MEDIA LAW RESOURCE CENTER 2012 JURY INSTRUCTIONS MANUAL

Prepared by the Litigation Committee
Defense Counsel Section, Media Law Resource Center

February 2012

FOR DEFENSE COUNSEL ONLY

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INTRODUCTION

In 1984, the Media Law Resource Center (MLRC; then known as the Libel Defense Resource Center) initiated a jury instructions project in response to the disturbing number of libel jury verdicts against media defendants. The primary goal of the project was to provide defense counsel with guidance on formulating more effective jury instructions. The MLRC prepared a Jury Instructions Manual in 1985 that highlighted jury instructions from significant defamation cases. The Manual was updated in 1995 and 2000 to add instructions and proposed instructions that were deemed worthy of inclusion.

Over the past two years, a subset of the MLRC Litigation Committee has worked on a major update of the Jury Instructions Manual. This 2012 revision has resulted in a substantial increase in the size of the Manual to include a wider scope of submitted and proposed instructions from a wider variety of jurisdictions. The 2012 Manual includes actual or proposed instructions from state and federal courts in 37 states. Each excerpt now also includes an indication of the jurisdiction in which the instruction was given or proposed.

Rather than providing substantial editorial commentary on the instructions, this revision has focused on including as many potentially useful instructions as possible that practitioners can consider using in their discretion. All the jury instructions excerpted herein are available in full from the Members section of the MLRC's website. Media defense counsel are encouraged to continue submitting actual or proposed jury instructions to the MLRC for inclusion in the materials made available online.

The Litigation Committee recommends consulting the "How To Use This Manual" section, below, for more details on the organization and content of the 2012 Manual.

HOW TO USE THIS MANUAL

While the charges included in the 2012 Manual were selected for their legal soundness as well as their congruity with the interests of media defendants, some of the included instructions may be overly complex or contain language that is case specific. In addition, some charges in the Manual are not entirely favorable to media defendants or underscore matters and issues that require attention by media defendants. Therefore, the charges in this Manual should not be considered "model" or recommended instructions, nor are the topics inclusive of every issue in a libel case for which a jury instruction may be advisable.

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

Charges are identified by case name, followed by the designation "C" if actually given by the court or "D," "P," or "J" if requested by the defendant, plaintiff or jointly by the defendant and plaintiff but not used by the court in whole or in part.

The Manual includes two tables of cases, one in alphabetical order by case name and one in alphabetical order by state of jurisdiction. Because federal court cases in this area are typically governed by state law, jury instructions from federal district courts are alphabetized by the state in which the court sits. However, users are reminded that a court sometimes may apply the law of a state other than that in which it sits.

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U.S. District Court (N.D. Tex. 1997)
Cause No. 2:96-CV-208-J
Court's Charge

Virginia

Puppy Land v. Roy H. Park Broadcasting
Virginia Circuit Court 1996
Court's Charge

Washington

Galley v. Seattle Times Co.
Washington Superior Court, King County 1987
No. 84-2-12970-1
Defendants' Requested Instructions

Tilton v. McGraw-Hill
U.S. District Court (W.D. Wash. 2007)
Case No. C06-0098RSL
Court's Instructions to the Jury

Williams v. Seattle Times
Superior Court of Washington, King County 1973
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Court's Charge & Defendant's Requested Instructions

Wisconsin

Maguire v. Journal Sentinel
Wisconsin Circuit Court, Milwaukee County 1997
Case No. 94-CV-11742
Defendants' Proposed Jury Instructions

Wyoming

Pring v. Penthouse Int'l, Inc.
U.S. District Court (D. Wyoming 1980)
Docket No. C79-351
Court's Charge & Defendant's Requested Instructions

JURY INSTRUCTIONS

I. INTRODUCTORY MATERIAL

I.A. Role of the First Amendment.

Editor's Note: *These instructions largely address the balance struck by New York Times v. Sullivan and its progeny between an individual's interest in protecting his reputation and society's interest in a free press.*

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

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

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

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

I will explain these terms in detail in a few moments.

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

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

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

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

-- Lasky v. ABC (S.D.N.Y.) (C)

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

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

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

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

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

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

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

The First Amendment to the United States Constitution provides for the protection of certain rights extremely precious in our society by guaranteeing freedom of the press, speech, assembly and religion. The freedoms guaranteed by the First Amendment are essential freedoms in a democracy like ours. The guarantees of freedom of speech and press are not for the benefit of the press so much as for the benefit and protection of all of us. Television broadcasts are within the constitutional free press and free speech guarantees.

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

If the law were to impose liability on the news media simply because a statement or report is false and defamatory, there would be a real danger that the news media would

be discouraged from exercising their constitutional rights. It is for this reason that we require the plaintiff in this case, Merco Joint Venture, to prove something beyond falsity and defamatory meaning – namely that the defendants broadcast with a high degree of awareness of probable falsity.

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

-- Merco Joint Venture v. Kaufman (W.D. Tex.) (D)

The newspaper articles that are at the center of this lawsuit concern matters of public concern and plaintiff's conduct as a public official. The first amendment to the Constitution of the United States and Article 1, § 7 of the Pennsylvania Constitution extend special protection to such reporting. In pertinent part, the first amendment provides that neither freedom of speech nor the freedom of the press can be abridged. The Pennsylvania Constitution similarly provides that no law may be made to restrain the freedom of the press.

-- McDermott v. Biddle (Pa.) (D)

You will better understand these instructions and the rules of law about which I am informing you if you keep in mind that this case involves a balancing of values, both of which are important in our society. Under certain conditions, the law of the State of Georgia grants individuals the right to recover for false, defamatory statements of fact which injure their reputations. The law in effect recognizes that the reputations of individuals are sometimes important enough to warrant legal protection.

On the other hand, the law of Georgia and our federal Constitution guarantee to individuals, and particularly to the press, freedom of speech. Because of these state laws and constitutional protections, even though a writer, editor, or publisher may have libeled a particular person, the vital interest of the public in being timely informed about newsworthy matters may require that a person's rights have to give way to the writer's, editor's, and publisher's protected constitutional right to report information freely to the public, even if the information may be incorrect in some respect.

Erroneous statements and falsehoods are inevitable in a free press and must be protected to some degree if the free press is to have the "breathing space" that it needs to survive. Thus the Constitution and the State of Georgia recognize that imposing legal liability for errors in the press without requiring a plaintiff to demonstrate fault on the

part of a publisher would run the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. To put it another way, our law recognizes that a rule which compelled a publisher to guarantee the accuracy of its factual assertions could lead to intolerable self-censorship as the only alternative to liability.

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

-- Sales v. Cox Enterprises (Ga.) (D)

I.B. Libel/Slander Defined

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

-- Sharon v. Time, Inc. (S.D.N.Y.) (C)

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

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

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

Western Broadcast Co. v. Times Mirror Co., 14 Cal. App. 3d 120, 125, 57 P.2d 977 (1936) (words are not defamatory merely because they are "unpleasant or hostile" toward an individual; Washburn v. Wright, 261 Cal. App. 2d 789, 799, 88 Cal. Rptr. 224 (1988) (to establish defamation it is not sufficient that the words, if believed, would stimulate "strong feelings of distaste" in some members of the community); Gang v. Hughes, 111 F. Supp. 27, 29-30 (S.D. Cal. 1953), aff'd. 218 F.2d 437 (9th Cir. 1954) (to establish defamation "[i]t is not sufficient, standing alone, that the language is unpleasant

and annoys or irks plaintiff, and subjects [her] to jests or banter, so as to effect [her] feelings[.]"); Sanford, Libel & Privacy (1987) at 77-78 ("[s]tatements that only annoy, embarrass, hurt feelings, are unpleasant . . . are not libelous[.]") (footnotes omitted.)

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

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

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

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

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

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

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

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

all the words contained therein their ordinary meaning as read and construed by an average reader of ordinary intelligence.

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

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

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

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

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

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

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

-- Malson v. Palmer Broadcasting Group (Okla.) (C)

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

-- Merco Joint Venture v. Kaufman (W.D. Tex.) (C)

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

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

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

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

-- Kastrin v. CBS Inc. (W.D. Tex.) (C)

You will find for the Plaintiff if you are satisfied by a preponderance of the evidence that:

(1) the article about Plaintiff published by Defendant on May 2, 2001 at Foxnews.com was defamatory;

(2) the article was not substantially true;

(3) Defendant was negligent in determining whether the article was substantially true or not; and

(4) as a direct result of the article published by Defendant, Plaintiff's reputation was damaged.

-- Hewan v. Fox News Network (E.D. Ky) (C)

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

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

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

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

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

Defamation is the making of a statement that tends so to harm the reputation of another as to lower the other in the estimation of the community or to deter third persons from associating or dealing with the other. If defamation occurs by the live spoken word, it is called slander. If defamation is in writing or broadcast on television, it is called libel. A corporation can bring a claim for libel or slander just as a person can.

-- Calvin Klein Trademark Trust v. Wachner (S.D.N.Y.) (D)

Plaintiff Rod Brown claims statements published by Defendant KCCI-TV on July 14, 2000 were libel. In order to recover; Plaintiff' must prove all of the following propositions:

1. Defendant made defamatory statements concerning the Plaintiff.
2. Defendants' statements were false.
3. Defendants made the statements with actual malice.
4. Defendants' false statements were a proximate cause of damage to the Plaintiff.
5. The amount of damage.

If the Plaintiff has failed to prove any of these propositions, he is not entitled to damages. If the Plaintiff has proved all of these propositions, you must then consider the Defendants' affirmative defense of truth.

-- Brown v. Des Moines Hearst-Argyle Television (Iowa) (C)

A "libel" is a false and malicious defamation of a person by printing or writing. For a communication to be "libelous," it must be more tha1J. annoying, offensive, or embarrassing. Rather, it must constitute a serious threat to the plaintiff's reputation: It be reasonably construable as a writing that would expose the plaintiff to public ridicule, contempt, humiliation, embarrassment, or hatred; one that would tend to deprive the plaintiff of the benefits of public confidence or social interaction; or one that would tend to injure the plaintiff in his business or occupation.

Whether a communication has such an effect must be determined by considering its natural and probable effect on the mind of the average reader.

-- Cobb v. Time Inc. (M.D. Tenn.) (C)

The Plaintiff contends in this case that he was defamed by the Defendant. Defamation can consist of either libel or slander. Libel consists of defamation that is written or embodied in a physical form. Slander consists of defamation that is spoken or gestured as a substitute for speech. A person may be defamed by any untrue statement that tends to harm him in his reputation or injures him in his occupation or which exposes him to public hatred, contempt, ridicule. A statement that lends to impute fraud, deceit, dishonesty or reprehensible conduct in a business is defamatory.

-- Tayar v. Palmer Communications (Okla.) (C)

A statement must be false to be libelous; a true statement is not libelous, no matter how much it may hurt the plaintiff's reputation or feelings. Furthermore, not every false statement is libelous. Only those false statements which naturally and normally tend to damage another's reputation in the community are libelous.

-- Carr v. Forbes, Inc. (D. S.C.) (D)

In this case, the plaintiff, Francis Sweeney, is a public figure, who is making a claim against the defendants, the New York Times Co. and its reporter Fox Butterfield, for defamation--more specifically for libel--alleging that defendants made a false publication concerning him and that the publication was made with actual malice, proximately causing injury to plaintiff's reputation. Defamation is a false publication causing injury to a person's reputation, or exposing him to public hatred, contempt, ridicule, shame or disgrace, or affecting him adversely in his profession or business. Libel is written defamation.

-- Sweeney v. New York Times Co. (N.D. Ohio) (C)

To recover on a claim for libel, each plaintiff must prove by a preponderance of the evidence each of the following essential elements:

First, that the defendant published a statement concerning the plaintiff. Second, that the statement was defamatory of the plaintiff. Third, that the statement was false. Fourth, that the defendant was negligent in making the false statement. Fifth, that the plaintiff suffered actual damages as a direct and proximate result of the publication of the false and defamatory statement concerning the plaintiff.

-- Sales v. Cox Enterprises (Ga.) (C)

Editor's Note: *The following instruction is the court's reading of the charge to the jury, taken from the trial transcript.*

The liability or legal responsibility claimed in this case involves the law of what is called defamation. And also, as the attorneys have argued to you, the law of what is called negligence. Defamation in the law means the injury to one's reputation by a false communication. An individual has a legal interest in his or her reputation, his or her good name. On the other hand, the Bill of Rights to our Constitution also guarantees the right to free speech and to freedom of the press. So there is a tension or a balancing that must be done between the rights of the individual and those of the media.

Again, defamation in the law means injury to a person's reputation by a false communication. There is a statute in Pennsylvania, that is an act of the legislature that states that in an action for defamation, the plaintiff has the burden of proving the following when the issue has been properly raised. One, the defamatory character of the communication. This means that the communication tends to harm the plaintiff's

reputation and is -- so as to lower the individual in the eyes of the community or to deter others from associating or dealing with the person, and also that it is false. Two, the publication by defendant. Three, its application to plaintiff. That is, in this instance, that it was about Mr. Kauffman and Mrs. Serdikoff. Four, the understanding by the recipient of its defamatory meaning. That is, if a person who read the communication understood its defamatory meaning. Five, the understanding by the recipient of it as intended to be applied to plaintiff. That is, the ordinary reader understood it applied to plaintiffs. And six, special harm resulting to plaintiffs from the publication. And seven, what is called abuse of a conditionally privileged occasion.

-- Kauffman v. Diamandis Communications (E.D. Pa.) (C)

Editor's Note: *The following instructions may be useful as examples of general orientation instructions to the jury, outlining in simple terms the issues that the jury must determine before moving into more detailed instructions and questions for each element.*

The court instructs the Jury that the issues on the libel claims in this case are:

1. As to each statement complained of by each plaintiff in the several reports, is that statement a statement of fact?

2. If the statement is one of fact, is the statement about plaintiff Chris Benson, or about plaintiff Puppy Land, Ltd., respectively?

3. As to any statement made about plaintiff Chris Benson or plaintiff Puppy Land, Ltd., respectively, was the statement made by a particular defendant?

4. As to any statement of fact about Chris Benson or Puppy Land, Ltd,., is the statement false?

5. If the statement is false, is the statement defamatory of plaintiff Chris Benson or Puppy Land, Ltd.?

6. If each of the five preceding questions is answered "yes," did each defendant, Kris Loyd and Roy H. Park Broadcasting, through its employees, know at the time of publication of the statements complained of that any such statement was false, or, believing the statement to be true, did each such defendant lack reasonable grounds for such belief, or act negligently in failing to ascertain the facts on which the statement is bases(?)?

7. To the extent all six of the preceding questions are answered "yes," with respect to the claim of either plaintiff against any defendant then what is the amount of plaintiff's damages against that defendant?

On each of these issues each plaintiff has the burden of proof.

-- Puppy Land v. Roy H. Park Broadcasting (Va.) (C)

The Court instructs the Jury that the issues on the libel claims in this case as to Amy Martin are:

That Amy Martin made two statements which were telecast by Channel 10 that Chris Benson and Puppy Land, Ltd. Allege were defamatory. These statements are:

(1) "With the boys it was more outright meanness, pinching, hitting, kicking, yanking their hair really hard, just whatever, you know anything goes."

(2) "He would choke them until they were just about passed out. Then he would work on them for a little bit when they started coming to. He would get them all rallied up against with a stick, choke them 'til they just about passed out again, work on them a little more 'til he had them done."

1. As to each statement complained of by each plaintiff in the several television reports, is that statement a statement of fact?

2. If the statement is one of fact, is the statement about plaintiff Chris Benson, or about plaintiff Puppy Land, Ltd., respectively?

3. As to any statement made about plaintiff Chris Benson or plaintiff Puppy Land, Ltd., respectively, was the statement made by Amy Martin?

4. As to any statement of fact about Chris Benson or Puppy Land, Ltd., is the statement false?

5. If the statement is false, is the statement defamatory of plaintiff Chris Benson or Puppy Land, Ltd.?

6. If each of the five preceding questions is answered "yes", did Amy Martin know at the time of publication of the statements complained of that any such statement was false, or believing the statement to be true, did the defendant lack reasonable grounds for such belief, or act negligent in failing to ascertain the facts on which the statement is based?

7. To the extent all six of the preceding questions are answered "yes", with respect to the claim of either plaintiff against any defendant, then what is the amount of the plaintiff's damages against that defendant?

On each of these issues ,each plaintiff has the burden of proof.

-- Puppy Land v. Roy H. Park Broadcasting (Va.) (C)

The Court instructs the jury that, in order to recover against the Defendant, WLOX, the Plaintiff must prove, in accordance with these instructions that:

1. The Defendant published a news story concerning the Plaintiffs.

2. The language complained of in the news story was false.

3. The language in the news story complained of was clearly and unmistakenly directed toward the Plaintiffs.

4. The language in the news story complained of was defamatory.

5. Such false and defamatory language, if any, caused or contributed to damages to reputation, if any, on the part of the Plaintiffs.

6. The existence of actual injury or damages, if any, to the Plaintiffs' reputations.

The Court instructs the jury that if the Plaintiff fails to prove any one of the above elements by a preponderance of the evidence, then it is your sworn duty as jurors to return you verdict in favor of the Defendant, WLOX.

-- Hudson v. WLOX Inc. (Miss.) (C)

Editor's Note: *The following instruction is a suggestion for the court to read to the jury as a preliminary statement before opening statements are given. Such a statement would be read by the judge but not submitted in writing to the jury at the beginning of its deliberation. A purpose of such a statement is to orient the jury as to the issues in the case so that they may follow the evidence more closely and with greater understanding. See, e.g., Tavoulareas v. Piro, 817 F.2d 762, 807 (Ruth Bader Ginsburg, J., concurring) (in defamation case, trial judge should instruct "the jury, in plain English, at the opening of the case and at appropriate times during trial, as well as at the close of the case"); W. Schwarzer, Reforming Jury Trials, 132 F.R.D. 575, 583 (1991) ("The case for giving the jury preliminary instructions at the start of the trial is compelling. . . [N]ot giving preinstructions is like telling the jurors to watch a baseball game and decide who won without telling them the rules until the end of the game.").*

Ladies and gentlemen, in this suit the plaintiff, Jeffrey K. Jenkins, claims that he was harmed by statements in an article in the December 1997 issue of *GQ* Magazine prepared and published by the defendants, Advance Magazine Publishers Inc. (through its division Condé Nast Publications Inc.) and Mary Fischer. You must decide whether,

under the facts and the law, the plaintiff is entitled to recover damages he alleges to have resulted from publication of the article.

If you have served on a jury before, you may recall that the judge normally instructs you on the law at the conclusion of the case, just before you hear the closing arguments of the lawyers and begin your deliberations. I will do that in this case, too. However, a defamation or invasion of privacy case like this one is a little different than the kind of case you may have seen or been required to decide before, such as a breach of contract case, or a case involving an automobile accident. There are some things you will be asked to decide, and some legal terms used to describe the issues you will decide, that may seem foreign or strange to you.

Therefore, I am going to give you an overview of what the issues are and some of the terms which will be used to help you understand the evidence as you hear it during this case. You are not to decide this case based solely on what I am telling you now. You are to listen to the evidence first, and then I will give you complete instructions in the law from which you will decide the case.

For now, I can tell you that the parties agree that the defendants published an article which mentions the plaintiff in the December 1997 issue of *GQ* magazine. He claims that certain statements in the article were false and defamatory to him, and placed him in a highly offensive false light, and that by publishing the article the defendants intentionally inflicted severe emotional distress upon him. The plaintiff claims that he is entitled to recover damages from the defendants for having published the article. The defendants deny that the statements about the plaintiff in the article were false or placed the plaintiff in a false light, or that the plaintiff suffered any injury to his reputation or otherwise as a result of anything in the article which the plaintiff claims is false. The defendants further deny that they published the article knowing that any statement about the plaintiff was false or believing that it was probably false. The defendants deny that the plaintiff is entitled to recover any damages from them.

Before giving you preliminary instructions on the law that will help you understand the issues for you to decide, I first want to give you a chance to see the article so that you will know what we are dealing with. The article will be displayed for you on the screen as the article is being read.

[Article displayed.]

As I indicated before, I am now going to give you a very brief introduction to the law on the subject. Please understand you will receive detailed instructions at the close of the case.

Each of the plaintiff's claims have specific elements of proof to them that I will instruct you on later. However, all the plaintiff's claims have certain elements in common. As to each of the statements challenged by Mr. Jenkins, which will be specifically identified for you later in the trial, he will have to prove to you each of the following elements:

- That the particular statement, in the context of the article as a whole, is a statement of fact about him that is either defamatory or the publication of which would be highly offensive to a reasonable person. A communication is defamatory if it harms the public reputation of the plaintiff enough that others are less likely to associate or deal with him or seriously ridicules him or exposes him to public hatred or contempt.

- That the particular statement is substantially false, that is, the impact of the statement on the reader is significantly different than if the statement were literally truth in every respect.

- That each defendant published the defamatory or highly offensive statement knowing at the time of publication that the statement was false or having a high degree of awareness that the statement was probably false. If a defendant has published a false or offensive statement with such knowledge, we call that "reckless disregard of falsity." The term "reckless disregard of falsity" does not mean carelessness or recklessness in the usual sense of those words, but refers to the defendants' actual state of mind with respect to the truth of a published statement at the time of the publication.

- You may not infer reckless disregard of falsity from the nature of the statements that the plaintiff claims are false. Neither may you infer reckless disregard solely from any conclusion you may reach about the adequacy of the defendants' investigation of the facts prior to the publication of the article. That is, an inadequate investigation, even a failure to investigate, is not proof of reckless disregard of falsity, unless the plaintiff proves clearly and convincingly that thereby the defendants actually came to know of the falsity or to be highly aware of the probable falsity of the statements about him which they published. Nor is reckless disregard shown from facts which may have become known or events which occurred after the publication of the article. There must be clear and convincing evidence to permit the conclusion that the defendants, in fact, knew what they were reporting was false or had an actual awareness of the probable falsity of the statements about the plaintiff in the article at the time that they were published.

- That the plaintiff was injured as a direct result of the publication of the particular statement which the plaintiff contends is false or offensive.

-- Jenkins v. Advance Magazine Publishers Inc. (W. D. Okla.) (D)

I.C. "Libel Proof" Plaintiff/Previous Bad Reputation

The interest of the plaintiff in a libel case is his reputation. In determining the amount of damage that a plaintiff has incurred because of a libelous publication, you must take into account the plaintiff's prior reputation. If you find in this case that the

reputation of the plaintiff has already been damaged or tarnished by adverse events or publicity prior to publication of the articles, then you may consider such proof in determining any amount to be allowed as damages, if any.

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

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

If you determine that the Defendants damaged Plaintiff AAA All City Heating, you may consider the evidence presented and whether such evidence warrants a reduction in damages. Since defamation is injury to reputation, it is appropriate to consider the state of the Plaintiff's reputation at the time of the broadcast.

Someone with a bad reputation would be injured less by a particularly defamatory statement than someone with a better reputation. Evidence pertaining to AAA All City Heating's reputation in the community can be considered when determining whether or not AAA All City Heating has actually been injured by the broadcast. Therefore, if you find that Defendants did broadcast a defamatory report, but that the broadcast was actually consistent with AAA All City Heating's reputation, you may take that into consideration to help you determine a proper damage award.

-- AAA All City Heating v. New World Communications (Ohio) (C)

With respect to the extent of Plaintiff's damages, you may consider the fact that Plaintiff had, in fact, been indicted by the Richmond County Grand Jury for three counts of non-support of dependents in the terms of the impact of harm to Plaintiff's reputation. You may consider this fact in deciding the issue of damages, along with the nature, extent of the harm suffered by the false statement in the context of all the facts and circumstances in evidence bearing on Plaintiff's damages.

-- Flippen v. Gannett Co. (Ohio) (C)

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

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

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

* * *

If you find that the statements made by Conroy Chino and broadcast by KOAT were false and damaging to Roberta Padilla's reputation, you must then decide if the false statements were more damaging than true statements would have been. If you find that the truth would have been as damaging as the false statements, or more damaging, you must return a verdict in favor of Conroy Chino and KOAT.

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

* * *

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

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

-- Padilla v. KOAT TV (N.M.) (D)

I.D. Burden of Proof/Clear and Convincing

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

It is used in two senses: first, it identifies which party must persuade you; second, it describes how firmly you must be convinced before you may render a verdict in favor of the party who bears the burden of proof. As to the first question – which party must persuade you – the burden of proof is on the plaintiff, Mr. Desai. That means if Mr. Desai has not convinced you of any issue, you must find for Mr. Hersh on that issue.

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

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

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

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

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

-- Desai v. Hersh (N.D. Ill.) (C)

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

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

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

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

As to the question (i) whether the statements made by the broadcast had a defamatory meaning, (ii) whether those statements were about General Westmoreland, and (iii) whether his reputation was harmed or damaged by those statements, plaintiff must prove those elements to you – "by fair preponderance of the evidence."

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

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

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

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

-- Westmoreland v. CBS (S.D.N.Y.) (C)

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

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

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

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

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

a. knew the quotation was false, or

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

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

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

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

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

-- Masson v. New Yorker (N.D. Cal.) (C)

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

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

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

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

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

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

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

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

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

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

-- Frey v. Multimedia, Inc. (S.D. Ohio) (C)

To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved

by a preponderance of the evidence in the case, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

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

* * *

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

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

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

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

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

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

the quality of the evidence, that is, its convincing quality, the weight and the effect that it has on your minds.

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

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

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

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

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

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

-- Paul v. The Hearst Corporation (M.D. Pa.) (C)

In order for the plaintiff to recover on his defamation claim, he must prove by a preponderance of the evidence each of the following things:

(1) That the defendants published a defamatory statement or statements of fact about him;

(2) That the defamatory statement, in the context of the article as a whole, is substantially false;

(3) That the false and defamatory statement directly caused injury to his reputation. In addition, the plaintiff must prove by clear and convincing evidence that:

(4) Any false and defamatory statement about him was published with reckless disregard of its falsity.

(5) With respect to Condé Nast, that the actual or probable falsity of the statement was brought home to the person in the organization having responsibility for the publication.

Unless the plaintiff proves all these things with respect to each defendant, your verdict must be for each defendant as to whom the plaintiff fails to prove these things.

Many of the terms I have used to describe the elements of the plaintiff's claim have a specific meaning in the law, so I will define them for you.

-- Jenkins v. Advance Magazine Publishers Inc. (W. D. Okla.) (D)

II. PUBLICATION

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

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

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

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

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

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

-- Lansdowne v. Beacon Journal (Ohio) (C)

III. OF AND CONCERNING

III.A. Generally

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

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

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

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

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

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

-- Lansdowne v. Beacon Journal (Ohio) (C)

For the statement to be "of and concerning" a Plaintiff's specific business property, the disparaging words must refer to an ascertained or ascertainable business, and it must be the Plaintiff's. The law does not allow the jury to connect the allegedly

disparaging statements to a Plaintiff on innuendo or presumption alone. While it is not necessary that the publication have mentioned a Plaintiff by name, the facts and circumstances must be such they point to the Plaintiff as the person concerning whom the alleged disparaging statements are made. Every listener does not have to understand the alleged disparaging statements to refer to the individual Plaintiff as long as there are some who reasonably do.

-- Texas Beef Group v. Winfrey (N.D. Tex.) (C)

The second element of plaintiffs' defamation case is the requirement that each of them prove by clear and convincing evidence that the false and defamatory information was of and concerning the particular plaintiff. Each plaintiff must submit convincingly clear proof that the allegedly libelous statement refers to that particular plaintiff personally. The identification of the plaintiff as a target of that statement must be certain and apparent from the words themselves, after you have invested the words of the article with their natural and obvious meaning but not extended those words by implication or by the conclusions of the plaintiff. A plaintiff cannot by implication identify himself or herself as the target of an alleged libel if the allegedly libelous statement does not point to him or her. It is not necessary that the plaintiff be mentioned by name, however, you must be able to conclude from reviewing the article that the article is aimed against that plaintiff.

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

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

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

-- Lasky v. ABC (S.D.N.Y.) (C)

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

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

-- Westmoreland v. CBS (S.D.N.Y.) (C)

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

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

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

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

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

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

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

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

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

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

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

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

In order to be defamatory of a specific plaintiff, the challenged statement must be "of and concerning" that specific plaintiff. It is not sufficient if the statement simply referred to a group of which a plaintiff was a member, if a reader would not reasonably understand the statement as referring to any particular member of the group. As the size of a group increases, it becomes less likely that a general statement would reasonably be understood to refer to any one individual or any one corporation which is included in the group.

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

-- Kastrin v. CBS Inc. (W.D. Tex.) (D)

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

-- Faigin v. Kelly (D. N.H.) (D)

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

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

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

-- Malson v. Palmer Broadcasting (Okla.) (D)

The Plaintiff must prove that each of the statements he claims was false and defamatory was about him – that they were "of and concerning" him. It is not necessary that the allegedly defamatory statement identify the Plaintiff by name, only that it by inference or innuendo at least refer in an intelligent way to the Plaintiff and that it is reasonably probable that members of the public viewing the broadcast would understand it as referring to the Plaintiff.

-- Brown v. Des Moines Hearst-Argyle Television (Iowa) (C)

The plaintiff must prove that each statement he complains about was written of and concerning himself. To the extent you find the statement was written about someone other than the plaintiff, you shall disregard it.

-- Carr v. Forbes, Inc. (D. S.C.) (D)

If you conclude that the plaintiff has established that the article contained false and defamatory statements, you must consider whether the plaintiff has also established by a preponderance of the evidence that each of those statement is “of and concerning” the plaintiff. That is, you must consider whether each such statement is about the plaintiff, not someone, or something else.

If you conclude that Mr. Clark has failed to establish by a preponderance of the evidence that any of the statements in issue are of and concerning him, then you must find for the defendants as to that statement.

-- Clark v. Connecticut Magazine (Ct.) (D)

III.B. Fiction

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

In order to so find, you must determine that the article was intended to refer to the plaintiff and that it is reasonably probable that members of the public who read the article would understand it as referring to her. A libel may be published of an actual person by a

story that is intended to deal with fictitious characters, if the characters or pilot bear resemblance to actual persons and events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person. It is not enough that the readers of a story recognize one of the characters as resembling an actual person, unless they reasonably believe that the character is intended to portray that person.

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

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

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

-- Pring v. Penthouse (D. Wyo.) (C)

IV. PLAINTIFF'S STATUS

IV.A. Public Figure Plaintiff

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

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

The distinction between a "public figure" and a "private figure" is significant because the level of constitutional protection appropriate to defamation of a public person

is higher and requires that a public figure may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

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

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

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

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

-- <u>New Testament Missionary Fellowship v. E.P. Dutton & Co.</u> (N.Y.) (D)

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

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

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

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

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

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

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

Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public figure in all aspects of his or her life.

-- Pring v. Penthouse (D. Wyo.) (C)

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

Check one answer:

"Was a limited public figure" ___

"Was not a limited public figure" ___

CMP has the burden of proof as to this issue.

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

-- Levine v. Gutman (N.D. Tex.) (C)

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

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

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

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

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

define for you, in making the statement; and

(h) Mr. Paul suffered actual harm as a result of that statement.

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

If you find that any of the statements complained of are defamatory, and of and concerning Mr. Clark, and false, you must next determine Mr. Clark's status as a plaintiff. You must determine whether he is a public or private figure and. if he is a private figure, whether the statements involved a matter of public concern.

These questions are important. because they determine what Mr. Clark's burden of proof will be.

