as discussed in the text. In addition, see also the following two sets of pattern-type instructions, not officially promulgated or recognized, that also cover defamation:

(1) Devitt, E. J. and Blackmar, C. B., Federal Jury Practice and Instructions, 3rd ed.rev., §§84.01 - 84.12, St. Paul: West Publishing Co., 1977, 1978, 1981, 1984

(2) Abbott, E. L. and Solomon, E. S. (eds.), Instructions for Virginia and West Virginia, 2nd ed.rev., §§89-107 - 89-108, Charlottesville, Va.: Michie Co., _____, 1983.

5. Wright and Daly, Connecticut Jury Instructions, 3rd ed.rev., §§460 - 470, Hartford: The Atlantic Law Book Co., 1980.

6. Young Lawyers Section, Bar Association of the District of Columbia, Standardized Civil Jury Instructions for the District of Columbia, rev. ed., §§17-1 - 17-16, District of Columbia: Bar Association of the District of Columbia, 1981.

7. Florida Supreme Court Committee on Standard Jury Instructions, Florida Standard Jury Instructions (Civil), MI 4.1 - 4.5, Tallahassee: The Florida Bar, 1982.

8. Idaho State Bar Committee on Standard Jury Instrucitons, Idaho Jury Instructions, §§480 - 480.1, 1973.

9. Iowa State Bar Association Special Committee on Uniform Court Instructions, Iowa Uniform Jury Instructions, §§10.1 - 10.7, 1977.

10. Kansas District Judges' Association Committee on Pattern Jury Instructions, Pattern Instruction, Kansas 2d, §§14.51 - 14.58, San Francisco: Bancroft-Whitney Co., 1977.

11. Committee on Pattern Jury Instructions of the Maryland State Bar Association, Inc., Maryland Pattern Jury Instructions - Civil, §§9:1 - 9:8, Rochester: Bancroft-Whitney Co., 1977, 1981.

12. Committee on Standard Civil Jury Instructions, Michigan Standard Jury Instructions 2d, §§118.01 - 118.07, 62 Mich. B.J., August 1983.

13. Mississippi Model Jury Instructions Committee, Mississippi Model Jury Instructions, §§30.01 - 30.05, St. Paul: West Publishing Co.

14. Missouri Supreme Court Committee on Jury Instructions, Missouri Approved Jury Instructions, 3rd ed., §§3.05, 3.06, 4.15, 4.16, 10.01, 16.01, 23.06(1), 23.06(2), 32.12, St. Paul: West Publishing Co., 1981.

15. New Jersey Supreme Court Committee on Model Civil Charges, New Jersey Model Civil Charges, §§3.12 - 3.13, Trenton: New Jersey State Bar Association, 1978.

16. UJI Civil Committee, New Mexico Uniform Jury Instructions - Civil, §§10.0 - 10.26, Charlottesville, Va.: The Michie Co., 1980.

17. Committee on Pattern Jury Instructions, Association of Supreme Court Justices, New York Pattern Jury Instructions - Civil, §§3.23 - 3.38, Rochester: Lawyers Co-operative Publishing Co., 1983.

18. North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions, North Carolina Pattern Jury Instructions for Civil Cases, §§806.50 - 806.75, Chapel Hill: North Carolina Conference of Superior Court Judges and North Carolina Bar Association Foundation, 1976.

19. North Dakota Judicial Council and State Bar Association of North Dakota Pattern Jury Instructions Committee, North Dakota Jury Instrucitons, Civil, §§105, 370, 371, 372, 373, Bismarck: State Bar Association of North Dakota, 1966.

20. The Civil Instructions Subcommittee of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions, Pennsylvania Suggested Standard Civil Jury Instructions, §§13.08 - 13.10, Harrisburg: Pennsylvania Bar Institute, 1981.

21. Crockett, J.A., Jury Instructions for Utah, §§90.1, 90.3, 90.60, 90.70, 90.72, Salt Lake City: V.O. Young, Inc., 1957.

22. Doubles, Emroch, and Merhige, Virginia Jury Instructions, §§48.01 - 48.30, St. Paul: West Publishing, Co., 1964, 1984.

23. Wisconsin Civil Jury Instructions, §§2510 - 2520, Regents, University of Wisconsin, 1966.

II. Privacy

1. Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles, California Jury Instructions, Civil, 6th ed.rev., §§7.20 - 7.22, St. Paul: West Publishing Co., 1977, 1982.

2. Kansas District Judges' Association Committee on Pattern Jury Instructions, Pattern Instructions, Kansas 2d, §§14.61 - 14.62, San Francisco: Bancroft-Whitney Co., 1977.

3. Committee on Pattern Jury Instructions, Association of Supreme Court Justices, New York Pattern Jury Instructions - Civil, §§3:45 - 3:46, Rochester: Lawyers Co-operative Publishing Co., 1983.

4. The Civil Instructions Subcommittee of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions, Pennsylvania Suggested Standard Civil Jury Instructions, §§13.12 - 13.13, Harrisburg: Pennsylvania Bar Institute, 1981.

5. Devitt, E. J. and Blackmar, C. B., Federal Jury Practice and Instructions, 3rd ed.rev., §§84.13 - 84.17, St. Paul: West Publishing Co., 1977, 1978, 1981, 1984.

SUPREME COURT REPORT:
The Court Completes a Significant Year for Libel Law

On July 5, 1984 the Supreme Court completed its most significant term for libel law in at least five years -- since the 1979 decisions in Hutchinson v. Proxmire and Wolston v. Reader's Digest. The Supreme Court handed down decisions in four key cases -- Bose v. Consumers Union (strongly reaffirming "independent" appellate review in constitutional libel actions); Keeton v. Hustler Magazine and Calder v. Jones (permitting broad assertion of personal jurisdiction in libel cases involving out-of-state plaintiffs, publishers and journalists); and Rhinehart v. Seattle Times (upholding judicially-ordered restrictions on the publication or use by a libel defendent of information discovered from the plaintiff during pretrial libel proceedings.

Curiously, despite this impressive number of libel-related decisions by the Court, it was a relatively quiet Term as regards the number of libel petitions presented for resolution. Thus, in comparison to actions in defamation cases during the 1982-83 Term (see Bulletin No. 8 at 62-66), fewer than half the number of new petitions were filed this Term (15 as compared to 38); and consequently fewer petitions were acted upon by the Court (21 [includes 7 cases carried over from last Term] as compared to 37). Also, fewer media-related petitions were filed, both by defendants challenging unfavorable decisions in the lower courts (9 media defense petitions this Term as compared to 12 last); and by plaintiffs challenging decisions in favor of the media (8 petitions this Term as compared to 15 last).

In Bulletin No. 11 a consolidated case list, recording all Supreme Court actions during the 1983-84 Term, will be published by LDRC, along with a comparative analysis of Supreme Court activity in the libel field over the past four years. In that report some additional reflections on the recently completed Supreme Court Term will also be provided, plus some thoughts on the possible implications of the reargument in Dun & Bradstreet v. Greenmoss scheduled for the beginning of the 1984-85 term.

The Supreme Court's actions from January 3, 1984, through July 5, 1984, the last day of the 1983-84 Term, as recorded in 52 United States Law Week, Issue No. 25 (1/3/84) through 52 United States Law Week, Issue No. 50 (6/26/84), are as follows:

I. Media Defendants -- Unfavorable Decisions Left Standing (5)

Field Communications Corp. v. Braig, 456 A.2d 1366, 9 Med.L.Rptr. 1056 (Pa. Super. Ct. 1983), cert. denied, 52 U.S.L.W. 3828 (5/15/84, No. 83-502). See LDRC Bulletin No. 9 at 15.

Macon Telegraph Publishing Co. v. Elliot, 302 S.E.2d 692, 9 Med.L.Rptr. 2252 (Ga. Ct. App. 1983), cert. denied, 52 U.S.L.W. 3828 (5/15/84, No. 83-1219). (Georgia Court of Appeals had affirmed the trial court's holding that a newspaper article which asserted that murder-trial juror had made up her mind before deliberations began is capable of defamatory meaning and that the award of $50,000 actual damages and $150,000 punitive damages against newspaper was not excessive.)

National Enquirer, Inc. v. Burnett, 144 Cal.App.3d 991, 193 Cal.Rptr. 206, 9 Med.L.Rptr. 1921, 52 U.S.L.W. 2132 (Ct. App. 2nd Dist. 1983), appeal dismissed, 52 U.S.L.W. 3609 (2/21/84, No. 83-1076). (California Court of Appeal had held that weekly publication which contains "how to" articles, medical or personal improvement articles, celebrity and gossip stories and provides little or no current coverage of politics, sports, crime or related subjects, and had a normal lead time of 1 to 3 weeks is not a newspaper within the meaning of §48a of the California Civil Code which limits damages for libel by a newspaper.)

Rhinehart v. Seatttle Times, 98 Wash.2d 226, 654 P.2d 673, 8 Med.L.Rptr. 2537 (Wash. 1982), cert. denied, 52 U.S.L.W. 3874 (6/5/84, No. 82-1758). See LDRC Bulletin No. 7 at 57. See also cross-petition on other issue as to which the Supreme Court granted certiorari -- LDRC Bulletin No. 9 at 14 and see Section V below for the disposition of that case.

Scripps-Howard Broadcasting Co. v. Embers Supper Club, Inc., 9 Ohio St. 3d 22, 457 N.E.2d 1164, 10 Med.L.Rptr. 1729 (Ohio 1984), cert. denied, 52 U.S.L.W. 3874 (6/5/84, No. 83-1653). (Ohio Supreme Court had held that where a private person has made a prima facie showing of defamation, defendant radio station must demonstrate by a preponderance of evidence that it acted reasonably in attempting to discover the truth or falsity or defamatory character of broadcast.)

