Pure Opinion: Is *Ollman v. Evans* Making a Comeback?

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Courts have long agreed that "pure opinion"—statements that cannot be proven to be either true or false—cannot be actionable in a defamation case.[1] They have not agreed, however, on the analysis to be used in determining whether the challenged speech constitutes protected opinion or potentially actionable statements of fact. In 1984, in the influential case of *Ollman v. Evans*,[2] the U.S. Court of Appeals for the District of Columbia set out a series of factors to use in this analysis, and the *Ollman* factors quickly became an analytical tool used by courts across the country.

Just a few years later, however, in *Milkovich v. Lorraine Journal*,[3] the U.S. Supreme Court reworked the law of opinion and declined to focus on a list of factors. Instead, the Court condensed the analysis into requiring a determination of whether the challenged statements stated actual facts about the plaintiff that could be proven true or false, without providing specific guidance to the lower courts on how that crucial determination should be made. In *Milkovich*'s wake, courts have been grappling with this essential distinction ever since.

In *Lieberman v. Fieger*,[4] the Ninth Circuit confronted a defamation claim based on statements by a trial attorney that a California psychiatrist, among other things, was "mentally unbalanced," was "a terrible witness who was disliked by the jury," and had submitted a bill of $100,000 to a court that "laughed at her and gave her zero."[5] Opinion or fact? The Ninth Circuit, citing *Milkovich,*[6] found that these statements and others—notably, that the plaintiff was "Looney Tunes" and "nuts"—were not actionable. In deciding the case, the Ninth Circuit applied a "totality of the circumstances" analysis remarkably similar to the test that the D.C. Circuit had used for its pre-*Milkovich* analysis in *Ollman.*[7] The Ninth Circuit's use of the totality test in *Lieberman* raises the question of whether the *Ollman* analysis has in fact survived *Milkovich*, despite the *Milkovich* majority opinion's fairly pointed observation that pre-*Milkovich* authority was no longer good law.[8]

This article will focus on *Lieberman* as a case study of whether *Ollman* has been reinvigorated in the post-*Milkovich* era in a case involving not only colorful statements of opinion, but also potential assertions of fact. It also will summarize significant post-*Milkovich* cases in other judicial circuits to provide an overall snapshot of the current development of the law of opinion in the United States.

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Just the Facts, Ma'am

The infamous *Jenny Jones* litigation triggered the cycle of events that led to the Ninth Circuit's decision in *Lieberman.* In 1995, Michigan resident Jonathan Schmitz appeared on the *Jenny Jones* show to meet someone who had a secret crush on him. That person turned out to be another man, Scott Amedure. Several days later, Schmitz found a sexually suggestive note that Amedure had left at his home. In response, he purchased a shotgun and went to Amedure's house and killed him. The incident attracted massive national publicity and resulted in criminal and civil litigation. Schmitz was ultimately found guilty of second-degree murder.

After Schmitz's conviction, Amedure's family, represented by Geoffrey Fieger, filed a wrongful death action against the *Jenny Jones* program and its owner, Warner Brothers. A well-known and highly successful personal injury lawyer in Detroit, Fieger gained national attention as the result of his long-standing representation of Dr. Jack Kevorkian, the advocate of assisted suicide. After extended pretrial proceedings, a jury trial resulted in a $29 million verdict in favor of the Amedure family. The Michigan Court of Appeals reversed, finding that the TV show owed no duty to protect Amedure from the homicidal acts of a third party.[9] The Michigan Supreme Court declined review.

