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LDRC Libel Defense Resource Center

LIBELLETTER

October 1994

ABC NEWS AWARDED MEGA-SANCTIONS

A federal district court judge has ordered dentist Owen J. Rogal, plaintiff in the well-publicized libel case against ABC News and correspondent John Stossel, to pay $256,360 in sanctions, representing attorneys' fees and costs for trial and pre-trial preparation in the case and one-half the attorneys' fees for the motion for sanctions. Dr. Rogal's attorney was ordered to pay the other half of ABC's attorneys' fees on the motion. The court also referred the matter as it pertains to plaintiff's counsel to the Disciplinary Board of the Supreme Court of Pennsylvania for review and for "such action as the Board may deem appropriate."

Burt M. Rublin of Wolf, Block, Schorr and Solis-Cohen who, with Jerome J. Shestack, represented ABC in this matter has written this article on the case.

Since journalists are sometimes "chilled" in their reporting by the prospect of a potential libel suit against them, it is only fitting that would-be libel plaintiffs and their attorneys should likewise be "chilled" by the prospect of sanctions being imposed against them if they maintain frivolous claims or engage in misconduct during the litigation. In *Rogal v. American Broadcasting Companies, Inc.*, Civil Action No. 89-5235 (Eastern District of Pennsylvania), United States District Judge Joseph McGlynn entered an Order on September 27, 1994 imposing approximately $270,000 in sanctions against the plaintiff and his attorney for their misconduct during trial, which is the largest sanction ever imposed in the Eastern District of Pennsylvania.

Judge McGlynn found that the

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Ayeni v. CBS, Inc.: Further Analysis

The case of the Ayenis and CBS has prompted a high level of comment and concern in the media community -- a "ride-along" case that generated not only state law claims, but constitutional and civil rights claims as well. The litigation involves the videotaping by a CBS News crew in the Ayeni home of the execution of a federal search warrant. The CBS crew was made aware of the search by the federal law enforcement officials. The initial litigation arose over a subpoena to CBS for its outtakes from then criminal defendant Babatunde Ayeni. CBS moved to quash. Subsequently, Mr. Ayeni's wife and infant son brought a civil action against CBS and one of the Secret Service agents engaged in the search.

Attached to this October edition of the *LDRC LibelLetter* is an in-depth analysis of the federal court decisions in both the criminal subpoena and the civil litigation prepared by Douglas P. Jacobs, Madeleine Schachter and David A. Schulz. Mr. Jacobs is Deputy General Counsel at CBS Inc.; Madeleine Schachter is now Senior General Attorney at Capital Cities/ABC, Inc.; David A. Schulz is a member of the firm of Rogers & Wells. Ms. Schachter and Mr. Jacobs were counsel to CBS in both Ayeni-related matters; Mr. Schulz also represented CBS in the civil litigation.

Last month, the *LDRC LibelLetter* reported on the Second Circuit Court of Appeals decision affirming the district court's denial of the Secret Service Agent's motion to dismiss. *LibelLetter* also reported in September on the relatively new Department of Justice policy restricting federal law enforment personnel from providing advance information to the media on such law enforcement activities as execution of search warrants. And in July, *LDRC LibelLetter* reported on the encouragement being given to prisoners by *Prison Legal News*, a newsletter written by and distributed to inmates, to sue the media under the same theories as were proposed in the Ayeni litigation.

LDRC ANNUAL MEETING NOVEMBER 9, 1994

The LDRC Annual Meeting will be held on Wednesday, November 9, 1994 at the Waldorf-Astoria at 4:30 P.M in the West Foyer Room. We would encourage all LDRC members to attend. The LDRC Executive Committee will be reviewing the annual budget for 1995, as well as the financial status of LDRC in 1994. The Executive Committee and LDRC staff will also present the membership with an overview of LDRC activities, both past and planned.

Please come and discuss and review LDRC with the Executive Committee and staff of LDRC.

ABC News Wins Sanctions on Libel Claim

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plaintiff, a Philadelphia dentist, "knowingly gave perjured trial testimony" on numerous occasions during the trial, and ordered the Plaintiff to pay ABC and its co-defendant, "20/20" correspondent John Stossel, the sum of $256,360. That figure represented the aggregate of the defense's attorney' fees for the trial and pre-trial preparation and one-half the fees expended in briefing the motion for sanctions. Judge McGlynn also sanctioned Dr. Rogal's trial attorney, M. Mark Mendel, for his "repeated and flagrant violations of the professional standards governing the trial of cases." He ordered Mr. Mendel to pay defendants the sum of $13,573, representing one-half of the fees that defendants incurred in preparing the sanctions briefs, and, even more significantly, referred Mr. Mendel's conduct to the Disciplinary Board of the Supreme Court of Pennsylvania for its review. As of the date of this writing, neither Dr. Rogal nor Mr. Mendel has filed an appeal.