II. Media Defendants -- Favorable Decision Left Standing (6)

Caron v. Bangor Publishing Co., 470 A.2d 782, 10 Med.L. Rptr. 1365 (Me. 1984), cert. denied, 52 U.S.L.W. 3891 (6/12/84, No. 83-1681). (Supreme Judicial Court of Maine had affirmed grant of summary judgment for defendant and held that newspaper editorial stating that police officers should be physically fit and criticizing an overwieght police officer was opinion and as such was not actionable.)

Graves v. Lexington Herald Leader Co., 9 Med.L.Rptr. 1065 (Ky. 1982), cert. denied, 52 U.S.L.W. 3828 (5/15/84, No. 83-619). See LDRC Bulletin No. 9 at 15.

Lane v. Arkansas Valley Publishing Co., 9 Med.L.Rptr. 1726 (Colo. Ct. App. 1983), cert. denied, 52 U.S.L.W. 3906 (6/19/84, No. 83-1528). (Colorado Court of Appeals had affirmed grant of summary judgment for defendant because newspaper articles criticizing county official disclosed the factual basis for criticism; and plaintiff failed to show the falsity of the factual bases for editorials or that they were published without reasonable investigation.)

Miskovsky v. Tulsa Tribune Co., 9 Med.L.Rptr. 1954 (Okla. 1983), cert. denied, 52 U.S.L.W. 3551 (1/24/84, No. 83-882). See LDRC Bulletin No. 9 at 16.

Miskovsky v. World Pub. Co., (Okla. 1983), cert. denied, 52 U.S.L.W. 3551 (1/24/84, No. 83-883). See LDRC Bulletin No. 9 at 16.

Montesano v. Don Rey Media Group, 9 Med.L.Rptr. 2266, (Nev. 1983), cert. denied, 52 U.S.L.W. 3791 (5/1/84, No. 83-1494). (Nevada Supreme Court had affirmed dismissal of plaintiff's claim and held that newspaper articles discussing police fatalities in the line of duty, including details of plaintiff's conviction in a hit-and-run death of an officer 20 years prior, do not constitute public disclosure of private facts since this information is a matter of public record.)

III. Non-Media Defendants -- Decisions Left Standing (2)

Lee v. Monsen, ___ F.2d ___ (7th Cir. 1983), unpublished decision, cert. denied, 52 U.S.L.W. 3509 (1/10/84, No. 83-464). See LDRC Bulletin No. 9 at 15.

Rhodes v. Hogan, ___ F.2d ___ (6th Cir. 1983), unpublished decision, cert. denied, 52 U.S.L.W. 3874 (6/5/84, No. 83-1809). (Sixth Circuit had held that employee's action for libel against former supervisor was properly dismissed as time-barred under Tennessee's one-year statute of limitations and that employee's subsequent action upon discovery of new evidence does not begin the statute running anew.)

IV. Cases Filed But Not Yet Acted Upon (1)

Piedmont Publishing Co., Inc. v. Cochran, 62 N.C.App. 548, 302 S.E.2d 903, 9 Med.L.Rptr. 1918 (N.C. Ct. App. 1983), cert. filed, 52 U.S.L.W. 3689 (3/20/84, No. 83-1459) -- unfavorable --

media. (North Carolina Court of Appeals had reversed grant of partial summary judgment on punitive damages holding that newspaper's publication of picture of plaintiff on park bench allegedly quoting plaintiff gives rise to material issue of fact as to whether defendants knew the quote was false, precluding summary judgment.)

V. Supreme Court Decisions (4)

Bose Corporation v. Consumers Union of the United States, Inc., ___ U.S. ___, 52 U.S.L.W. 4513, 10 Med.L.Rptr. 1625 (5/1/84, No. 82-1246), aff'g, 692 F.2d 189, 8 Med.L.Rptr. 2391 (1st Cir. 1982) (United States Supreme Court confirmed the continuing vitality of the doctrine of "independent review" of constitutional libel actions in affirming First Circuit's reversal of trial court's damage award and dismissal of the claim on grounds that plaintiff had not sustained its burden of proof of actual malice with convincing clarity.) See LDRC Bulletins No. 6 at 17, No. 7 at 50.

Calder v. Jones, ___ U.S. ___, 52 U.S.L.W. 4349, 10 Med. L.Rptr. 1401 (3/20/84, No. 82-1401), aff'g, 138 Cal.App. 128, 187 Cal.Rptr. 825 (Ct. App. 2nd Dist. 1982). (United States Supreme Court affirmed California Court of Appeal's holding that California had jurisdiction over National Enquirer's editor and reporter because they intended the tortious injury caused there, and that First Amendment concerns do not enter into the jurisdictional analysis.)

Keeton v. Hustler Magazine, Inc., ___ U.S. ___, 52 U.S.L.W. 4346, 10 Med.L.Rptr. 1405 (3/20/84, No. 82-485), reversing and remanding, 682 F.2d 33, 8 Med.L.Rptr. 1748 (1st Cir. 1982). (United States Supreme Court reversed the First Circuit's dismissal of plaintiff's claim for lack of jurisdiction over defendant thus allowing a New York resident to maintain an action against an Ohio publication in New Hampshire, the only state where the statute of limitations had not run, despite the fact that circulation there amounted to less than one-percent of total national circulation.) See LDRC Bulletin No. 6 at 14.

Seattle Times v. Rhinehart, ___ U.S. ___, 52 U.S.L.W. 4612, 10 Med.L.Rptr. 1705 (5/21/84, No. 82-1721), aff'g, 98 Wash.2d. 226, 654 P.2d. 673, 8 Med.L.Rptr. 2537 (Wash. 1982) (United States Supreme Court affirmed Washington Supreme Court's affirmance of trial court's protective order prohibiting libel defendant/newspaper from publishing, disseminating or using information concerning members of plaintiff's religious group obtained during discovery. The Supreme Court held that where a protective order is issued on a showing of good cause, as required by the Federal Rules of Civil Procedure, is not applied beyond the context of discovery, and does not restrict dissemination of information from other sources, it "does not offend" the First Amendment.) See LDRC Bulletins No. 7 at 57 and No. 9 at 14.

VI. Held Over to Next Term (1)

Dun & Bradstreet, Inc. v. Greenmoss Builder's, Inc., 9 Med.L. Rptr. 1902, (Vt. 1983), scheduled for reargument, 52 U.S.L.W. 3937 (6/26/84, No. 83-18). (Vermont Supreme Court had held that First Amendment limitations on award of presumed and punitive damages for libel, as enunciated in Gertz, are inapplicable to defamation actions against "non-media" defendants. At the close of the term the Supreme Court deferred ruling on the case, but instead requested that the parties reargue the issue whether the New York Times and Gertz rules as to presumed and punitive damages should apply to non-media defendants. In a noteworthy additional action, the Court also requested the parties to brief a second issue -- whether the Gertz damage rules should apply to speech "of a commercial or economic nature.")

STATE STANDARDS OF FAULT IN PRIVATE FIGURE LIBEL ACTIONS UNDER GERTZ: IS THE BATTLE REALLY LOST? (Part III)

In Bulletin No. 9, LDRC published the second of a series of articles assessing developments concerning private figure liability standards under Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (see LDRC Bulletin No. 9 at 29-43). That article updated the findings of Part I (see LDRC Bulletin No. 6 at 35-43), which had traced the trend in many states toward the adoption of a "mere negligence" standard rather than higher standards of fault. Twenty-four states (as of the 1983 LDRC 50-State Survey) have adopted some kind of negligence standard, with five additional states apparently leaning in that direction. On the other hand, only five states have adopted a higher standard. The balance of the states, however, have yet to rule on the matter.

Primarily, Part II summarized arguments that have been made, and that can be made, to secure more protective fault standards. We recounted arguments that have been made urging state courts to adhere to existing common law rulings which suggest that the proper standard of fault, even in cases involving private figures, is more than one of mere negligence -- particularly where the publication covers matters of public interest and concern. We also presented arguments that relied on free press and related clauses of state constitutions to bolster or supplement state common law arguments.

In Part III we shall continue to elaborate on the various arguments that have been made to support higher standards of fault in private figure libel actions under Gertz. The arguments are based on public policy, and also on the practical effects of the negligence standard. Additionally, policy and practical arguments in favor of particular types of standards higher than mere negligence -- such as gross negligence and actual malice -- will be presented.

III.* Public Policy

In addition to stressing state common law precedent and state constitutional law, media defendants have argued on public policy grounds for a standard higher than mere

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* [Ed.: This continues the section numbering begun in Part II of the Gertz series. Section I of Part II covered "State Common Law" issues; Section II covered "State Constitutional Law."]

negligence. The arguments are pervaded by two closely related themes. First, the arguments focus on the chilling effect that a negligence standard would have on the media, causing self-censorship that serves to inhibit the media in its reporting functions, and thereby to abridge the public's access to information. Second, the arguments take a broader view of the free speech and First Amendment ramifications of a negligence standard.

[Ed.: One basic public policy argument calling for a higher standard than negligence considered the media's greater reluctance to report on controversial issues involving powerful, albeit private figure, plaintiffs when faced with the mere negligence standard. (Petitioner's brief at 10-12, Oct. 12, 1983, asking for review of Bank of Oregon v. Independent News, Inc., 670 P.2d 616, 9 Med. L. Rptr. 2425 (Ore Ct. App. 1983))].*

"2. Public Policy Supports a Higher Standard Than Negligence.

