



BULLETIN

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LDRC 50-STATE SURVEY 1983:
KEY FINDINGS

The fully updated and expanded LDRC 50-State Survey 1983 has now been completed. (If you have not ordered your copy of the 1983 Survey you can do so by completing the Order Form that appears at the end of this Bulletin.) For most of the readers of this Bulletin the 1983 Survey's value (and the value of each annual edition) will lie primarily in its usefulness as a research and reference tool. Accordingly, conclusions as to the significance of the Survey results, in terms of what they reveal about the current status of, or current trends in, media libel and privacy law and litigation can to a great extent be left to each knowledgeable reader and user of the Survey.

However, publication of the results of the 1983 LDRC Survey is also a newsworthy event in its own right as are the trends it may identify. Therefore, subject to the important caveat noted immediately below, it is felt to be appropriate again this year to attempt briefly to summarize the key findings of the 1983 Survey for our Bulletin readers and for the general public as well. It is important to reiterate, however, as is noted in the 50-State Survey 1983 as well, that the "key findings" which follow are, in effect, summaries of summaries of summaries. Accordingly, just as each of the state survey reports must be understood as providing no more than an overview or outline of the law, this summary of the status summaries of those brief outlines must--a fortiori--be understood as no more than a shorthand description of general patterns in the law. In particular, the numbers and statistics provided below cannot be considered as more than approximations and general descriptions of basic trends. While we believe they provide generally reliable quantifications of our findings, based solely on the Survey reports received, they should not be considered or cited as precise and totally accurate measures of the exact state of the law in any or every jurisdiction. Similarly, neither this summary of key findings nor the status summaries should be used as a substitute for consulting the individual state reports in the 50-State Survey and, beyond them, the actual cases or statutes to which they refer.

SUMMARY JUDGMENT. LDRC's study of summary judgment motions (see LDRC Bulletin No. 4 (Part 2) at pp. 2-35) demonstrated that summary judgment remained the rule rather than the exception in libel litigation, at least as of 1982, with

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3 out of 4 of the motions studied granted. In the 1982 Survey, some 18 jurisdictions continued to favor summary disposition in libel actions. In 14 jurisdictions a "neutral" standard (neither favoring nor disfavoring summary judgment) was applied and only 3 of those jurisdictions appeared to have adopted a neutral standard in reliance on Hutchinson. In 7 jurisdictions summary judgments were granted in appropriate cases but the LDRC Survey reports did not indicate precisely what standard was being applied. Finally, in only 9 jurisdictions was summary judgment specifically disfavored, and only 2 of those jurisdictions disfavored summary disposition in reliance on Hutchinson with 5 or 6 disfavoring based in whole or in part on their own state law.

In 1983, despite Hutchinson, summary judgment continues to be a favored remedy in many cases and jurisdictions. Based on the 1983 Survey, only 2 jurisdictions (Alaska and Hawaii) appear to have moved toward a disfavoring approach. But in at least 2 other states, there appeared to be favorable movement: in Montana, previously categorized as disfavoring under state law, there was movement toward a neutral standard, and in Utah, the frequency of grants suggested that summary judgment is favored. New cases in at least 4 states--California, Connecticut, Minnesota and New Jersey--continued to favor summary judgment, and in Oregon at least 2 new cases granted summary judgment.

DAMAGES. Punitive damages continue to be one of the most worrisome features of current libel litigation (see LDRC Bulletin No. 4 (Part 1) at p. 3 and Table 2-B; also Bulletin No. 5 at 10-11; No. 6 at 2-13; and No. 7 at 58-64 (collected in LDRC Damages Watch 9/1/83)). The 1982 Survey found that some 9 jurisdictions entirely rejected punitive damages, either generally in all civil actions or specifically in libel actions, while some 25 other jurisdictions had expressly recognized constitutional limitations on the availability of punitive damages in libel actions. Finally, some 35 jurisdictions also limited the availability of punitive damages either under retraction law or the enforcement of other common law requirements, or both. With regard to actual damages, more than 25 jurisdictions had already recognized Gertz limitations on recoverable actual damages although two of those restricted Gertz's benefits to public figures or media actions. Only 3 jurisdictions appeared to "presume" damages in certain libel actions.

Although huge damage awards are still being imposed at the trial level by juries, in 1983 judges and appellate

courts continued to expand recognition of legal principles, common law and constitutional, that limit the availability or scope of such damages. According to the 1983 Survey, several additional states now recognize the Gertz limits on either actual or punitive damages or both. Also, a number of important cases this year reduced large damage awards, with at least 1 court expressly holding that an excessive monetary award "may constitute a threat to the exercise of free speech."

RECOGNITION OF SHIELD PRIVILEGE IN THE LIBEL CONTEXT.

In 1982, some 33 jurisdictions had recognized the shield privilege either by statute or case law or both. Of these, at least 13 jurisdictions had specifically recognized a claim for protection of confidential sources or information in the context of a libel or privacy action. Only 3 shield statutes and a small number of cases appeared specifically to deny shield coverage in the libel context and only 1 or 2 cases reported in the 1982 Survey ultimately imposed sanctions for refusals to turn over confidential sources or information in the libel context.

In 1983, developments were not especially favorable to the assertion of the shield privilege in the libel context. There were 3 states (Massachusetts, Michigan, Wisconsin) that moved toward recognition of the privilege, but none specifically in the libel context. In 3 other states (Arizona, Hawaii, New Hampshire) new cases imposed sanctions for the assertion of the privilege in the libel context. In Connecticut, a new case rejected the assertion of the privilege in a defamation action. In Missouri, it now appears that the privilege is rejected in defamation cases. And in Texas a new case recognized a qualified privilege, but one that might be overcome in a defamation context.

CONSTITUTIONAL OPINION PRIVILEGE UNDER GERTZ. In October 1982 Justices White and Rehnquist, in a dissent to a denial of certiorari, raised some troubling questions about the so-called constitutional opinion privilege under Gertz (see LDRC Bulletin No. 4 (Part 2), cover p.). The 1982 LDRC Survey indicated that as many as 27 jurisdictions had recognized special constitutional protections for opinion in reliance upon Gertz. Of these jurisdictions, 2 also recognized common law privileges for opinion, as did another 12 jurisdictions not in reliance upon Gertz. In 20 jurisdictions no case had yet considered the effect of Gertz on statements of opinion.

In 1983, recognition of constitutional opinion protection continued to gain momentum. New cases in as many as an additional 8 states have adopted the Gertz opinion privilege (Kansas, Maryland (federal court), Nevada, North Carolina, Oklahoma, Texas, Virginia (federal court), Washington (trial court)). However, not all cases in this area were entirely favorable, particularly in the definition of opinion (as opposed

to fact) subject to the "absolute" constitutional privilege. For example, an important case in the District of Columbia set up difficult definitional hurdles for the libel defendant's assertion of the opinion privilege, although rehearing en banc is pending in that action. North Carolina adopted but also strictly construed the reach of the opinion privilege. Colorado reaffirmed the privilege but with limits, and a new case in Pennsylvania recognized such limits.

NEUTRAL REPORTAGE. A new, constitutionally based privilege of neutral reportage has been seen by some observers as at least a partial solution to the chilling effect of libel actions on the media--see LDRC Bulletin No. 5 at 12-13. In 7 jurisdictions, according to the 1982 Survey, at least 1 court had specifically recognized a First Amendment privilege of neutral reportage; another 16 jurisdictions recognized related principles that might lead to adoption of neutral reportage or yield similar protection under the common law. Only 3 jurisdictions had definitively rejected the neutral reportage privilege.

In 1983, there was only limited additional development in this area with no definitive trend. On the favorable side, a new case in California adopted neutral reportage and 2 new cases in Florida reaffirmed the doctrine's recognition in that jurisdiction. On the other hand, New York's highest state court appears to have rejected neutral reportage (although the Second Circuit federal court in New York recognized it in the leading case), and a state court in Pennsylvania impliedly rejected the doctrine, thus joining the Third Circuit on the negative side of the issue. Finally, in Hawaii a new case recognized related principles.

PRIVATE FIGURES UNDER GERTZ. Since 1974 lower state and federal courts have slowly begun to implement the Gertz mandate to reform state defamation law applicable to private figure plaintiffs. While the 1982 Survey confirmed that few states have adopted a private figure standard greater than mere negligence (5 states had adopted a higher standard while 22 had adopted mere negligence), the LDRC Survey suggested that the question had not been considered and was otherwise open or unsettled in more jurisdictions (26) than previously documented, and that application and definition even of a mere negligence standard is often subject to significant variation from jurisdiction to jurisdiction.

Unfortunately, 1983 has seen a continued movement toward adoption of the mere negligence standard in a number of jurisdictions that had not previously decided their "private figure" fault standard under Gertz. At least 2 additional states definitively adopted negligence (Arkansas and South Carolina), while the issue is leaning toward negligence and pending on appeal before the highest courts in at least another 4 states (Florida, New Jersey, Oregon and Virginia).

BURDEN OF PROOF. The Supreme Court appeared to be prepared to decide the important issue of the burden of proof of truth or falsity in a libel action in Wilson v. Scripps-Howard but the case was settled after certiorari had been granted (see LDRC Bulletin No. 2 at pp. 27-28 and Bulletin No. 3 at p. 26). According to the 1982 Survey at least 20 jurisdictions imposed the burden of proof of falsity upon the plaintiff in a libel action and as many as 17 of these did so specifically based upon their interpretation of constitutional requirements. There were 17 jurisdictions that continued to impose at least the initial burden of proof of truth upon the defendant.

In 1983, the burden of proving falsity continued to shift to the plaintiff. New cases in at least 4 additional states have expressly placed the burden on plaintiff with new cases in another 2 states moving in that direction. In addition, as many as 7 other of the 1983 LDRC state survey reports have shifted position, or have provided new information, suggesting that the burden had already shifted to the plaintiff prior to 1983.

DEFENDANTS'S REMEDIES. At a time when the cost of defending even frivolous claims is ever increasing, more and more media libel defendants have given serious consideration to pursuing their own counterclaims against libel plaintiffs for malicious prosecution, abuse of process, or similar violations, or at the least are seeking to secure costs and attorneys's fees against unsuccessful libel plaintiffs. The 1982 Survey indicated that some 32 jurisdictions may provide potentially meaningful remedies for such meritless libel claims. And as many as 9 jurisdictions had already specifically recognized such remedies in the libel context. Only 3 jurisdictions provided no remedies to the libel defendant.

In 1983 there were no significant new developments regarding defendants's remedies.

NON-MEDIA DEFENDANTS UNDER GERTZ. One not insignificant issue left open by Gertz is the question of the availability of constitutional privileges, particularly in actions brought by private-figure plaintiffs, in favor of non-media defendants. The 1982 Survey revealed that some 20 jurisdictions applied (expressly or implicitly) Gertz rules to non-media defendants. On the other hand only 4 jurisdictions expressly refused to apply Gertz in the non-media context while another 2 had not applied Gertz but without clear or complete resolution of the issue. In 19 jurisdictions the issue did not appear to have yet been considered, and in 4 other jurisdictions there was divided authority on the matter.

In 1983, the most important development on this issue was the Supreme Court's grant of certiorari in Greenmoss v.

Dun & Bradstreet--a case that may resolve this issue once and for all. (See the Supreme Court Report section of this Bulletin, infra.) In related developments, the 1983 Survey indicates that as many as 6 states (Alabama, Montana, New Jersey, New Mexico, North Carolina, and Washington) in new cases held that Gertz rules should apply to non-media defendants, with only 3 states (Illinois, Kentucky and Vermont) holding they would not apply. New information or positions on the issue were provided or taken by the 1983 Survey reports in Indiana, Mississippi, New York and South Carolina.

FAIR REPORT PRIVILEGE. The fair report privilege can provide important protection to the media when it covers certain official or public events. In one form or another, applicable to official or other proceedings of one sort or another, the fair report privilege was specifically recognized, according to the 1982 Survey, in as many as 41 jurisdictions. In 22 of these jurisdictions the fair report privilege was recognized as a matter of common law; in 14 it was recognized by statute. In 4 of the jurisdictions the privilege was recognized both under common law and by statute, and in 1 remaining jurisdiction it was recognized but the 1982 Survey report did not make clear whether by statute or common law.

In 1983, as might be expected, the status of long-standing common law privileges did not dramatically change. However, there were important developments this year in a small number of cases, and several other states (Arizona, California, Massachusetts, Michigan, Minnesota and Washington) saw developments of some interest to the media. In 2 states (Delaware and North Carolina) new cases expanded or recognized the availability of the fair report privilege and (in North Carolina) the fair comment privilege. Finally, new information of some interest, reflecting developments prior to 1983, is included in the 1983 Indiana and Puerto Rico reports.

INVASION OF PRIVACY. The 1982 Survey did not focus on privacy in as great detail as libel. Nonetheless, the Survey did indicate the widespread availability of privacy claims in many U.S. jurisdictions. As many as 40 jurisdictions had some recognition of one or more branches of the tort and some 18 of these had expressly indicated they would recognize the traditional four branches--false light, intimate facts, intrusion and misappropriation. According to the 1982 Survey, only 4 jurisdictions expressly declined to recognize invasion of privacy claims, at least under the common law, while some 9 jurisdictions had not yet considered the question. Of the four branches, false light claims seemed to have been least re-

cognized (18* jurisdictions) with the other branches somewhat more broadly recognized: intrusion (21 jurisdictions--although a number of these appear to be non-media cases); intimate facts (23 jurisdictions--with some apparently non-media cases); and misappropriation and/or right of publicity (28 jurisdictions). In some 24 jurisdictions one or more aspects of privacy were governed by statute and in some 9 jurisdictions state constitutional provisions have some relevance.

In 1983, a somewhat more detailed privacy survey was undertaken and Survey preparers were asked to expand or to clarify their reports, where possible, so as to facilitate summarization of treatment as to each branch of the tort in their jurisdictions. The results of that expanded inquiry indicated no dramatic change in terms of overall trends from the 1982 Survey and, in fact, only a relatively small number of meaningful new cases and new developments. Thus, the total number of jurisdictions that indicated some recognition of one or more branches of the privacy tort increased by only 1, and that was apparently as a result of new information provided in the 1983 Survey report rather than new developments during the past year. Similarly, 3 additional jurisdictions (for a total of 21) reported recognition of the traditional four privacy torts, but none of these involved new developments since the 1982 Survey. With regard to the specific branches, definite recognition of false light, as indicated in the 1983 Survey, was up 4 (from 18 to 22) but of these only 2 (Maryland and Texas) involved new cases decided since the 1982 Survey report (there was also possible, but not clear, recognition in 2 other jurisdictions). Similarly, reported recognition of intrusion was up 10 (from 21 to 31), but only 4 of these changed reports involved new cases (Alabama (non-media), Massachusetts, Michigan and Puerto Rico). With regard to intimate facts, reported recognition was up 6 (from 23 to 29). Once again, however, most of these were simply reporting shifts rather than new developments, with only 2 jurisdictional reporting changes actually reflecting new developments since last year (Nevada and Texas). Misappropriation/right of publicity was reported up 2 (from 28 to 30), but only one of those (Michigan) involved a new case decided last year. Finally, as to statutory and constitutional privacy, there were no new developments that increased the numbers of such provisions, although 3 jurisdictions provided new information indicating that statutory coverage was up 2 (New Hampshire and Washington) (from 24 to 26) and constitutional provisions up 1 (Puerto Rico) (from 9 to 10).

* This figure was misreported as 17 in last year's Key Findings. There were also 2 jurisdictions in which it was reported possible, but not clear, that false light was recognized.

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OTHER TORTS. In addition to defamation and privacy the 1982 Survey briefly covered the related torts of intentional infliction of emotional distress (sometimes known as "outrage" claims) and trade libel or product disparagement. According to the 1982 LDRC Survey, as many as 50 jurisdictions recognized intentional infliction of emotional distress as a separate tort while only 4 expressly rejected it. However, only 4 jurisdictions had clearly applied or considered the tort in a media context. Media cases in the area of trade libel and product disparagement were also rare, according to the 1982 Survey. Only 7 jurisdictions reported such cases in the media context although at least 17 jurisdictions recognized the separate tort, with 10 of these subjecting such claims to special and normally heightened rules such as requiring proof of special damages, actual malice or intent to harm.

