



## LIBEL LETTER

November 1994

### Philip Morris v. ABC: Third Party Subpoenas Fishing For A Confidential Source

In the libel suit brought by Philip Morris Companies Inc. against ABC and two of its reporters, Philip Morris has sought to obtain the identity of an ABC News confidential source by issuing subpoenas duces tecum to telephone, airline, credit card, car rental and hotel companies that did business with ABC and the reporters. Philip Morris, through these subpoenas, is seeking to track the movement and communications of and by the reporters during a three month period in which they were presumably researching the news reports at issue in the litigation. Included in the subpoenas are the telephone records for the reporters' home telephones. The confidential source, who appeared in silhouette on broadcast reports on ABC's *Day One* program, was identified in the news reports as a "former R.J. Reynolds manager".

By motion filed with the Virginia Circuit Court in Richmond, Virginia on November 7, ABC has sought a protective order quashing the subpoenas duces tecum. In the alternative, ABC suggests that the Court defer consideration of the issues raised by the subpoenas until it has heard the motions on the subpoenas directed to ABC itself on the identity of the confidential source (currently scheduled for hearing on January 6, 1995) or such later date by which the Court has before it a more adequate record in the case or has ruled on ABC's demurrer. An *amicus* brief in support of ABC's position was filed by 15 major media organizations and trade associations.

ABC argues first the basis and importance of the reporter's privilege and its recognition under Virginia, as well as federal constitutional, law, and then that third party subpoenas designed to elicit

### Malcolm v. Masson

Jeffrey Masson has filed a motion for a new trial after a jury verdict against him in his libel suit against author Janet Malcom. Masson is challenging certain of the jury instructions. The case, which arose out of a two-part article published in *The New Yorker* in 1983, resulted in a jury verdict (the second, of course, in the litigation) returned on November 2, 1994, that two of the five contested quotes in the articles were false, one of those quotes was defamatory, but that the false and defamatory quote was not written with actual malice. *The New Yorker* magazine, which had been party to the first trial in 1993, was dropped and did not participate in this trial after the first jury found that with respect to statements it determined were false and defamatory, *The New Yorker* had not acted with actual malice in publishing Ms. Malcom's series.

Messrs. Levine and Sullivan, of Ross, Dixon & Masback, agreed to give the LDRC membership some of their thoughts about this case. There is little doubt that these thoughts will prove provocative, and may even engender some response. These comments are attached to this edition of *LDRC LibelLetter*.

no more than the identity of a confidential source must be governed by the structures of the privilege as well.

Starting with an analysis of the reporters privilege law, ABC asserts that the privilege is to be upheld in all

(Continued on page 2)

### Prozeralik v. Capital Cities: A Jury Verdict

In the retrial of the libel suit brought by Niagara Falls restaurateur John Prozeralik against a Buffalo television station formerly owned by Capital Cities, the jury, returning a verdict on Thursday, November 10, found CapCities liable for defaming the plaintiff and awarded him \$11 million in compensatory damages. At the same time, the jury stated its intention to award punitive damages. The trial procedure in the case provided for argument the following day on punitives, with evidence as to the amount that should, or should not, be awarded to be presented at that time. After deliberations on Friday, the jury returned an award to plaintiff of \$500,00 in punitive damages.

(Continued on page 4)

### New Cyberspace Libel Suit Filed

Prodigy Services Company, a nationwide on-line information provider, has been sued for libel by a Long Island brokerage and underwriting concern. The complaint, filed in Nassau County, N.Y. is based upon statements posted to "Money Talk," an electronic bulletin board maintained by Prodigy. The complaint alleges that the message was posted by either a former employee of Prodigy, or alternatively, an unknown "computer hacker," able to forge the log-on name of a genuine Prodigy subscriber. The person who is

(Continued on page 8)

but the most unusual civil cases. Philip Morris, ABC argues cannot make the showing necessary to defeat the privilege: that the identity of the source is critical to any element of Philip Morris' case or that Philip Morris has exhausted alternative sources for the information that it ostensibly hopes to obtain from the confidential source. To the contrary, ABC argues that the third party subpoenas at issue were "to harass defendants, thwart their constitutionally grounded reporter's privilege, and retaliate against the confidential source." (ABC Brief at p. 26-27.)

ABC argues that under the first prong of the test, Philip Morris is required to show that its case ultimately turns on the information it would obtain from the confidential source. Philip Morris cannot meet this requirement, and certainly not at the very early stage in the litigation, ABC asserts, because there was a large number of on-the-record sources who provided information similar to that provided by the confidential source, and discovery from R.J. Reynolds might well produce more -- discovery that Philip Morris has sought to block for various reasons. Both with respect to the issue of truth/falsity and actual malice, the on-the-record sources may obviate any need for the one confidential source. Moreover, ABC argues, plaintiff must make a showing that the broadcasts were defamatory and false before they should even be allowed to get to the issue of actual malice. Similarly, with respect to exhausting alternative sources, ABC argues that no discovery has been taken of the many identified sources and that plaintiff must look to encroach on constitutionally protected newsgathering activities for information only as a last resort.

[Editor's note: The exhaustion issue is one of the more analytically interesting ones in an instance such as this one. When the briefs of Philip Morris and ABC's reply are available it will worth reviewing again how this issue is argued. The question is certainly one of what information is being sought from the alternative sources: the specific identity of the

source or such information as goes to the substantive issues in the case such as substantial truth/falsity, and presumably ABC's reasons for believing, what it broadcast in the news reports at issue. The exhaustion point seems to highlight the need, at the very least, to analyze the third-party subpoenas when and in the same meticulous manner as the court will a subpoena directed to a journalist directly.]

ABC argues that whatever arguments apply to the validity of demanding the identity of the source from ABC or its reporters, the same policy and constitutional arguments apply to a backdoor attempt to obtain the same information from third parties. ABC distinguishes the unfortunate decision in *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979), in which a divided panel of the D.C. Circuit held that a telephone company need not give journalists notice of government subpoenas for their records in a criminal investigation absent reason to believe bad faith in the issuance of the subpoenas, by noting that notice is not an issue in this case, that there is no competing law enforcement interest in this civil suit, and that the decision in many respects has been criticized by and is inconsistent with authority in other cases.

Finally, ABC argues that the subpoenas are grossly overbroad, seeking to obtain information that would reveal all of the reporters' activities on a number of news stories that they were covering during the period in question, as well as invading the privacy (both personal and professional) of their spouses. As it turns out, one of the spouses is a reporter herself, and the subpoenas to the telephone company for home phone records could reveal some of her confidential sources.

The *Amicus* brief argues that third party subpoenas raise special risks to journalists and the policies underlying the reporters privilege. Such subpoenas require the same standards of judicial scrutiny as would a subpoena directed to the reporter. *Amici* argue that

subpoenas to third parties are particularly dangerous because, among other reasons, the third parties may neither appreciate nor care to spend significant resources to protect the information that would otherwise be subject to the reporter's privilege. Third party subpoenas may be issued and complied with without the journalist having notice of their existence and an opportunity to assert the privilege. Moreover, such subpoenas are by their very nature, overly broad, invasive not only of the very areas that the privilege is designed to protect, but the private lives of the reporters and their families. Finally, in a modern world no reporter can function without use of the telephones, travel on airplanes, stays in hotels. If third party subpoenas are not subject to the same strict requirements as subpoenas directed to reporters themselves, then the very existence of the privilege will be at risk. Plaintiffs will routinely circumvent the privilege by seeking information from the same or similar sources as has Philip Morris. In this case, the subpoenas should either be disallowed or held over until the Court determines its overall position vis a vis the confidential source issue.

