DOCUMENT RESUME

ED 282 222 CS 210 509

AUTHOR Drechsel, Robert E.
TITLE The Legal Risks of Social Responsibility.
PUB DATE Aug 87
NOTE 35p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (70th, San Antonio, TX, August 1-4, 1987).
PUB TYPE Information Analyses (070) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Codes of Ethics; Court Litigation; Freedom of Speech; *Journalism; *Legal Responsibility; *Malpractice; Moral Values; *News Media; Press Opinion; *Social Responsibility; Theory Practice Relationship
IDENTIFIERS *Journalists; Libel; *Media Ethics; Media Role; Media Use

ABSTRACT

By scrutinizing the extensive and growing literature on media ethics and media codes, as well as the current history of litigation in libel cases, this paper analyzes the risks presented by journalistic social responsibility in the context of expanding tort liability for what might loosely be called journalistic malpractice. Following a review of malpractice claims against other professionals in fields such as law and medicine that raise significant issues regarding the boundary between legal and moral responsibility, the paper considers cases in which journalists face similar issues, including the Westmoreland-CBS case. Specifically, the paper focuses on the use of professional standards and policies as either the source of newly developed legal duties or as standards against which claims of professional malpractice may be measured. Finally, the paper speculates briefly about the implications of the social responsibility theory for journalists. (Ninety-eight footnotes are appended.) (NKA)

THE LEGAL RISKS OF SOCIAL RESPONSIBILITY

Robert E. Drechsel
Associate Professor
School of Journalism & Mass Communication
University of Wisconsin-Madison
806 University Ave.
Madison, WI 53706

(Presented to the AEJMC Law Division,
AEJMC Annual Convention,
San Antonio, TX, August 1987)

THE LEGAL RISKS OF SOCIAL RESPONSIBILITY

The concept of social responsibility has enmeshed itself strongly in the fabric of American journalism. There is an extensive and growing literature on media ethics[1]; media codes and policy statements abound.[2] Premised on the idea that self-regulation can effectively pre-empt external regulation and that the news media are imbued with a public trust, social responsibility theory posits that the press freedom "can remain a right of those who publish only if it incorporates into itself the right of the citizen and the public interest."[3] As articulated in 1947 by the Commission on Freedom of the Press, social responsibility theory holds that freedom of the press "can only continue as an accountable freedom," that its "legal right will stand unaltered as its moral duty is performed," and that there is a point beyond which the media's failure to behave responsibly will require intervention by the state.[4]

Not all journalists may agree entirely with the Commission's statement of the theory, but it appears clear that acceptance of some notion of the press as trustee of the public is widespread. This notion is reflected not only in ethical codes,[5] but in such concepts as the news media as the Fourth Estate or as public watchdog or as an essential instrument of

self-government.

Social responsibility theory has been criticized on grounds that it could boomerang, and with disastrous results. Reporter Lyle Denniston, for example, has warned that the law is beginning to use the press' own claims of being a public servant as justification for more regulation.[6] Professor William Van Alstyne has expressed concern that critics of the press will be handed "a weapon forged by the press itself every time it seeks to extend press entitlements as the surrogate of the public right to know."[7] Such criticism tracks closely with Ronald Dworkin's larger analysis of the risk of what he calls a "policy-based" rationale for freedom of expression. Such a rationale focuses on the value of speech for its audience. The problem, Dworkin argues, is that an audience-based rationale opens the door to restriction in the name of the public interest.[8]

This paper analyzes the risks presented by journalistic social responsibility in the context of expanding tort liability for what might loosely be called journalistic malpractice. Libel falls into this category, as do a variety of other actions based on claims on journalistic negligence. In such litigation, the concepts of duty, obligation, fault, reasonableness and social utility often become central. Since these terms have meaning in the contexts of both ethics and law, confusion may set in. As Justice Holmes has written, "nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into

fallacy."[9] In other words, the very vocabulary of rights and duties may make it easier to turn moral responsibilities into legal responsibilities.

Further, although law and morality are not synonymous, much law may have strong moral underpinnings. William Ernest Hocking, who was a member of the Commission on Freedom of the Press, has written that "...law falls in behind the advance of ethical reflection, attempting to make unanimous in behavior what ethical sense has made almost unanimous in motive.... *** Law is the great civilizing agency it is...because it is a working partner with the advancing ethical sense of the community."[10] Thus, for several reasons -- the underlying utilitarian, policy rationale of social responsibility theory, the similar vocabulary of law and morals, and the seemingly easy progression from moral to legal obligation -- we might expect to see pressure exerted to transform professional ethics into legal standards.

Of course, there is no reason to believe that journalists alone have faced such pressure. The experience of other professionals may be instructive. Consequently, this paper examines claims of malpractice against other professionals which raise significant issues regarding the boundary between legal and moral responsibility. The paper then considers cases in which journalists face similar issues. More specifically, the paper focuses on the use of professional standards and policies as either the source of newly developed legal duties or as standards against which claims of professional malpractice may be measured.

Finally, the paper speculates briefly about the implications for journalists.

Ethical and Legal Responsibility in Other Professions

Actions for malpractice generally fall into the broader category of negligence actions. An action for negligence requires that the defendant be found to owe the plaintiff a legal duty to conform to a particular standard of conduct, and that the defendant has in fact failed to conform to that standard of conduct.[11] In general, negligence is conduct which "falls below the standard established by law for the protection of others against unreasonable risk of harm."[12]

When defendants are professionals, the standard of conduct required of them is that they exercise the "skill and knowledge normally possessed by members of that profession or trade in good standing...."[13] When defendants are laypersons, the standard is that they conduct themselves as reasonable persons under like circumstances.[14] Consequently, when non-professionals are sued, evidence that they conformed to customary standards is admissible but not conclusive as to negligence; but when professionals are sued, proof that they conformed to the customary practices of the profession will generally relieve them of liability.[15]

It follows, then, that testimony by experts can become central in suits against professionals, since lay jurors presumably are unable otherwise to judge what is customary practice in a profession.[16] It becomes logical also for

plaintiffs to look to other sources of evidence of what constitutes generally accepted professional conduct -- sources that include codes of ethics, professional policy statements, organizational rules, and even internal evaluations.

