IN THE MATTER OF:

THE LOEWEN GROUP, INC. and
RAYMOND L. LOEWEN

v.

THE UNITED STATES OF AMERICA

STATEMENT OF STEPHAN LANDSMAN

1. I am the Robert A. Clifford Professor of Tort Law and Social Policy at DePaul University College of Law in Chicago, Illinois. I am a 1972 graduate of the Harvard Law School and the author of four books and monographs as well as more than 40 scholarly articles, many of them concerned with the history and functioning of adversarial systems of justice. I teach courses regarding the law of evidence and torts as well as the use of empirical tools to analyze the operation of the trial process. I have also, throughout my career, been active as an advocate, having appeared in a winning cause before the Supreme Court of the United States and numerous other cases in both state and federal courts. A copy of my resume is attached hereto as Exhibit "A". My opinion in this matter will rely on the scholarly works cited in my resume unless otherwise noted.

2. I have been retained by the United States of America to give my opinion regarding the propriety of the proceedings in *Jeremiah J. O'Keefe, Sr., et. al., v. The Loewen Group, Inc., et al.*, Civil Action No. 91-67-423 (hereinafter *O'Keefe v. Loewen Group*), heard in the Circuit Court of the First Judicial District of Hinds County, Mississippi, located in Jackson, the state capitol of Mississippi.

In preparing this Statement I have relied, primarily, on the transcript of the proceedings in *O'Keefe v. Loewen Group*, the record of pre-trial and post-trial proceedings in the aforementioned case, and various scholarly materials appearing in my resume or cited in the body of this Statement.

In brief, it is my opinion that the proceedings in *O'Keefe v. Loewen Group* were conducted in a manner consonant with the dictates of adversarial justice and that there is a sound basis to conclude that such difficulties as were encountered by the Loewen Group were the result of its lawyers' strategic choices or miscalculations.

3. The Loewen Group has been intensely critical of a wide variety of aspects of the Mississippi justice system including, particularly, the activities of its trial judges, jurors, counsel and appellate courts. Indeed, Loewen has gone so far as to argue that the operation of these mechanisms constituted "a travesty of the elementary notions of justice" (Memorial of the Loewen Group, Inc., Jennings Opinion p. 5)*, and a "complete denial of justice." (Memorial of the Loewen Group, Inc., Neely Affidavit p. 2). In addition, the Loewen Group has been dismissive or sharply critical of various aspects of Mississippi's substantive law, including the tort law applicable in this case and the allowance of a claim for punitive damages.

It will be the first objective of this Statement to explore some of the underlying values and assumptions justifying reliance on the challenged system and substantive law.

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*Materials appended to the Memorial of the Loewen Group, Inc., will be cited by reference to the author's name and the internal pagination used therein.

In light of the Loewen Group's claim that it was treated unfairly, the second object of this Statement will be to explore what sorts of mechanisms exist to address allegations of prejudice and unfairness as well as whether (and if so, to what extent) these mechanisms were utilized in *O'Keefe v. Loewen Group*. Finally, in light of the trial record in this matter, an effort will be made to assess whether a substantial evidentiary basis existed upon which a rational jury could reach the decision made in *O'Keefe v. Loewen Group*.

4. The courts under scrutiny in this matter, as is the case with virtually all American courts, rely on a robustly adversarial approach to adjudication. The fundamental premise of this approach is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base a resolution of a litigated dispute that is acceptable both to the parties and to society.

This approach first grew up in England and was firmly established no later than the beginning of the eighteenth century and, probably, a good bit earlier. It is intimately associated with notions grounded in classic English liberalism emphasizing the need to respect and empower individual litigants and to allow the workings of market and market-like forces in the adjudicatory process as well as to assure that broadly shared communal values are reflected in the activities of the courts.

The adversary system was embraced in the British colonies in America from an early date. The adversarial orientation of America's courts was heightened as a consequence of the Revolutionary War and later social developments. Today, America

utilizes the most robustly adversarial system to be found anywhere in the world. As a consequence, no other court system cedes litigants as much autonomy and responsibility. A robustly adversarial system along American lines will have the following key characteristics:

(a) commitment to utilize the most neutral and passive factfinder available,

(b) reliance on proactive litigants who are solely responsible for the gathering and presentation of proof in the courtroom, and

(c) dependence on a highly structured set of forensic rules to regulate the clash of the adversaries.

5. To insure the most neutral and passive decision maker possible, the American adversary system has strongly embraced trial by jury since jurors, because of their numerosity, breadth of experience, and vetting pursuant to a number of screening devices, are unlikely to bring into court a shared set of views or biases likely to unite them in favor of or against one litigant.

The jury is woven into the fundamental fabric of the American Constitution. The right to a jury in criminal cases is guaranteed by both Article III and the Sixth Amendment. In civil cases the Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." There is significant evidence that the Constitution would not have been ratified had these two amendments not been included in the Bill of Rights.

As is the case in virtually every other State, Mississippi guarantees the right of jury trial in civil and criminal matters. Mississippi's guarantees in this regard appear in Article 3 § 31 of the Constitution of the State of Mississippi which provides: "the right of trial by jury shall remain inviolate . . . ." Both the Mississippi Supreme Court and Legislature have frequently reiterated the seminal importance of trial by jury. *See*, e.g., *Wells v. Panola County Bd. of Ed.*, 645 So. 2d 883, 898 (Miss. 1994) (right to jury trial as at common law preserved); Miss. Code Ann. § 9-3-63 (rules prescribed by Supreme Court shall preserve right of trial by jury as at common law and as declared in Mississippi and United States Constitutions). Rule 38 of the Mississippi Rules of Civil Procedure ("Jury Trial of Right") declares:

> (a) Right Preserved. The right of trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate.
>
> (b) Waiver of Jury Trial. Parties to an action may waive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived and requesting that the action be tried by the court. The court may, in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.

The judge, too, in an adversarial system, plays a fundamentally passive role. He or she is charged to preserve his or her own neutrality and safeguard the neutrality and passivity of the jury. These demands require that the judge take pains to leave the case in the hands of the parties. "[A]n adversary system assumes that competing litigants are capable of protecting their respective interests by presenting their cases to the trier of fact in an effective way. . . ." Stephen Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VIRGINIA LAW REVIEW 1, 7 (1978). The judge ought to refrain

from excessive involvement in the prosecution of the case. *Id. passim.* Mississippi has taken these injunctions seriously. In fact, Mississippi prohibits trial judges from summing up. Miss. Code Ann. § 11-7-155. Mississippi requires that its judges exercise substantial restraint and allow *counsel* to develop their cases as they deem appropriate. *See West v. State*, 519 So. 2d 418 (Miss. 1988) (improper questioning and commentary by trial judge required reversal of murder conviction); *Nichols v. Munn*, 565 So. 2d 1132 (Miss. 1990) (same in personal injury action). It is the attorney's duty to make the record and failure to do so will, in all but the most extraordinary of situations, lead to an adverse determination on appeal.

6. Placing the development of litigation in the hands of the parties means that counsel selected to represent each party will have substantial autonomy and authority in the preparation and prosecution of the case. It also means that counsels' strategic choices and courtroom conduct will often have a determinative impact on the outcome of proceedings. Parties will often stand or fall on the basis of the performance of their lawyers. "Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to persuade and that his proofs may be rejected as inadequate." Joint Conference of the ABA and AALS, *Report on Professional Responsibility*, 44 A.B.A.J. 1159, 1160 (1958).

In the present case, the Loewen Group, a wealthy corporate entity, used considerable resources to employ a diverse and highly credentialed trial team including:

(1) Richard Sinkfield, an African-American trial lawyer from a leading Atlanta, Georgia, law firm (Rogers & Hardin). Mr. Sinkfield specialized in complex civil

litigation and had held a variety of positions of prominence in the Georgia Bar (Member of the Board of Governors) and the American Bar Association.

(2) James Robertson, a white Mississippi trial lawyer who graduated from the Harvard Law School and served as a Justice of the Supreme Court of Mississippi from 1983 to 1992.

(3) Edward Blackmon, an African-American Mississippi trial lawyer of local prominence and a Mississippi State legislator.

(4) David Clark, a white Mississippi trial lawyer from a leading Mississippi law firm (now with Lake Tindall, then with Wise Carter Child & Caraway). Mr. Clark specialized in complex civil litigation and had held important positions in the Mississippi Bar (Chair, Litigation Section) and the American Bar Association.

(5) Robert Johnson, an African-American Mississippi trial lawyer of local prominence and a Mississippi State legislator.

The team representing the O'Keefe interests also included a number of distinguished lawyers, several of whom were African-American. Of O'Keefe's lead counsel, Willie Gary, Loewen's counsel, Richard Sinkfield said:

> "I am one of Mr. Gary's greatest fans. Before I came to this courtroom and before I met him personally, I wrote him a letter congratulating him on one of his successes that I saw in a newspaper article that he had achieved.* I told him in that letter that I hoped to get to see him try a case. When I got here, I reminded him of it and told him I didn't expect to see it with me having to defend it . . . He is a hero . . ."

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*Grammatical errors in trial transcript quotations will not be corrected or marked with a "[sic]". The rigors of trial and difficulty of transcription render such notations inappropriate.

(Transcript p. 1005-1006)*

7. One of the products of the adversarial approach to justice is a significant body of judge-developed or common law. Two categories of such law were applicable in the present case: first, that regulating contractual relations and, second, that addressing tortious injury.

The Loewen Group has conceded the applicability of contract principles in the present case but has avoided serious discussion of the tort claims pressed by O'Keefe. It has described the Mississippi litigation as "an ordinary commercial dispute." (Memorial of the Loewen Group, Inc., p. 53), a "garden-variety contract dispute" (Memorial of the Loewen Group, Inc., p. 115), and "a relatively straight-forward and routine breach of contract case." (Memorial of the Loewen Group, Inc., Jennings Opinion p. 13).

The Loewen Group's assessment notwithstanding, the following tort claims were vigorously pursued by O'Keefe: (1) "intentional tort arising out of contract," (2) "interference with contract and proper expected or prospective business advantage," and (3) "fraud either by misrepresentation or concealment." (Transcript p. 5477) The first and third of these were accompanied by claims for "emotional distress" (Transcript p. 5478), and a finding of liability with respect to either could serve, under Mississippi law, as the basis for an award of punitive damages.

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*Citations to the transcript in *O'Keefe v. Loewen Group* will note that fact and provide a citation to the relevant page or pages.

Intentional interference with contractual relations and with prospective advantage are widely recognized and long accepted torts. A basic formulation of the first of these appears in Section 766 of the Second Restatement of Torts. It provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

This tort is concerned with the protection of business relationships and has been expanded continuously over the course of the last 150 years. It is recognized across the United States (*see, e.g., Globe and Rutgers Fire Insurance Co. v. Fireman's Fund Fire Insurance Co.*, 97 Miss. 148 (1910)) and "[t]he present English law gives it full acceptance, as to all intentional interferences with any type of contract." W. Page Keeton et al. (eds.), PROSSER AND KEETON ON THE LAW OF TORTS, (5th ed. 1984), p. 980 [hereinafter PROSSER] (for Mississippi's approach to tortious interference with contract *see Cenac v. Murry*, 609 So. 2d 1257 (Miss. 1992)).