The 1983 Survey inquired more extensively into related tort actions involving media defendants and editorial content. It found as follows. As to intentional infliction of emotional distress, the 1983 Survey reconfirms prior evidence that such claims are relatively rare and rarely succeed against media defendants, particularly when purportedly based on editorial content.* Thus, according to the 1983 Survey, the few relevant new cases either rejected such claims against media defendants (Florida, Massachusetts, Michigan) or else involved non-media defendants (Alabama, Delaware, Kentucky) or else media defendants in a non-editorial context (Colorado, Minnesota). In the trade libel/product disparagement area there was only 1 new case development reported (Massachusetts). In 1983 LDRC also undertook for the first time to survey the status of other related torts as applied to media defendants, again in the editorial context. These other torts included: negligent infliction of emotional distress; simple negligence; prima facie tort; conspiracy; interference with contract; product liability; and strict liability. Overall, the inescapable conclusion is that these other torts are even less frequently asserted, much less with success, against the media. As to negligent infliction, only 4 jurisdictions reported any developments on the topic (Illinois, Massachusetts, Missouri and Ohio) and only 1 (Missouri) has clearly recognized the claim in the media context. Similarly, as to simple negligence, only 5 jurisdictions reported developments of any kind (California, Florida, Illinois, Oregon and the District of Columbia). In none of those jurisdictions was such a claim successfully asserted, with most jurisdictions expressly rejecting the theory in the media context, particularly where the negligence theory is asserted to avoid the privileges and defenses available to a media libel defendant. Prima facie tort is another claim that has not, according to the 1983 Survey, achieved meaningful recognition in the media context. Only 5 jurisdic-

* See also LDRC Bulletin No. 6 at 19-27.

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tions report any developments (Kansas, Missouri, New York, North Carolina and Ohio) and of these only New York indicated any potential current recognition of the claim in the media context. Somewhat more action was found in the 1983 Survey as to conspiracy claims, with some 11 jurisdictions reporting activity (Alabama, Arizona, Colorado, Kansas, Massachusetts, New Jersey, Ohio, Oklahoma, Texas, Utah, and the District of Columbia). However, of those that appear to involve media defendants, almost all either reject the claim outright or else suggest that the claim would be dependent on a defamation cause of action or would be subject to similar privileges or defenses. Similarly, regarding interference with contract, although 10 jurisdictions reported some recognition (7 in the media context--Alabama, Colorado, Illinois, Massachusetts, New Jersey, Pennsylvania and Texas; 3 non-media--Montana, Oklahoma and the District of Columbia), the only reported case (Colorado) that actually upheld such a claim against a media defendant was not based on editorial content. Finally, as to product liability (and strict liability), a similar dearth of cases was evidenced, with only California and Florida indicating any media context recognition and with both cases rejecting strict liability.

RETRACTION. Although some of them may not have the protective capacity they once had prior to the constitutionalization of libel law, retraction laws remained broadly in effect according to the 1982 Survey. Some 30 jurisdictions provided for retraction by statute while another 13 jurisdictions were reported to recognize the effects of retraction under common law.

In 1983, according to the LDRC Survey, there were no landmark developments or discernable new trends in the law on retractions. New developments, or information, were indicated in only a handful of reporting jurisdictions (California, Georgia, Missouri, Nevada, and Tennessee).

STATUTES OF LIMITATIONS. According to the 1982 Survey 28 jurisdictions provided a one-year statute of limitations for libel, 18 a two-year statute, 4 a three-year and 2 a four-year statute. The applicable period of limitation in Texas was unclear and in 2 jurisdictions, according to the 1982 Survey, the statute for slander was different (shorter) than for libel. In 18 jurisdictions the single publication rule had been expressly recognized, 11 of them under common law and 7 by statute (generally the Uniform Single Publication Act). Only 1 jurisdiction expressly adhered to a multiple publication rule.

Perhaps the most significant development pointed to in the 1983 Survey may occur in the case of Keeton v. Hustler,

currently on certiorari before the U.S. Supreme Court (see the Supreme Court Report section of this Bulletin, infra). In 1983, according to the Survey, pending a ruling in the Keeton case, there was little activity of special significance on this issue. However, the 1983 Survey did seek to clarify the status of the single publication/multiple publication rule and new information is provided on adherence to, or construction of, the rule in 8 jurisdictions. Thus, new information indicates that Florida, Georgia, Missouri, Puerto Rico and the Virgin Islands apparently adhere to the single publication rule, while the status of Texas is unclear but leaning toward adoption of single publication. Hawaii applies multiple publication and some case law indicates that West Virginia may also do so.

BROADCASTER'S SPECIAL PRIVILEGE. The 1982 Survey revealed that as many as 32 jurisdictions had adopted statutes providing special privileges to broadcasters, primarily where the law required that political candidates or other individuals be given coverage or access for equal time, fairness or other purposes, without the possibility of review or control by the broadcaster. A number of these privileges apply, or also apply, to cablecasters.

In 1983 there were apparently no significant new developments on this issue. However, new information in the 1983 Survey indicates that 3 additional states provide for a special broadcaster's privilege by statute (Missouri, South Dakota and Tennessee) and another state statute (in Arkansas) may be interpreted to so provide. Finally, an erroneous characterization in the 1982 issue status summaries incorrectly indicated that Kansas has such a statutory privilege. In fact, such a statute did at one time exist, but in 1964 it was not re-enacted.

APPELLATE STANDARD OF REVIEW. In 1983, to follow up on LDRC's major study of "Independent Appellate Review in Libel Actions Since New York Times v. Sullivan" (LDRC Study #3--see also LDRC Bulletin No. 7 at 1-50), the 50-State Survey was expanded to include post-trial and appellate review standards and procedures in each U.S. jurisdiction. The primary focus of inquiry was upon the extent to which special, heightened standards of review are applied in defamation actions and, where they are, how such special standards are defined. The 1983 Survey largely confirmed the findings and conclusions of LDRC Study #3. Thus, according to Study #3, 9 of the 11 Circuits and 22 states have applied special standards of appellate review in libel actions. Similarly, 23 of the Survey reports characterized their local jurisdictions as having applied special standards (Indiana (state), Washington, Wisconsin and Puerto Rico). (Added to this should be another 7 jurisdictions which

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were indicated in the Survey reports as undecided (or pending) on the issue but where Study #3 suggested there might be precedent supporting special review (Florida, Kentucky, Maine, Massachusetts, Minnesota, New Jersey and Ohio).) The 1983 Survey also confirmed that most courts applying special appellate review adopted the Supreme Court's standard of "independent review" (23 jurisdictions) as opposed to the arguably more restrictive "de novo" review standard (4 jurisdictions, plus 1 variously applying de novo or independent review).

SURVIVABILITY AND DESCENDABILITY OF LIBEL AND PRIVACY CLAIMS. It has been universally understood that the dead do not have a cause of action for libel and it has been generally assumed that such a cause dies with the person allegedly defamed. However, at least one widely reported recent libel case held that a claim will survive and a minority of jurisdictions have previously so held. Also, the issue of the survivability and descendability of privacy claims--particularly right of publicity claims--has recently been the subject of a growing body of divided case law. For this reason, in 1983, LDRC for the first time added to the 50-State Survey an inquiry regarding the survivability and descendability of libel and privacy claims. The results of this first Survey, while not fully definitive due to some lack of survey response and also due to the fact that the issues are open and undecided in a number of jurisdictions, generally confirms the given wisdom, but does indicate some variety of approach among jurisdictions. Thus, with regard to libel claims, according to the LDRC Survey, as many as 24 jurisdictions do not allow for survival or descent, while 5 apparently do to some extent (Michigan, New Jersey (recent federal case), Pennsylvania, Rhode Island (but only for 3 months) and South Dakota). In 3 other jurisdictions (Florida, Iowa and Maine) the matter is unclear. In another 21 jurisdictions there is no law on the point. (1 jurisdiction did not respond on this issue.) Regarding privacy, the situation is less definitive. In a majority of jurisdictions (28) there is no law on point and in another 13 jurisdictions the survey failed to respond on this issue. Only 7 jurisdictions were reported as recognizing survival or descent (not necessarily as to all branches of the privacy tort) (Georgia, Kentucky, Michigan, New Jersey (same recent federal case), New Mexico, South Dakota and Wisconsin), with another 2 divided on the issue (Tennessee and Texas). Only 4 jurisdictions were indicated as expressly not recognizing survival or descent of privacy claims.

DISCOVERY OF EDITORIAL MATTER AND THE EDITORIAL PROCESS. At least since Herbert v. Lando, 441 U.S. 153 (1979), potentially intensive discovery into the journalistic editorial process has become a controversial issue in libel litigation, with a number of widely publicized decisions ordering discovery of editorial matter which the media defendant had vigorously sought to pro-

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tect. In 1983, LDRC expanded its coverage of discovery issues in the 50-State Survey by adding an item on the discovery of editorial matter and the editorial process. Interestingly, according to the Survey, there have thus far been relatively few jurisdictions that have considered the issue. In as many as 40 jurisdictions the Survey reported no cases on point. (Another 3 did not respond to the question.) Of the 11 jurisdictions that had considered this discovery issue, only 2 had denied discovery (New Jersey and Pennsylvania (editorial matter only)), with 3 permitting such discovery and another 6 permitting discovery but with certain limitations.

SUPREME COURT REPORT: NEW TERM BEGINS
WITH FIVE LIBEL CASES TO BE HEARD

As predicted in Bulletin No. 8 (at 62), the 1983-84 Term has already proven to be far more significant for libel law than recent Terms. This prediction was due, in part, to the early scheduling of oral argument for three cases on which certiorari was granted last Term. Two of these cases--Keeton v. Hustler (see LDRC Bulletin No. 6 at 15) and Calder v. Jones (see LDRC Bulletin No. 6 at 17)--involve jurisdictional issues with importance in the areas of (1) admitted forum shopping as a means of circumventing unfavorable statutes of limitation, and (2) a state court's exercise of personal jurisdiction over out-of-state editors and reporters. The third case scheduled for oral argument is potentially the most significant libel case to be heard by the Supreme Court since New York Times v. Sullivan and Gertz v. Robert Welch; Bose v. Consumers Union (see LDRC Bulletin No. 6 at 17) presents the critically important issue of the appropriate standard of appellate review of trial court judgments in libel actions.

The 1983-84 Term's potential impact on libel law is indicated further by the Supreme Court's grant of certiorari in two other important libel cases: Seattle Times v. Rhinehart and Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. In terms of libel law development, Seattle Times may be a case of somewhat lesser importance than Dun & Bradstreet. The issues raised by Seattle Times--including the question whether a trial court's protective order prohibiting a libel defendant/newspaper from publishing information obtained through discovery was the equivalent of an unconstitutional prior restraint--are of broad significance to the media on general freedom of expression grounds. By contrast, Dun & Bradstreet more narrowly focuses on an issue of particular significance to the development of libel law--whether the enunciation in Gertz v. Robert Welch of First Amendment limitations upon presumed and punitive damages for libel would apply to non-media defendants. Petitioners in Dun & Bradstreet argue that the Supreme Court should reverse a Vermont court holding that the media libel defendant protections outlined in Gertz, which precluded private figure plaintiffs from recovery of more than actual damages absent proof of actual malice, should not apply to preclude a private figure from recovering presumed or punitive damages from a non-media defendant. The Vermont Supreme Court thus adopted the minority view on the issue of application of Gertz to non-media defendants (see Key Findings of the LDRC 50-State Survey, this Bulletin, supra.)

In considering the significance of the Supreme Court's grant of certiorari in both Seattle Times and Dun & Bradstreet, it should be noted that the decisions below were unfavorable to the defendants. Of further significance in Seattle Times is the fact that the Supreme Court as yet has taken no action on a cross-petition by plaintiff Rhinehart challenging the trial court's discovery order as violative of the privacy and First Amendment association rights of plaintiff's church and its members. (See listing below for citations.)

The Supreme Court's actions from July 19, 1983, through December 12, 1983, as reflected in 52 United States Law Week, Issue No. 3 (7/19/83) through 52 United States Law Week, Issue No. 24 (12/20/83), are as follows:

I. Certiorari Granted--
Unfavorable Decision Below (2)

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Vt. Sup. Ct., 9 Med.L.Rptr. 1902, cert. granted, 52 U.S.L.W. 3369 (11/7/83, 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.)

* Seattle Times v. Rhinehart, 98 Wash. 2d 226, 654 P.2d 673, 8 Med.L.Rptr. 2537 (1982), cert. granted, 52 U.S.L.W. 3261 (10/3/83, No. 82-1721). See LDRC Bulletin No. 7 at 57.**

II. Media Defendants--
Unfavorable Decisions Left Standing (1)

Larson v. Fisher, 138 Cal. App. 3d 627, 188 Cal. Rptr. 216 (Ct. App. 4th Dist. 1982), cert. denied, 52 U.S.L.W. 3369 (11/7/83, No. 82-2082). See LDRC Bulletin No. 7 at 57.

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

Fisher v. Larson, 138 Cal. App. 3d 627, 188 Cal. Rptr. 216 (Ct. App. 4th Dist. 1982), cert. denied, 52 U.S.L.W. 3369 (11/7/83, No. 82-2130). See LDRC Bulletin No. 7 at 56.

* See also cross-petition on other issue as to which no action has yet been taken by the Supreme Court.

** These cross-references are to descriptions of cases listed in previously published LDRC Supreme Court reports. Cases without cross-references are described for the first time in the LDRC Bulletin.

Fleury v. Harper & Row Publishers, Inc., 698 F.2d 1022, 9 Med.L.Rptr. 1200 (9th Cir. 1983), cert. denied, 52 U.S.L.W. 3264 (10/3/83, No. 83-13). (Ninth Circuit had held that plaintiff's libel action was barred under California's Uniform Single Publication Act by 1-year statute of limitations.)

IV. Non-Media Defendants--
Decisions Left Standing (3)

Demos v. Commercial Union, ____ F.2d ____ (7th Cir. 1983), unpublished decision, cert. denied, 52 U.S.L.W. 3263 (10/3/83, No. 82-2073). (The Seventh Circuit had held that an affirmative defense of arson in action seeking recovery of fire insurance proceeds is privileged for purposes of insured's subsequently filed defamation action against insurer.)

Levine v. Silsdorf, ____ A.D.2d ____, 447 N.Y.S.2d 936, 9 Med.L.Rptr. 1815 (1st Dept. 1982), cert. denied, 52 U.S.L.W. 3263 (10/3/83, No. 82-2165). See LDRC Bulletin No. 7 at 57.

National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, ____ F.2d ____ (4th Cir. 1983), cert. denied, 52 U.S.L.W. 3263 (10/3/83, No. 82-2153). See LDRC Bulletin No. 7 at 57.

V. Cases Filed But Not Yet Acted Upon (6)

Field Communications Corp. v. Braig, 456 A.2d 1366, 9 Med.L.Rptr. 1056, cert. filed, 52 U.S.L.W. 3263 (9/22/83, No. 83-502)--unfavorable--media--. (Pa. Sup. Ct. had held that assistant district attorney's statement concerning alleged bias of a judge is capable of defamatory meaning and is not "pure" expression of opinion that would be absolutely privileged and that actual malice could be established by a broadcaster's decision to rebroadcast program over judge's objection.)

Graves v. Lexington Herald Leader Co., 9 Med.L.Rptr. 1065, cert. filed, 52 U.S.L.W. 3324 (10/13/83, No. 83-619)--favorable--media--. (Kentucky Supreme Court had held that a newspaper which published what was found to be a "false and defamatory" article concerning mayoral candidate's property holdings had not been shown to have acted with actual malice.)

Lee v. Monsen, ____ F.2d ____ (7th Cir. 1983), unpublished decision, cert. filed, 52 U.S.L.W. 3210 (9/16/83, No. 83-464)--favorable--non-media--. (Seventh Circuit had held that former supervisor's defamatory job recommendation is protected under Illinois common law qualified privilege.)