In fact, developments in other professions indicate that ethical standards and policies are becoming increasingly relevant in malpractice litigation. The preamble to the American Bar Association's Model Code of Professional Responsibility states that the Code does not "undertake to define standards for civil liability of lawyers for professional conduct."[17] The ABA's Model Rules of Professional Conduct are even more specific:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. *** Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.[18]

Nevertheless, legal ethics have been used in two ways in connection with malpractice actions: as a source of legal duties the breach of which arguably constitutes malpractice; and as evidence of the standard of care required of a lawyer, departure from which is evidence of negligent conduct. The courts have been reluctant to interpret the code as creating legal duties, but have been more willing to consider the standards as evidence of what constitutes "due care" by a lawyer.[19]

For example, in Bickel v. Mackie, a federal district court

issued judgment for a lawyer who was sued for failure to comply with the Code of Professional Responsibility. The court specifically rejected the plaintiff's argument that provisions of the Code create a private cause of action.[20] The Missouri Court of Appeals reached a similar conclusion in Greening v. Klamen, rejecting a claim that the bar's disciplinary rules form the basis for a malpractice action.[21] On the other hand, an Illinois court, finding that legal duties are embodied in the ABA code, has noted that: "...it would be anomalous indeed to hold that professional standards of ethics are not relevant considerations in a tort action, but are in a disciplinary proceeding."[22] At least one court has gone so far as to hold that a violation of the Code of Professional Responsibility is "rebuttable evidence of malpractice"[23]

Other professions have faced similar developments. It has been held that since the "warranty of silence" contained in the Hippocratic Oath "is as much an express warranty as the advertisement of a commercial entrepreneur," the preservation of a patient's privacy "is no mere ethical duty upon the part of the doctor; there is a legal duty as well."[24] The American Medical Association's Principles of Medical Ethics have been found to state standards of professionalism against which physicians may be held.[25] And it has been suggested that physicians' malpractice insurance should indemnify them against payment of any judgment "unless the findings of the court show that [the physician] was guilty of conduct amounting to a violation of the

Principles of Medical Ethics."[26]

Accountants and even the clergy have faced the question of where ethical standards merge with legal liability. One commentator has noted that the principles of tort liability for accountants are "consistent with the slightly more specific statement of professional standards formulated by the American Institute of Accountants."[27] There has even been at least one attempt -- apparently unsuccessful -- to sue a member of the clergy for malpractice for harm resulting from allegedly improper counseling.[28] Nor has the clergy's reaction to the possibility of such liability been unanimously negative. Writing in terms reminiscent of social responsibility theory, one rabbi and law professor has argued that members of the clergy should be legally responsible for failure to refer to an expert those counseling cases beyond their expertise. The duty to refer in such cases "is an ethical duty and the imposition of [legal] liability, far from denigrating the position and efficaciousness of the clergyman, would enhance it."[29]

Meanwhile, beyond the context of professional malpractice actions, there is a trend in tort litigation toward allowing both discovery and admission at trial of codes, safety standards and policies, and so-called "self-critical analyses".[30] The reason is that such material can provide evidence of the defendant's standard of care.[31] For example, in the context of personal injury suits stemming from industrial accidents, courts have held that voluntary safety codes and policies are admissible -- though

not necessarily conclusive -- on the issue of negligence.[32] This appears to be especially true where the defendant has claimed to have voluntarily adopted such policies or standards.[33]

Closely related is the role of expert testimony. Again, either the plaintiff or defendant may attempt to use expert testimony to establish what constitutes due care in the context of a given case.[34] But expert testimony will be admissible only where the question is one that lay jurors cannot resolve within their own competence.[35] Codes and safety standards may be admissible where the court finds them relevant and not within the category of inadmissible hearsay. And expert testimony can help solve the hearsay problem -- a reluctance to allow evidence that is not subject to cross-examination -- by providing a witness subject to cross-examination. The expert may also then refer to industry codes and standards, thus gaining their admissibility.[36]

Even in the absence of specific codes and policies, the "custom" of a defendant's occupation may be relevant. Custom refers to whether a defendant has behaved in a given situation in the same way as those in his occupation generally behave.[37] Such evidence may be helpful to a defendant who has behaved customarily, but customary behavior may nevertheless itself be negligent if, for example, it is clearly dangerous or careless.[38] In any case, when a defendant offers evidence of custom -- or offers codes, policies or other standards as evidence -- there is always the risk such evidence will backfire if a jury believes that the defendant has departed from such standards.[39]

Occasionally, the defendant in a tort action will have engaged in some sort of self-analysis of whatever incident led to the legal suit. Since such "self-critical evaluation" could generate damning information, it would seem reasonable to expect a plaintiff to seek access to it.[40] Precisely this situation has led to claims from defendants for a "self-critical evaluation privilege" from discovery.[41] Privilege seemingly would be consistent with the long-standing principle that evidence of taking precautions after an accident should be excluded because it reflects hindsight, not foresight, and that admitting such evidence would counterproductively discourage people from taking precautions.[42]

Some courts have granted such a privilege; but others have rejected it. In Bredice v. Doctors Hospital, Inc., for example, a federal district court denied a motion to compel discovery of the minutes and reports of the defendant hospital's staff meetings concerning the death of plaintiff's husband. The court found an "overwhelming public interest" in encouraging the flow of ideas and advice: "Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit."[43] On the other hand, the Missouri Supreme Court refused to prohibit discovery of the records of a hospital peer review committee that studied the treatment that led to a malpractice suit: "We find no expression of policy in either the general law of evidence or in the

statutes according any protection of confidentiality in the situation presented here on public policy grounds."[44] Even where the privilege is granted, however, it appears that it covers evaluative statements and suggestions for future conduct, but not actual facts uncovered by an investigation.[45]

To one degree or another, ethical codes, policies and standards, plus self-critical evaluation all reflect concern about professional responsibility and a preference for self-regulation over legal sanction.[46] Yet it appears clear, at least in the context of other occupations and professions, that these very efforts may enhance the legal vulnerability they seek to avoid. We can now turn to journalism and consider whether the same risks are present in that field.

