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Media Malpractice: The Legal Risks of Voluntary Social Responsibility in Mass Communication

Robert E. Drechsel*

The concept of social responsibility has become enmeshed strongly in the fabric of American mass communication. 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 preempt external regulation and that the media—particularly the news media—are imbued with a public trust, social responsibility theory posits that 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

* Associate Professor, School of Journalism and Mass Communication, University of Wisconsin-Madison. B.A. (1971), M.A. (1976), Ph.D. (1980), University of Minnesota. The author wishes to thank his graduate student and research assistant, Deborah Barber, for her excellent contributions to this project. Funding for the research was provided by the Graduate School Research Committee at the University of Wisconsin-Madison.


2. For a compilation of a number of codes, see Responsibility in Mass Communication, supra note 1, at 289.


Clearly, acceptance of some notion of the press as trustee of the public has become widespread. This notion is reflected not only in ethics codes, 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. Journalist Lyle Den-niston, 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. 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." 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. As Professor Edmund Lambeth puts it, the Commission on Freedom of the Press "philosophically brought utilitarianism under the media tent whether the ringmasters of the press noticed or not."

This article analyzes the risks presented by voluntary social responsibility. It does so in the context of the expansion of legal liability for what might loosely be called journalistic or media malpractice. Libel falls into this category, as do a variety of other actions, most of them based on claims of negligence. In such litigation, the concepts of duty, obligation, fault, reasonableness and so-

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 Responsibility in Mass Communication, 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, Responsibility in Mass Communication, supra note 1, at 291.
cial utility often become central. Since these terms have meaning in the contexts of both ethics and law, confusion may set in. 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 fal-

In other words, the very vocabulary of rights and duties may make it easier to convert moral responsibilities into legal responsibilities. Precisely this possibility troubled Zechariah Chafee during the debates of the Commission on Freedom of the Press. “I certainly recognize the moral duty to tell the truth, for example, to tell the truth about the differences with Spain over Cuba in 1898,” he argued, “but do you want to make that a legal duty?”

Nevertheless, although law and morality are not synonymous, much of the law has strong moral underpinnings. William Ernest Hocking, the member of the Commission on Freedom of the Press to whom Chafee was expressing his concern, 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.” Thus, for several reasons—the underlying utilitarian, policy-based 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 article examines claims of malpractice against other professionals which raise significant issues regarding the boundary between legal and moral responsibility. The article then considers cases in which the mass media—primarily the news media—face similar issues. More

10. 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); J.H. Altschull, Agents of Power: The Role of the News Media in Human Affairs (1984) [hereinafter Altschull]. “Responsibility can be defined either as obligation or duty. It has never been possible to separate legal . . . responsibility from moral duty, and discussions of the ethics of journalism are eternally muddied by the confusion generated by this semantic puzzle.” Altschull, supra, at 304.


specifically, the article 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 malpractice and negligence may be measured. Finally, the article speculates about the implications for journalists.

I. 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.\(^\text{13}\) In general, negligence is conduct which "falls below the standard established by law for the protection of others against unreasonable risk of harm."\(^\text{14}\)

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..."\(^\text{15}\) When defendants are laypersons, the standard is that they conduct themselves as reasonable persons under like circumstances.\(^\text{16}\) 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.\(^\text{17}\)

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.\(^\text{18}\) It becomes logical also for plaintiffs to look to other sources of evidence of what constitutes generally accepted professional con-

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15. Id. at § 299A.
16. Id. at § 283.
17. See, e.g., Lambert, Malpractice Liability Concepts Affecting All Professions, in Medical Malpractice: The ATL Seminar 7 (L. Harolds & M. Block eds. 1966) [hereinafter Lambert]; and Professional Negligence (T. Roady & W. Andersen eds. 1960) [hereinafter Professional Negligence].
duct—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 litigation.

A. Lawyers

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.” 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.

Nevertheless, plaintiffs have attempted to use legal ethics 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

19. See Lind & Ullberg, Are Professional Codes of Ethics Acquiring the Force of Law?, 11 ALI-ABA COURSE MATERIALS J. 63 (1987). 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. The reason is that such material can provide evidence of the defendant’s standard of care. See Annotation, Admissibility in Evidence, on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored By Governmental Body or By Voluntary Association, 58 A.L.R.3d 148 (1974); Comment, Admissibility of Safety Codes, Rules and Standards in Negligence Cases, 37 TENN. L. REV. 581 (1970). 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. See, e.g., Burley v. Louisiana Power & Light Co., 319 So. 2d 334 (La. 1975); Cronk v. Iowa Power & Light Co., 258 Iowa 603, 138 N.W.2d 843 (1965); Jorgensen v. Horton, 206 N.W.2d 100 (Iowa 1973). This appears to be especially true where the defendant has claimed to have voluntarily adopted such policies or standards. See Burley, 319 So. 2d at 339.


21. MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE (1983) [hereinafter MODEL RULES].
constitutes "due care" by a lawyer.\textsuperscript{22}

For example, in \textit{Carlson v. Morton},\textsuperscript{23} the Montana Supreme Court was faced with the issue of whether ethical rules contained in the Code of Professional Responsibility "create a duty in and of themselves so that a jury may determine a breach of a legal duty merely by determining whether the attorney abided by the rules."\textsuperscript{24} If so, the plaintiff argued, no expert witness would be required to demonstrate that the defendant's actions were improper and negligent.\textsuperscript{25} Although the court conceded that violation of some disciplinary rules might establish negligence under some circumstances, the court flatly rejected the argument that the ethical rules create legal duties.\textsuperscript{26} Likewise, the Oregon Supreme Court has expressed concern that to expose attorneys to law suits for breach of ethical duties would ultimately deny the public access to the courts because lawyers would become reluctant to represent clients.\textsuperscript{27}

On the other hand, an Illinois court, finding that legal duties are embodied in the ABA code, has noted that: "[I]t 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."\textsuperscript{28} 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."\textsuperscript{29} Another has held that a plaintiff could

\begin{itemize}

\item \textsuperscript{23} Carlson v. Morton, \textit{Mont.} \textsuperscript{2}, 745 P.2d 1133 (1988).

\item \textsuperscript{24} \textit{Id.} at \textsuperscript{2}, 745 P.2d at 1135.

\item \textsuperscript{25} \textit{Id.}

\item \textsuperscript{26} \textit{Id.} at \textsuperscript{2}, 745 P.2d at 1136-37. The court specifically cited the preamble to the Model Rules in support of its conclusion.


\item \textsuperscript{28} Rogers v. Robson, Masters, Ryan, Brummond, 74 Ill. App. 3d 467, 392 N.E.2d 1365, 1371 (1979), \textit{aff'd}, 81 Ill. 2d 201, 407 N.E.2d 47 (1979). The supreme court did not specifically address the code-duty issue. 81 Ill. 2d at 205, 407 N.E.2d at 48-49.