The tort regarding interference with prospective advantage "has run parallel to that for interference with existing contracts." PROSSER at p. 1008. It has existed, in one form or another, since the fifteenth century, if not earlier. The Second Restatement of Torts formulation appears in Section 766B and provides:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> > (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

Mississippi law on this matter draws heavily on PROSSER and is described in *Cenac v. Murry*, *supra*.

The tort of fraud, most often referred to as "deceit" or "misrepresentation," is of ancient vintage. Its primary concern is with the ethics of bargaining. The tort of fraud focuses on the "intent to deceive, to mislead, to convey a false impression." PROSSER at p. 741; *see also General Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 269-70, (Miss. 1999) (discussing elements of a successful fraud claim). As set forth in the Second Restatement of Torts, Section 525, fraudulent misrepresentation or deceit is defined as follows:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

The measure of damages for fraud is particularly expansive, encompassing not only losses arising from the deceit but "consequential damages, such as personal injuries, damage to other property, or expenses to which [the plaintiff] has been put . . ." PROSSER at p. 769. As the PROSSER text notes: "If the deception is found to have been deliberate or wanton, punitive damages may be recovered . . ." *Id.*

8. In light of O'Keefe's trial evidence, which stressed allegations of lying and improper business tactics, tort law had particular salience in *O'Keefe v. Loewen Group*. Tort law had heightened salience for another reason as well, to wit that the business at issue involved the handling of the dead and transactions with the bereaved. Mississippi and,

indeed, all of America, has shown itself to be particularly sensitive to any matter concerning the treatment afforded mortal remains and grieving families. Tort-based protections have been extended in a broad array of funerary contexts. The true scope of concern is only hinted at in Section 868 of the Second Restatement of Torts which declares:

> One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.

Causes of action in tort have been recognized for mistreatment of a corpse, for mutilation of a corpse, for disturbance of a burial site, for interference with a burial, and for withholding a body to name but a few. *See, e.g., Arnold v. Spears*, 63 So. 2d 850 (Miss. 1953). Moreover, societal concern has been expressed in criminal statutes including prohibitions of unlawful autopsies, abuse of corpses, and desecration of cemeteries. *See, e.g.*, Miss. Code Ann §§ 41-39-1, 3, 5 (handling of dead bodies, parts and fetal tissue). All of this bespeaks a deep and abiding concern with the handling of the dead and their loved ones as well as a communal consensus that both tort and criminal remedies are appropriate when such concerns are ignored.

9. As already noted, Mississippi law provides that two of the tort claims made in *O'Keefe v. Loewen Group* -- intentional tort arising out of contract and fraud -- carry with them the possibility of an award of punitive damages. In so providing Mississippi stands with a majority of other American jurisdictions. *See* LINDA SCHLEUTER and KENNETH REDDEN, PUNITIVE DAMAGES, (4th ed. 2000) p. 390 ("A majority of jurisdictions allow punitive

damages for breach of contract that constitutes an independent tort.") [hereinafter PUNITIVE DAMAGES].

Punitive damages, like tort and contract principles, are a product of the common law. They were formally recognized in a pair of mid-eighteenth century cases involving the activities of the publisher and radical politician, John Wilkes. *See Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763). The court in *Wilkes v. Wood* declared:

> [A] jury [has] it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself.

Wilkes v. Wood at 98 Eng. Rep. 498-99.

This broad view was embraced in the United States no later than 1851, when the United States Supreme Court stated:

> It is a well-established principle of the common law, that . . . a jury may inflict [punitive] damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. . . . By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. . . . [An award of punitive damages] has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case . . . [and] the degree of malice, wantonness, oppression, or outrage of the defendant's conduct. . . .

Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

As reported in 1992 by a Justice of the Alabama Supreme Court, 47 of the 50 American States recognize the propriety of punitive awards although there is a significant diversity of approaches to administration. *See* Justice Janie Shores, *A Suggestion for*

Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls, 44 ALA L. REV. 61, 96-142 (1992). The American approach is typified by Section 908(1) of the Second Restatement of Torts:

> Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

The American embrace of punitive damages is to be contrasted with developments in England where the availability of punitive or "exemplary" damages has been dramatically curtailed, most particularly because of the decision in *Rookes v. Barnard*, 1 ALL E.R. 367 (A.C. 1964). It should be noted, however, that the *Rookes* decision has been the target of substantial criticism and, in December of 1997, a Law Commission Report urged reforms designed to override what were deemed excessive restrictions on exemplary damages. *See* Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (December 16, 1997). The work of the Law Commission has begun to be cited in reported cases. *See*, e.g., *Kuddus v. Chief Constable of Leicestershire* (Court of Appeal Civ. Div. Feb. 10, 2000) (LEXIS, UK Library, ALLCAS file), but the government has yet to seek legislative change regarding the matter.

In recent years, the United States Supreme Court has taken a series of steps to insure that punitive damages decisions are made in a manner consonant with due process. Mississippi courts have reviewed the State's approach to punitive damages and found it constitutional. *See Ivy v. GMAC*, 612 So. 2d 1108 (Miss. 1992); *Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857 (Miss. 1994). In 1993 Mississippi revised its procedures with

respect to the awarding of punitive damages by adopting Section 11-1-65 of the Mississippi Code. This Section, *inter alia*, requires that:

> Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

It also establishes a bifurcated trial procedure and states that:

> In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

It should be noted, however, that there is substantial doubt whether Section 11-1-65 applies in *O'Keefe v. Loewen Group,* first, because the case was commenced before the adoption of the Section and, second, because the enactment stipulates: "The provisions of Section 11-1-65 shall not apply to: (a) Contracts." This language has been interpreted by Mississippi courts as excluding a number of cases involving contract-based torts and fraud. *See American Funeral Assurance Co. v. Hubbs*, 700 So. 2d 283 (Miss. 1997) reh'g denied, 700 So. 2d 331 (Miss. 1997). In the *Hubbs* case, the court recognized the propriety of applying common law punitive damages rules rather than those set forth in the statute.

10. In addition to their tort and contract claims, the plaintiffs in *O'Keefe v. Loewen Group* pursued a number of claims under Mississippi statutory law. Among other things, these claims focused on actions in restraint of trade in violation of Mississippi Code Title 75 Chapter 21 (Trusts and Combines in Restraint or Hindrance of Trade) and unfair methods of competition or deceptive trade practices in violation of Title 75 Chapter 24 (Regulation of Business for Consumer Protection). On these matters, presented under the rubric of "monopolization", the trial judge instructed the jury:

> If you find by a preponderance of the evidence that the defendants have monopolized or attempted to monopolize the management or control of a class or classes of business within Mississippi, and if you further find that the actions of the defendants were carried out and committed for purposes and with the specific intent of injuring or damaging the plaintiffs' business and not for any honest or competitive purpose or legitimate reason, and if you further find that the defendants carried out predatory or exclusionary actions against the plaintiffs, that is actions calculated and intended to destroy plaintiffs' business, and if you further find that the predatory or anti-competitive actions of the defendants proximately contributed to the cause of damages of the plaintiffs, it will become your sworn duty as jurors to find for the plaintiffs as against the defendants on plaintiffs' anti-monopoly claims.

(Transcript pp. 5517-18).

It is beyond the scope of this Statement to analyze these matters in any detail except insofar as to note that these claims were vigorously pressed by O'Keefe and monopolization violations were found by the jury. The key witness with respect to many of the monopoly-related questions was O'Keefe's expert, Dale Espich. (Transcript pp. 1789-1872). He described Loewen's domination of various Mississippi markets (e.g. Transcript p. 1837), Loewen's persistent practice of raising prices (most extremely in dominated markets, as demonstrated by various Loewen filings with the United States

Federal Trade Commission) (e.g. Transcript pp. 1839-40), Loewen's tendency to "cluster" its purchases of funeral homes to dominate markets (e.g. Transcript pp. 1845-46), and Loewen's success in excluding O'Keefe from the largest Mississippi market -- Jackson (e.g. Transcript p. 1867). This testimony was not challenged by Loewen whose counsel asked a total of 6 questions on cross-examination. (Transcript pp. 1868-69).

On matters like monopolization, that present mixed questions of private and public concern, the State of Mississippi, in recent years, has become a leader in innovative strategies to serve the public interest. The best example of this point involves then Attorney General Mike Moore's utilization, in 1994, of the private bar to press an "unprecedented lawsuit" on behalf of the state's taxpayers to recoup Mississippi's share of Medicaid costs expended to treat those injured by the smoking of cigarettes. *See* Graham Kelder, Jr. and Richard Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STANFORD LAW & POLICY REVIEW 63, 73 (1997). This case eventually served as the model for litigation in 46 states and led to the fashioning of a $206 billion settlement between the tobacco companies and the states.

11. As is the case in every sophisticated legal regime, the adversary system provides mechanisms to deal with the possibility that one side or the other may become the object of adjudicator prejudice or animosity. Of particular relevance in the present proceedings are a number of mechanisms available at the pretrial and trial stages of litigation. At the pretrial stage parties are afforded a range of means to probe for and eliminate juror prejudice. If an entire community is biased against a litigant a change of venue may be sought. If a particular jury panel (venire) is contaminated a change of venire may be

requested. Assuming the fundamental neutrality of the venire as a whole, counsel are provided a series of tools to address the possibility of individual juror prejudice. Counsel and/or the court may question each juror in a process generally known as voir dire. If any juror candidate is demonstrated to pose a significant risk of prejudice he or she may be struck for cause. Even when no basis for removal is demonstrated in the voir dire questioning each litigant is permitted a number of peremptory strikes to remove juror candidates who appear to a litigant to pose some risk. Pursuant to the United States Supreme Court decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) and its civil analogue, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), no juror candidate may be struck by a litigant in an effort to advance a discriminatory objective based on the race, sex or national background of the potential juror.

Before trial, counsel for the opposing parties are provided an opportunity to alert the court to the risk of prejudice posed by any specific piece of evidence or category of evidentiary materials. Counsel may make a motion in limine requesting that the court prohibit the introduction of the biasing material at trial.

Once the trial has begun counsel have a variety of tools available to deal with prejudice. First, counsel may object to the introduction of such materials. Indeed, the rules of evidence require that counsel object whenever such materials are offered so that the jury may be protected and any error may be corrected without the need for a costly and time-consuming retrial. A claim of error on appeal may not be advanced, in most cases, if no objection has been made. As MCCORMICK ON EVIDENCE has observed:

> If the administration of the exclusionary rules of evidence is to be fair and workable, the judge must be informed promptly of contentions that evidence should be rejected, and the reasons supporting the contentions. The burden is placed on the party opponent, not the judge. The general approach, accordingly, is that a failure to object assigning the ground to a proffer of evidence at the time the offer is made, is a waiver upon appeal of any ground of complaint against its admission.