"A negligence standard will increase the probability that a defamation action will be brought as the result of the publication of unfavorable facts or criticisms concerning institutions or individuals. This is a particularly serious prospect in Oregon given the ruling of the Court of Appeals in this case which: (1) in effect forecloses summary disposition of defamation cases and compels a trial, (2) narrowly construes the public figure doctrine, and (3) signals a hostile attitude toward the press. The more powerful the potential plaintiff, the more likely the prospects of litigation and a large claim for damages. Because negligence provides endless opportunity for second-guessing, members of the media will never know at the time of publication whether they have gone far enough in their investigation of the facts to satisfy a jury.

"The ultimate effect of the negligence standard will be to find liability whenever a false or arguably false statement is brought before the jury. Prudent media practice under a negligence standard will be to steer clear of stories involving sensitive issues and powerful targets that could result in litigation. It is precisely that information which it is the

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* Filed by Bruce E. Smith, Roger M. Saydack, and Douglass S. Mitchell of Cass, Scott, Woods, and Smith, Eugene, Oregon.

media's duty to provide the public and which the public needs to know in order to make informed decisions in every sphere of activity.

. . .

"Implicit in the Court of Appeals decision is the assumption that unless the publisher's investigation discloses a falsehood, or fails to establish the truth, that investigation is negligent. That assumption ignores the basic premise that the First Amendment does not require the publisher to guarantee the truth of the publication. Such a requirement would for all practical purposes destroy a free and vigorous press."

[Ed.: A similar argument was made on appeal from Sisler v. Courier-News Co., unreported, (N.J. Super. Ct., App. Div., Docket No. A-5961-82T2). The argument stresses the importance of the information dissemination function of the press, and the added burden of fulfilling this function under a negligence fault standard.* (Brief for appellants at 35-7)]**

"Democracy is a fragile form of government, vitally dependent for its effective existence upon the informed participation of the public in the political and social process. The First Amendment assures the twin freedoms of speech and press, not to favor the profession of journalism, but to assure that the public has ready access to all information necessary to its informed participation in the governance of its affairs. To assure the public's freedom to obtain information of public import necessarily requires that the public be subjected to some information deemed by a portion of the public to be unnecessary, irrelevant or dangerous.

"The cautious editor, sensitive to the substantial threat and soaring costs of libel litigation, will inevitably resolve not to publish newsworthy information which might be detrimental to some powerful private individual involved in a matter of public interest or concern. Excessive caution

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* At times others have argued that the negligence standard frustrates the cheaper summary disposition of meritless cases, leading to lengthy trials, substantial discovery costs, and a chilling effect on publishers unwilling to risk litigation.

** Filed by John B. McCrory, Robert C. Bernius, and Richard A. Ragsdale of Herold & Ragsdale, Bernardsville, New Jersey.

necessarily diminishes the unimpeded flow of news and information to the public.

> ". . . a rule . . . that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters." Gertz v. Welch, 418 U.S. 323, 340-341 (1974).

"A negligence fault standard, while acceptable legally as a minimum standard, places undesirable and unnecessary burdens upon the press. Under the negligence standard, plaintiffs, attorneys, judges and jurors are each furnished an unrestricted license to second-guess, with 20/20 hindsight, each act or omission in the process of investigating, writing, editing and publishing a news story. An unlimited license to second-guess, given the inevitability of some human error in the mass of information published daily, is wrong in constitutional principle and censorial in pragmatic impact."

[Ed.: A thorough discussion of the self-censorship effect was put forth in the amicus brief filed by Apalachee Publishing Co. in Miami Herald Publishing v. Ane 423 So.2d 376 (Fla. 3d DCA 1982).[5] The focus is on the First Amendment and the need for uninhibited debate on public issues. The magnified effect of the negligence standard on smaller news organizations is also stressed (amicus brief at 10-17, footnotes omitted)]

"E. A negligent speech standard will engender self-censorship.

"Under a negligent speech standard, news stories on the same substantive topics will be adjudicated on dramatically

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[5] Filed by George K. Rahdert and Patricia Fields Anderson of Rahdert, Anderson, & Richardson, St. Petersburg, Florida.

different standards of liability depending on the unpredictable status of potential libel plaintiffs mentioned in the stories. Is the subject a public figure, triggering the constitutional "actual malice" standard of knowing or reckless falsity, Curtis Publishing Co. v. Butts, 388 U.S., 887 S.Ct. 1975 (1967), the Kansas Supreme Court held that a lawyer who represented an accused murderer was a public figure, but Elmer Gertz, the Chicago lawyer who represented the family whose son was killed by a policeman, was not a public figure in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). An accountant for the Committee to Re-Elect the President was a public figure in Buchanan v. Associated Press, 398 F.Supp. 1196 (D.D.C. 1975), but a person convicted for failing to appear before a grand jury investigating espionage was not a public figure in Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979). If learned jurists produce such divergent results, editors and reporters can hardly be expected to do better.

"As a result of the fear of guessing the subject's status incorrectly, the only logical way to avoid the error is for prudent editors and reporters to steer wide of the danger zone, to engage in what one commentator has called "journalistic orthodoxy." This self-censorship is the fourth, and gravest, difficulty with applying negligence to a newsroom operation. Unlike other areas of tort law in which increased safety is a desirable goal, safe speech is an error of constitutional magnitude. As Justice Douglas remarked, "With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking." Gertz, 418 U.S. at 360 (dissenting).

"Although media are business enterprises, as are automobile manufacturers, the media's "product" is uniquely afforded constitutional protection. The First Amendment is not needed to protect the majoritarian, the safe view; the First Amendment protects the minority, the unpopular, even the erroneous view. The First Amendment is grounded on "the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks. . . ." New York Times, 376 U.S. at 270 (citation omitted).

"Self-censorship due to increased liability amounts to a constitutionally impermissible chilling effect upon the newsgathering process. Its effects will be most damaging to the small newspaper or other media defendant. The small news organization simply cannot afford to run the risk of protracted, expensive litigation, much less the large jury award. The small newsroom staff, by definition, has fewer resources and is thus less able to obtain the absolute level of

accuracy within the deadline constraint that the negligence standard would impose. The choice for the small newspaper is compelled by economics: less hard-hitting, less controversial news delivered in a less timely fashion. These editorial decisions, compelled as they are by economic considerations, do violence to the First Amendment principle of "uninhibited, robust, wide-open" debate and do an injustice to their readers and viewers. In the nearly nine years since Gertz v. Robert Welch, Inc. was announced, evidence of self-censorship on the part of smaller press organizations has surfaced (such evidence was not available to the Gertz Court).

"As a preliminary matter, it is to be noted that proof of self-censorship requires proving a negative, that is, proof of inaction. Self-censorship results in stories not printed, persons not quoted, angles not pursued, series not written. In a recent study, two researchers polled managing editors from newspapers across the country about their knowledge of and adjustment to federal libel decisions. The research determined that in light of "more restrictive libel protection," compared to their counterparts at major newspapers, 11% more of the editors of smaller circulation newspapers will be less aggressive. "The difference is statistically significant," the study concludes. [Anderson and Murdock, "Effects of Communications Law Decisions on Daily Newspaper Editors," Journ. Q. 525 (1981).] Furthermore, in this same study only 29% of the smaller circulation papers disagreed with the statement "I check potentially libelous passages with my publisher." Considering that publishers are responsible for the economic well-being of their papers, the inescapable conclusion is that the publication of controversial stories is to some extent controlled by economic considerations for the smaller press.

"The Court in this case must consider that Floridians do not exclusively read large metropolitan newspapers. Most of Florida is served by small local daily or weekly newspapers. The weakening or destruction of even one of these papers through libel litigation or a large libel award is a very real possibility that affronts constitutional values.

"That the United States Supreme Court in Gertz was not prepared to rule out a negligence standard on constitutional grounds does not preclude this Court, with the benefit of a more thoroughly developed historical record, from rejecting negligence. The Gertz Court, despite incorrect characterizations to the contrary did not establish negligence as a standard for private figure libel actions. The Gertz Court instead ruled out strict liability without some showing of fault, but otherwise deferred to the states' judgment as to

an appropriate standard. In effect, Gertz inaugurated an era of state-by-state experimentation to determine proper libel standards. Upon careful reflection, it is evident that negligence as a standard is unworkable, unpredictable, and chills robust free expression which is the particular tradition and heritage of the small press organization in this country. Florida cannot afford to take the chance that a negligent speech standard will have a chilling effect on this state's vigorous free press. Cautious circumscription of free speech and press is everyone's loss and is deadly to a free society."

[Ed.: Finally, the tremendous volume of information handled by a newspaper is a factor which can be noted. The value of a complete published record of newsworthy matter and unimpeded information flow is balanced by the inevitability of some error in reporting when the volume is large. The petition for appeal in Harris v. The Gazette, Inc., unreported, (Vir. Cir. Ct. Goochland Co., Law Nos. 82-16, -17 and -18) pointed out the tradeoff, and consequently argued for a standard higher than negligence (Petition at 25-6, 30-2).]*

"Since this petition presents this Court with the opportunity it did not need to resolve in [a previous case] to hear this appeal and to resolve the matter once and for all, we turn to a demonstration that philosophically the trial court resolved the open issue incorrectly and that this Court, after granting an appeal, should resolve the open issue in favor of The Gazette.

"(2) Compelling Reasons of Policy Dictate Application of the N.Y. Times Malice Standard.

"Free speech has always occupied a privileged place in our society. One noted commentator captured the special role played by free speech:

> If a service as useful to society as medicine can be subjected to liability for professional malpractice, why cannot the press be held to a comparable standard? . . . If the risk of jury judgments under a negligence standard is not too inhibiting for

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* Filed by Lewis T. Booker and L. B. Cann III of Hunton & Williams, Richmond, Virginia.