\end{itemize}
state a cause of action for intentional infliction of emotional distress by alleging violation of the state rules of professional conduct. 30

B. Physicians

Physicians 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," 31 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." 32 The American Medical Association's Principles of Medical Ethics have been found to state standards of professionalism against which physicians may be held. 33 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." 34

On the other hand, a Texas appeals court has refused to recognize a cause of action against a psychiatrist for breach of implied warranty of compliance with the "ethical commandments of the psychiatric calling." 35 The lower court had found it critical that the code of ethics itself contained a statement that the code was "not law," and the appeals court agreed. 36

32. Id. at 801.
33. C. KRAMER, MEDICAL MALPRACTICE 10-13 (4th ed. 1976). Kramer collects cases on this issue. See also Schockemoehl, Admissibility of Written Standards as Evidence of the Standard of Care in Medical and Hospital Negligence Actions in Virginia, 18 U. RICH. L. REV. 725 (1984). In the context of hospital liability, one commentator has noted that "[n]ot one court which accepted the doctrine of independent negligence [by hospitals] rejected the view that regulations, standards and bylaws were evidence of the standard of care." Dornette, The Legal Impact of Voluntary Standards in Civil Actions Against the Health Care Provider, in HOSPITAL LIABILITY: LAW AND TACTICS 302, 319 (M. Bertolet & L. Goldsmith, 4th ed. 1980).
34. Hirsh, Insuring Against Medical Professional Liability, in PROFESSIONAL NEGLIGENCE, supra note 17, 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. See Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries v. Perotti, 419 F.2d 704, 710 (D.C. Cir. 1969).
36. 678 S.W.2d at 514. For a discussion of the relationship between psychologists' ethical and legal responsibilities, see Bersoff, Professional Ethics and Legal Responsibilities: on
C. Realtors

Courts in at least two jurisdictions have found ethics codes to be relevant in malpractice actions against realtors. In *Hoefer v. Wilckens*, the Montana Supreme Court accepted the trial court's findings that several of the broker defendant's acts constituted malpractice—findings "based largely on the standard of care required of realtors . . . under the Code of Ethics and Standards of Practice of the National Association of Realtors." The Iowa Supreme Court, reversing a lower court judgment for the defendants, held that violations of the National Association of Realtors Code of Ethics constituted evidence of negligence. "As a matter of public policy," the court said, "consideration should be given to evidence of applicable ethical standards when, as here, they are placed in evidence and admitted by defendants to be recognized and followed in the trade or profession."

D. Accountants

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." Indeed, several courts have found professional ethical standards directly or indirectly relevant in determining the standard of care to be applied to accountants. At least one court has leaned heavily on ethical standards as a rationale for extending the negligence liability of accountants to third parties.

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the Horns of a Dilemma, 4 J. SCH. PSYCHOLOGY 359 (1975). Bersoff apparently would favor greater legal responsibility for ethical breaches, and laments that "[a]s long as it appears to courts and to the public that psychology is a cacophony of competing claims to workable procedures, the judgment of its members, regardless of the profession's high-minded ethical standards, will be open to challenge." *Id.* at 373.


38. *Id.* at 218, 684 P.2d at 472. Although accepting the trial court's findings, the Montana Supreme Court held that the acts of the broker, which may have constituted malpractice, were inappropriate in holding the broker's agent liable for malpractice. *Id.*


41. Hawkins, *Professional Negligence Liability of Public Accountants*, in *PROFESSIONAL NEGLIGENCE*, supra note 17, at 262. Hawkins notes—in language that 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.

not under contract with them—a major change in the law. \(^{43}\) In language strongly reminiscent of discussions of social responsibility in journalism, the court cited directly to the Code of Ethics of the American Institute of Certified Public Accountants.

The ethical Code of the American Institute emphasizes the profession's responsibility to the public, a responsibility that has grown as the number of investors has grown, as the relationship between corporate managers and stockholders has become more impersonal, and as government increasingly relies on accounting information. \(^{44}\)

"The Accountant today occupies a position of public trust," \(^{45}\) the court concluded.

Perhaps ironically, such expanded legal liability has led the American Institute to make it clear that accountants have a responsibility to look actively for financial fraud inside companies and not simply to detect fraud if it comes their way. \(^{46}\) The new rules also will require accountants to state whether they have any doubts about whether the company they are auditing will survive for another year. \(^{47}\) News reports announcing the new rules noted a potential "chilling effect" on some accountants—many may decide to get out of the auditing business rather than risk suits by shareholders. \(^{48}\)

E. Clergy

During the past several years, members of the clergy have begun to find themselves vulnerable to malpractice actions. \(^{49}\) Such cases

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43. International Mortgage Co. v. John P. Butler Accountancy Corp., 177 Cal. App. 3d 806, 223 Cal. Rptr. 218 (1986). In so doing, the court concluded that the widely accepted rule of Ultramares v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), holding that accountants have no duty to parties not in privity, could no longer be justified. 177 Cal. App. 3d at 820, 223 Cal. Rptr. at 226.

44. 177 Cal. App. 3d at 817, 223 Cal. Rptr. at 224-25 (emphasis added).

45. \(\text{Id.}\) at 820, 223 Cal. Rptr. at 226. Auditors have been characterized as "besieged by lawsuits charging either negligence or fraud." Labaton, New Liability for Auditors, N.Y. Times, Oct. 5, 1987, at 26, col. 1 (nat'l ed.).

46. \(\text{New Auditor Rule to Require Search for Client Fraud, N.Y. Times, Feb. 10, 1988, at 1, col. 3 (nat'l ed.).}\)

47. \(\text{Id.}\)

48. \(\text{Id.}\)

are particularly germane here because ministerial malpractice, like journalistic malpractice, directly implicates first amendment interests.

The leading case is *Nally v. Grace Community Church of the Valley*, which the California Court of Appeals twice decided in favor of the plaintiffs before the California Supreme Court reversed late in 1988. In *Nally*, the parents of a suicide victim sued ministers and their church for wrongful death, alleging in part that the suicide occurred because a pastor negligently discouraged the victim from receiving psychological help, and that the victim committed suicide because he did not receive such essential treatment. After a three-week trial, the trial judge granted the defendants' motion for non-suit; the court of appeals reversed. The appeals court found that non-therapist counselors—including ministers—have a legal duty to take appropriate precautions where an emotionally disturbed person exhibits suicidal tendencies.

The minimal standard of care, the appeals court held, requires taking steps to place such a counselee "in the hands of those to whom society has given the authority and who by education and experience are in the best position to prevent the suicidal individual from succeeding in killing himself." Of particular relevance is the fact that the court apparently based this standard of care in part on the testimony of the plaintiffs' expert witnesses—experts

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53. *Nally I,* 204 Cal. Rptr. at 304, 305. The plaintiffs also alleged that the pastors committed intentional infliction of emotional distress by exacerbating the victim's pre-existing feelings of guilt, anxiety and depression, knowing that he had suicidal tendencies and knowing that this conduct would increase the likelihood that he would commit suicide. And they alleged that the defendants negligently failed to require adequate training for their counselors. In *Nally I,* the appeals court reversed summary judgment for the defendants on the intentional infliction of emotional distress claim, but did not consider the other causes of action. *Id.* at 309.

54. *Nally II,* 194 Cal. App. 3d at —, 240 Cal. Rptr. at 222, 243.

55. *Id.* at —, 240 Cal. Rptr. at 226.

56. *Id.* at —, 240 Cal. Rptr. at 227.
with both psychological and clerical credentials. Plaintiffs’ counsel also wanted to introduce into evidence the standards of the American Association of Pastoral Counselors, but the trial court refused to allow this evidence because neither the church nor its pastors were Association members. The trial court also excluded from evidence a tape recording made by one of the pastors to advise prospective church counselors on suicide. Made after Nally’s death, the recording seemingly treated suicide with approval. The state supreme court upheld the trial court on the inadmissibility of the recording. The question of the admissibility of the Association standards apparently was not appealed.

