Moldea v. New York Times

Chronology of Events

(Based exclusively on press coverage of this dispute since 1989)

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"Moldea has stated for the record that if the *New York Times Book Review* had published his letter, not an overlong one by prevailing standards, he would not have sued." **(*Los Angeles Times*; Jack Miles)**

"In the annals of publishing, it would be difficult to find a more David and Goliath-like mismatch." **(*New York*; Edwin Diamond)**

"The *Moldea* decision [by the federal appellate court] deserves applause . . . [and] will most likely prompt book reviewers to do more factual homework, a habit the First Amendment cherishes. And to the extent the decision chills reviews that maliciously and factually mislead the reader—the proof required for damage recovery when the book author is a public figure—it chills what ought to be chilled." **(*Legal Times*)**

"'[The federal appellate court's reversal of Moldea's victory] 'is impossible to understand,' said College of William and Mary law professor Rodney Smolla, an expert on the First Amendment. The first time around, he noted, Chief Judge Abner Mikva had strongly dissented, which means 'they argued this out, thought this out, thrashed it out . . . It's inexplicable.'" **(*Washington Post*; David Streitfeld)**

"'These judges spent over six months reviewing the case history as well as my book,'[Moldea] said. 'On that basis, they ruled in our favor. Since then, the only new contribution has been the avalanche of misleading articles and editorials overreacting to this decision. I think it's legitimate to question what impact all of that had on this very bizarre reversal.'" **(*New York Times*; Tamar Lewin)**

"Even some detractors of the original opinion agreed with Mr. Moldea's assessment. 'This extraordinary reversal suggests the power of big media when they gang up on a single writer,' said Carlin Romano, president of the National Book Critics Circle and literary critic for the *Philadelphia Inquirer*." **(*Wall Street Journal*; Paul Barrett)**

"I wish I could claim that my eloquence, either in my dissent or otherwise, persuaded my colleagues to change their minds. It was more likely the drumbeat of criticism begun

in the editorials of *The Washington Post* and *The New York Times* about the 'serious threat' to the First Amendment posed by the original decision." **(*Legal Times*; Abner Mikva)**

The Book, the *New York Times* Review, and the Immediate Aftermath

"Dan E. Moldea spent seven years researching and writing *Interference: How Organized Crime Influences Professional Football*. He and his publisher, William Morrow & Company, had high hopes upon the book's publication last autumn. Early reviews were good; bookstores were ordering briskly." **(*Columbia Journalism Review*; Steve Weinberg; March/April 1990)**

"Moldea's latest [book] . . . alleged that 26 past and present NFL team owners had documentable ties either to gamblers or to organized crime. Moldea also claimed to have assembled evidence of some 70 fixed professional football games, and the suppression of at least 50 'legitimate law enforcement investigations' into corruption inside the NFL . . . [Moldea is] a longtime activist on behalf of writers' rights [and]—as president of the Washington Independent Writers—was an important figure in the 1981 American Writers Congress . . . His first book, *The Hoffa Wars: Teamsters, Rebels, Politicians and the Mob*, published in 1978, was a Book-of-the-Month Club selection and was syndicated by, ahem, *The New York Times*. *Dark Victory: Ronald Reagan, MCA and the Mob*, a 1986 best seller, was a piercing, carefully documented look at organized crime's involvement in Hollywood." **(*Village Voice*; Doug Ireland; September 11, 1990)**

"[Moldea] wrote perhaps the most important sports book in the history of the language. He painted the true and terrifying picture of a business whose movers and shakers seem to have more connections to gambling and the mob than to touchdowns and Super Bowls . . . Moldea even exonerated some of the game's more dubious characters, spending as much time debunking alleged crookedness as he did documenting the real thing."[1] **(*L.A. Style*; Keith Olbermann; January 1992)**

"The author of three earlier books on organized crime, the 44-year-old Mr. Moldea was thrilled when advance copies of *Interference* led to appearances on national TV, including ABC's *Nightline* and *Good Morning America*.

"But in early September, just as the 1989 football season was starting, the *Times* landed a powerful blow. Conceding that 'there was some really hot stuff' in *Interference*, the reviewer, *Times* sportswriter Gerald Eskenazi, wrote, 'but there is too much sloppy journalism to trust the bulk of this book's 512 pages.'" **(*Wall Street Journal*; Paul M. Barrett; April 7, 1994)**

"Four days [after the September 3, 1989, publication of the review in the *Times*], Moldea wrote the reviewer . . . charging that Eskenazi had seriously misreported what Moldea had written. Eskenazi's errors about the book amounted to libel against the

book's author, Moldea said, and he demanded 'a full and prompt retraction.' Otherwise, he promised to 'take legal steps to remedy this situation, which has already caused tremendous illegal and unfair damage to my reputation and economic harm to my book.'" **(*Los Angeles Times Book Review*; Jack Miles; April 3, 1994)**

"Moldea felt that the review misrepresented his book. He thought it asserted that he alleged facts in the book that he hadn't alleged, and claimed that he didn't provide facts that, he believed, he'd provided. On advice of his attorney, Moldea sent a letter to Eskenazi on September 7, with a copy to *Times Book Review* editor Rebecca Sinkler, demanding a retraction or correction. Getting no immediate response, Moldea directed his attorney to call the *Times*'s general counsel on September 13, with a demand that the *Times* either retract or correct the review. On September 22, *Times* attorney David Thurm responded by letter that Eskenazi's review was 'clearly protected as opinion, and there is no basis for a correction or retraction'[2]

" . . . So just as one can see how Moldea's legalistic approach and doggedness irritated the *Times*, one can see how Eskenazi's combination of condescension and deception, coupled with his alleged inaccuracies, infuriated Moldea. To an outside eye, the whole review looks not so much illegal as inept—a bad assignment that produced an untrustworthy review. To Moldea, it constituted an act of libel that declared him incompetent at investigative reporting—a direct attack on his livelihood." **(*The Nation*; Carlin Romano; June 6, 1994)**

Eskenazi's Conflicts of Interest

"In the prologue to *Interference*, [Moldea] had predicted that the National Football League would 'send its front line of defense, the loyal sportswriters, to attack the messenger.' Eskenazi, he says, was beholden to the football establishment and the *Times* should have made it clear to readers that Eskenazi covered pro football." **(*Columbia Journalism Review*; March/April 1990)**

"In fact, Eskenazi is a full-time beat reporter covering the NFL and, specifically, the [New York] Jets. Moldea charges that '[Eskenazi] and the *Times* depend upon the NFL and NFL teams for access to information' and that Eskenazi's review was designed to curry favor with longtime sources." **(*Village Voice*; September 11, 1990)**

" . . . I'll say that (a) I think Mr. Eskenazi's a first-rate writer and there was nothing malicious in his review of Mr. Moldea's book, (b) I think Mr. Moldea is right when he charges Mr. Eskenazi with writing a review that, at the very least, was misleading in regard to several facts presented in the book and wrote that opinion for another publication, and (c) although I've been reviewing books for *The Times* for nearly 10 years and could therefore be putting myself in an awkward position, I have to say I'm

often puzzled by *The Times*' reviewing practices . . .

"What I wonder is why *The Times* doesn't exclude reviewers from reviewing certain books where a conflict of interest might at least be perceived, after all, it isn't as if there aren't a lot of other books and reviewers out there . . .

"I'm not suggesting that Mr. Eskenazi had that kind of natural bias against Mr. Moldea's book, but I think *The Times* could have fended off some charges by not giving the assignment to a beat writer—one who could risk losing precious 'access' to important National Football League information if he gave aid and comfort to a scathing critic of the league like Mr. Moldea. Again, I'm not suggesting that Mr. Eskenazi would back off of saying what he felt because of what the N.F.L. might do, but if *The Times* hadn't given the book to a beat writer to review, the possibility for criticism would not exist." **(*New York Observer*; Allen Barra; May 9, 1994)**

"The reviewer, veteran *Times* sportswriter Gerald Eskenazi, had covered had covered professional football for the paper for many years. In 1977, he'd written his own puffy book about pro football, *There Were Giants in Those Days*, in which he acknowledged his indebtedness to various New York Giants officials and to Joe Browne, the N.F.L.'s chief spokesman . . .

"To be sure, Eskenazi's review and its presentation excluded disingenuousness on someone's part at the *Times*. Eskenazi was then a veteran writer assigned to cover the Jets. In his book, Moldea specifically warned that the N.F.L.'s 'loyal sportswriters,' dependent on the league for information and access, would attempt to discredit his account. That alone might not have justified keeping the book from Eskenazi for review, but it increased the *Times's* obligation to make Eskenazi's link to the book's subject clear and upfront. Instead, the *Times's* identification line read, 'Gerald Eskenazi, a sportswriter for *The New York Times*, is currently working with Carl Yastrzemski on his autobiography.'

"As Doug Ireland noted in his September 11, 1990, *Village Voice* critique of the *Times*, 'the unsuspecting reader would naturally think that Eskenazi was a baseball writer.' To make matters worse, Eskenazi did not acknowledge in the body of the review that he'd covered the Jets for years, and had received past assistance from the N.F.L.'s director of communications, Joe Browne. Instead, worsening an already deceptive presentation, Eskenazi began his review with a mock admission that he might have a 'tangled financial connection' to the N.F.L. because 'my wife's first cousin married a psychiatrist whose father sold his plumbing business to a company that eventually became Warner Communications. And the owners of several football teams have a piece of Warner. Is that clear?'

"While trying to make it seem as if only a conspiracy nut could connect him to the N.F.L., Eskenazi essentially covered up his arguable conflict of interest. Whoever

signed off on his ID line slipped up. Since most book reviewers are invited to suggest their own ID lines, the original blame probably rests with Eskenazi." **(*The Nation*; June 6, 1994)**

"Mr. Moldea also believes Mr. Eskenazi's relationship with Joe Browne, the NFL's vice president of communications, created a predisposition against the book. Mr. Moldea says Mr. Browne attacked his book seven months before publication. Mr. Moldea says Mr. Eskenazi was scheduled to meet with Mr. Browne before receiving an assignment to review the book. Mr. Browne's name is listed in the margin of Mr. Eskenazi's personal notes about *Interference*." **(*Washington Times*; Judith Colp; April 23, 1992)**

False Facts and the Letter to the Editor

"Moldea took issue not so much with the negative review and charge of 'sloppy journalism' but more so with what he said were misstatements of facts and false innuendo used to support that conclusion." **(*Editor & Publisher*; Debra Gersh Hernandez; March 19, 1994)**

"Moldea has reason to be upset. I would, of course, never dream of suggesting that the review was 'sloppy.' But after comparing what the book says with what the review says it says, one might conclude that Eskenazi was some distance from Pulitzer territory." **(*Columbia Journalism Review*; Christopher Hanson; May/June 1994)**

"How nice, though, if, between opinions, we got the facts straight. Strong feelings are no guarantee of intelligent thinking . . . I've read *Interference*, and Gerald Eskenazi's *Times* review of it, and if we are to deplore sloppy journalism we must admit that sloppy reviewing is one of its drearier subdivisions." **(*The Nation*; John Leonard; July 11, 1994)**

"One Eskenazi statement claimed that Moldea portrayed a meeting between Joe Namath and Lou Michaels as 'sinister' when Moldea never used that word. Another said that Moldea 'revives the discredited notion' that Los Angeles Rams owner Carroll Rosenbloom drowned as a result of foul play—a notion Moldea rejected late in the book. A third stated that *Interference* contained only 'warmed over' stuff, despite Moldea's many fresh interviews. A fourth claimed that Moldea failed to reveal 'in his text' that the Baltimore Colts in a famous 1958 playoff game had a lousy field goal kicker (he mentioned it in a footnote). A final statement claimed that Moldea mischaracterized a certain Joe Hirsch as the writer of 'an inside information sheet' for horseracers." **(*The Nation*; June 6, 1994)**

"On Nov. 15, 1989, having failed to win a retraction or other correction, Moldea

wrote a letter of about 750 words to Rebecca Sinkler, editor of the *New York Times Book Review*, refuting five alleged errors in the review by quoting from the book. For example:

Charge: Leading the reader to believe that I claimed that Super Bowl III in 1969 was fixed, Eskenazi wrote that I charged that there was something premeditated and 'sinister' about a meeting in a Miami bar between Namath and Baltimore Colts placekicker Lou Michaels during the week before the game. He added that I failed to point out that the meeting 'almost came to blows.'