John Strong et al.(eds.), MCCORMICK ON EVIDENCE (5th ed. 1999), p. 84. In addition to objecting counsel may, if prejudicial material is aired, request that the jury be instructed to disregard it and may also request that the jury be instructed regarding such additional matters as will serve to cure any problems posed by such exposure as has occurred. In sufficiently serious cases counsel may move for a mistrial, thereby declaring counsel's contention that such serious prejudice has occurred that curative steps at trial will be unavailing. Of course, counsel may use a number of other tools to address the problem of prejudice including cross-examination of witnesses offered by the opposing side and/or affirmative evidence on behalf of the party allegedly injured by prejudicial materials. At the conclusion of the trial counsel may request that the jury be instructed in a manner that negates any prejudice that has been stimulated during the trial presentation.

In keeping with adversarial reliance on advocates to manage the litigation process, each side's lawyers are charged with responsibility to initiate the use of these protective mechanisms. Failure to do so will almost always be treated as a tactical choice binding on the party represented and a waiver of any claim on appeal.

12. The Loewen Group has claimed that the principal cause of the alleged denial of justice it suffered was anti-Canadian bias on the part of the jurors who decided *O'Keefe v. Loewen Group*. As Loewen has put it: "the verdict and judgment were the product of anti-

Canadian bias deliberately fomented by counsel for O'Keefe." (Memorial of the Loewen Group, Inc. pp. 4-5) Its expert, Richard Neely, in his Affidavit declared: "I conclude to a reasonable degree of jurisprudential certainty that the Defendants in *Jeremiah J. O'Keefe, Sr. et. al. v. The Loewen Group, Inc., et al*, were subjected to invidious discrimination because they were Canadians and were subjected to a complete denial of justice as that term is traditionally used in international law." (Memorial of the Loewen Group, Inc., Neely Affidavit p. 3).

In light of this claim I have examined the pre-trial and trial record of the proceedings in *O'Keefe v. Loewen Group,* to determine whether Loewen's counsel used the various mechanisms available to address perceived problems of anti-Canadian bias arising before or during the trial. That record demonstrates the following:

(1) No change of venue motion was sought regarding this or any other matter.

(2) No challenge to the venire was made regarding this or any other matter.

(3) In voir dire plaintiff's counsel made the following reference to the Canadian origins of the Loewen Group:

> Let me just say this: Ray Loewen, Ray Loewen is not -- that group is from Canada, and y'all remember the question you had on the questionnaire about you've got to give anybody a fair trial. Just because the group is from Canada, you still have to give them a fair trial. Do y'all agree that if they come down to Mississippi to do business in Mississippi, they've got to play by the same rules. Y'all agree with that? One set of rules, right?

(Appendix I, Item 11- Voir Dire Transcript pp. 36-37)* Defense counsel made no objection to this reference with respect to the question of Canadian association (although an objection was advanced regarding counsel's alleged request for a "commitment" from potential jurors). Plaintiff's counsel never again mentioned Canada or Canadians during voir dire save for one fleeting reference made to one juror candidate ("Did you know Ray Loewen and his group out of Canada, the Loewen Group?" *Id.* at p. 53). No objection was made by defense counsel on this occasion either.

During Loewen's voir dire, defense counsel asked potential jurors: "Can you tell me that, that our [Canadian] companies, the individuals who operate and run those companies, who own those companies will get the same kind of treatment now that you're going to give Mr. O'Keefe [?]" (*Id.* at 80). The court, at defense counsel's request, thereafter struck for cause one juror candidate, Sylvia Simmons, because she said in her answer to a query in a written questionnaire** that she did not think that "a foreign corporation . . . should be given a fair trial." (*Id.* at 167). The only other juror candidate the defense challenged on these grounds was George Bennett who in his questionnaire had complained of "special tax breaks that foreign corporations receive." (*Id.* at 168).

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*Appendix references will list the volume number, item number, item description and internal page number.

**The record indicates that before voir dire questioning began, all potential jurors were required to fill out written questionnaires. It is clear that these questionnaires made inquiry about each potential juror's feelings about Canada and foreign corporations.

Rather than pursue further questioning of Mr. Bennett, defense counsel suggested that he be left on the panel. (*Id.* at 170). The defendants used one of their peremptory strikes to remove Mr. Bennett from the jury panel. (*Id.* at 175).

The record of voir dire proceedings suggests that the jury was screened for anti-Canadian bias, that *both sides* instructed jurors not to act on such biases and that the two potential jurors who expressed anti-Canadian or anti-foreign sentiments were removed, one for cause, the other through peremptory challenge. It should also be noted that one of the jurors selected, Glenn Millen (eventually chosen jury foreman), was born and raised in Canada and, while living in Mississippi, continuously worked for a foreign corporation (Siemans). In a post-trial memorandum describing an interview with Mr. Millen, a lawyer working with the Loewen Group described him in the following manner:

> Mr. Millen was foreman of the jury. He is a white male, 63 years old, a retired engineer who was born in Canada, had previously served on a jury which found for the defendant. He apparently has a B.S. degree in engineering from Jackson State; resides at 1501 Edgewood Place, Clinton, Mississippi. His employment was with Siemans, where he was supervisor for development test engineering for approximately 20 years, the length of time which he has lived in Hinds County. He was born in Ontario, Canada, and lived in Canada for approximately 27 years.

(Report on Post-Trial Juror Interviews to be presented in the Supplemental Appendix of the United States of America.)

(4) No motions in limine seeking to bar reference to Canadian citizenship, foreign corporations or any related subject were made although the Loewen Group made a series of other motions in limine, regarding such matters as reference to evidence

of special damages and evidence referring to other lawsuits. (Appendix I, Item 10 -- Pretrial Motions Hearing Transcript, *passim*.)

(5) No objections regarding prejudice arising from references to Canadian citizenship, foreign corporations or any related subject were made by the Loewen Group during the course of the seven week trial. This is particularly striking in light of the number and range of objections that were made by the Loewen Group with respect to other matters.

(6) No motions for mistrial were made on the trial record by the Loewen Group regarding prejudice arising from references to Canadian citizenship, foreign corporations or any related subject during the course of the seven week trial.

(7) At the conclusion of the trial the Loewen Group requested a jury instruction regarding anti-Canadian prejudice. This instruction was refused on the apparent basis that it duplicated an instruction that the court had already prepared. Loewen Group's counsel, Mr. Robertson, had the following colloquy with the court on the matter:

> JUDGE GRAVES: Defendants?
>
> MR. ROBERTSON: From the defendants, Your Honor, we would request first with respect to C-1 the middle paragraph regarding bias, sympathy or prejudice, we had submitted an instruction, a more elaborate one that we think is tailored to this case which we would request be given, and if I can have a second --
>
> JUDGE GRAVES: I don't need to hear yours. You need to tell me what's wrong with this one.
>
> MR. ROBERTSON: There's nothing wrong with this one as it's written.
>
> JUDGE GRAVES: Do you have an objection?
>
> MR. ROBERTSON: We would only request an additional one, so --

JUDGE GRAVES: Let me stop you. Let me set the ground rules right now. All I'm asking you is if you have an objection to this instruction. Do you?

MR. ROBERTSON: Do not.

(Transcript, pp. 5390-91).

13. In light of Loewen's exceedingly modest use of protective devices regarding references to Canadian citizenship and cognate matters, there is little evidence that Loewen had any substantial concern at trial about alleged O'Keefe efforts to "foment" anti-Canadian feelings. Moreover, it was Loewen's counsel who repeatedly injected the question of anti-foreign sentiments into the trial by making inquiry about a 1990-91 advertising campaign mounted by O'Keefe that referred to Japan, Canada and the foreign (i.e. Loewen) ownership of a key O'Keefe competitor on the Mississippi Gulf Coast, Riemann Holdings.

At least a part of Loewen's strategic motive for prominently featuring this matter in its trial presentation was disclosed in Loewen's opening statement when defense counsel Richard Sinkfield contrasted the "courteous and hospitable" Raymond Loewen with Jeremiah O'Keefe who, Mr. Sinkfield declared, was "down on the Coast, rabble-rousing about the Japanese and other foreigners." (Transcript p. 105) The allegedly uncouth and disagreeable O'Keefe was to be the defendants' target. And the reason was not simply a matter of personalities but Loewen's articulated belief that "the public doesn't like that [foreign-bashing] and so there [is] backlashing." (Transcript p. 106). The thrust of the Loewen trial team's thinking seemed to be that if O'Keefe could be proven a "foreign-basher" jurors could be persuaded to "backlash" against O'Keefe.

In pursuit of this strategy, Loewen explored the question of O'Keefe's "rabble rousing about the Japanese and other foreigners" with at least four of O'Keefe's witnesses (Walter Blessey, Transcript pp. 723-32; Lorraine McGrath, Transcript pp. 1750-51; Paul Minor, Transcript pp. 1984-88; Jeremiah O'Keefe, Transcript pp. 2171-76). (As to the last of these, Judge Graves, *sua sponte*, declared: "Mr. Sinkfield, if I hear the word Hong Kong/Shanghai bank [a subject of the advertising campaign] one more time before I leave here today, you need to move to another area of cross examination." Transcript p. 2176). Loewen then proceeded to explore the same topic with *eight* of its own witnesses (Jeffrey O'Keefe, Transcript pp. 2572-73; David Riemann, Transcript pp. 2676-77, 2689-98, 2705, 2709-10; Reed Guice, Transcript pp. 3424-38 (entire direct examination); Michael Riemann, Transcript pp. 3967-69; Robert Riemann, Transcript pp. 4077-79; Donald Holmstrom, Transcript p. 4172; Peter Hyndman, Transcript pp. 4419-23; and Robert Spell, Transcript pp. 4825-26). O'Keefe did not initiate discussion of this matter with a single witness. All was done at Loewen's choice and on Loewen's initiative.

Loewen's decision to pursue this topic appeared to prove costly to the defendants on a number of occasions. Loewen's counsel, Ed Blackmon had the following exchange with O'Keefe's witness, Paul Minor after it was disclosed that Minor, a prominent trial lawyer, was helping O'Keefe on a *pro bono* basis:

> Q. Now, without getting into the right or wrong of what you just said about the ownership part, that is, were you acting pro bono for Mr. O'Keefe to cause [because?] a Canadian company was doing business, at least in partnership or some part of with a local ownership on the Coast. Is that why you got involved?
>
> A. No, I mean, I have no ax to grind. I've met David Riemann socially. I've never been involved in the insurance business. I had no ax to grind. My

involvement was I saw a Canadian company come in here to Jackson, Mississippi and trying to cheat people, and I tried to assist in stopping that. We have did it in a gentlemanly and honorable way. They rubbed our faces in the dirt, and we couldn't stand for it, and that's why we're here today.