The defendants argued that the malpractice action was barred by the freedom of religion clause of the first amendment. The appeals court responded that the evidence failed to establish that the Grace Community Church or its counselors held any religious belief which would preclude them from referring suicidal counselees to qualified counselors. The state supreme court never reached the constitutional issue. Instead, it found that the defendants owed no legal duty to the plaintiff because there was no special relationship between the parties, there was little causal connection between the counseling and the suicide, and imposing such a duty could have a serious deleterious effect on the availability of counseling services.

Two justices concurred, concluding that the defendants owed the plaintiff a legal duty but did not breach it. As evidence of the requisite “special relationship” between the plaintiff and defendant, they pointed to a church-published “Guide for Spiritual Counselors” which proclaimed the defendants to be proficient at treating severe depression and suicidal tendencies. They specifically rejected the argument that the first amendment precluded recognition of any legal duty, finding the duty in question to be religiously

57. *Id.* at __, 240 Cal. Rptr. at 221, 227.
58. 1988 Cal. LEXIS 256 at 15. See also Barker, *Clergy Negligence: Are Juries Ready to Sit in Judgment?*, *Trial*, July 1986, at 56, 59. Nine of 10 jurors and alternates interviewed after the trial said they were leaning strongly in favor of damages for the family; only one favored the church’s position. See Girdner, *To Err is Human*, *Calif. Law.*, Aug. 1985, at 21.
60. *Nally II*, 194 Cal. App. 3d at __, 240 Cal. Rptr. at 233.
61. 1988 Cal. LEXIS 256 at 31-40.
62. *Id.* at 51-52.
63. *Id.* at 54-55.
neutral and the government's interest to be compelling.\textsuperscript{64}

In two other reported cases, courts have affirmed dismissals of clergy malpractice actions. In \textit{Hester v. Barnett},\textsuperscript{65} the Missouri Court of Appeals directly addressed the plaintiff's assertion that the defendant minister acted "contrary to ministerial ethics and against Missouri law . . . and against the standard of conduct imposed upon ministers of the gospel. . . ."\textsuperscript{66} "The tradition that a spiritual advisor does not divulge communications received in that capacity . . ., even if a tenet of 'ministerial ethics' as Count I pleads, describes a moral, not a legal duty,"\textsuperscript{67} the court concluded. "In the absence of a legal duty, a breach of a moral duty does not suffice to invest tort liability."\textsuperscript{68} In \textit{Handley v. Richards},\textsuperscript{69} the Alabama Supreme Court adopted this reasoning as its own.\textsuperscript{70}

The Ohio Court of Appeals has also rejected a clergy malpractice claim, but the two judges voting to uphold dismissal of the claim disagreed among themselves.\textsuperscript{71} One rejected first amendment arguments against malpractice, but found, without elaborating, that the facts in the case at bar could not support such an action. For the other judge, first amendment concerns were dispositive.

There are no published or generally accepted standards for such counseling. Thus, the appropriate standard for pastoral counselors would have to be set at a reasonable minister standard. . . . Such an inquiry, however, leads to a review of the training and education of the particular religious body to which the minister is attached. This area of inquiry is . . . forbidden because of the First Amendment.\textsuperscript{72}

The third judge favored the plaintiff, arguing that the alleged sexual conduct was not "even arguably religious," and as such, "is un-

\textsuperscript{64} \textit{Id.} at 63, 66.
\textsuperscript{65} 723 S.W.2d 544 (Mo. Ct. App. 1987).
\textsuperscript{66} \textit{Id.} The plaintiffs alleged that the minister invited their trust and promised confidentiality, but then revealed family problems to the entire congregation, accused the plaintiffs publicly of child abuse, and attempted to get the children removed from the home. \textit{Id.} at 550.
\textsuperscript{67} \textit{Id.} at 544.
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} 518 So. 2d 682 (Ala. Civ. App. 1987).
\textsuperscript{70} \textit{Id.} at 684. The administrator of plaintiff's estate alleged that the plaintiff committed suicide in part because of emotional trauma suffered when he discovered that the minister who was providing marital counseling to him and his spouse allegedly was having a sexual affair with the spouse. \textit{Id.} at 683.
\textsuperscript{71} Strock v. Presnell, No. 9673986 (Ohio Ct. App. July 15, 1987) (LEXIS States library, Ohio file). Plaintiff alleged that minister was having sexual affair with plaintiff's spouse while giving the couple marital counseling.
\textsuperscript{72} \textit{Id.}
protected activity analogous to unprotected speech." 73 Further, again in language reminiscent of the debate over journalistic responsibility, the judge asserted that:

[F]ar from impeding religious liberty, allowing malpractice claims against prurient pastoral counselors reinforces the church's own religious doctrine. . . . Imposing societal prohibitions of such conduct on a minister through civil law does not restrict religious liberty, but actually enhances it. 74

Nor is this view of clergy liability held only by those outside of the clergy. 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." 75

Other professions, too, have had their ethical standards haunt them in court. 76 The point is simply that the boundary between law and ethics—between legal and moral duty—has become muddy in a variety of contexts in a variety of professions. We should not be surprised to see a similar development in the context of mass communication.

II. EXPERT TESTIMONY/SELF-CRITICAL ANALYSIS

Closely related to questions of duty and standard of care is the role of expert testimony. Either the plaintiff or defendant may attempt to use expert testimony to establish what constitutes due care in the context of a given case. 77 But expert testimony will be admissible only where the question is one that lay jurors cannot

73. Id.
74. Id.
75. Bergman, supra note 49, at 66. Like journalists, of course, members of the clergy have first amendment protection. 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.
resolve within their own competence.\textsuperscript{78} 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.\textsuperscript{79}

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.\textsuperscript{80} 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.\textsuperscript{81} 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.\textsuperscript{82}

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.\textsuperscript{83} Precisely this situation has led to claims from defendants for a "self-critical evaluation privilege" from discovery.\textsuperscript{84} 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 discour-

\textsuperscript{78} Harpér & James, supra note 18, at 985.

\textsuperscript{79} Comment, supra note 19, at 585; Philo, Use of Safety Standards, Codes and Practices in Tort Litigation, 41 Notre Dame L. Rev. 1, 7-8 (1965).

\textsuperscript{80} See generally Prosser & Keeton, supra note 13, at 185-96; Harpér & James, supra note 18, at 977.

\textsuperscript{81} See Prosser & Keeton, supra note 13, at 194-95. See also Morris, Custom and Negligence, 42 Colum. L. Rev. 1147, 1149 (1942).

\textsuperscript{82} See Prosser & Keeton, supra note 13, at 195-96.

\textsuperscript{83} See, e.g., Ames, Modern Techniques in the Preparation and Trial of a Medical Malpractice Suit, in Professional Negligence, supra note 17, at 113.

Some courts have granted such a privilege, but others have rejected it. In Bredice v. Doctors Hospital, Incorporated, 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.” 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.”

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.

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. 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 mass communication and consider whether the same risks are present in that field.

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85. Harper & James, supra note 18, at 981-82.
89. See, e.g., Gillman, 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 84, at 558.
90. 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 21, Preamble.
III. 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 there is 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."