Response: This is not true. I wrote in the second paragraph on page 197: '[Lou] Michaels told me that the meeting at a Miami bar/restaurant was quite accidental and even confrontational.' Michaels's statement was corroborated during my interview with Jets' player Jim Hudson, who accompanied Namath to the bar. Further, I never claimed that the 1969 Super Bowl was fixed. To the contrary, I produced evidence on pages 194 and 198-199 discrediting the theory by Colts' player Bubba Smith that it was.

"[T]he *Times* declined to publish this letter . . ." **(*Los Angeles Times Book Review*; April 3, 1994)**

"I can testify that Eskenazi misrepresented some of what Moldea wrote in *Interference*, in particular a meeting between New York Jets quarterback Joe Namath and Baltimore Colts placekicker Lou Michaels. He also charged that Moldea didn't 'state in his text' another point he clearly made in the 63 pages of notes at the end of the book." **(*Akron Beacon Journal*; Steve Love; April 19, 1994)**

"But more germane is this sentence from the book review: '[Moldea] revives the discredited notion that Carroll Rosenbloom, the ornery owner of the Rams, who had a penchant for gambling, met foul play when he drowned in Florida 10 years ago.' In fact, Moldea interviewed witnesses who were at the scene, obtained the autopsy photos, and concluded on page 360 of *Interference*: 'Rosenbloom died in a tragic accident and was not murdered.'" **(*New York*; April 18, 1994)**

"In fact, Moldea ended up discrediting the notion that Rosenbloom was murdered. He unearthed new evidence, interviewed experts, and concluded that the man died by accident." **(*Columbia Journalism Review*; May/June 1994)**

"Said Roger C. Simmons, the author's attorney: 'We believe we can prove that kind of assertion [by Eskenazi on what was reported in *Interference* about Rosenbloom's death] had no factual basis. And it had a devastating impact on [Moldea's] career.'

"He noted that Moldea sent a letter of reply to the *New York Times* soon after Eskenazi's review appeared, but it was not printed.

"'If they had printed his reply, there would never [have] been a case,' Simmons said." **(*Los Angeles Times*; David G. Savage; February 19, 1994)**

"For nearly eleven months between the appearance of the review and Moldea's suit, the *Book Review* refused to print his letter, even though Moldea made clear to the *Times* that if it published his letter, he would not sue . . .

"Even recently, when media critic Edwin Diamond questioned George Freeman about Moldea's offer to go away if the *Times* printed his letter, Freeman, now assistant general counsel of the *Times*, 'would neither confirm nor deny that the paper had received such a letter.'" **(*The Nation*; June 6, 1994)**

"Two years earlier [in 1992], however, after Moldea urged the NBCC [National Book Critics Circle] to take a public position in his support, I had phoned Freeman for the express purpose of asking whether the *New York Times* had ever received the letter in question. At that time, he confirmed that the *Times* had indeed received the letter but, finding it without merit, had not published it." **(*NBCC Journal*; Jack Miles; August 1994)**

"[Freeman] conceded, 'Whenever you get sued it cause you to think, 'What could we have done to prevent this?'

"This is where a letter that Moldea says he sent to the *Times*—and that the *Times* says it never got—plays a role. If the *Times* had published his letter, Moldea has said, he never would have sued.

"'We don't hold our letter page to be a place where we can ransom off lawsuits,' said Freeman, adding that 'we can't have a policy of publishing every letter by every disgruntled author.'

"However, if the *Times* had known it was looking at a four-year lawsuit, Freeman said, 'I suppose we would have looked more seriously at the letter to the editor he was purported to have sent us.'" **(*Washington Post*; David Streitfeld; October 4, 1994)**

"Before filing suit, Moldea said he sought redress in the pages of the *Times* through an op-ed or letter to the editor but was denied.

"*Times* assistant general counsel George Freeman, however, said the paper's position is that it never received the letter.

"'The notion that he believes the letter should've been printed is ludicrous,' Freeman said." **(*Editor & Publisher*; Debra Gersh Hernandez; October 15, 1994)**

"[W]hen the *New York Times* began receiving public criticism for refusing to publish my letter, in-house *Times* counsel George Freeman simply began denying that the newspaper had ever received it—despite the existence of my Federal Express airbill, documentation of billing and payment on my American Express statements, and even Federal Express's official confirmation of delivery to the *Times*." **(*Interference*; Dan E. Moldea; updated 1995 reprint)**

"My sympathies are not with the *New York Times* in its original response to Dan Moldea's complaints. Given all the circumstances, it should not have refused to run a letter from him replying to its very tough criticism." **(*American Journalism Review*; Reese Cleghorn; July/August 1994)**

"Moldea did not pick up the *Times* review and think lawsuit. He asked that mistakes of fact be corrected by the *Times* or, failing that, that he be allowed to write a rebuttal . . .

"'Just let me have my defense on the record,' Moldea said.

"*The Washington Post*, which also criticized his work, did.

"Result: No lawsuit." **(*Akron Beacon Journal*; April 19, 1994)**

"Carlin Romano, president of the National Book Critics Circle, [said] . . . 'None of the big media outfits seem to take seriously that it may be Moldea who's on the right side of freedom of expression here. His argument—that he and authors like him have little chance to respond to book reviews in major publications—is well taken.'" **(*Washington Post*; David Streitfeld; May 4, 1994)**

Damages Resulting from the Review

"Authors get bad reviews every day; as these things go, Moldea's was not overwhelmingly harsh. But the independent investigative journalist said it had a drastic effect on his career." **(*Washington Post*; David Streitfeld; February 19, 1994)**

"Mr. Moldea argues that by impugning his credibility, the *Times* hurt not just his book but also his career as a freelance investigative journalist. TV producers stopped calling; publishers for a time wouldn't even nibble at new book proposals; and lecture invitations dried up. 'I felt destroyed,' he says." **(*Wall Street Journal*; April 7, 1994)**

"In his four non-fiction books, Moldea has written about controversial subjects such as the influence of organized crime on institutions such as the Teamsters, Hollywood and professional sports. He can only be effective as long as he maintains a reputation for care, honesty and detail. When the *Times* tarnished this reputation, it silenced

Moldea's independent voice." **(*Newsday*; Roger C. Simmons; March 18, 1994)**

"As a result, Moldea contends, his publisher 'withdrew support for the book, more than 12,000 copies were returned from bookstores, reviews and articles in other newspapers virtually ceased, and there was no paperback book contract." **(*Seven Arts*; Dan Rottenberg; December 1994)**

"At KCBS-TV in Los Angeles, producers had planned an interview with him, recalls Keith Olbermann, the station's former sports director. But the *Times* review effectively killed those plans. 'What the *New York Times* says about a sports book has a lot of weight,' says Mr. Olbermann, who now works at ESPN.

"Based on an advance copy of *Interference*, independent producer Marnie Inskip was assigned to do a segment on Mr. Moldea by Fox-TV. After the *Times* review appeared, Fox officials called her in, pointed to a copy of the review and demanded, 'What's this?' Ms. Inskip says. The segment was canceled . . .

"Sales of *Interference* topped out at 21,000, and . . . bookstores began returning thousands of copies . . ." **(*Wall Street Journal*; April 7, 1994)**

"In the dozen years I have known Moldea, I've always expected that one day someone would get him.

"I just never figured it would be the *New York Times* . . .

"Eskenazi did what the mob could not: He killed Moldea." **(*Akron Beacon Journal*; Steve Love; April 19, 1994)**

"Mr. Moldea said he had requested retractions and corrections and had written a letter to the editor, and he filed suit just before the statute of limitations ran out . . . 'I may be crazy, but I'm not stupid . . . I wasn't looking for a way to commit suicide by suing *The New York Times*. This review was constantly thrown in my face, my income had gone to hell.'" **(*New York Observer*, D. T. Max; May 16, 1994)**

Filing Suit Against the *New York Times*

"Moldea turned to [attorney] Roger Simmons and to associate Edmund Law of Frederick, Md.'s Gordon & Simmons and to Stephen Trattner of D.C.'s Lewis & Trattner. [*Moldea v. New York Times* was filed on August 23, 1990, in U.S. District Court for the District of Columbia.]" **(*Legal Times*; Julie Cohen; March 7, 1994)**

"[A]s the statute of limitations on his libel claim was running out, he sued the *Times* .

. . alleging that six specific statements in the *Times* review—'too much sloppy journalism' and five other statements meant to support that judgment—falsely characterized his book and libeled him." **(*The Nation*; June 6, 1994)**

"Mr. Simmons says he's never doubted Mr. Moldea or any of his contentions. They met nearly four years ago, when Washington lawyer Stephen Trattner, the author's original lawyer and now co-counsel, introduced the two in a meeting. Soon after, Mr. Simmons, with a $5,000 payment up front, accepted the case on contingency . . .

"Mr. Simmons, a well-respected local trial lawyer . . . says, 'I love a good fight' in litigation.

"'Litigation is a form of civilized warfare. There are a lot of skirmishes, battles, but in the end the question is whether you win the war.'

"'I told Roger when I sat down and [signed] the contract that I don't care if I win or lose.' Mr. Moldea says. 'I said, "All I'm asking you to do is give me a great fight."'" **(*Washington Times*; Michael Richman; May 9, 1994)**

"Moldea, who gained attention with his bestselling first book, *The Hoffa Wars* in 1978, is seeking $10 million in punitive damages . . . for a *Times* review of his latest book . . . The suit charges that the *Times Book Review* 'has a powerful influence on the publishing business,' and that despite a 13-city, 70-interview book tour that had generated a third printing after an initial run of 28,000, sales plummeted after the Eskenazi review appeared." **(*Publishers Weekly*; Howard Fields; September 7, 1990)**

"Further, Moldea's suit alleges the review, since written by a sportswriter who covers football, 'was intended to protect the NFL by personally attacking Moldea, discrediting his reputation and smearing his good name as a careful investigative reporter.'" **(*Editor & Publisher*; Debra Gersh; September 8, 1990)**

"Moldea's suit challenges a closed system that, thanks to the market power of *The New York Times*, places one powerful voice (*The New York Times Book Review*) in the role of bashing, barring and even banishing books and their authors. In these days of chain bookstores that make purchasing decisions based on the *Times Review*, Moldea's suit alleges that the *Review* gained its market dominance by holding itself out as a fair and accurate evaluator of books."[3] **(*Newsday*; Roger C. Simmons; March 18, 1994)**

"While Moldea's book might have been negatively affected by the *Times* review, his career seems to have taken even more of a nose dive as a result of the suit. Publishers apparently regarded him as a pariah, and for a time he couldn't get another book contract." **(*Library Journal*; Francine Fialkoff; May 15, 1994)**

"Initially, Mr. Moldea's suit compounded his problems. For the first time in his

career, he couldn't get even a single offer on his book proposals. New York agent Frank Weimann tried to peddle an 'as-told-to' memoir of a former U.S. intelligence agent, with Mr. Moldea as the writer. But publishers' attitudes 'appeared to be: "If this guy is going to sue the *New York Times*, what kind of trouble will that get us into?"' says Mr. Weimann." **(*Wall Street Journal*; April 7, 1994)**

"After filing suit in August [1990], [Moldea's] woes only compounded. 'I turned in 20 proposals on 11 different subjects . . . No one [wanted] to work with me because I took on the *Times*.'"[4] **(*Washington Post*; February 19, 1994)**

"Mr. Moldea says that by 1991 his annual income from lecturing and publishing under his own name had dwindled to $2,800, down from $59,000 in 1988. Unmarried, he kept food on the table by ghostwriting, doing some private-eye work and serving as an expert witness on the mob." **(*Wall Street Journal*; April 7, 1994)**

"Odder still is that in filing a $10 million lawsuit against the *Times*, Moldea would come to be seen as a villain, a threat to criticism in particular and to the First Amendment in general." **(*Akron Beacon Journal*; April 19, 1994)**