Miskovsky v. Tulsa Tribune Co., 9 Med.L.Rptr. 1954, cert. filed, 52 U.S.L.W. 3462 (11/29/83, No. 83-882)--favorable--media--. (The Oklahoma Supreme Court had held that newspaper articles, editorials and cartoons which denounced in strong language the election tactics and qualifications for office of the plaintiff, a U.S. Senate candidate, constituted constitutionally protected statements of opinion.)

Miskovsky v. World Pub. Co., cert. filed, 52 U.S.L.W. 3462 (11/29/83, No. 83-883). (The Oklahoma Supreme Court affirmed the trial court's dismissal of the case since the issues raised were the same as those in Tulsa Tribune and therefore simply adopted the Tulsa Tribune opinion for this case.)

* Rhinehart v. Seattle Times, 98 Wash. 2d 226, 654 P.2d 673, 8 Med.L.Rptr. 2537 (1982), cert. filed, 52 U.S.L.W. 3104 (4/27/83, 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 Damages Watch:

SOME FAVORABLE MOVEMENT ON THE WON/LOST COLUMN
AND CONTINUED SUCCESS POST-TRIAL
BUT DAMAGES AWARDED ARE STILL STAGGERING

New developments in 27 cases involving damage awards in libel (or privacy) actions have occurred, or have been brought to LDRC's attention, since publication of LDRC Bulletin No. 7, July 15, 1983, through approximately December 31, 1983.* At the trial level developments were reported in 12 cases. Defendants fared better (in terms of won/lost ratio) than in previous reports, with 7 trial wins as compared to 5 for plaintiffs. If non-jury judgments are removed, this 58% winning record is reduced to 44% (4/9 jury verdicts). But this is still a substantially more favorable percentage than the 10-20% win record reported in previous Damages Watch Bulletins. It is too early to tell whether this shift represents a trend; however, given the very small number of media defendant wins before juries over the past few years, any jury trial wins must be seen as most welcome from the defense point of view. Despite this favorable movement on the won/lost side, the trend as to size of damage awards in trials lost continues to be highly unfavorable. All 5 of the plaintiff trial wins currently reported involved jury awards of over \$1 million, with the range from \$1.045 million to \$8.75 million and the average of the awards \$3.3 million! (It should be noted that the largest 2 of these awards involved non-media defendants, with the average media award at "only" \$1.3 million. Also, one of the new million-dollar awards has already been reduced by the trial judge, on post-trial motion, to \$100,000.)

On the post-trial and appellate side of the ledger, developments were reported in 15 cases. Defendants continue to fare well, with an overall 71% reversal or modification rate. Thus, of the 14 appeals taken by defendants, 10 resulted in favorable rulings. In 7 of the 14 appeals the damage award was reversed, and in another 3 cases the awards were modified downward. In addition, on the 2 plaintiffs' appeals, both favorable judgments were affirmed. Finally, the size of the 4 affirmed damage awards was generally on the low side, continuing the previously reported pattern--\$30,000; \$40,000; \$200,000 and \$350,000--with the largest of these relatively modest awards now pending on a grant of certiorari before the U.S. Supreme Court.**

* Of these cases, 4 involve new developments in cases previously reported in Damages Watch sections of the LDRC Bulletin; 23 involve cases reported for the first time. Not included in this count are the 2 older cases reported in Section III, below, regarding the taxability of libel damage awards.

** Another 2 awards, affirmed if or as modified or remitted, also involved relatively low damages of \$24,650 and \$200,000 (reduced from more than \$550,000).

I. TRIAL AWARDS

A. Defendant Wins

1. Casper v. Washington Post, 8 Med.L.Rptr. 2370
(E.D.Pa. 1982)

Award (Judge): -0-

Holding: Defendant's motion for involuntary dismissal was granted after non-jury trial at the close of plaintiff's case, on the ground that defendant failed to bear burden of proving actual malice.

2. Catalfamo v. The Florida Clearinghouse on Criminal Justice, No. CI80-1256 (Fla. Cir. Ct. Orange Co. Oct. 12, 1983)

Award (Judge): -0-

Holding: Directed verdict for defendant.

3. DeGregorio v. Time, No. Civil 82-0012/B (D.R.I. Nov. 8, 1983)

Award (Jury): -0-

Holding: Jury returned a verdict for defendant publisher and journalist after five-day trial on all claims.

4. Lovitt and Nash v. Hustler, see "News Notes" 9 Med.L.Rptr., No. 35 (Oct. 4, 1983) (Ind. Wash. Co. Cir. Ct.)

Award (Jury): -0-

Holding: Jury verdict for defendant magazine. Judge had previously dismissed claims as to publisher Flynt and non-media defendant drugstore.

5. Rhinehart v. Toledo Blade, No. 42741 (Ct. of Common Pleas, Hancock Co. 1983)

Award (Judge): -0-

Holding: Judge dismissed case for lack of evidence.

I. TRIAL AWARDS CONT'D

A. Defendant Wins Cont'd

6. Washington v. Time, No. 81-7729 (Ark. Cir. Ct.,
Pulaski Co., 1983)

Award (Jury): -0-

Holding: Jury verdict for defendant.

7. Woy v. Turner, 9 Med.L.Rptr. 2447 (N.D. Ga. 1983)

Award (Jury): -0-

Holding: Jury verdict for defendant. Prior to submission to the jury, the judge in a bench ruling found plaintiff to be a public figure.

B. Plaintiff Wins

1. In re IBP Confidential Business Documents Litigation, see "News Notes," 9 Med.L.Rptr. No. 42
(11/22/83) (N.D. Iowa)

Award (Jury): \$1.5 million compensatory, \$7.25
million punitive, \$550,000 pre-judg-
ment interest in this non-media
libel action

Status: Appeal pending

2. International Security Group, Inc. v. The
Outlet Co., No. 79-CI-10293 (Tex. Dist. Ct.,
224th Jud. Dist., Bexar Co.)

Award (Jury): \$1 million punitive, \$500,000
financial injury, \$100,000 mental
anguish

Status: Post-trial motions denied; appeal to be
taken in this media libel against a local
television station

3. Lipscomb v. Richmond News, unreported (Richmond,
Va. Cir. Ct.)

Award (Jury): \$1 million compensatory, \$45,000
punitive

Holding: Compensatory damages remitted by trial
judge to \$100,000; damages only against
reporter.

I. TRIAL AWARDS CONT'D

B. Plaintiff Wins Cont'd

4. Re v. Wilmington News Journal, No. 81-C-SE-65
(Del. Super. Ct. Nov. 3, 1983)

Award (Jury): \$1.3 million compensatory

Status: Post-trial motion for new trial pending

5. Sunward Corp. v. Dun & Bradstreet, Inc., Civil
Action No. 82-K-147 (D. Colo.)

Award (Jury): \$3.8 million presumed

Status: Appeal pending

II. POST-TRIAL AND APPEALS

A. Defendant Wins (i.e., award reversed or modified)**

- *1. Beamer v. Nishiki, No. 9054 (Hawaii Oct. 4, 1983)

Award (Jury): \$35,000

Holding: Sup. Ct. of Hawaii reverses trial court's order granting plaintiff's motion for summary judgment; affirms the denial of defendant's motion for summary judgment; vacates the jury's damage award and remands the case for a complete new trial. (See LDRC Bulletin No. 6 at 11.)

- *2. Bonar v. Heth, 10 Med.L.Rptr. 1057 (Cal. Ct. App. 1983)

Award (Jury): \$17,500 general, \$1,350 special,
\$7,150 punitive

Holding: Cal. Ct. of Appeal struck down the jury's award of \$1,350 in special damages because there was no evidence to support it. The rest of the award in general and punitive damages was upheld. (See LDRC Bulletin No. 4 (Part 1) at 8.)

* Indicates case previously reported in LDRC Bulletin.

** See also case I(B)(3), above, reporting jury award, not previously listed, and modification of award, post-trial.

II. POST-TRIAL AND APPEALS CONT'D

A. Defendant Wins . . . Cont'd

3. DeGregorio v. The News Printing Co., 9 Med.L.Rptr. 1045 (N.J. Super. Ct. App. Div. 1982)

Award (Jury): \$25,000 punitive

Holding: Jury verdict is reversed; remanded for entry of judgment dismissing the complaint.

- *4. Hunt v. Liberty Lobby, 10 Med.L.Rptr. 1097 (11th Cir. 1983)

Award (Jury): \$100,000 compensatory, \$550,000 punitive

Holding: Remanded for a new trial because erroneous jury instructions were given. (See LDRC Bulletin No. 4 (Part 1) at 13.)

5. KARK-TV v. Simon, 10 Med.L.Rptr. 1049 (Ark 1983).

Award (Jury): \$12,500 compensatory to each plaintiff

Holding: Reversed and remanded.

6. Little Rock Newspapers v. Dodrill, 10 Med.L.Rptr. 1063 (Ark. 1983)

Award (Jury): \$40,000 mental anguish

Holding: Reversed and remanded.

- *7. Marcone v. Penthouse, 8 Med.L.Rptr. 1444 (E.D. Pa. 1982)

Award (Jury): \$30,000 compensatory, \$537,000 punitive

Holding: New trial ordered unless plaintiff accepts remittitur to \$200,000 punitive. (See LDRC Bulletin No. 4 (Part 1) at 14.)

* Indicates case previously reported in LDRC Bulletin.

II. POST-TRIAL AND APPEALS CONT'D

A. Defendant Wins . . . Cont'd

8. Martinez v. Democrat Publishing Co. Inc.,
No. 81-2475-J2 (Or. Ct. App. Sept. 28, 1983).

Award (Jury): -0-

Holding: Directed verdict for defendant on plaintiff's commercial benefit claim is affirmed; unanimous jury verdict for defendant on plaintiff's false light claim is affirmed.

9. Mead v. Hicks, 10 Med.L.Rptr. 1030 (Ala. 1983).

Award (Jury): \$110,000

Holding: Reversed and remanded; trial court erred in submitting the issue of the existence of a qualified privilege to report alleged criminal act to the jury in this non-media libel action.

10. Mosrie v. Trussell, No. 82-1478 (D.D.C. Oct. 5, 1983).

Award (Judge): -0-

Holding: Directed verdict for defendant was affirmed.

11. Roshto v. Herbert, 9 Med.L.Rptr. 2417 (La. 1983).

Award (Judge): \$35,000

Holding: Judgment of the court of appeal imposing damage award and setting aside trial court judgment for defendants is reversed since evidence did not support a finding of invasion of privacy.

B. Plaintiff Wins (i.e., award affirmed or reinstated)

1. Greenmoss Builders v. Dun & Bradstreet Inc.,
9 Med.L.Rptr. 1902 (Vt. 1983), cert. granted,
52 U.S.L.W. 3369 (11/7/83, No. 83-18).

Award (Jury): \$50,000 compensatory, \$300,000
punitive

Status: Vermont Supreme Court reverses trial court grant of new trial, reinstates jury award that had been set aside by the trial judge on the ground that non-media defendant would

II. POST-TRIAL AND APPEALS CONT'D

B. Plaintiff Wins . . . Cont'd

Greenmoss Cont'd

not qualify for protection under Gertz. (N.B.: Certiorari was granted by U.S. Supreme Court on November 7, 1983, to review this ruling--see Supreme Court Report, supra, in this Bulletin.)

2. Lent v. Huntoon, 9 Med.L.Rptr. 2547 (Vt. 1983)

Award (Jury): \$15,000 compensatory, \$25,000 punitive

Holding: Jury verdict in this non-media action by employee against employer is affirmed.

3. Macon Telegraph v. Elliot, 9 Med.L.Rptr. 2392 (Ga. 1983)

Award (Jury): \$50,000 actual, \$150,000 punitive

Holding: Georgia Supreme Court granted certiorari but then vacated its own writ; Georgia Court of Appeals had affirmed the damage award, thereby leaving in effect the jury's \$200,000 verdict.

4. Miami Herald Publishing Co. v. Frank, No. 82-1190 (Fla. Dist. Ct. App. Oct. 18, 1983)

Award (Jury): \$30,000 compensatory

Holding: Jury verdict affirmed.

III. NOTE ON TAX TREATMENT OF LIBEL DAMAGE AWARDS

These cases arose out of older libel awards for compensatory and punitive damages and as such, they are not current cases for purposes of the LDRC Damages Watch; however, their holding is of some significance and should be noted: Church v. Commissioner, 9 Med.L.Rptr. 1883 (T.C. 1983) (damages awarded in this libel action, both compensatory and punitive, were received on account of personal injury, falling within the meaning of Sect. 104(a)(2) of the Internal Revenue Code, thereby excluding the award from income for federal tax purposes); Roemer v. Commissioner, 9 Med.L.Rptr. 2407 (9th Cir. 1983) (Ninth Circuit held that both the punitive and compensatory damages awarded in this libel action are excludable from gross income on account of personal injury under Sect. 104(a)(2), reversing a contrary ruling of the U.S. Tax Court).

JURIES AND DAMAGES: COMPARING THE MEDIA'S LIBEL EXPERIENCE TO OTHER CIVIL LITIGANTS

Over the past few years LDRC has gathered and reported data concerning damage awards in libel (and privacy) actions. Trends thus documented revealed alarming rates of plaintiff successes at the trial level, with upwards of 8 or 9 out of 10 cases tried to juries lost by media libel defendants. (See Damages Watch section of this Bulletin, supra.) Additionally, LDRC has reported on the staggering growth in the size of jury awards reported, with million-dollar damage assessments rapidly becoming the rule rather than the exception at the trial level. With these kinds of ominous statistics in mind, LDRC sought to put recent trends into more meaningful perspective by comparing them with the related experiences of defendants in other kinds of general civil litigation. LDRC was fortunate to have the benefit of the experience and insight of James J. Brosnahan, senior litigating partner in the San Francisco firm of Morrison & Foerster, who addressed this issue at the Libel Defense Workshop sponsored by LDRC, ANPA and NAB in Chicago in August of 1983. Although no transcript of the Workshop was made, since that Workshop Mr. Brosnahan has generously made the source materials upon which he relied in his talk available to LDRC in order that we might summarize them for the benefit of LDRC Bulletin readers.

(i) Plaintiff/Defendant Success Rates

Fascinating data provided in a recent study of twenty years of civil jury trials in Cook County, Illinois,* albeit a limited geographical sampling, provides some indication of the degree to which media libel litigants are apparently faring significantly more poorly than the average civil litigant in terms of plaintiff vs. defendant success rates. The Institute for Civil Justice (ICJ), an adjunct of the Rand Corporation, conducted the largest survey of civil juries ever undertaken, based on over 9,000 civil jury trials in Cook County, between 1960 and 1979, in both state and federal trial courts. Included in this sample were 11 types of civil cases, including automobile accident, professional malpractice and product liability. The overall aggregate proportion of plaintiffs' victories, in all cases, over the twenty year period, was 51%.

* Peterson and Priest, "The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979," FIC Quarterly 361 (Summer 1982).

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This percentage varied significantly from one type of case to the next, from a low of 33% plaintiffs' success in professional malpractice trials and 38% in product liability actions to a high of 60% in contracts and business torts cases and 63% in worker injury actions. In between were found intentional torts and injury to property at 43%, and automobile accident, common carrier, street hazard, "dramshop" and "miscellaneous" at slightly over 50%.

Although the variation in these figures is significant, as between different causes of action, and also over time, it is highly noteworthy that none of the plaintiff success rates found comes close to approaching the rates documented by LDRC in recent libel trials. Overall the LDRC data, covering some 100 libel jury trials over the period 1980-1983, indicates an 83% plaintiff success rate--a full 20% higher than the highest category on the ICJ Study and more than 30% higher than average. Moreover, the earlier study by Professor Franklin (see LDRC Bulletin No. 4 (Part 1) and 2 and Table 1 at 5), covering the period 1976-1980, identified precisely the same high 83% plaintiff success rate! Clearly, media libel defendants are faring poorly. Precisely why this is so remains to be explained.