During the murder trial, Schmitz's attorney retained Dr. Carole Lieberman, a California-based psychiatrist. In a posttrial hearing, the attorney argued that Dr. Lieberman had played an important role in the jury's determination that Schmitz lacked the specific intent necessary for a first-degree murder conviction and requested that the court authorize $24,512 for Dr. Lieberman's fees. The court declined to do so.[10]

Following the criminal case, Fieger's firm contacted Lieberman about serving as an expert in the civil case, for which she received $2,500 as a retainer. After she was deposed, a dispute arose over payment, and Dr. Lieberman advised Mr. Fieger that she was "not willing to make plans to testify" at trial until she had been paid in full.[11] Mr. Fieger refused to pay the bill. As a result, Dr. Lieberman filed suit for breach of contract and fraud (*Lieberman v. Fieger*) and issued a press release entitled "Psychiatrist Sues Fieger for Fraud, Calls for Boycott of the Jenny Jones Show!" The press release mentioned her upcoming book on the Amedure case.[12]

From *Jenny Jones* to Court TV

Once the Amedure civil trial got under way, Mr. Fieger was interviewed by Court TV. He apparently had been served with Dr. Lieberman's breach of contract complaint at the courthouse on the day of the interview. During the interview, Mr. Fieger was asked about the Lieberman suit, and the Ninth Circuit recounted his response as follows:

> Fieger responded that he had already told Lieberman that "under no circumstances" would he allow her to testify. He added that Burdick, Schmitz's original defense attorney, had told him "in no uncertain terms" that Lieberman was "mentally unbalanced" and "a terrible witness who was disliked by the jury." Fieger cited Lieberman's upcoming book and accused her of hunting publicity, stating: "This thing is being broadcast worldwide and it brings out the Looney Tunes. And this is one of the Looney Tunes." He added that "in the

criminal case, she had the audacity to submit a bill of $100,000," but the court "laughed at her and gave her zero." He concluded by stating that the description "of the nuts growing on trees" in California was "not that far off."[13]

Based on the interview, Dr. Lieberman amended her complaint against Mr. Fieger to add a count of slander and intentional infliction of emotional distress.

Lieberman Reaches the Ninth Circuit

Mr. Fieger removed the case to the federal district court, which granted his motion for summary judgment. The Ninth Circuit affirmed. It began its opinion by observing that "the central question in this case is whether the allegedly defamatory statements made by Mr. Fieger were constitutionally protected opinions."[14] Echoing the *Milkovich* analysis, the court identified the threshold question to be "whether a reasonable factfinder could conclude that the contested statement implies an assertion of objective fact."[15] The court then applied the "totality of the circumstances" test from its prior decision in *Partington v. Bugliosi* to answer this question.[16] The test analyzes the following three factors:

> (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact,
>
> (2) whether the defendant used figurative or hyperbolic language that negates that impression, and
>
> (3) whether the statement in question is capable of being proved true or false.[17]

The Ninth Circuit found that the district court had properly applied these factors.

• Broad context: The "general tenor of the work" negated the impression that Fieger was making statements of objective fact because the dispute grew out of a larger legal battle that had already attracted a great deal of public media attention, the interview was designed to gauge Fieger's reaction to having just been served with the suit that day at the courthouse, and he had just been in a heated exchange with Court TV about its coverage of the Schmitz matter.

• Hyperbole: The Ninth Circuit approved the district court's analysis that Fieger's "colorful expression" negated any impression that he was stating objective facts. The district court took particular note of his frequent use of terms such as *Looney Tunes*, *crazy*, and *nuts* and found that a reasonable viewer would have seen his use of *mentally unbalanced* as "part of a stream of rhetoric."

• True or false? Finally, the Ninth Circuit approved the district court's finding that none of the statements contained "verifiable assertions."[18]

Thus, the Ninth Circuit summarized its ruling that "these alleged defamatory statements constituted an expression of opinion constitutionally protected by the First Amendment."[19]

Lieberman argued vigorously that some of the statements were quite factual, such as the incorrect statement that she had submitted a bill for $100,000 rather than $24,000, the statement that the judge had "laughed" at her request for payment, and the statement that she was "a terrible witness disliked by the jury." The Ninth Circuit addressed these arguments by noting that none of them was the basis for her slander claim, and, thus, the district court could not be faulted for not analyzing them. Moreover, the court ruled that they would not be actionable in any event because Dr. Lieberman had failed to demonstrate that submitting a bill for $100,000 would be defamatory even if incorrect.