"I do not mean to suggest that Moldea is a villain. He is merely a man with no good options. *The Times Book Review* is a powerful forum. Moldea asserts it all but broke him, misrepresenting his book, costing him esteem, book contracts, lecture fees. He tried and failed to get the paper to publish a rebuttal letter. He also tried to get some other news outlet to air his side, but found none willing to take on the *Times*. Only then did he reach for the ICBM of libel litigation." **(*Columbia Journalism Review*; Christopher Hanson; May/June 1994)**

"A certain amount of journalistic arrogance contributed to this lawsuit. Moldea's attorney has said Moldea would not have sued if the *Times* had printed his letter to the editor in response to the review. It would be a travesty if such an action led to bad law." **(*Quill*; Lucy Dalglish; May 1994)**

Misleading Statements about the Suit

"Three legal experts [two private attorneys, Bruce Sanford and Floyd Abrams, and Henry R. Kaufman, general counsel of the Libel Defense Resource Center[5]] split on whether libel cases against reviewers and columnists will be more viable now than in the past. All agreed, however, that the courts will probably see heavy traffic as lawyers test the waters." **(*Washington Post*; David Streitfeld; August 24, 1990)**

"That fear [of the impact of a June 1990 Supreme Court decision in an Ohio case, *Milkovich v. Lorain Journal Co.*, holding that opinions based on provably false facts may

be libelous] now takes a faintly absurd but still troublesome twist with the lawsuit of writer Dan Moldea against *The New York Times* . . . Mr. Moldea's complaint . . . seems something of a stretch. The review does, as he charges, accuse him of 'sloppy journalism'; it goes on to give a string of examples, including spelling errors.[6] . . . But for Mr. Moldea to show that this sort of thing is provably false fact, rather than opinion, would require a large and unwarranted step past anything established in the Supreme Court's handling of the Ohio case." **(*Washington Post*; editorial; August 26, 1990)**

Lower Court Dismissal

"On Jan. 31, 1992, U.S. District Judge [John] Garrett Penn granted summary judgment in favor of the *Times* . . . [Summary judgment] is granted when the facts of a case are not in dispute and a decision may be rendered on the law alone . . . Moldea claimed that the facts were indeed in dispute." **(*Los Angeles Times*; April 3, 1994)**

"Ruling in favor of the *Times*, [Penn] said the statement ['sloppy journalism'] is an unverifiable opinion, and is thus not actionable under libel law.'" **(Associated Press; Laurie Asseo; February 1, 1992)**

"Moldea's attorney, Roger C. Simmons . . . said that his client is not challenging the right of Eskenazi to express his opinion, but rather 'whether or not the statements challenged contained factual assertions.'

"It is those factual assertions that Moldea claims are false and defamatory.

"'We feel it's an important case for writers,' said Simmons . . .

"Moldea commented, 'I believe if this ruling [the dismissal] stands, authors will be at the complete mercy of reviewers, and that the publications that print [their] reviews will have no responsibility to monitor conflicts of interest and [to] correct mistakes.'" **(*Editor & Publisher*; February 8, 1992)**

Appeal Filed

"In his appeal [filed on May 19, 1993], Moldea argued that the District Court was in error when it did not consider all the statements cited as defamatory in the original complaint that, according to his appeal, 'expressed or implied provably false, defamatory facts.'

"Moldea also noted that 'the mere fact that Eskenazi's statements appeared in a book

review does not warrant their protection and provides no basis for affirming the lower court's decision.'" **(*Editor & Publisher*; Debra Gersh; July 10, 1993)**

"Moldea contended in his brief to the Appeals Court—which set oral arguments for September 14—that Penn focused too much on that one quote ["sloppy journalism"] and not enough on the other five in question; did not allow him to amend his complaint to take into account another intervening Supreme Court opinion; and simply failed to follow the Supreme Court's edicts that opinions also can be libelous." **(*Publishers Weekly*; Howard Fields; June 7, 1993)**

"Throughout the four-year ordeal, [Simmons and Moldea] have disagreed on just one major point. Mr. Moldea says that prior to the first circuit court rehearing, he wanted the 'sloppy journalism' phrase removed from his argument, intending for Mr. Simmons to concentrate instead on the review's factual errors. But Mr. Simmons insisted that 'sloppy journalism' remain, saying that the review was based on false facts and, therefore [the term 'sloppy journalism'] was libelous.

"In the appellate court decision, the lawyer's intuition proved right."[7] **(*Washington Times*; May 9, 1994)**

The Appellate Reinstatement

"An author whose competence as a journalist was attacked by a *New York Times Book Review* may sue the newspaper for libel, the U.S. Court of Appeals for the District of Columbia Circuit ruled Feb. 18.

"The 2-1 panel reversed a lower court that had ruled the book review was not actionable 'because it consisted only of unverifiable statements of the reviewer's opinion' of the book." **(*National Law Journal*; March 7, 1994)**

"The ruling by a three-judge panel of the U.S. Court of Appeals was a procedural victory for investigative journalist Dan Moldea . . . " **(*Wall Street Journal*; Paul Barrett; February 22, 1994)**

"The D.C. Circuit reversed and remanded the case on two grounds. First, the court said that the book review could be defamatory as a matter of law because it attacked Moldea's competence in his profession. Second, the appeals court held that Eskenazi's characterizations of *Interference* were sufficiently factual that a jury could determine their truth or falsity." **(*Entertainment Law & Finance*; Stan Soocher; April 1994)**

"[T]he review gave a number of examples of Moldea's alleged sloppiness, five of which he is challenging in his suit. The judges said four of the five could be

meaningfully determined by a jury to be true or false." **(*Washington Post*; February 19, 1994)**

"[A] lawyer [Roger C. Simmons] who represented Moldea praised the ruling as a 'victory for the small guy' against the most powerful force in book publishing." **(*Los Angeles Times*; February 19, 1994)**

"Moldea's case is not about opinion; it's about publishing provably false facts that are disguised as opinion. Dan Moldea has been waiting since 1990 to have these issues fully aired at trial. Hopefully, such a hearing will now occur without further delay." **(*Newsday*; Roger C. Simmons; March 18, 1994)**

"'I've been waiting five years for my day in court, and it looks like I'm finally going to get it,' said an exultant Moldea." **(*Washington Post*; February 19, 1994)**

Milkovich and Opinions Based on Provably False Facts

"[The Moldea appellate] ruling illustrates a new trend in libel law. Since 1990, courts have increasingly held critics and opinion writers to the same strict standards for accuracy as news reporters.

"Before then, critics, columnists and editorial writers generally were seen as immune from libel suits because their words were labeled opinion, not fact." **(*Los Angeles Times*; February 19, 1994)**

"In 1990, the U.S. Supreme Court ruled in *Milkovich vs. Lorain Journal* that even statements of opinion can be libelous if they contain 'false and defamatory' facts. Until *Moldea vs. New York Times*, however, no one had claimed that a negative statement about a book could, by implication, constitute a 'false and defamatory' statement about the book's author. It is the novelty of this claim that may yet make the Moldea case one of historic importance for American book reviewing." **(*Los Angeles Times Book Review*; April 3, 1994)**

"Book reviews are entitled to no special protection in defamation law, the court made clear [in *Moldea v. New York Times*]. It noted that *Milkovich v. Lorain Journal Co*. rejected the practice of classifying statements as either assertions of 'opinion' or 'fact,' with opinion being protected by the First Amendment. Defamation law now recognizes that opinion is actionable if it implies a provably false fact. Even if a speaker states the facts upon which he bases his opinion, if they are either incomplete or incorrect, or his assessment of them is erroneous, the statement may imply a false assertion of fact and be actionable." **(*United States Law Week*; March 1, 1994)**

Analysis of the Appellate Decision

"What is at issue is whether a review must adhere to the same standards of honesty and accuracy that are applicable to hard-news stories . . . In other words, critics have to be able to support their case with provable facts, a revolutionary idea in both legal and journalistic terms." **(*New York*; April 18, 1994)**

"Without judging the facts as such, the court . . . found that since it was provable that Mr. Eskenazi might have erred, and perhaps erred in a way that defamed Mr. Moldea as a journalist, Mr. Moldea had the right to his day in court." **(*New York Observer*; May 16, 1994)**

"Two judges on the U.S. Court of Appeals for the District of Columbia Circuit, who are longstanding protectors of the First Amendment and who are among the finest minds in the legal profession, joined in the opinion at issue. They made it clear that *Moldea v. The New York Times* is most distinctly not a suit over a 'bad review,' nor about the use of the term 'sloppy' standing alone. It is a suit challenging verifiably false factual assertions."[8] **(*Washington Post*; Roger C. Simmons; March 23, 1994)**

"In *Moldea*, Judge Harry T. Edwards, writing for the majority, stated that, accusing the plaintiff of 'sloppy journalism' 'implies certain facts—that Moldea plays fast and loose with his sources . . . ' Judge Edwards added that a reviewer shouldn't be able to 'attack a person's work with impunity, and without substantiating his charges with facts, merely by using arguably imprecise terms." **(*Entertainment Law & Finance*; April 1994)**

"Can a writer sue over a negative opinion? Over the opinion as such, no, but over factual error offered as the basis of the opinion, yes, Moldea insists. So did [the] federal appeals court in Washington . . . " **(*Los Angeles Times*; editorial; March 9, 1994)**

"The panel also noted that its analysis 'is not altered by the fact that the challenged statements appeared in a book review rather than a hard news story.' It said 'the injury to Moldea's reputation is if anything greater because [the] review appeared in a forum to which readers turn for evaluation of books.'" **(*National Law Journal*; March 7, 1994)**

"The judges also agreed on the paramount importance of a *Times* review. 'For an author, they said, 'a harsh review in *The New York Times Book Review* is at least as damaging as accusations of incompetence made against an attorney or surgeon in a legal or medical journal.'" **(*Washington Post*; February 19, 1994)**

"Moldea rejects the notion that his suit could bring on some sort of nuclear winter in opinion writing. He insists that he is not suing over subjective opinions, that his case is

strictly about defamatory and false assertions of fact, and that it is only reasonable to hold opinion writers (who until recently enjoyed special protections from defamation suits) to the same standards as regular reporters." **(*Columbia Journalism Review*; May/June 1994)**

"The duty to refrain from false or defamatory statements cannot, obviously, require journalists to be infallible. An innocent mistake may always be corrected, and most publications—newspapers, in particular—correct errors far more quickly and prominently nowadays than they once did . . . Moldea has stated for the record that if the *New York Times Book Review* had published his letter, not an overlong one by prevailing standards, he would not have sued." **(*Los Angeles Times*; April 3, 1994)**

"[George Freeman, the *Times* senior attorney said,] 'The issue is not if we're right or wrong. Certainly the book is subject to multiple interpretations. It's wrong that it goes to a jury.'" **(*Editor & Publisher*; March 19, 1994)**

"The *Moldea* decision deserves applause for tacitly recognizing that free-speech goals are promoted, not threatened, by chilling publication of defamatory falsehoods about public officials or other figures that are the product of malice. Indeed, those goals would also be advanced by allowing the threat of defamation suits to deter negligent publication of untruths . . .