Social Responsibility and Journalistic Malpractice

Journalistic ethics and policies have played a role both in attempts to establish legal duties and to provide standards against which legal fault can be measured. In actions for libel and invasion of privacy, courts and litigants implicitly accept the premise that journalists have a legal duty not to libel people or invade their privacy. In actions based on other theories of liability, however, duty can become a central issue. In the context of fault, particularly in libel cases, journalists themselves have argued that ethical norms and customs should provide standards helpful in determining whether a journalist has exercised "due care."

Duty

The Statement of Principles of the American Society of Newspaper Editors declares that "[e]very effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly."[47] It further states the "[j]ournalists should respect the rights of people involved in the news; observe the common standards of decency and stand accountable to the public for the fairness and accuracy of their news reports."[48] Similarly, the code of the Society of Professional Journalists declares that journalists are obligated to "perform with intelligence, objectivity, accuracy, and fairness."[49] Despite the vagueness of such language, a number of litigants have premised their legal claims on alleged breaches of just such duties -- although the codes have not been directly cited.

Outside of the context of libel and privacy, several plaintiffs have built their claims on the basic argument that journalists have a legal duty to be accurate and to verify information before publishing. For example, in Tumminello v. Bergen Evening Record, Inc., the plaintiff asserted that a newspaper had negligently breached a legal duty of accuracy when it wrongly reported the result of a court decision. The plaintiff claimed to have suffered severe mental distress because the inaccurate report led him to believe that criminal charges against him would be dismissed, and that he became despondent and depressed when he learned the truth.[50] The court rejected his

argument: "Accuracy in news reporting is certainly a desideratum, but the chilling effect of imposing a high duty of care on those in the business of news dissemination and making that duty run to a wide range of readers or TV viewers would have a chilling effect which is unacceptable under our Constitution."[51]

Likewise, the courts have rejected claims that newspapers have a legal duty to investigate the accuracy of information in obituaries before publishing them,[52] or to publish any specific story at all.[53] Author William Peter Blatty recently lost a suit against the New York Times premised in part on the argument that the Times had breached a "public duty and trust to report the news fairly and accurately."[54] Blatty alleged that the newspaper breached this duty by wrongly failing to include one of his novels in its best seller list, thus costing him potential profits from the sale of paperback and film rights. The California Supreme Court did not directly address the duty question, but dismissed the case on grounds that the omission was not sufficiently "of and concerning" Blatty to withstand First Amendment scrutiny.[55]

On the other hand, in Hyde v. City of Columbia, the Missouri Court of Appeals held that a crime victim, who was harassed by her assailant after she was identified by a newspaper, did have a cause of action for negligence.[56] The plaintiff had argued that the newspaper's duty not to identify her while her assailant remained at large flowed in part from the paper's own internal policy.[57] The court apparently, though

rather ambiguously, accepted this argument: "[t]he 'unwritten policy' not to print the name and address of a female victim of a reported male attempted or actual sexual assault is nothing more than a usual news medium practice in conformance with precepts of 'common decency' and discerned 'mores of the community'."[58]

Meanwhile, the U.S. Supreme Court has granted review in U.S. v. Carpenter, a securities fraud case central to which is a journalist's violation of his newspaper's policy forbidding advance disclosure of stories the paper plans to publish.[59] Although not a tort action, the case is relevant because it focuses on the issue of whether the paper's written internal policy could give rise to a legal duty the breach of which could become the basis of criminal liability. The two lower courts have held that the policy could thus be used.

The case resulted from the discovery that a Wall Street Journal reporter who wrote an influential column on stock market gossip had become part of a scheme in which he would leak the contents of upcoming stories to outsiders who could then profit from whatever impact the stories had on the market. The government charged the reporter with violation of portions of the Securities Exchange Act, using the rationale that by violating the confidentiality policy he had perpetrated a fraud on the Journal which hurt its reputation and integrity. The Court of Appeals held that the Securities Exchange Act could be used to proscribe

> an employee's unlawful misappropriation from his employer, a financial newspaper, of

> material nonpublic information in the form of the newspaper's forthcoming publication schedule, in connection with a scheme to purchase and sell securities to be analyzed or otherwise discussed in future columns in the newspaper.[60]

The court specifically rejected the argument that this position violates the First Amendment. Ironically, it was precisely because the policy was not imposed by the government that the court saw no constitutional problem.[61] If criminal liability can be predicated on breach of duties established by a newspaper's internal policies, it would seem reasonable to argue that civil liability might be similarly premised.[62]

In any event, it would seem that journalists, like other professionals, are beginning to feel at least some legal pressure on their voluntarily assumed duties.

"Due Care"

In 1974 the U.S. Supreme Court held in Gertz v. Robert Welch, Inc. that states could use negligence as a fault standard in libel suits by private figures.[63] Consequently, private plaintiffs must show that the journalists who allegedly libeled them failed to use "due care." That, in turn, has increased the relevance of media ethics codes, internal policies and self-evaluations in libel litigation and in other tort litigation as well. Journalists now face the same argument as other professionals -- that departure from ethical norms and customs can be evidence of negligence.

There is little new in observing that the question of what

constitutes "due care" is highly significant. Professor David Anderson was one of the first to point out that nontraditional, non-mainstream news media could be at considerable risk if the courts adopted a "responsible publisher" standard:

> The standard of care should be sufficiently particularized so that a publisher with an unpopular philosophy, an unorthodox journalistic style, or limited resources will have its conduct measured against the standards of similar publishers, rather than those of the established conventional press.[64]

Others have warned that the requirement of fault -- particularly negligence -- may compel the courts to provide a legal definition for journalistic responsibility. Such legal definitions could then "be adaptable to other and more comprehensive systems of press regulation."[65] Meanwhile, it is conceivable that juries are beginning to perceive "the injuries caused by 'defective news' that is manufactured by corporate media enterprises as indistinguishable from the more palpable injuries caused by any other defective product."[66]

The concept of fault in libel law is reflected as much in the concept of "actual malice"[67] as in negligence. Actual malice requires a determination of whether journalists actually knew they were behaving irresponsibly and dangerously.[68] But negligence allows a jury to speculate on how a hypothetical reasonable person or journalist would have behaved.[69] Consequently, to the degree that ethics statements, policies, self-evaluations and outside experts provide evidence of how a journalist ought to behave, they can become relevant to a

determination of negligence and may help a jury draw inferences as to whether there is actual malice.