In deciding whether Mr. Clark is sufficiently well known in this community to be considered a public figure, you should take into account his reputation locally and his accomplishments. You may consider that Mr. Clark:

(a) was twice elected to the Greenwich RTM;

(b) was frequently a subject of articles in the Greenwich Time;

(c) has frequently issued press releases concerning matters of concern to Greenwich residents and was the author of an Open Letter to the Greenwich First Selectman which was also sent to The Greenwich Time;

(d) referred to Connecticut's anti-stalking statute as the "Bill Clark Law";

(e) described to Karon Haller his interview with Gabe Pressman which "got sent all over the airwaves" and concerned the "ridiculous soap opera" which was "front-page news in Greenwich, went state-wide, and it is about to go nation-wide";

(f) was the subject of a public demonstration protesting his election as a deacon of his church;

(g) described himself as the "enfant terrible" of Greenwich;

(h) sent copies of his letters of complaints against various town officials and the Greenwich Library to all the local media.

Based on this evidence, you may find that Mr. Clark was a local public figure and, therefore, he must meet the actual malice standard to prevail.

-- Clark v. Connecticut Magazine (Ct.) (D)

IV.B. Private Figure Plaintiff

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

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

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

-- Lansdowne v. Beacon Journal (Ohio) (D)

A private individual or corporation is not required to request a public apology, correction or retraction of the libelous matter broadcast by a television station.

-- Robinson v. KTRK Television (Tex.) (C)

V. DEFAMATORY MEANING

V.A. Generally

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

-- Sharon v. Time, Inc. (S.D.N.Y.) (C)

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

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

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

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

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

-- DiGregorio v. Time, Inc. (D. R.I.) (C)

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

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

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

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

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

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

employment; or that plaintiff lacks integrity or is dishonest in performing the duties of his employment.

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

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

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

-- Paul v. The Hearst Corporation (M.D. Pa.) (C)

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

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

You are instructed that a broadcast is defamatory if it tends to injure the reputation of a person or corporation and thereby expose him or it to public hatred, contempt or ridicule, or financial injury, or tends to impeach his or its honesty, integrity, virtue or reputation and thereby expose him or it to public hatred, ridicule, or financial injury.

In deciding whether a statement is defamatory, you are instructed that you must construe the statement as a whole in light of the surrounding circumstances, giving the words used their ordinary meaning as heard and understood by an average person of ordinary intelligence. You must not do anything to extend the effect of the words as they were actually used.

-- Meca Homes, Inc. v. TSM AM-FM TV (Tex.) (C)

In deciding whether a broadcast is libelous, the publication must be viewed from the point of view it would have on the mind of an ordinary viewer, and must be construed as a whole, in light of all the surrounding circumstances.

-- Robinson v. KTRK Television (Tex.) (C)

Defamatory communications are those which tend to expose a person to contempt, to harm the person's reputation, or to discourage others from associating or dealing with him or her. In deciding whether the communication was defamatory, you must consider its plain and obvious meaning. In determining whether the communication was defamatory, you may consider whether there are other facts in evidence known to the person to whom the communication was published which, when taken into consideration with the communication, gave it a defamatory meaning.

-- Dixon v. Martin (Tex.) (C)

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

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

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

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

-- Kastrin v. CBS Inc. (W.D. Tex.) (D)

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

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

Words alleged by plaintiffs to be defamatory should be read and construed by you according to their plain, natural, and ordinary meaning. You should not hunt for a strained construction in order to find that the statements challenged by plaintiffs are defamatory or true or false.

-- Sales v. Cox Enterprises (Ga.) (C)

A writing is defamatory if it would tend to bring Plaintiff into public hatred, contempt or ridicule, disgrace, or induce an evil opinion of him in the community; cause him to be shunned or avoided; or injure him in his business or occupation.

-- Hewan v. Fox News Network (E.D. Ky) (C)

The Court instructs the jury that defamatory words are those which tend to injure a person's reputation and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community.

-- Hudson v. WLOX Inc. (Miss.) (C)

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

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

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

-- Merco Joint Venture v. Kaufman (W.D. Tex.) (D)

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

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

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

-- Faigin v. Kelly (D. N.H.) (D)

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

-- Stecco v. Moore (Mich.) (D)

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

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

A published statement is defamatory if it tends to injure the reputation of that person so as to expose him to public hatred, contempt and ridicule. Not every unpleasant or uncomplimentary statement is defamatory. A publication that is unpleasant, offensive, or embarrassing, or that hurts the plaintiff's feelings, is not necessarily defamatory. To

be defamatory, a statement must tend to bring plaintiff into disrepute, or must tend to prejudice the plaintiff in the eyes of a substantial part of the community.

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

In determining whether the communications made about Dr. Mitchell were defamatory, you consider the communications in their context. Words or phrases which standing alone may not reasonably understood as defamatory may be so explained or qualified by their context making them defamatory. The context of a statement that is alleged to be defamatory includes all parts of the communication that are ordinarily heard or read with it. Thus, when considering whether the communications made by the Defendants were defamatory, you must consider the communications as a whole and not as individual words, phrases or sentences.

-- Mitchell v. Griffin Television (Okla.) (C)

A statement is defamatory if it is false in a material way and if it tends to cause such harm to the reputation of others that it lowers that person in the eyes of the community or deters third persons for associating with him.

-- Knight v. Chicago Tribune (Ill.) (C)

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

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

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

-- Malson v. Palmer Broadcasting (Okla.)(D)

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

-- Rogal v. ABC (E.D. Pa.) (C)

A statement is defamatory if it tends so to harm the reputation of another party as to lower that party in the estimation of the community or to deter others from associating or dealing with that party. Companies have reputations, just as people do. And a company is defamed if a statement tends to discredit the company in the conduct of its trade or business – in other words, if it impugns the basic integrity or competence of the company.

Not every unpleasant or uncomplimentary statement is defamatory. A statement that is merely unpleasant, offensive or embarrassing is not necessarily defamatory.

-- Calvin Klein Trademark Trust v. Wachner (S.D.N.Y.) (D)

A false statement is defamatory if it injures the reputation of the Plaintiff,. exposes the Plaintiff to public hatred, contempt or ridicule, or injures the Plaintiff in his efforts to maintain his business.

-- Brown v. Des Moines Hearst-Argyle Television (Iowa) (C)

Statements which are merely annoying, unflattering or embarrassing are not defamatory, even though a Plaintiff may be upset by the statements. Neither are differences of opinion defamatory. Instead, a defamatory comment is one which tends to shatter the standing of a person in the community of respectable society. *Scott-Taylor, Inc. v. Stokes*, 425 Pa. 426, 229 A.2d 733, 734 (1967); *Bogash v. Elkins*, 405 Pa. 437, 176 A.2d 677, 678-79 (1962); *Greenbelt Coop Publishing Ass'n. v. Bressler*, 398 U.S. 6, 13-14, 90 S.Ct. 1537, 1541-42, 26 L.Ed.2d 6 (1970).

-- Marisco v. Patriot News Co. (Pa.) (D)

The Court instructs the Jury that the burden is upon each plaintiff to prove by a preponderance of the evidence that any statement of which he or it complains is defamatory of that plaintiff. A statement is defamatory if people in the community understand that words in it, in their normal usage, harm the plaintiff's reputation, that is, say that the plaintiff is unfit to perform the duties of his or its employment, or lacks integrity or is dishonest in performing "the duties of his or its" employment; or that the

effect of the words is prejudicial to the plaintiff in his or its work, and if the plaintiff suffered actual damage because of the statement.

If you believe from the evidence that any statement complained of did not cause plaintiff Chris Benson or plaintiff Puppy Land, Ltd., to suffer any actual damage, then such statement was defamatory of Chris Benson or Puppy Land, Ltd., respectively.

-- Puppy Land v. Roy H. Park Broadcasting (Va.) (C)

A person may be liable for what that person implies, as well as for what is said directly.

-- Sound Environment, Inc. v. Liddy (Ariz.) (C)

One who utters defamatory remarks may be liable for the repetition of those remarks by third persons if the repetition was reasonably to be expected.

-- Sound Environment, Inc. v. Liddy (Ariz.) (C)

To prevail upon their defamation claim, Plaintiffs must prove by a preponderance of the evidence that Defendants made a statement that had a defamatory meaning toward Plaintiffs. A publication has a defamatory meaning if it tends to cause injury to a person's reputation, or exposes him to public hatred, contempt, ridicule, shame, or disgrace, or affects him adversely in his trade or business.

A statement is not defamatory unless it constitutes a serious threat to the Plaintiff's reputation. A statement is defamatory if it tends to so harm the Plaintiff's reputation that it prejudices the Plaintiff in the eyes of a substantial part of the community or deters third persons from associating or dealing with the Plaintiff. A statement is not defamatory simply because the person about whom the statement was made finds it unpleasant, annoying, offensive, or embarrassing.

In determining whether a statement is defamatory, words should be given their ordinary meaning and should be viewed in context of the whole broadcast.

If you find that Plaintiffs have failed to prove by a preponderance of the evidence that Defendants' statements had a defamatory meaning, you must find in favor of Defendants.

-- AAA All City Heating v. New World Communications (Ohio) (C)

Editor's Note: *The following instruction is the court's reading of the charge to the jury, taken from the trial transcript.*

As to defamation, the injury to one's reputation by a false communication, the law says that the communication, in this instance the photograph and caption, must be

reasonably understood by the recipient, here the readers of Car and Driver Magazine, in a defamatory way. A communication is not defamatory just because it may be annoying or embarrassing to the person or persons the communication refers to. The fact that a person does not consent to an article or statement does not make it defamatory. The use of colorful phrases or exaggeration will not make a communication defamatory merely for those stylistic kinds of reasons. Or if a communication is obviously worded in a manner that a reader would not reasonably consider to be -- it to be defamatory, the defendant cannot be liable. Therefore, the entire context of the publication and the nature of the readership, the specific context, here the reader's photography contest, and the intent of the communication from the reader's standpoint are all important factors in deciding whether the communication is defamatory.

To suggest that a person is the victim of a crime is not defamatory. To be a victim of a crime is not by itself enough. A victim is someone who is injured by a crime and is not the perpetrator of the crime, that is the person who commits the crime. The same is true of an adversary of crime or of criminals. That is, someone who is against crime. On the other hand, a statement that can reasonably be read to mean that a person could be a criminal or somehow voluntarily associates with criminals for some bad purpose as opposed to being a victim of crime or being against crime, this is a defamatory statement because it clearly tends to injure a person's reputation. The statement must also be false. That is, the defamatory thrust or heart of the statement, not merely some factual details or circumstances in the statement, and it must apply to plaintiffs and be reasonably understood by the readers to apply to plaintiffs. That is, if you decide the statement is defamatory and false, you must also decide whether the actual reader understood such defamatory false statement, when it used the word owner, specifically referred to plaintiffs and not merely to anyone who is an owner of a vehicle in similar circumstances. However, it is not necessary that a caption specifically name or identify the plaintiffs in order to apply to them. The question is whether, under the circumstances, the readership would conclude the caption and photograph applied to plaintiffs as owners of the automobile.

So to review defamation. Defamation, injury to one's reputation by false communication. A communication, a statement is defamatory if it tends to blacken, that is to harm, a person's reputation or expose the person to public hatred, contempt, scorn, ridicule, or to injure the person in his or her business or profession. The test is the effect the article is fairly calculated to produce, the impression it would naturally create in the minds of the average people among whom it is intended to circulate. The nature of the audience is a critical factor in determining whether a statement is capable of defamatory reading. The audience are those whom the publication is reasonably aware will read the magazine. Even where a plausible innocent interpretation of the communication exists, if there is alternative defamatory interpretation, the question must be considered by the jury. That is, what the average reader would conclude from reading the statement. However, that the statement may embarrass or annoy someone is not sufficient itself to prove a defamation. Injury to reputation is judged by the reaction of others in the community, and not by the party's self-estimation. Reputation is what other person's think of a

particular individual. As to falsity, the defamatory message itself must be false. And again, whether other parts of the statement are false doesn't make the statement defamatory.

Here, as I understand it, the defense, that is Car and Driver, admits that plaintiffs are not involved in crime. That there is no reason to believe at this point that the car was put in the Delaware River by organized crime. It says that that part of the caption was a mistake it made, but it contends that the "owners referred to in the caption are not to be fairly understood to be involved with crime or organized crime" in any event. So regardless of the mistake the caption is not false in a defamatory way. Plaintiffs contend, as I understand it, that considered as a whole, the caption should be read to mean in conjunction with the photograph, that plaintiffs are involved in some bad or improper way with organized crime.

-- Kauffman v. Diamandis Communications (E.D. Pa.) (C)

As the first element of a defamation claim, Plaintiff Mark Mendelson must prove that the article, as understood by the average reasonable person, was defamatory. An Article is defamatory if it tends to expose a person to hatred, ridicule or contempt – that is, if it tends to harm the reputation of that person so as to lower him in the estimation of the community or to deter others from associating or dealing with him. You must consider the meaning of the statements in the same manner in which the average reader of The Morning Call would reasonably view them. If Plaintiff Mark Mendelson has failed to prove that the article was defamatory, then your deliberations must cease and you must return a verdict in favor of Defendants Darragh and The Morning Call and against Plaintiff Mark Mendelson.

Not every unpleasant or uncomplimentary newspaper article is defamatory. An article that is mean, unpleasant, offensive, annoying or embarrassing is not defamatory. A statement is only defamatory if it tends to blacken Mendelson's reputation by lowering him in the estimation of the community, or deterring others from associating with him. To be defamatory, an article must tend to shatter the standing of a person in the community of respectable society.

Plaintiff Mark Mendelson's own reactions to the article have no bearing upon the effect the article would have on his reputation. A person "who is the target of unkind words is bound to feel hurt, but he or she often exaggerates in his or her mind the extent of damage done to his or her reputation in the public mind." Thus, in determining whether the article was defamatory, you may not give any consideration to whether Plaintiff Mark Mendelson was annoyed or embarrassed by the article.

-- Mendelson v. Darragh (Pa.) (D)

Unless you find that the language of which Mr. Clark complains is "a false and malicious publication about him which exposes him to public ridicule, hatred or contempt, or hinders virtuous [persons] from associating with him," you must find that

Mr. Clark has not been defamed by the statements in the article published by *Connecticut*.

In deciding whether the language of which Mr. Clark complains is defamatory, you must not use "innuendo" (disparaging meanings which Mr. Clark alleges are implicit in the language he complains of) to vary or enlarge the defamatory words.

In deciding whether the language of which Mr. Clark complains is defamatory, the statements must be taken in the context in which they were written and would be understood by ordinary viewers.

The statements in question are to be given their natural and ordinary meaning, and are not to be considered false unless the pleaded truth would have a different effect on the mind of the viewer than the statement as broadcast would have had.

Statements that are merely unflattering, annoying or embarrassing, or that hurt a plaintiffs feelings are not defamatory. Nor is there a cause of action "when only supersensitive persons with morbid imaginations" would consider the words defamatory.

You may find that certain statements are false, abusive, unpleasant and objectionable to the plaintiff without concluding that those statements are defamatory.

For example, Connecticut Courts have held it is not slander per se to call a police officer a "clown", a "big fat ape", or a "stupid S.O.B." *Moriarity v. Lippe*, 292 A.2d at 333-34 (1972). A "back room deal" has been held to be not libelous as a matter of law. *Woodcock*, 646 A.2d at 107 (Berdon, J. concurring), *citing Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 16 (1970) ("blackmail" simply rhetorical hyperbole); *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974) ("traitor" as described in a union newsletter "merely rhetorical hyperbole").

The fact that the article raised questions about Mr. Clark's relationship with his ex-wife and the Greenwich Library and police-department is not, of itself, libelous. Questions are not necessarily accusations. Questions do not necessarily imply derogatory answers. They are usually a form of opinion or speculation.

If you find that any of the statements at issue here were "colloquial and, figurative expressions used to embellish the facts" then you must find that this language was non-defamatory.

Similarly, you may find that certain of the statements at issue here were ambiguous and were not defamatory of Mr. Clark. If you find any of the statements to be ambiguous, you are instructed that you are not to assume that statement is defamatory. The First Amendment gives breathing space to ambiguous statements, and the news media is not expected to select from various interpretations only those that are acceptable to the subjects of their stories. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 513 (1984); *Woodcock*, 646 A.2d at 99. If you find that the cover or any of the statements at

issue are not defamatory, you should note that immediately on the jury interrogatory form.

-- Clark v. Connecticut Magazine (Ct.) (D)

V.B. Context

1. Print

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

-- Faigin v. Kelly (D. N.H.) (D)

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

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

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

-- Sharon v. Time, Inc. (S.D.N.Y.) (C)

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

-- Gertz v. Robert Welch, Inc. (N.D. Ill.) (C)

In determining whether the article published by Defendant is defamatory or substantially true, you should consider the article as a whole, including the headline, lead paragraph, and the body of the article. The words must be measured by their natural and probable effect on the mind of the average reader to determine if the gist or the sting of the article is defamatory.

-- Hewan v. Fox News Network (E.D. Ky) (C)

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

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

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

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

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

-- DiGregorio v. Time, Inc. (D. R.I.) (C)

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

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

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

You may not change the language of the articles or give the articles a meaning inconsistent with the words actually used. *Corabi v. Curtis Pub. Co.*, 441 Pa. 432, 447, 273 A.2d 899, 907 (1971), The words actually used by Mr. Biddle must be given their ordinary meanings and must be considered in the context of the entire series of articles. You may not pick out and isolate particular words or phrases and determine whether, considered alone, they conveyed the meaning claimed by plaintiff. Rather, you must consider the words and language used in context. *See* Sack, *Libel, Slander and Related* Problems 52 and cased cited in n. 45 (1980).

-- McDermott v. Biddle (Pa.) (D)

In deciding whether a statement is defamatory, it must be considered in the context of the entire article. You may not pick out and isolate particular words or phrases and determine whether, standing alone, they are defamatory. *Thomas Merton Center*,

supra, 442 A.2d at 216; Robert D. Sack and Sandra S. Baron, *Libel, Slander, and Related Problems*, § 2.4.2 at 76 and cases cited in n.46 (2nd ed. 1994).

The words used must be given their ordinary meanings. You may not change the language or give it a meaning not expressed by the words actually used. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 906 (1971); Robert D. Sack and Sandra S. Baron, *Libel, Slander, and Related Problems*, § 2.4.2 at 77-78 and cases cited in n.56-57 (2nd ed. 1994).

In considering the articles as a whole, you should read and consider the headlines in connection with the articles, bearing in mind that a headline cannot set forth all the details of an article. *See, e.g., Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53, 57-59 (1971); *Reiter v. Manna*, 436 Pa. Super. 192, 647 A.2d 562, 566 (1994).

-- Marisco v. Patriot News Co. (Pa.) (D)

In determining whether the statement made by a defendant is defamatory, you are to consider the words used in their proper context and in their plain and natural meaning as other people would understand them and according to the sense in which they appear to have been used. Defamation may be made by inference, implication or insinuation by the words used if such an inference, implication or insinuation is a reasonable one and if a reasonable person would draw it from the words used.

-- Puppy Land v. Roy H. Park Broadcasting (Va.) (C)

A libel plaintiff may not offer a construction of a publication that isolates particular words and phrases. That is because "'[w]ords which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable.'" A statement can not be made defamatory where the "reader must take the statement out of context" or otherwise give the statement "a tortured and unreasonable construction." In other words, a statement "cannot be rendered libelous 'by an innuendo which puts an unfair and forced construction on the interpretation of the publication. An innuendo must be warranted, justified and supported by the publication."

-- Mendelson v. Darragh (Pa.) (D)

In determining whether any particular statement in the defendants' article was libelous as to the plaintiff, the article must be read and construed as a whole. Phrases and sentences should not be isolated or taken out of context. Nor may the plaintiff pick and choose particular statements and attempt to construct a libelous article out of them. Reading the article as a whole, the plaintiff must demonstrate the five essential elements of libel as to each statement in the article that the plaintiff contends is libelous.

-- Carr v. Forbes, Inc. (D. S.C.) (D)

2. Broadcast

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

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

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

-- Machleder v. Diaz (S.D.N.Y.) (C)

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

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

The law imposes on plaintiffs the burden of proving that the broadcast was in fact understood in a defamatory sense by the average reasonable viewer. This means that you are not to seize on any one word, phrase or image, or to consider only one part of the broadcast. You must consider the whole of the broadcast in order to determine whether it is defamatory. Obviously, words and statements may mean different things to different people. You must render your verdict in favor of the defendants unless you find from the evidence that plaintiffs have proven by a preponderance of the evidence that the false statements were understood in a defamatory sense by the average, reasonable viewer.

In resolving the question whether the broadcast was defamatory, you are to consider the common and ordinary meaning of the words used in the context of the statements. But bear in mind that your deliberations are not to be governed solely by what you yourselves believe to be the meaning of the language used, nor indeed, by how you personally believe the defendants intended their language to be understood by viewers, or how plaintiffs understood it. The test is what you find from all the evidence that the

average, reasonable viewer who heard the words actually understood them to mean. You must give the words their fair and natural meaning when read in context. I emphasize again, that you must consider all the words of the broadcast and not focus solely on those which one or the other of the parties claims are at the heart of the case. You must also consider not only the words and images used in the portions of the broadcast filmed at Avenue P in Newark but also the words used in the opening and close of the report as broadcast from the studio.

-- Machleder v. Diaz (S.D.N.Y.) (D)

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

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

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

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

-- Kastrin v. CBS Inc. (W.D. Tex.) (P)

V.C. Average Reader or Viewer

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

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

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

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

-- Galloway v. CBS (Cal.) (C)

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

-- Pring v. Penthouse (D. Wyo.) (C)

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

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

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

In the event you do not find that the plaintiffs have proved by a fair preponderance of the evidence that the average persons among whom the articles were

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

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

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

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

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

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

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

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

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

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

-- Faigin v. Kelly (D. N.H.) (D)

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

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

As the first element of his defamation claim, Judge Merriweather must prove by a preponderance of" the evidence that the article was understood by the average, reasonable person who read the article to have the meaning Judge Merriweather claims it had.

This means that Judge Merriweather must prove that the average newspaper reader considering the article as a whole understood the article to state or imply as a fact

that the Harris indictment accused Judge Merriweather of fixing the trial of Loretta Massey.

You must decide whether the average reader understood the article and headline when read in context to imply that the Harris indictment accused Judge Merriweather of fixing the trial of Loretta Massey.

Obviously, words, statements, and images may mean different things to different people. The average newspaper reader is not someone with special knowledge of the issues or facts dealt with in the article. The average reader is a reasonable person of ordinary intelligence, education, and background who would be representative of those who actually read the article.

In considering the meaning the article, consider and read the headline bearing in mind that a headline cannot set forth all the details of the article. Under the First Amendment not all statements can be reasonably interpreted as stating actual facts about a person.

In order for Judge Merriweather to recover in this case, the average, reasonable reader of the Philadelphia Daily News must have understood from the article that the Philadelphia Daily News was stating or implying, as a fact, that the Harris indictment accused or stated that Judge Merriweather fixed the trial of Loretta Massey.

-- Merriweather v. Philadelphia Newspapers (Pa.) (C)

If you determine that Mr. Marsico has proven by clear and convincing evidence that the articles are defamatory, you will next consider whether the Plaintiff has proven the second element of his defamation action. Mr. Marsico must prove that the defamatory publications were understood as defamatory--not by you the jury--but by persons among whom the articles were intended to circulate. In other words, the Plaintiff must prove to you that the average readers of the *Patriot News*, among whom the articles were intended to circulate, would consider the articles to be defamatory, as I have defined that word to you. *Corabi, supra*, 273 A.2d at 907; 42 Pa. C.S. § 8343(a)(4).

In making this determination, you must consider the meaning of the statements in the same manner in which the average reader of the *Patriot News* would reasonably view them. *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir. 1978) (applying Pennsylvania law), *cert. denied*, 439 U.S. 861, 99 S.Ct. 181, 58 L.Ed.2d 170; Restatement (Second) of Torts § 563.

If you find that Plaintiff failed to prove by clear and convincing evidence that the articles were reasonably understood by average readers to be defamatory, your deliberations will cease and you must return a verdict in favor of Defendants and against Plaintiff. However, if you determine that Plaintiff has proven by clear and convincing evidence that the articles were reasonably understood to be defamatory by average

readers of the *Patriot News*, you will consider the next element of Mr. Marsico's defamation claim which he is required to prove.

In considering this element, keep in mind that it does not matter whether Francis Marsico is named or otherwise identified in the articles. What does matter, is whether the statements which Mr. Marsico claims are defamatory, can reasonably be understood as referring to him rather than to other persons. *Id.; Weinstein v. Bullick*, 827 F.Supp. 1193, 1199 (E.D. Pa. 1993), *citing Farrell v. Triangle Publications, Inc.*, 399 Pa. 102, 159 A.2d 734, 739 (1960).

Nor is it important whether Mr. Marsico considers the challenged statements to be about him. Instead, to meet his burden of proof, he must prove that average readers of the *Patriot News* articles would reasonably believe that any defamatory statements refer to him. *Zerpol Corp. v. DMP Corp.*, 561 F.Supp. 404, 410 (E.D. Pa. 1983).

-- Marisco v. Patriot News Co. (Pa.) (D)

V.D. Innocent Construction

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

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

-- Gertz v. Robert Welch, Inc. (N.D. Ill.) (C)

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

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

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

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

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

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

-- Williams v. Seattle Times (Wash.) (C)

V.E. Special Considerations

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

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

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

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

-- Boddie v. ABC (N.D. Ohio) (C)

VI. FALSITY

VI.A. Plaintiff's Burden of Proof

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

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

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

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

-- Mitchell v. Globe (D. Ark.) (C)

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

-- Rogal v. ABC (E.D. Pa.) (C)

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

-- Lasky v. ABC (S.D.N.Y.) (C)

Plaintiff Rod Brown must prove by clear and convincing evidence the pertinent statements of Defendant KCCI-TV were false. In determining whether Defendants' statements were false, you shall consider the broadcast as a whole giving the words used their ordinary meaning. You must determine from the totality of the circumstances whether the statements contain provably false connotations. A statement of opinion cannot be proved true or false.

-- Brown v. Des Moines Hearst-Argyle Television (Iowa) (C)

If you determine that the statements at issue are defamatory of plaintiffs, then it remains plaintiffs' burden to prove that those statement were false. A statement is considered false when it would have a different effect on the mind of the reader from that which the truth would have produced.

It is each plaintiff's burden to prove that the statements about which he complains were false. Each plaintiff must prove these statements false by a preponderance of the evidence as I have defined that standard of proof for you.

Because each plaintiff must prove that the statements in the article that he complains about were false, you must consider whether an alleged false act is significant or insignificant. To help you make this distinction, you should think about the gist of sting of a particular statement or statements in the article that plaintiff complains about. What is it about the statements that make them defamatory? What aspect of the statements allegedly exposes the plaintiff to public hatred, contempt, and ridicule? The statements must be false as this aspect of the statements for the plaintiff to have proved

substantial falsity. There can be no recovery if the statement produced the same effect on the mind of the average reader that the precise truth would have produced.

-- Sales v. Cox Enterprises (Ga.) (C)

The Court instructs the jury that, under the First Amendment to the United States Constitution and the Mississippi Constitution, the right to free speech and a free press is sacred, and no prosecution for defamation shall be permitted in the absence of proof beyond a preponderance of the evidence that the language complained of was false and defamatory. Truth is a complete defense to defamation. The Court further instructs you that if the Plaintiffs fail to prove that the language in the news story complained of was false and defamatory, then it is your duty to return your verdict for Defendant, WLOX.

-- Hudson v. WLOX Inc. (Miss.) (C)

If you find that Mr. Clark is a public figure or that the statements of which he complains concern an issue of public concern, then it becomes his responsibility to prove those statements are false; the defendant need not prove that the statements are true.

-- Clark v. Connecticut Magazine (Ct.) (D)

The Plaintiff has the burden to prove that the gist of the broadcast -- which is, again, the substance or core of the broadcast as a whole -- was false as to the Plaintiff. Falsity only exists if the broadcast is substantially and materially false, not just if it is technically false. Proof that the broadcast may have contained minor misstatements or inaccuracies is not sufficient to prove falsity if the substance of the broadcast is substantially true. In other words, the law of defamation overlooks minor inaccuracies where the Plaintiff cannot prove that the core meaning of the broadcast when considered as a whole is false.

In a defamation case such as this, the Defendants do not have to prove that their broadcast was true. They are not required to take any position about truth or falsity. Rather, what is required is that Plaintiff prove by the greater weight of the evidence that the gist of the broadcast was substantially false or was false in some significant respect. If, however, Defendants prove that the gist of the broadcast is true or substantially true, then they cannot be held liable.

If you find that the gist of the broadcast was substantially true, then your verdict must be for the Defendants.

If you find that the Plaintiff has proved by the greater weight of the evidence that the gist of the broadcast was substantially false, then you must consider the next element of her claim for defamation.

-- Woodie v. E.W. Scripps Co. (Fla.) (J)

VI.B. Falsity/Substantial Truth Defined

In determining falsity, the statements must be construed as a whole in the light of the entire "Can It Happen Here?" segment based upon how a person of ordinary intelligence would perceive the entire segment. Truth, not just known truth, is an absolute defense to a charge of falsity, and it makes no difference that the true facts were unknown until the time of the trial.

In this connection, you are instructed that the First Amendment of the Constitution guarantees the right of the freedom of speech and of press. The guarantee embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. This guarantee is to assure a robust debate on matters of public concern and an unfettered interchange of opinions and ideas for the bringing about of political and social changes desired by the people.

Under these constitutional guarantees, statements that are not objectively verifiable cannot be made the basis of a business disparagement lawsuit. Statements of opinion may be objectively verifiable if they imply the assertion of objective fact. However, statements of opinion that cannot reasonably be read to imply a false statement of objective fact and the expression of ideas, whether favorable or not, are protected forms of speech. The use of rhetoric and hyperbole is permitted. Further, a statement is not false if the statement is substantially true. A statement is substantially true if the statement made varies from the truth in insignificant details and is no more damaging to the Plaintiffs' property in the mind of the average viewer than a truthful statement would have been.

-- Texas Beef Group v. Winfrey (N.D. Tex.) (C)

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

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

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

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

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

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

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

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

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

-- Rogal v. ABC (E.D. Pa.) (C)

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

-- Lansdowne v. Beacon Journal (Ohio) (C)

To prevail upon their defamation claim, Plaintiffs must prove by a preponderance of the evidence that any statement you found to be defamatory is also false.

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

Reporters are not required to report the results of investigative journalism with a precision establishing an exhaustive, literal picture of what transpired as long as the gist or sting of the report is substantially true. No matter how defamatory a statement may be, if the Plaintiffs fail to prove that the statement is materially false, you must render a verdict for the Defendants.

WJW-TV 8 and Monday claim that the February 13, 1996 Broadcast is substantially true. Defendants are free to offer evidence that the statements are true, but by so doing they do not assume the burden of proving that the statements in the broadcast are true. Plaintiffs retain the burden of proving that the allegedly-defamatory statements in the February 13, 1996 broadcast are false in a **material** way. There is no burden upon Defendants to convince you that the February 13, 1996 broadcast is true.

-- AAA All City Heating v. New World Communications (Ohio) (C)

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

-- Padilla v. KOAT TV (N.M.) (D)

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

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

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

-- Lasky v. ABC (S.D.N.Y.) (C)

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

-- Lasky v. ABC (S.D.N.Y.) (C)

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

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

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

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

true. The details found to be untrue were insignificant. They did not contribute in any important way to the defamatory nature of the statement. They were not the gist or sting of the libel.

-- Westmoreland v. CBS (S.D.N.Y.) (C)

As I instructed you in Instruction No. 11, Plaintiff must show that the article about Plaintiff published by Defendant was not substantially true.