> other useful activity, why is it so undue a burden on communication? The question is a good one and the answer is not that we think communication will be inhibited more than the other activity, but simply that we are less willing to have it inhibited. It is a special kind of activity in our society. That, in brief, is what the traditions of the First Amendment are all about -- a special sensitivity to the risks of inhibiting communication activity and services.

H. Kalven, "The Reasonable Man and the First Amendment: Hill, Butts, and Walker," 1967 Supreme Court Review 267 (1967). The Supreme Court of the United States has made it explicitly clear why the press occupies a protected position in society:

> Those guarantees [of free speech] are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Time, Inc. v. Hill, 385 U.S. 374, 389 (1966).

. . . .

"As Justice Brennan wrote in Rosenbloom, "the negligence standard gives insufficient breathing space to First Amendment values." 403 U.S. at 52. Without the "breathing space" that would otherwise be afforded by a N.Y. Times malice standard, media self-censorship and an overall chilling effect on the operation of the press will inevitably result. As the Supreme of Colorado stated in Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (1975):

> Our ruling here results simply from our conclusion that a simple negligence rule would cast such a chilling effect upon the news media that it would print insufficient facts in order to protect itself against libel actions; and that this insufficiency would be more harmful to the public interest than the possibility of lack of adequate compensation to a defamation-injured private individual.

538 P.2d at 458. In short, "reasonable speech" is not the objective of the First Amendment. Rather, the First Amendment is based on "the principle that debate on public issues should be uninhibited, robust, and wide open." N.Y. Times Co. v. Sullivan, 376 U.S. at 270. The only way to ensure such debate on public issues is for the Court to hold that defendants such as The Gazette cannot be held liable absent a showing of N.Y. Times malice.

"A necessary measure of "breathing space" is required by the nature of the business of journalism. (Even a small newspaper such as The Gazette conveys an enormous volume of information to the public in every issue.) The sheer volume of information reported by a newspaper makes a certain amount of factual error inevitable, as a number of courts have recognized:

> [W]e assume that factual error is inevitable in the course of free debate and that some latitude for untrue or misleading expression must be accorded to the communications media; otherwise, free, robust debate worthy of constitutional protection would be deterred and self-censorship would be imposed in the face of unpopular controversy.

Aafco Heating and Air Conditioning Co. v. Northwest Publishers Inc., 321 N.E. 2d, 580, at 586 (Ind. Ap. 1975); see also Ross v. Gore, 48 S.2d 412 (Fla. 1950). The U.S. Supreme Court and many state courts recognize that we must tolerate innocent mistakes and factual errors as the price of robust free speech:

> In Rosenbloom it was observed that "the vagueness of the negligence standard itself, would create a strong impetus towards self-censorship, which the First Amendment cannot tolerate." From St. Amant: "[T]o ensure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." From Gertz: "the First Amendment requires that we protect some falsehood in order to protect speech that matters." Walker v. Colorado Springs Sun, Inc., 538 P.2d at 458."

IV. PRACTICAL EFFECTS

In addition to the general policy arguments concerning the chilling effect of a negligence standard, a number of arguments have been advanced noting the impracticality and unworkability of the negligence standard, both in the courtroom and in the newsroom.

[Ed.: the petitioner's brief in Ane, supra, examined the unworkability of the simple negligence standard. It stressed the unpredictability of the jury's reaction to different factual situations, and the resulting insecurity under which the press would be forced to operate. (Petitioner's brief at 38-41)].*

"B. The Reasonable Care Standard Adopted by the Third District Is Unworkable.

"The facts of this case and the decision of the Third District dramatically illustrate why a simple negligence standard is impossible to apply to daily news reporting of important public events.

"The reporter in this case diligently investigated all clues to ownership of the truck.

. . .

"Two judges on the Third District nevertheless concluded "we deal, in our view, with a clear case of journalistic negligence, the evidence of which in this case was more than ample to go to the jury for final resolution." 423 So.2d at 390. If this is a clear case of journalistic negligence, it it difficult to imagine any news article which contains an arguably false statement or which reports on multiple possibilities of an unfolding public matter which could not provide a basis of liability for negligence.

"The result in this case shows that the most obvious shortcoming of a simple negligence standard is that it is, in fact, no standard at all and there is no predictability about the jury response to a given question or a given set of facts. This is of obvious importance to the law which govern speech,

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* Filed by Talbot D'Alemberte and Thomas R. Julin of Steel Hector & David, Miami, Florida, and Richard J. Ovelman of the Miami Herald.

for doubt about free speech rights places the speaker at risk that some future jury may disapprove of his speech and assess damages.

"The "reasonable speech" standard -- requiring "responsible" journalism -- will not prove so useful. In the area of free speech, jurors do not generally have experience in the collection of news, nor writing, nor publishing. There are no legal standards of publication nor should there be. Moreover, unlike medical practice, law practice or other government regulated professions where the First Amendment does not limit or prohibit government action, the absence of a standard for the "responsible publisher" may not be filled by government enactments.

"The second major weakness in a "reasonable speech" standard is closely related to the first. If a juror is asked to pass on the "reasonableness" of speech, we will quickly move to the concept of the "ordinary reasonable prudent speaker" much as we have moved to the concept of the "ordinary reasonable prudent driver." The imposition of such a standard of care will result in a great abridgement (or homogenization) of free speech rights for, as Justice Douglas noted, the imposition of a reasonable care standard governing speech will insure that no one who is reasonable will speak.

"The ultimate arbitrator of reasonableness will be a jury impaneled many months later -- looking back at possibilities unthought of and unknown for further investigation, conjuring up different ways of phrasing, and shades of meaning which would never have occurred at the time of the original publication.

"The Third District's concept of journalistic negligence requiring "reasonable care" whenever a news article identifies a private figure -- irrespective of any other circumstances -- is contrary to all Florida common law. Such a theory would prove unworkable in practice, would unnecessarily complicate libel law, chill free speech by threatening a flood of litigation and create a nightmare for judges, litigants, journalists, and the public who ultimately will suffer most from the impact of a tightly fitting liability standard."

[Ed.: the Apalachee amicus in Ane, previously cited, argues that the negligence standard cannot be applied consistently in the libel area because of the infinite differences in the nature of individual publishers and their unique audiences. Additionally, the brief contends that under a negligence standard appellate and trial judges have diminished opportunities to protect First Amendment interests. (Amicus at 1, 7-10, some footnotes omitted.)]

"Modern newsgathering techniques increasingly involve instantaneous communications. Electronic typesetting, satellite communications, modern word processing and other technologies have combined to compress time requirements in the dissemination of the news. As even small media organizations gain access to instantaneous newsgathering systems, the quantity of information to be processed increases, as expectations in the marketplace increase as well. The pressures of time, information volume and market apply to small and large press organizations alike.

. . .

"C. Concepts of negligence are impossible to apply consistently.

"If this Court decides to adopt a negligence standard, the question then becomes how that standard will be applied. The Court could adopt the "responsible publisher" standard of Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967). Should the court adopt the same standard for the small weekly paper published in rural Florida as the Miami Herald or the St. Petersburgh Times? Should the defendant's conduct be measured by that of a reasonable man or that of a reasonable journalist? In Gobin v. Globe Publishing Co, 216 Kan. 223, 531 P.2d 76 (1975), the Kansas Supreme Court adopted what amounted to a journalistic malpractice standard. The court said the standard was that of the "reasonably careful publisher or broadcaster in the community or in similar communities..." But the Illinois Supreme Court rejected that theory in Troman v. Wood, 62 Ill. 2d 184, 340 N.E. 2d 292 (1975). The Illinois court concluded that such a standard would permit the one newspaper community to set its own standard.

"The Tennessee Supreme Court, however, has decided that the defendant should be held to the reasonably prudent man standard. Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978). Under this system, the jury determines from its own experience what is reasonable and assesses liability based on its impressions. This may be an appropriate standard for a car accident case since every juror can rely on personal experience as a driver, passenger or bystander. But most jurors have no experience with writing, with editing or with gathering news. Yet those jurors may be asked to determine what journalistic conduct is reasonable. As stated above, negligence is so indeterminate as a standard that, in the media context, it amounts to no standard.

"D. A negligence standard strips trial judges and appellate courts of their duty to safeguard First Amendment interests in libel cases.

"The Supreme Court in New York Times v. Sullivan articulated the appellate courts' responsibility to review de novo the entire record of a libel trial to assure that constitutional standards have been applied correctly. "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." New York Times, 376 U.S. at 285. Similarly, trial courts bear a constitutional responsibility to apply summary judgment whenever possible, to shield First Amendment values from the chilling effect of trials. Application of a negligence standard delegates these duties to the jury.

"A study of pre-trial, trial and post-trial disposition of libel cases reveals just how significant de novo judicial review is in this area of the law. A study published recently by Professor Marc Franklin of Stanford University demonstrates that defamation defendants won three-fourths of trial court rulings at the pre-trial stage, and plaintiffs were able to obtain reversal of only one-quarter of those rulings. (Franklin, "Suing Media for Libel: A Litigation Study," 1981 Am. Bar. Found. J. 795, 829. See also "Defamation Trials and Damage Awards--Updating the Franklin Studies," 4 Libel Defense Resource Center Bulletin (Pt. 1 1982).) If a plaintiff does survive the pretrial stages, however, he is more likely to win before a jury.

> Plaintiffs fared much better before juries than before judges. Plaintiffs won jury verdict in 20 of 24 cases, but judge awards in only 2 of 5. Although trial judges tended to uphold jury verdicts as to liability, the appellate courts upheld fewer than half of plaintiffs' judgments entered on jury verdicts. Where defendants had prevailed at trial, these results were upheld in 13 of 15 cases. (Franklin, supra note 9 at 829)

Plainly, if summary judgment and de novo appellate review are denied because of the traditional deference to jury fact findings of negligence, constitutionally unsound verdicts will emerge, untouched on appeal.*

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* See also LDRC Bulletin No. 6 at 42, documenting the complete absence on appeal of reversals based upon an improper finding of mere negligence.