A. 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." 91 It further states that "[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." 92 Similarly, the code of the Society of Professional Journalists declares that journalists are obligated to "perform with intelligence, objectivity, accuracy, and fairness." 93 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, Incorporated, 94 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 was not directly involved in the inaccurately reported case; instead, he claimed to have suffered severe mental distress because the inaccurate report

92. Id. at Art. VI.
led him to believe that criminal charges against him would have to be dismissed, and that he became despondent and depressed when he learned the truth. 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.

Courts have consistently rejected claims based on inaccurate financial reporting that has allegedly caused plaintiffs' financial loss. The leading case appears to have been Jaillet v. Cashman, a suit claiming that plaintiff lost money because he based a transaction on an erroneous Dow-Jones ticker report regarding the tax impact of a Supreme Court decision. In sustaining a demurrer, the court found the defendant to have the same obligations and duties as a newspaper publisher, and concluded that:

There is a moral obligation upon every one to say nothing that is not true, but the law does not attempt to impose liability for a violation of that duty unless it constitutes a breach of contract obligation or trust, or amounts to a deceit, libel, or slander. Theoretically, a different rule might be logically adopted, but as matter of practical expediency, such a doctrine seems absolutely necessary.

Subsequent decisions have elaborated on this conclusion, reasoning that perfection is unattainable in the publishing business, and that the possibility of virtually unlimited liability would deter dissemination of printed material. The first amendment itself has been recognized as a defense.

95. Id. at 1157.
96. Id. at 1160. See also Curry v. Evening Journal Publishing Co., 41 N.M. 318, 68 P.2d 168 (1937) (newspaper has no duty of accuracy to third parties in publication of obituary); Langworthy v. Pulitzer Publishing Co., 368 S.W.2d 385 (Mo. 1963) (no action lies against newspaper for nonlibellous but inaccurate reporting).
98. 115 Misc. at 384, 189 N.Y.S. at 744.
100. See Daniel, 137 Misc. 2d at 100-02, 520 N.Y.S.2d at 339-40; First Equity Corp. of Fla. v. Standard & Poor's Corp., 690 F. Supp. 256, 258 (S.D.N.Y. 1988); Gutter, 22 Ohio St.
Although ethics codes and policy statements have not directly been cited in such cases, at least two courts have suggested that a duty of accuracy will not be recognized even if the media claim to be accurate and encourage readers to rely on the information they disseminate. Plaintiffs in one case argued that the defendant effectively warranted the reliability of its content because it touted the reliability of its publication and marketed it as providing “action-worthy” information. “This suggestion is meritless,” the court responded. “It is one thing to say that the defendant extols the virtues of its publication. It is quite another to say that it anywhere assumes responsibility for 100 percent accuracy.”  

101. First Equity Corp. of Fla., 670 F. Supp. at 118. See also Demuth, 432 F. Supp. at 990. In Demuth, plaintiff claimed to have lost $4 million in business because an entry in a Merck reference manual misstated the toxicity of a substance used by plaintiff’s product. The court rejected the plaintiff’s argument that Merck assumed a duty of accuracy because it published its index for a serious purpose and expected readers to rely on it as an authoritative source of accurate information. Id. at 993. Similarly, in Roman v. City of New York, 110 Misc. 2d 799, 442 N.Y.S.2d 945 (N.Y. Sup. Ct. 1981), summary judgment was granted to Planned Parenthood in a suit claiming that plaintiff conceived an unwanted child because she followed allegedly inaccurate information in a Planned Parenthood booklet. Citing Demuth, the court concluded that Planned Parenthood owed no duty to the plaintiff even though it may pointedly have intended the booklet to provide information to the general public and could have reasonably foreseen plaintiff’s reliance on it: “One who publishes a text cannot be said to assume liability for all ‘misstatements’, said or unsaid, to a potentially unlimited public for a potentially unlimited period.” 110 Misc. 2d at 802, 442 N.Y.S.2d at 948.  

In two non-media cases, judges have remarked on the possible liability of the media for the harm resulting from incorrect weather forecasting. In National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir.), cert. denied, 347 U.S. 967 (1954), the court affirmed judgment for the government where plaintiff alleged that his property suffered flood damage because an inaccurate weather forecast led him not to take precautions. A concurring opinion, focusing specifically on the duty question, worried about the bar’s attempts to “get the camel’s nose into the tent” in the area of liability for gathering or disseminating public information. 210 F.2d at 279. The same judge asserted that “no liability would have existed against a newspaper or a radio station for any inaccuracy, negligent or otherwise, in whatever public information it might, on its own accord and by its own means, have undertaken to gather and disseminate about the flood conditions of the Kansas River, . . . .” Id. at 279.  

On the other hand, in Connelly v. State, 3 Cal. App. 3d 744, 84 Cal. Rptr. 257 (1970), the court reversed a demurrer in a negligence suit brought against the state for allegedly negligent dissemination of inaccurate river height forecasts. A marina owner alleged that he suffered damage because, in reliance on the forecasts, he set his docks too low. The court found that the state might not have owed plaintiff a duty but for the fact that he had personally called the forecasting office and identified himself as a businessman with much at stake in the proper river height forecast. Id. at 748, 84 Cal. Rptr. at 259-60. In dissent, Judge David worried that such reasoning might appear to create duty if a person called a television station and asked for a weather report, then acted on it and suffered harm. Id. at 758, 84 Cal. Rptr. at 267. See also Brown v. United States, 790 F.2d 199 (1st Cir. 1986), cert. denied, 479
Nevertheless, in one case—albeit involving a management consulting firm—a duty of accuracy has been recognized over the first amendment-based objections of the defendant. In *South Carolina Ports Authority v. Booz-Allen & Hamilton*, a state government agency sued a firm that had prepared a report, commissioned by the Georgia Ports Authority, comparing ports in Savannah, Ga., and Charleston, S.C. The plaintiff alleged that the firm had negligently prepared a report containing false and misleading information that harmed business in the South Carolina port; a central question was whether the consultant owed any duty to the plaintiff. The answer, provided by the South Carolina Supreme Court, was "yes":

We hold a duty to use due care, running from a consultant to the commercial competitor who is being critiqued, arises when the consultant undertakes to objectively analyze and compare the attributes of commercial competitors for the purpose of giving one a market advantage over the other. Under this analysis, [the consultant] owed a duty to the S.C. State Ports Authority to exercise due care to accurately report objective factual data concerning the Charleston port, if it knew or should have known the report was intended to be used by [the Georgia Ports Authority] as a marketing device.

The trial court then rejected the consultant’s argument that the first amendment required summary judgment. The court concluded that the consultant’s report was a form of “fact-based” commercial speech entitled to diminished first amendment protection which would be adequately provided by the proof requirements of negligence law.

With this sole exception—perhaps distinguishable on grounds that it involved a consultant and not a mass communicator—it appears that, at least outside the sphere of libel, courts have consistently rejected efforts to “legalize” mass communicators’ voluntary assumption of an obligation to be accurate. The same can be said regarding any voluntarily assumed obligation to correct inaccuracy.

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103. 289 S.C. 373, 376-77, 346 S.E.2d 324, 325-26 (1986). The question of the existence of duty had been certified to the state supreme court by the federal court of appeals for the D.C. Circuit.