"Substantial truth" means that the media is not to be held to the exact facts or to the most minute details of the transactions that it reports.

-- Hewan v. Fox News Network (E.D. Ky) (C)

The Court instructs the jury that a statement which is true on its face may, in fact, be false because it leaves out crucial information. Furthermore, the overall tone of a story may so distort the truth as to make the underlying implications of the story false. What is or is not implied in this news story is a question of fact for you to decide.

-- Hudson v. WLOX Inc. (Miss.) (C)

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

If you find that plaintiffs have failed to establish that the broadcast was substantially false, I charge you to find for defendants. If on the other hand, you should find that the broadcast was not substantially accurate then, but only then, you must go on to consider whether Irving Machleder and Flexcraft Industries have met their respective

burdens of proving that the statements were made with the requisite fault as I shall define the term for you.

-- Machleder v. Diaz (S.D.N.Y.) (D)

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

-- Merco Joint Venture v. Kaufman (W.D. Tex.) (C)

"False" means that a statement is neither literally true nor substantially true. A statement is "substantially true" if the statement made varies from the literal truth in only minor details or if it is no more damaging to the person affected by it in the mind of the average person than a literally true statement would have been. In other words, a statement is substantially true if the "gist," or the main point of the statement, is no more damaging to the person than the literal truth would be.

You are instructed that no plaintiff is entitled to recover damages, if any, for any statements which were true or "substantially true" at the time the statement was made. In other words, there can be no recovery of any damages for any statement unless it was both false and defamatory of a plaintiff at the time it was made.

-- Meca Homes, Inc. v. TSM AM-FM TV (Tex.) (C)

In considering the truth or falsity of a broadcast, consider the following: The alleged defamatory statement is not false if it is substantially true. The statements need not be literally true. You should consider the gist or central meaning of the broadcast while at the same time considering the truth or falsity of specific statements within the broadcast.

A statement of opinion cannot be false unless it contains an implied assertion of fact.

-- Robinson v. KTRK Television (Tex.) (C)

A statement is false if it is not substantially true. In determining whether a statement is true or false, you should consider the ordinary meaning of the words. Minor or technical inaccuracies will not render a statement false if the gist or substance of the

statement is true. And literal accuracy will not render a statement true if the words, given their ordinary meaning, convey a meaning that is in substance untrue.

-- Calvin Klein Trademark Trust v. Wachner (S.D.N.Y.) (D)

In order to meet his burden of proving falsity, it is not sufficient for plaintiff merely to show that the articles are less than 100% accurate. Even a flawed publication is protected so long as it is "substantially true." *Dunlap v. Philadelphia Newspapers, Inc*., 301 Pa. Super. 475, 491-492, 448 A.2d 6, 15 (1982); *Kilian v. Doubleday & Co*., 367 Pa. 117, 123, 79 A.2d 657, 660 (1951). Thus, as long as the challenged portions of the articles are substantially true, you must return a verdict in favor of the defendants.

-- McDermott v. Biddle (Pa.) (D)

An article is substantially true if the thrust or "gist" of the article is true. *Williams v. WCAU-TV*, 555 F.Supp. 198, 202 (E.D. Pa. 1983) (and cases cited). *See generally* Sack, Libel, Slander and Related Problems 137-38 (1980). Plaintiff must show that the differences between what was reported and the precise truth would have made a difference to the average reader.

In other words, plaintiff may not recover unless he proves by clear and convincing evidence that the average reader viewed an inaccurately reported series of facts to be more defamatory--to place plaintiff in a worse light--than the precise truth. *Williams*, 555 F.Supp. at 202.

-- McDermott v. Biddle (Pa.) (D)

In determining whether a statement is substantially true, you must give the words in the articles their ordinary, everyday meaning. Plaintiff may not prove falsity by relying on technical or highly subtle distinctions. *Brophy v. Philadelphia Newspapers, Inc*., 281 Pa. Super. 588, 594, 422 A.2d 625, 629 (1980).

-- McDermott v. Biddle (Pa.) (D)

Because the news articles in this case concern the enforcement of child support orders, which are matters of public concern, Plaintiff has the burden of proving that the articles are false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986).

It is not sufficient for Plaintiff merely to show that the articles are less than 100 percent accurate. Minor inaccuracies and imprecise descriptions of otherwise truthful information will not subject the *Patriot News* to liability. The law of defamation overlooks minor inaccuracies and concentrates on "substantial truth." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17, 111 S.Ct. 2419, 2432-33, 115 L.Ed.2d 447 (l991).

A publication is protected so long as it is "substantially true." A statement is substantially true, and Plaintiff may not recover, if the "gist" or "sting" of the article is

true. That is, there can be no recovery if the thrust of the article is true and a reader is not misled by any inaccuracies. Stated another way, an article is substantially true if the article has the same effect on the mind of the average, reasonable reader that the precise truth would have produced. *Masson, Ibid; Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 491-492, 448 A.2d 6, 15 (1982); *Kilian v. Doubleday & Co.*, 367 Pa. 117, 123, 79 A.2d 657, 660 (1951); *Oweida v. Tribune-Review Publishing Co.*, 410 Pa. Super. 112, 599 A.2d 230 (1991), *appeal denied*, 529 Pa. 670, 605 A.2d 334 (1992), *citing Williams v. WCAU-TV*, 555 F. Supp. 198, 202 (E.D. Pa. 1983); *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1316 (3d Cir. 1994). See generally, Robert D. Sack and Sandra S. Baron, *Libel, Slander and Related Problems*, § 3.5 at 183-187 (2nd ed. 1994).

Even though the words used in a news article may have a sharp edge, they are still considered substantially true if their "sting" or "gist" is no greater than the truthful information upon which they are based. *Mosley v. Observer Publishing Co.*, 427 Pa. Super. 471, 629 A.2d 965 (1993), *appeal denied*, 537 Pa. 664, 644 A.2d 1201.

Therefore, Francis Marsico may recover only if he proves, by clear and convincing evidence, that the statements in the articles which he claims refer to him as a "deadbeat," contain a materially greater sting than the court documents and Domestic Relations Office records relating to his child support arrearages, arrest and imprisonment on a charge of non-support. *Mosley, Id.; Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53, 56 (1971); *Sciandra v. Lynett*, 409 Pa. 595, 187 A.2d 586, 588-589 (1963).

Stated another way, Mr. Marsico may only recover if he proves, by clear and convincing evidence, that the statements which he claims refer to him as a "deadbeat," harmed his reputation in the mind of the average, reasonable reader, more than official records concerning his child support arrearages, arrest and imprisonment on a charge of non-support. *Dunlap v. Philadelphia Newspapers, Inc., supra*, 448 A.2d at 15; *Williams v. WCAU-TV supra*, 555 F.Supp. at 202; *Binder, Sciandra, Ibid.*

-- Marisco v. Patriot News Co. (Pa.) (D)

A statement is false if its substance or gist is contrary to the true facts, and other persons hearing the statement would be likely to think significantly differently about the person referred to than they would if they knew the true facts. The fact that a statement may have contained some false information does not necessarily make the substance or gist of the statement itself false.

The falsity must be substantial and material; minor inaccuracies or errors on immaterial matters do not render a news report substantially false. A statement is not substantially false if the impact of the news report as a whole would not be substantially different if the literal truth had been stated. Likewise, a statement is not substantially false simply because different words might have been used or the information might have been presented in a way different than that chosen by the Defendant.

-- Tayar v. Palmer Communications (Okla.) (C)

… [P]laintiff must prove by a greater weight of the evidence the falsity of the published matter. For a statement to be false, the statement must have a different effect on the mind of the reader from that which the truth would have produced. Minor inaccuracies or errors on immaterial matters do not amount to falsity of a statement if the substance or gist of the statement is substantially true. In addition, a statement is not false simply because different words might have been used or the information might have been presented in a way different than that chosen by defendants.

In deciding whether a statement is false, you must consider the allegedly defamatory broadcast as a whole, and decide whether, in the context of the news preport, a statement is false.

-- Stewart v. NYT Broadcast Holdings (Okla.) (C)

By "materially false" I mean that it is not enough to find that the article had minor inaccuracies. Inaccuracies do not amount to material falsity, "so long as 'the substance, the gist, the sting,'" of the article was true. Another way of looking at this is that the article need only be substantially true -- factual inaccuracies will not make an article untrue so long as the article would not materially mislead the reader. To meet this burden, it is not sufficient for Plaintiff Mark Mendelson merely to show that the article was less than 100 percent accurate.

Plaintiff Mark Mendelson may recover only for defamatory statements that can be proven true or false. Statements which cannot be proven true or false, even if harshly critical of Mendelson, are absolutely protected against a defamation claim. Furthermore, statements that interpret or characterize an event or occurrence in a way which cannot be proven true or false cannot be the basis of a finding of libel.

Vigorous, figurative or colorful language, used to make a rhetorical or emphatic point, also cannot be the basis of a valid libel claim.

Plaintiff Mark Mendelson has the burden of proving that the article was materially false by clear and convincing evidence. "[C]lear and convincing evidence is evidence that leaves no substantial doubt in your mind. It is evidence that establishes in your mind not only that the existence of a fact is probable but that it is highly probable. Clear and convincing evidence must be strong and compelling evidence." "Clear and convincing evidence" also means that Plaintiff Mark Mendelson's witnesses must be found to be

credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

-- Mendelson v. Darragh (Pa.) (D)

For a statement to be substantially true, it is not necessary that it be the literal truth or the precise truth. Slight inaccuracies are immaterial provided that the allegedly defamatory statement is true in substance. To put it another way, a statement is substantially true if the substance or the gist of the statement is justified, or if the allegedly defamatory statement affects its reader no differently than the actual truth that has been presented at trial. If you are in doubt as to whether the allegedly defamatory statements in this case are false or substantially true, or if the question of falsity or substantial truth is a close one, you should err on the side of finding the statement substantially true, and therefore find for defendants.

Accordingly, if you find that the plaintiff has failed to show that the substance or gist of each allegedly defamatory statement was not justified, or that the plaintiff has not proved that the statement has produced a worse effect than would the truth as you have seen it in this trial, then you must find for the defendants. Without proving falsity by proving lack of substantial truth, plaintiff cannot prevail on his claim.

-- Carr v. Forbes, Inc. (D. S.C.) (D)

In determining whether a statement in the article was false, the language used is to be given its ordinary meaning and is to be read and understood as the average *Forbes* reader would have read and understood it at the time.

-- Carr v. Forbes, Inc. (D. S.C.) (D)

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

-- Sweeney v. New York Times Co. (N.D. Ohio) (C)

You may not find that the Metro Corp. defendants are liable for defamation or false light unless you are convinced by a preponderance of the evidence that the phrase a "slip-and-fall lawyer" was substantially false as applied to Mr. Paul. Mr. Paul must prove to you that it was false. To do so, he must prove that the "gist" or "sting" of the phrase at issue was false, and not merely that it contained inaccuracies in detail that did not impair the substantial truth of the statement.

If you find that the communication, even if it was defamatory of the plaintiff, was substantially true you will return a verdict in favor of the defendant and against the plaintiff.

If you find that the communication was not substantially true and that it might reasonably have been understood by those other than the plaintiff, to whom it was communicated, as defamatory of the plaintiff you may return a verdict in favor of the plaintiff and against the defendant.

It is not sufficient for Mr. Paul merely to show that the phrase at issue was less than 100% accurate. Even a flawed publication is protected so long as it is "substantially true."

A statement is substantially true if the thrust or "gist" or "sting" of the phrase at issue is true. That is, there can be no recovery if the phrase produces the same effect on the mind of the average reader that the precise truth would have produced.

Mr. Paul may not recover unless he proves that the average reader would view an inaccurately reported fact to be more defamatory - to place plaintiff in a worse light - than the precise truth.

If you are not convinced that the phrase "slip-and-fall lawyer" as applied to Mr. Paul was substantially false, as I have just described for you, then your deliberations will end and you must find for the Metro Corp. defendants in this case.

-- Paul v. Philadelphia Newspapers (Pa) (D)

VII. OPINION

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

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

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

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

In order to be defamatory, there must have been a false statement which a reasonable person could have understood to have communicated facts concerning the plaintiff. If there is no statement which can be reasonably understood to have been a representation of facts concerning the plaintiff, then there can be no defamation and you must return a verdict in favor of the defendants. The burden is on the plaintiff to show that the broadcast in question was reasonably understood by one or more listeners as describing actual facts about the plaintiff or actual events in which the plaintiff participated. In making the determination of whether the broadcast could be understood as containing facts about the plaintiff, you must consider the broadcast as a whole, and not just a particular sentence. In addition, you must also consider the context and tone of the broadcast.

-- McCarnan v. WAMS Radio Station (Del.) (J)

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

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

-- Newton v. NBC (D. Nev.) (C)

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

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

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

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

Each plaintiff must prove by a preponderance of the evidence that any challenged statement is factual in nature and is not merely an expression of opinion. A plaintiff cannot recover on the basis of the publication of an opinion because an opinion cannot be proved true or false. In determining whether any statement in the broadcast is factual or an expression of an opinion, you should consider the common usage of the specific language, whether the statement is capable of being objectively proved true or false, and the context and content of the broadcast in which the statement appears.

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

-- Kastrin v. CBS Inc. (W.D. Tex.)

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

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

-- Faigin v. Kelly (D. N.H.) (D)

To be libelous, a statement must be false, and to be false it must be factual. Under our system of freedom of speech, there is no such thing as a false opinion. Statements of opinion cannot be the basis of a suit for libel. Opinions are protected by the First Amendment to the United States Constitution, and a plaintiff may not sue for libel allegedly contained in a statement of opinion.

Statements of opinion are often defined as statements that are incapable of being proven true or false, or statements that cannot be reasonably interpreted as stating actual facts about the plaintiff. Included in such statements of "opinion" are statements of "imaginative expression" and "rhetorical hyperbole". Imaginative or hyperbolic statements are statements made in language that is intended for effect and is not capable of any clear and precise definition. For example, in other cases, statements that a plaintiff was "exploiting people's fears", that certain persons were "scabs" with regard to union strikes, and that someone was involved in "black mail," that a store was "trashy," and that a physician rendered "excessive" treatment to a patient, have all been determined to be either statements of opinion or, more specifically, statements of rhetorical hyperbole which are not capable to precise definition or proof. Such statements cannot be the basis for recovery by the plaintiff in a libel lawsuit.

Therefore, if you find that a statement at issue here was a statement of opinion or of rhetorical hyperbole, you must find for the defendants as to that statement.

-- Carr v. Forbes, Inc. (D. S.C.) (D)

VIII. FAULT

VIII.A. Negligence

Negligence, for the purposes of this case, means the failure on the part of the Defendants to exercise that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances.

-- Mitchell v. Griffin Television (Okla.) (C)

Plaintiffs are required to prove by clear and convincing evidence that the defendant was negligent in publishing false and defamatory information. To establish negligence, each plaintiff must show that when publishing the false and defamatory statement, the defendant knew, or in the exercise of reasonable care, should have known, that the statement was false or would create a false impression in some material respect.

Even if you find that the defendant published something that was false, you may not assume from that fact that the defendant was negligent. Each plaintiff must prove more than an innocent mistake. Instead, each of the plaintiffs must show that the defendant did or failed to do something that a reasonably careful person under similar circumstances would do to ensure the accuracy of what it published.

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

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

"NEGLIGENCE," when used with respect to the conduct of Tri State Broadcasting Company, Inc., means failure to use ordinary care, that is, failing to do that which a broadcaster of ordinary prudence would have done under the same or similar circumstances, or doing that which a broadcaster of ordinary prudence would not have done under the same or similar circumstances.

-- Meca Homes, Inc. v. TSM AM-FM TV (Tex.) (C)

A publisher of a defamatory falsehood is negligent if the statement was published at the time the defendant knew or should have known that the defamatory statement was false.

-- Robinson v. KTRK Television (Tex.) (C)

The term "Negligence" in a defamation action requires the Plaintiff to show (1) the Defendant knew or should have known the defamatory statement was false and (2) the content of the publication would warn a reasonably prudent person of its defamatory potential. Negligent conduct is determined by asking whether the Defendant acted reasonably in checking the truth of the communication before publishing it.

-- Dixon v. Martin (Tex.) (C)

Plaintiff must show by a preponderance of the evidence that Defendant was negligent in determining whether the article was substantially true or not. It was the duty of Defendant to exercise reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication about Plaintiff before publishing it. If you are satisfied from the evidence that the Defendant failed to comply with this duty, then the Defendant was negligent.

The fact that allegedly false statements may have been obtained from other sources does not in and of itself, insulate someone who republishes those statements from liability.

In applying this standard, some of the factors, among others, you may consider are:

1. whether the matter was a topical one mandating quick publication or a non-"hot news" item allowing time for more thorough investigation and verification;

2. the level or newsworthiness and public interest in the defamatory matter published;

3. the extent of foreseeable harm to Plaintiff's reputation should the defamatory matter be false;

4. the trustworthiness and reliability of the Defendant's sources of information;

5. inconsistencies in the information provided;

6. whether the story was at odds with information in the Defendant's possession;

7. whether the reporter failed to use appropriate procedures or investigatory techniques to reasonably verify the accuracy of the allegedly defamatory information; and

8. whether the Defendant deviated from its own long-standing customs in investigating the information.

-- Hewan v. Fox News Network (E.D. Ky) (C)

The Court instructs the jury that in order to recover in this case, the Plaintiffs must prove, by a preponderance of the evidence, that false statements in the news story were published through the negligence of Defendant WLOX, Inc. Negligence means the failure to use reasonable care.

The word "negligence" as used in these instructions may be defined as the failure to use reasonable care. Reasonable care is that degree of care which a reasonable careful person would use under like or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like or similar circumstances or the failure to do something that a reasonably careful person would do under like or similar circumstances.

* * *

Regarding whether or not the Defendant was negligent in its telecast of June 21, 2006, I charge you that a television reporter is under a duty to exercise proper care in

reporting news items. If there is any question whatsoever in the mind of a news reporter as to the facts given him, he must not rely on the facts as given, but he is under a duty to exercise the initiative and motivation to perform a firsthand investigation.

If you find, in this case, that questions were raised in the mind of Defendant's news reporter about the accuracy of the proposed news story, and that the news reporter failed to use the initiative to perform a firsthand investigation, then I charge you that you may find the Defendant was negligent.

-- Hudson v. WLOX Inc. (Miss.) (C)

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

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

It was the duty of the defendants to use only the ordinary care of a reasonable person under like circumstances, and if this defendant used such care, then your verdict must be in favor of the defendants, even if you find the statements about which the plaintiffs complain were false and defamatory.

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

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

-- Taylor v. New York Times (Ala.) (D)

To prevail upon their defamation claim, Plaintiffs must prove by clear and convincing evidence that Defendants were negligent in making any statement which you have found to be both defamatory and false.

To determine whether Defendants were negligent, the standard by which the conduct of WJW-TV 8 and Monday is measured is that of a reasonably careful person under the same or similar circumstances. Plaintiffs must prove by clear and convincing evidence that WJW-TV 8 or Monday unreasonably failed to attempt to discover the truth or falsity or defamatory character of the publication.

To be "clear and convincing" the evidence must have more than simply a greater weight than the evidence opposed to it and must produce in your minds a firm belief or conviction about the facts to be proved.

If you find that Plaintiffs have failed to prove by clear and convincing evidence that Defendants did not do what a reasonably-careful person under similar circumstances would have done, you must find in favor of Defendants.

-- AAA All City Heating v. New World Communications (Ohio) (C)

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

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

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

-- Lansdowne v. Beacon Journal (Ohio) (D)

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

-- Mitchell v. Globe (D. Ark.) (C)

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

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

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

-- Rogal v. ABC (E.D. Pa.) (D)

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

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

The next issue for your determination on Plaintiff's claim for defamation is whether Defendants were journalistically negligent in making the broadcast.

"Journalistic negligence" is the failure to use the care which a reasonably careful journalist or media entity would use under like circumstances.

If you find that the Plaintiff has failed to prove that the Defendants were journalistically negligent in making the broadcast, then your verdict must be for the Defendants.

If you find that the Plaintiff has proved by the greater weight of the evidence that the Defendants were journalistically negligent in making the broadcast, then you must consider whether the broadcast was the proximate cause of an actual injury to the Plaintiff.

-- Woodie v. E.W. Scripps Co. (Fla.) (J)

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

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

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

Editor's Note: *The following instruction is the court's reading of the charge to the jury, taken from the trial transcript.*

The next issue is negligence. Question two on the verdict form. The defendants allege negligence in publishing the photograph and caption. In the law there are general rules of negligence, and it's a legal term. In order to make out liability for a defamatory statement, the private figure, plaintiff, may prove that the defendant acted intentionally. That is with knowledge of the falsity, but that isn't necessary. And plaintiffs here admit that defendant did not act intentionally, but contend they acted negligently. And negligence is sufficient for liability. The term negligence, sometimes simply known as carelessness or a fault, is the absence of ordinary care that a reasonably prudent person would exercise in the same circumstances. Negligent conduct *may* consist either of an act or an omission to act where there's a duty to do so. In other words, negligence is the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably careful person would not do in light of all of the surrounding circumstances and the evidence. And it's for you the jury to decide what would be reasonably careful conduct in the circumstances that you decide occurred.

When I speak of a reasonably prudent person, that includes a corporation. In this instance the defendant corporation, or what might be called a reasonably prudent publisher of a magazine. A corporation, as I've said, acts through its employees. So as to negligence, the question here is whether Diamandis Communications, Inc., acting through its employees as a reasonably prudent publisher of the magazine, was or was not negligent. And to repeat, the standard of negligence to be applied is that of an automobile magazine publication acting reasonably under the same circumstances as in this case. That's the test. There are no specific or special laws or legal rules or regulations that apply to the duty of a publication in this area. So it's proper to look to the custom, the practices, ethical principles adhered to in the industry to ascertain what would or would not be reasonable conduct on the part of the magazine publication given the circumstances.

The situation should not be viewed looking backwards, but from the magazine's standpoint at the time of the publication. That is, from the magazine's editors, its decision-maker's standpoints. In considering the circumstances, you can -- should consider all the facts as you find them. The nature of the magazine, the nature of the article, that is the photography contest; the information submitted to the magazine; the readership of the magazine. Whether the magazine should have attempted to check out any of the information, and if it did, with what effect. The choice of words used by the magazine in writing the caption. All of the circumstances as you find them as they bear on the issue of whether the magazine negligently violated its duty to plaintiffs not to publish a defamatory statement about them.

-- Kauffman v. Diamandis Communications (E.D. Pa.) (C)

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

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

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

There are two issues you must resolve in considering whether the defendants were negligent. The first issue is whether KFOR-TV had a reasonable basis for its news

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

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

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

-- Malson v. Palmer Broadcasting (Okla.)(D)

Francis Marsico might also show sufficient "fault" if he proves that the *Patriot News* Defendants were negligent in publishing false statements about Francis Marsico. It is not enough that the Plaintiff show the Defendants made an innocent mistake. In order to establish negligence, Mr. Marsico must prove by clear and convincing evidence, that the Defendants did not use "reasonable care and diligence to ascertain the truth." In other words, did the *Patriot News* Defendants act reasonably in gathering information before publishing the articles? Even if the published statements are false and defamatory, Francis Marsico cannot recover if the *Patriot News* took reasonable care and diligence to obtain what they believed were the facts. *Rutt v. Bethlehem's Globe Publishing Co.*, 484 A.2d at 83; Restatement (Second) of Torts § 580B cmts. d and g.

Another way of looking at the question of whether a defendant is negligent in a defamation action, is whether or not "he had reasonable grounds for believing that the communication was true" at the time of publication. *Mathis v. Philadelphia Newspapers, Inc.*, 455 F.Supp. 406, 418 (E.D. Pa. 1978), *citing*, Restatement (Second) of Torts § 580B cmt. d.

In this particular case, Plaintiff must also prove that the *Patriot News* Defendants were at least negligent in failing to anticipate that any false, defamatory statements might be viewed as wrongfully referring to Plaintiff, or that they failed to take appropriate action based on that knowledge. Once again, an innocent mistake is not sufficient to show negligence. Restatement (Second) of Torts §§ 564 cmt. f., 580A cmt. g.; *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 347, 94 S.Ct. at 3010; *Zerpol Corp. v. DMP Corp., supra*, 561 F.Supp. at 410 n.3.

In making the determination of whether or not the *Patriot News* Defendants were negligent in publishing any statements which you determine are false and defamatory regarding Francis Marsico, the standard of conduct to which the *Patriot News* Defendants should be held is that of a reasonable person under like circumstances. The *Patriot News* Defendants should be held to the level of skill normally possessed by members of the newspaper profession. Restatement (Second) of Torts § 580B cmt. g.; *Godwin v. Daily Local News Co.*, 47 D. & C.3d 639, 658 (Chester Co. 1987), *citing* Restatement, *Id.*

In making your determination regarding negligence, you may consider the nature of the interests which the *Patriot News* Defendants were seeking to promote by publishing the articles. "Informing the public as to a matter of public concern is an important interest in a democracy." The collection of child support payments by public officials in charge of this function is such a matter of public concern. You may therefore consider the substantial public interest involved in deciding whether a reasonable news person would have published the statements regarding Francis Marsico in the context of falling child support collections in Dauphin County in early 1992. *Philadelphia Newspapers, inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 at 1563-1564; Restatement (Second) of Torts § 580B cmt. h.

-- Marisco v. Patriot News Co. (Pa.) (D)

A person or a company is negligent when he or she or it fails to exercise ordinary care. Thus to answer the negligence questions, you must determine whether any of the defendants -Mary Beth Murphy, Keith Spore or Journal Sentinel Inc. - failed to exercise ordinary care. Ordinary care is the degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances. A person or a company fails to use ordinary care, when, without intending to do any wrong, he or she or it acts or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject a person or property to an unreasonable risk of injury or damage.

For each defendant, the burden of proof is upon Ms. Maguire to satisfy you to a reasonable certainty by the greater weight of the credible evidence that the particular defendant was negligent in publishing Professor Maguire's statement, as it appeared in Paragraph 13 of the Milwaukee Sentinel article of October 27, 1992.

If you are satisfied from the credible evidence that a defendant did not have a reasonable basis for publishing the statement or did not use ordinary care in checking on the truth or falsity of the statement, then you will answer "Yes" to the negligence question about that defendant. Otherwise, your answer will be "No."

Evidence has been received as to practices in the journalism profession, including with respect to quoting well-known persons and persons with a reputation for honesty. You should consider this evidence in determining whether Mary Beth Murphy, Keith Spore and Journal Sentinel Inc. acted with ordinary care in reporting and publishing

Professor Maguire's statement. This evidence of journalistic practice is not conclusive as to what meets the required standard for ordinary care. What is generally done by journalists in a given situation involving a newsworthy figure has some bearing on what an ordinarily prudent person would do under the same or like circumstances. Custom, however, cannot overcome the requirement of reasonable precaution and ordinary care. A practice which is obviously unreasonable and dangerous cannot excuse a person from responsibility for carelessness. On the other hand, a journalistic custom or practice which has a good record for reliability under similar conditions could aid you in determining whether any of the defendants was negligent.

-- Maguire v. Journal Sentinel (Wis.) (D)

VIII.B. Actual Malice

The First Amendment to the United States Constitution provides for the protection of certain rights supremely precious in our society by guaranteeing freedom of the press, of speech, assembly and religion. The freedoms guaranteed by that Amendment are essential freedoms in a government like ours. That Amendment was deliberately written in language designed to put its freedoms beyond the reach of government to change. These guarantees are not for the benefit of the press so much as for the benefit and protection of all of us. A broadly defined freedom of the press assures the maintenance of our political systems and an open society.

Exposure of the self to others in varying degrees is a sign of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press.

In this context, sanctions against either innocent or even negligent misstatements would present a grave hazard of discouraging the press from exercising the constitutional guarantees and are, therefore, not actionable under law.

However, the constitutional freedoms guaranteed by the First Amendment do not tolerate calculated falsehoods within the veil of its protection of privilege. Calculated falsehoods do not, therefore, come within the immunity of the First Amendment rights of freedom of the press and speech.

To summarize, the constitutional protections for speech and press prohibit recovery for false reports of matters of public interest in the absence of proof that the defendant published with knowledge of its falsity or with a high degree of awareness of probable falsity.

-- Eastwood v. National Enquirer (C.D. Cal.) (C)

To prove actual malice, the plaintiff must prove by clear and convincing evidence that the defendant published the Interview with knowledge that it was fabricated or with reckless disregard for whether it was genuine or not.

A reckless disregard for the truth requires more than a departure from reasonably prudent conduct. Reckless disregard is not shown by sloppy journalism, carelessness, or gross negligence. Even an extreme departure from accepted professional standards of journalism will not suffice to prove actual malice.

Rather, to prove actual malice the plaintiff must provide clear and convincing proof that the defendant in fact entertained serious doubts as to whether the Interview was genuine, or actually had a high degree of awareness of probable falsity. This is a subjective test focusing on the defendant's state of mind at the time of publication.

You may consider circumstantial evidence in determining whether the plaintiff has established actual malice by clear and convincing proof. You may, but need not, find actual malice if you conclude that the defendant had obvious reasons to doubt the genuineness of the Interview but purposefully avoided the truth.

-- Eastwood v. National Enquirer (C.D. Cal.) (C)

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

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

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

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

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

-- Frey v. Multimedia, Inc. (S.D. Ohio) (C)

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

-- McCarnan v. WAMS Radio Station (Del.) (J)

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

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

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

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

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

A plaintiff may demonstrate reckless disregard by the publisher of an author's work if there is clear and convincing evidence that the publisher, through its editors or

employees, in fact and subjectively, had obvious reasons to doubt the accuracy of the challenged quotations and that it acted in a way so as to purposefully avoid the truth.

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

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

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

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

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

-- Masson v. New Yorker (N.D. Cal.) (C)

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

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

In order for you to find that defendants published the complained of statement with actual malice the plaintiff must prove by clear and convincing evidence that the defendants either knew that the complained of statement was false in a material way at the time of publication or that the defendants had a reckless disregard for whether it was true or false. In order to prove a reckless disregard, the evidence must show that the defendants entertained serious doubt about the truth of the statement when they published it.

-- Knight v. Chicago Tribune (Ill.) (C)

The term "actual malice" means with actual knowledge that the broadcast was false or with reckless disregard of whether it was false or not. Actual malice may not be presumed.

The term "reckless disregard" requires that a false and defamatory statement was made either with knowledge that it was false or with a high degree of awareness of its probable falsity.

-- Robinson v. KTRK Television (Tex.) (C)

Knowledge of falsity means that CBS actually knew prior to broadcast that a statement was false. Reckless disregard for the truth means that CBS had a high degree of awareness of probably falsity. Your inquiry must be subjective -- that is, in order to find reckless disregard for the truth you must find that CBS in fact had serious doubt about the truth of the statement before the statement was broadcast. Your decision must turn upon CBS's state of mind at the time the broadcast aired on October 8, 1995.

-- Kastrin v. CBS, Inc. (W.D. Tex.) (C)

Acting with "knowledge of the falsity of the disparaging statement" is publishing a knowingly false statement or deliberate falsification at the time the statement was uttered, broadcast, or otherwise published. It is not enough to show that the publisher made a mistake.

Acting with "reckless disregard concerning a statement's falsity" is publication of a statement while entertaining serious doubts as to the truth or with a high degree of awareness of the probable falsity of the statement. Mere proof of a failure to investigate without more cannot establish reckless disregard for the truth. It must be shown that the publisher acted with a high degree of awareness of the probable falsity of the statements.