Counsel for ABC are McGuire, Woods, Battle & Boothe; Wilmer, Cutler & Pickering; and Madeline Schacter of Capital Cities/ABC, Inc.

The *Amici* included The New York Times Company, National Broadcasting Company, Inc., Dow Jones & Company, Inc., Westinghouse Broadcasting Company, Inc., The New Yorker, Cable News Network, Inc., Gannett Company, Inc., The Washington Post, Philadelphia Newspapers, Inc., The Chronicle Publishing Company, Reuters America, Inc., The Society of Professional Journalists, The Reporters Committee for Freedom of the Press, The Radio-Television News Directors Association and Magazine Publishers of America.

Counsel for the *Amici* were Cahill Gordon & Reindel, of New York; and Spotts, Smith, Fain & Rawls, of Virginia.

LDRC has copies of the briefs in the LDRC Brief Bank.

## Journalists Object to Brown & Williamson Subpoenas Seeking to Identify Sources A Litigation Strategy Note

By Theodore J. Boutrous, Jr.

Brown & Williamson Tobacco Corporation is engaged in a multi-state effort to compel media organizations and their reporters to produce documents, and thereby disclose their confidential sources. In fighting these subpoenas, the journalists have filed objections, rather than motions to quash. This strategy has several advantages that may be considered in other subpoena proceedings involving the press.

The Brown & Williamson matter began last May. It arises from a series of news reports during May and June by the media throughout the country. Reports by *The New York Times*, *The Washington Post*, *USA TODAY*, National Public Radio, *The Louisville Courier-Journal*, *The National Law Journal*, *CBS Evening News*, among others, disclosed and discussed the contents of certain internal Brown & Williamson documents. These documents reportedly discuss the company's attitude beginning many years ago toward health hazards and addictive qualities of cigarette smoking, and reflect debate within the tobacco industry about whether and how to disclose to the public internal scientific studies analyzing these dangers. As characterized by one federal judge in a related proceeding, the documents arguably "represent the proverbial 'smoking gun' evidencing [Brown & Williamson's] allegedly long-held and long-suppressed knowledge that [the company's] product constitutes a serious health hazard."

Following publication of initial reports in the press concerning the documents, Brown & Williamson immediately obtained subpoenas in three different jurisdictions, seeking to force seven different media organizations and nine reporters to produce all Brown & Williamson documents in their possession. Brown & Williamson obtained the subpoenas in connection with litigation pending in the Jefferson Circuit Court in Louisville, Kentucky,

where the company is embroiled in a dispute with a former paralegal, Merrell Williams, who worked for a Louisville law firm that represented Brown & Williamson.

Brown & Williamson contends in that litigation that Williams had access to, and stole, internal company documents. In January 1994, the company obtained a preliminary injunction that prohibited Williams "and all persons who are informed" of the injunction from disseminating information contained in any documents that may have been obtained by Williams. According to Brown & Williamson, Williams is purportedly the source of the documents described in press reports, and it needs discovery from the press to prove that assertion.

Rather than file motions to quash, most of the journalists filed objections to the subpoenas, asserting that the First Amendment and common-law journalists' privileges prohibited the compelled disclosure of the material sought by Brown & Williamson. This procedure is authorized by Rule 45(c)(2)(A) of the Federal Rules of Civil Procedure, as well as the rules of many states. Generally, the federal procedure allows a non-party who has been served with a subpoena *duces tecum* to file with the court a short, written objection within 14 days of service, and, if such an objection is filed, the burden then shifts to the party serving the subpoena to file a motion to compel. Absent an order from the court, the objecting party is under no obligation to produce the documents.

There are several potential advantages to this procedure in cases involving the press. The objection procedure requires that the party seeking to compel disclosure explain its case and demonstrate that it satisfies the three-part journalists' privilege test applied by most courts, i.e., that the requested material is highly relevant and "goes to the heart" of the litigation, critical to the case, and not available from alternative sources. Because the litigant seeking the

information presumably has far more knowledge of the underlying litigation than the non-party journalist who is being subpoenaed, it is fair, reasonable and logical to place the burden on the litigant to articulate its arguments against application of the privilege in the first instance.

The objection procedure gives the non-party journalist a clearer target at which to shoot when contesting a subpoena on grounds of privilege. Until the litigant tells the court why it thinks the information is highly relevant, crucial and unavailable from anyone else, it can be awkward and sometimes counterproductive for a non-party journalist to attempt to analyze the privilege issue in a motion to quash. Indeed, in the context of a motion to quash, the non-party journalist sometimes has no choice but to rely on general statements of the privilege law and speculation about the facts and legal theories of the underlying litigation. The objection procedure thus usually will allow a more focused and persuasive privilege argument that addresses the specifics of the case.

The objection procedure is available only in matters involving a subpoena *duces tecum* seeking production of documents. When a litigant also serves a subpoena for deposition testimony, it ordinarily will be necessary to file a motion to quash that subpoena in most jurisdictions or to produce the deponent and assert question-by-question objections. However, if the sole purpose of the subpoena for testimony is to authenticate the documents, it may be possible to argue that an objection will suffice.

Finally, it may be possible to invoke the objection procedure even in states that do not have rules explicitly authorizing it. In the Brown & Williamson matter, for example, *USA TODAY* and its reporter Doug Levy filed and served objections in the Virginia Circuit Court despite the fact that the Virginia rules do not explicitly set forth

(Continued on page 9)

**Prozeralik v. Capital Cities***(Continued from page 1)*

The compensatory award included \$6 million for loss of reputation, \$3.5 million for emotional and physical injury, and \$1.5 million for out-of-pocket losses.

The case arose from defendant's television and radio news broadcasts erroneously naming Mr. Prozeralik as victim of an abduction and beating in the Niagara Falls area, and reporting that the FBI was investigating the possibility that Prozeralik owed money to organized crime. The identification of Prozeralik in the reports initially arose out of speculation by defendant's news staff upon becoming aware of an assault upon a local restaurant owner. Although the testimony by the reporter was contradicted by her FBI source, the reporter testified that she understood the FBI source to confirm that Mr. Prozeralik was indeed the victim. After plaintiff notified the station of the error, the defendant broadcast retractions stating that John Prozeralik was not the victim; that the FBI had earlier said and confirmed that he was the victim; but that defendant's independent investigation had found that plaintiff was not involved. Plaintiff's action alleged that defendant's news report and the retraction had defamed him.

At the first trial, plaintiff won \$18 million, which was reduced to a judgment in the amount of \$15.4 million: \$4 million for humiliation, mental anguish and injury to reputation; \$1.4 million for direct financial loss, and \$10 million in punitive damages.

That determination went up the appellate ranks in the New York State courts, to the Court of Appeals, New York's highest court. (*Prozeralik v. Capital Cities, Comm., Inc.*, 21 Med. L. Rptr. 2257) The Court of Appeals reversed and sent the case back for retrial, holding that the trial court's jury instructions that all of defendant's television and radio broadcast retractions were false as a matter of law were erroneous; and that these instructions deprived the jury from resolving the critical interrelated issues

of credibility and actual malice.

Plaintiff in the retrial had asked the jury to award \$45 million in compensatory damages and \$125 million in punitives. Plaintiff's counsel argued that the punitive damage amount sought was 1% of the stock market value of CapCities/ABC.

Capital Cities/ABC has indicated that it will appeal the jury's verdict.