[Ed.: Another argument centers on the irresistable compulsion that jurors will feel to find that where there is falsity, there is negligence -- thereby clearly resulting in the imposition of liability without fault. (Sisler brief, supra, at 36-8)]

"Because the negligence standard provides endless opportunities to second-guess, without limitation, reporters and editors will never know at the time of publication whether their news stories have reached the level of perfection necessary to satisfy a jury. Negligence is too vague a standard to provide realistic guidance to reporters and editors, who must accurately anticipate unknown jurors' subjective reactions.

"In cases where falsity is ultimately demonstrated, jurors irresistibly will assume that some omitted action or effort could "reasonably" have been taken to avoid the error, and the investigation was thus somehow negligent or imperfect. Realistically, it will be a rare case in which a newspaper is found free of negligence where falsity is established to the jury's satisfaction, since, in retrospect, the appropriate pre-publication investigational steps will appear obvious. The ability to second-guess the issue of reasonableness of the reporter's or editor's conduct inherently assures, under the negligence standard, that virtually every libel action, brought by a private individual involved in a newsworthy matter, will be submitted to the unsympathetic mercies of a jury. The risk of substantial judgment at the hands of a jury, especially in situations where the content of a news story is unpopular, and the attendant exorbitant costs of defense, assures that important but possibly detrimental news will not be published by any but the most foolhardy editor.

"If the negligence standard is adopted in New Jersey, it surely cannot be premised upon an assumption that it provides any meaningful protection to the press, much less adequate protection. The negligence standard devalues private individual defamation actions against the media to the level of automobile litigation. The premise inherent in adoption of a negligence standard is that publication of important news articles, implicating private individuals in matters of public interest and concern, has no greater political or social utility in a democratic society than driving an automobile. The flow of news information to the citizens of this State must be given protection adequate to its constitutional purpose in our society."

[Ed.: A closely related argument noted that a jury might under a negligence standard find liability without fault,

in violation of the major premise of Gertz. (Apalachee amicus, supra, at 4-7).]

"B. The inevitability of error in newsgathering converts negligence into a constitutionally impermissible strict liability standard.

"The Florida Supreme Court, in Ross v. Gore, 48 So.2d 412 (1950), has taken judicial notice of the inevitability of errors in the newsgathering process:

> In the free dissemination of news, then, and fair comment thereon, hundreds and thousands of news items and articles are published daily and weekly in our newspapers and periodicals. This court judicially knows that it frequently takes a legal tribunal months of diligent searching to determine the facts of a controversial situation. When it is recalled that a reporter is expected to determine such facts in a matter of hours or minutes, it is only reasonable to expect that occasional errors will be made. Yet, since the preservation of our American democracy depends upon the public's receiving information speedily -- particularly upon getting news of pending matters while there still is time for public opinion to form and be felt -- it is vital that no unreasonable restraints be placed upon the working news reporter or the editorial writer.

Id. at 415. The imposition of a negligence standard is such an unreasonable restraint. An analogy can be made to the imposition of a negligence standard upon the trial judge who is forced, as are newsroom personnel, to make judgments under extraordinary time pressures. Of course every judge will make errors in conducting a trial, thus the "harmless error" rule. Appellate courts realize that after "months of diligent searching to determine the facts of a controversial situation," they operate with the luxury of hindsight not available to the trial judge. Ross v. Gore, supra. In what state would our judicial system be if we substituted "negligent error" for "harmless error" as a standard of judicial review?

"That same hindsight will guide jury deliberations if negligence is applied to newsroom operations. Any error a newspaper makes could be said to be negligent, in that a newspaper is not required to print anything at all. The editor could always have checked just one more source, or held the story just one more day, or proofread just one more time. Holding the news media to an unpredictable negligence standard, based ultimately on jury whim and hindsight rather than a fixed, judicially determined threshhold, must be interpreted by journalists, in the final analysis, as a strict standard of liability. This conclusion likewise follows from this Court's recognition that "it is only reasonable to expect that occasional errors will be made." Ross v. Gore, 48 So.2d at 415. If errors are inevitable, so the liability.

"Any standard which cannot be anticipated is tantamount to no standard. Liability founded on mere falsity, with no attendant showing of fault, is repugnant to the First Amendment and was firmly rejected by the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964). Truth is an insufficient shield to protect the occasionally erroneous statement that is inevitable in free debate, which "must be protected if the freedoms of expression are to have the 'breathing space'" they need to survive. 376 U.S. at 271-72, quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). Furthermore, strict liability was prohibited by the Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). An unpredictable jury negligence standard would accomplish indirectly what is, as a direct proposition of law, an unconstitutional chilling of free speech and free press."

[Ed.: Another factor which has been brought to a court's attention is the juror's inexperience with the newsgathering process as compared with more common situations to which the negligence standard is more fruitfully and fairly applied. (Petition for Appeal from Lewis v. Port Packet Corp., unreported, (Va. Cir. Alexandria Co., At-Law 6692) at 30-1.)].*

"The adoption of a negligence standard would also further confuse what is already one of the most complex areas of the law and produce a standard of care which would be in practice, no standard at all. Negligence by professional disseminators of news should presumably be measured by

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professional standards supra, 388 U.S. at 155, 87 S.Ct. at 1991 (plurality opinion per Harlan, J.). Yet fundamental disagreements exist within the journalism profession concerning what constitutes responsible journalism. Libel and Press Self-Censorship, [53 Tex. L. Rev. 422 (1975)] at 455. Moreover, the ability of newspapers to meet the abstract standards of "accuracy" and "fairness," will vary significantly with the resources of the newspaper. The Port Packet cannot reasonably be expected to apply the same investigative resources to an article as would be expected of Time magazine or The New York Times.

"The application by juries of the concept of negligence works when the jurors are evaluating areas where they have experience (e.g., operating a motor vehicle) or where expert testimony can sufficiently guide the jury with established standards of reasonableness. But the gathering, evaluation, writing and dissemination of the news is outside the experience of the layman and there are no established legal standards by which the jury can assess the reasonableness of the publication process. Since negligence is the constitutionally mandated minimum for liability, Gertz, supra, juries would in effect be formulating after-the-fact standards of constitutional dimensions. Furthermore, there is a risk that with such an amorphous standard, the jury would, in cases of unpopular statements or emotionally charged issues, impose liability without real fault. The values at stake is the freedoms of speech and of the press are too fundamental and important to leave them protected by such fragile shield."

V. STANDARDS OTHER THAN MERE NEGLIGENCE

In addition to merely outlining all of the problems inherent in the negligence standard, media defendants have also presented the positive aspects of adopting other standards. The actual malice standard is, of course, often proposed. But other intermediate standards, such as the gross irresponsibilty standard adopted by New York, have also been frequently suggested.

[Ed.: The petitioner in Bank of Oregon, supra, pointed to the importance of the media's societal function in arguing for a standard other than negligence. Brief at 13-14.]

"3. Proof of Actual Malice or at Least Gross Negligence Should be Required in Defamation Cases Involving Media Defendants and Stories of Public Interest.

"The trial court found, and Plaintiffs have not disputed the fact that, the allegedly defamatory article involved a matter of public concern. In bringing such matters to the attention of the public, the media is performing a valuable societal function which only it can perform. Post v. Oregonian, 268 Or 217, 519 P.2d 1258 (1974), sets forth the rule that a plaintiff must prove actual malice in a defamation action involving a media defendant and a matter of public interest. To date, that policy has not been changed by the Oregon legislature nor has it been abandoned by the Oregon Supreme Court.

"The 'public-interest' test should remain viable in Oregon as it has in other jurisdictions because the protection accorded media expression should depend upon its content and not solely upon the status of the prospective Plaintiffs. The trial court recognized this in setting a gross negligence standard. The Court of Appeals opinion fails to consider this important issue even though it was briefed and argued by Defendants.

"The importance of the content of the expression in defamation cases is underscored by the concurring opinion of Justice Linde in the recent case of Adamson v. Bonesteele, __ Or __, __ P.2d __ (November 1, 1983). There, Justice Linde suggested that a privilege usually accorded only to legislators but designed to protect discussion about legislative matters might apply to a statement made by an Oregon citizen relating to "an item of public business that may be a subject of an initiative or referendum" Adamson v. Bonesteeld, supra, Linde, J. concurring, slip op. at 2. It is precisely such a content-based analysis that Defendants urge in this case."

[Ed.: An interesting variation on the argument for an actual malice test was made in Sisler, supra. Sensing that the court may want a more protective standard for private individuals, the petitioner alternately suggested an actual malice test but with a change of the evidentiary standard. Brief at 38-40.]

"The fault standard applicable to private individual libel plaintiffs is a question of first impression in New Jersey appellate courts. In adopting an appropriate fault standard, the Court must seek to define the proper accommodation between the law of defamation and the constitutionally-protected freedoms of speech and press. Negligence does not provide effective protection to the constitutional communications interests at stake. "Gross irresponsibility" has been determined to be the necessary higher fault standard in New York. Chapadeau v. Utica

Observer-Dispatch, Inc., 38 NY2d 196, 341 N.E.2d 569 (1975). Alaska, Colorado, Indiana and Michigan have adopted the "actual malice" fault standard for private individuals involved in newsworthy matters, requiring proof, by clear and convincing evidence, that the news article was published with actual knowledge of falsity or with reckless disregard of probable falsity.