As to the other two statements, the court found that they would "constitute protected opinion."[20] As to the court "laughing" at her fee petition, the Ninth Circuit found that the court indeed had denied it and that although the judge may not have "laughed at her," this was merely a "hyperbolic and colorful description of the actual outcome."[21] As to whether she had been a "terrible witness disliked by the jury," the court noted that Schmitz's defense lawyer had apparently made this very statement in pretrial proceedings in the district court (and had been sued by Lieberman for doing so), and that, in any event, it was "a statement of personal viewpoint, not an assertion of objective fact."[22] Therefore, Mr. Fieger's mere repetition of this statement also was protected opinion.

Ollman v. Evans Redux?

Can broader conclusions be drawn from the Ninth Circuit's decision? Perhaps it may be a decision unique to the facts of the case, reflecting only that the Ninth Circuit was not inclined to let one of the participants in this public brawl use the law of defamation against the other. Certainly Mr. Fieger's well-known flamboyant and caustic style and the interview itself suggest that he was engaging in the "lusty and imaginative expression" that even the majority in *Milkovich* was careful to protect.[23]

At another level, however, *Lieberman*'s "totality of the circumstances" analysis shows that the more things seem to change, the more they really stay the same. Modern opinion law began with the U.S. Supreme Court's observation in *Gertz v. Robert Welch, Inc.*, that "under the First Amendment, there is no such thing as a false idea."[24] In the years between the decisions in *Gertz* and *Milkovich*, a significant body of law had developed holding that opinion was constitutionally protected.[25] In the course of developing this law, the courts had employed different standards to ascertain whether a complained-of statement was fact or opinion. The best-known example at the federal circuit level was perhaps the D.C. Circuit's decision in *Ollman v. Evans.*[26]

Bertell Ollman was a New York University political science professor who brought his action over an Evans and Nowak column entitled "The Marxist Professor's Intentions." The column stated that Ollman was "an outspoken proponent of political Marxism," viewed in his profession as a "political activist" who used his classroom for political indoctrination.[27] The *Ollman* court held that "courts should analyze the totality of the circumstances in which the statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion."[28] The court used the following four factors to "evaluate the totality of the circumstances":[29]

1. Analysis of the common usage or meaning of the complained-of statement: Does it have a precise meaning, or is its meaning more indefinite and ambiguous?

2. Veracity of the statement: Is the statement capable of being objectively characterized as true or false?

3. Full context of the statement, that is, the entire article or column in which the statement appears: Does other language suggest that the complained-of statement has factual content?

4. Broad context or setting in which the statement appears: Is it the sort of writing or speech that signals to the reader or listener that what is being read or heard is opinion and not fact?[30]

There was at least some question as to whether *Ollman,* as well as the similar Eighth Circuit analysis in *Janklow v. Newsweek, Inc.,*[31] and Fourth Circuit analysis in *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.,*[32] survived the Supreme Court's decision in *Milkovich.* This was, perhaps, prompted

in some part by the following statement from the majority opinion in *Milkovich*:

> [Respondents] propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) be considered in deciding which is which. But we think the "'breathing space'" which "'freedoms of expression require in order to survive,'" *Hepps*, 475 U.S. at 722 (quoting *New York Times*, 376 U.S. at 272), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.[33]

Justice Brennan's dissent observed that the circumstances to be scrutinized by a court in determining whether a statement purports to state or imply facts "are the same indicia that lower courts have been relying on for over the past decade or so to distinguish between statements of fact and statements of opinion," and he emphasized that this was exactly the analysis that the majority had used in determining that the statements at issue in *Milkovich* did imply actual facts about the plaintiff.[34] Nevertheless, the majority opinion seemed quite clear: pre-*Milkovich* decisions were "mistaken," and their analysis was not to be relied upon. It is reasonable to ask, however, whether the Ninth Circuit's "echo" of *Ollman*'s "totality of the circumstances" in *Lieberman* some twelve years after *Milkovich* suggests that *Ollman* survives in the Ninth Circuit or elsewhere.