-- Texas Beef Group v. Winfrey (N.D. Tex.) (C)

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

That the defendant was or might have been negligent in making the statements does not constitute actual malice. Defendant's conduct is not to be measured by whether a reasonably prudent person would have made the defamatory statements, or would have investigated more before making the statements. Mere failure to discover misstatements is insufficient to show the recklessness required for a finding of actual malice. Nor is the

fact that the defendant bore or might have bore ill-will toward the plaintiff sufficient in itself to establish actual malice, since, despite his hostility, the defendant may not have known of the falsity of the statements which he made, and may not have made the statements with a high degree of awareness of their probable falsity.

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

-- Wade v. Stocks (Fla.) (D)

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

Now what does this mean?

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

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

* * *

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

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

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

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

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

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

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

* * *

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

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

decide is whether the plaintiff has shown such knowing falsity or serious and subjective doubts about truth or falsity.

* * *

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

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

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

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

-- Lasky v. ABC (S.D.N.Y.) (D)

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

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

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

-- Paul v. The Hearst Corporation (M.D. Pa.) (C)

In order to establish actual malice on the part of the defendant, the plaintiffs must prove, by clear and convincing evidence, that the defendants published the material in question with knowledge that it was false, or with reckless disregard for whether it was false or not.

* * *

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

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

* * *

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

* * *

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

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

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

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

* * *

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

As applied to this case, this legal requirement means that Michael Schafer must prove by clear and convincing evidence that the photograph of him published by Time Inc. was published with knowledge that it was false or with serious doubts about its truth.

* * *

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

* * *

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

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

* * *

Of course, in order to determine if damages can be presumed in this case you must first understand the term "actual malice." A publication is made with actual malice if it is made with knowledge that it is false or with reckless disregard of whether it is false or not. In order to demonstrate actual malice, plaintiff must demonstrate more than just negligence by a preponderance of the evidence. He must prove by clear and convincing

evidence that the challenged libel was made by the defendant with knowledge that such statements were false or that the defendant acted with reckless disregard of their falsity. Reckless disregard is a high degree of defendant's awareness of the probable falsity of the statements made.

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

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

-- Schafer v. Time, Inc. (N.D. Ga.) (C)

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

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

Calculated acts engaged in by a publisher in a deliberate and purposeful attempt to avoid learning the truth may be evidence of publication with knowledge of probable falsity.

However, it is only in limited circumstances that a purposeful avoidance of the truth may amount to publication with a high degree of awareness of probable falsity or with serious doubts as to truth.

In order to find that defendants were at fault because of some purposeful avoidance of the truth, you must find by clear and convincing evidence that defendants had reason to question the truth of some important information they had obtained from an informant and deliberately and purposely did not interview others known to them who they knew had knowledge that might have contradicted the informant. *Harte-Hanks*, 109 S.Ct. at 2698.

Thus, in order to find fault based on a purposeful avoidance of the truth you must find that defendants both had a reason to question information obtained from an informant and deliberately and purposely chose not to interview another who they know had knowledge that might have contradicted the first informant.

-- McDermott v. Biddle (Pa.) (D)

The Plaintiff must prove actual malice by clear and convincing evidence. The Plaintiff may prove actual malice in one or both of the following ways:

1. The Defendant made the statement with actual knowledge that it was false; or

2. The Defendant made the statement with reckless disregard of whether it was false or not.

A person acts with reckless disregard when he or she entertains serious and subjective doubt as to the truth of the statement or acts with a high degree of awareness of the probable falsity of the statement.

Recklessness may be established where there are obvious reasons to doubt the truthfulness of the source for the report or the accuracy of his or her information.

If the Defendant through its employees suspected the falsity of the information provided by the source and intentionally avoided taking steps that would have confirmed their suspicion, they acted with reckless disregard of the truth.

-- Brown v. Des Moines Hearst-Argyle Television (Iowa) (C)

You have heard evidence concerning standards in the field of journalism. You may consider whether Defendant complied with these standards. However, compliance or noncompliance with industry standards is not conclusive proof on the issue of actual malice.

-- Brown v. Des Moines Hearst-Argyle Television (Iowa) (C)

A statement is published with "actual malice" if the person who published it knew it was false or with a reckless disregard for the truth. "Reckless disregard" means publication with substantial doubts about the truth of the statements.

To determine whether Defendants published the allegedly defamatory statements with actual malice, you must examine the information that was known to Defendants at the time of publication.

-- Schlieman v. Gannett Minnesota Broadcasting (Minn.) (C)

Reckless disregard of the truth is a subjective test. The Defendants can be said to have acted with reckless disregard for the truth if the person having responsibility for the publication of the allegedly defamatory publication (1) knew at the time of the broadcast that a defamatory statement about the Plaintiff was in fact false, or (2) had a high degree of awareness of the probable falsity or entertained serious doubts about the truth of the particular statement at the time of the broadcast and nevertheless broadcast it.

The Plaintiff bears the burden of proving reckless disregard by clear and convincing evidence.

-- Mitchell v. Griffin Television (Okla.) (C)

You may not infer reckless disregard of the truth from the nature of the statement that the plaintiff claims is false and defamatory. Neither may you infer reckless disregard solely from any conclusion you may reach about the adequacy of a defendant's investigation of the facts prior to making a statement. That is, an inadequate investigation, even a failure to investigate, is not proof of reckless disregard, unless the plaintiff proves that a defendant actually came to be aware of the probable falsity of the particular statement before it made the statement. Nor is reckless disregard shown from facts which become known or events which occur after the statement is made.

You should reach a separate conclusion whether the plaintiff has proved reckless disregard with respect to each defendant.

-- Stewart v. NYT Broadcast Holdings (Okla.) (C)

Editor's Note: *The following instruction is taken from a transcript of the court reading the instructions to the jury.*

Now, clear and convincing evidence is evidence that leaves no substantial doubt in your mind. It is evidence that establishes in your mind not only that the existence of a fact is probable but that it is highly probable. Clear and convincing evidence must be strong and compelling evidence, not merely evidence that the existence of a fact is more likely than not. On the other hand, clear and convincing evidence is not as high a standard as the prosecutor must meet in a criminal case, where the prosecutor must prove the defendant guilty beyond any reasonable doubt.

Now, again, I'd ask you to put your questionnaire down for a minute and listen to some of the things I'm going to have to say about this. I believe that you will better understand this second question if you keep in mind something that I told you at the beginning of this case, and that is that the law regarding defamation suits by public officials has attempted to balance two interests which are important in our society, both of which are entitled to equal protection. On the one hand, the law recognizes the legitimate interest of any person, including a public official, to be protected against the publication of false, defamatory statements about him. On the other hand, the law recognizes that it is important to all of us in a free democracy that there should be free,

open discussion in the press of the actions of our public officials. If the press incurred liability whenever a report about a public official turned out to be false, regardless of whether the publisher knew when it was published that the report was false or had serious doubts about its truth, the press might be afraid to risk critical commentary and we, the public, would be less informed.

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

To put it more simply, plaintiffs must demonstrate to you by clear and convincing evidence that a bell rang or a light bulb flashed in Mr. Byers' or in Mr. Boldt's mind a ringing bell or a flashing light that warned one of them that they were about to publish something which they realized the average reader would understand to assert that Mr. Street violated the criminal law or that a ringing bell a flashing light in fact caused Mr. Boldt or Mr. Byers to possess in their minds at that time a high degree of awareness that the average reader of the column would understand it to assert that Mr. Street broke the criminal law.

-- Street v. Philadelphia Newspapers (Pa.) (C)

If you find that Judge Merriweather has proved that the article was understood by the average readers to mean what plaintiff claims it means and that the meaning of the article is materially false, you must consider whether PNI and Mr. Maryniak acted with the necessary degree of fault as I will now define it for you.

The examination of the fault element of plaintiff's claim, therefore, requires you to examine defendants' intent and their state of mind when they wrote and published the article.

Your decision on the issue of fault is not an objective test, that is the question is not what a reasonable person should have done or even what you as the jury would have done. The question is whether the defendants actually knew the article would be understood to state a false fact or a probably false fact.

It is not enough for you to find that the defendant acted negligently or unethically, made a mistake, did not exercise good judgment, or reported something inaccurately, unfairly, or in an unbalanced fashion. Unless Judge Merriweather proved to you that the article was published with knowledge that it was false or with reckless disregard as to whether it was false, then your verdict must be for the defendants.

Investigatory omissions alone are not sufficient to constitute reckless disregard for truth. Thus, even if you find that defendants should have investigated further prior to publication, this fact is insufficient to constitute fault for purposes of this case.

Now, even if you find that defendant should have investigated further prior to publishing the articles or making the statements, this fact alone is insufficient to prove fault in this case. The law does not require a newspaper or public speaker to take every possible step, to look at every available document, or to speak to every person who has knowledge of the subject matter and fault here is not measured by whether you or some other person would have investigated further before publishing the articles or making the statements.

Your consideration of the investigation must be focused on the investigatory efforts actually undertaken by the defendant and not on any additional efforts that might hypothetically have been undertaken.

The fact that Judge Merriweather and the defendants disagree as to the meaning of the article does not prove that the defendants acted with knowledge of falsity or with a high degree of awareness of probable falsity.

Judge Merriweather bears the burden of proving that the defendants knew the article was false or recklessly disregarded the truth. He must do so by clear and convincing evidence.

-- Merriweather v. Philadelphia Newspapers (Pa.) (C)

Mr. Cobb must present clear and convincing evidence that Sports Illustrated acted with "actual malice"; that is, (1) that it knew the allegedly libelous statements in its article were false or (2) that Sports Illustrated published that article with reckless disregard as to whether the allegedly libelous statements were true or false. In deciding whether Mr. Cobb has met this burden, you may consider some or all of the following:

1. Whether portions of the article were fictitious or the product of Sports Illustrated's imagination.

2. Whether the publication was so unbelievable that only a reckless person would have broadcast it;

3. Whether there were obvious reasons to doubt the truth of an informant or the accuracy of his reports;

4. Whether Sports Illustrated made an appropriate investigation of the truth or falsity of the statements;

5. Whether words were deliberately quoted out of context so as to result in a false and defamatory representation of fact; and

6. Whether the publication was the result of deliberately omitting matters known to Sports Illustrated.

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

An important principle to keep in mind in deciding the issue of actual malice is that your decision must turn upon the state of mind of the defendant and its responsible employees or agents at the time of publication of the alleged defamatory statement.

A reckless disregard for the truth requires more than a departure from reasonably prudent conduct. A failure to exercise ordinary or reasonable care in ascertaining the truth of published material does not, standing alone, render a publisher liable in damages for defamation of a public figure such as the plaintiff here.

In order to find that Sports Illustrated acted with reckless disregard, you must find that there is clear and convincing evidence that, at the time it published the article, Sports Illustrated in fact entertained serious doubts as to the truth of the allegedly libelous statements it contained, or that it acted with a high degree of awareness that one or more of these statements were probably false. In making this determination, you may consider the behavior of Sports Illustrated's employees, including whether they investigated the facts included in the statement; whether they adequately questioned their sources; whether they employed measures for checking the accuracy of the statement; whether they questioned available witnesses; whether they considered leads to relevant evidence; whether they avoided or disregarded contrary evidence; and whether they checked the facts with Mr. Cobb. Such efforts, if made, might tend to negate an inference that employees of Sports Illustrated actually entertained serious doubts about the truth of the statements or sought to avoid learning the truth. You may also consider the testimony of the employees as to their state of mind when the article was written.

On the other hand, circumstantial evidence of reckless disregard may be found when there are obvious reasons to doubt the veracity of an informant or the accuracy of his reports, such as when a publisher knows of an informant's history of deceit and relies on that source without conducting an adequate investigation. The failure to investigate may show the publisher did not want to discover facts which would have contradicted its source or cast doubts on its veracity. Circumstantial evidence of reckless disregard may be found when no evidence is produced to indicate a story is "hot news," yet the publisher proceeds to publication without thorough investigation of serious charges. Ignoring Mr. Cobb's denials, if any, as to the truth of the charges may also be considered when determining actual malice or reckless disregard for the truth as falsity of the statement in some material respect.

-- Cobb v. Time Inc. (M.D. Tenn.) (C)

Because this case involves a matter of public concern, and because the Defendants are news media defendants, in order for the Plaintiff to recover on his claim for defamation, he must prove more than negligence, he must prove actual malice. *Hepps v. Philadelphia Newspapers, Inc.*, 475 U.S. 767, 106 S.Ct 1558, 1564; *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, at 542; *Rutt v. Bethlehem Globe Publishing, Inc.*, 335 Pa. Super. 163, 44 A.2d 72 (1984); Pennsylvania Standard Jury Instructions - Civil §13.08A.

In applying this rule, it is not enough for you to find that the Defendants acted negligently, made a mistake, or did not exercise good judgment. Unless Plaintiff proved to you by clear and convincing evidence that the contested articles were published with knowledge of its falsity or with serious doubts as to truth, in other words, publication with a subjective awareness of probable falsity, then your verdict must be for Defendants. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325 (1968); *Gertz v. Robert Welch, Inc.*, 418 U.S. at 323, 334, n.6, 94 S.Ct. 2997; *New York Times Co. v. Sullivan*, 376 U.S. 254 at 279-80, 84 S.Ct. 710.

To establish that Defendants knew that the statement were false, Plaintiff must demonstrate that Defendants had actual knowledge, prior to publication, that the information contained in the article was false. *New York Times Co. v. Sullivan*, 84 5.Ct. 710.

To find that the Defendants acted with reckless disregard for truth or falsity, you must find that Defendants, in fact subjectively entertained serious doubts as to the truth of the statements in the article. Only if you find that the Defendants treated the question of truth or falsity as a matter of total indifference, that is, that they were recklessly indifferent to the truth or falsity of the item, may you find that the Defendants acted with actual malice. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245; 251-52, 95 S.Ct. 465 (1974); *St. Amant v. Thompson*, 390 U.S. at 727, 730-731,88 S.Ct. 1323.

-- Marisco v. Patriot News Co. (Pa.) (D)

If you find that Plaintiff Mark Mendelson has proved that the article was understood by the average reader be defamatory of Mendelson and that the article was

materially false, you must determine whether Plaintiff Mark Mendelson has proved that Defendants Darragh and The Morning Call acted with the necessary degree of "fault." The examination of the "fault" element of Plaintiff Mark Mendelson's claim requires you to examine Defendants Darragh and The Morning Call's intent and their state of mind when they wrote and published the article. You must decide whether Defendants Darragh and The Morning Call actually knew the article stated or implied a materially false and defamatory fact or actually had serious doubts about whether the article stated or implied a materially false and defamatory fact.

In this part of your deliberations, you must focus on what Defendants Darragh and The Morning Call intended to say in the article as opposed to what Plaintiff Mark Mendelson claims the article meant. You must determine whether Defendants Darragh and The Morning Call intended to say what Plaintiff Mark Mendelson claims the article says and that Defendants Darragh and The Morning Call knew it was false or probably false. If you find that Defendants Darragh and The Morning Call did not intend to convey the false and defamatory meaning Plaintiff Mark Mendelson ascribes to in the article, then your deliberations should cease and you should return a verdict in favor of Defendants Darragh and The Morning Call.

Your decision on the issue of fault is not an objective test. That is, the question is not what a reasonable person should have done, or even what you, as the jury, would have done. Likewise, it is not enough for you to find that Defendants Darragh and The Morning Call acted negligently or unethically, made a mistake, did not exercise good judgment, or reported something "inaccurately," "unfairly or in an unbalanced fashion." The question is whether Defendants Darragh and The Morning Call actually knew the article would be understood to state a false fact or a probably false fact.

Even if you find that Defendants Darragh and The Morning Call should have investigated further prior to publishing the article or making the statements, this fact is insufficient to prove fault in this case. The law does not require a newspaper to take every possible step, to look at every available document, or to speak to every person who has knowledge of the subject matter. And fault here is not measured by whether you, or some other person, would have investigated further before publishing the article or making the statements, or whether you would have written the article in a different way. Therefore, in determining whether Plaintiff Mark Mendelson has met his burden of proof on the fault element, keep in mind that what Defendants Darragh and The Morning Call did, rather than what they did not do, is the measuring rod against which his conduct is to be assessed.

To put it another way, I am not asking you to determine whether Defendants Darragh and The Morning Call should have been aware that the article was materially false. Instead, you must find that a bell actually rang or that a light actually flashed and that when the article was published, Defendants Darragh and The Morning Call in fact knew in their minds or had in their minds a high degree of awareness that the article stated or implied a false fact.

In determining whether the statements were published with Defendants Darragh and The Morning Call's knowledge of falsity, a high degree of awareness of probable falsity or subjective awareness of probable falsity, the motive of the defendants is not the focus. For instance, the focus is not on whether Plaintiff Mark Mendelson was disliked by Defendants Darragh and The Morning Call. Only if Defendants Darragh and The Morning Call published deliberate lies or statements made with awareness of their probable falsity can Plaintiff Mark Mendelson recover in this action.

Plaintiff Mark Mendelson bears the burden of proving that the Defendants Darragh and The Morning Call knew the article was false or actually had serious doubts about whether it was false. He must do so by clear and convincing evidence. It would not be enough to base your verdict on a finding that Plaintiff Mark Mendelson's evidence on the issue of Defendants Darragh and The Morning Call fault seems slightly more convincing than Darragh and The Morning Call's evidence. Here the strong constitutional guarantees of freedom of speech and freedom of the press place a heavier burden on Plaintiff Mark Mendelson. Thus, your verdict must be for Defendants Darragh and The Morning Call unless you conclude that Plaintiff Mark Mendelson has proved with clear and convincing evidence that Defendants Darragh and The Morning Call published the article with knowledge of falsity or subjective awareness of probable falsity.

-- Mendelson v. Darragh (Pa.) (D)

The plaintiff has the burden of proving "actual malice" by clear and convincing evidence. To sustain his burden of proving "actual malice", the plaintiff must prove by clear and convincing evidence that, as to each statement that the plaintiff complains about, the defendants published the statement either:

(1) with knowledge that it was false; or

(2) with serious doubts about its truthfulness.

"Knowledge of falsity" means the defendants must have had actual knowledge at the time of publication that the statement was in fact false.

"Serious doubts about the statement's truthfulness" means the person or persons actually publishing the article must have in fact entertained in their minds serious doubts as to the truth of the statement.

If the defendants, their agents, employees, or representatives, in good faith, believed the statement in question was substantially accurate and true at the time of its publication, the defendants cannot be liable for it.

-- Carr v. Forbes, Inc. (D. S.C.) (D)

The "actual malice" that is necessary for the plaintiff to prove by clear and convincing evidence is not what is commonly thought of as malice. "Actual malice" is

not ill-will, hatred, or desire to injure the plaintiff. A magazine may lawfully publish stories about individuals that are not accurate, even though the reporter did so out of ill-will, hatred, and a desire to harm the individual. The crucial element is whether the defendant knew that the statement complained of was false or in fact entertained serious doubts as to its truthfulness.

In determining whether the defendants published any statement about the plaintiff with actual malice, you are to be governed by what the evidence shows that the defendants in fact knew or were aware about the truthfulness or falsity of such statements at the time of their publication. It is the defendants' knowledge at the time of publication which is controlling, and not what the defendants, with hindsight, after being informed of the plaintiff's objections, could have learned or might have learned. The question is not whether the defendants, through negligence or carelessness, published falsehoods, but whether the defendants, at the time they published, knew that factual statements in the article were false or in fact entertained serious doubts as to their truthfulness.

Actual malice is not measured by whether a reasonably prudent person would have published, or would have done further investigation before publishing. Failure to investigate does not establish actual malice. Thus, it is not enough for the plaintiff to prove that the defendants did not conduct a thorough investigation of the facts or that they were negligent or careless in the way they wrote or edited the article. In order to recover, the plaintiff must prove that the defendants knew that the complained of statements in the article were false or had serious doubts as to whether they were true. If you find that the defendants believed the sources of information for the story to be reliable and believed the story to be accurate when published, you must find in favor of the defendants and against the plaintiff.

Defendants are not required to track down every possible source, and they are not required to interview every person whom the plaintiff believes they should have interviewed.

The fact that defendants did not believe plaintiff's explanations or denials or print them in the article is not evidence of actual malice. Denials by public figures to media charges are part and parcel of free discussion about public affairs. The mere fact that a defendant knows that the public figure has denied harmful allegations or offered an alternative explanation of events is not evidence that the defendant doubted the allegations. "[S]uch denials are so commonplace in the world of [news media] charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.

The First Amendment protects a newspaper or magazine publisher's right to decide what facts it will report on a particular matter and what facts it chooses not to report. The plaintiff may recover for a selective presentation of the facts only by proving, with clear and convincing evidence, that the publisher selected the material to report with "actual malice", that is, with awareness that it would create a false statement of fact.

The law does not require that the article in question be "fair" or "balanced" in its statements about the plaintiff. In fact, the law prohibits you the jury from substituting your judgment for that of the press. In our system of freedom of speech, the courts may not require that the article in question be fair or balanced in a way you the jury might think or in the way the plaintiff thinks it should be. Likewise, the plaintiff may not recover simply by showing that the defendants' could have conveyed his position more strongly; the law does not require that the defendants present the plaintiff's side of the story.

Thus, even if you find that the article in question was unfair and unbalanced with regard to the plaintiff, you must find in favor of defendants if plaintiff does not prove by clear and convincing evidence that defendants published the statements at issue with "actual malice" as I have defined that term for you.

-- Carr v. Forbes, Inc. (D. S.C.) (D)

If you find that Mr. Paul has proven by clear and convincing evidence that the Metro Corp. defendants published defamatory falsehoods that are more defamatory than the full truth, or that they placed Mr. Paul in a false light, you will then consider the element of fault on the part of the defendants - an element that applies to both the claims of defamation and false light.

In order to foster public debate about issues of public importance, the United States Supreme Court has ruled that public figures must meet a high standard of proof in a defamation action. Emphasizing the importance of inhibited, robust discussion on public issues, the Supreme Court has noted that such discussion may include "vehement, caustic, and sometimes unpleasantly sharp attacks." (*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Mr. Paul, as a public figure, therefore has the very high burden of proving to you that the Metro Corp. defendants published the phrase at issue with actual malice. Unless you are convinced that the Metro Corp. defendants acted with actual malice, you must find for the Metro Corp. defendants on the defamation claim in this case.

The term "actual malice" that I have just mentioned is an element that the plaintiff must prove by clear and convincing evidence. Actual malice means that the written statements were published with knowledge that they were false, or with reckless disregard for whether they were true or false. "Reckless disregard" does not mean that the defendants were negligent, grossly negligent, or even "reckless" in the ordinary sense. Rather, to prove "reckless disregard" of the truth, Mr. Paul must establish by clear and convincing evidence, which I have already defined for you, that the defendants in fact entertained serious doubts as to the truth of the phrase at issue, or that the defendants -- published the phrase at issue with a high degree of subjective awareness that it was probably false. In other words, the defendants can be held liable only if they knew what they said about Mr. Paul was false or probably was false but they decided to say it anyway. If the Metro Corp. defendants reasonably believed, under the circumstances

surrounding publication of the article, that the phrase at issue was true, there is no actual malice and you must find for the defendants.

You must not confuse actual malice as I have defined it with more common definitions of malice, such as ill will or hatred. Plaintiff cannot prevail merely by proving that the Metro Corp. defendants or their employees were motivated by ill will, prejudice, hostility, hatred, contempt or even a desire to injure. Hostility, disapproval or other forms of ill will do not as such establish actual malice; a reporter may despise someone but nevertheless publish only what he believes to be the truth in writing about that person. The motives of the Metro Corp. defendants are irrelevant. Therefore, while you may consider ill will or other relevant forms of bias, to prevail, Mr. Paul must establish actual malice in the sense I have defined it. Only if the Metro Corp. defendants deliberately published lies or statements made in reckless disregard of the truth can Mr. Paul recover in this action.

Your inquiry in this area concerns a subjective matter, namely, the state of mind of Loren Feldman and the *Philadelphia Magazine* editorial staff. An important principle to keep in mind in deciding the issue of actual malice is that your decision must turn upon the state of mind of the defendants and their responsible employees or agents at the time of publication of the alleged defamatory statement. Unless I tell you otherwise in these instructions, you may not rely on any evidence as to events or circumstances after publication.

In applying the actual malice rule, it is not enough for you to find that the defendants acted negligently or made a mistake or did not exercise good judgment. Unless plaintiff proved to you that the phrase at issue was published with knowledge of its falsity or with serious doubts as to truth, then your verdict must be for the Metro Corp. defendants.

To establish that the Metro Corp. defendants knew that the phrase at issue was false, Mr. Paul must have demonstrated that they had actual knowledge, prior to publication, that the information contained in the phrase “slip-and-fall lawyer” was false as applied to Mr. Paul.

To find that the Metro Corp. defendants acted with reckless disregard for truth or falsity, you must find that they in fact subjectively entertained serious doubts as to the truth of the statements in the Mr. Paul.

I instruct you that neither Loren Feldman nor *Philadelphia Magazine* was under any duty to investigate or check facts beyond the duty to avoid publishing with actual malice as I have defined it. Investigatory failures alone are insufficient to constitute a reckless disregard of the truth. Moreover, the law does not impose upon a reporter or magazine the duty to take every possible step, to look at every available document, or to speak to every person who conceivably has knowledge of the subject matter. Moreover, the Metro Corp. defendants cannot be saddled with the impossible burden of verifying to

a certainty each of the facts associated in articles with a person's name, such as the phrase "slip-and-fall lawyer." Further, reckless disregard is not measured by whether a reasonably prudent person would have investigated further before publishing. The Metro Corp. defendants have not published with knowledge of falsity or with reckless disregard for truth if you find that they believed that the phrase at issue was accurate at the time of its publication, even if you find that a more thorough investigation might have prevented en-or in the article.

I also instruct you that, after publication, the defendant had no duty whatever to investigate anyone's claim that the statement was false, or to issue any retraction of the statement, or to further investigate its sources. You may not consider any failure of the defendant to engage in these types of activities as evidence of the existence of actual malice at the time of publication.

Finally, the fairness, morality, and propriety of a magazine publication is not a matter for your consideration. The First Amendment to the Constitution does not permit an award of damages against a magazine for being unfair or for publishing material which you may find to be improper.

-- Paul v. Philadelphia Magazine (Pa.) (D)

Editor's Note: *The following instruction should be given only in the event the court first determines that the implication contended by the plaintiff is a reasonable interpretation of the specific language of the article, and there is clear and convincing evidence that the defendants intended the particular implication suggested by the plaintiff and published that implication with actual malice.*

The plaintiff also contends that the statements about him in the article implied that he knowingly participated in the cover-up of a murder. The plaintiff claims that such an implication is false and defamatory and placed him in a false light before the public.

In order for the plaintiff to recover for any alleged implication that the article may bear, he must prove:

(1) By a preponderance of the evidence, that there are particular false statements in the article that, taken in context, reasonably create the implication of fact about him that he claims. In that regard, the plaintiff cannot place an imaginary construction on the words used and give them meaning which they do not convey, and it is for you to decide if the publication conveys the meaning alleged by the plaintiff;

(2) By a preponderance of the evidence, that the implication of fact is substantially false;

(3) By clear and convincing evidence, that the defendants intended to convey that specific implication of fact about the plaintiff; and

(4) By clear and convincing evidence, that the defendants recklessly disregarded the falsity of the implication of fact about the plaintiff they were intending to convey.

-- Jenkins v. Advance Magazine Publishers Inc. (W. D. Okla.) (D)

If Mr. Clark is a public figure, or the alleged defamatory statements concern an issue of public concern, he cannot recover any damages unless he demonstrates with convincing clarity that the defamatory statements were false and were published with actual malice.

Actual malice means a defendant has published a statement either knowing that it was false or in reckless disregard of whether or not it was false.

Convincing clarity, or clear and convincing evidence, is a higher standard of proof than a mere preponderance of the evidence. The plaintiffs burden is to convince you that the facts he asserts regarding defendant's knowledge (or lack of knowledge) of the falsity of the published statements are probably true and that the probability they are true is substantially greater than the probability that they are false.

The crucial inquiry is the defendant's attitude or state of mind toward the allegedly libelous material published. To meet his burden, the plaintiff must prove, by clear and convincing evidence, that the defendant in fact entertained serious doubts as to the truth of his publication.

The reckless disregard/actual malice standard is not the same as negligence; a defendant who does not know or does not have a reason to know that a statement is false or who publishes a statement negligently has not published it with actual malice.

Actual malice may be established if defendants "failed to investigate a story weakened by inherent improbability, internal inconsistency or apparent reliable contrary information."

You cannot find actual malice solely because you determine that the defendant could have investigated further or contacted other sources before publishing.

"Failure to investigate will not alone support a finding of actual malice."

Even if you decide the defendants did not check details, that failure does not constitute actual malice. Negligent misstatements of fact or mere negligence in researching the facts, do not constitute actual malice.

The failure to use the word "allegedly" is insufficient to create a jury issue of actual malice.

The fact that defendants knew that some sources were hostile to Mr. Clark does not show by convincing clarity that defendant published the story with reckless disregard of the truth.

Even if you find the defendants made minor mistakes in their interpretation of events, or selected the wrong term or language, that would not constitute actual malice.

-- Clark v. Connecticut Magazine (Ct.) (D)

VIII.C. Gross Irresponsibility

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

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

IX. DEFENSES

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

IX.A. Absolute Privilege

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

government records; it is enough that the broadcast report fairly summarized the information in the government records.

-- Padilla v. KOAT TV (N.M.) (C)

Only if you find that any of the statements were false and defamatory, and of and concerning Mr. Clark and that Mr. Clark is not subject to the actual malice standard, or if he is, he has met it, do you then need to determine any privilege is applicable here.

You must consider whether defendants were protected by an absolute privilege. Connecticut recognizes an absolute privilege for judicial proceedings.

The privilege prevents the recovery of damages for defamatory statements, even if published falsely or maliciously.

It protects statements "preliminary to" or made "during the course of a proposed or continuing judicial proceedings:"

Statements by a judge in. a judicial opinion are immune from claims of defamation.

-- Clark v. Connecticut Magazine (Ct.) (D)

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

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

-- Padilla v. KOAT TV (N.M.) (C)

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

If you find that any of the statements plaintiff has challenged are a fair and accurate report of government documents – including FBI Reports and Grand Jury transcripts – reporter Sharp obtained while preparing the articles, such statements are not actionable. The only qualification on this rule is that in addition to fairly and accurately

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

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

1. Fair Report

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

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

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

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

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

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

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

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

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

-- Paul v. The Hearst Corporation (M.D. Pa.) (C)

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

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

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

paraphrasing, or otherwise drawing on official documents or proceedings, the report is privileged.

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

The plaintiff may not recover for defamation if a defendant was legally privileged to make the statement about which the plaintiff complains. The plaintiff may not recover to the extent any statement published by the defendants is a substantially accurate account of a government document or government information. The media defendants have no duty to investigate the accuracy of a government document or government information before broadcasting that information. A substantially accurate report by the media about official statements is "privileged" under the law regardless of whether the report contains defamatory statements, and regardless of whether the information disclosed by a public official is itself accurate.

The news report need not be a verbatim restatement of government information or exact in every detail; it may be a summary or be abridged or condensed. To be legally privileged, the news report as a whole should be a substantially accurate account of the gist or substance of the official information. The broadcasts cannot embellish upon the contents of the information reported by the police.

Each defendant has the burden of proof with respect to its claim that their broadcasts were privileged.