(Transcript p. 1987.) Credibility questions aside, this interchange would not seem to have helped Loewen's cause in the slightest. The same might be said about the following exchange on direct examination between Ed Blackmon and Loewen's witness, David Riemann:

Q. Mr. Riemann, do you have any problem with doing business with Canadians?
A. No, I do not.
Q. Do you have problems with doing business with Japanese?
A. No, I wouldn't.
Q. People who are of the Japanese race?
A. No, I wouldn't.
Q. Did the Japanese have any involvement, to your knowledge, in the transaction that you just described for the jury?
A. Not to my knowledge.
Q. There's been some mention of the Shanghai bank. Do you know where that bank is located?
A. I know that there is a location in Seattle, Washington, and that that bank served as maybe a financing facility for U.S. acquisitions for Loewen at the time.
Q. Do you have any problems, Mr. Riemann, with people of the -- who are Chinese? Do you have any problems with them?
A. No.
Q. Do you have any problem doing business with Chinese people?
A. No.

(Transcript pp. 2677-78.) In this instance the repeated references to "race" and ethnic identity invited jury scrutiny of the *witness's* attitudes about such matters.

One final example of the self-inflicted problems Loewen faced by pursuing this line of questioning appears in the testimony of Reed Guice. The witness provided O'Keefe with advertising and public relations services during the 1990-91 campaign and

was called by Loewen to explore that point. After being tendered to O'Keefe for cross-examination his testimony began as follows:

> Q. (Mr. Gary) How long have you known this man [Jeremiah O'Keefe]?
> A. I feel like I've known him all my life.
> Q. There's something that you said early on. You said that he started out when you got started?
> A. That's correct, one of my first clients, yes, sir.
> Q. And you said something about you were proud of that association with Jerry?
> A. Absolutely.
> Q. Why did you say that? Tell the jury about that.
> A. Jerry O'Keefe has been a pillar of our community on the Mississippi Gulf Coast as long as I've been alive, and well long before that. At the time that we became associated, he was the mayor of Biloxi, and one of my first real important jobs in my business, I think, was helping him write a speech where he told the people of Biloxi that he was not going to run for an additional term. I still remember I was proud he came to me for help on that. He trudged up the steps of my little shop above the Dumar Shaver where we were trying to start a living and gave me that job. It was one of the things that encouraged me to continue.
> Q. Is he an honorable man?
> A. Absolutely.
> Q. Is he fair and honest?
> A. Absolutely.

(Transcript pp. 3439-40.)

A separate but related decision proved costly to Loewen. It involved Loewen's determination to cross-examine one of O'Keefe's witnesses, Michael Espy, on matters relating to Canada and NAFTA. Mr. Espy had grown up working for his father in the funeral business in Mississippi, had spent time as a Mississippi Assistant Attorney General concerned with issues of consumer fraud, had gone on to become a Congressman and, finally, Secretary of Agriculture in the Clinton Administration. Without any predicate whatsoever in the direct examination, Loewen's Richard Sinkfield, on cross-examination, had the following exchange with the witness:

Q. In your capacity as Secretary of Agriculture, I believe you had no small role, I think, in dealing with NAFTA or at least some of the issues involved in the North Americans Treaty Organization or Act?

A. Yes, as Secretary of Agriculture, I had the responsibility to promote American agricultural commodities and American farmers to different markets around the world, and I was involved as a -- as a cabinet secretary in NAFTA where we tried to sell American corn, beef, everything else to -- to not only Mexico but all of the NAFTA countries, including Canada, so yes, I was involved in the -- in my part of it, as well as the gat [GATT?] talks about it, sure.

* * *

Q. Would it be consistent with the spirit of NAFTA and the work that you've done in encouraging the purchase and sale of American goods in Mexico and Canada to compete with them on the basis of an ad campaign that says, "Don't buy Canadian, just buy American?" Would that be consistent with the spirit of what you were trying to promote?

A. Well, we believe in free enterprise. We believe in the free flow of goods between countries, but it was also consistent with what I did as secretary to make sure no one took advantage of the American people. In that respect, I was very involved in certain actions which restricted Canadian products into our market because they tried to undervalue, particularly -- I don't know if you want to know, but you know, we thought that their wheat, the Canadian wheat was underpriced. They would come in and flood our markets. Our people eat a lot of pasta, and they would not buy the American wheat. They would go for the cheaper wheat which was underpriced to take over the market, and then -- then they would jack up the price, and that was not right consistent with what I've done in my life, try to protect people, protect the American market. We believe in free enterprise. We don't believe in being cheated.

(Transcript pp. 1100-02.) Again, this exchange would not seem to have helped Loewen's cause in the slightest.

It may be useful to make one final observation on the question of references to locations in Canada, foreign citizenship and the like. If one were to learn that within the space of eleven pages of transcript more than a dozen references were made to "Vancouver" (the corporate headquarters of Loewen) and "Canada," one might become suspicious that subtle efforts were being made to call the jury's attention to Loewen's

"foreignness." This impression would, however, be dispelled if one were to learn that it was Loewen's counsel and witness who were involved in such conduct. That is exactly the pattern of interrogation displayed in the examination of Robert Riemann. (Transcript pp. 4079-89). What this exchange suggests is that trial participants did not see references to "Vancouver" or "Canada" as highly charged and that *both sides*, using local colloquial patterns, spoke that way on occasion.

14. A number of other considerations militate against the likelihood that anti-Canadian bias was "fomented" in *O'Keefe v. Loewen Group*. Perhaps foremost among these was the attitude of the trial judge, Judge Graves. During the cross-examination of Donald Holmstrom (a Loewen employee and author of several key memoranda), Michael Allred of the O'Keefe team, in apparent frustration at Holmstrom's circumlocutions, asked: Does that mean the same thing in common Mississippi southern English as they were opposed to it?" (Transcript p. 4312) Defense counsel made no objection on Loewen's behalf but, shortly thereafter, Judge Graves declared a recess and insisted that counsel, most particularly Mr. Allred, remain seated in the courtroom. The judge then declared:

> JUDGE GRAVES: Please be seated. Mr. Allred, before I say this, I want to apologize if I have misperceived your question of if I'm overly sensitive to matters like this, but in one of your questions, you made reference to common Mississippi southern English which seemed to me to be dangerously close to insulting somebody because they were not from common Mississippi and the south. Now, for anybody in here to make any efforts to appeal to ethnicity, colloquialism [parochialism?] or God forbid, racism, I can't always prevent that. Some of it may actually be -- may be appropriate. A lot of it wouldn't be, but I'm not going to allow any courtroom where any witness, any litigant, any lawyer is insulted based on race, ethnicity or national origin. I'm not going to have that in this courtroom, and if I misperceived your comment in that direction, then I'm sorry, but it provides me with an opportunity to make it clear that nobody is going

to come into this courtroom and be subject to any insult because of race, ethnicity or national origin. See you at 1:00 o'clock.

(Transcript pp. 4325-26.) This forceful, *sua sponte*, intervention when Loewen had made no objection suggests a vigilant judge who would not stand for a calculated assault on foreign litigants in his courtroom.

A second point of some significance is contained in a report commissioned by Loewen after the trial. This document entitled, "Report on Post-Trial Juror Interviews" described in some detail post-decision debriefings of a substantial majority of the jurors who had decided *O'Keefe v. Loewen Group*. (This document was produced pursuant to a discovery request by the United States and is to be presented in the Supplemental Appendix of the United States of America.) Although an obviously one-sided assessment designed to ferret out any basis for complaint about the jury* (whether fanciful or legitimate), the Report identified no anti-Canadian bias whatsoever among the jurors it interviewed. As noted earlier, the Report sketched the background of jury foreman Glen Millen who, it said, was born and raised in Canada and lived there for 27 years. It also

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*There is some question about the candor with which this investigation was carried out. At least two of the jurors interviewed (Akida Emir and Calvin Guyton) were told that the investigation was being performed at the instigation and to serve the needs of a California transactional attorney. (The interrogator said to Emir: "I explained to her that a California attorney who works for Loewen on transactional deals had asked us about the verdict and that we were interested in finding out for them what convinced the jury to render such a large verdict." Memorandum of Emir Interview p. 1). The interrogator said to Guyton: "I explained that I had been employed by a California firm which did business transaction work for the Loewen Group to do post-trial interviews." (Memorandum of Guyton Interview p. 1). While these assertions may have described the path by which money flowed to pay for these inquiries, they would appear to have been inaccurate in describing the true sponsor of the inquiries (Loewen Group) and the purpose for which they were undertaken (impeachment of the verdict).

noted that he was employed for the 20 years he lived in Mississippi by a corporation (Siemans) with its principle place of business outside the United States.

15. The Loewen Group has claimed that, in addition to the alleged manipulation of the jury's anti-Canadian sentiments, the seven week trial in *O'Keefe v. Loewen Group* was "infected by repeated appeals to the jury's . . . racial, and class biases." (Memorial of the Loewen Group, Inc. p. 2) At the outset, it should be noted that neither of the central characters in these proceedings (Jeremiah O'Keefe, Sr. and Raymond Loewen) was African-American. Both were, beyond cavil, wealthy men. Both sides in the litigation employed racially diverse trial teams including African-American and white lawyers (the two teams had three African-American and three white lawyers apiece). On both teams "lead counsel" was an African-American whose practice was centered in a state other than Mississippi (O'Keefe's Gary was based in Florida and Loewen's Sinkfield in Georgia). At least as far as these preliminaries are concerned there appeared little to distinguish the two sides on race- or wealth-related grounds.

In light of Loewen's claim, I have examined the pre-trial and trial record of the proceedings in *O'Keefe v. Loewen Group*, to determine whether Loewen's counsel used the various mechanisms available to address perceived problems of racial and/or class bias arising before or during the trial. That record demonstrates the following:

(1) No change of venue motion was made regarding racial or wealth-based animosities.

(2) No challenge to the venire was made regarding such questions.

(3) With respect to voir dire, the Loewen Group's Report on Post-Trial Juror Interviews noted that the jury venire comprised 53 persons of whom 31 were African-American and 22 were white. (Report on Post-Trial Juror Interviews p. 2) The jury originally empaneled had six African-American and six white jurors (a modest *under-representation* of African-Americans considering the number of African-Americans in the pool) and two African-American alternate jurors. O'Keefe was successful in having four juror candidates struck for cause (three African-American and one white) and used five peremptory challenges (two African-American and three white*). Loewen was successful in having one juror candidate struck for cause (an African-American) and used six peremptory challenges (four African-American and two white). Due to illness during the trial two of the original jurors (both white) were granted leave to withdraw and were replaced by alternate jurors. It is extremely dubious that this selection process is indicative of any racially discriminatory pattern or effort to "stack" the jury in a racially exclusive or biased way. As previously noted, the jury foreman was white and Canadian-born.

O'Keefe's counsel made no inquiries about juror attitudes regarding race or wealth during the voir dire. Loewen's counsel, Ed Blackmon, made one brief reference to equality of treatment. He asked:

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*O'Keefe made an initial effort to exercise one more peremptory challenge but, eventually, withdrew that strike. Due to an apparent mixup, the designated juror candidate was not seated on the jury. (The juror candidate in question was white.)