Ironically, the Ninth Circuit did not appear to take its totality of the circumstances test directly from *Ollman.* The phrase was first used in the Ninth Circuit decision in *Underwager v. Channel 9 Australia*, which observed that "to determine whether a statement implies a factual assertion, we examine the totality of the circumstances in which it was made."[35] *Underwager* then applied the three factors later used in *Lieberman.*

These three factors were established in the Ninth Circuit's earlier decision in *Unelko Corp. v. Rooney*,[36] which had made no reference to either "totality of the circumstances" or to *Ollman.* In fact, the *Unelko* court observed that the (pre-*Milkovich*) authority relied on by the district court "ha[s] . . . been effectively overruled by the Supreme Court's recent opinion in *Milkovich.*"[37] Nevertheless, a comparison of the four-prong *Ollman* test with the three-prong *Lieberman* test suggests no essential difference between the two. Both analyses evaluate the language used, the context in which it is used, and whether the statement can be proven true or false. Thus, *Ollman* appears to be alive and well in the Ninth Circuit.

In the Other Circuts . . .

Phantom Touring, Inc. v. Affiliated Publications

Shortly after *Milkovich,* the First Circuit was confronted in *Phantom Touring, Inc. v. Affiliated Publications*[38] with defamation claims over articles in the *Boston Globe* comparing the plaintiff's *Fake Phantom* musical comedy with the well-known *Phantom of the Opera* musical by Andrew Lloyd Webber. In discussing *Milkovich,* the First Circuit observed that "while eschewing the fact/opinion terminology, *Milkovich* did not depart from the multifactored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and non-actionable opinion."[39]

For this proposition, the court relied on *Ollman* as well as its own prior decision in *McCabe v. Rattiner*,[40] which had adopted a "totality of the circumstances analysis." Relying on these factors, the First Circuit found statements that the production was a "rip off," a "scandal," a "snake oil job," and "fake" and "phony" were not actionable because the words themselves admitted various interpretations.[41] In contrast, the court found that statements suggesting that the plaintiff was deliberately misleading the public could be sufficiently factual to be proven true or false. However, in applying the context factor, the court found that the sum effect of the "format, tone and entire content of the articles" made it unmistakably clear that the author was expressing a point of view only.[42]

Garrett v. Tandy Corp.

In 2002, the First Circuit, although not relying on "totality of the circumstances" or citing *Ollman* or *Phantom Touring,* applied the same analysis in a nonmedia case. In *Garrett v. Tandy Corp.,*[43] the plaintiff had been the only African-American customer at a Radio Shack store in Brunswick, Maine, when a computer apparently disappeared. After he left, the store manager discovered the loss and reported to the police his suspicions that the plaintiff had stolen the computer. He apparently made no police reports about any of the white customers who had been in the store at the time.

The plaintiff's complaint alleged civil rights violations and defamation. The district court granted Radio Shack's motion to dismiss. Among other defenses to the defamation claim, the store argued that the manager's statement that he suspected the plaintiff was a protected expression of opinion.[44] The appellate court first analyzed the word *suspect* and found that it could have any number of meanings, from suspecting that someone committed a crime to "predicting" that "the Patriots will win the Super Bowl next year." Holding that "context makes the difference," the First Circuit remanded to the district court for further evaluation of the context of the statement.[45]

Moldea v. New York Times Co.

In *Moldea v. New York Times Co.* (*Moldea II*),[46] the D.C. Circuit reversed its prior decision in *Moldea*[47] that the context of a complained-of statement was irrelevant in a *Milkovich* analysis.[48] Rereading *Milkovich* and relying on the First Circuit's decision in *Phantom Touring,* as well as its own prior decision in *Ollman,* the court in *Moldea II* concluded that "we are on reflection convinced that *Moldea* [*I*] erred in assuming that *Milkovich* abandoned the principle of looking to the context in which speech appears."[49] The court went on to note that book reviews such as were involved in *Moldea* enjoyed a "long and rich history in our cultural and legal traditions" and that a critic, though not without limits, "must be given the constitutional 'breathing space' appropriate to the genre."[50]

Weyrich v. New Republic, Inc.