-- Stewart v. NYT Broadcast Holdings (Okla.) (C)

The plaintiff cannot recover for defamation in this case if KFOR's reports about actions against M&M Drum Company or Glenn Malson taken by the City of Oklahoma City's Water and Wastewater Utilities Division convey to the viewer a substantially accurate account of the official action. The report may be abridged or condensed, and need not be exact in every immaterial detail.

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

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

-- Malson v. Palmer Broadcasting (Okla.)

The law gives a party a privilege to publish a fair and accurate report of a judicial complaint, even though the complaint itself contained defamatory statements. To establish that they are entitled to this privilege or defense, Calvin Klein and CKI have the burden of proving two elements by a fair preponderance of the evidence.

First, the privilege to publish a fair and true report of a judicial complaint is not available to the parties who themselves filed the complaint, if they filed the complaint maliciously and then publicized their allegations in the press. A complaint is filed maliciously if it is filed in bad faith with an intent to injure. And so the first element that Calvin Klein and CKI must prove is that they filed their complaint in good faith for a legitimate purpose other than generating negative publicity about Warnaco.

Second, Calvin Klein and CKI must prove that their statements fairly and truthfully reported the content of their complaint against Warnaco. The privilege to publish a fair and true account of a judicial complaint applies only to the extent that the challenged statement was actually part of the judicial complaint. The privilege does not extend to a statement that was not part of the complaint itself. The burden is on Calvin Klein and CKI to prove by a fair preponderance of the evidence that their statements were fair and true reports of their complaint.

In order to constitute a fair and true report, it is not necessary that a report quote the exact words of their complaint. A report that paraphrases, summarizes, or condenses the words used in the complaint is fair and true if the substance of the complaint is stated fairly and with substantial accuracy. On the other hand, statements are not fair and true if they are slanted or one-sided, or if they exaggerate or embellish on the allegations of the complaint in a way that conveys a substantially different meaning. The test is whether the statements that were made would have a substantially different effect on the mind of those who read or heard them than the effect of the complaint itself. If you find that the challenged statements, given their ordinary meaning, stated fairly and with substantial accuracy what was stated in the complaint, and did not exaggerate or add to what was stated in the complaint, you will find that the statements were fair and true. If you find that any of the challenged statements did not state fairly or with substantial accuracy what was stated in the complaint, or that any of the challenged statements exaggerated or added to what was contained in the complaint, you will find that the challenged statements were not fair and true.

Authorities: New York Pattern Jury Instructions - Civil, 3:31 (1968 & Supp. 2000); *Williams v. Williams*, 246 N.E.2d 333, 337, 23 N.Y.2d 592, 298 N.Y.S.2d 473 (1969); *McNally v. Yarnall*, 764 F. Supp. 853, 856 (S.D.N.Y. 1991); *Savage is Loose Co. v. United Artists Theatre Circuit, Inc.*, 413 F. Supp. 555, 561 (S.D.N.Y. 1976); *Daniel Goldreyer, Ltd. V. Van de Wetering*, 217 A.D.2d 434, 435-37,630 N.Y.S. 2d 18, 22 (1st Dep't 1995).

-- Calvin Klein Trademark Trust v. Wachner (S.D.N.Y.) (D)

Even if you do determine that the *Patriot News* Defendants published false and defamatory statements regarding Francis Marsico and that his privacy was invaded by being placed in a false light, Pennsylvania recognizes certain privileges which can serve to protect a Defendant from liability. One of these is caned the Fair Report Privilege. Under this privilege, reporters and publishers cannot be held liable for fair and accurate reports regarding the judicial or administrative activities of government, even though the accounts may contain defamatory falsehoods. *Mosley v. Observer Publishing Co., supra*, 629 A.2d 965 at 967.

-- Marisco v. Patriot News Co. (Pa.) (D)

Even if you determine that Defendants Darragh and The Morning Call published false and defamatory statements regarding Plaintiff Mark Mendelson, Pennsylvania recognizes certain privileges which can serve to protect Darragh and The Morning Call from liability because they are important to our public interest. One of these is called the Fair Report Privilege. Under this privilege, reporters and publishers cannot be held liable for fair and accurate reports regarding the judicial and administrative activities of government, even though the accounts may contain defamatory falsehoods.

This is such a case because the article at issue reported on various statements and allegations made in proceedings before federal, state and local courts and governmental entities, including lawsuits filed in court and investigations by the City of Allentown, the United States government and Federal Bureau of Investigations (FBI). Under the law, Defendants Darragh and The Morning Call cannot be liable to Plaintiff Mark Mendelson if the article was a fair and accurate summary of those statements and allegations.

When the media reports on such allegations, the media is under no obligation to investigate their accuracy. All the media is required to do is report on the allegations fairly and accurately. How a reporter gathers his information regarding a governmental document or action is immaterial for application ofthe privilege, if the reporter uses a reliable source, such as official documents or governmental officials.

The Fair Report Privilege is abused only if Defendants Darragh and The Morning Call's article was not fair, accurate and complete, or if Darragh and Morning Call's sole purpose was to harm Plaintiff Mark Mendelson. Plaintiff Mark Mendelson has the burden

of proving whether or not Defendants Darragh and The Morning Call abused the privilege and thereby lost its protections.

To be fair, accurate and complete, a verbatim recitation is not required. Rather, a summary of substantial accuracy is all that is required. To make this decision, you must compare those allegations with the article and determine whether the article contains the same "gist" or "sting" as the court and governmental records and proceedings. So long as the report of the event in the newspaper would have the same effect on the average, reasonable reader as the underlying event, the privilege is not abused. The question for you to decide is whether the article accurately reported on statements and allegations contained in court and governmental records and proceedings and was published solely for the purpose of causing harm to Plaintiff Mark Mendelson.

-- Mendelson v. Darragh (Pa.) (D)

IX.B. Qualified Privilege

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

-- Padilla v. KOAT TV (N.M.) (C)

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

-- Taylor v. New York Times (Ala.) (D)

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

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

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

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

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

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

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

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

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

You must also consider whether defendants were protected by a qualified or conditional privilege. Connecticut recognizes a conditional privilege for statements made without common law malice (spite or hatred), on a matter of public interest including statements by public officials.

If the defendants had an honest belief in the truth of the defamatory matter, reasonable grounds for his belief and an honest desire to discharge the interest or duty protected, the statements are conditionally privileged even if they are untrue.

The Court determines whether or not a particular statement is conditionally privileged. Accordingly, I instruct you that the statements in question, closely related to a matter of strong public interest, are conditionally privileged.

You, the jury, determine if the privilege has been abused because the defendants were motivated by an improper motive such as malice or spite, *Bleich*, 493 A.2d at 240; or because he spoke with reckless disregard of the truth, *Moriarity v. Lippe*, 294 A.2d at 335; or if the defamatory material bears no reasonable relationship to the issue under discussion, *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. at 616, 116 A.2d at 445.

-- Clark v. Connecticut Magazine (Ct.) (D)

1. Neutral Reportage

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

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

The doctrine of neutral reportage is a defense to a libel action. The doctrine of neutral reportage gives newspapers an absolute privilege to accurately publish statements

made by the police chief or police officers concerning newsworthy events, even though the statements were untrue and the reporter seriously doubted that they were true.

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

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

-- Tavoulareas v. Washington Post (D. D.C.) (D)

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

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

The neutral reportage privilege protects the Metro Corp. defendants irrespective of their belief in the truth or falsity of the phrase "slip-and-fall lawyer" as applied to Mr. Paul where the statement was made by a public official or public figure who is already embroiled in public controversy levels a false charge against another public figure.

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

2. Fair Comment.

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

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

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

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

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

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

-- Padilla v. KOAT TV (N.M.)

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

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

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

IX.C. Truth/Substantial Truth

Editor's Note: *While proving falsity is the plaintiff's burden, many states' case law includes language characterizing truth as a defense, and in some circumstances it is possible that truth still either may or must be asserted as a defense. This section collects some instructions in which truth might be characterized as a defense.*

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

-- Padilla v. KOAT TV (N.M.) (C)

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

-- Padilla v. KOAT TV (N.M.) (C)

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

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

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

-- Lansdowne v. Beacon Journal (Ohio) (C)

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

-- Schultz v. Readers Digest (E.D. Mich.) (C)

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

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

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

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

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

-- Merco Joint Venture v. Kaufman (W.D. Tex.) (C)

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

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

The Plaintiff must prove that the pertinent statements are false. However, Defendant KCCI-TV alleges as a part of its defense that the statements are true. It can prevail on this defense if it proves that the statements are substantially true.

KCCI-TV does not have to establish the literal truth of the publication in every detail as long as the "sting" or "gist" of the statement is substantially true. The "gist" or "sting" of a statement is the heart of the matter in question – the hurtfulness of the utterance. You may determine the "gist" or "sting" of the statements by looking at the

highlight of the broadcast, the pertinent angle of it, and not to the items of secondary importance which are inoffensive details not material to the truth of the statement.

The fact that a statement is substantially true is a complete defense, regardless of bad faith or malicious purpose. In order to establish this defense, KCCI-TV must prove the substantial truth of the statement. Slight inaccuracies of expression are not important so long as the statement is substantially true.

If KCCI-TV proves that a statement is substantially true, you cannot award Plaintiff any damages for any harm that statement may have caused Plaintiff.

-- Brown v. Des Moines Hearst-Argyle Television (Iowa) (C)

A statement may be said to be "true" if the "gist" or "sting" of the statement is true. That is, a statement is considered true, and therefore not libelous, if its injurious part is true. It is not necessary to prove the literal truth of the accusation in every detail f and it is sufficient to show that the imputation is substantially true. The question is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. Therefore, a substantially true communication cannot be the basis for actionable defamation.

-- Cobb v. Time Inc. (M.D. Tenn.) (C)

Truth or substantial truth is always a defense to libel, no matter who the plaintiff is, or what his status might be.

If you find that the statements of which Mr. Clark complains are true or substantially true, then you must find they are not defamatory.

A statement is considered to be true, even if some minor details are incorrect, so long as the main charge or gist of the statements is true. The question is whether the statements as published would have had a different impact on the reader than the truth as Mr. Clark claims it to be.

If you find the statements of which Mr. Clark complains are substantially true, then you must find for the defendant as to each of those statements.

-- Clark v. Connecticut Magazine (Ct.) (D)

IX.D. Consent

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

-- Masson v. New Yorker (N.D. Cal.) (C)

X. DAMAGES EXPLAINED

X.A. Actual and Compensatory

1. Generally

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

-- DiGregorio v. Time, Inc. (D. R.I.) (C)

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

-- McCarnan v. WAMS Radio Station (Del.) (D)

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

* * *

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

-- Lasky v. ABC (S.D.N.Y.) (C)

The burden is on the plaintiff in each case to prove by the greater weight of the evidence each item of damage he or it claims and to prove that each item was caused by

the libelous statement of a particular defendant. He or it is not required to prove the exact amount of damages, but he or it must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. To the extent that any plaintiff fails to do so, then he or it cannot recover for that item.

-- Puppy Land v. Roy H. Park Broadcasting (Va.) (C)

"Damages," if any, pertaining to James Robinson could include injury to reputation, mental anguish, humiliation or embarrassment, lost earnings or decrease in earning capacity.

"Damages," if any, pertaining to a corporation or joint venture could include injury to reputation and loss of profits.

-- Robinson v. KTRK Television (Tex.) (C)

If you find for the Plaintiff, then you must determine from the evidence and award him a sum of money that will fairly and reasonably compensate him for the following damages, if any, which you believe from the evidence he has sustained directly by reason of the May 2, 2001, Foxnews.com article having been published by the Defendant:

(1) Loss of earnings and/or opportunities in his employment, including such loss or losses as it is reasonably certain he will suffer in the future; and

(2) Embarrassment, humiliation and mental anguish, including any such suffering as he is reasonably certain to endure in the future.

-- Hewan v. Fox News Network (E.D. Ky) (C)

The Court instructs that if you return a verdict in favor of Plaintiffs on their claim for defamation, then it will be your duty to award them damages for harm to their reputations. Even though there is no fixed formula for determining such damages, Plaintiffs are not to be deprived of their right of recovery because they cannot prove the amount of damages with absolute certainty. If damage is certain, but the extent is uncertain, this does not prevent the recovery. Your verdict for damage to reputation must be a reasonable estimate of the harm to Plaintiffs' reputation caused by the defamation.

-- Hudson v. WLOX Inc. (Miss.) (C)

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

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

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

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

To recover general or special damages, plaintiff must prove that his damages were caused by statements published by the defendants which you have found to be libelous.

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

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

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

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

-- Paul v. The Hearst Corporation (M.D. Pa.) (C)

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

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

-- Faigin v. Kelly (D. N.H.) (D)

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

-- Schafer v. Time, Inc. (N.D. Ga.) (C)

If you find Plaintiff Rod Brown is entitled to recover damages, it is your duty to determine the amount. In doing so, you shall consider the following items:

1. The reasonable value of any loss of reputation sustained by the Plaintiff from the date of the broadcast to the present time.
2. The present value of any future loss of reputation sustained by the Plaintiff.
3. The reasonable value of any loss of profits from Plaintiff's business from the date of the broadcast to the present time.
4. The present value of any future loss of profits from Plaintiff's business.
5. The reasonable value of mental pain and suffering sustained by the Plaintiff from the date of the broadcast to the present time.

   Mental pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life.
6. The present value of future mental pain and suffering

The amount you assess for loss of reputation or mental pain and suffering cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the Defendants as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage.

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

-- Brown v. Des Moines Hearst-Argyle Television (Iowa) (C)

In order to recover any other damages, Plaintiff Rod Brown must first prove damage to his reputation caused by falsity in the broadcast. Injury to reputation relates to the diminished opinion which others in the community have of the plaintiff proximately caused by the falsity in the broadcast, not on any emotional distress to the plaintiff. If you

find Plaintiff suffered damage to his reputation caused by the falsity in the broadcast, you may consider whether he suffered any other damages proximately caused by the falsity in the broadcast.

-- Brown v. Des Moines Hearst-Argyle Television (Iowa) (C)

If you decide for Dr. Mitchell on his Defamation claim, you must then fix the amount of his damages. This is the amount of money that will reasonably and fairly compensate him for the injury sustained as a result of the defamatory statements published by Defendants.

In fixing the amount you will award Dr. Mitchell, you may consider the following elements:

a. The damage to his reputation and standing in the community;

b. Personal humiliation and embarrassment;

c. His mental pain and suffering, past and future; and

d. Emotional distress.

However, Dr. Mitchell may not recover any damages unless he first demonstrates a loss of reputation.

-- Mitchell v. Griffin Television (Okla.) (C)

If you find for Defendants, you shall not consider the matter of damages. But, if you find for Plaintiff on the defamation claim, you should award Plaintiff an amount of money that the greater weight of the evidence shows will fairly and adequately compensate Plaintiff for the actually injuries allegedly caused by the broadcast. A broadcast is a cause of damages if it directly and in natural and continuous sequence produces or contributes substantially to producing such damage.

If you find for Plaintiff, you shall consider the following elements of damages: Any injury to reputation or health and any shame, humiliation, mental anguish, and hurt feelings.

There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. An award should be fair and just in the light of the evidence. You are not permitted to award speculative damages. This means you are not to include in any verdict compensation for prospective loss, which, although possible, is wholly remote or left to conjecture and/or guess.

-- Woodie v. E.W. Scripps Co. (Fla.) (J)

If you decide for the Plaintiff on the question of liability, you must fix the amount of money which will reasonably and fairly compensate him for the following elements of damages proved by the evidence or presumed to have resulted from the defamatory Complained of Statement:

Impairment of Plaintiff's personal and professional reputation and standing in the community.

Personal humiliation, and anguish and suffering.

The value of loss of income and business opportunities.

The amount, if any, of these damages is for you to determine.

-- Knight v. Chicago Tribune (Ill.) (C)

If you determine that the Defendants' conduct proximately caused damages to Plaintiff AAA All City Heating, you may consider all of the evidence on the subject of damages because there is no set rule for the way damages are to be calculated in a defamation case brought by a business corporation.

The out-of-pocket loss to the business may include a loss of profits which you find was proximately caused by any statements you found to be false and defamatory. To evaluate lost profits, you should subtract variable or incremental costs from the lost revenue. A variable or incremental cost is one that varies as the company's revenue varies. A variable or incremental cost increases as revenue from the business increases and decreases as revenue decreases.

-- AAA All City Heating v. New World Communications (Ohio) (C)

If you find for Plaintiff, that is, if Plaintiff has proven by clear and convincing evidence that Defendants acted with negligence and Plaintiff has shown he sustained actual injury, you may award an amount of money that you decide by the greater weight of the evidence will fairly and adequately compensate for the injury directly caused by the statement that Thomas Flippen was indicted for four counts of unlawful sexual conduct with a minor.

You must put aside all passion, personal dislikes and anger. You may take into consideration all facts and circumstances in evidence to decide the amount of these damages. The following are the types of injury for which you may award compensation.

(1) the injury to the Plaintiff's reputation, including exposure to public hatred, contempt, ridicule, shame or disgrace;

(2) loss of business or professional income, and

(3) Plaintiff's mental anguish.

Direct cause exists where an act or failure to act in a natural and continuous sequence, directly produces the damage and without which it would not have occurred.

With respect to loss of business or professional income, you are not to speculate. The law deals in probabilities, not mere possibilities. You may consider only those things that from the evidence are directly related and reasonably certain.

-- Flippen v. Gannett Co. (Ohio) (C)

Editor's Note: *The following instruction is the court's reading of the charge to the jury, taken from the trial transcript.*

As to damages, that is an award of money, this issue, which is question three on the jury form, is for you to determine if you decide the defendants are legally responsible for damages. So if you decide that the photograph and caption were defamatory to plaintiffs and the defendants negligently published it, then the question is how much damages is each plaintiff entitled to? Where there are no actual damages, that is no real damages to reputation although the reputation was legally injured, then a jury should award what are called nominal damages. That is one dollar to the plaintiff for the legal injury or intrusion. On the other hand, if you decide that there were actual damages, then plaintiffs should each be compensated for that. And these are called compensatory damages. Damages that compensate. And the paramount rule is that such damages expressed in money should be fairly, fully and reasonably compensating. So let me review with you some principles of compensatory damages.

Here damages for injury to reputation involve the reasonably likely effect on each plaintiff's reputation and standing in the community and, as a result or consequence, their personal embarrassment, humiliation, mental anguish or suffering. There need not be any out-of-pocket loss or injury to one's business or employment. Here you should consider the position or standing of each plaintiff in the community and to -- and decide to what extent, if any, the alleged defamation had a negative effect, a damaging effect on their reputations. And, in turn, if so, caused them embarrassment, humiliation, mental anguish or suffering. And to what extent, if any, such effects and consequences may persist and occur in the future.

As to Mr. Kauffman's possibly running for political office, as well as all items of damages, you must find in the first place that there is a reasonable prospect that this may occur at some point. And if so, to what extent this publication -- this communication, the caption, would have on such a political campaign. In the same way, if you conclude that he will not run for office because of this communication, then you must decide what the chances were he would have run if this piece had never been published and what realistic or reasonable effect the publication of it has had on his decision.

If you find no actual damages have been proven, that is no harm to reputation, including plaintiffs' own alleged reactions of embarrassment and humiliation, you're to award nominal damages of one dollar each. Nominal damages apply, for example, if a plaintiff is shocked or insulted by the defamation but is not -- but gives no proof of actual harm. If you find the defamation caused actual harm to reputation including plaintiffs' embarrassment and humiliation, you are then to award damages to compensate them for the harm. Damages that are fairly and fully compensating.

Plaintiffs contend, as I understand it, that although they are not entitled to compensatory damages for the reactions of relatives and friends, since among them their reputation was not harmed, and of course it could not be harmed among readers of Car and Driver who did not know them at all, it was harmed among those who might recognize them from the picture, but who do not really know them well. And that this will continue to occur in the future and will prevent Mr. Kauffman from running for office or hurt his chances if he should choose to run. The defendant contends, as I understand it, that there is no proof of actual harm to plaintiffs' reputation. That relatives and friends are eliminated as well as the readership who does not know plaintiffs. And that the claim as to those who may recognize them but do not know them well is hypothetical, speculative and not supported by any evidence. And that Mr. Kauffman denied he intended to run for office during his pretrial and deposition testimony earlier this year.

-- Kauffman v. Diamandis Communications (E.D. Pa.) (C)

Plaintiff Mark Mendelson bears the burden of proving that a false and defamatory meaning of the article caused him actual injury. Mendelson is only entitled to recover damages which are the natural and direct result of the publication. A mere tendency of the statement to injure is insufficient. You may not presume damages; all items of actual damage must be specifically proven by Mendelson. You may not consider any damage to or feelings of his family, friends, business associates or relatives. It is only Plaintiff Mark Mendelson's own injury, personal to his reputation, which may be compensated. Plaintiff Mark Mendelson has the burden of establishing actual injury, and he must support any claim of actual injury with clear and convincing evidence. I have previously instructed you on what clear and convincing evidence means, and those instructions apply here.

-- Mendelson v. Darragh (Pa.) (D)

Question 7 asks you to assess whether Ms. Maguire was injured in different categories due to the publication of the 13th paragraph of the Milwaukee Sentinel article. You will answer this question only if you have answered "Yes" to the proper prerequisite questions.

Question 7a deals with Ms. Maguire's reputation. In arriving at your answer, you should consider whether, as the result of the publication of Professor Maguire's statement, Ms. Maguire has suffered any damage to her reputation in the community where her reputation is known. Ms. Maguire's reputation is presumed to have been good at the time the statement was published. However, in determining damage to reputation, you should consider all evidence that has been offered bearing on her reputation in the community.

Question 7b deals with whether Ms. Maguire suffered humiliation, mental anguish and emotional distress as a result of the statement.

The third damages question, 7c, asks whether Ms. Maguire's future earning capacity was impaired as a natural consequence of the publication of Professor Maguire's statement in the Milwaukee Sentinel. While Ms. Maguire has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as that needed to support findings as to other items of damage. The reason for this rule is that the concept of future earning capacity necessarily involves the consideration of factors which, by their very nature do not admit of any precise or fixed rule. However, damages for loss of future earnings may not be based on speculation. You are required to base your answer on evidence which, under all the circumstances of the case, reasonably supports your determination of damages.

On each of these questions, the burden again rests upon Ms. Maguire to convince you by the greater weight of the credible evidence to a reasonable certainty that she has sustained injury.

-- Maguire v. Journal Sentinel (Wis.) (D)

The plaintiff in this case has the burden of proving "actual damages" by a preponderance of the evidence. According to our law, "actual damages" in a case such as this is injury or damage that is the result of damage to reputation and must stem from any damage that the statement at issue caused to the plaintiff's reputation. However, I emphasize again to you, Ladies and Gentlemen, that all these types of injury or damage must result from, and be proximately caused by, the statements at issue in this case.

I caution you, Ladies and Gentlemen, that you must be careful to ensure that any damages you might award are damages that result from injury to plaintiff's *REPUTATlON* caused by the statement; you *may not* award damages based on any alleged injury the statement at issue caused to the plaintiff directly, but may only award damages that are found to have resulted from injury to plaintiff's reputation.

Therefore, Ladies and Gentlemen, plaintiff bears the burden of proving by a preponderance of the evidence that:

(1) The plaintiff had a reputation;

(2) That the statements at issue in this case caused injury to that reputation; and

(3) That the injury to the plaintiff's reputation was the cause of damages to the plaintiff.

Plaintiff must prove all three of these elements. If you find that plaintiff has failed to establish any one of these elements, you cannot award any damages to the plaintiff.

-- Carr v. Forbes, Inc. (D. S.C.) (D)

2. General Damages

a. Elements of General Damage

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

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

-- Rosenthal v. New Yorker Magazine (Cal.) (C)

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

-- Narula v. Santa Paula Chronicle (Cal.) (C)

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

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

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

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

1. The seriousness of the false charge;

2. The extent of the Defendants' newscasts;

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

4. The reaction of those who received the defamation;

5. The disruption those charges caused;

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

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

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

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

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

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

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

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

-- Frey v. Multimedia, Inc. (S.D. Ohio) (C)

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

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

-- DiGregorio v. Time, Inc. (D. R.I.) (C)

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate [plaintiff] for the following elements of damages proved to have resulted from the communication by the defendants:

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

2. Personal humiliation of the plaintiff; and

3. Mental anguish and suffering incurred by the plaintiff.

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

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

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

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

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

* * *

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

-- Galloway v. CBS (Cal.) (C)

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

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

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

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

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

-- Boddie v. ABC (N.D. Ohio) (C)

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

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

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

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

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

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

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

You may also take into account the defendants' unsuccessful assertion of the substantial truth of the defamatory communications as a matter likely to affect the plaintiffs' reputation. You may also consider what the probable effect the defendants' conduct had on the plaintiffs' trade, business, or profession and the harm that may have been sustained by the plaintiffs as a result of that conduct.

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

-- Paul v. The Hearst Corporation (M.D. Pa.) (C)

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

There is no set rule for the way damages are to be calculated in a libel case brought, as here, by a business corporation. The approach that you use in determining

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

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

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

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

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

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

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

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

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

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

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

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

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

-- Malson v. Palmer Broadcasting (Okla.)(D)

b. Reputational Injury

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

-- Rosenthal v. New Yorker Magazine (Cal.) (C)

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

-- McCoy v. Bergen Evening Record (N.J.) (C)

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

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

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

-- Williams v. Seattle Times (Wash.) (C)

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

-- Galloway v. CBS (Cal.) (C)

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

-- Gertz v. Robert Welch, Inc. (N.D. Ill.) (C)

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

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

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

-- Lasky v. ABC (S.D.N.Y.) (D)

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

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

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

If, on the other hand, he proves reputational harm, he may recover damages for that harm as well as for any other damages that were the natural and direct result of the statement including damages for any out-of-pocket loss, humiliation and mental suffering.

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

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

One type of damage that Mr. Paul claims is damage to his reputation. You may not award this category of damages to him unless you find in his favor on his defamation claim – that is, if you find for plaintiff only on his false light claim, he may not recover damages for loss of reputation. In order to find that the statement in question harmed Mr. Paul's reputation, you must find that persons who know Mr. Paul actually read the phrase in *Philadelphia Magazine* and that their opinion of him actually was diminished

specifically as a result of the publication. Injury to reputation is judged by reaction of other persons in the community and not by plaintiff's own speculation or self-estimation.

-- Paul v. Philadelphia Magazine (Pa.) (D)

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

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

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

-- Faigin v. Kelly (D. N.H.) (D)

In determining the amount of any injury to plaintiff's reputation, you must evaluate the kind of reputation the plaintiff enjoyed before the publication, as compared to the kind of reputation the plaintiff enjoyed after the publication; and whether plaintiff's reputation in the community has, in fact, actually been diminished since the publication. You may only award plaintiff damages for harm to his reputation resulting from publication of *Armed & Dangerous*.

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

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

-- Faigin v. Kelly (D. N.H.) (D)

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

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

c. Emotional, Physical, and Other Injuries

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

-- Levine v. Gutman (N.D. Tex.) (C)

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

monetary award for such injury you find that the Plaintiff suffered and for conscious pain and suffering.

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

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

-- Prozeralik v. Capital Cities (N.Y.) (C)

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

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

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

(a) any insult to him including any pain, embarrassment, humiliation, and mental suffering that he suffered as a result;

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

(c) if proven, any special damages.

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

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

-- Kastrin v. CBS Inc. (W.D. Tex.) (D)

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

-- Schafer v. Time, Inc. (N.D. Ga.) (C)

3. Special Damages

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

-- Rosenthal v. New Yorker Magazine (Cal.) (C)

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

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

* * *

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

-- Prozeralik v. Capital Cities (N.Y.) (C)

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

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

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

In a defamation action, there are generally two types of actual damages: general damages and special damages. In this case, Plaintiff cannot recover general damages unless she first Proves that she has incurred special damages as a result of a false publication by the Defendant.

General damages are awarded for the purpose of compensating the plaintiff for injury to her reputation and standing in the community, personal humiliation and mental anguish and suffering caused by the publication.

Special damages, on the other hand, are awarded for losses of an economic or pecuniary nature. Special damages are damages of such a nature that they do not follow as a necessary :consequence of the injury complained of. Special damages are damages that result from conduct of a person other than the defamer or the one defamed and must be legally caused by the defamation. Special damages are limited to specific monetary losses that a plaintiff incurs because of the defamatory publication. Loss of reputation alone is not enough to make the defamer liable unless it is reflected in some kind of economic or pecuniary loss. So too, lowered social standing and its purely social consequences are not sufficient.

Again, in order to recover any damages at all in this case, Plaintiff must prove the existence of special damages.

-- Moore v. Akron Beacon Journal (Ohio) (D)

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

-- Kastrin v. CBS Inc. (W.D. Tex.) (D)

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

-- Kastrin v. CBS Inc. (W.D. Tex.) (D)

4. No Speculative Damages

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

-- McCarnan v. WAMS Radio Station (Del.) (C)

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

-- DiGregorio v. Time, Inc. (D. R.I.) (C)

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

-- Frey v. Multimedia, Inc. (S.D. Ohio) (C)

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

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

-- Gertz v. Robert Welch, Inc. (N.D. Ill.) (C)

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

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

-- Galloway v. CBS (Cal.) (C)

You are not permitted to award speculative damages. This means you are not to

include in any verdict compensation for prospective loss which, although possible, is wholly remote or left to conjecture and/or guess.

-- Boddie v. ABC (N.D. Ohio) (C)

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

-- Lasky v. ABC (S.D.N.Y.) (D)

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

-- Paul v. Philadelphia Magazine (Pa.) (D)

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

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

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

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

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

only actual damages that are recoverable. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendant.

-- Schafer v. Time, Inc. (N.D. Ga.) (C)

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

-- Malson v. Palmer Broadcasting (Okla.) (D)

You may not award Plaintiff Mark Mendelson damages if his proof of harm is conjectural, remote or speculative, or where there is uncertainty regarding the existence of the damages. You may not render a verdict based on speculation or guesswork. You may not presume damages. Plaintiff Mark Mendelson must prove damages by clear and convincing evidence.

-- Mendelson v. Darragh (Pa.) (D)

5. Nominal Damages

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

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

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

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

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

If you find for Plaintiff but find that no damage has been proved, you may award nominal damages. Nominal damages are damages of an inconsequential amount that are awarded to vindicate a right where a wrong is established but no damage is proved.

-- Woodie v. E.W. Scripps Co. (Fla.) (J)

If you find that defendants . . . are liable for harm caused by their publication but

that the harm was not substantial, and you further find that the circumstances do not justify the award of punitive damages, your award of compensatory damages in plaintiff's favor may be in a nominal or token amount.

-- McCoy v. Bergen Evening Record (N.J.) (D)

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

-- Machleder v. Diaz (S.D.N.Y.) (C)

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

-- Schultz v. Readers Digest (E.D. Mich.) (C)
-- Tavoulareas v. Washington Post (D. D.C.) (D)

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

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

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

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

-- Schafer v. Time, Inc. (N.D. Ga.) (C)

If you find that defendants caused some injury to plaintiff, but that plaintiff has failed to prove by the greater weight of the evidence any amount of damages, you may award plaintiff what are called "nominal damages." Nominal damages are an insignificant, small or very small sum awarded where there is not substantial injury but

plaintiff's rights have been injured or where there has been injury but the plaintiff fails to show its amount.

-- Sweeney v. New York Times Co. (N.D. Ohio) (C)

"Nominal" means trifling or small. Nominal damages are generally $10.00 or less.

-- Flippen v. Gannett Co. (Ohio) (C)

You also have the option of awarding Plaintiff Mark Mendelson nominal damages. Nominal damages are not damages in fact, but in name only. They are allowed when the plaintiff has failed to prove any actual damages, but where you recognize that there was a wrong inflicted. Nominal damages are one dollar.