> Now, my first experience, and I've been practicing law for a number of years, and I really have to think back to see how many, but I do remember that the first case I tried was here in Hinds County in this courthouse in 1974, and I can tell you that the composition of the jury was quite different. The whole courthouse was quite different. And I'm here today to say that that has changed. It changed because of the laws that says that everybody has to be treated fairly, everybody has to be included in the system. Do all of y'all accept that, that this is the way our laws are today, notwithstanding how it was when I first came in here in 1974? Do you understand that?

(Appendix I, Item 11 -- Voir Dire Transcript p. 78) No requests were made by Loewen to strike any juror candidates for cause because of their views on race or wealth.

The record of voir dire proceedings suggests that Loewen evinced only the most modest concern about racial or wealth-based bias among the members of the venire. Loewen did remind the juror candidates that all were "to be treated fairly" and "included in the system." There was no further effort made with respect to these matters nor any objections lodged regarding them.

(4) No motions in limine seeking to bar reference to matters of race or wealth were made although the Loewen Group made a series of other motions in limine as described in Paragraph 12 *supra*.

(5) Objections regarding prejudice alleged to arise from "appeals to the jury's racial and class biases" were, to all appearances, nonexistent. There were a large number of objections made on the record during the trial but none appeared to be addressed to racial or class bias, no argument was made by Loewen's counsel on these points and no curative instructions were sought.

(6) No motions for mistrial were made during the trial by the Loewen Group regarding prejudice alleged to have arisen from "appeals to the jury's racial and class biases" during the seven week trial.

(7) The only requested instruction on these matters sought at the close of the case by Loewen has been considered at Paragraph 12 *supra*.

16. In light of Loewen's exceedingly modest use of protective devices to address alleged appeals to the jury's racial and class biases there is little evidence that Loewen had any substantial concern at trial regarding these matters.

It may, at this juncture, be worth noting that some questions touching on race and wealth were relevant to *O'Keefe v. Loewen Group*. As testified to by several witnesses (e.g. Earl Banks, Transcript p. 1117, Dale Espich, Transcript pp. 1830-31), the funeral business is a racially-divided one. This means that African-American funeral homes do not compete with white funeral homes for customers and that in defining markets for monopolization analysis the two should not be considered together. (Testimony of Dale Espich, Transcript pp. 1830-31). On the question of wealth, O'Keefe had articulated a legal theory that the Loewen Group had abused its substantial economic power and unequal bargaining position to overwhelm O'Keefe. This proposition was set forth in O'Keefe's Third Amended and Supplemental Complaint, Paragraph 2 of which, *inter alia*, alleged:

> Defendants have taken advantage of their wealth and unequal bargaining position with that of the Plaintiffs. After making the settlement agreement and agreement to close on certain transactions in the August, 1991 contract, the Plaintiffs caused undue delays, expenses, interest, and dissemination of public information concerning the transaction all of which severely injured the position of the

> Plaintiffs while enhancing the position of the Defendants. The Defendants acts, course of business, or usage in trade is typical conduct of these Defendants which they have used on a wide basis to the detriment of small businesses such as Plaintiffs in similar transfers.

(Appendix I - Item 8 p. 2) Similarly, Paragraph 163 of that Complaint alleged:

> From July 1991 forward, Ray Loewen schemed to use his great wealth and unequal, superior bargaining position and means and artifices of fraud, to destroy Plaintiffs as competitors so that he could either acquire Plaintiffs' valuable family businesses at a fraction of their value and eliminate Plaintiffs as competitors, or destroy Plaintiffs businesses so Loewen could acquire them in liquidation and eliminate them as competitors nevertheless.

(*Id.* at p. 52).

An examination of the entirety of the trial record would suggest that *both* O'Keefe and Loewen Group sought to present witnesses who would have particular credibility with African-American jurors. To this end, approximately one month into the trial, the Loewen Group sought to add three new witnesses to its witness list. (Transcript p. 3592) These new witnesses were Dr. Lyons, President of the National Baptist Convention, Dr. Jones, his chief assistant and Mr. Bill Smith, a Loewen "regional partner in California." (Transcript p. 3593) All were identified on the record as African-Americans. (Transcript pp. 3594-95) O'Keefe's counsel protested the addition of new witnesses stating "Now, we haven't claimed that they have discriminated against black people. I mean, somewhere its got to stop, Your Honor." (Transcript p. 3595) The judge responded:

> Well, I am as sensitive to racial issues, Mr. Gary, as anyone, believe me, but from the very first -- well, actually before the trial started, race has been injected into this case, and nobody has shied away from raising it when they thought it was to their advantage to raise it. I haven't seen anybody, either side of the case, shy away from dealing with race when there was some apparent advantage to them in dealing with it.

If this were a case where nobody had raised it, and I had no reason to question why anybody had called certain witnesses and raised character issues and demonstrated that we did business with black folks, I mean, that's been happening on the plaintiffs' side. Now, maybe there's other motivation for doing it, but it certainly looked like in the vernacular of the day, the race card has already been played, so -- and I'm as sensitive to it as anyone, and you will recall my discussion in chambers prior to the beginning of the trial.

MR. GARY: Right.

JUDGE GRAVES: So all I know is I know what's going on, and I know the jury knows what's going on, but it's going on. So if everybody wants to keep it going on, the race card has been played, so everybody's got one in their (inaudible) apparently.

(Transcript pp. 3595-96) Defense counsel did not protest the judge's analysis but rather pressed the case for the addition of the witnesses.

This question resurfaced when the court reviewed the parties' contentions concerning the need for rebuttal witnesses. The Loewen Group objected to O'Keefe's recalling one of its expert witnesses, Dean Hugh Parker, head of the School of Management and an Accounting Professor at Millsaps College. As to Dean Parker, Loewen's counsel, Jimmy Robertson and Judge Graves had the following exchange:

MR. ROBERTSON: Mr. Parker, Dean Parker's addressing that subject is far beyond the scope of the expert answers to interrogatories disclosure made by the plaintiffs.

JUDGE GRAVES: That argument would mean something to me if, at the time this trial started, we knew y'all were going to be trying to out African-American each other. We didn't know that. Y'all got in and they called all of your African-Americans in and you want yours.

MR. ROBERTSON: We didn't start it, Your Honor.

JUDGE GRAVES: Oh, I know y'all didn't start it. You're going to bring up the rear, and it ain't going too fast.

(Transcript p. 5289) Again, Loewen's counsel did not deny the judge's analysis of the defendants' trial strategy or the court's assessment that *both* sides had made ample efforts to present witnesses of particular credibility to African-American jurors.

Both O'Keefe and Loewen offered prominent African-American witnesses. Loewen went further and offered evidence of a potentially lucrative contract between the company and the National Baptist Convention -- one of the largest African-American church denominations in the United States. It is interesting to note that this effort was, apparently, viewed as insincere and may even have proved injurious to Loewen. The Report on Post-Trial Juror Interviews prepared on the defendants' behalf described this evidence as "gasoline on an already raging fire." (Report on Post-Trial Juror Interviews p. 8) Be that as it may, it was Loewen's strategic choice to introduce such evidence in its apparent effort to ingratiate itself with certain members of the jury.

17. It is not my purpose in this Statement to substitute my assessment of the evidence in *O'Keefe v. Loewen Group* for that of the jury or the judge. It was their task to evaluate the credibility of the witnesses and persuasiveness of the factual presentations. It may be appropriate to note, however, that O'Keefe was successful in assembling a case that, credibility issues aside, might prove persuasive. At the heart of that case was the testimony of four individuals who had been employed by Loewen: John Turner, Lorraine McGrath, David Riemann and Michael Riemann.

The first two of these witnesses had become disaffected with the Loewen Group and left the company. Each sharply criticized Loewen's business practices. Turner, who negotiated the August, 1991, contract that was central to the case, appeared to indicate that his honest efforts to close the deal with O'Keefe were purposely undercut by other employees of the Loewen Group. (Transcript pp. 195-260) Lorraine McGrath said she left Loewen in disgust because of a policy of constant and aggressive price increases for

funeral services (Transcript pp. 1228, 1240) When two members of her family passed away in the year-and-a-half before trial she chose to use O'Keefe rather than a Loewen affiliate to arrange the funerals. (Transcript p. 1209) She described a series of Loewen communications in which O'Keefe was given misleading information or in which pertinent information was withheld (Transcript pp. 1217-23) in apparent contravention of contractual promises.

The brothers David and Michael Riemann had become Loewen employee/partners ("regional partners") after their father's funeral home and insurance operations were bought by Loewen. They each wrote a letter in late August of 1991, to Raymond Loewen, complaining about the operations of the Loewen Group. These letters, which are more fully discussed in Paragraph 19 *infra* (and attached to this Statement as Exhibit "B") might be fairly read to lend powerful support to O'Keefe's contentions about Loewen's untruthfulness and unfair methods of competition. Coupled with the live testimony of the Riemann brothers, these letters could be viewed as demonstrating the unalterable opposition of critical players in the Loewen Group to any fair deal with O'Keefe.

Thus did O'Keefe adduce powerful proof of Loewen Group's misconduct out of the mouths of its past and present employees. When this proof was coupled with the unchallenged evidences on monopolization presented by O'Keefe's expert, Dale Espich (*see* Paragraph 10 *supra*) the package formed a solid foundation upon which a jury might choose to find against the Loewen Group.

18. The Loewen Group, its counsel and its witnesses committed at least four errors at trial that were likely to have undermined their credibility and strengthened O'Keefe's charges that Loewen was untruthful and/or engaged in fraudulent activity. Despite the gravity of these four self-inflicted wounds, neither the Loewen Group nor its experts have chosen, in the present proceeding, to discuss any of the incidents in question. The four, in order of occurrence at trial, were:

(1) the tardy disclosure and production of two highly significant documents written by David and Michael Riemann, respectively, which were offered together as trial Exhibit 165 and appeared to support a number of O'Keefe's central allegations (attached hereto as Exhibit "B");

(2) the striking by the court of the testimony of Loewen witness James Daniel Ellis after it was disclosed that Loewen's counsel had violated the court's sequestration order with respect to his pretrial preparation;

(3) the repeated assertions of memory failure by Loewen Group's chief executive officer (CEO), Raymond Loewen, during both his direct and cross-examination at trial; and

(4) the contradiction by both Loewen's witnesses and documents of Loewen's counsel's assertions about the net worth of the company during the punitive damages phase of the trial.