### **Enforcement of Foreign Libel Judgement**

The June edition of the *LDRC LibelLetter* reported on a Sec. 1983 (42 U.S.C. Sec. 1983) action brought by Vladimir Matusевич to deny enforcement of a British libel action against him in the United States. Matusевич, who is a U.S. citizen, was living in London in 1984 and working as a journalist for Radio Free Europe/Radio Liberty when he wrote a letter to the editor of the *Daily Telegraph* accusing Vladimir Telnikoff of espousing "racialist views" in Telnikoff's op-ed column discussing the ethnic composition of the Radio Free Europe/Radio Liberty Staff. Telnikoff wrote a responding letter and then sued Matusевич for libel. The defendant won in lower court where his statements were held to be "fair comments" as a matter of law, but the House of Lords reversed and remanded, holding that whether the letter was comment (opinion) or fact was a question for the jury. Mr. Telnikoff won a jury verdict in 1992 for £240,000 (then \$416,000 at the then-current exchange rate). Telnikoff is now seeking to enforce it in the U.S. courts.

Plaintiff has moved for summary judgment, in the Federal District Court for the District of Columbia, asserting that enforcement of the English judgment would deprive him of rights secured by the First and Fourteenth Amendments, and would be repugnant to public policy. He pointed out that under English defamation law, claimants need only show that the statements were of or concerning them, and that the statements damaged their reputation.

Falsity is presumed and actual malice is irrelevant. Such a rule is antithetical to United States law giving plaintiff the burden to prove falsity and fault. Matusевич urged that this law is an "indispensable safeguard" of free speech. Moreover, he said, the challenged statements in this case -- consisting of "no more than rhetorical hyperbole," printed in the context of a letter to the editor -- would not be actionable in the United States because they were not factual enough to be proven true or false and they presented a reasonable interpretation of defendant's words. Finally, plaintiff argued that it would be against public policy to recognize a foreign judgment so inimical to rights protected under the United States Constitution.

An *amicus* brief has been filed in support of plaintiff's motion on behalf of The New York Times Company, Inc., the Associated Press, National Broadcasting Company, Inc., Cable News Network, Inc., The Copley Press, Inc., and Magazine Publishers of America.

This case, assert amici, as well, is one that so dramatically underscores the differences between British and American law that the judgment, a judgment so "repugnant to the protection of political opinion at the core of our First Amendment", should not be enforced by a United States Court.

Amici also maintain that it is absolutely natural that a U.S. court should decline to enforce a British judgment that contravenes U.S. policy (despite comity considerations), since British courts likewise do not enforce U.S. judgments inconsistent with British public policy. Amici's greatest concern is the "dangerous precedent that would be created if [the] Court were to lend its imprimatur to foreign libel judgments . . . that so clearly violate established First Amendment rights." The result could be a virtual directive sent to libel plaintiffs to sue overseas.

Counsel for plaintiff is Davis, Polk & Wardwell. Counsel for amici is Laura Handman, Esq. of Lankenau, Kovner & Kurtz.

Copies of both briefs are available in LDRC's Brief Bank.

## In Banc Rehearing Denied in *Foretich V. Capital Cities/ABC, Inc.*

The Fourth Circuit has denied without opinion a motion by Capital Cities/ABC, Inc. for rehearing and rehearing *in banc* on the issue of whether libel plaintiffs, Vincent and Doris Foretich, parents of Dr. Eric Foretich, were limited purpose public figures and on what ABC contended is a dramatically new test for determining limited public figures, a test in conflict with prior Fourth Circuit law. CapCities/ABC was supported by an *amicus* brief filed by 11 media and media trade associations.

Dr. Eric Foretich became embroiled in one of the most publicized and debated child custody actions in history when his ex-wife, Dr. Elizabeth Morgan, accused him and his parents of sexual abuse of their daughter, Hilary Foretich. The custody dispute spawned multiple contempt citations and resulting jail terms for Dr. Morgan, legislation limiting contempt imprisonment in custody disputes, and ultimately, removal of Hilary from the United States by her mother. The initial custody dispute began in 1983, but the various libel suits that reportage on it and the participants spawned continue through today.

A panel of the Fourth Circuit, in *Foretich v. Capital Cities/ABC, Inc.*, 22 Med.L.Rptr. 2353 (1994), held that the Morgan-Foretich custody battle was a "public controversy" for purposes of public figure analysis, but that the grandparents were not public figures. The Court, after noting that the burden of proving that the plaintiff is a public figure must be borne by the defendant, set out the Fourth Circuit test for limited public status from the en banc opinion in *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703[16 Med.L.Rptr. 1689](4th Cir.)(en banc), cert. denied, 501 U.S. 1212 (1991): (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special

prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation.

[It is interesting that the panel notes, in Footnote 11 of the opinion, that the Fourth Circuit *Reuber* five-part test is more stringent than that applied by the D.C. Circuit which, the panel states, "requires the defendant to prove only that the plaintiff 'played a sufficiently central role in the controversy.'"]

Having found that the plaintiffs apparently met all of the criteria set out in *Reuber*, the panel created an exception: individuals publicly accused of committing an act of serious sexual misconduct that if proved to have been committed would be punishable by imprisonment cannot be deemed a limited purpose public figure merely as a result of their making "reasonable public replies" to the accusations. In essence, a self-defense exception, modeled explicitly by the panel on the common law conditional privilege to speak in self-defense.

Capital Cities/ABC argued that the court's position rests not on the plaintiffs participation in what all agree is a public controversy, but instead "on the novel proposition that 'public figure' status can turn entirely on the type of public controversy at issue." (Defendants/Appellants Brief at p.2) Or, as Amici put it, instead of an exclusive focus on the conduct of the plaintiffs as was the test in *Reuber*, the panel "turns the focus on the conduct that prompted plaintiff's response, making that the linchpin on which private/public figure status turns." (Amicus Brief at p. 7)

While in this instance specifically limited to charges of sexual misconduct, the panel's analysis, CapCities/ABC and Amici argued could be used to negate public figure status of almost anyone accused of criminal conduct or wrongdoing. The imposition of this new criteria onto the test and its obvious result, it is argued, is contrary to

precedent in other circuits as well as that of the Fourth Circuit.

Moreover, by basing the plaintiffs' status on the content of the controversy, the panel has, CapCities/ABC contended, created a content-based regulation of a First Amendment privilege that is fundamentally inconsistent with First Amendment principles.

CapCities/ABC and Amici argued that the result of the panel's new criteria, ostensibly patterned on common law self-defense privilege, will be to chill speech on alleged criminal misconduct -- a result that is directly contrary to the underlying purpose of the self-defense privilege. That privilege is designed to encourage more speech on accusations, allowing those accused of criminal conduct (among other accusations) to rebut them openly, subject only to the common law limitations. The panel's grafting of this notion onto public figure status would allow those accused of criminal conduct to speak out, protected by the privilege, and yet obtain the protections of private figure status as well when the debate is reported.

Capital Cities/ABC was represented by Wm. Bradford Reynolds, of Collier, Shannon, Rill & Scott, and Paul R. Taskier and Adam Proujansky, of Dickstein Shapiro & Morin, L.L.P., both of Washington, DC.

The Amici were represented by Laura R. Handman, of Lankenau Kovner & Kurtz, New York, New York.

LDRC has copies of the briefs of Capital Cities/ABC and Amici in the LDRC Brief Bank.