(ii) Size of Damage Awards

Data also provided in the ICF Cook County study as well as a study published last year by Jury Verdict Research, Inc., confirms that media libel defendants are not alone in experiencing rapid increases in the average size of damage awards, or in the dramatic proliferation of million-dollar "mega verdicts." Nonetheless, when the abstract psychic nature of defamation injury is considered in contrast to the massive and permanent physical debilitation and lifelong expense that often is the basis for huge awards in the areas, for example, of medical malpractice and product liability, it is difficult to justify recent trends in libel damage awards or to view the mega-awards in libel as anything but punitive awards intended to punish unpopular parties or disfavored expression.

A brief look at the data is illuminating. The ICF Cook County damages data are out of date, extending through 1979 only, and therefore cannot be considered fully comparable to the Jury Verdict Research and LDRC data, discussed below, which cover the more recent periods of 1980-82 and 1980-83 respectively. The ICF findings are nonetheless worth reviewing for the perspective they provide on the more recent trends. Thus according to ICF, the average jury award in Chicago doubled over the 1970s, after it showed no change from 1960 to the early 1970s. This increase in the '70s is entirely attributable

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to the larger awards (top 25%), with the largest awards (top 10%) more than doubling in the 1970s. The largest single category of increase was professional malpractice awards, which increased 700% during the early 1970s but then decreased somewhat in the late 1970s. The average for all awards during the 1960s (computed in 1979 dollars) was \$30,000. By the last five years of the 1970s it was \$69,000. As to specific categories, the average product liability award was \$377,000 for the period 1975-79. In 1974, the worst year recorded, malpractice awards averaged \$845,000, but only \$370,000 for the period 1970-74, and this dropped to \$210,000 for the period 1975-79. Worker injury awards averaged \$250,000, and street hazard awards averaged \$166,000, during the same period.

The Jury Verdict Research, Inc. (JVR), data are more current, covering up to the period 1980-82.* JVR's average for 332 product liability awards during that period was \$785,651. Excluding million-dollar awards, that figure drops to \$278,226. JVR's average for 322 medical malpractice awards during the same period was \$665,764. Excluding the million-dollar awards, the average drops to \$238,032. JVR also notes the number of million-dollar awards in each category. During the period 1980-82 there were 122 million-dollar awards out of 322 product liability verdicts. Thus, 37% of the product liability verdicts involved million-dollar awards. Regarding medical malpractice, there were 79 million-dollar awards out of 322, or 24.5%. Finally, JVR notes the overall dramatic growth in million-dollar verdicts for all recorded individual personal injury actions. To give perspective, the first million-dollar award was not entered until 1962.** During the 1960s no year saw more than 5 million-dollar awards--and remember, this is for all personal injury actions. It was not until 1971 that the million-dollar awards broke double figures--15 that year. In 1976, the pace of million-dollar awards increased dramatically--47 that year, compared to 26 in 1975. Then 70 in 1977; 74 in 1978; 106 in 1979; 130 in 1980; and 235 in 1981. Total recorded million-dollar awards, through part of 1982--869. JVR provides the following noteworthy rationale for such huge awards:

* Jury Verdict Research, Inc., "Injury Valuation Reports, Current Award Trends," No. 270 (Solon, Ohio, 1983). The 1982 reporting year is only partial in report No. 270.

** Interestingly, the award, \$3,500,000, was in a libel action by John Henry Faulk against Aware, Inc. The award was later remitted to \$450,000.

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"While an award of one million dollars or more may appear unreasonable at first glance, these awards are generally made to seriously injured plaintiffs, and the jury's decision to grant such a verdict is usually based upon testimony presenting legitimate computations of the plaintiff's projected lost earnings and the medical expenses necessary to sustain him for life."

The experience LDRC has documented in libel damage awards can now be put into perspective, remembering, of course, that defamation-related injury, to the extent there is any actual injury, is rarely of a quality or degree comparable to the massive physical impact and permanent, costly physical debilitation so often caused by medical malpractice or by defective, dangerous products. LDRC has documented 22 million-dollar awards in libel cases between 1980-83. JVR indicates that from 1962 through part of 1982 there had been 15 million-dollar libel awards out of the total of 869 for all personal injury cases. Presumably there is some overlap of these figures. A fair estimate would place the total of million-dollar defamation awards at somewhere between 25 and 30 in an over-twenty-year period. However, most of these awards have been imposed in the past three years, with some half or more of these coming within the past year. This rising crescendo of million-dollar awards reflects the similar trends noted by JVR and ICJ; but it exceeds them in degree. For example, JVR's worst million-dollar year--235 in 1981--still represented only 30% of the total for all previous million-dollar awards. The 1983 libel experience represented a 50% increment.

Similarly, if one looks at the percentage of million-dollar awards in comparison to all awards in that category, one can see how frequently libel defendants are experiencing mega-awards. This experience is the same as, if not worse than, experience in the high damage award areas such as medical malpractice and product liability. Thus, in the LDRC data, million-dollar awards represent some 27.5% of all jury awards during the 1980-83 period. This is actually higher than the overall percentage of million-dollar awards in medical malpractice, which was 24.5% over the period 1980-82. The libel percentage is somewhat lower than product liability, which ran at 36.7% over the 1980-82 period. However, in 1983, million-dollar libel verdicts far exceeded even that high percentage. Thus, in its last two Damages Watch reports, published in July 1983 and January 1984, LDRC documented some 20 jury damage awards in libel actions, with 12 out of the 20 at more than a million dollars--that's 60%!

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A final measure of the relative experiences of libel and other civil personal injury defendants is the average size of damage awards. In this area, again, it is stunning to see how libel awards stack up against these other categories of awards--in high-risk activities with the potential for massive and lifelong physical injury. In fact, remarkably, recent libel awards have substantially outstripped recent medical malpractice and product liability awards, on average. Thus, for the period 1980-83, the average of 80 separate damage awards documented by LDRC was a whopping \$2,174,633! This figure dwarfs the average figures (1980-82) for medical malpractice--\$665,764--and product liability--\$785,651--noted above as compiled by JVR. Even if one excludes the 3 massive eight-figure awards* included in the LDRC data, the average still remains at a figure higher than the other two categories: \$871,891. Only if all recent million-dollar libel verdicts are excluded does the libel average of \$181,563--still a very substantial six-figure amount--fall below the average for similar figures excluding million-dollar awards in medical malpractice, \$238,032, and in product liability, \$278,226.

In sum, libel defendants are experiencing trends not only similar to, but often more adverse than, those experienced in connection with other high-stakes tort claims. One can therefore take little comfort from this data, which is particularly disquieting given the preeminent First Amendment values that are at stake in libel litigation but that are not implicated in the other areas.

* Pring v. Penthouse (\$26,535,000); Lerman v. Flynt (\$40,000,000); and Guccione v. Hustler (\$40,300,000).

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

(Part II)

On March 15, 1983, LDRC published the first in what it now appears may be a series of articles on developments concerning private figure liability standards under Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (see LDRC Bulletin No. 6 at 35-43). In Part I, questions were raised as to whether a near-universal adoption of a negligence standard is really a foregone conclusion under Gertz. While (as of the 1982 LDRC 50-State Survey) some twenty-two states had adopted one form of "negligence" standard or another, and only five states had adopted higher standards of fault, nonetheless almost half of the states had then still not definitively ruled on the matter. Also, data compiled by LDRC was cited to document the adverse consequences that can result from the application of minimal state standards of fault. For example, according to an analysis of the LDRC summary judgment study, there is a striking disparity in summary judgment success rates depending upon the standard applied, with the rate of defendant grants increased in direct relation to the degree of fault required. Similarly, an analysis of LDRC "damages watch" cases on appeal reveals no case in which a plaintiff's verdict was reversed based upon a finding of negligence, thus suggesting that the negligence standard provides no meaningful protection to libel defendants beyond requisite proof of the basic common law elements of the defamation tort.

Working from these observations, Part I concluded--despite past trends--that media defendants simply have no choice but to continue to seek more protective fault standards in states where the issue remains undecided; or, where a standard has been adopted, to seek the most favorable possible construction and application of that standard.

Since Bulletin No. 6 was published there has been--as documented elsewhere in this Bulletin (see Key Findings of the 1983 50-State Survey, supra)-- continued movement, unfortunately, toward adoption of the mere negligence standard in a number of jurisdictions that had not previously decided their private figure fault standard under Gertz. In the past year at least three states definitively adopted some kind of negligence standard (Arkansas, South Carolina and Oregon), while the issue is leaning toward negligence and pending on appeal before the highest courts in at least another three states (Florida, New Jersey and Virginia).

In this Part II of LDRC's series on private figure standards under Gertz, we present to Bulletin readers excerpts from recent briefs urging upon those courts the adoption of state fault standards more demanding of the private libel plaintiff, and presumably more protective of the libel defendant, than "mere negligence." These excerpts are indicative of the variety of legal and policy arguments that can be, and have been, made in such cases. It is hoped that by circulating such arguments broadly media defendants can begin to move the courts toward a greater receptivity to the media defense point of view on this important issue.

I. STATE COMMON LAW

Gertz left the states free to adopt the minimal fault standard the Gertz majority held was required by the First Amendment but by no means precluded the adoption of a higher standard. Since state courts are thereby left free to exercise a certain degree of discretion in the matter, it is not surprising that media defendants have recently placed substantial emphasis on pre-existing state common law precedents. These either have decided, arguably, the issue of the appropriate fault standard, or else suggest, by analogy, the degree of protection that ought to be provided to libel defendants in such cases. The first major type of state law argument proceeds from related common law privileges, such as fair report and/or fair comment on issues of public interest or concern. The second argues that one or more governing state cases--often those decided shortly before or after Rosenbloom v. Metromedia but before or at the time of Gertz--have defined the applicable fault standard and should be followed.

(i) Pre-Gertz Decisions

[Ed.: In Miami Herald v. Ane, 423 So.2d 376 (Fla. DCA 3, 1982), the Florida Third District Court of Appeal affirmed a \$5,000 compensatory damage award against the Miami Herald, holding that the applicable standard of fault in a Florida private figure libel action is negligence, and that plaintiff had sufficiently met that standard of proof. In pursuing its appeal from this 2 to 1 ruling (the dissenter would have applied an actual malice standard), the Herald argued, inter alia, that the Florida Supreme Court had already definitively adopted the actual malice standard (Petitioner's Brief,* March 23, 1983, at 31-41).]**

"ADOPTION OF THE SIMPLE NEGLIGENCE STANDARD CONFLICTS WITH THIS COURT'S ENDORSEMENT OF THE ACTUAL MALICE STANDARD FOR DEFAMATION ACTIONS INVOLVING MATTERS OF REAL PUBLIC OR GENERAL CONCERN.

"In Firestone v. Time, Inc....this Court endorsed the Rosenbloom standard requiring plaintiffs to plead and prove

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

** Note: the excerpts that follow do not include footnotes that may appear in the briefs as originally prepared by counsel.

'actual malice' in defamation actions based on news reports relating to matters of 'real public or general concern.' The rationale of Firestone remains persuasive; there have been no developments in Florida or federal law suggesting this Court would recede from this rule as a standard of Florida law and a negligence standard for expression would not be workable.

"A. In Firestone I This Court Adopted the Actual Malice Test for Cases Involving Matters of Real Public or General Concern.

"This Court decided Firestone I in 1972, after the Rosenbloom decision in 1971 but prior to the Gertz decision in 1974. It is the timing of this decision which has led some courts and commentators to question its precedential value. A careful reading of Firestone I and the subsequent decisions in Firestone II and Firestone III reveals, however, that this Court endorsed the actual malice standard as a proper means of protecting news reports relating to matters of real public or general concern because it was persuaded that such standard struck the proper balance between free speech and reputational interests. This became, and remains, the rule of law in Florida.

. . . .

"This Court's opinion in Firestone I drew on the policy analysis advanced in the Rosenbloom plurality opinion. There was no requirement, and none was recognized, that Florida follow the plurality opinion which did not have the binding precedential weight of a majority opinion of the United States Supreme Court. This Court endorsed the Rosenbloom plurality opinion because it found the reasoning of the plurality persuasive...

. . . .

"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

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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."

[Ed.: A similar argument was made to the Virginia Supreme Court in Harris v. The Gazette, Inc., unreported (Vir. Cir. Ct. Goochland Co., Law Nos. 82-16, -17 and -18) (see LDRC Bulletin No. 6 at 5) (Petition for Appeal,* May 13, 1983, at 21-23, 25).]

"(1) Sanders v. Times-World Corp. Is Controlling.

"In Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), the U.S. Supreme Court held that 'so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.' Since the plaintiffs here are private individuals, the fault standard that they must meet to recover for alleged libel is a question of Virginia law.

"When Gertz was decided in 1974, this Court had already decided Sanders v. Times-World Corp. holding that private plaintiffs seeking recovery for an alleged libel that involved a matter of public or general concern must show N.Y. Times malice. 213 Va. at 372-373. This Court said in Sanders:

"The events and happenings at Western Community College were matters of 'public or general concern.' There is no evidence in this case from which the jury could conclude that the statements...and the articles published by Times-World were made with actual malice or that they were made with reckless disregard of whether or not they were true.

"We therefore hold that the trial court did not err in entering summary judgment for the defendants.

"213 Va. at 373. To be sure, Sanders rested on the Constitutional mandate of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality decision), and Gertz overturned Rosenbloom. For at least three reasons, however, Sanders remains good law in Virginia, and the trial court erred when it held to the contrary.

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

"First, Gertz did no more than remove the Constitutional mandate in Rosenbloom that private plaintiffs, under the First Amendment, must prove N.Y. Times malice to recover if the alleged libel reported a matter of public or general concern. Thus, Gertz did not hold that state decisions based on Rosenbloom were invalid. It held only that the states were not Constitutionally required to follow Rosenbloom.

"Second, in overturning Rosenbloom, the Gertz Court can hardly be said to have repudiated the wisdom of the N.Y. Times malice standard or its application to a private plaintiff's libel action involving a matter of public or general concern. On the contrary, at least as many Justices of the Supreme Court in Gertz were opposed to the less stringent negligence standard made possible for the states in Gertz as were in favor of it. In Gertz, Chief Justice Burger and Justices Blackmun, Brennan and Douglas favored a N.Y. Times malice standard or one calling for a stricter standard of recovery. If Justice White's position in Rosenbloom, where he stated that the N.Y. Times malice standard should apply to media reports on the official action of public servants, were added to that of these four Justices, a majority of the Supreme Court would have favored a N.Y. Times malice standard under the facts of this case. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, n. 10.

"Justice Blackmun, who joined the five-man majority in Gertz with great hesitation, did so only in order to create a majority:

"As my joinder in Rosenbloom's plurality opinion would intimate, I sense some illogic [in Gertz]. ... If my vote were not needed to create a majority, I would adhere to my prior view [in Rosenbloom]. A definitive ruling, however, is paramount.

"Gertz, above, 418, U.S. at 353-354 (Blackmun, J. concurring).

"Furthermore, this Court in Newspaper Publishing Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132 (1976), had the opportunity to repudiate Sanders but declined to do so. The timing of Burke is significant. It clearly followed Gertz's invitation to the states to set their own fault standard. Moreover, the issue of Gertz's impact on Rosenbloom, and by extension on Sanders, was clearly considered in Burke. Indeed, this Court was expressly urged in Burke to renounce Sanders. But this Court declined to renounce Sanders, preferring instead to leave Sanders intact for reconsideration on another day.

...

"Since this petition presents this Court with the opportunity it did not need to resolve in the Burke case, above, 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."

(ii) Other Common Law Privileges

[Ed.: In addition to arguing that the precise matter has already been decided, a number of briefs also rely upon related state common law privileges that suggest a recognition of the need for heightened protection to be accorded, at least in reporting certain matters of special public importance. One such argument was succinctly made in another Virginia case now pending before the Virginia Supreme Court, Lewis v. Port Packet Corp., unreported (Vir. Cir. Ct. Alexandria Co., At-Law 6692) (see LDRC Bulletin No. 6 at 6) (Brief of Appellant,* Record No. 830651, February 13, 1984, at 29-30). The argument immediately follows the contention that the Virginia Gertz standard had already been determined in Sanders v. Times-World Corp.]