Similarly, in *Weyrich v. New Republic, Inc.*, the D.C. Circuit, relying on its decision in *Moldea II* (and thus *Ollman* as well) and *Milkovich,* emphasized the long-standing protection for rhetorical hyperbole and imaginative expression as well as the importance of context—"the court must consider the statement in context."[51] The *New Republic* had published a biting political commentary about the plaintiff entitled "Robespierre of the Right—What I Ate at the Revolution." It offered a view of Mr. Weyrich's life as a leading member of the conservative movement. Analyzing the language used and the context, the court found that the statement that the plaintiff "began to suffer bouts of pessimism and paranoia" following the 1981 election was certainly pejorative, but that *paranoia* was clearly not used in the clinical sense and that *paranoia* has taken on a less-than-definitive popular meaning.[52] Thus, the court concluded that the

use of *paranoia* is "rhetorical sophistry rather than a verifiable fact."[53] Further, the court emphasized context in observing that the statement had appeared in an article in a magazine that was known for its political commentary.

However, language and context will only take the publisher so far. The court remanded the case for further proceedings on several of the verifiable anecdotes, including statements that in one particular instance the plaintiff "snapped," erupted in a "volcano of screaming," "frothed at the mouth," and sent a letter to someone's fiancée suggesting that he was unfit for marriage.[54] "[I]n other words," the court warned, "an article's 'political context' does not indiscriminately immunize every statement contained therein."[55]

Biospherics, Inc. v. Forbes, Inc.

In *Biospherics, Inc. v. Forbes, Inc.,* the magazine's column "Streetwalker" featured a comment that "investors will sour on Biospherics when they realize that Sugaree [the company's sugar-substitute product] isn't up to the company's claims."[56] In analyzing *Forbes*'s opinion defense, the Fourth Circuit observed that *Milkovich* had specifically rejected any multifactor test such as that used in *Ollman.*

Little practical difference can be found, however, between the analysis then used by the Fourth Circuit and that used in *Ollman.* Noting that the challenged statements could be reasonably interpreted as stating or implying actual facts, the court nevertheless found that "the context and general tenor of the article indicate that the piece contains constitutionally protected subjective views and not factual statements."[57] A large part of the court's opinion seems to have been based on its finding that the column had a "breezy" tone, was "Streetwalker," and was entitled "Sweet Talkin' Guys." The court concluded that "ultimately any reasonable person reading 'Sweet Talkin' Guys,' would recognize, based on the tenor, language, and context of the article, that the challenged statements contain a subjective view, not a factual statement."[58]

Flam v. American Association of University Women

Of particular interest in the Second Circuit is *Flam v. American Association of University Women.*[59] In a directory of attorneys willing to consult on possible gender discrimination claims, published by the American Association of University Women (AAUW), the plaintiff was described as an "ambulance chaser with interest only in slam dunk cases."[60] In holding this description was actionable, the court relied solely on a *Milkovich* analysis and did not refer to pre-*Milkovich* opinion law. However, as with the *Ollman* analysis, the content of the statement was crucial. The court rejected the defendant's arguments that the terms were inherently informal and that imprecise terms of slang were, thus, purely subjective. Although the court previously emphasized context in "general terms," such an approach worked against the defendant this time. The court found that the AAUW's directory of participating attorneys was a particularly "fact-laden" publication.[61]

McClure v. American Family Mutual Insurance Co.