104. 676 F. Supp. at 349-50. The court appeared to believe that the “burdens of proof and presumptions operative in negligence compared to defamation cases” would actually favor the defendant. But the court may have misunderstood the constitutional law of libel. *Id.*
In at least two cases, courts have rejected theories of liability based on alleged violation of a duty to retract, even when allegedly libelous material was involved.\textsuperscript{105}

The courts have also consistently rejected creative claims that the media have a "duty to publish" various types of material in order to meet their obligation to keep the public fully informed and their obligation to be fair. For example, when the New York Times failed to include one of his novels in its best sellers list, author William Peter Blatty sued the newspaper, alleging in part that the Times had breached a public duty and trust to report the news fairly and accurately.\textsuperscript{106} Blatty claimed that wrongfully failing to include his novel in the list cost him potential profits from the sale of paperback and film rights. The California Supreme Court ultimately avoided the duty question, and dismissed the case on grounds that the omission was not sufficiently "of and concerning" Blatty to withstand first amendment scrutiny.\textsuperscript{107} However, other courts have directly addressed such claims of duty and have rejected them.\textsuperscript{108} Nor is this surprising, given the United States Supreme Court's decision in Miami Herald v. Tornillo\textsuperscript{109} that the first amendment was violated by a state law requiring newspapers to provide reply space to political candidates they


\textsuperscript{107} 42 Cal. 3d at 1048, 232 Cal. Rptr. at 552, 728 P.2d at 1187.


\textsuperscript{109} 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 the context of broadcasting, however, the Court has taken essentially the opposite position. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
media have a legal duty to investigate the accuracy of non-libelous information. Most of these cases have involved a "duty to investigate" claims made in advertisements. Most commonly, courts have refused to recognize such a duty because of fear that requiring the media to investigate the accuracy of information in advertising would create an onerous burden that would discourage the media from accepting advertising and drive many publications out of business. Cases in which a duty to investigate advertising has been recognized appear to fall into three categories: sexually explicit advertisements, advertisements in which the publisher itself appears to recommend the product, and advertisements apparently soliciting serious criminal conduct.

The "criminal conduct" cases both involve advertisements placed in Soldier of Fortune magazine and involve allegations that the magazine negligently published what were in fact advertisements placed by "hit men" who either harmed or murdered plain-


112. Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969). In Hanberry, plaintiff sued the publisher of Good Housekeeping after she allegedly fell and sustained serious injuries while using shoes given Good Housekeeping's consumer guarantee seal. Reversing a demurrer sustained by the trial court, the appeals court held that Hearst owed the plaintiff a legal duty to use ordinary care so that consumers are not unreasonably exposed to risk. The court concluded that where Hearst's procedures and methods represented to the public that it possessed superior knowledge and special information regarding the product, it is liable for negligent representations of either fact or opinion. Id. at 686, 81 Cal. Rptr. at 523.

tiffs or their relatives. Two federal district courts denied summary judgment to the magazine in these cases.\textsuperscript{114} The magazine subsequently settled one of the cases,\textsuperscript{115} and a jury brought in a plaintiff's verdict of $9.4 million in the other.\textsuperscript{116} In the latter case, the surviving family of a murder victim alleged that the magazine was negligent in failing to investigate the nature of an ad placed by the murderer and saying: "EX-MARINES—67-69 'Nam Vets—EX-DI—weapons specialist—jungle warfare, pilot, M.E., high risk assignments U.S. or overseas [followed by a telephone number]."\textsuperscript{117} The court rejected the magazine's argument that it was under no legal duty to the plaintiffs.\textsuperscript{118} Two factors appeared to be central to the court's reasoning: the fact that commercial speech was involved, and the fact that the Supreme Court seems to have approved of negligence actions even in the context of some non-commercial speech.\textsuperscript{119} However, the court did note that the standard of reasonable care might be different for a newspaper of general circulation even if the same ad were involved: "The reasonableness of its publication in defendants' magazine without investigation, however, is not clear given the nature of the magazine and its readership and given the fact that many advertisements submitted for publication in the personal services column expressly offered criminal services."\textsuperscript{120}

In non-advertising contexts, the courts have been far more reluctant to find a duty to investigate non-libelous information. Courts have rejected claims that newspapers have a legal duty to investigate the accuracy of information in obituaries before publishing them,\textsuperscript{121} or to investigate the safety of a dandruff remedy recommended in a feature story.\textsuperscript{122} Likewise, a federal district court re-

\textsuperscript{115} The Norwood case was settled. Damages Given for 'Hired Gun' Ad, THE NEWS MEDIA & THE LAW, Spring 1988, at 50, 51 [hereinafter Damages Given].
\textsuperscript{116} Magazine Is Ordered to Pay $9.4 Million for Killer's Ad, N.Y. Times, March 4, 1988, at 9, col. 1 (nat'l ed.). A $110 million suit has now been filed against the magazine by another plaintiff claiming that his father's murder was arranged through a similar ad in the magazine. Damages Given, supra note 115, at 51.
\textsuperscript{117} Eimann, 680 F. Supp. at 864.
\textsuperscript{118} Id. at 866.
\textsuperscript{119} Id. at 865-66. The court referred to the libel case of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), holding that states may permit private figures to win libel suits upon proof of negligence. Id.
\textsuperscript{120} Eimann, 680 F. Supp. at 866.
fused to recognize that the publisher of the *Physicians Desk Reference* had any legal duty to independently test the drugs it included.\textsuperscript{123} The plaintiff claimed that the gross negligence of the defendant in publishing information about Valium led to her addiction to the drug. Although it was unclear whether the information was or was not commercial advertising, the court found the distinction unimportant. If it were advertising matter, the publisher still had not warranted or recommended the drug; if it were non-commercial speech, it was protected by the first amendment as speech important to the public interest.\textsuperscript{124}

Only in one case has a court apparently recognized a legal "duty to investigate" outside of the context of libel. In *Parnell v. Booth Newspapers, Incorporated*,\textsuperscript{125} a federal court denied a newspaper's motion for summary judgment where the plaintiff alleged negligence resulting in emotional distress. The plaintiff claimed that the newspaper had published retouched, but still identifiable, photographs of her in connection with articles on prostitution. In so doing, she alleged, the newspaper had failed to exercise reasonable care in investigating and verifying, and in failing "to follow generally acceptable journalistic standards" in breach of legal duty.\textsuperscript{126}