## LDRC 50-State Survey Volume III Planned

Harry Johnston announced at the LDRC Annual Meeting that LDRC is engaged in the research and development of a Volume II of the *LDRC 50-State Survey: Current Developments in Media Libel and Invasion of Privacy Law*. Volume II will focus exclusively on non-libel claims, including such newsgathering claims as breach of contract, promissory estoppel, and trespass. It is hoped that Volume II will be published by mid-1995, with annual updates thereafter. LDRC is actively seeking views from the membership on the issues to be covered and suggestions (or volunteers) of lawyers who might be interested in preparing a state survey for this new volume.

Non-libel causes of action have seemingly risen both in number and in creativity in recent years. The current *Survey* simply could not be expanded any further to accommodate more materials without becoming unwieldy. A second volume seemed the right answer to the growing needs and interests of the LDRC membership.

To the extent possible, LDRC hopes to spread the burdens and benefits of Survey preparation to qualified attorneys and firms not already involved in the current volume, with strong preference to be given to members of LDRC Defense Counsel Section.

Assistance in identifying potential preparers in states currently lacking DCS members (or multiple members) will also be greatly appreciated. States with no members of the Defense Counsel Section are: Alabama, Connecticut, Idaho, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Puerto Rico, Rhode Island, West Virginia, Wyoming, Utah. States where the only DCS member already participates in the current Survey are: Arkansas, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina.

A mailing on Volume II with subscription and shipping information and allowing LDRC members to sign up to receive a copy of Volume II will be sent in January.

## 1995 LDRC/NAB/NAA Libel/Privacy Conference September 20-22, 1995

The LDRC/NAB/NAA will be sponsoring the biennial Libel/Privacy Conference on September 20-22, 1995. The Conference will be held in the same location as in 1993, the Ritz-Carlton in Tysons Corner, Virginia, near Washington, D.C.

Dan Waggoner, co-chair with Terry Adamson of the DCS Conference Committee, announced at the Defense Counsel Section Annual Meeting on November 10, the initial formation of the Conference Committee and that ideas for the Conference were being developed. DCS committees will be canvassed for issues and Conference-related materials.

The Conference is designed for defense counsel only and its success has been underscored by the growing attendance at the biennial event. LDRC members should put these conference dates on their calendars: September 20-22, 1995.

## Defense Counsel Section Holds Annual Meeting

The Defense Counsel Section of LDRC held its Annual Meeting at a breakfast on November 10, 1994. The Meeting was called to order by President Eugene Girden. Gene noted strong development of the DCS, now numbering 125 law firms nationwide. He called for continued activity and growth in the DCS and complemented it for its contributions to LDRC programs and activities.

The DCS elected Thomas Leatherbury as its next Treasurer. His election moved P. Cameron DeVore up to President, Jim Grossberg to Vice-President and Laura Handman to Secretary -- with Gene Girden

becoming President-emeritus. Each individual will hold their current office for two years and then move up one position, with a new treasurer elected every two years.

The DCS heard reports from Sandra Baron, Executive Director, Henry Kaufman, General Counsel, and from representatives of each of the DCS Committees. DCS members were urged to notify LDRC early and often of new cases, claims, trends and issues, and to continue to send LDRC briefs for the LDRC Brief Bank, as well as materials on expert witnesses and jury instructions. Members were

urged as well to become active in DCS committees, all of which are currently engaged in projects. Cam DeVore closed the meeting with an exhortation to the membership to assist LDRC in identifying and contacting possible new DCS members.

Minutes from the meeting will be available next month and will be included in the *LDRC LibelLetter*.

## LDRC Annual Meeting Held

The Annual Meeting of the LDRC was held on November 9, 1994, at the Waldorf-Astoria Hotel. Harry M. Johnston, III, Chairman of the LDRC Executive Committee, called the meeting to order.

Among the highlights was a report from Harry Johnston reporting on some of the accomplishments of LDRC during the year:

- \*\* Transition from a General Counsel to an Executive Director management system has been effected
- \*\* Research and development on a Volume II of the *LDRC 50-State Survey* has begun, with the new volume to focus on non-libel claims.

- \*\* LDRC LibelLetter, a monthly publication, has been launched.

- \*\* Computers have been acquired for LDRC, thanks to funds from the 1993 Libel/Privacy Conference made available by NAA and NAB.

- \*\* 11 new Media Members and 24 new DCS members have joined LDRC in 1994

- \*\* Annual Dinner attendance would be close to record breaking.

A copy of the minutes from that meeting follow in the *LDRC LibelLetter*.

## LDRC ANNUAL DINNER

Before more than 300 LDRC members and guests, the 12th LDRC Annual Dinner on November 9, 1994, at the Waldorf-Astoria featured the presentation of the "William J. Brennan, Jr. Defense of Freedom Award" to Dr. Jan Moor-Jankowski, defendant in the groundbreaking New York State litigation of *Immuno A.G. v. Moor-Jankowski*.

Harry Johnston, LDRC Chairman, and Sandra Baron, Executive Director of the LDRC started the program with thanks to the members for their support throughout the year. Acknowledging the support for LDRC programs, Baron remarked that "this is a most extraordinary membership." Baron also introduced the first speaker of the evening, Diane Zimmerman, Professor of Law at New York University School of Law. Zimmerman, a former *Newsweek* and *N.Y. Daily News* reporter prior to her study of law, has served as Chair of the ABA's First Amendment Rights Committee and as a Trustee of the Copyright Society.

Professor Zimmerman spoke briefly on the *Immuno* case. That case, which was litigated over a 7 year period, resulted in a resounding post-*Milkovich* opinion from the New York Court of Appeals, New York's highest court, on the libel issue of opinion speech.

In discussing *Immuno*, Zimmerman pointed out the important fact that the New York Court of Appeals chose to handle the highly technical, scientific

speech in *Immuno* as "indistinguishable from other media cases....the issues are exactly the same as if it were a network news story." Zimmerman also praised Chief Judge Kaye's majority opinion for looking to the state constitution for protections of civil liberties and free speech, an approach advocated by Justice Brennan. The *Immuno* decision defined a broad analysis for protectable opinion Zimmerman noted that it has been cited by a number of courts in other states since, and has been a source of encouragement for an "interesting reformation in the law." Zimmerman explained that *Immuno* seemingly "allowed courts to say that the standard of whether or not something is opinion, and therefore protected, is essentially what it was before *Milkovich* was decided. *Immuno* has been read as affirming the practice of protecting speech, if from its context, it could be understood as expressing opinion." Professor Zimmerman noted that *Immuno* has been cited in New Jersey, Pennsylvania, Maine, Colorado, Arizona and other states. In closing, Zimmerman called the decision in *Immuno* "the result of a very courageous fight." A copy of her remarks will be included in the next month's *LibelLetter*.

Solomon B. Watson IV, Vice-President and General Counsel of the *New York Times Company*, and Chair of the "William J. Brennan, Jr. Defense of Freedom Award" Committee, presented the award to Dr. Jan Moor-Jankowski,

remarking that "Dr. Moor-Jankowski's efforts set an easy predicate upon which to base this award...Dr. Moor-Jankowski exemplifies that which is at the fundamental basis of the First Amendment, the right of an individual to speak or publish his or her opinion, and not to fear unfair attacks upon that right by the wealthy, the powerful and the mighty."