Two recent law review articles reflect just how relevant such voluntary standards have become. Professor Lackland Bloom Jr., in an exhaustive examination of proof of fault in media defamation actions, cites extensively to journalistic ethics codes and journalism textbooks "when they bear on the issues [of fault] under discussion."[70] Bloom favors holding journalists, like doctors and lawyers, to the standards prevalent in their profession.[71] He notes that

> [d]espite a great deal of diversity, many well-accepted practices and standards of conduct exist in journalism with respect to what a reasonably prudent publisher does to achieve accuracy. The generally agreed upon objectives of the profession are often stated in nonbinding ethical codes. The more specific standards, practices, and customs frequently have been set forth in training manuals for journalism students as well as working journalists.[72]

Professor Todd Simon has also favored a "malpractice" standard of fault in negligence cases -- holding journalists responsible only if they depart from generally accepted journalistic practices.[73] But Simon goes beyond Bloom by suggesting that a national standard of care be adopted for journalists, and that the national standard should be defined by journalistic ethics codes.[74] He especially favors the codes of the American Society of Newspaper Editors and the Society of Professional Journalists.[75] "Adherence to freely adopted standards," he argues, "should present an unusually strong libel defense."[76]

Noting the close relationship between the concepts of social responsibility and "due care", Simon asserts that "[j]ournalists have a duty, and the code is a means toward the end of meeting that duty."[77] He concedes that codes may be somewhat imprecise, and that adoption of a code-related standard is likely to lead to battles of expert witnesses, but does not see these as problems.[78] "Application of a malpractice standard might encourage public support for licensing," he writes, "but that is a matter for future media vigilance."[79]

Why have commentators -- including the Restatement of Torts[80] -- so generally favored a "malpractice" standard of due care? Apparently because of fear that juries will more easily find against journalists if the relevant standard is something other than a standard determined by the occupation itself. Thus the battle for supremacy between the "ordinary care" standard and the "malpractice" standard. The former would be determined merely by reference to a hypothetical reasonable "person", the latter by reference to a hypothetical reasonable "journalist."

Courts in several states have adopted a "malpractice standard" -- "the conduct of the reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances."[81] Others have favored ordinary negligence, often explicitly rejecting a malpractice approach.[82] As one court put it, "[i]n a community having only a single newspaper, the [malpractice] approach suggested would permit that newspaper to establish its own standards. And in any community

it might tend, in 'Gresham's Law' fashion, toward a progressive depreciation of the standard of care."[83]

Even an ordinary negligence standard, however, can invite evidence pertaining to ethical, customary journalistic behavior, or about a news medium's own standard policies. Since an ordinary care standard generally focuses on the behavior of a reasonable person under the same circumstances:

> ...the demands of a functioning newsroom should qualify as circumstances that the reasonable person would consider relevant in a media defendant case. The factfinder could and should consider the factors that essentially dictate the content of professional standards.... *** Expert testimony would be admissible to establish these factors. This testimony would provide the factfinder with the professional benchmark.[84]

Of course, evidence pertaining to newsroom policies and professional standards, though relevant, may not be decisive. Perhaps more importantly, such evidence can damn as well as exonerate. Those favoring a "malpractice" standard of journalistic fault may wrongly assume that measuring journalists' behavior against customary professional standards will generally work to journalists' benefit.

Media defendants often attempt to introduce evidence as to professional standards or at least as to their own policies. Some courts have refused to admit such evidence. For example, in Cramlet v. Multimedia, a suit for outrageous conduct by a woman whose kidnapped child was cared for by employees of the Phil Donahue show while the child's father was interviewed by Donahue, the defense attempted to introduce testimony from "well known

journalistic experts" as to the ethical appropriateness of such conduct. The court refused:

> "(the defendant) submitted no written canons of journalism ethics that purport to justify its actions in this case. In effect, the experts were to be called to instruct the jury on the meaning of the First Amendment, a function of this court if applicable, and to tell 'war stories' about journalists' experiences in other cases....Nothing in the record suggests that any generally accepted or written standards of journalism apply here.[85]

One court has concluded that the standards of basic news reporting are simply common knowledge, requiring no expert testimony.[86] Another has found arguments for admission of expert testimony on professional custom and practice "not at all persuasive when asserted defensively by a member of the profession," since "negligence throughout a trade should not excuse its members from liability."[87]

On the other hand, where courts do admit such evidence, the results can be devastating. For example, in Kohn v. West Hawaii Today, a libel plaintiff was able to elicit testimony from the defendant that he had deviated from his own routine standard of care, and a jury verdict for the plaintiff was upheld.[88] And in Hyde v. City of Columbia, a court considered a newspaper's unwritten policy of not naming sexual assault victims and noted that "a deviation from that industry standard...becomes evidence of negligence."[89] Similar evidence has been harmful to media defendants even in determinations of fault at the level of actual malice.[90]

Closely related is the issue of the risks inherent in

self-critical evaluation by journalists. That question, though not yet the subject of substantial litigation, did arise prominently in the Westmoreland libel case. The issue was whether to admit as evidence CBS's internal investigation of the making of the documentary over which Westmoreland sued. Although the court ultimately ruled most of the report inadmissible on grounds of relevance, it rejected CBS's argument that the entire report should be inadmissible: "to establish a rule forbidding [admissibility of such reports] would deprive injured claimants of one of the best and most accurate sources of evidence and information."[91] The court noted that even if the report showed that the network's internal rules and guidelines were violated, such violation has no tendency to prove actual malice.[92] It is not clear whether the outcome would have been different had Westmoreland had to prove only negligence.

Another question is whether external evaluations of media conduct could be used to establish standards of due care. Professor Ronald Farrar, addressing this issue in the context of news councils, has concluded that the risk of such use is slight.[93] The worrisome scenario for journalists would be that as a news council develops a body of principled decisions, such decisions could be drawn on by litigants as evidence of what is generally accepted as appropriate journalistic conduct in a variety of situations. Departure from such standards would then arguably become negligence.