"[T]he *Moldea* ruling will most likely prompt book reviewers to do more factual homework, a habit the First Amendment cherishes. And to the extent the decision chills reviews that maliciously and factually mislead the reader—the proof required for damage recovery when the book author is a public figure—it chills what ought to be chilled." **(*Legal Times*; Bruce Fein; March 14, 1994)**

General Media Reaction to the Decision

"[Moldea's] suit, which had been dismissed by a lower court, immediately assumes the significance of a major First Amendment test case . . . 'This is a surprising if not startling result, and perhaps unprecedented,' said Henry R. Kaufman, chief counsel of the Libel Defense Resource Center. The information clearinghouse is supported by media that include the *New York Times* and *The Washington Post*." **(*Washington Post*; February 19, 1994)**

"The case, not widely known until the second ruling, has begun to rattle the publishing industry over the potential for libel in book reviews." **(*Christian Science Monitor*; David Holmstrom; March 1, 1994)**

"'I'm expecting to get powdered here,' . . . Moldea said. 'People see this as creating

tremendous damage to the First Amendment. But I just see it as putting opinion writers' feet to the fire." **(*Washington Post*; February 19, 1994)**

"The media are up in arms over the panel's decision, pointing to a dissenting judge's assertion that it could 'open up the entire arena of artistic criticism to mass defamation suits.' Until recently, courts made a sharp distinction between assertions of fact and opinion, and opinion was completely shielded from libel suits." **(*Wall Street Journal*; April 7, 1994)**

"Since September 1989, when Gerald Eskenazi's review appeared in the *New York Times Book Review*, Moldea has been a literary leper . . . Moldea continues to be vilified in the pages of the *Washington Post* and elsewhere." **(*Akron Beacon Journal*; April 19, 1994)**

"The very idea of a Moldea victory at trial has sent an arctic tingle down the spines of many opinion writers, who fear their leeway will be constrained. If Moldea prevails 'we might as well fold our tents,' as *Washington Post* book reviewer Jonathan Yardley put it." **(*Columbia Journalism Review*; May/June 1994)**

"Almost all the news stories and editorial commentaries about the case have framed it as the story of one crank writer whining about one bad review. Moldea is pictured as an enemy of free speech." **(*New York*; April 18, 1994)**

"Some journalists and First Amendment buffs see Mr. Moldea as a traitor. 'For Dan Moldea, an investigative journalist who has been the beneficiary of libel-defense law, to turn around and file a libel suit is unconscionable,' says Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press." **(*Wall Street Journal*; April 7, 1994)**

"Kirtley . . . criticizes Moldea 'for bringing in the lawyers.' Instead, she says, he should have raised hell, gone public, written letters to the editor. But that's exactly what Moldea says he did do. First he wrote Eskenazi 'questioning his use of misleading facts.' According to Moldea, Eskenazi never replied. Next, Moldea asked the *Times* to run a corrections box and was turned down. Next, he wrote a letter to the editor of the *Book Review*. It never appeared." **(*New York*; April 18, 1994)**

"Contributing to the pile-on tactics, both big corporate media and putative defenders of free expression strafed *Moldea I* from the start, with little attempt to understand Moldea's side of the case." **(*The Nation*; June 6, 1994)**

"'This case is not about the First Amendment,' said Moldea in a phone interview. 'If a writer bases his opinions on a series of false facts that are defamatory, then he loses his opinion privileges. That is what this case is about.'"[9] **(*Christian Science Monitor*; March 1, 1994)**

"What seems certain at this point is that the *Times*, whether or not it is legally culpable, was guilty of some sloppy journalism of its own—not to mention considerable hauteur—and that Moldea is a hapless figure who finds himself in a lose-lose position . . . [He says,] It's Catch-22: 'If I lose, I'm dead. If I win, I'm still dead, because I'm seen as limiting free speech.'" **(*New York*; April 18, 1994)**

Misleading Statements about the Appellate Decision[10]

"Unless the decision is overturned by the Appeals Court, critics will have no right to criticize literary and artistic works.

"The decision could destroy an American art form—the review. Who wants to read criticism if you know the critic has one eye on her computer screen and the other watching for lawyers?" **(*Quill*; Lucy Dalglish; May 1994)**.

"If author Dan E. Moldea wins his libel suit against *The New York Times Book Review*, he loses, and so does every writer and editor in the country . . . [S]ubjects of Moldea's books could sue him. Certainly a book that says football officials are being influenced by the Mob is not enhancing their careers. Law is a two-way street, and Moldea should consider the long-term implications, particularly for investigative journalists, rather than focusing on assuaging a wounded ego.

"Moldea claims that the review caused him to lose television bookings and assignments. That may be, but the loss is more of an indictment of how commercial the book business has become and how spineless the rest of the media are in the shadow of the *Times*.

"As a journalist, Moldea should be more outraged at the larger picture. What's happening to independent thinking? What's happening to intellectual discourse? A review is supposed to stimulate both, but today it is often seen as a price tag." **(*Boston Globe*; editorial; April 18, 1994)**

"Whatever Moldea's own problems, the court's decision has disturbing implications for review media . . . It could . . . open us up to wholesale lawsuits from irate authors, resulting in substantial legal costs even if we were to win the case. And it could threaten the existence of already shrinking newspaper review sections and the promotion efforts that publishers base on reviews.

"More importantly, however, the decision threatens First Amendments rights . . .[11]

"Nevertheless, most authors don't sue because of a bad review. They take the bad

ones with the good ones. They understand that taking reviewing knocks is part of the publishing process . . . [W]hether or not they've been favorably or badly reviewed, they shouldn't jeopardize the First Amendment." **(*Library Journal*; Francine Fialkoff; May 15, 1994)**

"Ask a typical American teenager and his mother what a 'sloppy' room looks like, and you're sure to get wildly differing descriptions. Defining that adjective is an extremely subjective undertaking. There is no provable right or wrong answer because the question seeks an opinion, not a fact. But that is the very word at issue in a case decided by the U.S. Court of Appeals here last Friday." **(*Washington Post*; editorial; February 24, 1994)**

"People worry about the chilling effect of laws declaring that opinion pieces are not immune to libel suits. And we should. We are much less likely to get an honest appraisal, or a spirited and valuable discussion, if the writer is looking over his shoulder for advancing attorneys." **(*Washington Post*; Joann Byrd; February 27, 1994)**

"Looking back over all those years and all those reviews, I realize that I've often said a book 'has the clear ring of truth.' This, however it may be phrased, is how a reviewer says, 'I don't have the time to research every assertion or fact in this book, but the material is presented with sufficient authority to persuade me that it's accurate.' In saying that Moldea's book was 'sloppy,' Eskenazi—if I interpret him correctly, which is to say, here we go again—was merely saying the opposite: 'I don't have the time to research every assertion or fact in this book, but the material is not presented with sufficient authority to persuade me that it's accurate.'" **(*Washington Post*; Jonathan Yardley; February 28, 1994)**

"Obviously, this most recent turn in the world of legal squabbling portends doom for the legion of scribes who, without ever having to demonstrate any noticeable talent in the arts themselves, gleefully run roughshod over the efforts of others. Now, for nobly protecting the citizens of our nation from the extreme nausea induced by inferior entertainment products, these brave and honorable men and women must face persecution." **(*Los Angeles Times*; David Kronke; February 28, 1994)**

"A book, after all, even a work of non-fiction, is a kind of confession, a revelation, real or posed, of who the author really is, of what he or she believes has meaning. And to see his heartfelt declaration dismissed as flat or ordinary or sloppy in the pages of *The New York Times* is a hard enough slap across the nose to draw tears from anybody." **(Universal Press Syndicate; Pete Dexter; March 2, 1994)**

"A review is, after all, pure, subjective opinion, and as such has been protected from libel suits. We have always recognized that critiques of music or restaurants or movies in a section set aside for reviews, or under a column heading that says this is a review, are expressions of opinion. Statements that are clearly opinion should never be

influenced or limited by the fear of lawsuits. Even if a reviewer's judgment is negative when every other reviewer thinks that, for example, Danielle Steel is better than Marcel Proust, shouldn't the sole dissenter be permitted his say? He should, even if he makes unintended factual errors in his review." **(*Newsday*; Martin Garbus; March 10, 1994)**

"In fact, you'd be safer if you followed my mother's (and probably your mother's) maxim: 'If you don't have something nice to say, then don't say anything at all.'" **(*Legal Times*; Martin Garbus; March 14, 1994)**

"Cry me a river. I don't know how many reviews the appellate judges read, but by my standards this one was mild. If they were to read John Simon in *New York* magazine or Howard Rosenberg in the *Los Angeles Times*, or catch some of the Siskel-Ebert television reviews of films, they would learn what a highly unfavorable review is. Nor do I think that it should be at all relevant what the conclusion of a review is. Some restaurants and books are not just bad but very bad, and a reviewer should be free to say so." **(*Daily Variety*; Martin Garbus; April 11, 1994)**

"There might be a situation where a suit could appropriately be filed against a reviewer—where it can be shown that his language and judgments are malicious because he is motivated by personal animosity. That is not the basis of Moldea's suit, however, and Moldea does not claim it is." **(*Publishers Weekly*; Martin Garbus; April 25, 1994)**

"You might think that the ruling of the appeals court would be good news for authors longing to get back at the critics. But the Association of American Publishers and the PEN American Center have together submitted an amicus brief on behalf of *The Times*. The Appeals Court's decision, the AAP-PEN brief argues, 'would invite each of the hundreds, if not thousands of persons criticized in the thousands of book reviews and other critical works published each year to bring libel actions against their critics and their critics' publishers . . . As creators whose own lifeblood depends upon a vigorous First Amendment, these authors and publishers recognize . . . that such inherently subjective criticism "goes with the territory."'" **(*New York Observer*; Jim Windolf; March 28, 1994)**

"This [the AAP-PEN amicus] made George Freeman, *The Times's* assistant general counsel, very happy. 'It's very significant that even the book publishers and authors who are the subject of scathing reviews have realized that though in the short run they may be happy that *The Times* got into trouble over a book review, in the long run their interests are on the side of free speech and allowance of opinionated reviews,' Mr. Freeman said yesterday." **(*New York Times*; Sarah Lyall; March 23, 1994)**

"I teach a class in media law, and I asked the members of my class to read the court's original opinion in the *Moldea* case. From their responses, I could see that the court's decision worried some of my student journalists. Our campus newspaper publishes

movie and concert reviews. Could one of our reviewers be open to legal action by writing a critical piece?

"The class consensus was that Moldea was just too thin-skinned. Those who earn their living by selling their work to the public should expect a certain amount of critical comment." **(*Houston Chronicle*; Nicole B. Casarez; May 13, 1994)**

"Every columnist and editorial writer in the country indeed, anyone who publishes written criticism of anyone else will now want to think twice about expressing opinions not based on what Edwards and Wald call 'true facts.' . . . I'm thinking hard about what I myself write about fatheaded federal judges." **(*Cincinnati Enquirer*; James J. Kilpatrick; April 26, 1994)**

The *En Banc* Petition

"Notwithstanding the perils of the D.C. Court of Appeals, probably the nation's most politicized court, we asked for . . . rehearing en banc." **(*Communications & the Law*; George Freeman; December 1995)**

"[On March 21, 1994] *The New York Times* . . . asked the entire [11]-judge appeals court to review the decision made by three of its members. If it affirms the three judges' decision, then the case will be remanded to the district court for rehearing, this time before a jury . . . If the three judges' opinion is overruled, Moldea says he will appeal to the U.S. Supreme Court." **(*Los Angeles Times*; April 3, 1994)**

"In its petition for rehearing, the *Times* argued that the appeals court decision 'undermines two centuries of jurisprudence protecting literary criticism' and, through various examples, 'places at risk virtually every unflattering review . . . The decision's fundamental error is not in concluding that Eskenazi's characterization was arguably wrong; it is in presuming that there is any right interpretation . . . '

"Moldea brief, however, submitted by Roger Simmons of the firm Gordon & Simmons, argued, 'The review was not a traditional one because it misrepresented the contents of the book, contained false and defamatory statements which assailed Moldea's professional competency and honesty, and affirmatively concealed the nature and extent of Eskenazi's relationship with the NFL . . . This is a classic case of an appellee who is unhappy with an appellate panel's reversal of summary judgment which was based on the lower court's improper resolution, or disregard for genuine issues of material fact; in this case, the interpretation of certain factual statements contained in the review.'" **(*Editor & Publisher*; Debra Gersh Hernandez, April 23, 1994)**

"Publishers—not to mention book reviewers—are closely watching appeals to the ruling. In addition to its pending request for a new hearing by the full 11-member appeals court, the *Times* could also appeal to the Supreme Court. Says Mr. Moldea: 'We still have a long way to go.'" **(*Wall Street Journal*; April 7, 1994)**

The *Amici*[12]

"[T]he Association of American Publishers and the PEN American Center have together submitted an amicus brief on behalf of *The Times* . . . Another amicus brief was filed on behalf of the Newspaper Association of America, Dow Jones & Company, the Associated Press, Scripps Howard, the Copley Press, *The Christian Science Monitor*, Time Inc, *U.S. News & World Report*, *The New Yorker*, Magazine Publishers of America, the Society of Professional Journalists and others." **(*New York Observer*; Jim Windolf; March 28, 1994)**