-- Mendelson v. Darragh (Pa.) (D)

6. Presumed Damages

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

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

-- Masson v. New Yorker (N.D. Cal.) (C)

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

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

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

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

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

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

[definition of actual malice omitted]

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

-- Schafer v. Time, Inc. (N.D. Ga.) (C)

Falsely accusing one of a crime is defamation *per se*. The false statements Defendant made about Plaintiffs accused them of the crimes of perjury, false swearing, and bank fraud. Thus, Defendant falsely accused Plaintiffs of numerous crimes, which constitutes defamation *per se*.

If the words are defamatory per se, damage is presumed and general damages may be recovered without allegation or proof of specific damages. This is because such words are, without the aid of extrinsic proof, injurious to the person concerning whom they are spoken. Plaintiffs are entitled to recover such general damages as harm to reputation, mental anguish, worry, embarrassment, pain, suffering and emotional distress from Defendant's false statements about Plaintiffs.

-- Gardner v. Stokes (Mont.) (C)

To recover damages for defamation, Warnaco is not required to prove its actual monetary losses. The law presumes damage from the publication of a statement that tends to discredit a party in its trade or business, and it recognizes that damages cannot be proved with mathematical certainty. You are to apply your common sense and good judgment in deciding the amount of damages. In fixing that amount you should consider Warnaco's standing in the community, the nature of the statements that were made, the extent to which these statements were circulated (in other words, how many people heard or read them), the tendency of the statements to injury a company like Warnaco, and all of the other facts and circumstances in this case.

-- Calvin Klein Trademark Trust v. Wachner (S.D.N.Y.) (D)

If the plaintiff establishes that certain statements were false and libelous *per se*, he may be entitled to recover presumed or general damages. In such instances, "the law only presumes an injury to the plaintiff's reputation, and does not presume damages".

The doctrine of proximate cause is relevant to determining damages in a libel per se case and the plaintiff may only recover for the damages to his reputation which were caused by the publication. If the plaintiff does not prove damages to his reputation or that the publication in question caused specific damages, he is only entitled to nominal damages.

-- Clark v. Connecticut Magazine (Ct.) (D)

7. Mitigation of Damages

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

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

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

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

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

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

-- Paul v. The Hearst Corporation (M.D. Pa.) (C)

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

-- Stecco v. Moore (Mich.) (D)

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

-- Schafer v. Time, Inc. (N.D. Ga.) (C)

You are instructed that any person who claims damages as a result of an alleged wrongful act of another has a duty under the law to use reasonable diligence under the circumstances to "mitigate," or minimize, those damages. The law imposes on an injured person the duty to take advantage of reasonable opportunities he may have to prevent the aggravation of his injuries, so as to reduce or minimize the loss or damage.

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

The question of whether the plaintiff acted "reasonably" with respect to the mitigation of damages is one for you, as the jury, to decide. Although the law will not allow an injured plaintiff to sit idly by when presented with an opportunity to mitigate, this does not imply that the law requires an injured plaintiff to exert himself unreasonably or incur unreasonable expenses in an effort to mitigate; and it is the defendant's burden to prove that the damages reasonably could have been avoided. In deciding whether to reduce the plaintiff's damages because of some failure to mitigate, therefore, you must weigh all the evidence in light of the particular circumstances of this case, using sound discretion in deciding whether the defendant has satisfied his burden of proving that the plaintiff's conduct was not reasonable.

-- Cobb v. Time Inc. (M.D. Tenn.) (C)

You have heard evidence of the circumstances of the publications, including the source of the information. You may consider this in mitigation of any compensatory or punitive damages claimed by either plaintiff, but it may not be considered in mitigation of any out-of-pocket losses which may have been proved by a preponderance of the evidence by either plaintiff .

-- Puppy Land v. Roy H. Park Broadcasting (Va.) (C)

Although a retraction or correction is not a defense, you may consider evidence of such matters for the purpose of mitigating or lessening the damages alleged by plaintiff. In evaluating a claim of mitigation, you should consider the method of retraction or correction, the prominence or lack of prominence of the retraction or correction and the promptness of the retraction or correction.

-- Sweeney v. New York Times Co. (N.D. Ohio) (C)

Defendants printed a correction on October 12, 2006 in the News Journal, which read: [text of correction omitted] The correction was published on the News Journal's website on April 11, 2007. Defendants claim that this action reduced or eliminated the damages claimed by the Plaintiff. In deciding the issue, you may consider the wording of the Defendants' correction, its location, its noticeability, its circulation, the time when it

was published, and all the facts and circumstances in evidence bearing on the Plaintiff's damages.

-- Flippen v. Gannett Co. (Ohio) (C)

Editor's Note: *The following instruction is the court's reading of the charge to the jury, taken from the trial transcript.*

As to the issue of what is called a retraction. Where a publication prints something that is alleged to be defamatory and thereafter prints a retraction or a correction, to the extent that this serves to withdraw or cancel any harm to reputation in the mind of the reader, it will lessen plaintiff's damage claim. However, the making of a retraction or offer to make a retraction is not necessarily an admission of liability. The publication can simply run a retraction saying that although we do not believe that what was printed was defamatory, the facts are such and such. Here you have heard that there was no retraction and there has been some evidence and argument on the subject that you may consider in regard to the positions of both sides after suit was started.

-- Kauffman v. Diamandis Communications (E.D. Pa.) (C)

A person who has been injured by the action of another must use ordinary care to mitigate or lessen the person's damages. "Ordinary care" is the degree of care usually exercised by a person of ordinary intelligence and prudence under the same or similar circumstances.

In this case, the rule of mitigation means that Ms. Maguire was required to use ordinary care to mitigate or lessen her damages, if any, as a result of Paragraph 13 of the Milwaukee Sentinel article. You must ask yourselves whether the evidence showed that the actions of Ms. Maguire following the publication of the statement tended to lessen any harmful effects, or tended to make them worse.

You must keep in mind Ms. Maguire's duty to mitigate as you fix damages, if any, resulting from the statement. If you find that Ms. Maguire did not use ordinary care to mitigate her damages, you should not include in your answer to the damages questions any amount for consequences of the injury that could have been avoided. The burden of proof on this issue is on the defendants, who must satisfy you to a reasonable certainty by the greater weight of credible evidence that Ms. Maguire did not use ordinary care in mitigating damages.

-- Maguire v. Journal Sentinel (Wis.) (D)

X.B. Punitive Damages

Editor's Note: *Practitioners should avoid the use of the term "actual malice" in proposed instructions about punitive damages. See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666 & n.7 (1989) (describing the term as "unfortunately*

confusing" and encouraging judges to use "plain English" terms such as "state-of-mind" or "deliberate or reckless falsity" instead). Some instructions from older cases which may use the term are included below because they otherwise fairly describe the law with respect to consideration of punitive damages. Instructions on punitive damages have been divided into two categories: those which require only proof of knowing or reckless disregard of truth and those which also add an element of common law malice or outrageous conduct as a prerequisite to a punitive damage award.

1. Actual Malice

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

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

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

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

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

-- Gertz v. Robert Welch, Inc. (N.D. Ill.) (C)

The Court instructs the Jury that if you find that either plaintiff is entitled to be compensated for his damages, and if you further believe by clear and convincing evidence that the defendant made the statements with actual malice; that is, he knew they were false or he made them so recklessly as to amount to a willful disregard for the truth, then you may also award punitive damages to punish a defendant for his actions and to serve as an example to prevent others from making such statements in the future.

If you award punitive damages, you must state separately in your verdict the amount you allow as compensatory damages and the amount you allow as punitive damages.

-- Puppy Land v. Roy H. Park Broadcasting (Va.) (C)

2. Actual Malice and Common Law Malice

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

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

* * *

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendants' act or omission, which proximately caused the actual damage to the plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

I want to emphasize to you that in order to award punitive damages in this case, regardless of whether or not you find that the plaintiff is a public figure, you must find by clear and convincing evidence that the defendants published the passages complained of with reckless disregard as defined in these instructions.

-- Pring v. Penthouse (D. Wyo.) (C)

Editor's Note: *In Lasky, the proposed instruction on actual damages required a reckless disregard finding.*

In this case, Mr. Lasky seeks punitive damages in addition to his claim for compensatory damages. Punitive damages are designed to punish a defendant or to deter future conduct. They may be considered only if Mr. Lasky satisfies each and every one of the other elements that I have previously described to you. If you find that Mr. Lasky satisfied such elements, punitive damages may only be awarded upon proof of one further element: Mr. Lasky must prove that ABC acted with an actual intent to injure him when it prepared its broadcast and did so with spite and ill will.

Any punitive damages you decide to award should bear a reasonable relationship to the actual damages that you have found, if any.

You may not award punitive damages against ABC unless you find that ABC expressly authorized or ratified the actual intent of its employees to injure Mr. Lasky, or authorized or ratified their spite and ill will, or that an officer of ABC participated in such conduct.

-- Lasky v. ABC (S.D.N.Y.) (D)

If, and only if, you have found actual damage to reputation, you may consider awarding punitive damages.

If you find that the defendants' conduct was a substantial factor in bringing about the harm the plaintiff is alleged to have suffered and if you find that the conduct of the defendant was outrageous, you may award punitive damages, as well as any compensatory damages, in order to punish the defendant for his conduct and to deter the defendant and others from the commission of like acts.

A person's conduct is outrageous when he acts with a bad motive or when he acts with reckless indifference to the interests of others.

Punitive damages are designed to punish conduct which is evil or wanton. Consequently, in order to impose punitive damages you must find that plaintiff's evidence goes beyond that required for compensatory damages.

To recover compensatory damages, Mr. Paul must prove with convincing clarity that the Metro Corp. defendants published false and defamatory statements about him either with knowledge that the statements were false or in reckless disregard to whether they were false or not. To recover punitive damages he must prove, in addition, that the Metro Corp. defendants acted with a bad motive or with reckless indifference to the rights of plaintiff.

-- Paul v. Philadelphia Magazine (Pa.) (D)

You have heard the law you need to know in order to determine if the plaintiff should be awarded compensatory damages. Although I have described two theories under which you can award compensatory damages, if you decide to award compensatory damages, you will award one sum. Now, I will provide you with instructions concerning the third and final damage theory in this case, called punitive damages. If you award compensatory damages, the law permits the jury, under certain circumstances, to award the injured person punitive damages in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct. In a libel case, you cannot award punitive damages unless you find that the plaintiff has proven by clear and convincing evidence that the defendant acted with actual malice. You will recall that actual malice exists if the defendant published the defamatory material knowing it was false or acting with reckless disregard as to its falsity.

In order to receive punitive damages the plaintiff must also demonstrate by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or entire want of care which would raise the presumption of conscious indifference to consequences. Negligence, even gross negligence, is inadequate to support a punitive damages award. In this context, malice does not mean actual malice as it has been previously defined for you. In this context, an act or a failure to act shows malice if it was prompted or accompanied by ill will, or spite, or grudge, either toward the plaintiff individually, or toward all persons in one or more groups or categories of which the injured person is a member. An act or a failure to act shows wantonness if it was done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person. An act or a failure to act shows oppression if it was done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity.

-- Schafer v. Time, Inc. (N.D. Ga.) (C)

If you find in favor of Linda Stewart and grant her actual damages, then you must also find by a separate verdict, whether either of the defendants has acted in reckless disregard of Linda Stewart's rights and/or has acted intentionally and with malice. The plaintiff has the burden of proving this by clear and convincing evidence. By that I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is highly probable and free from serious doubt.

Reckless disregard means that the defendants acted (1) having a high degree of awareness of the probable falsity of the publication; or (2) with actual knowledge of probable falsity of the publication; or (3) entertaining serious doubts as to the truth of the publication. In order for the Defendants to have acted in reckless disregard of Linda Stewart's rights, its conduct must have been unreasonable under the circumstances, and also there must have been a high probability that the conduct would cause serious harm to Linda Stewart.

Malice involves either hatred, spite, or ill-will, or else the doing of a wrongful act intentionally without just cause or excuse.

If you find that a Defendant acted in reckless disregard of Linda Stewart's rights, or acted intentionally and with malice towards Linda Stewart, you may award punitive damages against a Defendant in a later part of this trial. If you find that a Defendant did not act in reckless disregard of Linda Stewart's rights, or acted intentionally and with malice towards Linda Stewart, you may not award punitive damages against a Defendant.

-- Stewart v. NYT Broadcast Holdings (Okla.) (C)

If you grant compensatory damages to the Plaintiffs and determine by clear and convincing evidence that the Defendants published their statements with knowledge of falsity or with reckless disregard for the truth or falsity of the statements, then you may in your discretion assess punitive damages against the Defendants.

Punitive damages are not to be considered as compensation to the Plaintiffs, but as punishment to the Defendants, and as an example to others to deter them from like conduct. The law does not require you to award punitive damages, and if you do so, you must use sound reason in setting the amount. You should be aware that the purpose of punitive damages is to punish, and not destroy, a defendant. In determining the amount of punitive damages, you may consider the following factors:

1. The harm the Defendants' conduct has already caused and is likely to cause;
2. The degree of wrongfulness of the Defendants' conduct;

3. How long the conduct lasted and whether it is likely to continue;

4. Whether there was other similar conduct, and if so, how often it occurred;

5. How aware the Defendants were of the conduct and its consequences, and whether there were attempts to conceal the conduct;

6. Whether the Defendants benefited from the conduct, and if so, whether that benefit should be taken away;

7. The need to discourage others from similar conduct; and

8. The financial resources of the Defendants.

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

If you find for plaintiff and award actual damages, you may also consider whether you will separately award punitive damages. If you do not find actual damage, you cannot consider punitive damages.

The purposes of punitive damages are to punish the offending party and to make the offending party an example to discourage others from similar conduct. You may decide that the defendant is liable for punitive damages if you find by clear and convincing evidence that the defendants' acts or failures to act demonstrated malice or insult.

Malice includes:

(a) that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge, or

(b) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

"Substantial" means major, of real importance, of great significance, not trifling or small.

-- Sweeney v. New York Times Co. (N.D. Ohio) (C)

In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a defendant for the conduct inquired about in Interrogatory Nos. ___ and to deter a defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages; however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party.

The factors that you may consider in awarding punitive damages, if any, are --

(a) the nature of the wrong,

(b) the character of the conduct involved,

(c) the degree of culpability of the wrongdoer,

(d) the situation and sensibilities of the parties concerned, and

(e) the extent to which such conduct offends a public sense of justice and propriety.

You may award punitive damages only for those statements, if any, which you have found were (1) both false and defamatory, (2) made with knowledge of falsity or with serious doubts about the truth, and (3) made with malice.

-- Kastrin v. CBS Inc. (W.D. Tex.) (D)

Editor's Note: *The following instruction may be used when actual malice is a requirement for a finding of liability, and when the jury has made such a finding before considering punitive damages.*

As to Plaintiff's claim for punitive damages against the Defendant, Chicago Tribune Company, a different rule applies. Punitive damages may be awarded against the Chicago Tribune Company only (1) if you find in favor of the Plaintiff on the question of liability, and (2) if you find that, as to the acts giving rise to liability one or more of the following conditions are proved:

(a) The corporation, through its management, authorized the doing and the manner of the act or omission; or

(b) The act or omission was that of a managerial employee who was acting in the scope of his employment; or

(c) The corporation, through its management or a managerial employee, ratified or approved the act or omission.

If you find for the Plaintiff and against the Defendant on the question of liability, and if you further find that one or more of these conditions are proved, and if you further believe that justice and the public good require it, you may, in addition to any other damages to which you find the Plaintiff entitled, award an amount which will serve to punish the Defendant, Chicago Tribune Company, and to deter it and others from similar conduct.

-- Knight v. Chicago Tribune (Ill.) (C)

If, and only if, you have found actual injury to reputation, you may consider awarding punitive damages to Plaintiff Mark Mendelson.

Punitive damages in a defamation case are designed to punish intentional lies. Punitive damages are not compensation; rather, they are "awarded to punish the wrongdoer and to deter both him and others from engaging in similar conduct in the future." To award punitive damages, you must find that Defendants Darragh and The Morning Call's conduct was "reprehensible" and involved "some element of outrage similar to that usually found in crime."

Negligence by Defendants Darragh and The Morning Call is not sufficient to enable Plaintiff Mark Mendelson to recover punitive damages. Instead, Plaintiff Mark Mendelson has the burden of proving that Defendants Darragh and The Morning Call published any false, defamatory statements regarding him while knowing that the statements were false or with reckless disregard as to whether they were true or false. I have previously instructed you on the meaning of this requirement, and those instructions apply to Plaintiff Mark Mendelson's claim for punitive damages.

In addition to, Plaintiff Mark Mendelson must also prove by clear and convincing evidence that Darragh and The Morning Call's conduct was outrageous, malicious, wanton, reckless, willful, oppressive or the result of bad motive or reckless indifference to Mendelson's rights. This requirement focuses on Defendants Darragh and The Morning Call's disposition toward Plaintiff Mark Mendelson at the time of the alleged wrongful act. Here, Plaintiff Mark Mendelson must prove by clear and convincing evidence that Defendants Darragh and The Morning Call acted with a necessary degree of evil volition to Plaintiff Mark Mendelson.

If after weighing and considering the evidence, you are convinced that Defendants Darragh and The Morning Call published false and defamatory statements which refer to Plaintiff Mark Mendelson with knowledge that the statements were false or with reckless disregard as to whether they were true or false, and that Darragh and The Morning Call acted with evil volition toward Mendelson, and that Mendelson has made this showing through clear and convincing evidence, then and only then, may you assess punitive damages against Defendants Darragh and The Morning Call. Whether to award punitive damages, however, is within your discretion. The law does not require you to assess punitive damages.

If you decide to award punitive damages, you must consider the following three factors: the character of Defendants Darragh and The Morning Call's actions, the nature and extent of the harm suffered by Plaintiff Mark Mendelson and the wealth of Defendants Darragh and The Morning Call.

The award of punitive damages must not be influenced by passion or prejudice. "Guideposts" by which to analyze the award of punitive damages are: (1) the reprehensibility of the conduct complained of; (2) the relation between the harm actually inflicted and the punitive award, and (3) the difference between the remedy here sought by Plaintiff Mark Mendelson and the civil penalties authorized or imposed in similar cases.

When considering the nature of Defendants Darragh and The Morning Call's acts, you may take into account with Defendants Darragh and The Morning Call actually intended to harm Plaintiff Mark Mendelson when they engaged in the behavior that you have found to be outrageous. Under the law, negligence and carelessness is not as blameworthy as calculated acts and intentional harm, and may not be punished by punitive damages.

The amount of any punitive damages award must bear a reasonable relationship to the size of the compensatory damage award.

Because this case involves news reporting on issues of public concern, it is particularly important that you award no more punitive damages than are necessary to punish Defendants Darragh and The Morning Call and deter them from repeating any wrongful behavior. A greater award may improperly make Defendants Darragh and The Morning Call and other news organizations afraid to perform their valuable function of keeping the public informed on important matters.

Remember, that any compensatory damages you award, and the costs of defending the litigation, are themselves deterrent and must be considered in determining whether any additional deterrence is needed, and if so, how much.

You may not speculate about whether Defendants Darragh and The Morning Call's financial condition in determining a punitive damages award. Nor may you punish Defendant The Morning Call, simply because it is a corporation.

You may not impose an award of punitive damages that is larger than Defendants Darragh and The Morning Call could reasonably have anticipated.

-- Mendelson v. Darragh (Pa.) (D)

X.C. Proximate Cause

If you find in favor of the plaintiffs, or either of them, on their defamation claim under the instructions I have given you, then you must determine what amount of damages, if any, will fairly compensate the plaintiffs for any injury they have suffered.

The plaintiffs are not entitled to recover damages for any injury they may have suffered because of the broadcast of truthful information; they can recover only if, and to the extent, the broadcast of false and defamatory information about them through the negligence of KFOR-TV was a direct cause of the injury.

A direct cause means a cause which, in a natural and continuous sequence, produces injury and without which the injury would not have happened. For negligence, if any, of the defendants to be a direct cause you must also find that a television broadcaster using ordinary care could have foreseen that some injury to the reputation of a person or corporation in the plaintiffs' situation might reasonably result from a failure to exercise ordinary care.

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

Finally, Mr. Masson must prove, by a preponderance of the evidence, that one or more of the challenged quotations caused him to suffer damage. In order for plaintiff to

recover damages, any damages awarded must be found by you to have directly resulted from the quotation or quotations, if any, you have found to be defamatory as defined for you. Defendants are not responsible for any damages plaintiff may have suffered as a result of the other portions of the article, or from plaintiff's other activities or writings.

The interest of the plaintiff in a defamation suit is his reputation. If you find in this case that the reputation of the plaintiff had already been damaged by other adverse publicity prior to the publication of the article, then you may consider such proof in determining any amount to be allowed as damages, if any.

-- Masson v. New Yorker (N.D. Cal.) (C)

To recover on his defamation claim, Dr. Rogal must prove by a preponderance of the evidence that negligently false statements in the broadcast caused him actual injury. If those statements in the broadcast were not the cause of harm to Dr. Rogal, he may not recover.

* * *

Although Dr. Rogal may recover for the actual injury to his reputation and standing in the community caused by a defamatory falsehood, injury to reputation cannot be presumed, and any claim of actual harm must be proved by competent evidence.

-- Rogal v. ABC (E.D. Pa.) (D)

Proximate result or cause means that before any award for damages may be made to plaintiff, plaintiff must prove that the harm or damage was caused or resulted from a false defamatory statement written or published by defendant. That is, it must appear that the conduct of a defendant played a substantial part in bringing about or actually causing the damage and that the damage was either a direct result or a reasonably probable consequence of the publication.

* * *

As I have instructed you, damages are proximately caused if it appears from the evidence that the publication played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the publication. You must not consider the financial circumstances of a defendant in your determination of compensatory damages since compensatory damages involve only an award for damage caused to plaintiff, nor may you consider an award of counsel fees or costs as compensatory damages.

-- DiGregorio v. Time, Inc. (D. R.I.) (C)

In addition, in order to be awarded damages, Mr. Lasky must prove that the portions of the broadcast that he has proved are false and made with constitutional

malice, if any, are the parts that caused his injury. In other words, if you were to find, for example, that half of the broadcast was true, and the other was false, and that Mr. Lasky had proved only that the true statements had caused him injury, then you should award no damages to Mr. Lasky. Similarly, if you were to find that Mr. Lasky had proved that ABC had acted with knowing falsity or serious and subjective doubts about truth or falsity only with regard to a part of the broadcast that caused him no injury, then you should not award Mr. Lasky any damages. Mr. Lasky must prove that the parts of the broadcast that caused him injury are the same parts that he has proved are defamatory, of and concerning him, false, and made with constitutional malice.

-- Lasky v. ABC (S.D.N.Y.) (D)

Damages, if any, may only be awarded to compensate for injury actually caused a plaintiff or plaintiffs by publication of the article or articles in question. Actually caused by; the natural result of.

Damages are never presumed, Ladies and Gentlemen – are never presumed, and, in order to recover damages for injury allegedly caused by publication of the defamatory article, the plaintiff, or the respective plaintiffs must prove that the damages resulted from such publication by a fair preponderance of the evidence – that damages were caused by that publication.

* * *

Thus, you may not award Mr. Hepps damages caused by reason of injury suffered by his wife, his family, or his friends, except as such injury caused Mr. Hepps to himself suffer.

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

You are not to presume plaintiff suffered any injury as a result of statements he has challenged that you may find false and libelous. You are also not to presume plaintiff suffered injury if you find the tone and tenor of the articles, i.e., their overall impact, was false and libelous. Plaintiff must prove with competent evidence that any of his injuries were caused by the statements that you find are false and defamatory.

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

As I have previously told you, it is the plaintiffs' burden to prove their damages were a proximate [result] of the actions of the defendants. In this respect you should consider plaintiffs were the subject of substantial publicity reporting the proceedings brought by the Attorney General. News accounts were broadcast on the radio and television, and were published in three newspapers besides the Record. Accounts of the subsequent hearings were published on two occasions in April 1979 in the Record and other newspapers, and harm to plaintiffs' reputation from these is not compensable. You shall consider only the damage, if any, to plaintiffs which occurred as a result of any libelous portions of the article of February 21, 1979, by defendants, the Bergen Evening

Record Corporation and Alfredo Lopez. You shall not award damages to plaintiffs for any damages resulting from the publication in the broadcast media, and in other newspapers. Similarly, you shall consider only the damages to plaintiffs resulting from any inaccuracies in the articles published by defendants the Bergen Evening Record Corporation and Alfredo Lopez and not from the rest of the article itself, if an accurate account, even if damaging to plaintiffs.

-- McCoy v. Bergen Evening Record (N.J.) (C)

If you find that plaintiff has met his burden of proving the other elements of his libel claim as to one or more statements, you should then consider what damages the plaintiff has suffered as a direct and natural consequence of the publication of those statements by themselves and not the harm, if any, suffered by plaintiff from anything else contained in The Power House.

Each statement should be considered separately in this way.

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

For plaintiff to prevail as to a statement, he has the burden of proving that that particular statement damaged him. Therefore, if The Power House would have been equally damaging to the plaintiff's reputation without that statement, plaintiff has not met his burden of proof. Put differently, to find for the plaintiff as to a statement you must determine that the statement caused harm beyond that which resulted from what was written about plaintiff elsewhere in the book.

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

A person who seeks damages has the burden of proving that it is more probable than not that the damages sought were caused as a direct result of the conduct of the defendant(s). Additionally, he must show the nature, extent, and amount of those damages.

The burden is on the plaintiff to prove by a preponderance of the evidence each item of damage he claims and to prove that each item was caused by the wrongful conduct of defendant(s). He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.

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

If you find that the communication, or any portion of it, was defamatory and not substantially true, you must determine whether it caused actual injury to the plaintiffs.

In order for the plaintiffs to recover, the defendants' conduct must have been a substantial factor in bringing about the plaintiffs' injury. This is what the law recognizes as legal cause. A substantial factor is an actual, real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the event.

Actual injury can include impairment of reputation in the community, personal humiliation, mental anguish, and suffering.

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

-- Paul v. The Hearst Corporation (M.D. Pa.) (C)

You may award only those damages, if any, you find were a direct and proximate result of any statements in the broadcast which you have found to be substantially false and defamatory and made with knowledge of falsity or with serious doubts about the truth. You must not award any damage caused by any other acts, events, or circumstances.

-- Kastrin v. CBS Inc. (W.D. Tex.) (D)

The final element of plaintiff's case is actual injury. Plaintiff must prove that he suffered actual injury as a direct result of the publication of *Armed & Dangerous*. Actual injury is not limited to out-of-pocket losses. Rather, it includes impairment of reputation and standing in the community.

Injury is caused by the publication of the statement if it appears from the evidence that the publication played a substantial part in bringing about or actually caused the injury, or that the injury was either a direct result or a reasonably probable consequence of the publication of a statement found to be false and defamatory and of and concerning plaintiff.

When determining whether a particular statement in the book caused the plaintiff actual harm, you must distinguish injury to the plaintiff caused by that statement from injury caused by other statements in the book or from any injury that may have been caused prior to publication of the book or by factors other than the book. You may not award the plaintiff any damages for actions taken by Mr. Kelly other than the false and defamatory statements complained of in *Armed & Dangerous*.

If the statements at issue did not cause any additional harm to plaintiff beyond that caused by other factors, then you must determine that the statement did not cause

plaintiff actual injury. Plaintiff must prove this element by a preponderance of the evidence.

-- Faigin v. Kelly (D. N.H.) (D)

If you find in favor of the plaintiff on her defamation claim under the instructions I have given you, then you must determine what amount of damages, if any, will fairly compensate the plaintiff for any injury she has suffered that was caused directly by false and defamatory statements about her.

The plaintiff is not entitled to recover damages for any injury she may have suffered because of the broadcast of truthful or privileged information; she can recover only if, and to the extent, the negligent broadcast of substantially false information defamatory to her was a direct cause of the injury.

A direct cause [is that] which, in a natural and continuous sequence, produces injury and without which the injury would not have happened. For the negligence, if any, of the defendants to be a direct cause in this case you must also find that a television broadcaster using ordinary care:

(1) Would have foreseen that viewers would reasonably understand the news reports to refer to the plaintiff and not to some other person, and

(2) Would have foreseen that some injury to the reputation of a person in the plaintiff's situation might reasonably result from a failure to exercise ordinary care.

-- Malson v. Palmer Broadcasting (Okla.) (C)

Direct cause means a cause which, in a natural and continuous sequence, produces injury and without which the injury would not have happened. For negligence to be a direct cause it is necessary that some injury to a person in Dr. Mitchell's situation must have been a reasonably foreseeable result of Defendants' negligence.

-- Mitchell v. Griffin Television (Okla.) (C)

If you find there was injury, then you will answer the cause questions, numbers 8, 9 and 10. The cause questions in the special verdict ask whether there was a causal connection between the negligence of any defendant and any injury claimed by Ms. Maguire. These questions do not ask about "the cause" but rather "a cause." The reason for this is that there may be more than one cause of an injury. Therefore, in order to find that a particular defendant's negligence was a cause of the injuries claimed by Ms. Maguire, you must find that the negligence of that defendant was a substantial factor in producing the injuries.

-- Maguire v. Journal Sentinel (Wis.) (D)

Editor's Note: *The following instruction is the court's reading of the charge to the jury, taken from the trial transcript.*

Negligence is not by itself enough to prove liability for damages. In addition, the negligence must have been what's called the legal cause of the damages claimed. And this means that the negligence must have been a substantial factor in bringing about the damages. Think of legal cause as just meaning substantial factor in causing something to happen. So was defendant negligent? If so, was the negligence a substantial factor in causing the harm claimed by the plaintiffs. A substantial factor is an actual, real, important factor. It's more than just a trivial or insignificant factor having little connection with the damages claim. If the defendant has been negligent and that negligence is a substantial factor in bringing about the damages, it just doesn't make any difference that the damages may have been unusual or unexpected. There still is legal causation and liability. Or to say this a little differently, once negligence is shown, then there is liability for all harm legally caused by the negligence, even if the harm was not at the time foreseeable.

-- Kauffman v. Diamandis Communications (E.D. Pa.) (C)

XI. OTHER

XI.A. Agency

This action is brought by William Lansdowne, plaintiff against Peter Phipps, The Akron Beacon Journal, and other employees of the Akron Beacon Journal, defendants, upon the claim that defendants negligently made a false publication concerning plaintiff. It is also claimed that the false publication proximately caused injury to the reputation of plaintiff. An action for defamation has, as its purpose, giving an injured plaintiff vindication of his good name.

A corporation acts through its officers and employees. It is responsible for their acts or failures to act when they act within the scope of their employment.

It is undisputed that Peter Phipps was an employee of the defendant, Beacon Journal Publishing Company, and acted within the scope of his employment at the time in question. Therefore, anything that he did or failed to do was an act of Beacon Journal Publishing Company, Inc.

-- Lansdowne v. Beacon Journal (Ohio) (D)

The New York Times Company cannot be guilty of publishing alleged defamatory statements about Randy Taylor, Sr. which were motivated by knowledge of or reckless disregard of the falsity except through one of its own agents acting within the line and scope of his employment. Now in this case the plaintiffs contend that managing agents Frank Helderman or Jack Doane were motivated by such a state of mind in the

publication of alleged defamatory statements, and if you do not find that Frank Helderman or Jack Doane had such a state of mind in the publication of alleged defamatory statements, then you cannot return a verdict against The New York Times Company. You may not return a verdict against The New York Times Company based upon the state of mind of LaRue Hardinger as there is no evidence that she was managing agent.