Moor-Jankowski took the podium to a standing ovation, and told the members that he "cherished this award more than any other that he has received from heads of state, academies and universities, because it represents a highly visible encouragement in the ongoing struggle we all must conduct daily in the defense of our freedoms." During the seven-year history of the case, he noted, "well-known law firms in this country, Austria, Germany and the U.K. recommended that their clients publish retractions and/or accept costly settlements. I, however, am unable to retract what I know to be true. As I once said in my deposition, I deeply believe that in a democratic society, everybody is entitled to their opinion."

Considering the tremendous chilling effect that the cost of libel defense presents, Moor-Jankowski wondered aloud whether the researchers of the 50's and 60's who presented the link between tobacco and asbestos to cancer might, under this kind of restraint, have been able to bring to light their important and

(Continued on page 8)

## Prodigy

(Continued from page 1)

registered with Prodigy as using the log-on (or "handle") denies any knowledge of the posting. Although the complaint charges Prodigy with "publishing" the allegedly defamatory statements, the individual under whose "handle" the postings were made is also being named as a defendant. Plaintiffs announced the filing of the complaint on November 10, 1994, and claim \$100 million in damages.

The postings at issue charged misconduct by the plaintiffs, Stratton Oakmont and its president, in connection with an initial public offering with which Stratton Oakmont was involved. Prodigy runs a disclaimer on all of its bulletin boards to the effect that subscribers are responsible for the statements they make. A Prodigy spokesman was quoted by the Associated Press as stating that more than 75,000 unedited notes are posted in its electronic discussion groups every day.

One of the issues raised by the current unknown status of the author of the allegedly libelous statement is the degree to which an author of any given posting can be tracked down. It would appear that simply having a computer "handle" is not always sufficient to locate the actual speaker, and there is presently no technology to prevent this occurrence.

As of this publication, Prodigy had not had sufficient time in which to respond. The Plaintiffs originally filed a motion requesting a Temporary Restraining Order, enjoining Prodigy from "further publication" of the statements, and also asking that the network purge the postings from computer memory, however this motion was dropped with leave to bring the motion again on three day's notice. LDRC has received a copy of the complaint from Prodigy and will endeavor to keep members posted on the progress of the case.

## Annual Dinner

(Continued from page 7)

life-saving light findings.

Moor-Jankowski, in considering the weighty impact of libel defense expense, suggested that "what is needed is some form of fee-shifting mechanism, to act as a legal deterrent to wealthy corporations interested in muzzling criticism of their activities. Costly, meritless libel suits are a misuse of the court system to undermine the protection that we should enjoy under the First Amendment." A copy of Dr. Moor-Jankowski's remarks are included in this edition of the *LDRC LibelLetter*.

Following Moor-Jankowski's speech, Governor John Sununu and Michael Kinsley, co-hosts of CNN's *Crossfire* program engaged in a dialogue both with one another and then with the audience on issues of reporting ethics and libel law. Kinsley, acknowledging that his views on libel law would probably comport with those of the LDRC membership, took on the task of questioning Sununu and moderating the discussion. Governor Sununu claimed that libel law as it has developed post-*New York Times v. Sullivan* has encouraged a climate of irresponsible reporting and reporting techniques that discourage individuals from accepting positions in government -- a danger, claimed Sununu, to first rate public service and a bipartisan concern. As could be expected, Governor Sununu drew fire from the audience with his charges that at least a small portion of the Washington press corps used what amounted to veiled threats to report disparaging matter unless comments, confirmations, denials or other information were forthcoming from government officials. Governor Sununu said that he had been told by a number of reporters in Washington that they cared little about the truth of allegations that they reported if the allegations themselves were newsworthy. After the evening's program had officially ended, Governor Sununu could still be found debating the issues with audience members.

LDRC is very grateful to Michael Kinsley and John Sununu for agreeing to

participate in the LDRC Annual Dinner, and we are grateful to Rick Davis, Executive Producer of CNN's *Crossfire* and other CNN talk programs, for arranging to present *Crossfire* on Wednesday night out of New York, instead of its usual home in Washington, in order to allow Messrs. Sununu and Kinsley to attend the Annual Dinner.

## Opinions Protected: Two Judges Lose Libel Claims

By Edward J. Davis

The defamation complaints of two justices of the New York State Supreme Court who were listed among "The 10 Worst Judges" by the *Village Voice* have been dismissed for failure to state a claim. Justices Irma Vidal Santaella and Edward Rappaport were two of the subjects of a front-page story in the weekly newspaper that highlighted many problems of the judicial system and advocated merit selection of judges. The decisions dismissing their complaints reinforce the constitutional protection afforded to expressions of opinion about public officials' performance of their duties and appear to significantly strengthen the protection for speculation or hypothesis about a public official's bias or motivation.

Justice Rappaport, of Brooklyn, charged that the *Voice* falsely accused him of giving unduly favorable treatment to law enforcement officers who came before him as criminal defendants because of his past career defending police officers charged with crimes, and of misconduct in arranging for a disproportionate number of such cases to be assigned to him. In her decision dismissing the complaint, on October 26, 1994, Justice Carol H. Arber of the Supreme Court for New York County took notice of the context and character of the articles, which signalled to readers that they contained

(Continued on page 9)

## Village Voice

(Continued from page 8)

opinions, and the rigorous showing required where a plaintiff charges libel by implication. Emphasizing that "the courts have determined that discussion and criticism of judges must be encouraged," Justice Arber held that the statements implying bias or questioning Justice Rappaport's motivation in deciding certain cases were protected by the First Amendment because they could not be verified as true or false. She found further that the alleged factual omissions in the articles concerning the way cases were assigned did not attribute any improper activity to Justice Rappaport himself, but related to the assignment system and therefore did not defame Justice Rappaport.

Justice Santaella had alleged that the Voice libeled her by publishing a photograph of her in judicial robes on the front page, with a blindfold across her eyes holding the article's headline, and by charging her with favoritism, incompetence, dereliction of official duties and making decisions based on political influence. In a decision dated May 27, 1994, her fellow Justice in New York County (Manhattan), William J. Davis, ruled that the use of her photograph was a protected expression of rhetorical hyperbole and that the characterization of her in the article was a protected expression of opinion. Like Justice Arber, he held that statements and implications as to her possible bias and motivation in deciding cases were not assertions of fact that could be proved true or false, but hypotheses and conjecture offered after a full recitation of relevant facts. Justice Davis also ruled that New York's statutory privilege for fair and true reports of official proceedings protected the article, since the Voice fairly and truly reported on five Appellate Division decisions reversing Justice Santaella that formed the basis for the article's criticisms. He held that any omissions merely reflected the obvious subjective viewpoint of the authors.

The Voice and the authors of the articles were represented by Victor A.

Kovner, Laura R. Handman and Edward J. Davis of Lankenau Kovner & Kurtz.

## APME/SPJ Ethics Codes

After a year of intense debate, the Associated Press Managing Editors voted last month to adopt a new, updated ethics code. The new code, a shorter version of the controversial 10-page set of restrictive guidelines initially proposed, addresses such issues as diversity in staffing and coverage, journalists and community involvement, plagiarism, and electronic photo manipulation.

### SPJ LAUNCHES OWN ETHICS REVAMP

Fast on the heels of the APME guideline debate, the Society of Professional Journalists announced the formation of a Task Force to revamp and modernize its own ethics code.

Kevin Smith, of the *Dominion Post* in West Virginia, and Chairman of the SPJ Ethics Committee, told LDRC that SPJ hoped to avoid some of the problems that APME faced in revising its code. While the Task Force, composed of 17 individuals from a wide spectrum of the media, believes that there are a few clearly defined issues to be addressed by an ethics code -- for instance, reporters should not plagiarize -- most newsroom issues are not so easily codified, commented Smith. Issues such as the use of a confidential sources for reports, privacy matters and photo manipulation do not, he said, lend themselves to easy answers or codification.