"*Moldea vs. the New York Times* is one of the most important libel cases facing the publishing industry. Crime writer Dan Moldea, author of *Interference: How Organized Crime Influences Professional Football*, sued the *Times* for libel, alleging that a review of his book factually misstated key elements of his reporting and called Moldea a 'sloppy' journalist. Among those to file a joint amicus friend-of-the-court petition on behalf of the *Times* were the Association of American Publishers (the nation's largest trade association of publishers) and the PEN American Center (an international organization of novelists, poets, essayists, playwrights and editors). The problem: In the petition, they got the title of Moldea's book wrong, calling it 'Interference: How Organized Crime Influences Basic Sports Knowledge.' 'Somebody screwed up,' said PEN attorney Leon Friedman. 'I don't know where that crept in.'" **(*Hollywood Reporter*; THR E-Mail; April 25, 1994)**

"The [appellate] ruling set off a storm of media protest in editorials and in court. Typical was a brief [amicus] prepared by several publishers, including *U.S. News*. 'The repercussions of this far-reaching, unsettling ruling threaten to keep from the public much of the insight, perspective and information that can only come from free-ranging criticism,' said that group. 'Every author, artist or chef out to avenge an ego wounded by a less-than-glowing review is now a potential plaintiff.'" **(*U.S. News & World Report*; Ted Gest; May 16, 1994)**

"As if all [the critical newspaper editorials] didn't already place enough of a figurative ex parte hand on the scales of D.C. justice, the lawyer hired to write the brief for 'the world,' as some referred to the media organizations' amicus, was Kenneth Starr, himself a former member of the D.C. Circuit Court of Appeals. While former federal judges are free to file briefs to their former courts . . . , Moldea could be forgiven for thinking the circumstances didn't help him. Did their former colleague's opinion affect

Edwards and Wald?" **(*The Nation*; June 6, 1994)**

"PEN and the AAP held that the court decision for Moldea has 'significantly undercut the constitutional protection afforded literary critics and their publishers throughout history . . . The potential loss to First Amendment freedoms arising out of encouraging suits of the sort Mr. Moldea has initiated far outweighs any benefit that may derive from 'setting the record straight' in response to biting criticism' . . . Writers would risk libel suits if they wrote and published literary criticism that dared to challenge or provoke ideas." **(The Pen Newsletter; no byline; Summer 1994)**

Reaction from Other Writers' Groups

"One interested party that very significantly did not weigh in with the court [with an amicus] was the Authors Guild, which represents writers and which may have been influenced by the fact that Mr. Moldea is a member.

"'We are very interested in it and we've been following it very closely,' said Robin Davis Miller, the guild's executive director. 'But it's far from clear which side the authors should be on. Reviews are a double-edged sword: publicity is better than no publicity, but are there lines that reviewers can't cross? Absolutely. Is this one of those cases? I don't know.'" **(*New York Times*; March 23, 1994)**

"In September 1990, WIW's [Washington Independent Writers'] Board of Directors voted 7-2 to adopt a resolution supporting Moldea's legal action. The resolution acknowledged the book reviewer's 'undeniable First Amendment right to free expression of his or her opinion regarding any book under review,' however it also asserted the 'moral and ethical obligation of the publisher to retract any libelous portions of the review or to provide the author in question with the opportunity for a rebuttal.'" **(*Independent Writer*; Rosemary Lally; April 1994)**

"Late in 1991, Moldea asked the National Book Critics Circle to take a public position in support of his suit. I was president of the NBCC at the time and forwarded his request to the NBCC board, a body of 24 book editors and free-lance critics. I also spoke to [*Times* legal counsel] George Freeman and [*New York Times Book Review* editor] Rebecca Sinkler at that time so as to be able to present their side of the dispute to the NBCC board.

"After much consideration, the board decided to take no position on the matter.[13] Thinking as reviewers faced with the prospect of future litigation if their work struck an author as defamatory, some on the board tacitly sided with the *New York Times* . . . Others on the board, perhaps thinking of their vulnerability as authors to essentially unaccountable reviewers, tacitly sided with Moldea, who claims: 'If I win this case, the

worst that can happen is that reviewers and other opinion-writers will suddenly have a responsibility to be accountable for what they write. Any writer who cannot live with that should not be in this profession.'" **(*Los Angeles Times*; Jack Miles; April 3, 1994)**

"[I]n 1991 and 1992, both Sinkler and Freeman spoke more directly to the N.B.C.C. and its president, Jack Miles. Moldea had asked the N.B.C.C. to consider the merits of his case. He hoped that it would issue a statement supporting his view that the *Times* had libeled him or at least find that the paper had shown extreme lack of generosity in refusing to publish his letter.[14] *Times* counsel Freeman, however, opposed the idea of the N.B.C.C. commenting on the matter, writing a letter to Miles on January 16, 1992, that 'it is entirely inappropriate for the National Book Critics Circle to take any substantive position with respect to the facts of this litigation. It hardly behooves your fine organization to be exploited by a party in litigation in such a way.'" **(*The Nation*; June 6, 1994)**

The Appellate Panel Reverses Itself

"On May 3, Mr. Moldea soundly lost Round 3 of the literati's most-watched ringside battle since last year's fight between Janet Malcolm and Jeffrey Masson." **(*New York Observer*; May 16, 1994)**

"In an extraordinary action, a federal appeals court retracted a controversial ruling that would have made it easier to file libel suits against publishers of negative book reviews and other critical works.

"A three-judge panel of the U.S. Court of Appeals said its 2-1 decision in February had simply been wrong—a stunning admission for an influential court to make, especially in a celebrated case . . .

"The *Times* had urged the panel to reconsider its initial decision, but the three judges didn't even hold a new round of oral arguments, making yesterday's reversal even more surprising . . .

"Federal appeals courts have considerable latitude to change their views on an issue, as long as they don't clash with the Supreme Court. In addition, three-judge panels sometimes modify aspects of their rulings at the request of litigants. On rare occasions, the full membership of an appeals court will reverse a ruling by a three-judge panel. What made yesterday's action so unusual was the fact that the panel majority changed its own position 180 degrees in the same case." **(*Wall Street Journal*; Paul Barrett; May 4, 1994)**

"The ruling nullifies a controversial opinion issued by the court in February that

appeared to open the door to libel suits against critics who pan movies, plays, restaurants, books or anything else offered to the public . . . Judge Patricia Wald also switched sides with Edwards, making for a 3-0 ruling. The new decision, at least for now, kills Moldea's lawsuit." **(*Los Angeles Times*; David G. Savage; May 4, 1994)**

"Edwards' new opinion noted, 'the distress felt by a judge who, in grappling with a very difficult legal issue, concludes that he has made a mistake of judgment . . .'

"Moldea and his lawyer, Roger Simmons, said the new ruling was a mistake and would be appealed to the Supreme Court." **(Associated Press; David Morris; May 3, 1994)**

"Edwards, reversing his earlier opinion, declared that he now believed that 'spirited critiques of literary works' must be shielded from libel suits, except when they launch a false 'personal attack' on the author." **(*Los Angeles Times*; May 4, 1994)**

"Edwards, 53, a 1980 Jimmy Carter appointee and former University of Michigan law professor, has a reputation for decisiveness, even stubbornness. The same has been said of Wald, 65, a former assistant attorney general, appointed by President Carter in 1979. Like Mikva, they are considered appeals court liberals." **(*Washington Post*; Joan Biskupic; May 5, 1994)**

"Lawyers for the *Times*, which had been hoping at best for a rehearing by the full 11-member appeals court, were happily stunned yesterday. Bruce Sanford [the *Times*'s lead outside counsel] saluted Edwards's 'enormously rare' action as 'a testament to the quality of the man and the judge.'" **(*Washington Post*; May 4, 1994)**

"The appeals court also dismissed Moldea's charge of false light invasion of privacy, and discounted his argument that the reviewer, a football writer for the newspaper, had ulterior motives for the negative review." **(*Editor & Publisher*; Debra Gersh Hernandez; May 21, 1994)**

"Simmons [said] that 'we have certainly not given up. Dan Moldea is a fighter, and we intend to win. We will pursue at the next level." **(*Washington Post*; May 4, 1994)**

Analysis of the Reversal

"Edwards reversed what he lamely called *Moldea I*, upholding the lower court's grant of summary judgment . . . Wisdom is one thing. *Stare indecisis* is another. Contrary to some reports, which suggested that Edwards had tossed out *Moldea I*, *Moldea II* announced that the 'fundamental framework' for defamation actions established in *Moldea I* is 'sound, and we do not modify it in this decision.' The problem was that

Moldea I 'failed to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works . . . that are capable of a number of rational interpretations.' On reconsideration, Edwards declared, he and his two colleagues now held that 'as a matter of law' the *Times* review . . . was 'substantially true'

" . . . The chief problem with the flip-flop is that the 'generally correct' statement of the law of defamation in *Moldea I* specifically recognized that the Supreme Court in *Milkovich v. Lorain Journal* . . . ruled that the genre in which a defamatory statement appears is irrelevant to its accountability. *Moldea II's* adoption of the analysis suggested in the *Times*'s brief on the petition to rehear—that libel suits against criticism should go forward 'only when the interpretations are unsupportable by reference to the written work'—differed so much in tone and approach from the aggressive, pro-little-guy sound of *Moldea I* that it seemed to come from either a completely different judge (with the same name), or at least a completely different law clerk. . .

"Having made a thorough mess of things so far, Edwards and Wald should resist taking a third crack at the case in response to Moldea's own likely petition for rehearing. But as it stands—or wobbles—*Moldea II* smells as bad as any D.C. Appeals Court case in memory." **(*The Nation*; June 6, 1994)**

"The decision turned on the issue of whether opinion writing, such as the unfavorable criticism of Mr. Moldea's book, should be governed by the same legal standard as news writing. . . [Y]esterday those same three judges . . . ruled that although book reviews and other forms of criticism were not exempt from libel law, critics must have 'the constitutional "breathing space" appropriate to the genre'" **(*New York Times*; Tamar Lewin; May 4, 1994)**

"Even if a reviewer is trying to damage an author's reputation, there may be nothing the courts can do about it, 'at least not without unacceptably interfering with free speech,' Judge Edwards asserted[15] . . .

"Judge Edwards's original decision had provoked emotional attacks by reviewers, publishers and media companies, who accused him of endangering constitutionally protected free speech . . .

"In yesterday's opinion, Judge Edwards went so far as to adopt the *Times*'s proposal of a legal standard that would provide critical works with a broad shield against libel suits." **(*Wall Street Journal*; May 4, 1994)**

"'I am amazed,' said Prof. Rodney Smolla . . . 'I've never heard of one [a judge reversing himself] like that in my life. I have heard of circuit conflicts [within an appeals court] but not an interpersonality split in one judge,' he joked." **(*Los Angeles Times*; May 4, 1994)**

"With the latest decision, the appeals court judges 'have declared open season on unchecked criticism on authors and their published works,' Moldea said . . .

"[Roger Simmons] said . . . the second decision 'allows and permits maliciously false book reviews to be published without recourse. That acknowledgment is a very chilling statement of the law as created by the second Moldea opinion.

"'What it means is that a book reviewer can deliberately set about to misstate the contents of a book and the character of a writer by making deliberate misstatements of fact without recourse,' Simmons continued . . .

"In addition, he said the deluge of strong editorial opinions after the first Moldea appeals opinion showed it did not dampen the spirit of opinion writers." **(*Editor & Publisher*; May 21, 1994)**

"As with most complex litigation, it would take a lifetime to disentangle every contested element of *Moldea v. New York Times*. But despite the reflex posturing of big media organizations praising *Moldea II* as a victory for freedom of speech, it's actually the opposite. It's a victory not for working journalists, authors and critics who thrive on debating issues and interpretations but for corporate media managers who want to squelch criticism of what they publish, escape tightening their standards to eliminate shoddy reviewing, evade questioning of the judgment of their critics, avoid paying for their mistakes as other corporate managers must and, above all, prevent ordinary Americans—the members of a jury—from getting a look at their practices." **(*The Nation*; June 6, 1994)**

"Moldea is no public official, not even a 'public figure' also subject to the knowing or reckless falsity standard.[16]

"Nevertheless, the Court of Appeals put a burden of proof on Moldea that is quite analogous to the *New York Times v. Sullivan* standard—and equally as difficult, perhaps impossible, to meet.