"This Court's decision in Sanders represented the logical development and union of the qualified privileges that Virginia has long recognized for comment or criticism upon matters of public concern, see Story v. Newspapers, Inc., 202 Va. 588, 118 S.E.2d 668 (1961); James v. Haymes, 160 Va. 253, 168 S.E. 333 (1933); Williams Printing Company v. Saunders, 113 Va. 156, 73 S.E. 472 (1912), and for statements made by one with a legitimate interest in the subject matter of the statements to others with a common interest in the subject. See Kroger Company v. Young, 210 Va. 564, 172 S.E.2d 720 (1970); Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967); Powell v. Young, 151 Va. 985, 145 S.E. 731 (1923) (per curiam on rehearing).

"These privileges, when considered together, provided the basis for the privilege recognized in Sanders. That basis is that the news media has an obligation to inform the public on matters of public concern and the public has a corresponding right to receive such information so that there may be an 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" New York Times, 376 U.S. at 269, 84 S.Ct. at 720. This obligation, and the corresponding right, are especially important in the context of a local newspaper devoted to covering the news of its community, for it is at the local level that the people have the most direct and immediate control of their government.

* Filed by Harvey B. Cohen, Joanne F. Alper and William L. Jacobson of Cohen, Gettings, Alper & Dunham, Arlington, Virginia.

. . .

"However, these limited applications of the qualified privilege offer little protection to segments of the media attempting to illuminate previously unexamined aspects of society or which report not only 'events,' but also trends, practices, mores, and conditions in the community or society. Libel and Press Self-Censorship [53 Tex.L.Rev. 422 (1975)] at pages 453-456. The reporter or publisher who tries to cover more than just 'city hall' or people who have already gained media attention, does so at the peril of having a jury, with the benefit of hindsight, find that his reporting lacked ordinary care."

[Ed.: Even more elaborate arguments from pre-existing state common law privileges were made in Florida in the Ane case, supra. One such argument was presented in an amicus brief by the author of the state's leading law review article on Florida common law privileges. See Rahdert & Snyder, "Rediscovering Florida's Common Law Defenses to Libel and Slander," 11 Stet.L.Rev. 1 (1981). (Brief of Amicus Curiae Apalachee Publishing Co.,* March 23, 1983, at 18-19, 21-26).]

"THE ANE OPINION, BY OVERSTATING THE EFFECT OF FEDERAL CONSTITUTIONAL LAW ON THE FLORIDA LAW OF DEFAMATION, CANNOT BE RECONCILED WITH THIS STATE'S COMMON LAW AND WILL LEAD TO THE EVISCERATION OF THE COMMON LAW OF LIBEL.

"A. The Ane Decision Blurs the Distinction Between Common Law and Constitutional Privileges, and Inappropriately Casts Doubt on the Continued Vitality of the Common Law of Libel.

"Chief Judge Hubbard's opinion in Ane appears to proceed from the assumption that the United States Supreme Court's rulings in the New York Times v. Sullivan line of cases have superseded Florida's common law of defamation.

. . .

"At a minimum, this Court should make clear that federal law does not subsume Florida's common law as the Ane opinion implies.

. . .

"At common law, speech is actionable when maliciously published and when it tends to subject the plaintiff to hatred, contempt or ridicule. However Florida, like other states, recog-

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nizes certain absolute and qualified privileges for speech that would be otherwise defamatory and actionable. The absolutely privileged utterance--a judge's remark from the bench, for example--can never be actionable, regardless of the speaker's motive. The qualifiedly privileged utterance can be overcome only by a showing of express malice, that is, ill-will, spite or hatred toward the plaintiff. This principle of the common law has not been changed or superseded by federal decisions.

"Much of the confusion and uncertainty surrounding contemporary defamation law springs from the difference between common law malice (ill-will, spite or hatred) and constitutional malice (knowing or reckless disregard for the truth). The Supreme Court, in formulating the actual malice (constitutional) standard, has created an additional test, it has not extinguished the common law malice standard. The effect of the Ane negligence language is to obfuscate Florida's common law of qualified privilege, and cannot be reconciled with Florida cases.

. . .

"Focusing on the social value of public debate, as a matter of common law the Florida Supreme Court adopted a qualified privilege for 'fair comment on a public matter' prior to Rosenbloom v. Metromedia, Inc. This common law qualified privilege was reaffirmed as recently as Gibson v. Maloney, 231 So.2d 823, 826 (Fla. 1970), more than one year prior to Rosenbloom. That the United States Supreme Court subsequently receded from the Rosenbloom plurality's constitutional privilege for 'events of public or general interest' did not and could not 'overrule' or disturb a Florida Supreme Court ruling providing greater protection than that mandated later as a constitutional minimum.

. . .

"Media defendants, just as any other defendants, are entitled to both common law and federal constitutional protections. If the subject is a 'public matter' under Gibson and the plaintiff is a private figure such as Aurelio Ane, the common law requires a showing of express malice before the plaintiff may recover, and federal constitutional law requires a showing of at least 'some fault.' Gertz. It is in this very situation, then, now before this Court, that Florida's century-long commitment to free speech and free press provides greater protection to the defendant than does federal constitutional law. To suggest that Florida courts, by seeking to follow federal cases, are dependent upon the United States Supreme Court to give meaning to Florida's common law 'stands Florida defamation law on its head.' Ane, 423 So.2d at 385. The Gertz Court clearly intended just the opposite: great deference to the states' resolution of the question.

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"Although the appropriate standard of fault under the First Amendment for a private figure plaintiff is now the question before this Court, that standard of fault has already been settled as a matter of Florida common law. The Miami Herald in this case was entitled to a showing of express malice, at the least, before the plaintiff could recover.

"C. Gertz Adopted State-by-State Experimentation To Determine an Appropriate Libel Standard. Florida Should Recognize a Constitutional Standard Similar to its Common Law Privilege for Publication of Matters in the Public Interest.

"Close analysis of the Gertz decision shows that the Court intended to defer to the states' determination of the appropriate standard of fault in a private figure plaintiff defamation action. That standard, the Court said, must at a minimum require the showing of 'some fault' on the part of the defendant. To the extent that the Gertz opinion prohibited strict liability for defamation at common law, the Ane opinion is correct; but neither Gertz nor any other Supreme Court case can be read as otherwise obliterating the common law of Florida or of any other state. In fact, Gertz invites, if not requires, state-by-state development of the law of libel.

II. STATE CONSTITUTIONAL LAW

[Ed.: To bolster or supplement state common law arguments, defense counsel have also looked to the free press and related clauses of their own (and other) state constitutions. The constitutional argument proceeds from the notion that the state's press clause must be read independently of the First Amendment and that it must be read to provide greater, or at least different, protection to the media in defending libel actions beyond Gertz's minimum standards. One such argument was recently made in Curran v. Aylesworth Communications Corp., a case pending in New Jersey, where the state's highest court has from time to time indicated its willingness to go beyond federal constitutional standards in construing the state's constitution and where the particular free press clause provides some textual basis for going beyond the First Amendment. (Brief in Support of Defendants Motion for Leave To Appeal,* April 1983 at 14-16.)]

* Filed by Gerard H. Hanson of Brener, Wallack & Hill, Princeton, New Jersey.

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"A. Article 1, Section 6 of the New Jersey Constitution Mandates that the Press Receive Broad Constitutional Protections.

"It is well established under our system of federalism that no decision of the United States Supreme Court can bind a state court from enforcing privileges found in a state constitution--even though the United States Constitution would not require such recognition. This concept was articulated by the late Chief Justice Weintraub in State v. Funicello, 60 N.J. 60, 69, cert. denied, 408 U.S. 942 (1972), as follows: 'As to federal issues, the Federal Supreme Court is supreme and the State Supreme Court is subordinate, while as to all other matters, the State Supreme Court is supreme and the Federal Supreme Court is subordinate.' 60 N.J. at 69.

"This division of responsibility was also recognized by the U.S. Supreme Court in Branzburg v. Hayes, 308 U.S. 665 (1972) wherein the court commented that: 'It goes without saying, of course, that we are powerless to bar state courts from responding in their own way construing their own constitutions so as to recognize a newsman's privilege [not to reveal confidential sources], either qualified or absolute.' 408 U.S. 665, 706 (1972).

"The New Jersey Supreme Court has often construed provisions of our state constitution more expansively than their federal counterparts, even when the state/federal provision contained virtually identical language. Robinson v. Cahill, 62 N.J. 473, cert. denied, 414 U.S. 976 (1973). For example, in State v. Johnson, 68 N.J. 349 (1975) the New Jersey Supreme Court held that the New Jersey Constitution imposed greater restrictions on governmental searches and seizures than those required by the federal Constitution through the Fourth Amendment.

"Defendants submit that the New Jersey Constitution enhances and extends the protection afforded to the press under the First Amendment because of the specific language of Article 1, Section 6 which provides, in pertinent part:

"No law shall be passed to restrain or abridge the liberty of speech or of the press." (Emphasis added)

"As can be seen, the language follows the First Amendment, but then significantly adds the word 'restrain.' During the Constitutional Convention in 1947, it was proposed that the free speech and press provisions as originally enacted in 1844 be discarded in favor of the language conforming exactly to the language of the federal Constitution's First Amendment; III. State of New Jersey Constitutional Convention of 1947 at 168. That proposal was rejected and the 1844 provision was re-enacted. Id.

at 184-185. This is the language which exists today. In view of the constitutional delegation's explicit rejection of the First Amendment language in favor of the much stronger 'restrain or abridge' language, it is evident that our constitutional fathers intended to provide greater freedom of the press through the state Constitution than existed under the First Amendment.

"We respectfully submit that to give the word 'restrain' effect in Article 1, Section 6, this court must provide substantially greater free press protection than it is compelled to give under the First Amendment. To give full expression to the enhanced press protection of Article 1, Section 6, we urge this court to adopt the New York Times actual malice test as the applicable standard to be considered in evaluating defendant's conduct in publishing the complained of language. Furthermore, we respectfully urge this court to direct plaintiff to prove that defendants published with actual malice by a burden of 'clear and convincing' evidence. Defendants submit that the New Jersey Constitution so requires."

[Ed.: Some constitutional arguments of this kind, it is obvious, are at least in part dependent upon the textual and contextual circumstances and prior construction of the particular constitutional provision at issue. However, many state press clauses are similar if not identical and similar arguments will therefore also be applicable from one state to the next, at least by analogy. One example of this use of another state's constitution is found in the case of Bank of Oregon v. Independent News, Inc., 670 P.2d 616, 9 Med.L.Rptr. 2425 (Ore. Ct. App. 1983), taking off from the appeal to state experimentation and broad construction of its free press clause. (Petition for Review of Independent News, Inc., et al.,* October 12, 1983, at 8-10.)]

"1. The Oregon Constitution Supports a Standard of Liability Higher Than Negligence.

"What the Oregon Constitution requires, or will or will not permit in setting a standard of liability in defamation actions is a fundamental and intricate legal question. The Court of Appeals could 'find no basis for interpreting the language of Article I, sections 8 and 10, as embodying a general requirement that a plaintiff can recover for injury to reputation only if he proves culpability greater than negligence on the defendant's part.' Bank of Oregon v. Independent News, Inc., slip op. at 20 (October 12, 1983). But the bare language of a constitution has little vitality until it is infused with meaning by the appellate court.

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

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Nothing in the language of the First Amendment embodies any requirement at all regarding standards of fault in defamation cases, yet a wealth of law has emanated from the language of that amendment. This court can and must go beyond the bare words of the constitutional provisions and render a positive opinion showing the place of these provisions in Oregon's law of defamation.

"The responsibility for abuse imposed by Article I, section 8 does not foreclose the qualified privilege of a higher standard of liability than negligence. Abuse, as it is used in the Constitution, is a relative term. Numerous absolute and qualified privileges are recognized in Oregon because of the importance placed upon certain types of speech and a defamatory utterance is not an abuse if it is privileged. (See Respondents Brief at 29-30.) Neither would a higher standard of liability violate Article I, section 10 of the Constitution because the guarantee of 'a remedy by due course of law for injury...[to] reputation' is not violated unless a remedy is 'wholly denied.' Davidson v. Rogers, 281 Or. 219, 222, 547 P.2d 624 (1978).

"The Oregon Supreme Court has not hesitated to go beyond the words of Article I, Section 8 in defining the parameters of free expression. In Wheeler v. Green, 286 Ore. 99, 118-19, 593 P.2d 777 (1979), the Court determined the limits of 'responsibility' for abuse, not from the specific language of the Constitution, but from the Court's sensitivity to freedom of expression:

"It is true that Article I, §8 does not by its terms limit the extent of a defendant's 'responsibility' for defamation to that which is required to satisfy the protection which a plaintiff is guaranteed by Article I, §10. In the sensitive area of free expression, however, the threat of large damage recoveries can easily inhibit the exercise of freedom of constitutionally protected expression, as well as its abuse.

"Even more than punitive damages, a negligence standard will inhibit the exercise of free expression.

"The initiative and referendum powers reserved by the people of Oregon in their Constitution compel a policy of encouraging the media to investigate and speak out on issues of public importance. Under Article IV, section 1, the citizenry is itself a legislative body; but unlike the elected legislature, it does not have paid investigators and researchers to furnish the information it needs to legislate intelligently. The citizens

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must rely on the media to fulfill the investigative and communicative functions of the legislative process. An actual malice standard encourages this communication and is entirely consistent with the populist Oregon tradition embodied in the initiative and referendum provisions of the Constitution.

"It is significant that the Court of Appeals ignored Indiana's adoption of an actual malice standard based upon its state constitution. See Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), cert. denied, 424 U.S. 913 (1976). Article I, sections 8 and 10 of the Oregon Constitution were adopted, almost verbatim, from the Indiana Constitution of 1851. H. Carey, A History of the Oregon Constitution, 469 (1926). The Indiana court's decision is entitled to consideration in this Court's interpretation of the Oregon Constitution."

[Ed.: Finally, if before the right court, one can appeal to the court to strike out boldly in new directions, turning the state constitution into a tool for circumventing the current U.S. Supreme Court's apparent reluctance to indulge in further expansion of libel protections under the First Amendment. An example of such an approach occurs in the Bank of Oregon case, supra (Brief of Amicus Curiae American Civil Liberties Union of Oregon, * December 13, 1982, at 2-3, 5-9).]

"I. NO RIGHT OF ACTION FOR DEFAMATION SHOULD BE
RECOGNIZED FOR SPEECH RELATING TO A MATTER OF
PUBLIC CONCERN.

. . . .

"The ACLU believes that this principle [absolute protection for speech relating to any subject of public concern] should be adopted as the law of Oregon, under Article I, section 8 of the Oregon Constitution, and that it should also be recognized as the proper application to libel law of the First Amendment to the Federal Constitution.

. . . .

"The shifting standards and inconsistent results in the United States Supreme Court's libel decisions are strikingly similar to those found in its search and seizure decisions and its equal protection decisions. It is the inconsistency and unpredictability of results in the latter two areas that are responsible, in large measure, for the Oregon Supreme Court's decisions to establish independent standards in those areas as matters of

* Filed by Charles F. Hinkle of the American Civil Liberties Union, Portland, Oregon.

state constitutional law. State v. Caraher, 293 Or. 741, 749, ____ P.2d ____ (1982) ('Eight years of uniformity with U.S. Supreme Court decisions has not, however, brought simplification to the law of search and seizure in this state.');

Hewitt v. State Accident Insurance Fund Corp., ____ Or. ____, ____ P.2d ____ (November 16, 1982) (referring to 'apparent inconsistency of results' in U.S. Supreme Court sex discrimination cases, which have applied a 'kaleidoscope of standards and rationales').

"There is ample precedent, therefore, for Oregon courts to recognize state constitutional guarantees stronger than those established by the United States Supreme Court in construing the federal Constitution. Indeed, in the area of free speech guarantees, the Oregon Supreme Court has already done so, for it is settled that Article I, section 8 provides 'a larger measure of protection' to speech than does the First Amendment, and that it is 'more explicit' in its protection than is the First Amendment. Deras v. Myers, 272 Or. 47, 64, 535 P.2d 541 (1975); In re Richmond, 285 Or. 469, 474, 591 P.2d 728 (1979). For that reason, both the Supreme Court and this Court are now deciding 'free speech' cases by applying Article I, section 8, without reference to the First Amendment. State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982); State v. Frink, 60 Or. App. ____, ____ P.2d ____ (decided November 10, 1982).