In a variety of other contexts, however, courts do appear to have recognized legal duties rooted in the media's heretofore voluntarily

\begin{itemize}
\item \textsuperscript{123} Libertelli v. Hoffman-LaRoche, 7 Media L. Rep. (BNA) 1734 (S.D.N.Y. 1981).
\item \textsuperscript{124} Id. at 1735-36. Even in cases where plaintiffs have claimed to have been injured while following instructions in various "how-to" books, courts have generally refused to recognize any legal duty on the part of publishers. See, e.g., Alm v. Van Nostrand Reinhold Co., 134 Ill. App. 3d 716, 480 N.E.2d 1263 (1985) (publisher of book on tool making had no duty to provide adequate and safe instructions and warnings); Lewin v. McCreight, 655 F. Supp. 282 (E.D. Mich. 1987) (publisher of book on metalsmithing had no duty to warn readers of content of books it publishes). In only one case has liability been imposed on a publisher for injuries suffered by a person following allegedly misleading instructions in a book—in this case instructions on an eighth grade chemistry experiment. See *Rand McNally to Pay Damages in School Textbook Mishap*, Publisher's Weekly, Sept. 26, 1980, at 42. But see Walter v. Bauer, 109 Misc. 2d 189, 439 N.Y.S.2d 821 (1981), modified, 88 A.D.2d 787, 451 N.Y.S.2d 533 (1982), appeal dismissed, 88 A.D.2d 790 (1982) (publisher under no duty to warn of possible danger in procedures suggested in fourth grade science text). Courts have, however, left open the question of an author's liability to readers. See, e.g., Cardozo v. True, 342 So. 2d 1053 (Fla. App. 1977) (book retailer not liable for consequences of information contained in book, but liability of author remains open question). One suit has been brought directly against an author for injuries allegedly sustained by an infant because of vitamins administered upon advice offered in the author's book. However, it was dismissed on a jurisdictional issue. See *Young v. Mallet*, 49 A.D.2d 528, 371 N.Y.S.2d 1 (Sup. Ct. App. Div. 1975).
\item \textsuperscript{125} 572 F. Supp. 909 (W.D. Mich. 1983).
\item \textsuperscript{126} Id. at 916.
\end{itemize}
assumed standards. 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. 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. The court apparently, though 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 the discerned 'mores of the community'."

A newspaper's policy statements also became legally significant in *United States v. Winans*, a securities fraud case central to which was a journalist's violation of his newspaper's policy forbidding advance disclosure of stories the paper plans to publish. Although not a tort action, the case is relevant because it focused 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 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 and with mail and wire fraud, using the rationale that by violating the newspaper's 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:

> [P]roscribe 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.

128. *Id.* at 256.
129. *Id.* at 269 n.25.
131. 791 F.2d at 1026.
The court specifically rejected the argument that this determination violates the first amendment. Ironically, it was precisely because the policy was not imposed by the government that the court saw no constitutional problem.\textsuperscript{132} 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.\textsuperscript{133} One commentator has subsequently worried that the case "can be interpreted as giving the SEC a brief to oversee the ethics of financial journalism of the responsible news media" and could "generate wide ranging inquiries into ethical standards in an effort to establish the conduct a news outlet requires of its employees."\textsuperscript{134}

\textsuperscript{132} Id. at 1034. The Supreme Court upheld the securities law conviction on a 4-4 vote, and unanimously voted to uphold the mail and wire fraud conviction; consequently, the opinion focused only on the mail and wire fraud portion of the case. The court mentioned the internal policy issue only in passing: "The Journal's business information that it intended to be kept confidential was its property; the declaration to that effect in the employee manual merely removed any doubts on that score and made the finding of specific intent to defraud that much easier." 108 S. Ct. at 321-22.

\textsuperscript{133} 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. \textit{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. \textit{Id.} at 1266-69. This rationale is somewhat unclear in light of Lowe v. S.E.C., 472 U.S. 181 (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." \textit{Id.} at 209.

\textsuperscript{134} R. Spellman, \textit{Financial Journalism Under Fire: the SEC and Newsroom Ethics} at 9-10 (paper presented to the annual meeting of the Association for Education in Journalism & Mass Communication, Aug. 6, 1986, Norman, Okla.). More recently, a defunct stock brokerage firm has sued \textit{Barron's National Business and Financial Weekly}, claiming that the magazine and competing brokers conspired to force it out of business. Brought under the Securities Exchange Act of 1934, the suit alleges that the publication's editor spread the word that \textit{Barron's} would soon publish a negative article about plaintiffs, and that the editor did so in violation of the magazine's written policy prohibiting such disclosures. Creative
What previously have been questions only of journalists' ethical duties have become the subject of litigation in two other recent cases. Both have involved issues of journalists' promises or representations to sources in the process of gathering information.

In the first, convicted murderer Jeffrey MacDonald sued author Joe McGinniss for fraud, breach of contract, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress after learning the contents of *Fatal Vision*, a book McGinniss wrote about MacDonald's murder case. MacDonald had given McGinniss exclusive access and cooperation so that McGinniss could write the story of MacDonald's prosecution for the murder of his family. He had also given McGinniss what appeared to be a clear, written release from liability for whatever McGinniss might write. But when *Fatal Vision* was not the sympathetic account that MacDonald had expected, and when it became clear that—without telling MacDonald—McGinniss had for some time been convinced of MacDonald's guilt, MacDonald sued. Essentially, he claimed that McGinniss lied to him when he promised to write a "true" story about MacDonald's experience, and that he misled MacDonald into thinking he was writing a sympathetic account and tricked him into continuing to cooperate with the project.

McGinniss' first problem was that his insurance company refused to indemnify him, claiming that his policy covered only libel and invasion of privacy and that MacDonald had alleged neither. Consequently, McGinniss sued his insurer and won a declaratory judgment concluding that MacDonald's allegations were in fact grounded in libel, and that the insurance company was obligated to cover McGinniss' expenses. The trial judge, however, refused to treat the case as "libel in disguise" and allowed the case to go to trial on the theories of liability MacDonald alleged. A mistrial was declared after the jury deadlocked at 5-1 in favor of MacDonald;

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Securities, Inc. v. Bear, Stearns & Co., *reported in* the *News Media & the Law*, Fall 1987, at 15. Late in 1988 the claim against the editor of *Barron's* was dismissed. See Judge Dismisses Charges Against Barron's Editor, *Editor & Publisher*, Dec. 17, 1988, at 20.


137. 648 F. Supp. at 1270.
subsequently, the parties settled the case for $325,000. During the trial, such figures as William F. Buckley and Joseph Wambaugh testified on McGinniss' behalf and against imposing legal liability for McGinniss' reportorial techniques. After the trial, media attorney Floyd Abrams concluded that the case has "enormous potential for choosing all the ground rules for journalism, not just books—and not just books with a subject where you have an arrangement of the sort that you did—but the entire news gathering process."138

In the second case, a jury awarded $700,000 to a source who claimed breach of contract and fraudulent misrepresentation when newspapers published his name after their reporters had promised him confidentiality.140 The plaintiff had given reporters derogatory information about a political candidate on the condition that he not be named in connection with the story. But when editors learned that the source was supporting the opposing candidate, they overrode the reporters' promise and, over the reporters' objections, named the source. The newspapers' motion for summary judgment was denied when the judge refused to "adopt the premise that the First Amendment should operate to excuse news organizations from the consequences of a decision to publish when that decision involves the breach of a valid contract or of the general tort laws."141 The court saw no constitutional issue: "This is not a case about free speech, rather it is one about contracts and misrepresentation."142 At trial, several journalists testified on behalf of the plaintiff; a journalism professor and a former editor also testified as experts for plaintiff about journalistic ethics and the importance of keeping promises of confidentiality.143 After the trial, the plaintiff's lawyer was quoted as saying, "The promise of confidentiality now has a legal backing as well as moral and ethical

143. Jury Awards, supra note 140.
backing."\textsuperscript{144}

Taken together, then, these cases suggest that journalists, like other professionals, are beginning to feel at least some legal pressure on their voluntarily assumed duties.\textsuperscript{145} As has been the case with other professionals, the courts have been generally reluctant to expand legal duties based on what previously have been voluntary, moral duties. But notable exceptions to this reluctance have begun to appear.\textsuperscript{146}

B. "Due Care"

In 1974 the United States Supreme Court held in \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{147} that states could use negligence as a fault standard in libel suits by private figures. 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.\textsuperscript{148} 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

\textsuperscript{144} \textit{Advice for Sources}, N.Y. Times, Aug. 9, 1988, at 40, col. 2 (nat'l ed.). One of the defendant newspapers has subsequently adopted new guidelines on the use of anonymous sources. The newspaper's editor acknowledged that having the new guidelines presents the risk that they might be used against the newspaper in court some day, but said the paper had balanced that risk against the need to have clear guidelines that everyone at the newspaper could follow. \textit{Anonymous Sources}, EDITOR & PUBLISHER, Aug. 27, 1988, at 17.