" . . . In its opinion issued on May 3, 1994, the court announced a new constitutional test for whether a book review could be subject to a defamation suit: No work of commentary is actionable unless its interpretations of the book 'are unsupportable by reference to the written work.' It is not enough that some reasonable jurors could find the review's interpretations of the book to be factually false; the plaintiff must show that 'no reasonable person could find that the review's characterizations were supportable interpretations' of the book.

"In other words, as long as the court can imagine that there are some reasonable people (i.e. federal judges) who might agree with the reviewer's interpretation of the

book—or if not agree at least find the reviewer's characterizations 'supportable'—then no suit can be brought. Why? Because the review is thus 'substantially true' as a matter of law.

"The court toyed in its opinion with the notion that an accusation of 'sloppy journalism' might not be 'sufficiently verifiable to be actionable in defamation.' Ultimately, though, it decided not to travel down this traditional common-law path of truth versus opinion. The court instead wandered down the constitutional path of First Amendment 'breathing space.'

"And thus the court delivered the unkindest cut to Dan Moldea: he was kicked out of court not because the review was opinion and thus could never be proven false, but because three judges who never faced the plaintiff in a courtroom, who did nothing more than read a book review and a bunch of lawyers' briefs, have decided that the review was 'substantially true.'

"Applying this same legal reasoning to any other kind of tort case would raise howls of protest. The court, after all, has neatly reversed the classic summary judgment standard: it has held that the plaintiff is entitled to go to the jury only if no reasonable juror, viewing the facts in the light most favorable to the defendant ('supportable interpretation'), could find for the defendant.

"Dan Moldea might ask: So what's the point of my Seventh Amendment right to a jury trial if I get to go to the jury only when the judge says no juror could find for my opponent?

"Good question, Dan." **(*Washington Lawyer*; Patrick A. Malone; September/October 1994)**

"[F]ormulating a position on *Moldea v. New York Times* that actually encourages robust debate rather than one that merely aligns itself with traditional free-expression reflexes requires abandoning knee-jerk loyalty to the *Times* for its First Amendment deeds over the years . . .

"Once that's done, the *Times* victory in *Moldea II* seems less triumphant. The unholy mess of *Moldea v. New York Times*, in which Moldea fights for the right to answer an attack on his book and the *Times* hides behind the First Amendment while suppressing his voice, developed because of a fundamental division at the heart of *The New York Times*." **(*The Nation*; June 20, 1994)**

Was Media Pressure a Factor for the Reversal?

"[B]ook review sections at newspapers and magazines around the country were frightened of what the *Moldea* case might mean in terms of their ability to conduct free and open inquiry in their pages, and a general call had gone out to newspaper editorial writers to alert the court that they would open a Pandora's box if their February opinion were allowed to stand. Those forces, Mr. Moldea believes, brought about the sharp legal reversal. 'A journalist asked me how I felt after we won the first round in February, and I said we were about to see a demonstration of raw power in America coming at us like a rifle shot,' Mr. Moldea recalled." **(*New York Observer*; May 16, 1994)**

"'These judges spent over six months reviewing the case history as well as my book,'[Moldea] said. 'On that basis, they ruled in our favor. Since then, the only new contribution has been the avalanche of misleading articles and editorials overreacting to this decision. I think it's legitimate to question what impact all of that had on this very bizarre reversal.'"[17] **(*New York Times*; May 4, 1994)**

"Even some detractors of the original opinion agreed with Mr. Moldea's assessment. 'This extraordinary reversal suggests the power of big media when they gang up on a single writer,' said Carlin Romano, president of the National Book Critics Circle and literary critic for the *Philadelphia Inquirer*." **(*Wall Street Journal*; May 4, 1994)**

"'This is impossible to understand,' said College of William and Mary law professor Rodney Smolla, an expert on the First Amendment. The first time around, he noted, Chief Judge Abner Mikva had strongly dissented, which means 'they argued this out, thought this out, thrashed it out . . . It's inexplicable.'" **(*Washington Post*; May 4, 1994)**

"In response [to Edwards's original written opinion], critics and columnists dealt Edwards plenty of harsh criticism and at least a few accusations of incompetence. For example, columnist James J. Kilpatrick slammed the decision but conceded that he was thinking twice about 'what I myself write about fat-headed federal judges.'" **(*Los Angeles Times*; May 4, 1994)**

"[T]he possibility that Edwards and Wald succumbed to media pressure, expressed both in print and on the inside-the-Beltway dinner circuit, can't be ignored . . .

"Did Wald, a 65-year-old former assistant attorney general frequently mentioned as a candidate for high posts in the Clinton Administration, really have nothing to say in *Moldea II* to explain her own about-face? Was she simply trying to escape responsibility for the *Moldea I* firestorm?

"Only the judges know." **(*The Nation*; June 6, 1994)**

"[T]he sheer rarity of a reversal by the D.C. Circuit Court of Appeals, dismissing [the] controversial lawsuit . . . continued to reverberate yesterday.

"'It was and is the talk' of the law firms, said Kenneth W. Starr, a former appeals court judge and former solicitor general, now in private practice . . .

"Judge Abner J. Mikva, who dissented in the original case, was vindicated this week. But he took no credit yesterday.

"'I certainly did not lobby them on the issue,' he said. 'I didn't send them copies of the editorials or anything. They could read those on their own.'

"So did the original majority give in to outside pressure, as Moldea and others suggested Tuesday?

"'These are very strong-minded judges,' Mikva said. 'They don't cave to pressure. Even good pressure' . . .[18]

"Others were not as generous. A libel lawyer who spoke on the condition of anonymity attributed the reversal to the 'firestorm of public criticism that the earlier decision received.'

"Separately, Columbia Law Prof. Kent Greenwalt said, 'We could talk about conscious and unconscious levels of response to public reaction. I think well enough of Edwards and Wald to rule out the possibility they said to themselves, "I think my decision was right the first time, but now that I'm going to be embarrassed and attacked I'm going to change my mind." But it's possible to be influenced unconsciously.'" **(*Washington Post*; May 5, 1994)**

"[Kenneth] Starr's surprise appointment as Whitewater prosecutor—despite zero prosecutorial experience and Republican political activism that should disqualify him—only confirms that cronyism operates in the Court of Appeals as much as elsewhere in the government. That career move, like the appointment to White House counsel of Chief Judge Abner Mikva—the sole dissenter in *Moldea I* who carried the day in *Moldea II*—should remind us that many American judges are simply a different species of politician. They should be subject to the same skeptical questions we toss at legislators and administrators." **(*The Nation*; Carlin Romano; September 5-12, 1994)**

Misleading Statements About the Appellate Reversal

"In a decision that was closely watched by the journalism world, the federal Court of Appeals for the District of Columbia, sitting *en banc*, reversed a decision that found a *New York Times Book Review* actionable as libel." **(*ABA Journal*; July 1994)**

"Book critics in America breathed a sigh of relief yesterday after the United States Court of Appeals ruled that they could write bad reviews." **(*Daily Telegraph*; Hugh Davies; May 5, 1994)**

"The initial 2-1 libel decision handed down 10 weeks ago . . . sent shock waves through the criticism community, which argued that if the ruling were allowed to stand, critics could kiss goodbye their right to trash books and movies." **(*Daily Variety*; Dennis Wharton; May 5, 1994)**

"Just as protection of speech is justified by the need for full and vigorous debate over government policy, it is similarly justified by the need for debate in the country's cultural life. The public at large—in this case, the people who buy books—benefits from the opinions of critics and the continuous controversy over standards. Judge Edwards's second thoughts defend the interests not only of the reviewer but, much more important, the reader." **(*Washington Post*; editorial; May 5, 1994)**

"The Court of Appeals judges have rebounded with sensitivity, and with courage, given the difficulty of changing judicial minds. The whole society, freer to speak and argue about matters of public concern, is the winner." **(*New York Times*; editorial; May 7, 1994)**[19]

"The judges' initial decision would have had opinion writers throughout the country looking over their shoulders with a mixture of fear and loathing every time they sat down to work. For the United States to remain free requires an unfettered press. That includes the ability to express strong, clear opinions without fear of retribution. It is one of the basic tenets on which this country was founded, the very first amendment to the Constitution." **(*St. Petersburg Times*; editorial; May 6, 1994)**

"The ruling should help safeguard the right of free expression. While Moldea plans to appeal the ruling to the U.S. Supreme Court, for the panel not to have reversed itself would have had a serious chilling effect on opinion and commentary in America." **(*Houston Chronicle*; editorial; May 13, 1994)**

"Despite the power of a *Times* review to ruin a book, we regard Moldea's libel claim as a greater danger to free expression . . . If the general accusation of 'sloppy journalism' in a book review can be punished by a court, practitioners of political and cultural

commentary—as well as investigative reporters like Moldea—might as well unplug their computers." **(*The Nation*; editorial; June 6, 1994)**

"A little more than 10 weeks after issuing a decision that severely restricted the First Amendment rights of journalists to publish their opinions, the court changed its mind and struck a dramatic blow for free expression."[20] **(*American Journalism Review*; Lee Levine; July/August 1994)**

"True, Mr. Moldea may have lost many buyers as a result of *The Times*' devastating critique of his book. But that's part of the price he pays for living in a society that prizes his right to write a freewheeling account of life in the National Football League. A writer like Mr. Moldea should understand the need to protect an occasionally erroneous account. I'm glad the D.C. Circuit got the point, even if Moldea didn't." **(*The Recorder*; Karl Olson; May 25, 1994)**

The Judges' Comments on the Reversal

"Judge Abner J. Mikva, who dissented in the original case, was vindicated this week. But he took no credit yesterday.

"'I certainly did not lobby them on the issue,' he said. 'I didn't send them copies of the editorials or anything. They could read those on their own.'

"So did the original majority give in to outside pressure, as Moldea and others suggested Tuesday?

"'These are very strong-minded judges,' Mikva said. 'They don't cave to pressure. Even good pressure' . . . " **(*Washington Post*; May 5, 1994)**

"**Bar Report**: One case that received a lot of media attention recently was *Moldea v. New York Times*, in which the plaintiff alleged he'd been libeled in a review of his book. The outcome was confusing because you and Judge Edwards voted in favor of the plaintiff for a 2-1 ruling and then you both reversed yourselves. Can you explain what happened?

"**Judge Patricia Wald**: That was quite a close case. Judge Edwards had the assignment and I thought his opinion was supportable and we made our ruling. Then we received an extremely vigorous petition for rehearing. The purpose of a petition for a rehearing is to draw the court's attention to things it didn't do right. Upon looking carefully into it, Judge Edwards felt we'd made a mistake. I agreed with him and we changed the decision.

"Believe it or not, we do grant a number of petitions for rehearing and we do change decisions every year. Because the press gives heavy coverage to press cases this was labeled 'unprecedented'—even though it wasn't unprecedented at all.[21] Now when you reverse yourself in a highly publicized case like that you know you're going to get a lot of flak—and that's what we got.

"**Bar Report**: Does the criticism bother you?

"**Judge Patricia Wald**: Not really. Nobody likes it. But the only time it gets to you is if you think you've done something wrong. The important thing is to get it right—even if that means admitting you made a mistake. That's what we did in this case. I knew we were going to get pilloried, but we lasted it out, and we moved on. That's what life tenure is all about." **(*Bar Report*, Tim Wells; April/May 1995)**

The Road to the U.S. Supreme Court

"Moldea's attorney, Roger Simmons, said although no final decision had been made, they likely will petition the Supreme Court for a hearing rather than ask the appeals court for an *en banc* review.

"Even if they won after a full appeals court review, Simmons explained, the *Times* likely would appeal to the Supreme Court, delaying resolution further.

"Simmons thinks the case is a good one for the High Court because of the indecision evident in the appeals court and to clarify how the court's *Milkovich* and *Masson* decisions should be applied." **(*Editor & Publisher*; May 21, 1994)**

"Moldea can now either return to the Court of Appeals with a request for an *en banc* hearing before the full panel of judges or take the case directly to the Supreme Court. 'Bet heavily that we will be going to the Supreme Court,' Moldea said." **(*Independent Writer*; Rosemary Lally; June 1994)**

"Eventually, will the Supreme Court, which chooses a finite number of cases among hundreds of annual petitions, hear *Moldea vs. the New York Times*? Mr. Simmons says yes without hesitation.