"We suggest that New Jersey adopt the "actual malice" fault standard as the proper and pragmatic accommodation between individual reputation and the public's right to know, in those cases where a private individual is involved in matters of public interest or concern. The "actual malice" standard is compelled by an impressive matrix of State law: "[F]reedom of the press . . . is strongly protected under the State Constitution [,] State statutory enactments [,] and State decisional law [citations omitted]." State v. Schmid, 84 N.J. 535, 556 (1980), app. dism,. sub nom., Princeton University v. Schmid, 455 U.S. 100 (1982). The Supreme Court has consistently "enforced the strong public policy that favors the press and protects the press function," and has vigorously declared that "the provisions of the State Constitution dealing with expressional freedoms antedate the application of the First Amendment to the states and are set forth more expansively." (Emphasis supplied) State v. Williams, 93 N.J. 38, 58 (1983).

"If the "actual malice" fault standard is deemed too harsh to provide adequate protection to private individuals involved in newsworthy matters,.the Court can soften the "actual malice" rule, achieving greater protection to private individual reputation, with only minimal loss to that "press function," by requiring that, in New Jersey, a private individual defamation plaintiff may establish "actual malice" by the fair preponderence of the credible evidence, rather than by clear and convincing proof.

"Finally, Sisler's proof in this case fell far short of demonstrating publication with either "actual malice" or "gross irresponsibility," and the judgment must be reversed."

[Ed.: Finally, the petitioner in Ane, supra, argued for an actual malice standard, and took the opportunity to summarize the available standards and some of the sources of policy which states have used in making a determination on standard which to apply. Petitioner's brief at 35-6.]

"This Court has not expressly considered the question of the standard of care applicable to libel suits involving matters of general or public concern since either Firestone or

the decision in Gertz. There has been no development in the law which would support the conclusion that this Court would find the rationale of Rosenbloom unpersuasive today. Prior to Gertz, this Court adopted the actual malice test stating its belief that the policy reasons for doing so were compelling. The Gertz decision renders that decision no less compelling since Gertz holds only that this Court need not adopt the standard and offers no plausible basis for change. Moreover, Florida's common law privilege for reporting matters of general or public concern is very similar to the Rosenbloom test and much stronger than a simple negligence standard.

"To eliminate the confusion regarding this state's commitment to free speech it is now essential for this Court to reaffirm its Firestone I decision and clearly establish that Florida law provides strong protection of all speech about issues of real public or general concern by requiring libel plaintiffs to prove actual malice as other state courts have done.

"Those states, like Florida, which historically have given free speech strong protection have expressly announced adoption of the public interest/actual malice standard of Rosenbloom v. Metromedia, supra.

. . .

"There is also an "intermediate standard" such as that adopted in New York requiring a plaintiff to "establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975). Most states which have decided the question before the Court appear to have adopted the simple negligence standard. These states have justified their adoption of this standard on their various state constitutional provisions, statutes, and policies. Some state constitutions, for example, explicitly protect reputation. See, e.g., Troman v. Wood, 62 Ill.2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Company, 216 Kan. 223, 531 P.2d 76 (1975). Florida's does not. Some states have never afforded any more protection for speech than negligence standard. See, e.g., Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975); Taskett v. King Broadcasting Co., 86 Wash.2d 439, 546 P.2d 881 (1976). Florida always has required at least proof of express malice when the speech involved a matter of public interest or concern. Some states have found that their courts never have defined what constitutes a matter of public concern. See,

LAW REVIEW LIBRARY BIBLIOGRAPHY

In this issue of the Bulletin is introduced a bibliographic listing of law review articles and other related scholarly works in the fields of libel and privacy law which have been collected by LDRC. If found useful, updated listings will appear in the Bulletin from time to time.

For several years, since its founding, LDRC has been developing this informal library of pertinent scholarly materials, both to keep itself abreast of the latest developments, changes and perspectives on the law, and to make this information available to its subscribers. While LDRC's Law Review Library is by no means a comprehensive collection of works in the field, it does contain a sampling of representative works over the past several years.

These materials were identified and acquired by various means. In the early years law review articles came to LDRC on a sporadic basis. More recently, listings of new articles in Legal Contents and Media Law Reporter have been utilized, and the Index of Legal Periodicals has been checked. Finally, papers from conferences and drafts of articles in progress have occasionally been received and kept on file.

As all or most of the articles listed below are in copyright, our ability to copy or distribute them is limited.

However, Bulletin readers are encouraged to order desired articles directly from the publications, or, in the cases of unpublished articles (or when information is needed in a hurry) we will, where possible, make material available for perusal at LDRC.

We would appreciate hearing from Bulletin readers regarding any noteworthy articles not included in the accompanying listing as well as receiving any comments or suggestions regarding additional sources of material or ways in which the LDRC constituency can be best served in the collection or presentation of this material.

One extremely useful article not listed by us is "Constitutional Limitations on Libel Actions: A Bibliography of New York Times v. Sullivan and its Progeny, 1964-1984," by Frank Houdek, 6 Comm/ent L.J. 1 (1984). This bibliography, in conjunction with our index, should provide a more comprehensive list of recent works.

The accompanying bibliography is presented in two parts. Part I is an alphabetical listing, by author, of material in LDRC's possession. The listing includes other standard bibliographic information. Part II is an alphabetical listing of topics, cross-referenced to the authors and the LDRC file numbers of the articles where the topic is addressed.

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Topic	Author	LDRC File #
Absolute Privilege	Franklin	16
Actual Injury	Anderson	1
Actual Malice	comment	11
Actual Malice	comment	12
Actual Malice	Compton	13
Actual Malice	Hunter	22
Actual Malice	Lewis	23
Actual Malice	Malone & Smolla	25
Actual Malice	note	30
Actual Malice	note	31
Actual Malice	note	35
Actual Malice	note	37
Actual Malice	Oakes	39
Actual Malice	Schauer	43
All-Purpose Public Figure	comment	9
Appeals	Franklin	17
Appropriation of Name or Likeness	Hill	19
Appropriation of Name or Likeness	Savell	42
Awareness of Meaning	Franklin & Bussel	18
Burden of Proof	Petrus	39
Clear and Convincing	Smirlock	45
Common Law Privacy Privileges	Been	3
Community Standards Test	Beck	2
Confidentiality	Hill	19
Confidential Source Privilege of Journalists	Hunter	22
Constitutionalization of Privacy	Beck	2
Constitutional Limitations on Defamation Liability	Hill	19
Content of Charges	Franklin	17
Context Public Figure	Smolla	47
Corporate Plaintiffs	comment	4
Corporate Plaintiffs	Drechsel & Moon	14
Corporate Plaintiffs	Petrus	39
Corporate Plaintiffs	Siegel	44
Costs of Litigation	Franklin	16
Costs of Litigation	Smith	46
Convincing Clarity	Franklin & Bussel	18
Cultural Trends	Smolla	48
Damages	Anderson	1
Damages	Franklin	16
Damages	Franklin	17
Damages	Hill	19

Topic	Author	LDRC File #
Damages	Hulme	21
Damages	Lewis	23
Damages	note	29
Damages	Ropski	40
Damages	Smolla	47
Damages	Smolla	48
Damages	Van Alstyne	49
Defamatory Opinion	Hill	19
Defamatory Statement	Franklin & Bussel	18
Defenses to Defamation and Privacy	Sanford	41
Descendibility	Ropski	40
Disclosure of Confidential Sources	comment	11
Discovery	Hunter	22
Discovery	Lewis	23
Discovery	Oakes	38
Editorial Process, Privilege Against Discovery	Oakes	38
Elements of Defamation	Sanford	41
Emotional Harm	note	32
Entertaining and Informing Functions in Media	Smolla	47
Expression/Action	comment	9
Expression/Action	Emerson	15
Fact/Opinion	Franklin & Bussel	18
Fair and Accurate Report Privilege	comment	12
Fair Comment Privilege	note	34
False Light	Been	3
False Light	Hill	19
Falsity	Franklin & Bussel	18
Fault Requirements	Franklin & Bussel	18
Fault Requirements	Hill	19
Fiction	comment	7
Fiction	comment	8
Fiction	Hill	19
Fiction	Smirlock	45
First Airing	Franklin	17
First Amendment	Emerson	15
First Amendment	Mayton	27
First Amendment	Schauer	43
First Amendment	Van Alstyne	49
First Amendment Application to Media & Non-media Defendants	Hill	19
Gertz in Montana	Smith	46
Group Defamation	Marcus	26
Group Defamation	comment	7

Topic	Author	LDRC File #
Illinois Defamation Law	Malone & Smolla	25
Illinois Defamation Law	note	30
Individual Actions in Group Defamation	Marcus	26
Intentional Infliction of Emotional Distress	Mead	28
Intrusion	Hill	19
Invasion of Privacy	Beck	2
Invasion of Privacy	Been	3
Invasion of Privacy	comment	9
Invasion of Privacy	Hill	19
Invasion of Privacy	Hogan & Schwartz	20
Invasion of Privacy	Mead	28
Invasion of Privacy	note	29
Invasion of Privacy	Ropski	40
Invasion of Privacy	Sanford	41
Invasion of Privacy	Savell	42
Invasion of Privacy	Van Alstyne	49
Invasion of Privacy by Non-media Defendants	Hill	19
Kansas Defamation Law	note	32
Libel Insurance	Franklin	16
Likelihood of Confusion	Ropski	40
Logical Types	Beck	2
Malice	note	36
Media	Smolla	48
Media Defendants	Franklin	16
Media Defendants	Mead	28
Mitigating Circumstances	Sanford	41
Negligence	Smith	46
Negligence	Smolla	47
Newsgathering	comment	11
Newsworthiness Privilege	Beck	2
Newsworthiness Privilege	comment	5
Non-damage Remedies	Hulme	21
Non-media Defendants	Malone & Smolla	25
Non-media Defendants	note	35
Of and Concerning	comment	7
Of and Concerning	Smirlock	45
Oregon Defamation Law	comment	6
Opinion	comment	7