\textsuperscript{145} For purposes of labor law, journalists have generally not been considered to be professionals. \textit{See} Express News Corp., 223 NLRB 627 (1976). But a recent federal district court decision has held that some journalists may now be considered professionals and thus exempt from the overtime pay requirements of the Fair Labor Standards Act. \textit{See} Sherwood v. The Washington Post, 677 F. Supp. 9 (D.D.C. 1988).

\textsuperscript{146} In contexts other than tort or contract law, there have been attempts—ultimately unsuccessful—to make voluntary fair trial-free press guidelines legally binding on journalists. \textit{See} Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975); State v. Allen, 73 N.J. 132, 373 A.2d 377 (1977). One court has succeeded in making adherence to such guidelines a condition of courtroom access. \textit{See} Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982).


\textsuperscript{148} The Statement of Principles of the American Society of Newspaper Editors has reportedly been used in court in at least nine cases. \textit{See} Sutherland, \textit{Journalist Groups Arguing Over Need for Strong Ethics Codes}, ASNE Bull., Dec. 1987, at 4 [hereinafter Sutherland].
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 of due care: "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." 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." 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."

The concept of fault in libel law is reflected as much in the concept of "actual malice" as in negligence. Actual malice requires a determination of whether journalists actually knew they were behaving irresponsibly and dangerously. But negligence allows a jury to speculate on how a hypothetical reasonable person or journalist would have behaved. 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. For example, in


152. 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).

153. See, e.g., Restatement, supra note 13, at § 580A comment d.

154. Id. at §§ 298, 299A.
Tavoulareas v. Piro, the plaintiffs were successful in compelling the Washington Post to disclose speeches, articles and written memoranda embodying the Post's or individual defendants' opinions about journalistic standards. The plaintiff was also allowed to depose the newspaper's former ombudsman to ask questions concerning his "knowledge of journalistic practices and standards of The Post during the time period roughly contemporaneous with [publication of the allegedly libelous articles]."

Two recent law review articles reflect just how relevant 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." Bloom favors holding journalists, like doctors and lawyers, to the standards prevalent in their profession. He notes that:

Despite 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.

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. 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. He especially favors the codes of the American Society of Newspaper Editors and the Society of Professional Journalists. "Adherence to freely adopted standards," he argues, "should present an unusually strong libel defense."

156. Id.
158. . Id. at 343.
159. Id. at 336-37.
161. Id. at 472.
162. These two codes are reprinted in Responsibility in Mass Communication, supra note 1, at 289.
163. Simon, supra note 160, at 472.
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." 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. "Application of a malpractice standard might encourage public support for licensing," he writes, "but that is a matter for future media vigilance."

Why have commentators—including the RESTATEMENT SECOND OF TORTS—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." Others have favored ordinary negligence,

164. Id. at 477.
165. 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 470. Presumably, these defenses recognize the value of accurate, fair and objective reporting on public matters; departure from these standards can destroy the defense.
166. Id. at 488.
167. RESTATEMENT, supra note 13, at § 580B comment g.
168. For example, Professor Hopkins argues that a malpractice standard has two advantages: it eliminates concern that journalists' actions will be judged against a "sea of negligence," and it requires the actions of similar media to be compared under similar reporting and publishing circumstances. Hopkins, supra note 147, at 18. It is relatively easy to find examples of cases in which journalists have been saved from liability by testimony that they have followed their own routine procedures. See, e.g., Dairy Barn Stores v. ABC, 15 Media L. Rep. (BNA) 1239 (N.Y. Sup. Ct. 1988) (court accepts defendants' own tape editor and cameraman's statement of what "standard journalistic practice" is); Shapiro v. Newsday, 5 Media L. Rep. (BNA) 2607 (N.Y. Sup. Ct. 1980) (plaintiff unable to show evidence of gross irresponsibility where newspaper acted in accord with its standard procedures).
often explicitly rejecting a malpractice approach.\textsuperscript{170} 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."\textsuperscript{171} Or as another has asserted: "We find that a jury in this state is as competent as any expert to form an intelligent and accurate opinion as to whether a reporter should have conducted additional investigations."\textsuperscript{172}

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:

\textquote{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.\textsuperscript{173}}

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 pro-

\begin{footnotes}
\item\textsuperscript{172} Troman v. Wood, 62 Ill. 184, 340 N.E.2d 292, 298-99 (1975).
\item\textsuperscript{173} Bloom, supra note 157, at 344.
\end{footnotes}
fessional 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 to accept such testimony:

[[T]he 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."

One court has concluded that the standards of basic news reporting are simply common knowledge, requiring no expert testimony. 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."

On the other hand, where courts do admit such evidence, the

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175. Id. at 1709. 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 Annotation, 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; Journalism Profs Take Stand, Colum. Journalism Rev., July/August 1981, at 7; The Rising Price of Profs, Colum. Journalism Rev., July/August 1982, at 16. Of course, plaintiffs too may attempt to use experts to demonstrate legal fault, but they have also run into difficulty. See, e.g., Brueggemeyer v. ABC, 684 F. Supp. 471 (N.D. Tex. 1988) (affidavit by consultant in media analysis and communications research asserting that her analysis of broadcast showed failure to use due care and reckless disregard is either inadmissible or not probative of actual malice).
176. Greenberg v. CBS, 69 A.D.2d 693, 710, 419 N.Y.S.2d 988 (1979). See also Kohn v. West Haw. Today, 65 Haw. 584, 656 P.2d 79, 83 (1982) (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); and Richmond Newspapers, 362 S.E.2d at 42-43 (court did not err in excluding evidence from expert witness, a nationally known journalist, who testified as to appropriate standards for investigative reporting and concluded that defendant did not depart from standards of accuracy and fair play).
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. 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." Similar evidence has been harmful to media defendants even in determinations of fault at the level of actual malice.

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 West-
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moreland v. CBS\textsuperscript{183} 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."\textsuperscript{184} 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.\textsuperscript{185} 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.\textsuperscript{186} 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.\textsuperscript{187} Departure from such standards would then arguably become negligence.

Farrar argues that such fear is overrated 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 group consisting in part of nonmembers of the profession.\textsuperscript{188} Such an argument, however, may underestimate the fact


\textsuperscript{184} Id. at 68. 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). Weiss favors a self-evaluative privilege for the media on grounds that it is more likely to encourage self-evaluation and responsiveness to public opinion than is compelled disclosure. Id. at 173.

\textsuperscript{185} 601 F. Supp. at 69.

\textsuperscript{186} Farrar, News Councils and Libel Actions, 63 JOURNALISM Q. 509, 515 (1986) [hereinafter Farrar].