Farrar argues that such fear is overstated because no

single standard is likely to become decisive in determining journalistic fault, and because courts are unlikely to accept a "professional" standard developed by a ground consisting in part of nonmembers of the profession.[94] Such an argument, however, may underestimate the fact that negligence in any given case is often a highly situational concept that does not depend on universal standards. Further, many courts do not apply a journalistic malpractice standard at all, so it may not matter that news council members are nonprofessionals.

To a large degree, of course, the question is moot since, with the notable exception of the Minnesota News Council, the news council movement appears dead. Some newspapers do, however, have ombudsmen or reader contact editors who investigate reader complaints and publish their findings and conclusions.[95] If a reader complaint ultimately leads to a lawsuit, it would seem conceivable that at least the facts developed by the ombudsman could be discoverable by the plaintiff as might the facts uncovered by any type of internal investigation.[96]

Implications

This paper purposely has used the words "professional" and "ethics" without precisely defining them, because however one defines them, it appears that journalistic social responsibility has legal ramifications. In part, these ramifications are result of the Supreme Court's emphasis on the concept of "fault" in libel law during the past two decades and especially since the Gertz case. But they are also a result of American journalism's

increasing concern with -- or at least lip service to -- social responsibility. One result is that the distinction between moral and legal responsibility has become increasingly muddled.

In the context of tort litigation, media defendants have themselves contributed to this result by arguing in some cases for consideration of professional standards and in other cases for the irrelevance of professional standards. They have argued against recognition of new legal duties even when those duties are drawn from the media's own ethical standards. Yet they have attempted to use some of those same standards and customs in an effort to avoid liability for negligence. At best there is risk of confusion when one attempts to use one's own professional standards as a yardstick against which to measure one's legal responsibility.

Should journalists turn their backs, then, on social responsibility? Is it too risky a concept to embrace? Certainly not. But it might be useful to rethink the question of how desirable a professional malpractice standard is in determining legal responsibility. Journalists may not be worse off -- and may in the long run fare better -- under an ordinary negligence standard precisely because it does not so directly encourage invocation of universal professional standards. Further, an ordinary negligence standard does not so directly imply that journalists have special legal or constitutional status. Special status claims flow naturally from assertions that journalism serves vital societal functions, and such assertions lead easily

to confusion of moral and legal duties.

In some cases -- especially where a malpractice standard of fault has been adopted -- plaintiffs may invoke professional standards regardless of a defendant's desires. This is precisely why courts that have rejected a malpractice standard may in fact be journalists' friends, not their enemies. Even in such malpractice cases, journalists may be wise to try to define specific standards as narrowly as possible or to emphasize that there is no consensus about universal standards of good journalism.

In addition, journalists might profitably become more cognizant of the vocabulary of rights and duties and of how easily legal and moral concepts become confused.[97] For example, in a study of the origins of the 'watchdog' metaphor, Timothy Gleason has pointed out that newspaper publishers in the nineteenth century used that metaphor as part of an effort to gain special protection for newspapers in the common law of libel.[98] But the concept implied obligations as well as rights. Today, the obligations may be catching up with the rights.

*****

ENDNOTES

1. See, e.g., C. CHRISTIANS, K. ROTZOLL & M. FACKLER, MEDIA ETHICS (2d ed. 1987); RESPONSIBLE JOURNALISM (D. ELLIOTT, ed. 1986); E. GOODWIN, GROPING FOR ETHICS IN JOURNALISM (1983); THE RESPONSIBILITY OF THE PRESS (G. GROSS, ed. 1966); J. HULTENG, THE MESSENGER'S MOTIVES (2d ed. 1985); E. LAMBETH, COMMITTED JOURNALISM (1986); J. MERRILL & S. ODELL, PHILOSOPHY AND JOURNALISM (1983); ETHICS AND THE PRESS (J. MERRILL & R. BARNEY, eds. 1975); P. MEYER, ETHICAL JOURNALISM (1987); W. RIVERS, W. SCHRAMM & C. CHRISTIANS, RESPONSIBILITY IN MASS COMMUNICATION (3d ed. 1980); B. SWAIN, REPORTERS' ETHICS (1978).

2. For a compilation of a number of codes, see W. RIVERS, W. SCHRAMM & C. CHRISTIANS, supra note 1, at 289.

3. COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 18 (1947).

4. Id. at 19, 131. See also, W. HOCKING, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE 166 (1947).

5. E.g., "The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time." American Society of Newspaper Editors Statement of Principles, reprinted in W. RIVERS, W. SCHRAMM & C. CHRISTIANS, supra note 1, at 289. "The public's right to know of events of public importance and interest is the overriding mission of the mass media. *** Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust." Society of Professional Journalists/Sigma Delta Chi Code of Ethics, Id. at 291.

6. News Section, Media L. Rep. (BNA), Nov. 26, 1985.

7. Van Alstyne, The Hazards to the Press of Claiming a 'Preferred Position'," 28 Hastings L.J. 761, 769 (1977). For similar criticism by a communication scholar, see J. MERRILL, THE IMPERATIVE OF FREEDOM 99 (1974).

8. Dworkin, Is the Press Losing the First Amendment? N.Y. Rev. of Books, Dec. 4, 1980, at 49, 51-52. For another view skeptical of the value of a "public interest" standard in determining the level of constitutional protection for the press, see Helle, Judging the Public Interest in Libel: the Gertz Decision's Contribution, 61 Journalism Q. 117 (1984).

9. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 460 (1897). See also D. LYONS, ETHICS AND THE RULE OF LAW 69 (1984).

10. Hocking, Ways of Thinking About Rights: A New Theory of the Relation Between Law and Morals, in 2 LAW: A CENTURY OF PROGRESS 242, 258 (1937).

11. RESTATEMENT (SECOND) OF TORTS §328A (1977). See also, W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 164-65 (5th ed. 1984).

12. RESTATEMENT, supra note 11, at §282.

13. Id., at §299A.

14. Id., at §283.

15. See, e.g., Lambert, Malpractice Liability Concepts Affecting All Professions, in MEDICAL MALPRACTICE: THE ATL SEMINAR 7 (L. Harolds & M. Block eds. 1966); and PROFESSIONAL NEGLIGENCE (T. Roady & W. Andersen eds. 1960).