The updated code will not be a "long laundry list" of do's and don'ts: the objective of this new revision will be to provide journalists with a series of questions, rather than dictate a paternalistic and rigid code of behavior. Areas SPJ will be looking at include freedom and responsibility, promises of confidentiality, diversity, accuracy and deception.

Lou Hodges, of Washington and Lee University, and a member of the Task Force, commented recently that the revised code will ultimately place the burden of responsibility on the individual, and that the purpose of the new code will be to allow journalists "to work out for themselves the standards about which they

wish the live." Hodges has undertaken to prepare a draft for discussion purposes; that draft has been circulated among Task Force members for comment. By February, the Task Force hopes to have a draft ready to present to the SPJ Executive Committee for review, and the next draft will then be dispatched to SPJ local chapter presidents and chapter members for review.

The SPJ first adopted a code in 1926. It was revised in 1973, 1984 and 1987. Mr. Smith said that as this Task Force tries to avoid a code featuring press behavior ultimatums, the new code may still be met with disagreement within the media community. He has urged the membership not to let fine point wrestling matches hold up the process. Further, this Task Force has made it quite clear that whenever the latest version is complete, its provisions will not be written in stone. "Codes of ethics, like muscles and brains and old house pets, wither and atrophy unless they get exercised occasionally," said Ethics Committee member Jay Black, of the University of South Florida.

## Brown & Williamson

(Continued from page 3)

this procedure. In the objections, the press parties took the position that they would, if required, appear at the noticed time and place solely to claim that the documents sought were privileged, but that any such appearance was unnecessary and therefore wasteful. Brown & Williamson filed a motion to compel. In July, after the motion was fully briefed and argued, the court quashed the subpoenas, finding that the documents were protected from disclosure by the First Amendment. Mr. Boutros is an associate in the Washington, D.C. office of Gibson, Dunn & Crutcher, which represents the New York Times Company, The Washington Post Company, National Public Radio, The National Law Journal, USA TODAY, and The Louisville Courier-Journal and their respective reporters in the subpoena proceedings discussed in this note.

### REMEMBER P&G...

The two tobacco company subpoena scenarios should recall for the media the rather chilling episode in 1991 with Procter & Gamble. In 1991, Cincinnati law enforcement searched the records of every telephone user in southwestern Ohio -- over 650,000 people and businesses -- in an effort to determine who had called a Wall Street Journal reporter to provide confidential information about Procter & Gamble. They acted on a complaint filed by Procter & Gamble, and under color of a seldom-used 1974 state law which makes it a crime for an employee of a company to "furnish or disclose confidential matter or information" to "any person not authorized to acquire it." A local prosecutor and the police obtained a grand jury subpoena directed to Cincinnati Bell seeking to obtain the telephone numbers of all who within a three month period had telephoned a given Wall Street Journal reporter either at her bureau or at her home.

While the public ultimately, of course, learned of law enforcement's successful efforts to obtain phone records for an entire region, the local telephone company, Cincinnati Bell, did not notify the Wall Street Journal, nor was it required to do so. At the time, a Cincinnati Bell spokesperson stated that it was not the practice of the company to notify anyone that a subpoena had been received and complied with.

Procter & Gamble ultimately issued a statement saying it had made a "mistake." The search had come to nothing conclusive, and, as media lawyers would imagine, experts were quoted as saying the investigation may have infringed on First and Fourth Amendment rights.

© 1994 Libel Defense Resource Center  
404 Park Avenue South, 16th Floor  
New York, New York 10016

Executive Committee: Harry M. Johnston III (Chair); Peter C. Canfield; Robert Hawley;  
Chad Milton; Margaret Blair Soyster; Eugene L. Girden (ex officio)

Executive Director: Sandra S. Baron  
Staff Assistant: Melinda E. Tesser

General Counsel: Henry R. Kaufman  
Associate General Counsel: Michael K. Cantwell

LDRC would urge LDRC members to notify the LDRC Executive Director of any new cases, opinions, legislative and other developments in the libel, privacy and related claims fields. LDRC welcomes submissions from LDRC members for the *LDRC LibelLetter*.

## **MASSON V. MALCOLM:** **Dodging a Bullet**

By Lee Levine and Michael D. Sullivan\*

There has been so much incorrect, incomplete, and just plain incompetent reporting about Jeffrey Masson v. Janet Malcolm that we should probably not be surprised that very few libel lawyers or their clients appear to understand just how much they owe Janet Malcolm for having the guts and the pride to put herself through the ordeal of a second trial last month in San Francisco. So spare us the wisecracks and the references to "Bleak House," and reflect for a moment on what this case was really all about.

First, some background, drawn from the trial testimony. Janet Malcolm conducted extensive interviews with Jeffrey Masson over a period of months. She tape recorded many of these interviews; she didn't tape record others. When she didn't have, or didn't use, a tape recorder, she took notes. When she finished all of her interviews with him, she listened to the tape recordings and made handwritten notes of those statements by Masson she thought were significant. She then combined all of her handwritten notes -- of taped interviews and of the other interviews -- into a master set of typed notes, which she arranged by subject matter and consulted as she wrote. She testified that the quotations attributed to Masson in the article as published represent her selection and organization, from among that mass of materials, of his own words into a coherent manuscript.

Masson sued because he didn't like the portrait that the article painted of him. His original complaint, and several amendments to it, included a host of allegations that he hadn't said things that turned up, word for word, on the tapes. Once he got access to the tape recordings in discovery, he amended his complaint yet again to include new allegations of misquotation that, though they appeared in Malcolm's typed notes, did not appear on the tapes. In other words (our, not his), with respect to these quotes, Masson had "plausible deniability."

The three most significant allegedly "fabricated" quotes -- that Masson said he would turn Sigmund Freud's home into a place of "sex, women, fun;" that Anna Freud and Kurt Eissler thought of Masson as "an intellectual gigolo;" and that, once his book was published, psychoanalysts would call Masson the "greatest analyst" that ever lived -- are all contained in Malcolm's typed notes. A fourth quotation -- the so-called "wrong man" passage -- contains words that are without dispute on tape; Masson's complaint was that, by editing out a small portion of it -- Malcolm had made him falsely appear to be dishonorable.

Let's take these two categories one at a time. With respect to the three allegedly "fabricated" quotations, Masson was permitted to go to a jury simply because he (1) swore he never said those words and (2) they did not appear on tape. This was so even though Masson had also sworn he had not said various other things attributed to him in the article, which happened to show up on the tapes. If Malcolm had lost -- or if she had quietly settled the case after the first trial -- any interview subject who does not, on reflection, like the way she is quoted in print, and is fortunate enough not to have been tape recorded making the statements -- would have a reasonable shot at successfully pursuing a defamation action against the author and publisher. Because Janet Malcolm stuck it out -- the jury found that Masson had not carried his burden of proving falsity with respect to any of these three quotations -- and Masson has apparently walked away empty handed after more than a decade of litigation, we suspect our clients will not be seeing a rash of these claims any time soon.