\textsuperscript{187} A former chairman of the Minnesota News Council has been quoted as saying that the council is "developing a body of thoughtful, case-by-case essays on newspaper ethical problems"—a sort of "common law with respect to newspaper ethics. . . ." Remarks of Judge C. Donald Peterson, quoted in Kennedy, Processing the Beefs, QUILL, Oct. 1977, at 26, 27.

\textsuperscript{188} Farrar, supra note 186, at 515.
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.\textsuperscript{189} 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.\textsuperscript{190}

\section*{IV. Implications}

This article purposely has used the words "professional" and "ethics" without precisely defining them, because however one defines them, it appears that social responsibility in mass communication has legal ramifications. Mass communicators, like other professionals, are feeling increased pressure for the recognition of new legal duties; and voluntary professional standards are becoming ever more relevant in litigation. In part, these ramifications are a result of the Supreme Court's emphasis on the concept of "fault" in libel law during the past two decades and especially since the \textit{Gertz} case. But they are also an inevitable result of mass communicators' increasing concern with social responsibility. Consequently, in mass communication as in other professions, the distinction between moral and legal responsibility has become increasingly fuzzy.

Media litigants 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

\begin{itemize}
\item \textsuperscript{189} \textsuperscript{189} \textsuperscript{189} See, e.g., Glasser & Ettema, \textit{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, \textit{Public Accountability or Public Relations? Newspaper Ombudsmen Define Their Role}, 64 \textit{Journalism Q.} 3 (1987).

\item \textsuperscript{190} \textsuperscript{190} \textsuperscript{190} 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). \textsuperscript{190} \textsuperscript{190} \textsuperscript{190} See also Ramada Inns v. Dow Jones, 13 Media L. Rep. (BNA) 1872 (Del. Super. Ct. 1986) (denying request to depose attorneys for newspaper libel defendant in attempt to discover that attorneys and editors had discussed journalist's allegedly shoddy reporting practices, but noting that facts being sought may yet be discoverable).\end{itemize}
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 communicators turn their backs, then, on social responsibility? Is it too risky a concept to embrace? Certainly not. First, it is important not to lose a sense of perspective. A 1985 survey of 188 daily newspapers found that the number of editors who believed that their legal vulnerability would decrease in light of having written standards outnumbered those who feared an increase in vulnerability, and that reducing legal vulnerability was a major reason cited by editors for adoption of written standards.¹⁹¹ The survey found that written standards are "well entrenched and unlikely to be changed, dilated, or abolished in the near future,"¹⁹² and concluded that "some newspaper editors and media attorneys overestimate the current and potential threat of the offensive use of these standards and underestimate the advantage of their defensive use."¹⁹³ Ultimately, it might be argued, what editors do is more important than what legal doctrine might say.

Second, there is the practical argument that even in the absence of written (or widely known but unwritten) standards of behavior, evidence regarding a defendant's normal custom or procedure will be heard in evidence anyway. That is, it may be just as risky not to have explicit policies as it is to have them. Since having them may sometimes work to one's advantage, there is no disincentive to being voluntarily responsible.

¹⁹¹. Project, Standards Governing the News: Their Use, Their Character, and Their Legal Implications, 72 Iowa L. Rev. 637, 649, 653 & 690 (1987) (authored by Lynn Weckham Hartman) [hereinafter Hartman]. Thirty-four percent believed having written standards would decrease their vulnerability; 26 percent believed standards would increase vulnerability. The former group's primary reason was belief that the newspaper could use the standards in libel suits to show that it had taken steps to insure fairness and accuracy; the latter group's fear was that plaintiffs' lawyers would misuse the standards in libel cases. Id. See also Barnes, Keep Your Eyes Open; You'll Know Unethical Behavior When You See It, ASNE Bull., Dec. 1987, at 10; and Does Your Newspaper Have a Code of Ethics? ASNE Bull., Dec. 1987, at 8 (including remarks from one editor who reported having newspaper's ethics code subpoenaed twice).

¹⁹². Hartman, supra note 191, at 651.

¹⁹³. Id. at 656. Although the study found that written standards are indeed relevant to the issue of fault in libel cases, it also concluded that written standards were infrequently used in litigation. Id.
Nevertheless, it might be useful to rethink the question of how desirable a professional malpractice standard is in determining legal responsibility. Journalists, for example, may still fare better in the long run 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.

One can easily imagine cases—especially where a malpractice standard of fault has been adopted—in which plaintiffs may be far happier than defendants to introduce professional standards. This is precisely why courts that have rejected a malpractice standard may in fact be the media’s 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 and other mass communicators might profitably become more cognizant of the vocabulary of rights and duties and of how easily legal and moral concepts become confused. Some communicators are becoming cognizant of this problem. For example, after long and intense debate, the Society of Professional Journalists has rejected efforts to add specific enforcement provisions to its code of ethics, and voted to delete language from its code calling on journalists to “actively censure and try to prevent violations of these standards.”

A central concern

194. See supra notes 10 and 11 and accompanying text. Of course, not all commentators agree that legal and moral obligations ought to be kept carefully distinct. Glasser, for example, has argued that:

From the perspective of an affirmative understanding of the First Amendment, in short, the journalist’s principal and overriding responsibility is to assure the integrity of the press by seeing to it that the press is at all times free to conduct itself in accordance with its highest ideals. At the very least, this means that a free press is a press free to act with regard for—and with reference to—the general welfare of its community; it means, as the American Society of Newspaper Editors recognized more than half century ago when it promulgated its ‘Canons of Journalism,’ that freedom of the press means freedom ‘from all obligations except that of fidelity to the public interest.’

Glasser, Press Responsibility and First Amendment Values, in Responsible Journalism, supra note 1, at 93.

195. Self-Censure Clause Dropped, Editor & Publisher, Nov. 21, 1987, at 9. The society has not, however, moved away from the idea of written standards of professional conduct. The organization voted also to insert the following language into the code:

Adherence to this Code is intended to preserve and strengthen the bond of mutual
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was that "any code of ethics that purports to be more than aspira-
tional might well be considered a set of organizational or associa-
tional rules or even a set of legal rules; enforcement changes the
very nature of such a code." The Radio Television News Direc-
tors Association has taken similar action, dropping a censure provi-
sion in its code because of "the legal problems that codes of ethics
present in libel and privacy cases." The American Society of
Newspapers Editors has considered scaling down or eliminating its
Statement of Principles, but has not actually done so.

Such actions imply recognition of a distinction between respon-
sibility and accountability—a distinction Professor Louis Hodges
has argued is of great importance to the mass media:

Responsibility has to do with defining proper conduct; accountability with
compelling it. The former concerns identification; the latter concerns power.
The issue of responsibility is a practical one the answer to which can come
from an examination of society's needs to know and the press's abilities to
inform. The issue of accountability is a political one the answer to which
can come from an analysis of centers of power—government, media organi-
zations, public influence.

In practice, the two concepts are far less easily separated. A pri-
mary challenge is to make certain that issues of accountability do
not become the central determinant of responsibility—a challenge
at which neither the courts nor the media appear to have succeeded.

Professor Timothy Gleason has pointed out that newspaper pub-
lishers in the nineteenth century used the metaphor of the press as
a public "watchdog" in order to gain special protection for newspa-
pers in the common law of libel. But the concept implied obliga-
tions as well as rights. Today, the obligations may be catching up
with the rights.