16. Lambert, supra note 15, at 8; F. HARPER & J. FLEMING, 2 THE LAW OF TORTS 985 (1956); Curran, Professional Negligence--Some General Comments, in PROFESSIONAL NEGLIGENCE, supra note 15, at 1, 5.

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983).

18. PREAMBLE, MODEL RULES OF PROFESSIONAL CONDUCT (1983).

19. Dahlquist, The Code of Professional Responsibility and Civil Damage Actions Against Attorneys, 9 Ohio N.U.L. Rev. 1, 2 (1982); Ross, Violation of the Code of Professional Responsibility as Stating Cause of Action in Legal Malpractice, 6 Ohio N.U.L. Rev. 692, 694 (1979); Underwood, The Doctor and His Lawyer: Conflicts of Interest, 30 Kan. L. Rev. 385, 388 (1982); Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation, 30 S.C. L. Rev. 281, 286 (1979). Most states have adopted the ABA Model Code.

20. 447 F.Supp. 1376, 1383 (N.D. Iowa 1978).

21. 652 S.W.2d 730, 734 (Ct. App. Mo. 1983).

22. Rogers v. Robson, Masters, Ryan, Brumsond, 392 N.E.2d 1365, 1371 (Ill. App. Ct. 1979), affm'd, 407 N.E.2d 47 (Sup. Ct. Ill. 1979). The supreme court did not specifically address the code-duty issue. 407 N.E.2d at 48-49.

23. Lipton v. Boesky, 313 N.W.2d 163, 167 (Ct. App. Mich. 1981). See also, Hansen v. Wightman, 538 P.2d 1238 (Ct. App. Wash. 1975).

24. Hammonds v. Aetna Casualty & Surety Co., 243 F.Supp. 793 (N.D. Ohio 1965).

25. C. KRAMER, MEDICAL MALPRACTICE 10-13 (4th ed. 1976). Kramer collects cases on this issue.

26. Hirsh, Insuring Against Medical Professional Liability, in PROFESSIONAL NEGLIGENCE, supra note 15, at 138-39. Similarly, in a wrongful death action, a jury has been allowed to conclude that a hospital's failure to observe its own internal policies and procedures indicated negligence. Lucy Webb Hayes National Training School for Deaconesses and Missionaries v. Perotti, 419 F.2d 704, 710 (D.C. Cir. 1969). For a discussion of the relationship between psychologists' ethical and legal responsibilities, see Bersoff, Professional Ethics and Legal Responsibilities: on the Horns of a Dilemma, 4 J. Sch. Psychology 359 (1975).

27. Hawkins, Professional Negligence Liability of Public Accountants, in PROFESSIONAL NEGLIGENCE, supra note 15, at 262. Hawkins notes -- in language that immediately brings to mind principles of journalistic practice -- that it has been recognized that accountants have a legal duty not merely to verify the arithmetical accuracy of balance sheets but to inquire into their substantial accuracy. Id. at 263.

28. Bergman, Is the Cloth Unraveling? A First Look at Clergy Malpractice, 9 San Fern. V.L. Rev. 47 (1981); Stewart, Caution for Counselors, The Living Church, Feb. 8, 1987, at 8.

29. Bergman, supra note 28, at 66. Like journalists, of course, members of the clergy have First Amendment protection flowing in part from the freedom of religion clauses. Bergman notes that despite this, and despite the fact that members of the clergy have been exempt from regulation and licensing (as have journalists), malpractice liability may still be imposed. He argues that the counseling function can be conceptually separated from the clergy's purely religious function so as to make malpractice actions for harmful counseling possible without creating First Amendment problems. Id. at 59, 66.

30. See Annot., 58 A.L.R.3d 148 (1974); Comment, Admissibility of Safety Codes, Rules and Standards in Negligence Cases, 37 Tenn. L. Rev. 581 (1970); Schockemoehl, Admissibility of Written Standards as Evidence of the Standard of Care in Medical and Hospital Negligence Actions in Virginia, 18 Univ. Richmond L. Rev. 725 (1984).

31. Comment, supra note 30, at 582; Schockemoehl, supra note 30, at 726.

32. See, e.g., Burley v. Louisiana Power & Light Co., 319 So.2d 334 (Sup. Ct. La. 1975); Cronk v. Iowa Power & Light Co., 138 N.W.2d 843 (Sup. Ct. Iowa 1965); Jorgensen v. Horton, 206 N.W.2d 100 (Sup. Ct. Iowa 1973). For an example in the context of a

suit for negligence against a stockbroker, see Piper, Jaffray and Hopwood Inc. v. Ladin, 398 F.Supp. 292 (S.D. Iowa 1975).

33. Burley v. Louisiana Power & Light Co., 319 So.2d at 339.

34. HARPER & FLEMING, supra note 16, at 985; Morris, The Role of Expert Testimony in the Trial of Negligence Issues, 26 Texas L. Rev. 1 (1947).

35. HARPER & FLEMING, supra note 16, at 985.

36. Comment, supra note 30, at 585; Philo, Use of Safety Standards, Codes and Practices in Tort Litigation, 41 Notre Dame Law. 1, 7-8 (1965).

37. See generally, PROSSER & KEETON, supra note 11, at 185-96; HARPER & FLEMING, supra note 16, at 977.

38. PROSSER & KEETON, supra note 11, at 194-95. Morris, Custom and Negligence, 42 Colum. L. Rev. 1147, 1149 (1942).

39. PROSSER & KEETON, supra note 11, at 195-96.

40. See, e.g., Ames, Modern Techniques in the Preparation and Trial of a Medical Malpractice Suit, in PROFESSIONAL NEGLIGENCE, supra note 15, at 113.

41. See, e.g., Case Comment, Civil Procedure: Self-Evaluative Reports--A Qualified Privilege in Discovery? 57 Minn. L. Rev. 807 (1973); Note, The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083 (1983); Spencer, The Hospital Incident Report: Asset or Liability? 22 A.F. L. Rev. 148 (1980-81). But see Flanagan, Rejecting a General Privilege for Self-Critical Analyses, 51 Geo. Wash. L. Rev. 551 (1983).