"This Court has the opportunity, therefore, to clarify the law of libel in Oregon, and to establish a stronger basis of protection for speech on matters of public concern, by ruling that Article I, section 8 of the Oregon Constitution bars any cause of action based on speech relating to such matters, or, in the alternative, by recognizing an absolute privilege for such speech under the common law. The cases now pending before this Court provide an appropriate occasion to do so, for the plain fact is that the First Amendment, as interpreted by the present U.S. Supreme Court, is an unreliable reed to lean upon for the protection of speech concerning public affairs. The Court's shifting standards, and its general retreat from the premise underlying New York Times, have led Irving R. Kaufman, former Chief Judge of the Court of Appeals for the Second Circuit, to conclude that 'the time has come to acknowledge that this exercise in constitutional intervention [into libel law] has been a stunning, if well-intentioned, failure,' because the constitutional standards that have evolved since New York Times was decided 'no longer provide any meaningful protection to the media in a defamation action.' I. Kaufman, 'The Media and Juries,' New York Times, November 4, 1982.

"It would make little sense, of course, to adopt the kind of privilege proposed here, and then to define the term 'matter of public concern' in a narrow and crabbed fashion. The whole point of the proposed privilege is to give the widest possi-

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ble latitude to speech, and to let the people themselves, not the courts, and not some other branch of government, determine what is of 'public concern.' Article I, section 8 of the Oregon Constitution protects 'the right to speak, write, or print freely on any subject whatever' (emphasis added), so whether or not Alexander Meiklejohn was correct in his view that the First Amendment protects only communications that have to do with the process of self-government, that view cannot possibly apply to the Oregon constitutional guaranty. It is an elitist view, after all, for it implies that the kind of communication that is of most interest and concern to the majority of the citizens of this country is not deserving of constitutional protection. The National Enquirer is read by many more Americans each week than is the New Republic or the National Review and the Oregon Constitution protects the former just as much as the latter.

"The same point can be made, however, without reference to the American public's taste for gossip and yellow journalism; on a far more serious level, as a leading First Amendment scholar has pointed out, 'If it is important for a citizen who suspects the city treasure of stealing taxpayers' money to speak up and say so, it would seem just as important that similar suspicions be aired about a merchant who may be fleecing customers, an auto mechanic making unsafe car repairs, a doctor giving harmful advice to patients, or a father sexually molesting his daughter.' F. Haiman, Speech and Law in a Free Society, 53 (1981). Surely the ethical standards and business judgment of a bank that has business dealings with hundreds of individuals every day are matters of genuine public concern under any standard. For that reason, the ACLU urges this Court to affirm the judgment in the Bank of Oregon case, and to do so by adopting, as a matter of state constitutional or common law, an absolute privilege for speech relating to matters of public concern, and to define 'matters of public concern' (again, as a matter of state law) in the broadest possible terms."

[Ed.: In Part III of this article, to be published in LDRC Bulletin No. 10, we shall continue this elaboration of the arguments currently being made to support higher standards of fault in private figure libel actions under Gertz, including public policy arguments, arguments based upon the practical and other effects of the negligence standard, and policy and practical arguments in favor of particular types of standards higher than mere negligence, including gross negligence and actual malice.]

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<u>CASE NAME / COURT</u>	<u>AREA OF LAW</u>	<u>TOPIC</u>
<u>Auditory Instrument v. ABC</u> N.D. Ill.	Defamation	Discovery
<u>Bank of Oregon v. Independent News</u> Ore. Sup. Ct.	Defamation	Private Figure Under <u>Gertz</u>
<u>Braig v. Field Communications</u> U.S. Sup. Ct. / Pa.	Defamation	Opinion
<u>Braig v. Field Communications</u> U.S. Sup. Ct. / Pa.	Defamation	Public Official
<u>DeRoburt v. Gannett</u> Cir. Ct. / Hawaii	Defamation	Motion To Dismiss (Act of State Doctrine)
<u>Dun & Bradstreet v. Greenmoss</u> U.S. Sup. Ct. / Ga.	Defamation	Damages Under <u>Gertz</u> (Non-media defendant)
<u>Edgehill v. Municipal Publ.</u> Pa. Ct. Com. Pleas / Phila. Co.	Defamation	Summary Judgment
<u>Flynn v. Higham</u> Cal. Ct. App.	Defamation	Survivability
<u>Galloway v. CBS</u> Cal. Super. Ct. / L.A. Co.	Defamation	Actual Malice
<u>Galloway v. CBS</u> Cal. Super. Ct. / L.A. Co.	Defamation	Truth
<u>Golden v. Elmira Star-Gazette</u> N.Y. Sup. Ct., Ontario Co.	Defamation	Motion To Dismiss
<u>Golden v. Elmira Star-Gazette</u> N.Y. Sup. Ct., Ontario Co.	Defamation	Opinion
<u>Harris v. The Gazette</u> Va. Sup. Ct.	Defamation	Damages
<u>Harris v. The Gazette</u> Va. Sup. Ct.	Defamation	Public Concern Under <u>Gertz</u>

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<u>CASE NAME / COURT</u>	<u>AREA OF LAW</u>	<u>TOPIC</u>
<u>Lane v. Arkansas Valley Publ.</u> <u>Colo. Ct. App.</u>	Defamation	Actual Malice
<u>Lane v. Arkansas Valley Publ.</u> <u>Colo. Ct. App.</u>	Defamation	Opinion
<u>Lipscomb v. Richmond Newsp.</u> <u>Va. Cir. Ct.</u>	Defamation	Damages
<u>Parker v. Palm Beach Newsp.</u> <u>Fla. Ct. App.</u>	Defamation	Private Figure Under Ger
<u>Parker v. Palm Beach Newsp.</u> <u>Fla. Ct. App.</u>	Defamation	Public Figure / Official
<u>Parker v. Palm Beach Newsp.</u> <u>Fla. Ct. App.</u>	Defamation	Summary Judgment
<u>Rinaldi v. Viking Press</u> <u>N.Y. Sup. Ct. App. Div.</u>	Defamation	Republication
<u>Rinaldi v. Viking Press</u> <u>N.Y. Sup. Ct. App. Div.</u>	Defamation	Substantial Accuracy
<u>Rinaldi v. Viking Press</u> <u>N.Y. Sup. Ct. App. Div.</u>	Defamation	Summary Judgment
<u>Ronald Re v. Gannett</u> <u>Del. Super. Ct.</u>	Defamation	Damages
<u>Roessler v. Aylesworth</u> <u>N.J. Sup. Ct.</u>	Defamation	Hyperbole
<u>Roessler v. Aylesworth</u> <u>N.J. Sup. Ct.</u>	Defamation	Opinion
<u>Roessler v. Aylesworth</u> <u>N.J. Sup. Ct.</u>	Defamation	Public Figure
<u>Roessler v. Aylesworth</u> <u>N.J. Sup. Ct.</u>	Defamation	Summary Judgment
<u>Simms v. Calcasieu Television</u> <u>La. Ct. App., 3d Cir.</u>	Defamation	Summary Judgment
<u>Springer v. Viking Press</u> <u>N.Y. Ct. App.</u>	Defamation	Of and Concerning

<u>CASE NAME / COURT</u>	<u>AREA OF LAW</u>	<u>TOPIC</u>
<u>Tavoulareas v. Washington Post</u> <u>D.D.C.</u>	Defamation	Damages
<u>Valentine v. CBS</u> <u>Cir. Ct. / Fla.</u>	Defamation	Defamatory Meaning
<u>Valentine v. CBS</u> <u>Cir. Ct. / Fla.</u>	Defamation	Summary Judgment
<u>Valentine v. CBS</u> <u>Cir. Ct. / Fla.</u>	Defamation	Truth
<u>Valentine v. CBS</u> <u>Cir. Ct. / Fla.</u>	Invasion of Privacy	Disclosure of Intimate Facts
<u>Valentine v. CBS</u> <u>Cir. Ct. / Fla.</u>	Invasion of Privacy	Statutory Privacy
<u>Wentworth Military Academy</u> <u>v. Taft Broadcasting</u> <u>W.D. Mo.</u>	Defamation	Defamatory Meaning
<u>Wentworth Military Academy</u> <u>v. Taft Broadcasting</u> <u>W.D. Mo.</u>	Defamation	Neutral Reportage
<u>Wentworth Military Academy</u> <u>v. Taft Broadcasting</u> <u>W.D. Mo.</u>	Defamation	Truth

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LDRC BRIEF BANK -- BY AREA OF LAW AND TOPIC

<u>AREA OF LAW</u>	<u>TOPIC</u>	<u>CASE NAME / COURT</u>
Defamation	Actual Malice	<u>Galloway v. CBS</u> Cal. Super. Ct. / L.A. Co.
Defamation	Actual Malice	<u>Lane v. Arkansas Valley Publ</u> Colo. Ct. App.
Defamation	Damages	<u>Harris v. The Gazette</u> Va. Sup. Ct.
Defamation	Damages	<u>Lipscomb v. Richmond Newsp.</u> Va. Cir. Ct.
Defamation	Damages	<u>Ronald Re v. Gannett</u> Del. Super. Ct.
Defamation	Damages	<u>Tavoulareas v. Washington Po</u> D.D.C.
Defamation	Damages Under Gertz (Non-media defendant)	<u>Dun & Bradstreet v. Greenmos</u> U.S. Sup. Ct. / Ga.
Defamation	Defamatory Meaning	<u>Valentine v. CBS</u> Cir. Ct. / Fla.
Defamation	Defamatory Meaning	<u>Wentworth Military Academy v</u> <u>Taft Broadcasting</u> W.D. Mo.
Defamation	Discovery	<u>Auditory Instruments v. ABC</u> N.D. Ill.
Defamation	Hyperbole	<u>Roessler v. Aylesworth</u> N.J. Sup. Ct.
Defamation	Public Concern Under <u>Gertz</u>	<u>Harris v. The Gazette</u> Va. Sup. Ct.
Defamation	Motion To Dismiss (Act of State Doctrine)	<u>DeRoburt v. Gannett</u> Cir. Ct. / Hawaii
Defamation	Motion To Dismiss	<u>Golden v. Elmira Star-Gazett</u> N.Y. Sup. Ct., Ontario Co.

<u>AREA OF LAW</u>	<u>TOPIC</u>	<u>CASE NAME / COURT</u>
Defamation	Neutral Reportage	<u>Wentworth Military Academy v. Taft Broadcasting</u> W.D. Mo.
Defamation	Of and Concerning	<u>Springer v. Viking Press</u> N.Y. Ct. App.
Defamation	Opinion	<u>Braig v. Field Communications</u> U.S. Sup. Ct. / Pa.
Defamation	Opinion	<u>Golden v. Elmira Star-Gazette</u> N.Y. Sup. Ct., Ontario Co.
Defamation	Opinion	<u>Lane v. Arkansas Valley Publishing</u> Colo. Ct. App.
Defamation	Opinion	<u>Roessler v. Aylesworth</u> N.J. Sup. Ct.
Defamation	Private Figure Under <u>Gertz</u>	<u>Bank of Oregon v. Independent News</u> Ore. Sup. Ct.
Defamation	Private Figure Under <u>Gertz</u>	<u>Parker v. Palm Beach News</u> Fla. Ct. App.
Defamation	Public Figure	<u>Roessler v. Aylesworth</u> N.J. Sup. Ct.
Defamation	Public Figure / Official	<u>Parker v. Palm Beach Newsp.</u> Fla. Ct. App.
Defamation	Public Official	<u>Braig v. Field Communications</u> U.S. Sup. Ct. / Pa.
Defamation	Republication	<u>Rinaldi v. Viking Press</u> N.Y. Sup. Ct. App. Div.
Defamation	Substantial Accuracy	<u>Rinaldi v. Viking Press</u> N.Y. Sup. Ct. App. Div.
Defamation	Summary Judgment	<u>Parker v. Palm Beach Newsp.</u> Fla. Ct. App.
Defamation	Summary Judgment	<u>Rinaldi v. Viking Press</u> N.Y. Sup. Ct. App. Div.
Defamation	Survivability	<u>Flynn v. Higham</u> Cal. Ct. App.

<u>AREA OF LAW</u>	<u>TOPIC</u>	<u>CASE NAME / COURT</u>
Defamation	Summary Judgment	<u>Edgehill v. Municipal Publ.</u> <u>Pa. Ct. Com. Pleas / Phila.</u>
Defamation	Summary Judgment	<u>Roessler v. Aylesworth</u> <u>N.J. Sup. Ct.</u>
Defamation	Summary Judgment	<u>Simms v. Calcasieu Televisio</u> <u>La. Ct. App., 3d Cir.</u>
Defamation	Summary Judgment	<u>Valentine v. CBS</u> <u>Cir. Ct. / Fla.</u>
Defamation	Truth	<u>Galloway v. CBS</u> <u>Cal. Super. Ct. / L.A. Co.</u>
Defamation	Truth	<u>Valentine v. CBS</u> <u>Cir. Ct. / Fla.</u>
Defamation	Truth	<u>Wentworth Military Academy v</u> <u>Taft Broadcasting</u> <u>W.D. Mo.</u>
Invasion of Privacy	Disclosure of Intimate Facts	<u>Valentine v. CBS</u> <u>Cir. Ct. / Fla.</u>
Invasion of Privacy	Statutory Privacy	<u>Valentine v. CBS</u> <u>Cir. Ct. / Fla.</u>

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LDRC STEERING COMMITTEE DINNER:

GENE ROBERTS WARNS OF CHILLING EFFECTS ON JOURNALISM

LDRC's annual Steering Committee meeting and dinner (described more fully in the 1983 Annual Report, *infra*) had as its theme for the evening "Libel, Juries and the First Amendment" from the judicial and press points of view. Speakers addressing this topic were Eugene L. Roberts, Jr., Executive Editor of the Philadelphia Inquirer, and the Honorable Harold R. Tyler, Jr., former United States District Judge, Southern District of New York, and senior partner in the New York City firm of Patterson, Belknap, Webb & Tyler. Master of Ceremonies for the evening's program was Fred W. Friendly, of the Columbia Journalism School and Media & Society Seminars. Roberts told those assembled that "if the trend in libel continues we will not be facing merely a chill, but a deep, penetrating freeze." Judge Tyler, on the other hand, warned the press not to be overly sensitive to phenomena that are being experienced by most large institutions. According to Tyler, "When you defend cases before juries, you're bound to lose a few." The press, said Tyler, does not get "singled out."

Because of the importance of his remarks (the full text of which is available from LDRC) and their dramatic articulation of the real "chilling effect" on journalism of the mega-awards for damages being experienced by the media, we reprint the following verbatim excerpts from Gene Roberts's dinner speech:

"You don't have to look closely at many libel cases in the last three years to know that the First Amendment may be in more jeopardy than at any time in its nearly 200 years of existence. I realize this is a sweeping statement, but the facts, alas, more than justify it. Of the last 82 cases to go before juries, as you will no doubt hear repeatedly tonight, the press and radio and television have lost 85%. True, on appeal, we have gone on to have more than 65% of the unfavorable verdicts set aside, and another 10% of the awards substantially reduced. But on the long road to ultimate victory in the appellate courts, real violence is being done to the concept of free speech and, thus, to the free flow of information that a democratic society must have if it is to cast its votes wisely and well.

"And, if the trend continues to escalate over the next three years, the damage may be almost incalculable. The cost of libel defense alone is enough to intimidate and silence

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many reporters and publishers on controversial issues. And then there is the paralytic effect on newsrooms of almost unlimited discovery as plaintiffs's attorneys search, under Times v. Sullivan, for evidence of malice or reckless disregard for truth. In one case alone, Herbert v. Lando, a newsman was deposed in 28 distinct sessions, which altogether produced 3,000 pages of transcript and 240 exhibits. But the expense and the long, agonizing discovery process make up merely a part of the intimidating impact of the jury trend.

...

"In ruling in such cases as Herbert v. Lando that there are virtually no limits on plaintiffs in probing into states of mind, the courts have given plaintiffs's attorneys all the running room they need to take jurors's minds off the central questions of truth and falsity. Probing into state of mind has lengthened trials to the point that the question of truth gets overwhelmed by the side issues. My paper in the last two years has endured one trial that lasted 5 weeks and another than lasted 6½ weeks. Another publication in Pennsylvania, Philadelphia Magazine, has in the past year undergone 22½ weeks in the courtroom in just one long-running case.