"'When Dan first walked into the office, I looked at my law partner, and we all agreed that this case is going to the Supreme Court,' he says. 'I've always viewed this as one for the Supreme Court because it involves a balancing of writers' rights and the right to criticize.'" **(*Washington Times*; May 9, 1994)**

"If the *Moldea* decision sticks—Moldea's expected to seek a Supreme Court review—

it might well take its place alongside *Sullivan* and the Pentagon Papers case as a cornerstone of our nation's commitment to a free press." **(*American Journalism Review*; July/August 1994)**

"Martin Garbus . . . an expert on publishing law, told *PW* this kind of reversal was 'extremely rare.' He credited the reversal to the publishing community's outcry at the February decision, and noted, 'Nothing has changed except the response from the publishing community.' However, Garbus said, 'Moldea is likely to appeal to the Supreme Court and 'I think the court is likely to accept the case. Moldea's arguments are consistent with recent Supreme Court decisions—decisions that I think are wrong.'" **(*Publishers Weekly*; Howard Fields; May 9, 1994)**

"By the time the U.S. Supreme Court has finished with this case, the principle of reviewer responsibility to the facts will be somewhat better established in law than it now is, to the discomfiture of many, while the concrete likelihood of proving serious damage as a result of even grievous reviewer irresponsibility will be only moderately enhanced.

"Surprisingly, it may be the humble letters department that will end up saving book reviewing from death by lawsuit." **(*NBCC Journal*; Jack Miles; August 1994)**

The Supreme Court Petition

"Attorneys for author Dan E. Moldea petitioned the United States Supreme Court on August 1, 1994, requesting a review of his four-year libel suit against *The New York Times*." **(*Independent Writer*; no byline; September 1994)**

"In a release announcing his petition for certiorari, Moldea stated, 'Whether we win or lose, my attorneys have given me a great fight for a worthwhile cause—trying to make opinion writers accountable for what they publish, just like news reporters.

"'Given the same set of unfortunate circumstances, I would do it all over again. I have no regrets, and I firmly believe that the Supreme Court will hear our case.'" **(*Editor & Publisher*; no byline; August 27, 1994)**

Proposed Settlement

"[T]he solution in *Moldea* itself would pressure the Times to offer a journalistic handshake to Moldea. Even now [after the appellate reversal]—perhaps especially now, when the *Times* has the upper hand—the ideal resolution of *Moldea v. New York*

Times would be a settlement that included [an] Editor's Note from the *Times* apologizing for being less than its best self in denying Moldea his right to reply, publication of a letter from Moldea and payment of court costs." **(*The Nation*; June 20, 1994)**

Miscellaneous Issues

"The legal contest has spawned hundreds of articles . . . The legal findings are fascinating. Moldea's Aug. 23, 1990, lawsuit, followed by thousands of pages of documents from both parties, is on file at the U.S. District Court in Washington, D.C. The trial court's opinion appears in the law reports at 793 F.Supp.335; it can be found at law libraries or on computer databases covering the courts, such as Lexis and Westlaw. The U.S. Court of Appeals for the District of Columbia's first opinion can be found at 15 F.3rd 1137. The appellate court later modified that opinion.

"As part of the lawsuit, Moldea and his lawyers, in May 1994, made available a chronology of events based on media coverage of the case. For those deeply interested in the case, the chronology is a good guide." **(*NBCC Journal*; Steve Weinberg; August 1994)**

"[W]hile you couldn't tell it from reading the *Times*, whose customary rapt attention to First Amendment cases waxed and waned on this action depending on whether the paper was winning or losing (it ran a brief wire service notice of *Moldea I*; a prominent, staff-written National section story on *Moldea II*), *Moldea v. New York Times* is the most provocative First Amendment case in years. It offers subtle facts and complicated philosophical questions about the respective verifiability of facts and evaluations. It pits deeply entrenched legal ideals against each other: the 'breathing space' that criticism needs to be effective, and the right of an individual to defend his reputation. Perhaps most singularly, it exhibits the *Times*, normally on the noble side of free-expression controversies, confronting its raw power in the marketplace of ideas, particularly in regard to books . . .

"Learning to love *Moldea v. Times* as a watershed libel ruling requires bringing together the facts of the case, the legal analysis they generate and the realities of power politics in book reviewing. It isn't a pretty picture . . .

"Appreciating why *Moldea v. Times* turned into such a mess requires reflection on a too-little-pondered subject: how the *Times*, as a matter of practice rather than policy, often discourages free expression." **(*The Nation*; June 6, 1994)**

"Moldea also contends that the *Times* should be required to accurately identify the biases and credentials of its 'neutral' reviewers, ensure that its reviewers actually read the books they review, and insist that its editors fact-check reviews against the books

under review. Where errors of verifiable fact are made, Moldea's suit argues that the *Times* should give an author the opportunity for a rebuttal." **(*Washington Post*; Roger C. Simmons; March 23, 1994)**

"The U.S. Court of Appeals' decision was a stunner. Journalists and publishers said it would erode the First Amendment, opening nearly all opinion to lawsuits and chilling critics' sharp reviews into bland accounts. Book writers hailed it as a way to finally hold big-media book reviewers accountable. And author Dan Moldea planned for his day in court, where he could finally bring his libel claim against *The New York Times*, who, he says, ruined his writing career by misportraying his book.

"That was February.

"In an equally stunning reversal 10 weeks later, the appeals court in Washington, D.C., dismissed Moldea's libel claim. Now, as Moldea petitions the Supreme Court to hear his case, followers of the First Amendment wait to see if the *Times*' victory will stand. The court is expected to announce this month whether it will take up *Moldea vs. The New York Times*. . . .

"Moldea, an investigative author . . . says he's fighting to make opinion writers accountable for what they publish. He says he's been unfairly portrayed as a 'thin-skinned author with a wounded ego,' who would take away the right of writers to freely express their opinions. Moldea says editorial writers and columnists have misrepresented the case and many in the journalism community, including SPJ [Society of Professional Journalists], have distorted or ignored his side of the issue.

"The high-stakes fight leaves the First Amendment caught in the middle. 'It's like we're playing a game of chicken,' Moldea says. 'It's like we're two teen-agers in fast cars, driving toward the edge of a cliff, waiting to see who's going to jump out first. Who's going to be the winner?'

"Still, Moldea says he's prepared to take his fight as far as it will go. 'Our strategy all along has been: if *The New York Times* pulls out a knife, we pull out a gun,' he says. 'If they pull out a gun, we pull out a cannon.'

"Although Moldea has become an enemy to many in the journalism community, the book world—including some book reviewers—has offered support. Some even see it as an opportunity to hold powerful media companies accountable for malicious and inaccurate reviews, which can break a new book." **(*Quill*; Jamie Prime; October 1994)**

The U.S. Supreme Court Refuses to Hear Any New Cases

"Acting on a libel lawsuit against *The New York Times*, the Supreme Court yesterday let stand a ruling in favor of *The Times* that gave a book review wider latitude than that given to a news article. . . .

"The decision, which came without comment, let stand an opinion in May by the United States Court of Appeals for the District of Columbia Circuit. The case attracted wide attention when the appeals court first ruled for Mr. Moldea in February and then reversed itself and ruled for *The Times* in May. The two opinions took different views of the way a court should review an author's claim of having been libeled in a review. . . .

"'I have been convicted and sentenced to death professionally without a trial,' [Moldea] said yesterday." **(*New York Times*; William Glaberson; October 4, 1995)**

"Dan Moldea had his final day in court yesterday, and it wasn't a happy one. The Supreme Court declined to review the author's libel lawsuit against the *New York Times*, putting an end to Moldea's five-year battle for vindication. . . .

"'Now I have to get a life,' the writer said yesterday. His career has rebounded; he is publishing a book in the spring on the police investigation into the murder of Robert Kennedy. Presumably, the *Times* will review it.

"'I'm sure they'll be very fair,' Moldea said."[22] **(*Washington Post*; October 4, 1994)**

Analysis in the Immediate Wake of the Supreme Court's Decision

"Moldea's claim was that errors made by the reviewer amounted to libel against the author. In fact, the review did contain some errors; Moldea did have some valid points. The Court of Appeals first ruled that the errors in the review could constitute libel. But then, months later, the court, to general amazement, reversed its decision, stating that it had 'failed to take sufficient account of the fact that the statements at issue appeared in the context of a book review . . .'

"Was this distinction raised by the *New York Times* the one that persuaded the high court, or was it something else? At this point, we do not know. The *Moldea* case was settled without that point having been nailed down. . . . Claiming our First Amendment freedom to criticize legal briefs and court decisions, we suggest that the complex matter of responsibility to fact even within the expression of opinion deserves further attention." **(*Los Angeles Times*; editorial; October 10, 1994)**

"The book's author, Dan Moldea, argued that the reviewer's conclusions were based on issues of fact, but that the facts were wrongly presented.

"*The Times* countered that reviews are protected opinion and it prevailed in the lower courts, which eventually dismissed Moldea's claim.

"That case, [Jane] Kirtley said, 'could have had a profound impact on news organizations to publish reviews of anything . . . [The appeals court] took a very generous view of what opinion is when in the context of a review." **(*Editor & Publisher*; Debra Gersh Hernandez; January 7, 1995)**

"'It's obviously a matter that we are deeply disappointed about,' noted Moldea's attorney, Roger Simmons. 'We think the law has been left in a state of disrepair.'

"Simmons said he believes the *Moldea 2* decision cannot be reconciled with *Milkovich*, creating a different standard for opinion writers, which 'was what *Milkovich* was supposed to wipe out . . .

"'I think it is a mistake. It will generate a lot of bad law until they take another case,' he said. 'There's no way you can square *Milkovich* with *Moldea 2*.'

"[George] Freeman, however, said that he believes his opponents misunderstand the *Moldea 2* ruling. . . .

"The *Moldea 2* opinion 'does help clarify *Milkovich* in the context of reviews,' Freeman said, adding that it 'should be the death knell for any onslaught of claims by plaintiffs suing about reviews. Not that we've seen any groundswell.'" **(*Editor & Publisher*; October 15, 1994)**

Misleading Statements About the Supreme Court's Inaction

"Reacting to yesterday's high court action, Henry Hoberman, outside counsel for the *Times*, said that 'opinion writers and commentators are now safe from would-be censors and opinion police like Dan Moldea." **(*Washington Post*; October 4, 1994)**

"[T]he court wisely left undisturbed a U.S. Court of Appeals ruling dismissing a libel action filed by a writer who objected to a *New York Times* review of his book. This case has an unusual history since a three-judge panel of the court originally found in the writer's favor and later changed its opinion. But the ruling that now stands is the right one. Allowing libel suits to be filed over a difference of opinion would make any published appraisal of literature, art or public events impossible." **(*Washington Post*;**

editorial; October 9, 1994)

"Earlier this month, the Supreme Court denied Moldea's petition for *certiorari*, and thus left standing the 'supportable interpretation' test. Although successful claims remain unlikely in the D.C. Circuit and in other jurisdictions that choose to follow *Moldea II*, its new standard of review could pose problems for publishers. Since reviews as a genre may no longer be given blanket protection, publishers will be confronted with the problem of identifying reviews which may require legal review prior to publication. Moreover, since *Moldea II* may require a detailed textual analysis of all factual implications, there is the possibility that more claims may be asserted, increasing defense time and cost." **(*Publishers Weekly*, Henry L. Kaufman and Michael Cantwell; October 24, 1994)**

A Final Word

"[Roger] Simmons believes, 'If we achieved anything, perhaps we raised the level of consciousness about what standards apply to reviewing. Everyone would have benefitted' from a Supreme Court decision in either direction that clarified the issue of protection for opinion writing.

"Pointing out that Moldea never had the benefit of a trial or full discovery, Simmons said his client, 'is one of the most courageous people I have ever worked with. He had the guts to stand up and take on the people who determine who succeeds in his profession.'