The New York times Company cannot be held liable for any alleged malicious acts of its employees as such acts were outside the scope of their employment.

The corporate defendant can only be found to have acted with fault through the acts of its agents or employees acting within the line and scope of their employment. The plaintiffs voluntarily dismissed as a defendant in this case Robert Ursul, the author of the diary series. Because of this voluntary dismissal, you may not find the corporate defendant liable due to any acts or omissions of Robert Ursul.

I charge you that you cannot find The New York Times Company subject to liability for alleged defamatory statements in the privileged articles dated April 5, 1986, April 6, 1986, April 9, 1986, April 11, 1986, April 28, 1986, or April 30, 1986, unless you find that a managing agent charged with responsibility for the content of The Gadsden Times acted with malice in making or approving the publications. For these purposes, the managing agents would be Frank Helderman, Jr. or the defendant Jack Doane. Even if you find that LaRue Hardinger acted with malice in making the publications, you may not find that the other defendants acted with malice based solely upon their mental state.

The New York Times Company cannot be guilty of publishing alleged defamatory statements about Randy Taylor, Sr. which were motivated by malice except through one of its own managing agents acting within the line and scope of his employment. Now in this case the plaintiffs contend that managing agents Frank Helderman or Jack Doane were motivated by such malice toward Randy Taylor, Sr. in the publication of alleged defamatory statements, and if you do not find that Frank Helderman or Jack Doane had such malice toward Randy Taylor, Sr. in the publication of alleged defamatory statements, then you cannot return a verdict against The New York Times Company. You may not return a verdict against The New York Times Company based upon the malice of LaRue Hardinger as there is no evidence that she was a managing agent.

-- Taylor v. New York Times (Ala.) (D)

I remind you that Mr. Patrick and Mr. Dulack were never employees of defendant Dutton. They were independent contractors.

The general rule is that publisher is not liable for the fault of an independent contractor, such as a non-staff author. Only if Dutton itself acted with actual malice (if

plaintiff is a public figure) or gross irresponsibility (if plaintiff is a private figure) can it be held liable to the plaintiffs, or any one of them.

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

This case should be considered and decided by you as an action between persons of equal standing. A corporation is entitled to the same fair trial as is a private citizen. When a corporation is involved, it may act, of course, only through its agents and employees. In general, any agent or employees of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his or her employment or within the scope of his or her duties as an employee of the corporation.

Concerted Activity

The law recognizes that, ordinarily, anything a person can do for himself or herself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of a Defendant are willfully directed or authorized by the Defendant, or if the Defendant aids another person by willfully joining together with that person in the commission of a wrongful act, then the law holds that Defendant responsible for the conduct herself or himself. A person knowingly and intentionally assisting another to commit fraud, a trespass, or a breach of an employee's duty of loyalty would be equally liable as one who performed all of the acts herself or himself.

-- Food Lion, Inc. v. Capital Cities/ABC, Inc. (M.D. N.C.) (C)

MMAR and Dow Jones are corporations. A corporation is an entity created under law. A corporation acquires knowledge and acts only through its officers, employees, and other agents. A corporation is responsible for the knowledge acquired and acts done by its officers, employees, and other agents in the course or scope of their authority or employment. The term "course or scope of authority or employment" means any act or acts done in furtherance of the corporation's business by one or more of its officers, employees, or other agents.

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

A corporation can have knowledge, act recklessly or be negligent only if such knowledge or conduct is attributable to an employee of the corporation who was acting in the scope of his employment. An "employee" is a person in the service of another with the understanding, express or implied, that such other person has the right to direct the details of the work, not merely the result to be accomplished. An employee is acting in

the "scope of his employment" if he is acting in furtherance of the business of his employer.

-- Merco Joint Venture v. Kaufman (W.D. Tex.) (D)

"Agency" refers to a relationship which is created when one person authorizes or consents to another person acting on his or her behalf as a representative. The person who acts as the representative is called the "agent." The person for whom the agent acts is called the "principal." The principal places his trust and confidence in the agent to represent the principal's interests in a oral and selfless manner. In this case the plaintiff was the agent. Mr. Kelly was the principal.

-- Faigin v. Kelly (D. N.H.) (D)

XI.B. Confidential Sources

Editor's Note: *Few courts have determined the appropriate instructions to provide a jury concerning either the proper or improper invocation of the reporter's privilege against compelled disclosure of information. In any case where the privilege is invoked, careful consideration should be given to formulating an instruction advising the jury why relevant information was not introduced in evidence.*

You are instructed that Mr. Hersh had a privilege under the laws of the State of Illinois not to reveal the names of his confidential sources. You are to draw no inferences from that fact that Mr. Hersh knew his statements were false or that he in fact had serious doubts as to the truth of these statements.

-- Desai v. Hersh (N.D. Ill.) (C)

During the trial, you occasionally heard witnesses refer to confidential sources. The law recognizes that people often will not disclose information to a reporter unless they receive a pledge of confidentiality from the reporter. The law grants members of the press the right to keep their sources confidential, and reporters and their editors are privileged to refuse to disclose the names of sources. Similarly, certain information that might tend to disclose the identity of confidential sources has been deleted from some of the documents in evidence. You should not draw any adverse inference solely from the fact that a reporter or editor refused to disclose the identify of a confidential source or the information received from that source.

-- Kastrin v. CBS Inc. (W.D. Tex.) (D)

XI.C. Privacy/Related Torts

The Plaintiff also alleges that KWTV's news reports about him invaded his privacy by placing him in a false light before the public. In order to recover on this claim, the Plaintiff must prove each of the following things:

1. That the Defendants broadcast a statement about him that was substantially false;

2. That the Plaintiff was thereby placed in a false light before the public that would be highly offensive to a reasonable person; and

3. By clear and convincing evidence, that the Defendants knew or acted in reckless disregard of (a) the truth of the statement they broadcast and (b) the false light in which the Plaintiff would be placed by that statement.

-- Mitchell v. Griffin Television (Okla.) (C)

A publication is "highly offensive" if the defendant knows that the Plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. Minor inaccuracies cannot be "highly offensive." It is only when there is such a major misrepresentation of character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position.

-- Mitchell v. Griffin Television (Okla.) (C)

Plaintiff claims that the publication of the advertisement, in addition to being libelous, constituted an invasion of her right of privacy under Section 51 of the New York Civil Rights Law. In New York this claim may only be sustained if it meets the specific requirements of section 51, thus, any common understanding you might have of the right to privacy should be ignored if it conflicts with these instructions.

To prevail on the claim, plaintiff must prove by a preponderance of the evidence:

First, that plaintiff's "name, portrait or picture" was used;

Second, that plaintiff is identifiable, as that term is defined for you in these instructions, from the publication of such name, portrait or picture;

Third, that the use was without plaintiff's consent;

Fourth, that the use was for advertising purposes or purposes of the trade, as those terms are defined for you in these instructions;

Fifth, that plaintiff sustained injuries as a result of this use.

Plaintiff claims that the publication of the advertisement placed her in a false light in the eyes of the public. In order to recover on this claim, plaintiff must prove by a preponderance of the evidence:

First, that publicity complained of identified plaintiff;

Second, that the publicity placed plaintiff in a false light;

Third, that the false light complained of would be highly offensive to a reasonable person;

Fourth, that defendant in publishing the advertisement knew or acted in reckless disregard of the falsity of the advertisement and the false light in which the plaintiffs was placed.

In deciding whether the advertisement identified plaintiff, you must follow the instructions I have already given you on whether the advertisement was "of and concerning" plaintiff and whether she was "identifiable" from the advertisement.

Plaintiff Donna Dalbec also seeks to recover punitive damages for the invasion of her privacy resulting from the publication of the advertisement. Mrs. Dalbec may only recover such damages if, in addition to proving all the elements of the invasion of privacy claim, plaintiff also establishes that the advertisement was published by one or more of defendants knowing that it did not have the plaintiff's consent. If they did not know that they were acting without plaintiff's consent, then they cannot be held for punitive damages on the invasion of privacy claim. This knowledge must also be proven by clear and convincing evidence.

The mere fact that plaintiff's name may have been published in a magazine of questionable taste is not sufficient grounds to support an action for false light. The mere fact that plaintiff may be unhappy about the appearance of her name in defendant's magazine, that appearance alone nor any embarrassment caused thereby does not entitle plaintiff to recover.

Remember, the quality of Gentlemen's Companion is not an issue in this case.

In order to recover on this claim, plaintiff must show that she was clearly identifiable from the advertisement. The use of the name Donna Newbury is but one element to consider. In addition, you should consider Mrs. Dalbec's adoption and use of her husband's name since her marriage in 1971. Where the plaintiff is only known to a few intimates by the name used, you must find for defendant on this claim. You should also consider in deciding this case, the other descriptive material contained in the advertisement which purports to describe the Donna Newbury named in the

advertisement. These other elements, such as age, height and weight plaintiff herself states, do not fit her. Thus, if the other characteristics listed in the advertisement lead you to believe that person named in the advertisement could not be plaintiff, then plaintiff's claim for invasion of privacy must fail.

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

The right to privacy, like other personal rights, may be lost in many ways – by express or implied waiver or consent, or by a course of conduct which prevents its assertion. Moreover, the right is not absolute, it is qualified by the rights of others.

An actionable invasion of privacy exists only when the defendant's conduct is unreasonable and seriously interferes with the plaintiff's privacy interest. The reasonableness of the defendant's conduct is assessed by balancing his interest and pursuing his course of conduct against the plaintiff's interest in protecting his privacy. Where defendant's action is properly authorized or justified by circumstance, it may be found reasonable and non-actionable even though it amounts to a slight invasion of the plaintiff's privacy.

In order to establish an invasion of privacy, plaintiff must show that the defendant published information that placed the plaintiff before the public in a false light. in order to establish liability, it is essential that the matter published concerning the plaintiff is not true.

The right of privacy is not designed to safeguard property, business, or other money interests, and the right of privacy is denied to corporations and institutions, and even to partnerships.

An actionable invasion of privacy occurs only when the defendants' conduct is unreasonable and seriously interferes with the plaintiffs' privacy interests.

Reasonable interference with an individual's right to privacy, if properly authorized and taking place under proper circumstances, is not prohibited.

More than insensitivity or simple carelessness is required for the imposition of liability for damages for invasion of privacy when the publication is truthful, accurate and non-malicious.

A tortious invasion of privacy does not occur when an individual makes a photograph or motion picture of a public site, which anyone is free to observe.

Recovery of invasion of right of privacy is only available when the plaintiffs' private affairs have been given unauthorized exposure. If plaintiffs voluntarily make appearance and invite publicity, there is no privacy right.

All awards for invasion of privacy must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

In Louisiana, in order to recover for an invasion of privacy, plaintiffs must show they have had an "actionable" claim not merely and "actual" claim. An invasion of privacy is "actionable" only when the defendants' conduct is unreasonable and seriously interferes with the plaintiff's privacy interest. To determine the reasonableness of the defendants' conduct, you must balance the defendants' interest in pursuing their course of conduct against plaintiffs' interests in protecting their privacy, if they have not waived their right to privacy.

In order for the defendants to be found liable for publication, in a false light, to amount to an invasion of privacy, plaintiffs must prove that:

A. The false light in which they were placed is highly offensive to a reasonable person and;

B. The defendants had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.

A person's privacy can be invaded only if the defendant has published matter which clearly refers to the plaintiff, that is, which uses the plaintiff's actual name or picture, and clearly identifies him.

There can be no violation of the right of privacy unless the name or likeness of the plaintiff is used in the publication.

No invasion of privacy occurs where the plaintiff's image can only be identified through independent knowledge.

There can be no invasion of privacy based on publicity which casts the plaintiff in a false light in the public eye, unless there are acts which are sufficient in themselves to familiarize the public with either the name, likeness, or other means of identifying the plaintiff.

The right of privacy protects only the ordinary sensibilities of an individual and not supersensitiveness.

-- Easter Seals v. Playboy (La.) (D)

Plaintiffs' second cause of action against the Seattle Times Company and Erik Lacitis is for "false light" invasion of privacy. One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to

liability to the other for invasion of his privacy, if (1) the false light in which the other was placed would be highly offensive to a reasonable person; (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed; and (3) the conduct proximately caused damages to the plaintiff.

Each of the plaintiffs bears the burden of establishing these elements of their claim by clear and convincing evidence.

In order to establish the claim for invasion of privacy, each plaintiff must first prove by clear and convincing evidence that defendants published a matter concerning that plaintiff that was false. As with plaintiffs' claim of defamation, each plaintiff must show that statements made in the article are false in some substantial way. If the article was substantially true, plaintiffs have failed to prove falsity.

In order to establish the claim for invasion of privacy, each plaintiff must also show that the publicity given to that plaintiff has placed him in a false light before the public of a kind that would be highly offensive to a reasonable person. In other words, each plaintiff must show that he or she, as a reasonable person, is justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. There must be such a major misrepresentation of the plaintiff's character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable person in his or her position.

The same privilege to report on publication of matters contained in the police incident reports and the Roth civil complaint that applies to plaintiffs' claims of defamation also applies to plaintiffs' claims for invasion of privacy.

The same privilege to report on publication of matters contained in reports of official actions or proceedings that is available to defendants in connection with plaintiffs' cause of action for defamation also applies to plaintiffs' claims for invasion of privacy.

Finally, in order to establish the claim for invasion of privacy, plaintiffs must also show that Erik Lacitis knew that the information that he published was false or that he acted in reckless disregard of the truth of falsity of that information and the false light in which plaintiffs would be placed as a result of the publication of that information. As with plaintiffs' claim of defamation, reckless disregard of truth or falsity is not proved by showing that Mr. Lacitis failed to investigate the basis for the statements made or that a more prudent person would have refrained from making such statements. Each plaintiff must show that Erik Lacitis did, in fact, entertain serious doubts as to the truth of his publication.

-- Galley v. Seattle Times Co. (Wash.) (C)

A plaintiff waives his right to privacy if he does any of the following:

(1) he discloses the matters that he alleges are private matters regarding his personal life to others besides his family, his therapist, counselor, physician, or others who by virtue of their position are expected to maintain plaintiff's privacy, and/or close personal friends, or

(2) he fails to take reasonable steps to protect the privacy of such matters, or

(3) he reveals such matters in circumstances in which he knows or reasonably should know the matters could become publicly known.

-- Tilton v. McGraw Hill Companies (W.D. Wash.) (C)

Editor's Note: *The following instruction is taken from a transcript of the court reading the instructions to the jury.*

Karen Carpenter also seeks to recover damages based upon a claim of invasion of privacy, by public disclosure of private facts. The essential elements of this claim are:

One, Tom Leykis or Westwood One or its agents or employees made or allowed to be made a public disclosure of facts about Karen Carpenter; before this disclosure, the facts were public -- excuse me. Before this disclosure, the facts were private; that is, not known to the public. And three, the fact or facts made known to the public would be highly offensive to a person of ordinary sensibilities; and four, Tom Leykis or Westwood one or its agents or employees disclosed the facts or allowed the facts to be disclosed with knowledge that the facts -- the fact or facts were highly offensive or with reckless disregard of whether they were highly offensive or not; and five, the facts made known were not newsworthy; and six, the public disclosure of this or these facts caused Karen Carpenter to sustain injury, damage, loss or harm.

In determining whether the facts made, known was or were newsworthy, you should consider first the social value of the fact published; second, the depth of the intrusion into Karen Carpenter's private affairs; third, the extent to which Karen Carpenter voluntarily pushed herself into a position of public notoriety; and fourth, whether the fact is a matter of public record.

-- Westwood One v. Carpenter (Alaska) (C)

Intrusion into Private Affairs: Each of the plaintiffs other than Mr. Turnbull claims that ABC violated his or her right to privacy. To establish this claim, each plaintiff must prove all of the following:

1. That the plaintiff had a reasonable expectation of privacy in the conversations or conduct he or she participated in at the workshops;

2. That the plaintiff's conversations or conduct that ABC taped captured the plaintiff's private or personal affairs;

3. That ABC intended to tape conversations or conduct that captured the plaintiff's private or personal affairs;

4. That ABC's conduct would be highly offensive to a reasonable person;

5. That the plaintiff was harmed; and

6. That ABC's conduct was a substantial factor in causing the plaintiff's harm.

In deciding whether an intrusion is highly offensive, you should consider, among other factors, the following:

(a) The circumstances surrounding the intrusion;

(b) ABC's motives and goals;

(c) The setting in which the intrusion occurred; and

(d) How much privacy the plaintiff could expect in that setting.

-- Turnbull v. ABC (C.D. Cal.)

Physical Invasion of Privacy [Civil Code § 1708.8(A)]: Each of the plaintiffs other than Mr. Turnbull claims that ABC physically invaded his or her privacy. To establish this claim, each plaintiff must prove all of the following:

1. That ABC knowingly entered onto the land of another without permission, or otherwise committed a trespass;

2. That ABC intended to physically invade the plaintiff's privacy with the intent to record the plaintiff engaging in a personal activity;

3. That ABC's physical invasion was offensive to a reasonable person;

4. That the plaintiff was harmed; and

5. That ABC's conduct was a substantial factor in causing the plaintiff's harm.

"Personal activity" includes, but is not limited to, intimate details of the plaintiff's personal life or other aspects of plaintiff's private affairs or concerns.

In deciding whether a physical intrusion is offensive, you should consider, among other factors, the following:

(a) The circumstances surrounding the intrusion;

(b) The defendant's motives and goals;

(c) The setting in which the intrusion occurred;

(d) How much privacy the plaintiff could expect in that setting; and

(e) You may also take into account whether ABC and Yoruba Richen were acting upon a belief that in entering onto another's property, Richen intended to investigate the suspected violation of a law or suspected violation of an administrative regulation.

-- Turnbull v. ABC (C.D. Cal.)

Recording of Confidential Information [Penal Code § 632]: Each of the plaintiffs other than Mr. Turnbull claims that ABC unlawfully eavesdropped on his or her conversations. To establish this claim, each plaintiff must prove all of the following:

1. That ABC intentionally recorded the plaintiff's conversation by using an electronic device;

2. That a reasonable person would not have expected that the conversation may be overheard;

3. That a reasonable person would not have expected that the conversation may be recorded;

4. That ABC did not have the consent of all parties to the conversation to overhear or record it;

5. That the plaintiff was harmed; and

6. That ABC's conduct was a substantial factor in causing the plaintiff's harm.

-- Turnbull v. ABC (C.D. Cal.)

The Plaintiff, Nellie Mitchell, also claims damages from defendant for invasion of privacy by publicity which put Mrs. Mitchell in a false light. In order to prevail on this claim, the plaintiff has the burden of proving by clear and convincing evidence the following:

One, that the false light in which she was placed by the publicity would be highly offensive to a reasonable person, and

Two, that the defendant acted with actual malice in publishing the statements at issue in this case. Actual malice means that Globe International intended, or recklessly failed to anticipate, that readers would construe the publicized matter as conveying actual facts or events concerning Mrs. Mitchell. A finding of actual malice requires showing of more than mere negligence.

The plaintiff Nellie Mitchell has sued the defendant Globe International for invasion of privacy. One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of another.

The right or privacy is invaded by:

(1) Appropriation of the other's name or likeness; and
(2) Publicity that unreasonably places the other in a false light before the public.

In order for plaintiff to recover for invasion of privacy, plaintiff must prove that Globe International willfully invaded plaintiff's privacy and willfully exposed plaintiff to public ridicule and/or emotional distress.

In order to recover from the defendant Globe International for appropriation of likeness, the plaintiff Nellie Mitchell has the burden of proving each of the following propositions:

(1) That the plaintiff's likeness was exploited by the defendant; and
(2) That the exploitation resulted in gain to the defendant.

The gain to the defendant must be more than the gain that comes from selling additional issues of the publication in which the plaintiff's likeness was used. The exploitation of the plaintiff must be more than the appearance of the plaintiff's likeness in a publication, even if its manner of use and placement was designed to sell more copies of the publication in which it appeared.

Whether these elements have been proved is for you to determine.

In order to recover from Globe International for placing her in a false light, Nellie Mitchell has the burden of proving each of the following essential elements:

(1) That Nellie Mitchell was placed before the public in a false light;
(2) That the false light in which she was placed would be highly offensive to a reasonable person; and
(3) Globe International had knowledge of or acted in reckless disregard as to

the falsity of the publicized matter and the false light in which the other would be placed.

Whether each of these elements has been proved is for you to determine.

Invasion of Privacy Damages

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

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

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

You are not to permit bias or prejudice to enter into the consideration, nor sympathy for the plaintiff.

Damages must be reasonable. In the event your verdict is for the plaintiff, you may award only such damages as will fairly and reasonably compensate her for the injury or damage you find from a preponderance of the evidence in the case, she sustained as a result of defendant's acts.

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

The fact that I have instructed you as to the proper measure of damages should not be constructed as intimating any view of the Court as to which party is entitled to prevail in this case. Instructions as to the measure of damages are given for your guidance in the event you find from the evidence in favor of the plaintiff.

Special Instruction

An invasion of privacy derives from a wrongful intrusion into an individual's private activities.

The right of privacy is the right of an individual to be left alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public into matters with which the public is not necessarily concerned.

Invasion of privacy thus is the unwarranted appropriation of an individuals' personality, the publicizing of an individual's private affairs with which the public has no legitimate concern in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Calculated falsehoods do not, therefore, come within the immunity of the first amendment rights of freedom of the press and speech.

To summarize, the constitutional protections for speech and press prohibit recovery for false reports of matters of public interest in the absence of proof that the defendants published the report with knowledge of its falsity or in reckless disregard of the truth.

In the case, the burden of proof is upon the plaintiff, Nellie Mitchell, to prove, by a preponderance of the evidence, her assertions of an invasion of privacy, the elements of which are:

First, an unwarranted and/or wrongful intrusion by the defendants into the plaintiff's private or personal affairs with which the public had no legitimate concern;

Second, defendants published a report or article about plaintiff with knowledge of its falsity or in reckless disregard of the truth; and

Third, defendants' acts of publishing an article about Nellie Mitchell with knowledge of its falsity or in reckless disregard of the truth caused injury in the form of outrage, or mental suffering, shame or humiliation to plaintiff as an individual of ordinary sensibilities.

-- Mitchell v. Globe (D. Ark.)

Dr. Rogal claims that the broadcast falsely created the impression that he is overeager to diagnose and treat TMJ in the pursuit of financial gain.

There are five elements or parts to Dr. Rogal's "false light invasion of privacy" claim, and Dr. Rogal has the burden to prove each and every one of the elements in order to prevail. In other words, if Dr. Rogal fails to prove each and every one of these elements, you must return a verdict for ABC and Mr. Stossel.

To establish his false light invasion of privacy claim, Dr. Rogal must prove that: (1) the "20/20" broadcast conveyed the false impression of him that he claims it conveyed; (2) the broadcast was materially false; (3) ABC and Mr. Stossel had actual knowledge of falsity or in fact entertained serious doubts as to the truth of the matters they broadcast concerning Dr. Rogal and the allegedly false light in which he would be placed; (4) the knowingly false aspects of the broadcast placed Dr. Rogal in a false light that would be highly offensive to a reasonable person of ordinary sensibilities; and (5) as

a direct result of the broadcast, Dr. Rogal sustained actual injury.

Meaning of the Broadcast

As the first element of his claim, Dr. Rogal must prove by a preponderance of the evidence that the broadcast actually conveyed to the average viewer the false impression of him that he claims it conveyed. See Corabi v. Curtis Publishing Co., 441 Pa.. 432, 447, 273 A.2d 899, 907 (1971); Sellers v. Time. Inc., 423 F.2d 887, 887-90 (3d. Cir.), cent. denied, 400 U.S. 830 (1970). If you conclude that the broadcast might have been understood in more than one way, then you must determine which way the average viewer would have understood the broadcast.

The average viewer is not someone with specialized training or with special knowledge of the issues or facts dealt with in the broadcast. The average viewer is a reasonable person of ordinary intelligence, education and background who would be representative of those who actually saw the broadcast. Lorentz v. R.K.O. Radio Pictures; Inc., 155 F. 2d 84, 87 (9th Cir. 1946).

In considering the meaning of the broadcast and whether it conveyed the false impression attributed to it by Dr. Rogal, you may not change the language of the broadcast or give it a meaning inconsistent with the words actually used. Corabi v. Curtis Co., supra, 273 A.2d at 907.

Dr. Rogal also must prove either that the material statements of fact in the broadcast concerning Dr. Rogal were false, or that the broadcast as a whole conveyed a false impression of Dr. Rogal. If the broadcast was substantially true, then Dr. Rogal cannot recover, no matter how hurtful the statements may have been to him. Larsen v. Philadelphia Newspapers, Inc., 375 Pa. Super. 66, 543 A.2d 1181 (1988); Restatement (Second) of Torts, § 652E; Machledery v. Diaz, 801 F.2d 46 (2d Cir. 1986).

Dr. Rogal has the burden of proving falsity by clear and convincing evidence. Philadelphia Newspapers, Inc, v. Hepps, Time, Inc, v. Hill, Peoples Bank and Trust Co. v. Mountain Home. It would not be enough here, as it would be in most other civil cases, for Dr. Rogal's evidence to be slightly more convincing than ABC's and Mr. Stossel's evidence. Here, the strong constitutional guarantees of freedom of speech and freedom of the press place a heavier burden on Dr. Rogal. Clear and convincing evidence is evidence that is highly probable, clear, explicit, and unequivocal.

As the judge told you at the beginning of the case, the burden of proof on Dr. Rogal usually is by a preponderance of the evidence – whether the evidence tips in favor of Dr. Rogal or in favor of Mr. Stossel and ABC. But on a few issues in this case, Dr. Rogal has a higher burden. He must prove that statements in the broadcast or the broadcast as a whole is false by evidence that is clearly convincing.

If Dr. Rogal has failed to prove, by clear and convincing evidence, that the broadcast created a false impression about Dr. Rogal that was substantially false, then your deliberations on the false light claim will cease, and you will return a verdict in favor of ABC and Mr. Stossel on that claim.

If you find that Dr. Rogal has proved that the broadcast was understood by average viewers to convey the allegedly false impression Dr. Rogal claims and he has proved by clear and convincing evidence that the impression was false, you must then consider whether Mr. Stossel and ABC acted with the necessary degree of "fault" as I will now define it for you.

An essential element of any false light/invasion of privacy claim is that ABC and Mr. Stossel had actual knowledge of the falsity of the publicized matter or actually entertained serious doubts as to its truth. Rogal must also prove that ABC and Mr. Stossel had knowledge of or acted in reckless disregard of the false light in which Rogal claims he was placed by the broadcast. Id. Restatement (Second) of Torts, § 652E. This requirement is based upon Pennsylvania law as well as upon the First Amendment to the Constitution of the United States.

In order to prove the fault element of this action, Dr. Rogal must prove by clear and convincing evidence, either that the "20/20" program was broadcast with knowledge by ABC and Mr. Stossel that the broadcast was false or that ABC and Mr. Stossel in fact had serious doubts as to the truth of the program at the time it was broadcast. Bose Corp v. Consumers Union of United States, Inc., 466 U.S. 485, 511 n.30 (1984); Harte-Hanks Communication, Inc. v. Connaughton, 105 L.Ed.2d 562, 576 (1989); Restatement (Second) of Torts, § 652E(b) and Comment d.

This examination of the "fault" element of Dr. Rogal's claim therefore requires you to examine ABC's and Mr. Stossel's intent and their state of mind when they prepared and broadcast the program.

Here again, Dr. Rogal has the burden of proving the facts of his case with clear and convincing evidence. It is not enough in this case, as it is in most other civil cases, if Dr. Rogal's evidence on ABC's and Mr. Stossel's state of mind seems slightly more convincing than ABC's and Mr. Stossel's evidence. Here the strong constitutional guarantees of freedom of speech and freedom of the press place a heavier burden on Dr. Rogal. Thus, your verdict must be for ABC and Mr. Stossel unless you conclude that Dr. Rogal has proved with the convincing clarity which the Constitution demands that ABC and Mr. Stossel published the challenged statements knowing them to be false or with serious doubts as to whether they were true.

In this part of your deliberations, you must focus on what ABC and Mr. Stossel actually said in the broadcast as opposed to what Dr. Rogal claims the broadcast meant. You must determine whether ABC and Mr. Stossel actually knew that what they intended to say was false or had serious doubts about its truth. Bose Corp., 466 U.S. at 515.

In other words, for Dr. Rogal to prevail you must find that ABC and Mr. Stossel knew they were conveying the false impression Dr. Rogal asserts was made and that subjectively, in their own minds, they knew that this impression was false or had real doubts about its truth or falsity.

Highly Offensive to a Reasonable Person

It is not enough for Dr. Rogal to prove that false impressions about him were published with knowledge of falsity or reckless disregard for truth. In addition, Dr. Rogal must prove that the knowingly false light in which he was placed would be highly offensive to a reasonable person of ordinary sensibilities. Larsen v. PNI, supra, 543 A.2d at 1188; Restatement (Second) of Torts § 652E(a) and Comment c.

In determining whether serious offense would be taken by a reasonable man in the position of Dr. Rogal, you may consider any evidence tending to show that Dr. Rogal himself was or was not seriously offended by the statements in the broadcast at the time they were made.

Minor errors do not give rise to any serious offense to a reasonable person. Dr. Rogal's privacy is not invaded when unimportant false statements are made, even if they are made deliberately. Restatement (Second) of Torts, § 652E, Comment e.

To meet his burden of proving this element, Dr. Rogal must prove that there was such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in Dr. Rogal's position. Restatement (Second) of Torts § 652E, Comment c.

Actual Injury

If you find that Dr. Rogal has proven that ABC and Mr. Stossel broadcast derogatory falsehoods that would be highly offensive to a person of ordinary sensibilities, with knowledge of falsity or subjective awareness of probable falsity, then, and only then, may you consider the next element of false light case, which I will refer to as actual injury.

To recover on his claim, Dr. Rogal must prove that the knowingly false aspects of the broadcast that are highly offensive caused him actual injury. If the broadcast was not the cause of any actual harm to Dr. Rogal, he may not recover. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974); Restatement (Second) of Torts, § 652H, Comment c.

Dr. Rogal has complained that the broadcast caused injury to his reputation and standing in the community, and that he thereby suffered severe emotional distress, mental anguish and humiliation. Such injury cannot be presumed, however, and Dr. Rogal must support any claim of actual harm by competent evidence. Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1088 (E.D. Pa. 1980).

If you find that Dr. Rogal has not proved that the broadcast itself was the cause of any actual injury to him, then your deliberations will cease and you will return a verdict in favor of ABC and Mr. Stossel and against Dr. Rogal on this count.

-- Rogal v. ABC (E.D. Pa.)

One who gives publicity to a matter concerning another person which places that other person before the public in a false light is responsible to that person for all harm suffered as a result of this publicity if plaintiff establishes that:

(a) he was placed in a false light;
(b) publicizing matter of this kind about a reasonable person would be highly offensive to that reasonable person; and
(c) the person giving the publicity acted with knowledge of the falsity of the matter or in reckless disregard of whether it was true or false.

Conduct which is highly offensive to a reasonable person is that which a reasonable person, in similar circumstances, would find very objectionable or which a reasonable person in similar circumstances could be expected to take with serious offense. Publicity means that the matter is communicated to the public at large or to so many persons that the matter must be regarded as substantially certain to become public knowledge.

A plaintiff is placed in a false light if a defendant knowingly or recklessly and selectively published true statements in a manner which created a false impression, whether those statements are literally true or not. The literal accuracy of separate statements may not render a communication true where the implication of the communication as a whole was false.

-- Paul v. The Hearst Corporation (M.D. Pa.)