Topic	Author	LDRC File #
Passage of Time/Public Status	Been	3
Plaintiff's Prima Facie Case	Franklin & Bussel	18
Political Libel	note	37
Press Protection From Libel	Compton	13
Presumed Harm	Anderson	1
Prima Facie Torts	note	36
Privacy Law in New York	Savell	42
Privacy Rights of Corporations	Siegel	44
Private Figure	comment	4
Private Figure	comment	11
Private Figure	Drechsel & Moon	14
Private Figure	Franklin	17
Private Figure	Hill	19
Private Figure	Lewis	23
Private Figure	Malone & Smolla	25
Private Figure	note	30
Private Figure	note	32
Private Figure	Sanford	41
Private Figure	Smith	46
Private Figure	Smolla	47
Proving Harm	Anderson	1
Public Controversy	comment	4
Public Controversy	note	33
Public Disclosure	Been	3
Public Figure/Official	Beck	2
Public Figure/Official	Been	3
Public Figure/Official	comment	4
Public Figure/Official	comment	9
Public Figure/Official	comment	11
Public Figure/Official	comment	12
Public Figure/Official	Compton	13
Public Figure/Official	Drechsel & Moon	14
Public Figure/Official	Franklin	17
Public Figure/Official	Hill	19
Public Figure/Official	Hunter	22
Public Figure/Official	Lewis	23
Public Figure/Official	note	33
Public Figure/Official	note	35
Public Figure/Official	Sanford	41
Public Figure/Official	Schauer	43
Public Figure/Official	Siegel	44
Public Figure/Official	Smolla	48
Public Figure/Official	Smolla	47

Topic	Author	LDRC File #
Public Interest	comment	4
Public Interest	Malone & Smolla	25
Public Interest	note	31
Public Interest	Siegel	44
Red Flag Words	Sanford	41
Reliance on Official Records	comment	12
Republication	comment	5
Republication	Franklin	17
Reputation	Anderson	1
Reputation	Franklin	16
Reputation	note	32
Reputation	Smolla	47
Right of Publicity	Hogan & Schwartz	20
Right of Publicity	Ropski	40
Satire	comment	8
Scholarship	Hogan & Schwartz	20
Seditious Libel	Lewis	23
Seditious Libel	Mayton	27
Self Censorship	Franklin	16
Small Business Plaintiffs	Siegel	44
Standard of Liability Under Gertz	comment	6
State Law Standards	comment	6
State of Mind of Publishers	Hunter	22
State of Mind of Publishers	Oakes	38
Strict Liability	Smolla	47
Summary Judgment	Franklin	16
Summary Judgment	Franklin	17
Summary Judgment	Hunter	22
Summary Judgment	note	31
Summary Judgment	note	37
Taxation of Defamation Awards	comment	10
Testimonial Privilege	comment	11
Time Between Event and Report	Franklin	17
Truth as Defense	Franklin & Bussel	18
Type of Controversy	Been	3
Type of Defendant	Franklin	17
Type of Plaintiff	Franklin	17
Unreasonable Publicity of Another's Life	Hill	19
Vindication Remedy	Hulme	21

LDRC BRIEF BANK -- BY NAME OF CASE

CASE NAME/COURT	AREA OF LAW	TOPIC
Braig v. Field Communications U.S. Sup. Ct./Pa.	Defamation	Neutral Reportage*
Crittendon v. Combined Communication Ok. Sup. Ct.	Defamation	Fair Report of Judicial Proceedings
Gaeta v. New York News N.Y. Ct. of App.	Defamation	Private Figure under Gertz
Gaeta v. New York News N.Y. Ct. of App.	Defamation	Summary Judgment
Gaeta v. New York News N.Y. Ct. of App.	Defamation	Defamatory Meaning
Gaeta v. New York News N.Y. Ct. of App.	Defamation	Damages / Punitive
Junklow v. Viking Press Cir. Ct./S.D.	Defamation	Republication
Kennedy v. Toledo Blade Ct. Common Pleas/Ohio	Defamation	Truth
Kennedy v. Toledo Blade Ct. Common Pleas/Ohio	Defamation	Fair Report of Judicial Proceedings
Kennedy v. Toledo Blade Ct. Common Pleas/Ohio	Defamation	Opinion
Lerman v. Chuckleberry Publishing S.D.N.Y.	Defamation	Summary Judgment
Lerman v. Chuckleberry Publishing S.D.N.Y.	Defamation	Republication
Lerman v. Chuckleberry Publishing S.D.N.Y.	Invasion of Privacy	Statutory Privacy

* Previously cited as "public official" in Bulletin No. 9.

LDRC BRIEF BANK -- BY NAME OF CASE

CASE NAME/COURT	AREA OF LAW	TOPIC
Levine v. CMP Publications 5th Cir./Texas	Defamation	Fair Report of Judicial Proceedings
Levine v. CMP Publications 5th Cir./Texas	Defamation	Actual Malice
Levine v. CMP Publications 5th Cir./Texas	Defamation	Damages
Levine v. CMP Publications 5th Cir./Texas	Defamation	Choice of law
Nodar v. Galbreath Fla. Sup. Ct.	Defamation	Non-media action-private parties
Nodar v. Galbreath Fla. Sup. Ct.	Defamation	Damages
Nodar v. Galbreath Fla. Sup. Ct.	Defamation	Public Official
Owens v. Highland Dist. Ct./Tex	Defamation	Opinion
Rinaldi v. Viking Penguin N.Y. Sup. Ct. App. Div.	Defamation	Privilege
Robertson v. Oregonian Publishing Cir. Ct./Ore.	Defamation	Public Figure
Roessler v. Aylesworth N.J. Sup. Ct.	Defamation	Of and Concerning
Tavoulareas v. Washington Post D.D.C.	Defamation	Actual Malice
Thompson v. Tulsa Neighborhood Comprehensive Health Services Ok. Sup. Ct.	Defamation	Actual Malice
Washington v. Time Cir. Ct./Ark.	Defamation	Truth
Washington v. Time Cir. Ct./Ark.	Defamation	Summary Judgment
Washington v. Time Cir. Ct./Ark.	Defamation	Neutral Reportage
Washington v. Time Cir. Ct./Ark.	Defamation	Defamatory Meaning
Westmoreland v. CBS S.D.N.Y.	Defamation	Opinion
Westmoreland v. CBS S.D.N.Y.	Defamation	Truth
Westmoreland v. CBS S.D.N.Y.	Defamation	Summary Judgment
Westmoreland v. CBS S.D.N.Y.	Defamation	Actual Malice
Westmoreland v. CBS S.D.N.Y.	Defamation	Absolute Privilege

LDRC BRIEF BANK -- BY AREA OF LAW AND TOPIC

AREA OF LAW	TOPIC	CASE NAME/COURT
Defamation	Absolute Privilege	Westmoreland v. CBS S.D.N.Y.
Defamation	Actual Malice	Levine v. CMP Publications 5th Cir./Texas
Defamation	Actual Malice	Tavoulareas v. Washington Post D.D.C.
Defamation	Actual Malice	Thompson v. Tulsa Neighborhood Comprehensive Health Service Ok. Sup. Ct.
Defamation	Actual Malice	Westmoreland v. CBS S.D.N.Y.
Defamation	Choice of Law	Levine v. CMP Publications 5th Cir./Texas
Defamation	Damages	Gaeta v. New York News N.Y. Ct. of App.
Defamation	Damages	Levine v. CMP Publications 5th Cir./Texas
Defamation	Damages	Nadar v. Galbreath Fla. Sup. Ct.
Defamation	Defamatory Meaning	Gaeta v. New York News N.Y. Ct. of App.
Defamation	Defamatory Meaning	Washington v. Time Cir. Ct./Ark
Defamation	Fair Report of Judicial Proceedings	Crittendon v. Combined Communications Ok. Sup. Ct.
Defamation	Fair Report of Judicial Proceedings	Kennedy v. Toledo Blade Ct. Common Pleas/Ohio
Defamation	Fair Report of Judicial Proceedings	Levine v. CMP Publications 5th Cir./Texas

LDRC BRIEF BANK -- BY AREA OF LAW AND TOPIC

AREA OF LAW	TOPIC	CASE NAME/COURT
Defamation	Neutral Reportage*	Braig v. Field Communication U.S. Sup. Ct./Pa
Defamation	Neutral Reportage	Washington v. Time Cir. Ct./Ark.
Defamation	Non-media action-private parties	Nodar v. Galbreath Fla. Sup. Ct.
	Of and Concerning	Roessler v. Aylesworth N.J. Sup. Ct.
Defamation	Opinion	Kennedy v. Toledo Blade Ct. Common Pleas/Ohio
Defamation	Opinion	Owens v. Highland Dist. Ct./Tex.
Defamation	Opinion	Westmoreland v. CBS S.D.N.Y.
Defamation	Private Figure under Gertz	Gaeta v. New York News N.Y. Ct. of App.
Defamation	Privilege	Rinaldi v. Viking Press N.Y. Sup. Ct. App. Div.
Defamation	Public Figure	Robertson v. Oregonian Publishing Co. Cir. Ct./Ore.
Defamation	Public Official	Nodar v. Galbreath Fla. Sup. Ct.
Defamation	Republication	Janklow v. Viking Press Cir. Ct./S.D.
Defamation	Republication	Lerman v. Chuckleberry Publishing S.D.N.Y.
Defamation	Summary Judgment	Gaeta v. New York News N.Y. Ct. of App.
Defamation	Summary Judgment	Lerman v. Chuckleberry Publishing S.D.N.Y.