"Just a few years ago, many of these cases would never have got to a jury. Judges would have ruled them out on summary judgment. But, as I'm sure you all know, summary judgment, particularly in libel cases, is almost a thing of the past....

"In Pennsylvania, the State Supreme Court in 1981 overruled a summary judgment in my newspaper's favor and sent the case back to be jury-tried. This ruling made it virtually impossible for any newspaper to get summary judgment in a public official libel case in Pennsylvania. Consequently, virtually every such case now proceeds to trial. (Since the 1981 ruling that had that effect, by the way, one of the justices who participated in that decision has sued my newspaper for libel. This falls under the category of making your own rules before you order someone to the poker table.)

"So now, sophisticated legal questions like the principles set forth in Times v. Sullivan go before juries, not judges.

"And in that arena, the plaintiffs's attorneys are attacking with emotion. They are portraying their cases--even when representing politicians and governmental figures--as the lone individual fighting for his reputation against powerful and rich newspaper and television interests. They are utilizing all the tactics plaintiffs's attorneys have used in personal injury cases--stage props, including news stories and headlines blown up to

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billboard size. And they are sending a steady message to the jury, one that has worked again and again in personal injury cases: if you must err, err on the side of the individual, not on the side of the corporation. It's only money, after all, and the corporations can afford it.

"And we are responding without emotion, using the time-honored defense of truth. We are simply trying to say there was no error in our stories, or if there was error, it was without malice or reckless disregard of the truth, made in the rush and haste of trying to report quickly under the unrelenting pressure of deadlines. The Supreme Court, after all, ruled in Times v. Sullivan--very, very wisely I think--that this is the sort of error we must permit when it involves public figures in a democratic society, if we are to be free at all to inform one another on public affairs or the action of public figures.

"But juries generally get only a few sentences or, at most, a few minutes of Times v. Sullivan, in charges by judges to the jury, and that falls to cut through the days--weeks, even--of emotion-laden argument laid down by plaintiffs's attorneys.

"Those of us who have witnessed libel trials recently know that the defense is usually not getting the same latitude as the plaintiff. Recent court rulings, such as in the Lando case, have given plaintiffs the broadest possible latitude to inquire into reporters's and editors's state of mind....Increasingly, because of this latitude, plaintiffs's lawyers are trying to confuse juries--and succeeding. They are spending less time on what was actually in the stories, and more time in the courtroom on what is in the reporters's notebooks. Jurors--most laymen for that matter--don't understand that back of stories of a few hundred words are often thousands of words of notes and research. And plaintiffs's lawyers are making it appear that in distilling the research down to a printable size, reporters are unfairly marshalling their facts and distorting. The Catch-22 of all this is: the better and more conscientious the reporter, the vaster the research, and thus the greater the reporter's vulnerability to this line of attack from the plaintiff.

"Critics of the press like to believe that the increase in libel trials and adverse verdicts will have the effect of increasing press responsibility or promoting the establishment of internal safeguards against inaccuracies or unfairness. Nothing could be farther from the truth. To the contrary: the escalating jury awards almost certainly will undo the considerable progress we have made toward more internal examination.

"Look at the Tavoulareas case. The worst strike against the Washington Post was that a copy editor had questioned the thrust of the Tavoulareas story in a note to another editor.

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Never mind that this is precisely what we hire copy editors to do--raise questions again and again, over and over, all night long, if necessary, to ensure accuracy. In the jurors's minds, The Post got no credit for setting up the procedures that allowed the copy editor to be heard. It got only blame for deciding against the copy editor and printing the story.

"And look at CBS in the Westmoreland case. The gravest strike against it is an internal investigation that found there had been some mistakes, although the network, after reviewing the investigative report, concluded that the documentary's overall findings were sound.

"Written challenges from copy desks can help ensure accuracy, internal reports can help ensure fairness. But neither written reports nor written challenges will long endure when they result in multimillion-dollar libel verdicts.

...

"Meanwhile, the costs of defending against these suits mount up for the press--not so much right now as to deflect a big newspaper or television network, but more than enough to make editors of small papers hesitate before publishing any controversial story--or even to cause them, however reluctantly, to kill such a story.

"In the few short years since cases like Lando burst on the scene, it hasn't taken long to see where all this is leading. Each jury verdict begets suit after suit. The price of printing news fairly and without favor grows higher. And, as time goes on, the price of printing the news, or even of the average citizen speaking out, will become a privilege that only the very wealthy can afford to exercise.

...

"[Y]ou who are defense counsel will have your hands full in trials yet to come. And we, in newspapers, radio and television, have a monumental public education job ahead of us if we are to counter the attitudes on libel that are sweeping the jury rooms. And we have not even begun. Even journalists are not fully aware. I frequently encounter reporters and editors who have not heard of the appalling libel box-scores so carefully documented by the Libel Defense Resource Center. Although the Center's statistics clearly delineate a crisis that is gathering momentum like an avalanche, the last two annual conventions of both the American Society of Newspaper Editors and the Associated Press Managing Editors Association have come and gone without head-on discussions of the jury verdict trend in libel. Why is there so much silence?

"I think those who have not yet been victimized think it cannot happen to them. And those who have been victimized may fear that calling attention to themselves publicly as losers in a libel case would be tantamount to medieval lepers's ringing their bells and

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shouting 'unclean, unclean.' Our critics to the contrary, the vast majority of journalists deeply prides itself on its reputation for accuracy, and recoils in horror at the thought of adverse libel verdicts. In recent months, I have talked to two reporters only hours after they lost libel cases with verdicts in excess of a million. And seldom have I seen such pain. Or fear. Fear that they would be permanently thought reckless by their colleagues--fear that their careers were permanently derailed.

"In past subpoena and prior-restraint cases, we in journalism have warned of a phenomenon we have termed 'chilling effect.' But if the trend in libel continues we will not be facing merely a chill, but a deep, penetrating freeze. And don't think that I am even remotely engaging in rhetorical fantasy or hyperbole. The career dangers to reporters from libel losses are very real. And the dangers can be minimized by shunning controversial stories. I know one reporter who, after being sued by a politician in what I believe is a very frivolous action, asked to be excused from another assignment that was likely to be controversial. And think of the dilemma of publishers and publishing companies faced with spiraling legal costs. One sure way of reducing legal expenses is to reduce the amount of controversy the paper is covering.

"I have been talking about the damaging effect of libel suits as weapons of intimidation. The answer to that, you might say, is more nerve; more backbone; there is still room, you might say, for the brave who will not be intimidated. I reply to you that the freedom of juries in some states to award uninsured--yes, uninsured--punitive damages will ultimately take care of even the brave.

"I feel, and feel strongly, that there is no place in a society whose very foundations rest upon freedom of speech and expression for punitive damages in libel cases. It amounts to a fine, almost like a criminal penalty, for speech that some may find unpopular. Juries, after all, are average people, picked at random from the public as a whole, and our own constitutional fathers fully recognized that the popular will--the majority, even--could suppress, and even repress, as fully as any absolute despot. The First Amendment was designed to protect the press, the nation itself, from inroads upon freedom of expression by anyone, anytime, anywhere.

"Yet now we find ourselves in a state of affairs where bank embezzlers, stock swindlers, practitioners of Medicare fraud--and countless others who literally steal people's money--are almost never the targets of \$1 million fines.

...

"Meantime, the press routinely is the target of \$1 million, or more, in fines--not for crimes committed, but for practicing free speech and reporting the news.

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"You might make a case that when we injure someone it is not unreasonable to pay a compensatory award limited to proven, real damages--although the truth is, compensatory awards themselves run into the millions of dollars and often bear no relation to actual damages. But punitive damages? You can't allow them, especially at the rate currently awarded. To do so is to chill--no, to absolutely freeze--the role of the press in a democratic society. Even some of you as lawyers may be surprised that there are states in which punitive damages can't be insured against. California is one. Kansas is another. And Connecticut. And Florida. And 24 others.

"And in these states, if a small paper loses a punitive award, it will become extinct. And if a large paper has a punitive award against it that is sustained on appeal, even it may be forever crippled, chilled and, yes, frozen. The very word "punitive" harkens back to medieval times. If the king, or the mob, doesn't like the message, there is a punitive solution--burn the messenger's house, or cut out his tongue.

"There is no room for this concept in a democratic society.

"Yet, it is a real danger, and it is growing rapidly more dangerous month by month as the new wave of jury verdicts crests and crashes down on journalists who, for the most part, are working for modest salaries and long hours in unglamorous jobs to perform a role absolutely essential if voters are to know how to exercise their franchise. How much risk are we going to ask the average rank-and-file reporter or editor to endure for a greater good?

"I agree absolutely with Anthony Lewis of the New York Times and Columbia University--that seldom has the flow of information or the viability of the First Amendment been in such jeopardy as from the current trend in libel verdicts."

LDRC 1983 ANNUAL REPORT

The idea that ultimately led to the formation of the LDRC had its genesis several years ago with the informal meetings and discussions of an "Ad Hoc Libel Group"--several attorneys representing media organizations concerned about adverse developments in the libel field. Later, in 1979 and early 1980, proposals were entertained to formalize such meetings under the aegis of a new "umbrella" organization. Finally, in November, 1980, these efforts culminated in the formation of a Steering Committee, the election of a Chairman and the retention of a General Counsel for a new entity, the "Libel Defense Resource Center."

In 1981 and 1982 LDRC moved rapidly from theory to reality, firmly establishing itself as a vital and creative organization operating effectively on behalf of the entire media community. Substantial funding was provided by an impressive array of leading trade groups, professional organizations and media entities. An information bank and clearinghouse system were established and utilized by libel defendants and their attorneys. Various special projects and studies were formulated and undertaken. LDRC was increasingly looked to as a source of useful and authoritative information by attorneys practicing in the field as well as by journalists, academics, government officials and others with an interest in libel and privacy developments.

In 1983 LDRC solidified its position as the authoritative voice on media libel issues and developments. Its "Damages Watch" reports were widely covered in the media and strongly influenced a growing debate over the capacity of current libel laws to control runaway libel juries and multi-million dollar damage awards. LDRC's annual 50-State Survey established itself as the indispensable guidebook to current legal developments. Institutionally, sales of that Survey, and subscriptions to the quarterly LDRC Bulletin, enabled LDRC to move toward partial budgetary self-sufficiency, thereby helping to assure LDRC's long-term survival and continued effectiveness.

In the report that follows, more particulars of LDRC's impressive range of projects during its third year of operations are presented. The picture that emerges, we believe you will agree, is one of continued accomplishment, on behalf of LDRC's more than fifty supporting organizations as well as on behalf of the even larger number of media organizations who share a common interest in LDRC's purposes and activities.

Finally, we would, as always, add our thanks to those many, many individuals and organizations who gave their time and support--moral and financial--to LDRC in 1983. We look forward gratefully to continued support as LDRC enters its fourth year with the ambitious agenda for useful action outlined herein.

New York City
January 10, 1984

Harry M. Johnston III, Chairman
Henry R. Kaufman, General Counsel

Organization

LDRC was formed in 1981 as an unincorporated, not-for-profit tax exempt 501(c)(6) entity governed by a Steering Committee comprised of one representative from each of LDRC's supporting organizations. Under its by-laws, LDRC's day to day operations are supervised by an Executive Committee of between 9 and 13 individuals, chosen from the larger Steering Committee, headed by a Chairman selected by the Executive Committee, and administered by a retained General Counsel. LDRC maintains its headquarters and small staff at the offices of its General Counsel. Members of LDRC's Executive and Steering Committees include a number of the nation's most knowledgeable libel defense attorneys and representatives of most of the nation's leading media organizations.

Finances

In 1983, LDRC obtained voluntary contributions from 49 of its supporting organizations totalling more than \$90,000. In addition, substantial revenues were also realized from interest on income; sales of LDRC materials, including the 50-State Survey, the quarterly Bulletin, brief bank digests and photocopies; LDRC administrative fees; and profits from the LDRC/ANPA/NAB Workshop. With this money, LDRC was able to fund a total budget of \$115,000 to pay for legal fees; fees for administrative staff; stipends for law student interns; fees for other legal research; rent for office space; separate telephone lines; printing and distribution of quarterly Bulletins; the expansion and first steps toward computerization of a libel brief bank and information clearinghouse; the publication of LDRC's comprehensive 50-State Survey of legal developments; the implementation of major studies, as summarized in this report; the mounting of a major two-day libel litigation workshop in cooperation with two other associations; and all other day to day operations of the Center. LDRC was also able to retire a deficit of approximately \$13,500 carried over from 1982.

LDRC Supporters

The fifty-one organizations supporting LDRC in 1983 (up from forty-one in 1982) represent a broad spectrum of leading media groups, publishers, broadcasters, journalists, editors, authors and libel insurance carriers, some of whom may never have previously worked together in a formal way but all of whom share a common interest in responding effectively to continuing problems in the libel field. They are: Alabama Press Association; American Association for the Advancement of Science; American Broadcasting Companies, Inc.; American Newspaper Publishers Association; American Society of Journalists and Authors; American Society of Newspaper Editors; Association of American Publishers; Association of American University Presses; Authors League of America; Bantam Books, Inc.; Bergen Evening Record Corp.; The Boston Globe Foundation; CBS, Inc.; CNA, Insurance; Capital Cities Communications, Inc.; Council of

Writers Organizations; Cox Enterprises, Inc.; The Dallas Morning News; Doubleday & Company, Inc.; Dow Jones & Company; Dun & Bradstreet; Employers Reinsurance Corporation; Forbes Inc.; Gannett Co., Inc.; Hearst Corporation; Knight-Ridder Newspapers, Inc.; Macmillan Publishing Co., Inc.; Magazine Publishers Association; Media/Professional Insurance, Inc.; Mediatex Communications Corporation; Mutual Insurance Company Limited of Hamilton, Bermuda; National Association of Broadcasters; National Newspaper Association; The New York Times Foundation; News America Publishing Incorporated; Newhouse Newspapers; P.E.N. American Center; Penthouse International, Ltd.; Playboy Enterprises, Inc.; Radio-Television News Directors Association; Reporters Committee for Freedom of the Press; St. Petersburg Times; Society of Professional Journalists, Sigma Delta Chi; Student Press Law Center; Time Incorporated; The Times Mirror Company; Tribune Company (Chicago); Warner Communications, Inc.; The Washington Post Company; Writers Guild of America, East; Writers Guild of America, West.

LDRC 50-State Survey

In 1983 LDRC's most ambitious single project continued to be the annual 50-State Survey of current developments in media libel and invasion of privacy law. The 1982 Survey resulted in publication of a 650 page book providing never-before-available access to up-to-date and comprehensive summaries of the law of media libel and privacy, jurisdiction by jurisdiction, for use by the practicing attorney, journalist and scholar. The 1983 50-State Survey, 846 pages in length, was published in December 1983. A thoroughgoing revision and expansion of the 1982 edition, prepared by LDRC's state-by-state network of expert media defense firms, the 1983 Survey includes updated survey reports from every U.S. jurisdiction. Each state report, and all indexes and charts, highlight new developments for easy identification. New topics covered in the 1983 Survey include: definitions of actual malice; printer, distributor and bookseller liability; special rules for motions to dismiss; more detailed coverage of discovery; pleading; burden of proof; jury instructions; appellate review standards; invasion of privacy; related tort claims; survivability and descendability of libel and privacy claims; libel insurance; and bibliographies of relevant books and articles on state libel law and practice. The 1983 volume also includes a Foreword on Canadian defamation law by Stuart M. Robertson, one of the leading media attorneys in Canada, former in-house counsel to the CBC and author of two texts on Canadian media law. Sales of the 1982 Survey paid for the entire cost of the project and it is hoped that the 1983 Survey will be similarly self-funding.