Next, and equally important, is the case of the "wrong man" quotation. As we all know, journalists and their editors shorten long quotations for publication every day, taking out

sentences, digressions, and words that they believe are irrelevant to their story. So long as the editing does not materially distort the meaning of what the subject said, there ought to be no problem. In Masson v. Malcolm, Malcolm removed from a long quotation about Masson's ouster as Projects Director of the Freud Archives, which quotation centered on his express refusal to be silent about the circumstances of his firing, a sentence in which Masson quotes Dr. Kurt Eissler -- the Secretary of the Archives -- as indicating that, if Masson kept silent, he might one day get his job back.

At trial, it became apparent that Malcolm had learned that Dr. Eissler (who so testified at trial) would not, under any circumstances, have given Masson his job back. She then made the good faith judgment that, by simply editing out the statement Masson attributed to Eissler, she would not be changing Masson's meaning -- i.e., that he was the "wrong man" to keep silent.

The jury found that Malcolm had changed the meaning of Masson's words through her editing, but that she had done so, as she had testified, in the good faith belief that she had accurately captured the gist of what he had said. Thus, the "wrong man" quotation presents a classic case of the constitutional malice standard working the way it is supposed to work -- protecting journalists from liability for the good faith choices they must inevitably make in practicing their craft.

Once again, if Janet Malcolm had not seen this case through, and Masson had actually recovered money (either by settlement or jury award), we have little doubt that our clients would soon be on the receiving end of a flurry of "defamatory editing" claims. Indeed, without the benefit of tape recordings, disgruntled news subjects would have a pretty free hand to allege that their "actual" words had been deliberately "edited" so as to create a false, defamatory meaning. The resulting "he said, she said" dispute (as so many holier-than-thought commentators have described Masson v. Malcolm) would at least get the plaintiff to a jury in more than one courthouse around the country.

The news media community has been eager throughout to dismiss Masson v. Malcolm as an aberration attributable to some journalistic failing of Janet Malcolm. Don't kid yourself, it could have happened to virtually any journalist who has ever conducted an interview and published something other than a verbatim transcript of it. Thanks to Janet Malcolm, however, the case is now likely to be an aberration. For that, we all owe her a debt of gratitude.

\*

Lee Levine and Michael D. Sullivan are members of the Washington, D.C. firm of Ross, Dixson & Masback. The firm served as counsel to the defendants' insurance carrier in connection with the Masson v. Malcolm litigation.

Libel Defense Resource Center  
Annual Meeting  
November 9, 1994

The Annual Meeting of the LDRC was held on November 9, 1994, at the Waldorf-Astoria Hotel. Harry M. Johnston III, Chairman of the LDRC Executive Committee, called the meeting to order.

Harry Johnston reported that among the accomplishments of the organization were the following:

- \*\* Transition from a General Counsel to an Executive Director management system had been effected.

- \*\* Research and development on a Volume II of the LDRC 50-State Survey had begun, with the new volume to focus on non-libel claims.

- \*\* LDRC LibelLetter, a monthly publication, had been launched.

- \*\* Computers had been acquired for LDRC, thanks to funds from the 1993 Libel/Privacy Conference made available by NAA and NAB.

- \*\* 11 new Media Members and 24 new DCS members have joined LDRC in 1994

- \*\* Annual Dinner attendance that night would be close to record breaking.

Harry noted that LDRC's financial health was such that a contingency fund could be established. Because LDRC has historically experienced somewhat uneven distribution of revenue throughout the year, a contingency fund is particularly important in order to allow the organization to stay on top of the payment of its expenses.

Harry introduced and called for a report from LDRC's new Executive Director, Sandra Baron. She introduced her report by emphasizing that LDRC is a clearinghouse for the media defense bar that relies upon the membership to provide it with information on new cases, claims, opinions, litigation strategies and other information and materials of use to the membership. She sought comments on the *LDRC LibelLetter*, as well as topic suggestions. She reported on the still in-development data base program for the LDRC Brief Bank (with thanks to new DCS member Sherman & Sterling for initial programming services), as well as computerization of the indices of the Expert Witness and Jury Instruction data bases.

Sandy reported that an LDRC goal for 1995 and beyond is user friendly interactivity with its membership. LDRC is looking into purchasing an additional computer and dedicated phone line, to be used with a modem and PC Anywhere software, to allow the membership to make their own inquiries into the LDRC Brief Bank index and the other data indices.

Sandy also reported that LDRC had received a proposal from the newly launched National Law Journal "Law Journal Extra!" service, seeking to put the LDRC Bulletin on-line and offering to create for LDRC a private area on the service in which to put the LDRC indices and up to 8 forums for access by LDRC members only. The cost to LDRC members would, at least initially, be \$10 per month and \$10 per hour usage charges for access to all of the services provided by Law Journal Extra!. Sandy solicited any comments or suggestions either regarding this service

or any other means of creating an interactive network for LDRC and its members.

Sandy Baron presented the LDRC Budget for 1995, with estimated actuals for 1994, and the LDRC accountant's draft report for the third quarter of 1994. The actual expenditures for 1994 seem to be generally in line with the budget for the year, but revenues are up from the budget in virtually all major categories.

There were no questions on the Executive Director's report.

Harry Johnston then asked Peter Canfield, a member of the Executive Committee, to give a report on the launching of the *LDRC LibelLetter*. Peter reported that the *LibelLetter* was created in response to a concern expressed from the Tofel Report that LDRC members were unaware of the services provided by LDRC. However, the publication has become more substantial, offering members a real opportunity to share substantive material with one another. Peter reported that LDRC was in the process of creating a *LibelLetter* Committee, with membership from the Media Members and the DCS, with a mandate to generate ideas for long and short term projects for the *LibelLetter* and to forward new and noteworthy matters of interest to the Executive Director.

Harry Johnston then asked Chad Milton, a member of the Executive Committee, to give a report on fundraising and membership. Chad reported that with the media industry in such a continuing volatile period, with consolidations and divestitures, LDRC finds new opportunities to add members at the same time that LDRC is losing members. LDRC proposes to establish a Membership Committee under Chad's leadership, the mandate of which will be to develop strategies for obtaining new members, identify media companies that should be targeted for membership solicitation and to assist in making contact with such organizations.

Harry Johnston then asked Robert Hawley, also a member of the Executive Committee, to provide a report on the transition within LDRC from a General Counsel to an Executive Director management model. Bob reported that the initial stages of the transition had been effected: an Executive Director hired and the budget created to support her and a staff assistant. It is hoped that at the end of next year an additional professional staff person can be added. Henry Kaufman and his associate, Michael Cantwell, continue to work on substantive projects for LDRC, but the Executive Committee continues to look at what is the most efficient and effective way to use LDRC resources. It is likely that more projects will be moved "in-house" over time as that appears to allow LDRC to better exercise control over costs and do more with its limited resources. It is also likely that LDRC will be forced to move to new accommodations in the next year or so because the current space is inadequate.

Harry Johnston asked Henry Kaufman, General Counsel to LDRC, to provide a report. Henry noted that LDRC has published four issues of the LDRC Bulletin on time and with strong substantive content. Four editions are planned as well for 1995, including a study on summary judgment motions. The *LDRC 50-State Survey* is now on computer, allowing for easier production of the book. The ease with which one can search the *Survey* once it is on computer suggests that LDRC should look at the possibility of putting the *Survey* on CD Rom in the future. Members will be asked to offer suggestions with respect to the development of a Volume II of the

*Survey*, focussing exclusively on non-libel claims. LDRC is interested in hearing from members about topics that need to be covered, as well as media counsel that the membership would propose to create the state surveys.

