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INTRODUCTION†
to an
ADDRESS BY THE HONORABLE ABNER J. MIKVA

There is no more volatile issue in the law of defamation today than the question of whether statements of "fact" should be accorded different treatment under the First Amendment than statements of "opinion."[1]

The issue traces its origins back more than twenty years to the U.S. Supreme Court decision in *Gertz v. Robert Welch, Inc.*,[2] in which the Supreme Court, in dicta, said:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[3]

This statement in *Gertz* spawned a new line of defense in defamation lawsuits[4]—that statements of opinion were entitled

† This introduction was written by Stephen J. Wermiel, Associate Professor of Law, Georgia State University College of Law. The introduction provides background to the speech entitled "In My Opinion, Those Are Not Facts," which was delivered by the Honorable Abner J. Mikva on October 15, 1994 at the Georgia Bar Media & Judiciary Conference in Atlanta.

1. The Supreme Court ruled in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), that the First Amendment imposes limits on state defamation laws. For a full discussion of the fact-opinion issue, see ROBERT D. SACK & SANDRA BARON, LIBEL, SLANDER, AND RELATED PROBLEMS, § 4 (2d ed. 1994); BRUCE W. SANFORD, LIBEL AND PRIVACY, § 5 (2d ed. 1994); and RODNEY A. SMOLLA, LAW OF DEFAMATION, § 6 (Nov. 1994).

2. 418 U.S. 323 (1974).

3. *Id.* at 339-40 (footnote omitted).

4. Statements of opinion were previously accorded a common law privilege of "fair

to an absolute privilege under the First Amendment.[5] For sixteen years after *Gertz*, many state and federal courts applied the absolute privilege when they could determine whether a statement was opinion rather than fact.[6]

Much of the controversy after *Gertz* centered on how to determine whether a statement was one of fact, making it actionable, or one of opinion, making it privileged. The leading test developed to assist judges in this often tricky and difficult determination was proffered by the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in 1984 in *Ollman v. Evans*.[7] The D.C. Circuit said that statements should be examined in "the totality of the circumstances in which the statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion."[8]

To measure the totality of the circumstances, the D.C. Circuit suggested four factors to be examined. First, look at "the common usage or meaning of the specific language" to determine if the words have a common meaning or convey ambiguity.[9] Second, examine "verifiability—is the statement capable of being objectively characterized as true or false."[10] Third, "consider the full context of the statement" to see if other words or the full article would change a reader's perception.[11] Fourth, "consider the broader context or setting"[12] to see if the article is located among the editorials or on the arts or book review pages, where expressions of opinion are more traditionally found.[13]

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comment," which provided a limited defense in defamation actions, but not an absolute privilege. Milkovich v. Lorain Journal Co., 497 U.S. 1, 13-14 (1990).

5. *See, e.g.*, Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (en banc) (holding a challenged statement in *Newsweek* magazine about South Dakota Governor William Janklow to be protected opinion), *cert. denied*, 479 U.S. 883 (1986). The 8th Circuit said, "Opinion is absolutely protected under the First Amendment." *Id.* at 1302.

6. *See, e.g.*, S & W Seafoods Co. v. Jacor Broadcasting Co., 390 S.E.2d 228, 229 (Ga. Ct. App. 1989) (holding that a "series of critical and unflattering comments" broadcast on a WGST radio talk show about an Atlanta restaurant was protected opinion).

7. 750 F.2d 970 (D.C. Cir. 1984) (en banc) (holding that a column by journalists Evans & Novak labeling a political science professor a Marxist was protected opinion), *cert. denied*, 471 U.S. 1127 (1985).

8. *Id.* at 979.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *See id.* at 984-85.