19. The late-surfacing documents described in Paragraph 18(1), were not made available to O'Keefe until after the plaintiff had, essentially, concluded its case in chief. (*See* Transcript p. 2589) The documents were two letters, one each from David and Michael

Riemann -- key Loewen Group employee/partners doing business in Mississippi. The letters contained evidence that the Loewen Group did not consult these key employee/partners regarding the negotiations with O'Keefe to draft the 1991 agreement that was at the heart of the litigation, that these employee/partners were violently opposed to any deal with O'Keefe, that these employee/partners would attempt to block such a deal if given the opportunity, that these employee/partners felt that Loewen had broken a series of promises to them and that Loewen had instructed these employee/partners to make efforts to pry business associates (funeral directors) away from O'Keefe. (*See* Exhibit "B" attached hereto, *passim.*)

O'Keefe's counsel described these documents, bound together as Exhibit 165, as "a very, very significant piece of evidence." (Transcript p. 2589) Loewen's counsel did not deny the documents' importance. (Transcript pp. 2590-91) The newly produced documents became the centerpiece of O'Keefe's cross-examination of Loewen's first witness, Jeffrey O'Keefe. (*See* Transcript p. 2625 ff.) They, thereafter, formed the core of O'Keefe's cross-examination of Loewen's second witness, David Riemann. (*See* Transcript p. 2814 ff.) Later, they were the central focus of the cross-examination of Loewen's witness, Michael Riemann. (*See* Transcript p. 4028 ff.)

The lateness of the discovery of these documents as well as the suspicious fact that they were presented as a single bound package was explored on several occasions at trial. O'Keefe's counsel was permitted to ask Michael Riemann the following questions about the matter:

Q. How is it, sir, that your letter that you kept in Gulfport and your brother's letter that you say you never saw appeared in this courtroom on the same day attached together, sir? do you know?

MR. SINKFIELD: Objection, Your Honor.

JUDGE GRAVES: Overruled.

A. I don't know, sir.

Q. (By Mr. Williams) Now, wouldn't you find that strange if you kept your letter in your locker in your room in Gulfport and your brother's letter was in Vancouver and they met up here in this courtroom simultaneously together, attached together, wouldn't you find that to be so strange --

MR. SINKFIELD: Objection, Your Honor.

JUDGE GRAVES: Overruled.

A. No, sir. Like I say, I don't know anything about it, so I don't know how they got here.

Q. (By Mr. Williams) And if you, as a president of a company, sir, addressed a letter to a CEO and John Turner, you would have left them a copy of that letter, wouldn't you sir?

A. Sir, I don't remember, I'm telling you.

Q. Do you recall --

A. I know I read the letter in the meeting, and I don't remember whether or not that I left a copy of it or I didn't leave a copy of it.

(Transcript pp. 4034-35) The court did not hold that there had been any specific wrongdoing with respect to the production of the documents but the impression that some sort of misconduct might have been involved remained.

20. The impression of misconduct could not help being exacerbated after the testimony of Loewen's eleventh witness, James Daniel Ellis, was stricken from evidence, as noted in Paragraph 18(2), because Judge Graves found that there had been a violation of the court's sequestration order.

Ellis was a consulting actuary called by Loewen to describe his work on matters related to contractual negotiations between O'Keefe and Loewen. After he had concluded his direct examination, O'Keefe's counsel requested an opportunity to examine files Ellis had referred to during his direct examination. This request was

granted and, upon inspection, these files were found to contain two letters of troubling import.

The first was a letter from Loewen's counsel, Jimmy Robertson, dated October 8, 1995. (This was about a month after the trial had begun.) The letter, in pertinent part, read:

> They [O'Keefe] will no doubt charge that you were acting in an unprofessional manner in allowing Loewen and particularly Don Holmstrom [a Loewen employee] to dictate assumptions to you and thus compromise your professional integrity. . . . We will only ask assurances that you will emphatically deny these charges.

(Transcript p. 3692) This letter might, fairly, be viewed as an effort to provoke the witness into a strong reaction against O'Keefe and as an improper ploy to extract assurances about the content of the testimony to be given.

The significance of this first letter was substantially exceeded by that of a second letter, dated September 12, 1995 (the second day of the trial). In this letter Mr. Robertson (Loewen's counsel), provided Ellis with a partial transcript of the testimony of an O'Keefe witness named Walter Blessey. (*See* Transcript p. 366 ff.) All parties eventually agreed that the communication of the transcript violated the court's sequestration order. (*See* Transcript pp. 3700-05) Having reached that conclusion Judge Graves felt it incumbent upon him to instruct the jury to disregard Ellis's testimony. (Transcript p. 3708) Loewen's counsel pleaded with the court to impose some alternative sanction. As Loewen counsel Richard Sinkfield stated on the record: "Perhaps there should be a sanction to us as lawyers, and I stand with my colleagues prepared to accept full responsibility. . ." (Transcript p. 3705) All realized that Loewen would suffer a

substantial blow to its credibility if the witness were struck. Judge Graves, however, saw no alternative and at *Loewen's* request gave the jury the following instruction on the matter:

> Ladies and gentlemen, the Court should inform you that prior to the break a witness, Dan Ellis, was testifying on behalf of the defendants and was under cross examination by the plaintiffs. The Court, during the period of time that you were out determined that a transcript of some witness's testimony, some prior testimony had been sent to Dan Ellis. At the beginning of the trial, the parties invoked the rule of sequestration, which means that a person who was going to be testifying as a witness is to remain outside the courtroom until such time as they are called. One of the reasons for that is so that that person does not have the benefit of sharing or hearing the testimony of other witnesses. By sending a transcript of the testimony to Dan Ellis, the Court determined that the rule of sequestration had been violated and so it is for those reasons that the Court determined that Dan Ellis should be excluded as a witness from this trial. You are further instructed that you are to disregard all of the testimony which you heard earlier from Dan Ellis inasmuch the Court has determined that he should be excluded as a witness for the reasons stated.

(Transcript pp. 3712-13) This incident could not help but have dealt the defendants a sharp blow, especially in a case where accusations about lying and fraud were of central importance.

21. As indicated in Paragraph 18(3), Loewen's credibility was further undercut by the testimony of its CEO, Raymond Loewen. On *direct examination*, Mr. Loewen indicated on *several dozen* occasions that he "could not recall" facts, had "no personal knowledge" of activities, was "not familiar" with circumstances, or "couldn't remember" conditions. Judge Graves was eventually moved, outside the hearing of the jury, to observe:

> JUDGE GRAVES: At least 75 percent of the questions you've asked him, his answer has been, "I don't know."
> MR. SINKFIELD: Yes, sir.
> JUDGE GRAVES: Now, I know y'all got into trouble for talking too much to your witnesses before you put them on the witness stand, but this sounds

like a witness you haven't talked to at all. That's the way it sounds. I know that's not true. So you can't be asking him this because you don't know that his answer is: "I don't know."

(Transcript p. 5060)

Mr. Loewen was not only forgetful but inclined to quibble, even with his own lawyer. At one point, the following exchange took place between Mr. Sinkfield and his client's CEO:

Q. Now, is -- you just mentioned dinner cruises again. Is that a boat or is that a yacht?
A. I really don't know the difference.
Q. It's a big boat, is it?
A. I don't know what is big, but it is a boat that is 110 feet long. I'm not sure if that is big. In some standards it is; in some, it is not.
Q. Is it sometimes called a yacht?
A. It is.

(Transcript p. 5102)

Raymond Loewen carried his forgetfulness and quibbling over to cross-examination, becoming increasingly combative and querulous. Eventually, Judge Graves suggested to Mr. Sinkfield:

You might want to tell your witness to stop asking questions. If you kind a give him a clue to do that, maybe he'll pick it up.

(Transcript p. 5144) This testimonial performance was likely to have further harmed Loewen's credibility.

22. In light of all this it should come as no surprise that Loewen's defense was not believed and the jury returned a verdict finding Loewen liable for compensatory damages on a series of contract, tort and monopolization claims. Pursuant to prior arrangement, the court then proceeded to a bifurcated hearing on punitive damages. At this hearing

Loewen's counsel once again undermined Loewen's credibility as indicated in Paragraph 18(4).

In his opening remarks in the punitive phase of the trial, Mr. Sinkfield asserted that the net worth of the Loewen Group was $411 million according to "all the published documents that we have." (Transcript p. 5757) Almost immediately Sinkfield proceeded to contradict his opening claim by introducing, for the purpose of cross-examination, a *Loewen document* filed with the United States Securities and Exchange Commission which declared that Loewen's "net worth [number] as shown in the statement" was $630,944,000. (Transcript p. 5766) This fifty percent variation was noted by O'Keefe's counsel and used to strip away whatever tatters of credibility Loewen retained. Things were not helped when Loewen's witness on net worth opined that the company's value was "in the range of 600 to 700 million dollars" (Transcript p. 5777) and that the market value of the concern was $1.7 billion. (Transcript p. 5778)

23. The problems described in Paragraphs 18-22 *supra* were all the product of Loewen's and Loewen's counsel's decisions. None may be charged to anyone else. It is axiomatic that litigants will be held liable for the strategic choices of their counsel in an adversary system. It is the rare case where well-heeled litigants can realistically expect relief from their own improvident behavior or counsel's failed efforts. My esteemed mentor in the law of evidence, Professor Laurence Tribe, has rightly derided such claims for relief as a quest for "Dow Jones Due Process". (Memorial of the Loewen Group, Inc. Tribe Statement p. 13)

24. The Loewen Group's errors at trial were compounded by a strategy that sought to avoid discussion of the size of any damages award the jury might consider. Although Loewen offered testimony from several witnesses about the propriety of this or that claim for damages, in its closing statement, Loewen did not discuss what sort of award of damages might make sense or effectively address the figures presented by O'Keefe's counsel. This approach left the jury with no guidance on damages except that supplied by O'Keefe. Such a strategy is exceedingly risky. It may lead to a finding of no liability but, if unsuccessful, may result in a monetary award based exclusively on the plaintiff's figures -- unchallenged by the defendant's best arguments or proof. Such is said to have been the situation in the case upon which Professor Tribe bases much of his Statement in the present proceedings, *Pennzoil v. Texaco*, 481 U.S. 1 (1987). There defense counsel failed to adduce proof on the question of damages, leaving jurors no alternative but to base their decision on the arguments and figures adduced by the plaintiff. (*See* THOMAS PETZINGER, JR., OIL AND HONOR: THE TEXACO PENNZOIL WARS (1987)).

This problem was aggravated when Mr. Sinkfield undercut Loewen's credibility on the question of the corporation's net worth. (*See* Paragraph 22 *supra*.) What the jurors got from Loewen was wildly varying figures and no assurances of accuracy. They had little choice but to rely on the materials presented by O'Keefe.

25. One final matter requires brief consideration. It is not the main concern of this Statement to assess the quality of the appellate judiciary of the State of Mississippi. It has, however, been contended by Loewen and, most particularly its expert, Judge Neely, that the Supreme Court of Mississippi was a craven and scheming body. ("[T]he Mississippi

Supreme Court found a convenient way to avoid either reversing *O'Keefe v. Loewen* (which would have been politically dangerous given the power of the plaintiff's bar in Mississippi) or of writing an opinion affirming *O'Keefe v. Loewen* (which would have humiliated the Mississippi Supreme Court and exposed it to review and reversal by the U.S. Supreme Court.)") (Memorial of the Loewen Group, Inc., Neely Affidavit p. 14) This remarkable opinion is belied by an assessment prepared for Loewen by Wynne S. Carvill of the San Francisco law firm of Thelen, Marrin, Johnson & Bridges.