False Light

1. Mr. Paul makes a second claim in this case in addition to defamation: He claims that the phrase "slip-and-fall lawyer" that was published by defendants was false as applied to his practice and placed him in a false light before the public. This claim is similar to defamation, and the same public policies that I explained to you earlier regarding a person's right to recover for publication of a defamatory statement apply to this claim too.

2. Pennsylvania law says that even if the false statement made about the plaintiff did not injure the plaintiff's reputation, the plaintiff still can recover if the statement was so outrageous as to be highly offensive to a reasonable person. At the same time, the same interests of the press to exercise their rights to make critical statements about public figures apply to this type of claim with full force.

3. To recover on a claim of false light, Mr. Paul must prove:

(a) the statement was not substantially true, as I have already explained that concept to you;
(b) the statement would be highly offensive to a reasonable person;
(c) the statement was publicized with knowledge of falsity or with reckless disregard of its falsity, as I shall explain;
(d) the statement was of a sort to cause mental suffering, shame, or humiliation to a person of ordinary sensibilities; and
(e) the statement did not report on an issue of public concern.

Burden of Proof - False Light Invasion of Privacy

The Plaintiff has the burden of proving:

1. Plaintiff was placed in a false light;
2. the false light in which the Plaintiff was placed would be highly offensive to a reasonable person; and
3. the Defendants had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed.

Your verdict will be for the Plaintiff if you decide that all of these have been proved.

Your verdict will be for the Defendant if you decide that any one of these has not been proved.

You are further instructed that such publicity must lift the curtain of privacy on a subject matter that a reasonable man of ordinary sensibilities would find offensive and objectionable; supersensitiveness is not protected.

-- Paul v. Philadelphia Magazine (Pa.) (D)

The right of privacy is the right to be let alone.

In order to constitute an invasion of the right of privacy, the act must be of such a nature that would cause mental distress or injury to a person having ordinary feelings and intelligence.

The right of privacy is invaded if another:

Intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns and if the intrusion would be highly offensive to an ordinary man;

Publicizes matters of a kind highly offensive to an ordinary man concerning the private life of another;

Publicizes matters which place another before the public in a false light of a kind highly offensive to an ordinary man.

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

Invasion of Privacy/False Light: Plaintiff Mark Mendelson makes a second claim in this case in addition to libel. He claims that Defendants Darragh and The Morning Call made statements that were false and that invaded his privacy by placing him in a false light before the public. To recover on a claim of false light, Plaintiff Mark Mendelson must prove each and every one of the following six elements: (1) Defendants Darragh and The Morning Call published a materially false article about Plaintiff Mark Mendelson; (2) the article must be highly offensive to a reasonable person; (3) Defendants Darragh and The Morning Call knew or had serious doubts about the falsity of the article and the false light in which Plaintiff Mark Mendelson would be placed; (4) the statement reported private facts which were not of public concern; (5) the statement was not a fair and accurate report of court and governmental records and proceedings; and (6) Plaintiff Mark Mendelson sustained actual injury because of the article. If he fails to prove any of these elements, you must return a verdict for Defendants Darragh and The Morning Call and against Plaintiff Mark Mendelson.

As the first element of his false light claim, Plaintiff Mark Mendelson must prove that the article published by Defendants Darragh and The Morning Call was materially false by clear and convincing evidence. I have previously instructed you on the meaning of "clear and convincing evidence," and those instructions apply as well to Plaintiff Mark Mendelson's false light invasion of privacy claim. Unless Plaintiff Mark Mendelson proves that the article was in fact materially false by clear and convincing evidence, he cannot recover.

Plaintiff Mark Mendelson also must prove that the article was highly offensive to a reasonable person. To meet his burden Plaintiff Mark Mendelson must prove that Defendants Darragh and The Morning Call knew that Plaintiff Mark Mendelson, as a reasonable man, would be justified in the eyes ofthe community in feeling seriously offended and aggrieved by the article. The article must be the sort to "cause mental suffering, shame or humiliation to a person of ordinary sensibilities." There must be "such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position."

Plaintiff Mark Mendelson must also prove that Defendants Darragh and The Morning Call published a false article with knowledge or in reckless disregard of its falsity. That means that Plaintiff Mark Mendelson must prove that Defendants Darragh and The Morning Call published the article knowing that what they intended to say was false or knowing that there was a high degree of probability that what they intended to

say was false. As with Plaintiff Mark Mendelson's libel claim, he must prove by clear and convincing evidence that Defendants Darragh and The Morning Call actually knew that what they intended to say in the article was either false or probably false. The instructions given in Plaintiff Mark Mendelson's libel claim regarding fault apply as well to his false light invasion of privacy claim.

Plaintiff Mark Mendelson must prove that the article at issue involved private facts which are not of public concern. If Plaintiff Mark Mendelson has not done so, then you must cease deliberations and return a verdict for the Defendants Darragh and The Morning Call and against Plaintiff Mark Mendelson.

Under the law, Defendants Darragh and The Morning Call are privileged to publish a fair and accurate report of official proceedings and records. By "privileged," I mean that Defendants Darragh and The Morning Call cannot be liable to Plaintiff Mark Mendelson if their article was a fair and accurate report of various allegations and statements contained in court and governmental records and proceedings. I have already instructed you about the fair report privilege with respect to the defamation claim. Those instructions apply as well to Plaintiff Mark Mendelson's false light invasion of privacy claim.

To recover on a false light claim, Plaintiff Mark Mendelson must prove that a false meaning, if there is any, caused him actual injury. If any false meaning did not cause him any injury, he may not recover. As I have already instructed you with respect to the defamation claim, Plaintiff Mark Mendelson must prove by clear and convincing evidence that a false statement or implication ofthe article caused him actual injury. Those instructions apply as well to the false light invasion of privacy claim.

-- Mendelson v. Darragh (Pa.) (D)

Invasion of Privacy/Publication of Private Facts: Plaintiff Mark Mendelson makes a third claim in this case in addition to libel. Mendelson claims that Defendants Darragh and The Morning Call published private facts in a highly offensive manner. A publication is actionable for publication of a private fact only if publicity was given to private facts, which would be highly offensive to a reasonable person and which are not of legitimate concern to the public.

A private fact is "one that has not already been made public." A public fact is one "open to the public to observe." "A fact contained in a public record is deemed a public fact." There can be no liability for publicity to private life "when the defendant merely gives further publicity to information about the plaintiff that is already public."

The private fact that is published must be one that would be "highly offensive to a reasonable person." The publication must be accomplished in such a way as to outrage or cause mental suffering, shame or humiliation to a person of reasonable sensitivity. I have already instructed you on this element when addressing Plaintiff Mark Mendelson's false light claim.

The private fact that is published must be on that "is not of legitimate concern to the public." Public interest has been held to encompass any information concerning the "community-at-large's well being or its legal rights and liabilities." I have already instructed you on this element when addressing Plaintiff Mark Mendelson's false light claim.

There is a constitutional privilege for the publication of truthful facts in public records. The privilege to publish "truth information lawfully obtained" is absolute. If you find that Defendants published truthful facts contained in public records, you must find against Plaintiff Mark Mendelson.

Lastly, Plaintiff Mark Mendelson must prove that the publication of private facts in a highly offensive manner caused him actual harm.

-- Mendelson v. Darragh (Pa.) (D)

Invasion of Privacy/Intrusion Upon Seclusion: Plaintiff Mark Mendelson makes a third claim in this case in addition to libel. Mendelson claims that Defendants Darragh and The Morning Call made statements that intruded into his seclusion. Intrusion upon seclusion requires proof that Defendants Darragh and The Morning Call have intentionally intruded, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns in a manner that would be highly offensive to a reasonable person. Intrusion may consist of a physical intrusion, the use of one's senses to oversee or overhear another's affairs or "some other form of investigation or examination into plaintiff's private concerns." The invasion of seclusion may be 1) by physical intrusion into a place where the plaintiff has secluded himself; 2) by use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or 3) by some other form of investigation or examination into plaintiff's private concerns. This cause of action, however, is not based on publication, but rather seeks to protect the plaintiff from invasive acts by a defendant. For Plaintiff Mark Mendelson to recover, he must prove that the Defendants committed some sort of invasive acts upon Plaintiff Mark Mendelson. Absent such a showing, he cannot recover.

The intrusion must be "substantial" and "highly offensive" to a reasonable person. The intrusion must be of a kind that would "cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

There is no cause of action for intrusion with respect to "matters which occur in a public place or a place otherwise open to the public eye."

Lastly, Plaintiff Mark Mendelson must prove that the intrusion upon his seclusion caused him harm.

-- Mendelson v. Darragh (Pa.) (D)

Mr. Clark claims also that he was placed in a false light by the *Connecticut* cover and article.

The difference between defamation and false light privacy is that defamation protects against injury to reputation; false light privacy protects against emotional distress (hurt feelings).

Connecticut applies the same defamation defenses and privileges to false light claims where, as here, the facts from the libel claim are the same as the privacy claim. If you find for the plaintiff on any of his libel claims, he may not recover again for false light privacy − he may receive only one recovery for the same publication.

Media defendants can be liable for false light invasion of privacy only where there is publication of highly offensive material without regard to either falsity or to the false impression relayed to the public. In considering this claim, you should be clear that as long as the matter broadcast is substantially true, the defendants, are constitutionally protected from liability for false light invasion of privacy regardless of its decision to omit facts that may place the plaintiff under less harsh public scrutiny.

The "highly offensive" element requires challenged material be highly offensive to a reasonable person. Trivial indignities or names that offend a hypersensitive individual do not meet the "highly offensive" test.

To prevail on his claim of false light, Mr. Clark must prove the statements to which he objects are both false and such a "major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably expected to be taken by a reasonable in his position."

In addition, Mr. Clark must prove defendants acted with actual malice in order to prevail on this claim.

-- Clark v. Connecticut Magazine (Ct.) (D)

XI.D. Republication

Defendant LFP claims that it republished the advertisement from one which originally appeared in M.E.T. Personals magazine. If you credit this evidence then you may not find against LFP on the libel claim unless you also find that LFP had, or should have had substantial reasons to question the accuracy of the advertisement or the good faith of the author of it.

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

The fact that a libelous statement has been published before in another publication does not necessarily relieve a defendant from responsibility for republishing that statement. However, the republisher of a work is entitled to rely upon the research of the

original publisher absent a showing that the republisher had or should have had substantial reasons to question the accuracy of the article or the good faith of the reporter. Rinaldi v. Holt, Rinehard & Winston, 42 N.Y.2d 369, 397 N.Y.S.2d 943 cert. denied, 434 U.S. 969 (1977); Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 435 N.Y.S.2d 556 (1980). If you find that a plaintiff is a public figure, then the republisher cannot be liable unless he had actual knowledge that the original statement was, in fact, false or published with a belief that it was probably false. If you find that a plaintiff is a private figure, then a defendant cannot be liable unless you find that it was grossly irresponsible for him to rely on the previously published statements.

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

XI.E. Quotations

Mr. Masson must prove by a preponderance of the evidence that one or more of the challenged quotations was false.

In order to prove any of the challenged quotations are false, plaintiff must prove two separate matters:

First, that he did not make the challenged statement; and

Second, he must also prove any words you find he did speak were deliberately or recklessly altered in a way so as to effect a material change in meaning.

A meaning is not materially changed unless it has a different effect on the mind of the reader from that which the actual words would have produced.

Slight inaccuracy in details does not necessarily make a quotation false.

Minor changes to correct for grammar or syntax do not amount to falsity. In addition, when writing from notes or when translating from tape recording to the written word, a writer may edit or alter a speaker's words beyond slight corrections of grammar of syntax without the quotation being considered a false quotation, so long as the alteration does not materially change the speaker's meaning.

The omission of minor details, or the placement of quotations said at two different times or places in the same paragraph, in an otherwise basically accurate account does not give rise to a claim of defamation. Likewise, the choice or organization of material which goes into the article is a matter of editorial judgment and does not standing alone constitute evidence of falsity, as I've defined falsity in these instructions.

However, juxtaposing a series of events or statements may create a false and defamatory implication. This may be so even though the included facts or statements are correct.

-- Masson v. New Yorker (N.D. Cal.) (C)

XI.F. Fraud

In order to prove it was damaged by fraud, Food Lion must prove, by a preponderance of the evidence, the following five things:

First: That the Defendant made a false representation of material fact.

Second: That the representation was reasonably calculated to deceive. A representation is calculated to deceive when the person who makes it knows it to be false, or makes it as a positive assertion without any knowledge of its truth of falsity.

Third: That the false representation was made with the intent to deceive. An intent to deceive is manifest when, at the time the false representation is made, the defendant intends that it be acted or relied upon by the plaintiff. Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred.

Fourth: That the Plaintiff was in fact deceived by the false representation and that the Plaintiff's reliance was reasonable. Food Lion's reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care for his own welfare, would have relied on the false promise.

Fifth: That Food Lion suffered damages as a result of its reliance on the false representation. However, in this phase of the case, Food Lion need only establish that it was damaged, not the precise dollar amount of such damage.

The measure of compensatory damages for fraud is an amount that will compensate the Plaintiff for the loss occasioned by the Defendants' fraud, or the amount which the Plaintiff is actually "out-of-pocket" by reason of Defendants' fraud. In other words, Food Lion is entitled to be placed in the same financial position as it would have been had the applications for employment not been made. For example, you may consider items such as expenses, if any, incurred by Food Lion in hiring and training Ms. Dale and Ms. Barnett as employees in their respective positions and costs, if any, to Food Lion in placing Ms. Dale and Ms. Barnett on the payroll as employees as well as any costs in terminating them from the payroll.

-- Food Lion, Inc. v. Capital Cities/ABC, Inc. (M.D. N.C.) (C)

XI.G. Trespass

Every voluntary, unauthorized entry on land in the peaceable possession of another constitutes a trespass, without regard to the degree of force used and irrespective of whether actual damage is done. The parties in this case agree that at the times in question Food Lion had peaceable possession of the property and that entry in each instance was voluntary. What the parties dispute is whether entry was authorized. A jury may find that an entry was not authorized if the Plaintiff proves by a preponderance of the evidence (1) that a Defendant made a knowing misrepresentation in requesting permission to enter; (2) that the misrepresentation was made for the purpose of obtaining consent to enter and (3) that, were it not for the misrepresentation, permission to enter would not likely have been granted.

In three instances a jury may also find a trespass even though entry as an employee was not procured through misrepresentation and was originally authorized.

First: If Food Lion proves by a preponderance of the evidence that Ms. Dale or Ms. Barnett or both intentionally damaged property belonging to Food Lion;

Second: If Food Lion proves by a preponderance of the evidence that while working simultaneously as an ABC employee and a Food Lion employee, Ms. Dale, Ms. Barnett, or both breached her duty of loyalty to Food Lion as I have just explained that term for you; or

Third: If Food Lion proves by a preponderance of the evidence that while working simultaneously as an ABC employee and a Food Lion employee, Ms. Dale, Ms. Barnett, or both – for the purpose of furthering an investigation on behalf of ABC – unreasonably interfered with and unreasonably disrupted the work of other Food Lion employees, you may find that the original scope of consent was exceeded and that a trespass has occurred.

On the trespass claim, Food Lion does not contend it suffered actual damages as a proximate result of the Defendants' activities. Actual damages in a trespass case would represent a diminished value of the property and there is no claim that any of the stores was valued less at the time Ms. Dale or Ms. Barnett left than when they were hired as employees. With regard to a trespass, however, a plaintiff is entitled to receive nominal damages even if there is no proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damage incurred by the Plaintiff.

-- Food Lion, Inc. v. Capital Cities/ABC, Inc. (M.D. N.C.) (C)

The plaintiffs in this case claim that defendants trespassed on their property.

A trespasser is a person who enters or remains upon premises in possession of another without the direct or implied consent of the possessor. Trespass is the wrongful interference with one's person, property or rights such as injury to a person's right of possession, and that injury to possession may occur by unauthorized occupancy of the property, or by damage to the property itself. Consent is an absolute defense to trespass, even if obtained by a misrepresentation of fact; there can be no trespass where implied or express consent was given to enter the premises. Consent means willingness that an act or invasion of an interest take place.

-- Copeland v. Hubbard Broadcasting (Minn.) (D)

Trespass is not committed if there is permission given to enter the property and the person coming onto the property does not move beyond the possessor's invitation or permission. Plaintiffs do not claim that Johnson was asked to and refused to leave, or that she entered any part of their house without permission. Instead, they claim that by recording what she saw exceeded the scope of the consent they had given. Wrongful conduct following an authorized entry on land can result in a trespass.

-- Copeland v. Hubbard Broadcasting (Minn.) (D)

If you determine that defendants are liable for trespass, you must determine what damages, if any, plaintiffs sustained. In this case, plaintiffs are seeking mesne profits. Mesne profits are a sum recovered for the value or benefit which a person in wrongful possession has derived from his wrongful occupation of land between the time when he acquired wrongful possession and the time when possession was taken from him. The purpose of mesne profits is to permit a plaintiff to recover what he might have earned if he had been in possession, not what the trespasser may have earned from being in wrongful possession. In order to recover mesne profits, the trespasser must have kept the owner out of possession.

-- Copeland v. Hubbard Broadcasting (Minn.) (D)

XI.H. Duty of Loyalty

The law recognizes that an employee owes her employer a duty to follow the reasonable directions of her employer and to make a good faith effort toward performing her job requirements with the care and skill reasonably expected of persons in that position. This duty is known as a duty of loyalty. It is breached when a person, employed by two separate employers, devotes such time and attention to the duties and responsibilities of one that she either fails to follow the reasonable directions of the other or fails to make a good faith effort toward performing the job requirements of the other with the care and skill reasonably expected of persons in that position.

The duty may also be breached with regard to the performance of specific acts when an employee, performing a specific act in a particular way for the purpose of

following the directions or achieving the reasonable expectations of one employer, harms the other employer through the performance of that specific act.

To prevail on this claim, Food Lion must prove the following facts by a preponderance of the evidence:

First: That Ms. Dale or Ms. Barnett, or both breached her duty of loyalty to Food Lion; and

Second: That the breach of the duty of loyalty proximately caused Food Lion to suffer damages.

As I just instructed you with regard to the question of damages in the fraud claim, in this phase of the case Food Lion need only establish that it was damaged, not the precise dollar amount of such damage.

It will be Food Lion's burden to prove what actual damages it sustained as a proximate result of Ms. Dale and/or Ms. Barnett devoting time and attention to ABC's business when she should have been devoting time and attention to following Food Lion's reasonable directions or, otherwise, making a good faith effort toward performing the job requirements of Food Lion with the care and skill reasonably expected of persons in that position.

It would also be Food Lion's burden to prove what, if any, loss it may have suffered as a proximate result of Ms. Dale or Ms. Barnett or both performing any specific act in a particular way for the purpose of following the directions or achieving the reasonable expectations of ABC, which, in the doing, harmed Food Lion through the performance of that specific act.

-- Food Lion, Inc. v. Capital Cities/ABC, Inc. (M.D. N.C.) (C)

XI.I. Wrongful Death

Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful television production company would use. Therefore, by "negligence," I mean the failure to do something that a reasonably careful television production company would do, or the doing of something that a reasonably careful television production company would not do, under the circumstances that you find existed in this case.

The law does not say what a reasonably careful television production company using ordinary care would or would not do under such circumstances. That is for you to decide.

I now want to discuss with you duties owed by the Defendant to the Plaintiff.

A special relationship between parties may create a duty.

A Defendant, under the circumstances of this case, has a duty to exercise ordinary care to protect those persons from foreseeable and unreasonable risks of harm while they are on those premises. These risks could have either been known, or should have been known, to the Defendant by exercising ordinary care.

A Defendant has a duty to take reasonable measures to protect a Plaintiff from criminal acts by a third person on or off the premises, so long as the acts were foreseeable.

The Defendant under these circumstances, may be liable if it makes a misrepresentation to another and physical harm results from an act done by the other or a third person in reliance upon the truth of the representation. There are two elements. If the Defendant: (1) intended its statement to induce, or should realize that it is likely to induce action by another or by a third person which involves an unreasonable risk of physical harm to the other; and (2) knows that the statement is false.

A Defendant has a duty under these circumstances to disclose to another a fact that it knows may justifiably induce the other to act or refrain from acting and has the further duty to exercise reasonable care to disclose to the other party matters known to it that it knows to be necessary to prevent its partial or ambiguous statement of facts from being misleading.

The Defendant has a duty to not act in a manner that either intends to affect or realizes or should realize that it is likely to affect the conduct of another or a third person in such a manner as to create an unreasonable risk of harm.

Defendant has a duty to act in a manner such that it does not intentionally and unreasonably subject another to emotional distress which it should recognize as likely to result in illness or other bodily harm, even though it had no intention of inflicting such harm and irrespective of whether the act was directed against another or a third person.

Under the concept of free speech, you cannot find the defendant negligent because of: (1) the Jenny Jones Show's decision to tape a "Same Sex Secret Crush" show on March 6, 1995; or (2) the topic of any *Jenny Jones* show taped before March 6, 1995.

The plaintiff has the burden of proof on each of the following propositions:

a. That the plaintiff was injured and sustained damages;

b. That the defendant was negligent in one or more of the ways claimed by the plaintiff, as stated to you in these instructions; and

c. That the negligence of the defendant was a proximate cause of the injuries/damages to the plaintiff.

Your verdict will be for the plaintiff, if he was injured and sustained damages, and defendant was negligent, and such negligence was a proximate cause of plaintiffs injuries and damages.

Your verdict will be for the defendant, if plaintiff was not injured and did not sustain damages; or the defendant was not negligent; or if negligent, such negligence was not a proximate cause of the plaintiff's injuries and damages.

The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.

We have a law known as the Wrongful Death Act. This law permits the personal representative of the estate of a deceased person to bring an action whenever the death of a person or injuries resulting in the death of a person have been caused by the negligence of another. In this case, Patricia Graves and Frank Amedure, Sr., the personal representatives of the estate of Scott Amedure, the deceased, are suing Warner Bros., the defendant. Patricia Graves and Frank Amedure, Sr., are representing the Estate: Frank Amedure, Sr. (father), Patricia Graves (mother), Frank Amedure, Jr. (brother), Wayne Amedure (brother), Michael Amedure (brother), and Tina Skrine (sister). They are the real parties in interest in this lawsuit and in that sense are the real plaintiffs, whose damages you are to determine if you decide for the personal representatives of the estate of Scott Amedure.

If you decide the plaintiffs are entitled to damages, you shall give such amount as you decide to be fair and just, under all the circumstances, to those persons represented in this case. Such damages may include the following items, to the extent you find they have been proved by the evidence:

1. Reasonable funeral and burial expenses;
2. Reasonable compensation for the pain and suffering undergone by Scott Amedure while he was conscious during the time between his injury and death;
3. Losses suffered by Scott Amedure's next of kin, including Patricia Graves, Frank Amedure, Sr., Wayne Amedure, Michael Amedure, Frank Amedure, Jr. and Tina Skrine, as a result of Scott Amedure's death, including:
    a. Loss of service;
    b. Loss of gifts and other valuable gratuities; and
    c. Loss of society and companionship.

Which, if any, of these elements of damage has been proved is for you to decide, based upon evidence and not upon speculation, guess, or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. There has been some discussion that could be interpreted that you are a public conscience with a need to send a message. If this is what you feel, that would be incorrect. Your verdict must be solely to compensate for the damages and not to punish the defendant.

If you find for the plaintiffs, then in determining the damages, you may consider the length of time those damages probably would have continued, taking into consideration the number of years Scott Amedure was likely to have lived. In making this determination you may consider the mortality table which is a part of our statutes. This table shows that an ordinarily healthy person of 32 years old has a life expectancy of 39.43 years.

-- Amedure v. Schmitz (Mich.)

XI.J. Loss of Consortium

If you find in favor of the plaintiff, the plaintiff's spouse is entitled to be compensated for the loss of the injured party's services to her and the loss of companionship of her spouse.

-- Paul v. The Hearst Corporation (M.D. Pa.)

XI.K. Business Disparagement

To recover on a claim of business disparagement, a Plaintiff must prove the following:

(1) That the Defendant published a false, disparaging statement;

(2) That the statement was "of and concerning" a Plaintiff's specific business property;

(3) That the statement was made with knowledge of the falsity of the disparaging statement or with reckless disregard concerning its falsity, or with spite, ill will, and evil motive, or intending to interfere in the economic interests of the Plaintiff in an unprivileged fashion; and

(4) That the disparaging statement played a substantial and direct part in inducing special damage to the business interests of the Plaintiff in question.

It is undisputed that the broadcast in question was published.

Statements are "disparaging" if they are understood to cast doubt upon the quality, purity, or value of the Plaintiffs' goods or products, and the Defendant intends the statements to cast the doubt, or the statements can reasonably be understood as casting doubt.

-- Texas Beef Group v. Winfrey (N.D. Tex.) (C)

Damages for business disparagement may not include recovery for hurt feelings or injury to the personal reputations of the owners of the business. To recover damages for business disparagement, each Plaintiff must establish by a preponderance of the evidence that a direct, monetary loss has been realized by their cattle business. Each Plaintiff must show that the Defendant's disparaging communication played a substantial and direct part in harming their business interest, and that the communication resulted in a direct and realized monetary loss that is naturally and directly attributable solely to the false communications at issue.

-- Texas Beef Group v. Winfrey (N.D. Tex.) (C)

The plaintiff in this lawsuit claims that the defendants libeled and disparaged Merco Joint Venture and the Merco Project by and during an August 2, 1994 national television broadcast of "TV Nation."

The plaintiff complains that the defendants' actions constitute libel and business disparagement, and have filed suit seeking compensatory and punitive damages on account of the defendant's conduct.

The plaintiff claims that: (1) the defendants made or broadcast defamatory statements concerning Merco and the Merco Project; (2) these statements were false; (3) the defendants knew these statements were false or made or broadcast these statements with reckless disregard for whether the statements were true or false; and (4) the broadcasting of these statements caused harm to the plaintiff.

The plaintiff further alleges that the defendants' actions in making or broadcasting the statements constituted business disparagement.

A claim for business disparagement has five essential elements, as follows:

First: The making or broadcasting by the defendants of disparaging statements about the plaintiff;

Second: The disparaging statements must be false;

Third: The defendants knew the statements were false or were aware of their probable falsity at the time it was broadcast;

Fourth: The statements were made with a lack of privilege; and

Fifth: The disparagement proximately caused financial injury to the plaintiff.

Defendants Tristar and Kaufman claim that each of the statements made during the broadcast were and are true, or at a minimum substantially true. Tristar and Kaufman claim they did not have any reason, nor did they have doubts, as to the accuracy of any of the statements that were made in the broadcast. Specifically, Tristar and Kaufman claim they did not make or publish the broadcast or the statements in the broadcast with knowledge that any of them were false, nor did they do so with a reckless disregard as to their truth or falsity. Tristar claims that all of the statements in issue were accurate quotes of the people stating personal opinions and beliefs. Similarly Kaufman claims that all his statements were his personal opinions and beliefs.

Tristar and Kaufman also claim that plaintiff has suffered no damages as a result of the broadcast.

-- Merco Joint Venture v. Kaufman (W.D. Tex.)

XI.L. Miscellaneous

Editing: A Defendant alleged to have unfairly edited and published a disparaging statement cannot be held liable for refusing to publish everything a plaintiff would like. The choice of material to go into a television broadcast, and decisions made as to limitations on the size and content of a program, and on the treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. You may not find a Defendant liable for broadcasting truthful statements because it failed to include additional facts that might have cast the Plaintiffs in a more favorable or balanced light, if the gist of the broadcast as a whole and the Complained of Statements are substantially true. However, a publisher who deliberately distorts meaning to create a false, disparaging statement cannot rely on editorial right or privilege to avoid liability.

-- Texas Beef Group v. Winfrey (N.D. Tex.) (C)

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by the evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's

ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure to recollect, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of such witness such weight, if any, as you may think it deserves.

The plaintiff contends that she suffered mental and emotional anguish as a result of the publication of the article. You may not award any damages to the plaintiff for such mental suffering unless you first find that plaintiff's reputation has, in fact, suffered due to the publication of the article.

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

-- Similar instructions were given in Gray v. St. Martin's Press., Inc. and Paul v. Hearst Corp.

I instruct you that under libel law, there is no obligation upon a writer, editor, or publisher to be fair or to present both sides of the story. There is no obligation to seek out interviewees favoring the other side, to give equal advantage to interviewees favoring the other side, or even to publish their statements. There is no legal obligation to interview the parties that are the subject of criticism. How a publisher chooses to act in these respects is a matter of its editorial policy; in these matters the publisher is free to act in whatever manner it thinks best.

Recognizing the importance of free, open, and robust discussion in the press on matters of public interest, the law of libel imposes no obligations of fairness or evenhandedness. The publication of commentary that flatly accuses individuals and institutions of undesirable actions, without including their denials or evidence to the contrary, is a daily event. Each of us is entitled to our own opinion as to whether this is a good or bad thing. But your opinion on that subject may not enter into your deliberations as jurors.

You may not act in the role of an editor and base your decision in this case on whether you think the book would have been better or fairer if it had been investigated or

presented in a different manner. A book is not a public forum, and the plaintiffs have no right to insist upon publication of a contrary point of view.

In short, you may not find that the defendants acted with actual malice or gross irresponsibility merely because you find that they may have failed to discuss the plaintiffs' opposing point of view.

Damages for Emotional Injury

Unless an individual plaintiff establishes that he has sustained actual injury to his reputation, he cannot recover for "mental anguish." Each plaintiff must prove by a preponderance of the credible evidence that his reputation in the community was injured before you consider whether that plaintiff suffered any personal humiliation or anguish. Any claim for mental suffering is "parasitic" and compensable only after damage to reputation has been established. Moreover, those emotional damages, if any, must be caused by proven injury to his reputation.

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

You are the sole judges of the evidence and of the credibility of the witnesses. You may accept or reject any part of the testimony of any witness and you should accept only the testimony you consider worthy of belief. In determining the weight to be accorded the testimony of any witness, you may consider the demeanor of the witness while on the witness stand; his apparent candor or evasion or the existence or non-existence of any bias or interest; and whether he has previously made contradictory or conflicting statements. You may take into consideration what, if anything, the witness has to gain or lose by his testimony.

The defendants have interposed a defense of contributory negligence to the claims based upon the diary series. By this defense the defendants claim that, prior to the publication of the diary series, the plaintiffs had knowledge of certain information pertaining to the subject matter of the preceding privileged articles and deliberately or negligently withheld such information from the defendants. Defendants thus contend that plaintiffs' own negligence proximately caused or proximately contributed to cause the damages claimed by them based upon the diary series. If you are reasonably satisfied from the evidence that the plaintiffs were guilty of contributory negligence as claimed by the defendants, the plaintiffs could not be entitled to recover for any alleged false and defamatory statements in the diary articles.

The defendants' answer raising contributory negligence is an affirmative defense. Therefore, the burden is upon the defendants to reasonably satisfy you from the evidence as to the truth of all of the material allegations of this defense.

Contributory negligence is negligence on the part of the plaintiffs that proximately contributed to the alleged damages.

If you are reasonably satisfied from the evidence that a plaintiff is guilty of contributory negligence, such plaintiff cannot recover for any initial simple negligence of the defendants.

-- Taylor v. New York Times (Ala.)

The defendant published a correction regarding the photograph that plaintiff is complaining of in this action. The failure to publish a correction or the failure to publish a correction to the plaintiff's satisfaction is not a basis for awarding damages in a defamation action. However, you may consider the timing, content and location of the correction in connection with the question of whether it served to mitigate or lessen any damages he received from the original publication.

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