Harry Johnston then called on Eugene Girden, President of the Defense Counsel Section, to report on the DCS. Gene reported that the DCS was up to (or would be shortly) 125 members. DCS members are active participants in LDRC activities. DCS has established a two year progression for its officers, allowing for a new officer every two years. Thomas Leatherbury will be nominated for Treasurer of the DCS at the Annual Meeting of the DCS on November 10, Gene will become President Emeritus, Cameron DeVore will become President, James Grossberg, Vice-President and Laura Handman, Secretary.

Harry Johnston called for New Business. Harry noted for the membership that the by-laws, adopted by the membership at the Annual Meeting in 1993, authorized the membership to overrule the actions of the Executive Committee under a procedure set forth in the by-laws. Harry reported that the Committee had realized that the by-laws did not provide for staggered election of Executive Committee membership. Thus among the actions of the Executive Committee in 1994, and in order to remedy that oversight, the Executive Committee had adopted an amendment to the by-laws that would initiate such staggered elections. The amendment provides as follows:

Art. III, Sec 4: The Chair and members of the Executive Committee shall each serve terms of two years. For purposes of the 1995 elections only, two of the five candidates for the Executive Committee shall be nominated to each serve one-year terms, and three candidates shall be nominated to each serve two year terms. Thereafter, the Chair and members shall each be nominated and shall serve terms of two years.

Harry also stated that the current Executive Committee, according to the by-laws, would serve as a nominating committee. The Executive Committee would be actively looking in upcoming months for persons within the membership who were interested in serving on the Executive Committee. Any interested parties should contact either Harry or Sandy Baron.

Steve Bookshester reminded the membership that the Libel/Privacy Conference, co-sponsored by NAA, NAB and LDRC, would be held in 1995 on September 20-22, in Tyson Corners, Virginia at the same hotel in which the conference was so successfully held in 1993.

There being no further business, the Annual Meeting of the LDRC Membership was adjourned.



**NEW YORK UNIVERSITY MEDICAL CENTER**  
Laboratory for Experimental Medicine and Surgery in Primates (LEMSIP)



MANHATTAN OFFICE:  
550 First Avenue, New York, NY 10016  
Telephone: (212) 679-8884, 263-6626  
Telefax: (212) 213-2654  
Telex: 126545 NYUMEDIC

LABORATORY AT STERLING FOREST:  
RR1, Long Meadow Rd., Tuxedo, NY 10987  
Telephone: (914) 351-2922, 351-5124  
Telefax: (914) 351-5258

**Acceptance Speech by Dr. Jan Moor-Jankowski**  
**LDRC ANNUAL DINNER**  
**November 9, 1994**

---

In accepting the William J. Brennan, Jr. Defense of Freedom Award, I feel deeply gratified and I want to thank the Libel Defense Resource Center.

I cherish this Award more than any other I have received during the course of my life from Heads of State, National Academies and Universities, because, to me it represents a highly visible encouragement in the ongoing struggle we all must conduct daily in the defense of our freedom of speech.

Upon hearing of the Award, the well-known AIDS researcher, Dr. Preston Marx, wrote to me "I have been to countries in Africa and South America that have none of our freedoms. Ironically, on paper, many of these countries share our system of government. What I have learned is that laws are meaningless for those that they ostensibly protect without the force of will from persons such as yourself. Freedoms only survive through the peoples' will."

The LDRC Award represents for me the recognition of what once seemed to be a never ending lonely struggle of seven years until the victory of the second and final 1991 decision of the US Supreme Court, and even later, when the Austrian-based multinational libel plaintiff continued their barrage of press releases in Europe misinterpreting the decision of the American Courts to malign my scientific position. The plaintiff, Immuno Aktiengesellschaft, went even so far as to sue in 1992 in Germany the respected daily Frankfurter Rundschau for their truthful report on the Immuno vs. Moor-Jankowski case.

I spoke of a lonely battle, but in reality the battle was joined in 1986 by my attorney, Mr. Philip Byler, after the initial 2 years during which all the other defendants have settled and everybody involved believed that there was no hope for a successful defense. The plaintiff, Immuno boasted in an Austrian newspaper that they have sued "innumerable parties, say fifty", among them World Wildlife Fund and Greenpeace. Well-known law firms in this country, in Austria, Germany and in the U.K. recommended that their clients publish retractions and/or accept costly settlements.

I, however, am unable to retract what I know to be true, and, as I once said in my deposition, I believe that, in a democratic society, everybody is entitled to their opinion. Fortunately, Mr. Byler was at my side like a knight in a shining armor. With dogged persistence, he helped me to withstand the pressures for settlement and, using his complete mastery of the law and of the facts, including the intricate biologic subject matter,



Page 2

Acceptance Speech

William J. Brennan, Jr. Award

November 9, 1994

he pushed the adversary into retreat and into final admission during the Court of Appeals argument that what was printed concerning the so-called core libel was true -- that, in other words, they were wrong in their evaluation of the biological situation. Mr. Byler was the architect of my victory. Thank you, Philip!

Mr. Anthony Lewis wrote in a letter to Mr. Byler "it was worth the battle". That assessment assumes that we learn the lesson of the Immuno battle and that lesson appears very troubling to me.

Libel litigations, even those ending with an apparent victory like mine, exert a chilling effect on the free debate because of the toll they exact in aggravation, time, and money. In my case, at the insistent direction of the motion court, I was deposed for fourteen days, and depositions were also ordered in Africa and in Austria. Yet, I was, and still am, the editor of a small, highly specialized medical journal which, while internationally distributed has only 300 subscriptions. Mr. Floyd Abrams, who wrote my Amicus brief for universities stated that there are close to 4,000 such journals which "serve a major educational function in setting forth what are often heatedly disputed views". These small publications are at the cutting edge of highly specialized progress and they are produced by unpaid editors, mostly members of University faculties who cannot afford to be insured.

How likely are such scholars to draw comfort from the court decision in my favor when they read that that decision cost me 7 years, i.e., 10% of the average life expectancy and 25% of an average scientific career? And when they hear that the financial cost of the defense represented forty years of an average professorial salary of \$50,000 per annum! In the climate created by my "victory" the scientists who in the 1950s did not hesitate to publish in scientific journals the first tentative discussions on the correlation of cancer with tobacco and asbestos, could have had second thoughts, and the public might have been deprived of the knowledge of the health hazards as we understand them today!

As for the plaintiff, the General Counsel for Immuno AG told me at the press conference in Vienna that for them the costs of suing were just pre-tax business expenses! Moreover, what some may consider to have been a negative publicity for that firm, became a free advertisement with photogenic baby chimpanzees splashed over the pages of European newspapers and the name of the firm in bold letters. It has actually made Immuno better known than ever before. As a chairman of the department of surgery of a major German medical school told me "Immuno must be doing some important research, why would they otherwise work on chimpanzees?"

Cases such as Immuno should not happen. The law should be clearer than what it seemed to be before the New York Appellate courts spoke, and judges should exercise a more

Page 3

Acceptance Speech

William J. Brennan, Jr. Award

November 9, 1994

intelligent management of libel suits than what New York County Supreme Court Judge Shainswit did. In addition, what I feel we still need is some form of fee-shifting mechanism to act as a legal deterrent to, for example, wealthy corporations interested in muzzling public criticism of their activities. Costly, meritless libel suits are a misuse of the court system to undermine the protection that we should enjoy under the First Amendment. In closing I would like to quote Mr. Anthony Lewis' op-ed column in the New York Times article that concerned my case and was entitled "Abusing the Law": "Somehow our law must make clear - to giant foreign companies among others - that in this country we honor and protect free speech"