The D.C. Circuit test was readily accepted by other courts.[14] The *Ollman* decision "brought such clarity to the law that [the] analyses were quickly adopted throughout the nation."[15]

The clarity was short-lived.[16] In *Milkovich v. Lorain Journal Co.*,[17] the Supreme Court said there is no "wholesale defamation exemption for anything that might be labeled 'opinion.' "[18] Instead, the Court relied on an earlier decision, *Philadelphia Newspapers, Inc. v. Hepps*,[19] holding that when there is a news media defendant and the statement involves a matter of public concern, the plaintiff bears the burden of proving that a statement is false.[20] In *Milkovich*, Chief Justice William H. Rehnquist wrote that *Hepps* "ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."[21] The Court in *Milkovich* shifted the focus away from the context of contested statements toward the question of whether those statements were capable of being proven or not. Still, the Court said judges could consider factors such as whether the statements contained "figurative . . . or hyperbolic language" or whether "the general tenor" of the article suggested statements of opinion, not fact.[22]

After *Milkovich*, the lower state and federal courts appeared once again to move in disparate directions in search of a clear standard. The U.S. Court of Appeals for the Ninth Circuit, relying on a narrow reading of *Milkovich*, concluded that television commentator Andy Rooney's statement that a windshield water repellant product was ineffective was not a protected statement of opinion.[23] The U.S. Court of Appeals for

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14. *See, e.g., Janklow,* 788 F.2d at 1302 (adopting the *Ollman* test with modifications).

15. SANFORD, *supra* note 1, at 134.

16. The *Ollman* decision also had its detractors. Justice William H. Rehnquist, dissenting from the denial of certiorari, said lower courts that accorded an absolute privilege for statements labeled opinion were using "a meat axe" to solve "a very subtle and difficult question." Ollman v. Evans, 471 U.S. 1127, 1129 (1985).

17. 497 U.S. 1 (1990).

18. *Id.* at 18.

19. 475 U.S. 767 (1986).

20. *Milkovich,* 497 U.S. at 16.

21. *Id.* at 20.

22. *Id.* at 21.

23. Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990) (holding that although the statement was not opinion, dismissal was proper because Unelko failed to prove the falsity of the statement), *cert. denied*, 499 U.S. 961 (1991).

the First Circuit interpreted the Supreme Court's decision more broadly as continuing to incorporate factors like those outlined by the D.C. Circuit in *Ollman* prior to the *Milkovich* decision.[24]

Perhaps the most significant development since *Milkovich* is the D.C. Circuit's decisions in *Moldea v. New York Times Co.*[25] The D.C. Circuit issued one opinion, finding that a statement about "sloppy journalism" in the New York Times Book Review asserted provable facts that were not insulated from liability simply because they were in a book review.[26] Then, in a remarkable turnabout, the D.C. Circuit granted rehearing and issued a new opinion amending the earlier decision and holding that the context of a book review was a significant factor to be weighed in deciding whether a review asserted provable facts in a defamation claim.[27]

It is too soon to determine whether the *Moldea II* decision will occupy the high pedestal in the post-*Milkovich* realm that the D.C. Circuit's *Ollman* decision did in an earlier period. It has already been cited as authorative by at least one state court,[28] and others are sure to follow suit.

In the speech that follows, Judge Abner J. Mikva, who left the bench in September 1994, to become Counsel to the President, provides unusual insight into the *Moldea* decisions in which he participated. This unique perspective examines the change in the D.C. Circuit's decisions and the likely significance of the *Moldea II* ruling in the ongoing debate over the proper analysis of the fact-opinion distinction in defamation cases.

The speech was delivered in Atlanta on October 15, 1994 at the fifth annual Georgia Bar Media & Judiciary Conference, of which the Georgia State University College of Law was a sponsor.

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24. Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir.) (holding that newspaper articles accusing a touring theater company of misleading the public were not actionable in a defamation claim), *cert. denied*, 112 S. Ct. 2942 (1992).

25. Moldea v. New York Times Co., 15 F.3d 1137 (D.C. Cir.) (*Moldea I*), *modified*, Moldea v. New York Times Co., 22 F.3d 310 (*Moldea II*), *cert. denied*, 115 S. Ct. 202 (1994).

26. *Moldea I*, 15 F.3d at 1145-46. The decision was written by Judge Harry Edwards and was joined by Judge Patricia M. Wald. Judge Abner J. Mikva dissented.

27. *Moldea II*, 22 F.3d at 311. Judge Edwards wrote the second opinion, as well, this time joined without dissent by Judges Wald and Mikva.

28. NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center, 879 P.2d 6, 10 (Colo. 1994) (en banc) (holding that television news reports about a company that sold do-it-yourself living wills were protected statements of opinion).