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LDRC BRIEF BANK -- BY AREA OF LAW AND TOPIC

AREA OF LAW	TOPIC	CASE NAME/COURT
Defamation	Summary Judgment	Washington v. Time Cir. Ct./Ark.
Defamation	Summary Judgment	Westmoreland v. CBS S.D.N.Y.
Defamation	Truth	Kennedy v. Toledo Blade Ct. Common Pleas/Ohio
Defamation	Truth	Washington v. Time Cir. Ct./Ark.
Defamation	Truth	Westmoreland v. CBS S.D.N.Y.
Invasion of Privacy	Statutory Privacy	Lerman v. Chuckleberry Publishing S.D.N.Y.

NEWS BRIEFS

LDRC v. MOBIL -- NO LIBEL SUIT WAS FILED

In a modest contretemp, earlier this year, LDRC challenged Mobil Oil on Mobil's distortion of LDRC statistics in a widely circulated op-ed advertisement by Mobil. The gist of the exchange between LDRC and the nation's most outspoken corporate media critic -- and the delicious irony of Mobil's refusal to correct its inaccurate report when the accurate data would not as strongly support its criticism of the media -- was nicely summarized in the following comments by Floyd Abrams in remarks given at the University of Michigan.

Mr. Abrams' speech was entitled "The Press at Bay." In it he discussed, among other things, the press' alleged lack of popularity in the nation at large, and how the press reacts to perceived public hostility:

"There is another type of poll of which publishers, editors and journalists are acutely aware. It relates to how the press does in front of juries in libel cases. Statistics compiled by the Libel Defense Resource Center indicate that in approximately 85% of libel cases in which juries have reached verdicts in cases involving media defendants since 1980, they have done so against those defendants.

* * * *

"On some issues, to be sure, it is difficult to quarrel with those who criticize aspects of press performance ... There should be no answer to such criticisms except one: an apology.

"But there are other criticisms which should be answered. And to which the press too rarely responds. What, for example, should be said of the nationwide efforts of Mobil

Oil Company to mobilize, so to speak, public opinion against the press? On one level, Mobil's efforts are matters between it and its shareholders: if a publicly held company chooses to spend its money to finance an appeal of what had been styled as a private suit by its president against the Washington Post, or to purchase at its expense plaintiff's libel insurance for its executives, or advertisements denouncing the press, it is an awkward role for outsiders to suggest that the money might better be spent on drilling or other more traditional corporate activities. In fact, for those of us who are grateful for Mobil's support of public television fare, it would come with neither grace nor consistency for us to urge Mobil to limit its spending to its business. But that cannot excuse Mobil for committing the very sins with which it often -- and often wrongly -- taxes the press.

* * * *

"...[C]onsider a recent Mobil advertisement which misused some figures I referred to earlier. In eighty-five percent, I said, of libel cases in which juries have reached verdicts since 1980, the juries voted against the press. Mobil's phraseology went this way:

> "According to a study by the Libel Defense Resource Center, 85 percent of the media libel cases since 1980 have resulted in jury verdicts against the press and television media."

As the Libel Defense Resource Center immediately pointed out to Mobil in a letter of its General Counsel Henry Kaufman, the language of Mobil's advertisement was "inaccurate and misleading." Why? For one thing, as Mobil itself well knows, perhaps 90% of all "media libel cases" never go to trial because they are dismissed for lack of merit before trial. And, as Mobil also knows -- and knew -- 70% or more verdicts against the press are reversed or modified on appeal. Thus it was true to say that in 85% of libel cases which have reached juries, they voted against the press; it was, at best, misleading to suggest that 85% of media libel cases resulted in jury verdicts against the press.

So Mr. Kaufman advised Mobil. Accurately. What was Mobil's response? By letter of February 24, 1984, Donald S. Stroetzel, Mobil's "Manager Communications Programs," it "reaffirmed" its choice of language.

I would not pause on this so long if the point made were not in my view so central to so much criticism of press performance today. Mobil's failure to own up to its distortion is suggestive of one of two possibilities. Either Mobil does not care enough about speaking with any degree of precision to do so even when called to account. Or -- giving Mobil more room for honest error than it tends to do when it presumes to sit in judgment for the public on the press -- Mobil genuinely believed that its language, although inaccurate, possibly misleading and incomplete, was still close enough so as not to require a change of language. If the truth lies in the second area, Mobil should view a too-common failing of journalists with new understanding, if not approval."

LITIGIOUS GROUPS

(i) Libel Prosecution Resource Center -- The Sincerest Form of Flattery?

In an earlier item on "Litigious Groups" (see LDRC Bulletin No. 7 at 66) LDRC reported briefly on the activities of the American Legal Foundation (ALF). ALF, along with two other Washington-based media "watchdog" groups, appeared to be turning more frequently to libel litigation as a part of their activities. At that time ALF had already participated, or had offered financial or moral support, in connection with three libel actions (Galloway; Possert and Farley; and Westmoreland) -- all (coincidentally?) against CBS.

Since our last report, ALF has formalized and accelerated its libel-related activities in a new project known as the Libel Prosecution Resource Center (LPRC). According to ALF's General Counsel, Michael McDonald, the new center will be a "plaintiffs' counterpart to the media's Libel Defense Resource Center." As part of this new effort LPRC will apparently attempt to organize a "network" of attorneys across

the country willing to represent libel plaintiffs; LPRC will "operate as a referral service" for "media victims." LPRC also intends, apparently, to duplicate some of LDRC's information clearinghouse activities. It will also soon be publishing a "monograph" on libel law by Bruce Fein, "adjunct constitutional scholar" for the American Enterprise Institute. In that publication, Fein, who is also General Counsel to the Federal Communications Commission, apparently argues that the "actual malice" standard of New York Times v. Sullivan should be abandoned. According to Fein, public officials should be allowed to bring libel actions based on a "negligent publication of falsehoods" standard.

LPRC also apparently plans to become active in libel litigation. It has already filed friend-of-the-court briefs in at least two libel cases -- Tavoulereas v. Washington Post and Bank of Oregon v. Independent News, Inc. (involving the issue of a corporation's status as a public or private figure). But LPRC's litigation activities will not necessarily be limited to a backup role as amicus curiae. McDonald has told LDRC that his center may well actually represent plaintiffs in selected libel cases, with ALF attorneys handling such cases and, presumably, financing some or all of the litigation costs. One or more such cases are apparently already under consideration. McDonald indicates that as much as half of ALF's time, staff and budget may ultimately be shifted to LPRC projects and away from ALF's more traditional media "fairness," FCC-type activities.

(ii) The Media Institute

Yet another Washington-based, media watchdog group that has recently turned its attention to libel is The Media Institute. The Institute bills itself as a "nonprofit, tax-exempt research foundation supported by a wide range of foundations, corporations, associations and individuals. The Institute has published a number of studies analyzing television news coverage of major economic issues." According to Leonard J. Theberge, President of The Media Institute, the Institute's studies, in the past, had generally "concentrated on evaluating the content of television coverage. These reports had, according to Theberge, often identified serious distortions in the media's presentation of vital issues."

In a new book published last year The Media Institute has now turned its attention away from abstract analysis of "deficiencies in media coverage" toward "the larger question of how to correct them." The new book is entitled Media Abuses: Rights and Remedies -- A Guide to Legal Remedies. It was published by the Institute in 1983. Although the book also covers "administrative relief" such as the fairness doctrine and personal attack proceedings before the FCC, more than half of the text is taken up with discussions of "judicial relief" -- defamation, privacy, damages and tortious newsgathering. While the presentation is generally low-keyed, the book's pro-plaintiff perspective is clear. The "high hurdles" to recovery in defamation actions are acknowledged, but the book goes on to extoll the potential benefits of such litigation in contrast to actions before the FCC:

> "Because of the requirement [in defamation litigation] that a broadcaster defend his actions under oath, the possibility of monetary damages and the danger of adverse publicity for the station, using the courts may be a more effective means of assuring fairness and objectivity in broadcast than relying on the power and policies of the Federal Communications Commission." Id. at 25.

LDRC 50-State Survey 1984: Survey of Federal Circuits

Work is already well underway on the 1984 50-State Survey, to be published by LDRC prior to the end of the year. This year's edition will include a new feature that should be of interest to Bulletin subscribers as well as to all other readers of LDRC publications. Currently in preparation is a Circuit by Circuit report on the status of libel and related privacy law in each of the Federal Circuits. Like the State Surveys, each of the Circuit reports will be prepared by a leading media defense attorney or law firm actively practicing within the particular Circuit. Each Circuit report will include information on key libel and privacy cases in that Circuit. Noteworthy divergences between law in the Circuit and in the Circuit's constituent states will be highlighted. And pertinent observations on Circuit trends, as well as practical advice on practice in the Circuit, will be provided. We are hopeful that this new feature of this year's 50-State Survey will be found to be of use.

LDRC Annual Dinner -- November 7, 1984 --Please Make Note on Your Calendars

LDRC's annual Steering Committee dinner will again be scheduled to coincide with the PLI Communications Law Seminar. As in 1983, the dinner will be open to the public. A noted speaker will be featured. This year, however, the LDRC dinner will be held on the Wednesday evening immediately preceding PLI, rather than on the Thursday evening of the first day of PLI. The LDRC dinner will be scheduled to follow the traditional annual Media Law Reporter cocktail party

Since PLI is being held this year on Thursday, November 8 and Friday November 9, the LDRC dinner will be held on Wednesday, November 7, 1984. Please mark your calendars and plan to attend. Further details as to time, place and program will be provided in a future Bulletin.