MEMO

TO: Legal Team

FROM: Jose S. Dela Cruz

SUBJECT: Immunity From Liability For Speeches/Statements Made by Convention Delegates

DATE: June 15, 1995

A question has been raised whether Convention delegates are immune from liability for defamatory statements made in the course of Convention proceedings. The probable answer is "no."

The most familiar example of this type of privilege is the Speech and Debate Clause of the U.S. Constitution. "No member of Congress shall be questioned in any other place for any speech or debate in either House." Art. I, Section 6, cl.l.

The various states accord a similar privilege for state legislators either by statute or by constitutional provision. The NMI Constitution has a provision according a similar immunity to local legislators. Article II, Section 12.

The enabling statute for the Third Constitutional Convention does not have a provision which accords immunity to Convention delegates for defamatory statements.

7 CMC Section 3401 provides that in the absence of written law or customary law, the common law as expressed in the Restatements of the Law apply.

Because there is no written or customary law on the subject (as far as I am aware of, as to the latter), Restatement law appears to apply.

The Restatement, among the several defenses to the tort of defamation (e.g. truth or consent), also sets forth the "Speech and Debate" defense for members of Congress and local legislative bodies. Restatement (Second) Torts, Section 590. Defamatory statements made by witnesses in legislative proceedings are also deemed privileged. Id., at Section 590A. Defamatory statements by an executive or administrative officer of the United States Government or by a governor or superior executive officer of a state are also privileged and shield a maker making the statement from liability. Id., at Section 591.

I have been unable to find, during the course of my brief and cursory research, any case authority regarding the extension of a similar common law privilege to constitutional convention delegates. The basis of many of the privilege defenses to defamatory statements made by government officials often rest with court-made laws. See generally, 50 Am. Jur. 2d Libel and Slander, Section 286. To be accorded the privilege, a statement must be made in the proper

discharge of an official duty. Id. At common law, the legislative privilege was limited to comments "pertinent" to the official business of the legislative body. Id., at Section 294. Communications made in the course of judicial proceedings are also generally privileged from liability for libel or slander. Id., at Section 299.

Because the work of convention delegates is quite similar to that of legislative bodies, one could persuasively argue that the common law legislative privilege of immunity from suit for defamatory statement should also apply to convention delegates. Until the courts decide to make such privilege applicable to Convention delegates, however, it is my opinion that, because there is no statute or applicable Restatement law expressly making the privilege applicable to delegates, there is no privilege for members of a constitutional convention.

In the absence of a privilege then, the rules of defamation of public officials or public figures would apply. Because convention delegates are clearly public officials, the Restatement law regarding defamation of a public official or public figure applies. Restatement (Second) Torts, Section 580A reads:

> One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other person, or
>
> (b) acts in reckless disregard of these matters.

Thus, if a private person or another delegate publishes (makes) a false and defamatory statement concerning a convention delegate regarding the delegate's conduct, fitness, or role in that capacity, the one making the statement is liable if he knows the statement to be false and it defames the delegate or if the maker of the statement acted in reckless disregard of its truth or falsity.

The United States Supreme Court requires that in order for a public official to recover damages for a defamatory and false statement made by another person there must be clear and convincing proof that the statement was made with "actual malice." 50 Am. Jur. 2d Libel and Slander, Section 42, citing New York Times Co. V. Sullivan, 376 U.S. 254, 11 L. Ed.2d 686, 84 S. Ct. 710.

"Public official" has been referred to as applying to those government employees who have substantial responsibility for or control over the conduct of governmental affairs. Id., at Section 46.

"Actual malice" involves a subjective standard testing the publisher's good-faith belief in the truth of his statements. Id., at Section 33, citing St. Amant v. Thompson, 390 U.S. 727, 20 L. Ed.2d 262, 88 S. Ct. 1323. The public official defamed must demonstrate that the person making the statement realized the statement was false, in fact entertained serious doubt as to the truth of

his publication, or acted with a high degree of awareness of the statement's probable falsity. Id.

The burden of proof required of the public official defamed is quite stringent. Actual malice must be proven by the official defamed using a clear and convincing standard of proof.