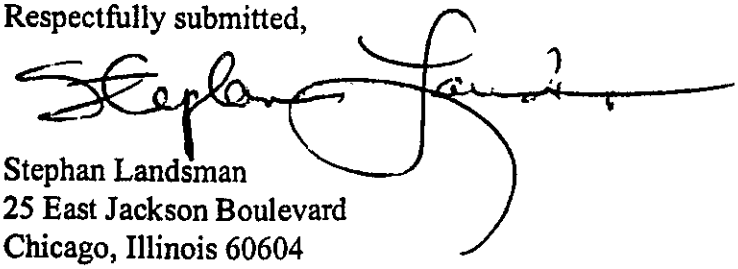
When Loewen was faced with a series of questions involving hundreds of millions of dollars it asked Mr. Carvill to assess the Mississippi Supreme Court. His analysis appears in Volume II of the Appendix of the United States of America (II Appendix of the United States, Item 50 -- Letter from Wynne Carvill, et al. to Raymond Loewen, et al. (Nov. 28, 1995)). What Mr. Carvill concluded and told his client in its moment of crisis was:

> A couple of weeks ago we sent you a letter profiling the Mississippi Supreme Court based on articles readily retrievable through our electronic database. That profile was not particularly encouraging, and thus one of the areas of inquiry in my recent trips to Mississippi was to get a better read on the Court and the overall political climate in Mississippi. Based on those inquiries I can now submit a more favorable report and say that the Company should have substantially greater confidence in the appellate process than my earlier, very preliminary report would have indicated.

(*Id.* at 1) Mr. Carvill then proceeded to discuss individually the nine members of the Mississippi Supreme Court. He thought several were hostile to business but wrote respectfully of all members of the court, save one. Words like "practical," "pragmatic,"

"fair," "intelligent" and "reasoned" predominate. It is striking that when so much was on the line Mr. Carvill came to such different conclusions than Judge Neely.

Respectfully submitted,



Stephan Landsman
25 East Jackson Boulevard
Chicago, Illinois 60604
(312) 362-6647

Dated: March 9, 2001

Exhibit "A"

RESUME

NAME: Stephan Landsman

DATE OF BIRTH: December 30, 1946

HOME ADDRESS: 2776 Sheridan Rd.
Evanston, Illinois 60201
(847) 332-2687

MARITAL STATUS: Married to Janice Toran
Three sons born
6/8/79, 6/16/82, and 2/23/90

COLLEGE EDUCATION: Kenyon College
Gambier, Ohio
(1965-1969)

(1) Academic Performance:
Summa Cum Laude,
High Honors in Religion
One of top 3 in class of 150

(2) Honors:
Phi Beta Kappa, Academic
Endeavor in the Field of
Religion Prize

LAW SCHOOL EDUCATION:

Harvard Law School
Cambridge, Massachusetts
(1969-1972)

(1) Academic Performance:
Cum Laude

PRESENT POSITION: Robert A. Clifford Professor of Tort Law and Social Policy,
DePaul University, College of Law

PUBLICATIONS:

BOOKS, MONOGRAPHS, AND BOOK CHAPTERS

(1) *The Civil Jury in America*, Chapter 11 in WORLD JURY SYSTEMS (Neil Vidmar ed.) Oxford University Press (2000).

(2) *Chapter 42 (Consolidation and Bifurcation)*, MOORE'S FEDERAL PRACTICE, THIRD EDITION (1997).

(3) *The History and Objectives of the Civil Jury System,* Chapter 2 in VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert Litan ed.). The Brookings Institution. (1993) (chapter tracing the history of the civil jury system).

(4) ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION. West Publishing Co. (1988) (text explaining concepts fundamental to American legal system).

(5) THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE. American Enterprise Institute (1984) (monograph describing and defending adversary system of justice).

(6) COMPLEX LITIGATION TRAINING MANUAL. Legal Services Corporation. (1981) (post-graduate training package designed to teach complex litigation skills).

(7) WHAT TO DO UNTIL THE LAWYER COMES: AN INVITATION TO LAW. Doubleday & Company. (with McWherter and Pfeffer) (1977) (layman's introduction to the legal process).

ARTICLES AND LONGER SYMPOSIUM PIECES

(1) *The Civil Jury in America*, 61 LAW AND CONTEMPORARY PROBLEMS 285 (1999).

(2) *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WISCONSIN LAW REVIEW 297 (with Diamond, Dimitropoulos and Saks) (1998).

(3) *One Hundred Years of Rectitude: Medical Witnesses at the Old Bailey, 1717-1817,* 16 LAW AND HISTORY REVIEW 445 (peer reviewed journal) (1998).

(4) *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW AND CONTEMPORARY PROBLEMS 81 (1996).

(5) *Of Witches, Madmen, and Products Liability: An Historical Survey of the use of Expert Testimony,* 13 BEHAVIORAL SCIENCE AND THE LAW 131 (1995) (peer reviewed journal).

(6) *Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAVIORAL SCIENCES AND THE LAW 113 (1994). (peer reviewed journal.)

(7) *The Civil Jury in America: Scenes from an Unappreciated History,* 44 HASTINGS LAW JOURNAL 579 (1993). [reproduced in part in Levine, Doernberg, & Nelken, CIVIL PROCEDURE ANTHOLOGY (1998)].

(8) *Who Needs Evidence Rules:* Anyway? 25 LOYOLA OF LOS ANGELES LAW REVIEW 635 (1992).

(9) *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINNESOTA LAW REVIEW 655 (with Rakos) (1992).

(10) *The Satanic Cases: A Means of Confronting the Law's Immorality*, 66 NOTRE DAME LAW REVIEW 785 (1991).

(11) *A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 LAW AND PSYCHOLOGY REVIEW 65 (with Rakos) (1991).

(12) *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL LAW REVIEW 497 (1990). [Winner of the Oleck Prize for best faculty writing at Cleveland Marshall College of Law.]

(13) *From Gilbert to Bentham: The Reconceptualization of the Law of Evidence*, 36 WAYNE LAW REVIEW 1149 (1990).

(14) *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 UNIVERSITY OF PITTSBURGH LAW REVIEW 401 (1984).

(15) *A Brief Survey of the Development of Adversary Procedure*, 44 OHIO STATE LAW JOURNAL 713 (1983).

(16) *The Decline of the Adversary System and the Changing Role of the Advocate in that System*, 18 SAN DIEGO LAW REVIEW 401 (1981).

(17) *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO LAW REVIEW 487 (1980). [reproduced in part in Field, Kaplan & Clermont, MATERIALS ON CIVIL PROCEDURE (5th Edition)].

(18) *The Indefensible Defense of Impossibility: Excusing Localities from the Performance of State Mandated Duties*, 27 CLEVELAND STATE LAW REVIEW 47 (1979).

(19) *Can Localities Lock the Doors And Throw Away The Keys? Fiscally Motivated Suspensions of Public Education Programs: A Proposed Equal Protection Analysis*, 7 JOURNAL OF LAW AND EDUCATION 431 (1978).

(20) *Massachusetts Comprehensive Alcoholism Law--Its History and Future*, 58 MASSACHUSETTS LAW QUARTERLY 273 (student piece) (1973).

BOOK REVIEWS AND SHORT SYMPOSIUM PIECES

(1) *The Perils of Courtroom Stories* (review essay concerning Janet Malcolm's THE CRIME OF SHEILA MCGOUGH) 98 MICHIGAN LAW REVIEW ___ (in press) (reproduced, in part, in 6 FEDERAL BAR COUNCIL NEWS No. 4, October, 1999).

(2) *Symposium: Judges as Tort Lawmakers*, 40 DEPAUL LAW REVIEW 275 (general editor and contributor) (2000).

(3) *Symposium: The American Civil Jury: Illusion and Reality*, 48 DEPAUL LAW REVIEW 197 (general editor and contributor) (1999).

(4) *The Rules of Evidence in the Age of the Resurrection of the Jury*, INTERNATIONAL COMMENTARY ON EVIDENCE (April, 1999) (online journal).

(5) *Retroactive Trials and Justice* (review essay concerning Carlos Nino's *Radical Evil on Trial*) 96 MICHIGAN LAW REVIEW 1456 (1998).

(6) *Symposium: Contingency Fee Financing of Litigation in America*, 47 DEPAUL LAW REVIEW 227 (1998) (general editor and contributor). (Includes *The History of Contingency and the Contingency of History* abstracted in SOCIAL SCIENCE RESEARCH NETWORK.)

(7) *The Challenge of Procedural Reform* in INTERNATIONAL TRENDS OF CIVIL JUSTICE (Institute of Comparative Law, Chuo University) (1995).

(8) *History's Stories* (review essay concerning James Goodman's STORIES OF SCOTTSBORO) 93 MICHIGAN LAW REVIEW 1739 (1995).

(9) Review of BEYOND REASONABLE DOUBT AND PROBABLE CAUSE by Barbara Shapiro in 3 THE LAW AND POLITICS BOOK REVIEW No. 4 (April, 1993) (A publication of the Law, Courts, and Judicial Process Section of the American Political Science Association).

(10) *Judicial Jeremiads: A Review of Rudolph Gerber 's LAWYERS, COURTS AND PROFESSIONALISM*, 15 JUSTICE SYSTEM JOURNAL 842 (No. 3) (1992).

(11) *Blackstone, Bleckley and the Value of Rhetoric* (symposium essay on a speech by Judge Logan Bleckley) 41 MERCER LAW REVIEW 529 (1990).

(12) *The Triumph of Justice* (review essay concerning Jean-Denis Bredin's THE AFFAIR: THE CASE OF ALFRED DREYFYS) 85 MICHIGAN LAW REVIEW 1095 (1987).

(13) *When Justice Fails* (review essay concerning Paul Avrich's THE HAYMARKET TRAGEDY) 84 MICHIGAN LAW REVIEW 824 (1986).

(14) *The Servants* (review essay concerning John Flood's BARRISTERS' CLERKS, THE LAW'S MIDDLEMEN) 83 MICHIGAN LAW REVIEW 1105 1985).

(15) *Paradise Lost? A History of Alternative Dispute Resolution Mechanisms in America* (review essay concerning Jerold Auerbach's JUSTICE WITHOUT LAW?) 79 NORTHWESTERN UNIVERSITY LAW REVIEW 653 (1984).

ARTICLES IN TRANSLATION

(1) *The Adversary System in America - The Challenge of Procedural Reform*, 24 YAMANASHIGAKUIN LAW REVIEW 443 (1992) (Japanese, translated by Professor Kunio Shiibashi).

(2) *America's Experience with the Civil Jury* 30 YAMANASHIGAKUIN LAW REVIEW 132 (1994) (Japanese, translated by Professor Kunio Shiibashi).

PAPERS

(1) *The Rules of Evidence in the Age of the Resurrection of the Jury*. Presented at AALS Annual Meeting, New Orleans, January, 1999.