42. HARPER & FLEMING, supra note 16, at 981-82.

43. 50 F.R.D. 249, 250-51 (D.C.D.C. 1970). See also, Gillman v. United States, 53 F.R.D. 316 (S.D.N.Y. 1971).

44. State ex rel. Chandra v. Sprinkle, 678 S.W.2d 804, 807 (Sup. Ct. Mo. 1984). See also, Wright v. Patrolmen's Benev. Ass'n, 72 F.R.D. 161 (S.D.N.Y. 1976).

45. See, e.g., Gillman v. United States, 53 F.R.D. at 318-19. "Thus, as recognized by the courts, the qualified privilege for self-critical studies protects only subjective conclusions." Flanagan, supra note 41, at 558.

46. Of course, lawyers and physicians are licensed by the state. But the preamble to the ABA's Model Rules, for example, asserts that "[t]o the extent that lawyers meet the obligations of their

professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination." MODEL RULES, supra note 18.

47. ASNE CODE, Art. IV, reprinted in W. RIVERS, W. SCHRAMM & C. CHRISTIANS, supra note 1, at 290.

48. Id. at Art. VI.

49. CODE OF ETHICS, SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI, id. at 291.

50. 454 F.Supp. 1156 (D.N.J. 1978).

51. Id. at 1160. See also Jaillet v. Cashman, 189 N.Y.S. 743, 115 Misc. 383 (Sup. Ct. 1921), aff'd 202 A.D. 805, 194 N.Y.S. 947 (1922), aff'd 235 N.Y. 511, 139 N.E. 714 (1923). In Jaillet, the courts rejected the plaintiff's claim that Dow Jones had breached a legal duty of accuracy when it disseminated an erroneous report about the tax impact of a supreme court decision.

52. See, e.g., Rubinstein v. New York Post, 11 Media L. Rep. (BNA) 1329 (Sup. Ct. N.Y. 1985); Wolford v. Herald-Mail, 11 Media L. Rep. (BNA) 1428 (Cir. Ct. Md. 1984).

53. See, e.g., Newman v. New York Post, 13 Media L. Rep (BNA) 1059 (Sup. Ct. N.Y. 1986) (rejecting claim that newspapers breached duty to cover candidates for city-wide office as result of which candidates lost potential contributions); Ahmad v. Levi, 414 F.Supp. 597 (E.D. Pa. 1976) (refusing to issue injunction requiring media to publicize certain foreign policy issues); Cyntje v. Daily News Pub. Co., 551 F.Supp. 403 (D.C. V.I. 1982) (granting summary judgment to media where plaintiff sought damages for failure to run news releases). Outside of the context of tort law, the U.S. Supreme Court has rejected the argument that newspapers are surrogates for the public with concomitant fiduciary obligations. Miami Herald v. Tornillo, 418 U.S. 241 (1974). "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." Id. at 256. In context of broadcasting, however, the court has taken essentially the opposite position. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

54. Blatty v. New York Times, 13 Media L. Rep (BNA) 1928, 1930 (Sup. Ct. Calif. 1986).

55. Id. at 1935-36.

56. 637 S.W.2d 25 (Mo. Ct. App. 1982), cert. denied, 459 U.S. 1226 (1983).

57. Id. at 256.

58. Id. at 269 n.25.

59. 612 F.Supp. 827 (S.D.N.Y. 1985), aff'd, 12 Media L. Rep. (BNA) 2169, 791 F.2d 1024 (2d Cir. 1986), cert. granted, 55 U.S.L.W. 3424 (Dec. 16, 1986)(No. 86-422).

60. 12 Media L. Rep. (BNA) at 2169.

61. Id. at 2177.

62. The original indictments in the case also charged the reporter with violating a duty to readers to disclose his personal interest in the securities he wrote about. The government dropped that claim. 612 F.Supp. at 840 n.7. The Securities and Exchange Commission also initially filed a civil action against the reporter and others involved, basing it on essentially the same rationale as the criminal case. Ultimately, the civil action was not pursued. SEC Attacks Financial Press, The News Media & the Law, Nov./Dec. 1984, at 4, 6. In another case involving journalists and securities law, a federal appeals court reinstated a civil action for damages suffered by shareholders as a result of publicity given to a firm by a newspaper columnist. Zweig v. Hearst Corp., 407 F.Supp. 763 (C.D. Cal. 1976), rev'd, 594 F.2d 1261 (9th Cir. 1979). The columnist had apparently made a practice of purchasing stock in a company, writing about it, then reselling the stock. The court reasoned that the columnist had become an "informal" investment adviser who had voluntarily assumed a duty to disclose facts relating to his own lack of objectivity when writing about stocks in which he had an interest. 594 F.2d at 1266-69. This rationale is somewhat unclear in light of Lowe v. S.E.C., 105 S.Ct. 2557 (1985), in which the Supreme Court held that the S.E.C. could not enjoin the defendant from publishing an investment newsletter offering nonpersonalized advice and comment even though he had been convicted of violating several securities laws while he was in the investment business. The court found that he could not be considered an investment adviser under the terms of the Investment Advisers Act of 1940 because his publication didn't have the personalized character that identifies a professional adviser and because his newsletter was exempt from the act's restrictions as a "bona fide newspaper, news magazine or business or financial publication." Id.

63. 418 U.S. 323, 347 (1974).

64. Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 455-56 (1975). See also Franklin, What Does 'Negligence' Mean in Defamation Cases? 6 Comm/Ent L. J. 259 (1984). In 1967, a plurality of the U.S. Supreme Court applied a "responsible publisher test" in the context of libel actions brought by public

figures. Public figures could recover "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). A majority of the court, however, favored application of the actual malice standard in public-figure cases, as the majority pointed out in Gertz v. Robert Welch, Inc., 418 U.S. at 336.

65. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 647 (1978). See also Bezanson, Conference Report--The Cost of Libel: Economic and Policy Implications 6-7 (Gannett Center for Media Studies, 1986).