The Eighth Circuit's most recent pronouncement involved an insurance company's statements relative to two agents whose contracts were terminated by the company after those agents lobbied the legislature to enact a bill limiting their employer's ability to market certain insurance products. In *McClure v. American Family Mutual Insurance Co.*, the court held that the statements, to the effect that the agents engaged in "disruptive and disloyal activity over a period of years" and that the agents' conduct was "totally unacceptable by any business standard," were not defamatory but instead were "the company's characterizations of activity that [the agents] had undertaken in connection with [their] lobbying efforts."[62] In arriving at this conclusion, the court observed that Minnesota follows the four-factor test set forth in *Janklow*: "(1) specificity and precision [of the statement]; (2) verifiability; (3) literary and social context in which it was made; and (4) public context."[63] This test was also based on *Ollman.*

Ollman Is Alive and Well

When Geoffrey Fieger went on one of his tirades against Dr. Lieberman, he was probably unconcerned about the impact it could have on the law involving speech claimed to be "opinion." Presumably, most courts would have no difficulty finding these statements not actionable. But for less obvious cases that require a more demanding scrutiny of the "totality of the circumstances," the original factor analysis from *Ollman,* modified slightly in the Ninth Circuit, seems to be making a comeback.

Endnotes

1. *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
2. 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1127 (1985).
3. 497 U.S. 1 (1990).
4. 338 F.3d 1076 (9th Cir. 2003).
5. *Id.* at 1079.
6. 497 U.S. at 14–21.
7. *Lieberman,* 338 F.3d at 1080; *Ollman*, 750 F.2d at 950.
8. *Milkovich,* 497 U.S. at 14–21.
9. *See* Graves v. Warner Bros., 656 N.W.2d 195, 199–203 (Mich. Ct. App. 2003).
10. *See* Lieberman v. Fieger, 338 F.3d 1076, 1078 (9th Cir. 2003).
11. *Id.*
12. *Id.*
13. *Id.* at 1078–79.
14. *Id.* at 1078.
15. *Id.* at 1079.
16. 56 F.3d 1147, 1153 (9th Cir. 1995)
17. *See Lieberman,* 338 F.3d at 1080.
18. *Id.*
19. *Id.*
20. *Id.* at 1081.
21. *Id.*
22. *Id.* (quoting Partington v. Bugliosi, 56 F.3d 1147 (9th Cir. 1995)).
23. Milkovich v. Lorraine Journal, 497 U.S. 1, 17 (1990).
24. 418 U.S. 323 (1974).
25. *See* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS 4-12 (¶ 4.2.3.1) (3d ed. 2003).
26. 750 F. 2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).
27. *Id.* at 987.
28. *Id.* at 979.
29. *Id.*
30. *See id.*
31. 788 F.2d 1300 (8th Cir. 2000).
32. 829 F.2d 1280 (4th Cir. 1987).
33. 497 U.S. 1, 17 (1990).
34. *Id.* at 23 (Brennan, J., dissenting).
35. 69 F.3d 361, 367 (9th Cir. 1995).
36. *See* 912 F.2d 1049 (9th Cir. 1990).
37. *Id.* at 1053.
38. 953 F.2d 724 (1st Cir. 1992)
39. *Id.* at 728.
40. 814 F.2d 839 (1st Cir. 1987).
41. *Phantom Touring*, 953 F.2d at 726.
42. *Id.* at 730.
43. 295 F.3d 94 (1st Cir. 2002).
44. *See id.* at 96–97.
45. *Id.* at 105.
46. Moldea v. New York Times Co., 22 F3d 310 (D.C. Cir. 1994) [hereinafter *Moldea II*].
47. Moldea v. New York Times Co., 15 F.3d 1137 (D.C. Cir. 1994).
48. *Moldea II*, 22 F3d at 310.
49. *Id.* at 315.
50. *Id.*

51. 235 F.3d 617 (D.C. Cir. 2001).
52. *Id.* at 625.
53. *Id.*
54. *Id.* at 627.
55. *Id.* at 626.
56. 151 F.3d 180, 180 (4th Cir. 1998)
57. *Id.* at 184.
58. *Id.* at 185.
59. 201 F.3d 144 (2d Cir. 2000).
60. *Id.* at 147.
61. *Id.*
62. 223 F.3d 845, 853 (8th Cir. 2000).
63. Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302–03 (8th Cir. 1986); *accord McClure,* 223 F.3d at 853 (citing Geraci v. Eckankar, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995)).