(2) *Teaching About Famous Miscarriages of Justice in an Innocence Curriculum.* Presented at National Conference on Wrongful Convictions and the Death Penalty, Northwestern University, November, 1998.

(3) *Contingency Fees.* Presented at Mississippi State Bar Association Summer School for Lawyers, July, 1998.

(4) *Is It Time to Replicate* THE AMERICAN JURY? Presented at AALS Annual Meeting, San Francisco, January 9, 1998.

(5) *Policy Considerations on Accountability, Peace and Justice* presented at the International Conference on Reining in Impunity, Siracusa, Italy, September 17, 1997.

(6) *Successor Regime Responses to the Human Rights Violations of a Predecessor,* presented at a conference on reigning in impunity for international crimes, United States Holocaust Memorial Museum, April 13, 1997.

(7) *The Holocaust on Trial - Adolf Eichmann and the Settling of Memory,* presented at a faculty seminar Duke University School of Law, March 11, 1997.

(8) *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, presented at the National Conference on the Future of Punitive Damages, University of Wisconsin Law School, October 26, 1996.

(9) *Unpopular Acquittals as an Engine of Social Change,* presented at the Annual Meeting of the Law and Society Association, July 12, 1996.

(10) *The Empiricals Strike Back? Thoughts About Social Science and the American Jury*, presented at the conference on the Role of the Jury in the Democratic Society, Georgetown University Law Center, October 28, 1995.

(11) *One Hundred Years of Servitude: Medical Witnesses at the Old Bailey, 1717-1817*, presented at the Twelfth British Legal History Conference, University of Durham, England, July 20, 1995.

(12) *Civil Case Processing*, presented at the Ohio 1994 Bench-Bar Conference, Columbus, Ohio, November 17, 1994.

(13) *Reform in the Federal Courts: A view from the organized Bar*, presented at the Annual Meeting of the Law and Society Association, June 18, 1994.

(14) *Reforming the Civil Rule Making Process,* presented at the Prentice Hall "Revolutionary Changes in Practice Under the New Rules of Civil Procedure" Conference, March 8, 1994.

(15) *The Jury System: Has a Good Idea Gone Bad?,* presented at a meeting of the Minnesota State Bar Association, June 26, 1993.

(16) *The Adversary System in America: The Challenge of Procedural Reform*, presented at the Institute of Comparative Law, Chuo University, Tokyo, Japan, November

24, 1992 (also presented at the Osaka, Japan, District Court, November 20, 1992).

(17) *The Risk of Bias in Decision Making in Civil Litigation*, presented at the meeting of the Ohio Judicial Conference in Columbus, Ohio, on September 10, 1992.

(18) *The History and Objectives of the Civil Jury System*, presented at the Symposium on the Future of the Civil Jury System in the United States, sponsored by the Brookings Institution and the American Bar Association Section of Litigation at Charlottesville, Virginia, June, 1992.

(19) *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, presented at the Hearsay Reform Conference, University of Minnesota Law School, Minneapolis, Minnesota, September 7, 1991 (with Rakos).

(20) *Exploring the History of the Law of Evidence*, presented at the Tenth British Legal History Conference, Oxford, England, July, 1991.

(21) *The Satanic Cases*, presented at a conference entitled Trial Advocacy Teaching in the 90s and Beyond sponsored by the American Bar Association Section of Litigation and the National Institute of Trial Advocacy at Northwestern University School of Law, October 27, 1990.

(22) *The Impact of Hearsay Evidence on Mock Jurors*, presented at the annual convention of the American Psychological Association, Boston, Massachusetts, August 1990 (with Rakos).

(23) *The Rise of Adversarial Process: Changes in Criminal Procedure at the Old Bailey 1717-1797*, presented at the annual meeting of the Law and Society Association, Washington, D.C., June, 1987.

(24) *The Supreme Court: What is Its Role in Education?* presented at the annual convention of the American Association of School Administrators, San Francisco, California, February, 1986.

(25) *Public Law 98-377: The Equal Access Act Comes to Ohio*, presented at the Interdenominational Conference on Equal Access, Cleveland, Ohio, July, 1985.

(26) *The Decline of the Adversary System and the Changing Role of the Advocate in that System,* presented at the International Conference on Ethics and Responsibilities of the Legal Profession, Tel Aviv, Israel, August, 1980.

WORK IN PROGRESS

(1) THE HOLOCAUST ON TRIAL: THE RULE OF LAW AND THE DEFENSE OF MEMORY (book-length project analyzing Eichmann, Demjanjuk and Finta cases as well as the broader issues they raise).

(2) *Bifurcation and Damages* (further empirical studies concerning the effect of bifurcation on the trial of punitive damages claims, funded by a $250,000 grant from G.D. Searle & Co. (with Dr. Shari Diamond and Professor Michael Saks).

(3) ADVOCACY ASCENDENT: THE TRIUMPH OF THE COURTROOM LAWYER (book-length study of the rise to preeminence of trial advocates in the second half of the eighteenth century).

(4) SYMPATHY FOR THE DEVIL (book-length study regarding impact of representation of radically evil defendants on defense counsel).

AWARDS:

(1) Robert A. Clifford Chair of Tort Law and Social Policy (1996-2002)

(2) Wilson G. Stapleton Award for Faculty Excellence (1993)

(3) Oleck Prize for Outstanding Faculty Writing (1990)

(4) American Civil Liberties Union Award of Recognition (1983)

PRO BONO LITIGATION:

(1) Amicus Brief KUMHO TIRE COMPANY, LTD. V. CARMICHAEL (U.S. Supreme Court No. 97-1709)

(2) SULIMAN V. CITY OF SHAKER HEIGHTS, 92 CV 908 (1992). (Lead counsel for city defending pro-integrative rental program).

(3) CITY OF AKRON V. AKRON CENTER FOR REPRODUCTIVE HEALTH, 103 S. Ct. 2481 (1983). (Oral advocate and counsel of record representing Akron Center for Reproductive Health, et al.)

(4) STEVENS V. CALIFANO, 448 F.Supp. 1313 Affirmed 443 U.S. 901 (1979). (Counsel of record representing plaintiff Stevens, et al.)

(5) ROBINSON V. RHODES, 424 F.Supp. 1183 (N.D. Ohio 1978). (Lead counsel representing plaintiff Robinson, et al.)

(6) SKAPURA V. MCFAUL, 54 Ohio St.2d 348 (1980). (Oral advocate and counsel of record representing petitioner Skapura.)

COMPLEX CIVIL LITIGATION (SELECTED EXAMPLES):

(1) PEOPLE OF THE STATE OF ILLINOIS V. PHILIP MORRIS, INC., 96L 13146 (Cir. Ct. Cook Co.) (dispute regarding $900 million in fees arising out of settlement of tobacco litigation).

(2) REGIONAL TRANSIT AUTHORITY V. GIBBONS, 81 C 431 (N.D. Ill.). ($25 million jury award in complex contract action).

(2) KOCIEMBA V. G.D. SEARLE & CO., No 3-85-1599 (D. Minn.) (products liability defense of Copper 7 IUD).

(3) MCCARTHY V. G.D. SEARLE & CO., CV-85-6406-IH (C.D. Cal.) (products liability defense of Copper 7 IUD).

EXPERT WITNESS APPEARANCES:

(1) THE LOEWEN GROUP ET AL. V. THE UNITED STATES OF AMERICA ICSID Case No. ARB (AF)/98/3 (NAFTA arbitration, expert witness on behalf of the United States of America).

EMPLOYMENT EXPERIENCE:

(1) September 1994 to present, Professor, DePaul University College of Law. Subjects taught: Torts, Evidence, When Justice Fails, Psychology of the Courtroom.

(2) September 1982 to 1993, Professor, Cleveland-Marshall College of Law. Subjects taught: Torts, Evidence, When Justice Fails (analysis of Sacco-Vanzetti, Scottsboro, Rosenberg, and Dreyfus trials), Psychology of the Courtroom (examination of social science materials concerning the operation of American trial courts).

(3) September 1979 to May 1982, Associate Professor, Cleveland Marshall College of Law. Subjects taught: Evidence and Constitutional Litigation Clinic.

(4) May 1976 to May 1979, Assistant Professor, Cleveland-Marshall College of Law. Subjects taught: Evidence, Clinical Studies, and Administration Law.

(5) September 1972 to May 1976, legal practice with Legal Services Corporation, Rochester, New York.

BAR MEMBERSHIPS:

(1) New York State Courts (1973)

(2) United States District Court for the Western District of New York (1973)

(3) United States Court of Appeals for the Second Circuit (1975)

(4) Ohio State Courts (1976)

(5) United States District Court for the Northern District of Ohio (1976)

(6) United States Supreme Court (1978)

(7) United States Court of Appeals for the Sixth Circuit (1980)

OTHER PROFESSIONAL ACTIVITIES:

(1) Consultant to American Judicature Society Jury Reform Guidebook Project.

(2) Tenure Review Consultant Stanford Law School, Cleveland-Marshall College of Law, Brooklyn Law School, Chicago-Kent College of Law.

(3) Reviewer American Judicature Society, BEHAVIORAL SCIENCES AND THE LAW, LAW AND HISTORY REVIEW, National Science Foundation (Law & Social Sciences).

(4) Contributor to JURY TRIAL INNOVATIONS (National Center for State Courts) (1997).

(5) Visiting Professor, National Law School of India University, Bangalore, India, November 1996.

(6) Member, governing Council American Bar Association Litigation Section (1995-1998).

(7) Vice Chair Illinois State Justice Commission appointed by Governor Jim Edgar October, (1994-1996).

(8) Member, Chicago Inn of Court (1994 -).

(9) Chair, American Bar Association Litigation Section Subcommittee on the Rules Enabling Act (1994-1995).

(10) Reporter, American Bar Association Working Group on Case Management (1993-1994).

(11) Fellow American Bar Foundation.

(12) Member, American Bar Association Working Group on Civil Justice System Proposals (1991-1992).

(13) Reporter, American Bar Association Litigation Section Task Force on the Adversary System (1991 - 1992).

(14) Member, Association of American Law Schools Committee on Sections and Annual Meeting (1991-1993).

(15) Correspondent, British Royal Commission on Criminal Justice (1991).

(16) Consultant, G.D. Searle and Co. (1986-1992).

(17) Reporter, American Bar Association Litigation Section Task Force on Training the Advocate (1986-1989).

(18) Program Chairman, Association of American Law Schools Mini Workshop on Appellate Litigation (1987).

(19) Chairman, Litigation Section of the Association of American Law Schools (1987).

(20) Program Chairman, Litigation Section of the Association of American Law Schools (1985).

(21) Visiting Scholar Wolfson College, Cambridge University, Cambridge, England (1983-1984).

(22) Program Director, City of Cleveland Assistant Law Directors/Assistant Prosecutors Training Program (1981).

(23) Legal Services Corporation Training Consultant (1978-1981).

(24) Instructor, Clinical Teachers Training Conference (1977).

(25) Diplomat, National Institute for Trial Advocacy (1973).