66. R. SMOLLA, SUING THE PRESS 12-13 (1986).

67. Actual malice is defined as publication of a libel "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

68. See, e.g., RESTATEMENT, supra note 11, at §580A comment d.

69. Id. at §§298, 299A.

70. Bloom, Proof of Fault in Media Defamation Litigation, 38 Vand. L. Rev. 247 (1985).

71. Id. at 343.

72. Id. at 336-37.

73. Simon, Libel as Malpractice: News Media Ethics and the Standard of Care, 53 Fordham L. Rev. 449, 452-53 (1984).

74. Id. at 472.

75. These two codes are reprinted in W. RIVERS, W. SCHRAMM & C. CHRISTIANS, supra note 1 at 289.

76. Simon, supra note 73, at 472.

77. Id. at 477.

78. Id. at 477, 483. Simon also asserts that to some degree journalism standards and ethical principles have "slipped into libel through the back door" -- for example in the context of the defenses of qualified privilege and neutral reportage. Id. at 468, 470. Presumably, these defenses recognize the value of accurate, fair and objective reporting on public matters; departure from these standards can destroy the defense.

79. Id. at 488.

80. RESTATEMENT, supra note 11, at §580B comment g.

81. Gobin v. Globe Publishing Co., 531 P.2d 76, 84 (Sup. Ct. Kan. 1975). See also, Martin v. Griffin Television Inc., 549 P.2d 85, 92 (Sup. Ct. Okla. 1976); Seegmiller v. KSL, Inc., 626 P.2d 968, 976 (Sup. Ct. Utah 1981); Triangle Publications, Inc. v. Chumley, 317 S.E.2d 534, 537 (Sup. Ct. Ga. 1984). One state has required evidence that the publisher has acted "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (Ct. App. N.Y. 1975). The same standard has been applied to false light invasion of privacy. Fils-Aime v. Enlightenment Press, 13 Media L. Rep (BNA) 1971, 1973 (App. Div. N.Y. 1986).

82. See, e.g., Bank of Oregon v. Independent News, 11 Media L. Rep. (BNA) 1313, 1318 (Sup. Ct. Ore. 1985); McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882, 886 (Sup. Ct. Ky. 1981); Memphis Publishing Co. v. Nichols, 4 Media L. Rep (BNA) 1573, 1578 (Sup. Ct. Tenn. 1978).

83. Troman v. Wood, 340 N.E.2d 292, 298-99 (Sup. Ct. Ill. 1975).

84. Bloom, supra note 70, at 344.

85. 11 Media L. Rep (BNA) 1707, 1709 (D. Colo. 1985). The court also refused to instruct the jury as to the difference between moral and legal duty, saying such instructions were argumentative and could have confused the jury. Id. See generally, Annot., Libel and Slander: Necessity of Expert Testimony to Establish Negligence of Media Defendant in Defamation Action by Private Individual, 37 A.L.R.4th 987 (1985); Ullmann, Teachers' Testimony in Libel, Media L. Notes, April 1983, at 4.

86. Greenberg v. CBS, 69 A.D.2d 693, 710 (1979). See also Kohn v. West Hawaii Today, 9 Media L. Rep. (BNA) 1238, 1242 (Sup. Ct. Hawaii) (lack of expert testimony in libel case does not bar plaintiff's right to recovery unless evidence is of such technical nature that laypersons are incompetent to draw their own conclusions without such evidence).

87. Schrottmann v. Barnicle, 8 Media L. Rep. (BNA) 2068, 2075 (Sup. Ct. Mass. 1982). The court also noted that "we hesitate to involve the courts in fashioning rules for journalistic practice." Id.

88. 9 Media L. Rep. (BNA) at 1241. See also, Gazette Inc. v. Harris, 325 S.E.2d 713 (Sup. Ct. Va. 1985) (upholding libel judgment for plaintiff where evidence of negligence included showing that long-standing custom of newspaper was violated in preparing story). But see, Ryder v. Time, 3 Media L. Rep. (BNA)

1170 (D.C.D.C. 1977) (granting summary judgment where defendant followed standard procedures of normal publishing practice).

89. 637 S.W.2d at 269 n.25.

90. See, e.g., Sharon v. Time, 599 F.Supp. 538 (S.D.N.Y. 1984) (denying motion for summary judgment and referring to possible deviation from fact-checking procedure specified in defendant's own handbook for researchers); News Publishing Co. v. DeBerry, 321 S.E.2d 112 (Ct. App. Ga. 1984) (affirming verdict for public official plaintiff where journalism professor testified as to professional standards and gave opinion on hypothetical situation involving such standards); Kerwick v. Orange County Publications, 53 N.Y.2d 625 (Ct. App. N.Y. 1981) (summary judgment for newspaper reversed where editor admitted that his conduct had not met standards of the profession in information-gathering and dissemination as he understood them). But see Henslee v. Monks, 571 P.2d 440 (Sup. Ct. Okla.) (affirming jury verdict for broadcaster where news director for another station testified as to defendant's adherence to high professional standards in preparing allegedly libelous story).

91. Westmoreland v. CBS, 11 Media L. Rep. (BNA) 1703, 1705 (S.D.N.Y. 1984). See also, Bruck, The Mea Culpa Defense: How CBS Brought on the Westmoreland Suit--and Sacrificed One of Its Own, Am. Law., Sept. 1983, at 82; Weiss, Who's Watching the Watchdog?: Self-Evaluative Privilege and Journalistic Responsibility in Westmoreland v. CBS, Inc., 7 Comm/Ent L. J. 149 (1984).

92. Id. at 1706.

93. Farrar, News Councils and Libel Actions, 63 Journalism Q. 509, 515 (1986).

94. Id. at 515.

95. See, e.g., Glasser & Ettema, A Census of North American Newspaper Ombudsmen (Preliminary Findings, Silha Center for the Study of Media Ethics and Law, University of Minnesota, 1985); Ettema & Glasser, Public Accountability or Public Relations? Newspaper Ombudsmen Define Their Role (in press, Journalism Q., Spring 1987).

96. For the proposition that facts are discoverable in the context of self-evaluation, see Rosario v. New York Times, 84 F.R.D. 626, 631 (S.D.N.Y. 1979) (denying discovery of certain self-evaluative documents in context of complaint regarding newspaper's affirmative action policies).

97. See supra n. 9 and accompanying text.

98. Gleason, The Watchdog in Nineteenth Century Libel Law: Common Law Concept of Freedom of the Press 10 (Paper presented to the AEJMC Law Division, AEJMC annual meeting, August 1986).

#####