" . . . Moldea commented that he is 'not bitter about anything. I have a lot of respect for the *Times* and its attorneys.'

"Moldea, who said he has 'no regrets,' thanked his attorneys for giving him 'a great fight for a worthwhile cause: trying to make opinion writers accountable for what they publish, just like news reporters.'

"Moldea also said, 'If I had to do it all over again, I would. I can't think of one thing we did wrong. There's not a single thing I could even second-guess my lawyers on. I think it was fair.'" **(*Editor & Publisher*; October 15, 1995)**

Endnotes

[1] "[N]o libel suits were either threatened or filed against *Interference*. No source quoted in the book denied the accuracy of his or her quote." **(*Los Angeles Times*; Dan E. Moldea; May 29, 1994)**

[2] "I retained an attorney who called the *Times*' chief in-house counsel and asked for a correction. The *Times* refused. It is worth noting that two years earlier in April, 1987, the *Times* had been forced to print a correction regarding a previous review of my work." [The *Times* attorney who handled the 1987 matter was David Thurm.] **(*Los Angeles Times*; Dan E. Moldea; May 29, 1994)**

[3] "'I'm not cutting back on the First Amendment at all; I see this as more of an economic issue,' [Simmons] says. 'You have a very limited number of people controlling what may be said in the print medium today. If those people are going to have that kind of power and control over the marketplace, they should be required to exercise it evenhandedly and fairly.'" **(*Washington Times*; May 9, 1994)**

[4] "Last July, he got a $75,000 contract with Norton & Co. to write a book about the killing of Robert Kennedy." **(*Wall Street Journal*; April 7, 1994)**

[5] "[N]early half of Streitfeld's story quoted three 'First Amendment' attorneys who were implicitly represented as neutral observers in my case. One of the attorneys, Henry R. Kaufman, the general counsel of the Libel Defense Resource Center, gave a broad, clearly objective response. The other two attorneys quoted, Bruce Sanford and Floyd Abrams, trivialized the merits of my case. However, Streitfeld did not indicate anywhere in his story that . . . Sanford and Abrams were both outside counsels for *New York Times* and that Sanford had been selected as the lead counsel for the *Times* in my particular case." [Also, both Kaufman and the Libel Defense Resource Center, are funded, in part, by the *New York Times*.] **(Letter from Moldea to Leonard Downie, managing editor of *The Washington Post*; June 20, 1991)**

[6] "The review [also] cited three misspelled names of sports figures [in *Interference*] . . . Moldea acknowledges the three misspelled names . . . [H]e took the spellings from stories in the *Washington Post* and the *Los Angeles Times*." **(*New York Magazine*; April 18, 1994)**

[7] Moldea now agrees with Simmons. "The term 'sloppy journalism' in a vacuum 'is just a statement of opinion,' Moldea noted. But when 'you base it on facts, and those examples are wrong, then the term sloppy journalism itself becomes a libelous statement because it's based on provable [false] facts." **(*Editor & Publisher*; Debra Gersh Hernandez; May 21, 1994)**

[8] "Speaking for the court of appeals, Judge Edwards said: 'We certainly do not mean to suggest that all bad reviews are actionable. We do hold, however, that assertions that would otherwise be actionable in defamation are not transmogrified into nonactionable statements when they appear in the context of a book review.'" **(*Washington Post*; Roger C. Simmons; March 23, 1994)**

[9] "[Moldea's] complaint argues for honesty and accuracy in opinion writing—something that has long been mandatory in news reporting. It was filed only after the *Times* explicitly refused both to print a correction and to publish any rebuttal letter regarding its review of Moldea's book.

"Contrary to the image the [media have] projected, *Moldea* is not an assault on the foundations of the 'marketplace of ideas.' It is, however, a demand for opinion writers and reviewers to take a few basic steps to get their facts straight." **(*Washington Post*; Roger C. Simmons; March 23, 1994)**

[10] None of the listed writers bothered to contact either Moldea or his attorneys prior to writing their news articles, editorials, op-ed pieces, and/or columns.

[11] Despite the apocalyptic tone of this op-ed piece by Francine Fialkoff, the executive editor of Library Journal, she went on to write: "At the recent Public Library Association meeting in Atlanta in late March, Michael Sawyer, director of the Clinton Public Library (IA), asked what impact the *Moldea* ruling would have on *LJ*. None, I told Sawyer."

[12] "On May 2, the day before handing down *Moldea II*, the Court of Appeals issued an order denying permission for the two pro-*Times* amicus briefs to be filed. If not for that move, Moldea would have had a legal right to reply to them. Plainly, the court wasn't interested in giving him the opportunity. The court was so abrupt to issue *Moldea II* that the order denying the pro-*Times* amicus briefs reached Moldea's attorney on the day after *Moldea II* was announced. Did Edwards, Wald or any of their clerks read the pro-*Times* amicus briefs?" **(*The Nation*; Carlin Romano; June 6, 1994)**

"Actually, the procedural situation was even more irregular than I described, and [PEN-AAP amicus authors/attorneys Leon] Friedman and [R. Bruce] Rich have their facts wrong when they write that Moldea's lawyers 'did in fact respond to the new arguments made by the *Times* and the amici.' According to Roger Simmons, Moldea's chief attorney, a clerk for the Court of Appeals phoned his office before the Moldea legal team filed its reply to the *Times*'s motion for rehearing and instructed Moldea's team not to address either of the amicus briefs in its response." **(*The Nation*; Carlin Romano; September 5-12, 1994)**

"The legal community continued to buzz when, on the following day, the court, without comment, announced that it had not accepted two amicus briefs filed earlier for other publishing organizations on behalf of the *Times*—even though one was from the judges' former colleague, Kenneth Starr. That move makes it look like the judges were not swayed by outside influences, as some critics had charged. 'It's strange, I grant you,' says R. Bruce Rich, a partner at New York's Weil, Gotshal & Manges, who filed the other brief. While court rules discourage the filing of amicus briefs on motions for rehearing, judges customarily read the briefs before deciding whether to allow them. 'My view is that the position of the numerous amici were in fact heard by the panel and, indeed, by the full court,' says Starr, a partner in the D.C. office of Chicago's Kirkland & Ellis. 'Our mission was fully accomplished, and the court's rules were fully vindicated.'" **(*Legal Times*; no byline; May 9, 1994)**

[13] "The N.B.C.C. declined to do so after a subcommittee of three board members—this writer, *San Francisco Chronicle* book editor Pat Holt and former *Los Angeles Times* book editor Jack Miles—could not agree on their recommendation to the organization." **(*The Nation*; Carlin Romano; June 6, 1994)**

[14] "Sinkler also wrote to Miles in February 1992, sending him Judge Penn's decision and inviting him to call her to discuss the *Times*'s handling of the review. According to a February 21 letter from Miles, he spoke to her that day and Sinkler said she considered the charges in Moldea's letter groundless and decided not to publish it. 'She stresses,' Miles wrote, 'that they strive to protect reviewers from reckless or unjustified charges by aggrieved authors even as they strive to protect authors from reviewers who may have misled the *Book Review* about, e.g., a prior relationship.'" **(*The Nation*; June 6, 1994)**

[15] "In effect, the appellate court, in its virtually unprecedented act, created an exemption from libel for opinion writers when they engage in 'mischievous intent,' as the court now calls it. News reporters and nonfiction authors have no such exemption and continue to be held to a 'malice' standard." **(*Los Angeles Times*; Dan E. Moldea; May 29, 1994)**

[16] "Before Moldea can win his case, it will have to be determined if he is a public figure. If he is, he will have to prove the review was written with malice—an eventuality he said he was prepared for." **(*Washington Post*; February 19, 1994)**

[17] "Washington attorney Bruce Sanford, who represents the *Times* in this case . . . said he does not believe there is any evidence to support Moldea's charges that the reversal was influenced by the media . . .

"'I think it's a bit insulting to suggest somehow that these judges are particularly susceptible to criticism by the media,' he added . . .

"*Times* senior attorney George Freeman . . . also said he thought it was 'inappropriate' to accuse the court of bowing to media influence 'in that it undermines the integrity and courage of the judges' sitting on the 'second most important court in the country.'" **(*Editor & Publisher*; May 21, 1994)**

[18] Five years after the decision, Mikva was even clearer, saying: "I wish I could claim that my eloquence, either in my dissent or otherwise, persuaded my colleagues to change their minds. It was more likely the drumbeat of criticism begun in the editorials of *The Washington Post* and *The New York Times* about the 'serious threat' to the First Amendment posed by the original decision. While my dissent was quoted widely in those editorials, the panel ignored it when the second *Moldea* opinion held that book reviews are entitled to special protection." **(*Legal Times*; Abner Mikva; June 14, 1999)**

[19] "*The Times* hailed the reversal in a May 7, 1994 editorial, but, true to its previous pattern, it did not print Moldea's response to that editorial." **(*Authors Guild Bulletin*; Kay Murray; Summer 1994)**

"Having refused for years to publish a letter from Moldea defending his book, [*The Times*] recently refused to publish an Op-Ed piece by him, responding to the paper's May 7 editorial crowing about *Moldea II*." **(*The Nation*; June 20, 1994)**

"In a May 7 editorial, *The New York Times* self-righteously concluded that the appellate court's second opinion safeguarded 'spirited argument,' adding: 'The whole society, freer to speak and argue about matters of public concern, is the winner.'

"Again, the *Times*' failure to publish my letter to the editor in response to a false and misleading review of *Interference*—as well as my reply to its May 7 editorial—have denied me the opportunity to participate in 'spirited argument.'

"This is not journalism; this is corporate tyranny." **(*Los Angeles Times*; Dan E. Moldea; May 29, 1994)**

[20] In response to Levine's piece, the *American Journalism Review* published a letter to the editor, which stated: "I wasn't really surprised to find *AJR* publishing a piece of conventional wisdom, written by 'a media defense lawyer' (translation please?), alleging a dire threat to the First Amendment posed by Moldea's suit, although I would've thought it far more clever on your part to at least allow the plaintiff, albeit a mere scribe, a rebuttal . . . In short, what if Moldea is right on the main points and the *New York Times* wrong? Would *AJR*'s applause for the court's ruling then be so loud?" **(*American Journalism Review*; Jeff Stein; September 1994)**

[21] Clearly, Wald is misrepresenting the events of this case. Indeed, the *Times* did petition the appellate court for a rehearing, and, indeed, the court occasionally grants such rehearings and, in some rare instances, reverses earlier rulings. However, in *Moldea v. New York Times*, as Wald fully realizes, there was no

rehearing. The reversal of the three-judge appellate panel's own February 18 decision in this case is and remains unprecedented—regardless of Wald's protests to the contrary.

[22] "A rave review by *The New York Times*' venerated book reviewer Christopher Lehmann-Haupt is every author's dream. But are your chances even better if you've brought a lawsuit against *The Times* for their last review of one of your books?

"On Thursday, May 25, *The New York Times* published a highly favorable review, by Mr. Lehmann-Haupt, of Dan E. Moldea's *The Killing of Robert F. Kennedy: An Investigation of Motive, Means and Opportunity*. The book, Mr. Lehmann-Haupt wrote, was 'carefully reasoned and ultimately persuasive'; Mr. Moldea's 'dramatic account . . . brings the point of dispute into sharper focus, leading the reader to believe that the author is on the verge of a major discovery.' Mr. Lehmann-Haupt concluded: '[H]is book should be read, not so much for the irrefutability of its conclusions as for the way the author has brought order out of a chaotic tale and turned an appalling tatter of history into an emblem of our misshapen *Times*.'

"' . . . I thought it was a real classy deed for both Christopher Lehmann-Haupt and *The Times* to do,' Mr. Moldea told *The Observer*. 'Sometimes when you're reviewed, you get a real pro and other *Times* you get a shill for the institution you're writing about. The last time I got a shill, this time I got a pro.'

"Said Mr. Lehmann-Haupt: 'I just sort of put my head in the sand and tried to judge the book on its own merits. That to me is the job of a good reviewer.'" **(*New York Observer*, Alex Kuczynski; June 5, 1995)**

The New York Times Book Review ran a second favorable review of Moldea's book on Sunday, June 18, 1995.

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