LDRC/ANPA/NAB Libel Defense Workshop

LDRC's first education program was mounted in 1983. Co-sponsored by the American Newspaper Publishers Association and

the National Association of Broadcasters, the "Libel Defense Workshop" was held in Chicago on August 25-26. The program was oversubscribed with more than 175 paid attendees and a total audience, including panelists and speakers, of over 200. Highlights of the Workshop included videotape presentations of portions of two libel trials (Burnett--witness examination; Galloway--summation) and the three featured mealtime speakers--Judge Harold Tyler (Patterson, Belknap, Webb & Tyler, New York City); James Squires (Editor, Chicago Tribune); and James Brosnahan (Morrison & Foerster, San Francisco). Attendance at the Workshop was limited to counsel who represent libel defendants. In connection with the Workshop LDRC prepared a 914 page set of Workshop materials. This "LDRC Litigation Formbook" was comprised mainly of pre-existing litigation forms and related litigation materials organized by legal topic and/or phase of the litigation. It is expected that the Formbook will be repackaged in early 1984 in a somewhat revised version for sale to persons unable to attend the Workshop. The Formbook will include materials covering topics such as pre-publication review, procedures and guidelines; claims, retractions and corrections; libel insurance; settlements; complaints, answers, affirmative defenses, counterclaims and counteractions; motions; discovery; interrogatories; document requests; requests for admissions; protective orders; motions in limine; evidentiary problems; trial briefs; witness outlines; expert witnesses; jury selection and instructions; verdict forms; opening and closing statements; post-trial motions and appellate practice. Other LDRC Formbooks with new and pertinent materials may be published periodically if sufficient interest is evidenced.

LDRC Litigation Studies

During 1983 LDRC published two new studies on litigation trends, one on "independent appellate review" in libel actions and one on "motions to dismiss," a companion to LDRC's 1982 study of motions for summary judgment. In addition, the 1982 study of trials, damages and appeals was updated in LDRC's ongoing "Damages Watch" reports.

(i) Appellate Review Study

LDRC's "independent appellate review" study was undertaken in connection with a case now pending before the United States Supreme Court (Bose v. Consumers Union) challenging the application of special appeal procedures in libel actions. LDRC studied sixty cases in which independent appellate review was considered and found that, overall, 95% adopted the special rule. Courts that have applied the rule include 9 out of the 11 federal circuit courts of appeal and courts in 22 states. Four out of five of the awards against libel defendants, primarily media organizations, were reversed or modified on appeal when the independent review procedures were applied. This reversal modification rate is even higher than the generally high rate of reversals in all recent libel cases. Previous studies of appeals since 1976, including two by LDRC, found

that between 70 and 78% of all judgments against libel defendants were reversed or modified on appeal. Despite this high reversal rate, LDRC found, independent review has been applied with restraint and has not led appellate courts to overturn proper factual findings by juries and judges in the trial courts. It is believed that the independent review study gives ammunition to those arguing for continuation of independent review in constitutional libel actions. First, it documents how indispensable independent review has become in assuring that legally unsupportable libel awards will not be allowed to jeopardize the First Amendment rights of libel defendants. But it also demonstrates that appellate courts have not gone too far in applying the independent review procedure. In short, LDRC argued based on this study, independent review is doing what it was designed to do, in a wholly proper manner, and should be retained without limitation by the Supreme Court. The LDRC study was cited in an amicus curiae brief submitted to the U.S. Supreme Court by a group of leading media organizations, headed by the New York Times.

(ii) Motions To Dismiss

Following up on LDRC's 1982 study of motions for summary judgment, in 1983 LDRC undertook a comprehensive study of the nature and results of preliminary motions to dismiss in media libel and privacy cases. LDRC studied 95 motions to dismiss during the period 1981-1983, concluding that "the motion to dismiss procedure is an important one for media defendants." The 62 page study found that by using motions to dismiss (or demurrers), media organizations sued for libel (or invasion of privacy) are able to terminate more than 2 out of 3 cases in which such motions are made at the earliest stage of the litigation. Moreover, if partial grants are included, the dismissal study concluded that trial courts agree to dismiss at least some claims, litigants or legal issues in more than 3 out of 4 cases. The study also documented empirically what has been widely recognized --i.e., that a great many libel complaints are legally deficient and that such meritless cases can and should be disposed of at the earliest possible stage of the litigation. In other related findings the study reported that issues which were most often the subject of successful dismissal motions included gross irresponsibility (New York fault standard) (100% grant rate); intentional infliction of emotional distress and related torts (87%); invasion of privacy (all branches) (85%); opinion (80%); personal jurisdiction (79%); of and concerning (77%); defamatory meaning (68%). Generally lower but nonetheless excellent success rates were found on issues such as fair comment/report (71%); procedural matters (67%); damages (67%); and actual malice (62%). Also, defense success rates on dismissal motions did not vary significantly as between state and federal courts (70% vs. 74%), with a 67% rate where plaintiff status was unclear or undecided.

(iii) Damages Watch

In 1983 LDRC continued to monitor closely developments involving the award of damages against media defendants at trial, post trial or on appeal. This "Damages Watch" project in effect represented an ongoing updating of LDRC's major 1982 study of 54 damages cases covering the period 1980-1982. At the end of July LDRC issued a summary of the results of the latest several media libel trials, re-

porting a dramatic new upsurge in million dollar awards against the media. In a statement accompanying release of the report LDRC decried this accelerated trend, calling upon the courts to "act to gain control of this tidal wave of judgments before journalistic enterprise in the public interest fades into history." Finally, because of the continuing interest in data gathered by the Damages Watch project, a new compilation of Damages Watch reports was published by LDRC on September 1. The new publication, excerpted from LDRC Bulletins Nos. 4 through 8, described the results of LDRC's efforts to monitor libel and privacy awards against media defendants entered or appealed from during the period 1980 through July 1983. It is believed that the 90 separate cases listed present as complete a picture of recent damage awards and appeals from such awards in libel and privacy trials as is currently available. It is expected that updated LDRC Damages Watch compilations will be published periodically until a completely new consolidated damages study and analysis is prepared and published sometime in 1984.

LDRC Bulletin

In 1983 the primary means of disseminating information about LDRC's resources and materials continued to be the LDRC Bulletin. Published quarterly, the Bulletin reports on LDRC special studies and other activities, provides news of recent libel and privacy developments and lists available reports and materials which can be ordered from LDRC. In a change of policy, the 1983 Bulletin was distributed by paid subscription rather than free of charge as in previous years. The 265 subscriptions sold (at \$50 each) exceeded LDRC's 1983 target of 250 subscriptions. Income from sales of subscriptions is used to support LDRC's general budget. In 1984 LDRC hopes to increase its paid subscription base. When combined with sales of back issues, special Bulletin binders and other special reports excerpted from the Bulletin, LDRC expects the Bulletin to generate as much as \$20,000 in revenue to support programs and activities. LDRC also plans to prepare an Index to Bulletins 1-10 which will be provided to all Bulletin subscribers in the spring of 1984. 1983 Bulletins, in addition to publishing the special reports described above, covered the following key topics, among numerous others: ongoing reports of Supreme Court developments, including the annual Term-end tabulation of all pertinent cases and actions; ongoing bibliographic listings of briefs available at LDRC, organized by case name and by legal issue; a new outside study on intentional infliction of emotional distress (including LDRC findings on the subject); private figure fault standards under Gertz (including data suggesting that a "mere negligence" standard fails meaningfully to prevent the imposition of liability without fault in certain cases); plaintiffs' libel insurance; reports on the activities of several "litigious" groups; an LDRC statistical study of broadcaster experience in libel trials and appeals; and a summary of an outside study of actual jury attitudes in a recent million dollar libel damage case.

Information Services

(i) LDRC/CBS Computer Brief Bank

A special project was undertaken in 1982, with the invaluable cooperation of the CBS Law Department, to digest and computerize substantive and bibliographic information regarding briefs on file at LDRC and at CBS. The combined bibliography covered some 75 key legal issues in 125 cases and encompassed 250 legal points made in the digested briefs. Full digests and photocopies of any briefs in the LDRC/CBS brief bank can be ordered through LDRC. In 1983 LDRC continued to add additional briefs to its information bank, to digest selected issues and briefs, and to publish updated listings periodically in the LDRC Bulletin. Some 100 briefs and more than 150 brief digests, covering more than 100 key legal issues, were added to the LDRC system in 1983. Some progress has also been made toward conversion of LDRC's manual recordkeeping system to computerized data and the final steps in this process have been funded in LDRC's 1984 budget.

(ii) LDRC Case Files

In 1983 LDRC continued to maintain, update and expand its state by state files of pending libel cases. When received by LDRC, generally in advance of publication, case opinions or litigation documents are indexed by case name, state, and legal issue(s) presented. Requests for further information, briefs and other materials are then made regarding important cases and issues and periodic follow-ups are also scheduled. As of the end of 1983, LDRC had developed active files of such opinions, briefs and other materials in well over 400 cases pending in all U.S. jurisdictions.

(iii) Special Issue Files

In 1983 LDRC continued to maintain its active special issue files covering well over 100 key legal issues, closely paralleling libel and invasion of privacy issues identified in the Media Law Reporter's classification guide. These files collect materials, in addition to those contained in the active LDRC case files or general archival materials, on high priority issues such as appellate review; discovery; damages; burden of proof; motions to dismiss; reporter's privilege in libel actions; state Gertz standards; statute of limitations; summary judgment; use of expert witnesses; counterclaims for malicious prosecution; definition of actual malice and public figure; right of publicity; related editorial torts; bookseller, printer and distributor liability; invasion of privacy; venue in libel actions; and insurance among many others. Finally, special files for law review articles and a separate collection of jury instructions and other litigation forms are maintained.

(iv) Responding to Inquiries

In addition to providing general information through mass publication to LDRC's entire constituency, in 1983 LDRC counsel and staff continued to be available to answer specific inquiries from libel defendants or their counsel and other interested organizations or individuals who contacted LDRC, by telephone or by mail, for special assistance. Such assistance, which is provided either without fee or with the imposition of modest administrative fees (\$7.50

per request), ranged from simply alerting the caller or correspondent to recent developments or legal opinions and providing available briefs or materials pertinent to the particular inquiry, to more extensive legal research or investigations initiated by LDRC counsel, or staff, at times utilizing LDRC's network of knowledgeable organizations, attorneys and other individuals. Such inquiries--more than 200 in 1983--covered the gamut of issues and problems that can be presented in libel counselling or libel litigation. Inquiries not involving specific litigations or legal issues, primarily from news media, scholars or researchers interested in general developments in the libel field also demanded the time and attention of LDRC staff. Finally, a small number of callers have sought assistance in securing knowledgeable libel counsel or in alerting potential amici curiae to issues and appeals of interest to them.

Press Coverage

In 1983, LDRC continued to receive useful coverage in the trade and general press. All of LDRC's studies, publications, and press releases were covered in the Media Law Reporter, the key publication reaching LDRC's legal constituency. Other legal coverage was secured in U.S. Law Week, The National and New York Law Journals, and the ABA Student Lawyer. LDRC activities were also noted in 1983 in most of the key media trade publications, including the Columbia Journalism Review, Editor & Publisher, The Editor's Magazine, Quill, Presstime, Publishers Weekly and the Society of Professional Journalists's Freedom of Information '83-'84. Finally, LDRC, or LDRC data, also received wide mention in the general press including Harper's, Time Magazine, The Progressive, the New York Times, the Wall Street Journal, the Philadelphia Inquirer, the Philadelphia Daily News and the Washington Post. Editorials in the New York Times, the Washington Post and Editor & Publisher cited LDRC data and/or mentioned LDRC by name, in decrying recent trends.

Annual Steering Committee Dinner

LDRC's annual Steering Committee meeting and dinner, traditionally scheduled to coincide with the PLI Communications Law Seminar, was open to the public this year for the first time. The \$100 a plate dinner, at the Waldorf-Astoria Hotel on November 17, kicked off LDRC's Jury Project. The theme for the evening was "Libel, Juries and the First Amendment" from the judicial and press points of view. A generous grant from CNA Insurance enabled LDRC to dedicate a share of ticket revenues to the Jury Project. Speakers at the dinner, attended by more than 200 media attorneys and executives, were Eugene L. Roberts, Jr., Executive Editor of the Philadelphia Inquirer, and the Honorable Harold R. Tyler, Jr., former United States District Judge, Southern District of New York, and senior partner in the New York City firm of Patterson, Belknap, Webb & Tyler. Master of Ceremonies for the evening's program was Fred W. Friendly, of the Columbia Journalism School and Media & Society Seminars. Roberts told those assembled that "if the trend in libel continues we will not be facing merely a chill, but a deep, pene-

trating freeze." Judge Tyler, on the other hand, warned the press not to be overly sensitive to phenomena that are being experienced by most large institutions. According to Tyler, "When you defend cases before juries, you're bound to lose a few." The press, said Tyler, does not get "singled out." LDRC may mount similar public programs on libel issues of importance as part of the annual LDRC Steering Committee dinner in future years.

1984 Programs and Projects

In 1984, in addition to continuing its many current activities as outlined above, and to publishing the first LDRC Litigation Formbook (described above in connection with the ANPA/NAB/LDRC Libel Defense Workshop), LDRC hopes to embark upon at least two additional major projects: the LDRC Jury Project and the LDRC Expert Witness Project.

(i) LDRC Jury Project

Recent LDRC Studies have documented the media's distressingly poor record in defending libel and privacy claims that are tried before juries. Three out of four pretrial motions for summary judgment are successful, as are as many as four out of five post-trial motions and/or appeals. However, in libel cases that are tried before juries, almost 90% result in judgments against the media defendant. The purpose of the LDRC Jury Project is to embark upon a wide-ranging series of projects designed to study and understand jury behavior in libel cases and attempt to respond effectively to--if not reverse--these disturbing trends. Depending upon the availability of funding, and specific approval of each aspect of the project, such an LDRC Jury Project may entail one or more of the following: (1) LDRC will collect and organize a manual of jury instructions and will work to develop and test "model" jury instructions. Proceeds from the November 17 Steering Committee dinner will be used as seed money for this aspect of the project, subject to approval of a specific budget; (2) A series of scholarly papers related to jury issues may be commissioned; (3) Consideration will be given to some kind of jury attitudes survey, by an outside agency, or LDRC, or both, subject to specific approval and funding. Such a survey might include a poll of the attitudes of actual libel jurors in past cases, or a national demographic poll of pertinent public attitudes, or both; (4) Consideration will be given to organizing a colloquium or seminar, possibly in cooperation with other interested organizations, to review the findings of the LDRC Jury Project, subject to specific approval and funding by the Executive Committee.

(ii) Expert Witness Project

The Expert Witness Project will involve a major expansion of LDRC's existing files on expert witnesses which currently include general information about the use of such witnesses, transcripts of expert testimony in a small number of cases, and motions and briefs arguing for or against the use, or the limitation, of

expert testimony either for libel plaintiffs or defendants. The Expert Witness Project in 1984 will seek comprehensively to expand LDRC's files, systematically to identify all persons who have appeared as expert witnesses in libel cases, and generally to serve as a clearinghouse for information in this area. This information will be made available only to media defendants and their counsel by specific request.

1984 Budget

LDRC's budget, approved by the LDRC Steering Committee at its annual meeting on November 17, 1983, is designed to expand LDRC's projects and activities substantially while minimizing the burden on LDRC's supporting organizations. LDRC's self-reliance will continue to increase as self-funding approaches 50% and may well exceed 50% if other special projects are approved during 1984. Proposed increases in the basic LDRC budget can be funded with renewal contributions at current levels, plus increased revenues from Bulletin subscriptions and related user income. Modest cost increases in the 50-State Survey project can be funded, as they were last year, entirely out of proceeds from sales of the Survey plus special grants. In addition to the basic and 50-State Survey budgets, separate budgets will be established and approved in advance for any other special projects. For example, the LDRC Formbook--if approved--is estimated (subject to further refinement) to cost \$20,000, but is expected to produce revenue at least equal to costs. Other special projects might include the computerization and sale of LDRC substantive data; publication of an LDRC jury instruction manual; the LDRC Jury Project; and an LDRC follow-up workshop in connection with the Jury Project. Each of these would either be self-funding or specially funded. Each special project will be subject to specific approval by the Executive Committee under new policy guidelines approved by the Steering Committee in November 1983.