This case concerned a segment of the "20/20" program on March 24, 1989 which reported on a controversial dental-medical condition known as temporomandibular joint disorder ("TMJ"). Dr. Rogal had one of the nation's most financially lucrative TMJ practices, and he was shown treating patients at his crowded Philadelphia clinic. The broadcast described the fact that Dr. Rogal had diagnosed TMJ in thousands of patients, most of whom were plaintiffs in personal injury lawsuits arising out of motor vehicle accidents, and he charged an average of $3,000 to treat each patient. Dr. Rogal was shown examining John Stossel and diagnosing him as having TMJ, even though several other dentists had reached a contrary conclusion. The broadcast also showed Dr. Rogal's rather aggressive advertisements to personal injury lawyers, his presentation of expensive seminars to other dentists concerning TMJ, and Mr. Stossel's questioning of him as to whether his practice was more devoted to financial gain than patients' well-being. Dr. Rogal sued under theories of defamation and false light invasion of privacy, and after a two week trial in December, 1992 (in which the defense rested immediately after the conclusion of plaintiff's case), the jury returned a defense verdict. No appeal was taken from that verdict by Dr. Rogal. The case was televised on Court TV in January, 1993, and several LDRC members acted as commentators in connection with the telecast.

The key to the defense verdict was the cross-examination of Dr. Rogal by ABC's lead trial counsel, Jerome Shestack, which spanned three days and totally destroyed Dr. Rogal's credibility with the jury. As stated in Judge McGlynn's 25-page Memorandum Opinion entered on March 29, 1994 (1994 U.S. Dist. LEXIS 3683), which recites the specific misconduct by Dr. Rogal and his attorney upon which the subsequent sanctions order was based, Dr. Rogal's testimony was "impeached by his own documents, deposition testimony, discovery responses and by his own witnesses." Judge McGlynn stated that "Dr. Rogal's testimony was so thoroughly discredited. . .that the jury had little difficulty in rejecting his claim. Ordinarily an adverse verdict would be a sufficient sanction. But Dr. Rogal showed such utter contempt for the oath that additional sanctions are called for."

Judge McGlynn also excoriated Dr. Rogal's attorney, Mark Mendel, for: "(1) expressing his own opinions with respect with the evidence; (2) referring to facts not in evidence; (3) mischaracterizing facts in evidence; (4) engaging in *ad hominem* attacks on defense counsel; (5) suggesting to the jury that the court was treating him less

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Media Loss on Hidden Camera Claim

In an unusual turn-of-a-claim, ABC recently lost a jury verdict in a California trial court in Los Angeles in a case involving use of a hidden camera in reporting on a telepsychic operation. The jury awarded $335,000 to one plaintiff and $225,000 to a second plaintiff in compensatory damages, with equal amounts to each in punitive damages, based upon a claim characterized by the court as intrusion into seclusion by hidden photography.

The plaintiffs were employees in a large telepsychic operation in California. They were taped at the telepsychic facility, which housed over 100 telephones, by an ABC freelance employee and cameraman with hidden video and audio equipment. The plaintiffs believed the freelance employees to be a new, fellow employee of the telepsychic facility and her boyfriend. None of the conversations were done in private; all were taped in open workplace environs with others either participating or in the nearby vicinity.

The plaintiffs' original claims included ones for violation of the California penal provision on eavesdropping, intentional infliction of emotional distress, false light and intrusion. The claims related to the broadcast itself, including public disclosure of private facts and false light,

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Other Noteworthy Sanctions Awards:
Braden v. News World Communications

In *Braden v. News World Communications, Inc.*, 22 Med. L. Rptr. 1065 (D.C.Super.Ct. 1993), the court awarded sanctions under the District's Rule 11 (modelled on the Federal Rule 11) to the defendant upon finding that plaintiff's contentions were unsupported by existing law or a good faith argument for an extention, modification or reversal of existing law. The case involved a report in *The Washington Times*, a publication of the defendant News World Communications, Inc. The report discussed CNN's termination of plaintiff Thomas Braden as a host of the cable television program *Crossfire*. It said that Braden was terminated amid talk that his ability to perform on-air was impaired by a stroke-like illness.

Braden sued for libel and the court granted defendants' motion for summary judgment. Defendants then moved for Rule 11 sanctions against plaintiff and his attorneys. Defendants claimed that plaintiff failed to conduct a reasonable pre-filing inquiry into the relevant facts and the applicable case law as to "public figures" and "actual malice."

The court found that sanctions were inappropriate with regard to plaintiff's factual inquiry. Nevertheless, it awarded sanctions as to the legal inquiry. In the complaint Braden conceded that he had been a public figure as a host on *Crossfire*, but claimed that he had become a private figure immediately upon discharge from thisposition. The court found this claim was patently indefensible.

Braden's public figure status was "all-purpose", the court found, not only based upon his appearances on CNN but also upon his exposure as an author, columnist and former poltical candidate. The court found no evidence that Braden became less well-recognized or had lost access to the media directly after he ceased to appear on-air and analogous case law was to the contrary. An additional factor supporting sanctions was the fact that plaintiff's attorneys were not working against any statute of limitations or other time constraint when they filed the complaint that would have explained or justified their failure to file an adequate complaint.

The court also sanctioned Braden for his contention that a standard less onerous than "actual malice" should apply to defendants' actions. Braden claimed in the complaint that defendant's report about the discharge from *Crossfire* addressed matters of private concern which plaintiff contended under *Dun & Bradstreet v. Greenmoss*, 472 U.S. 749 (11 Med. L. Rptr. 2417) (1985), called for a negligence standard, and/or that CNN was a "non-media" defendant.

The court said the claim that the report touched on matters of private concern was untenable. Braden had made his health public

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Worldwide Primates v. McGreal: Rule 11

The United States Court of Appeals for the Eleventh Circuit recently awarded sanctions, this time under Federal Rule 11, in a speech-related claim. The case, *Worldwide Primates v. McGreal*, No. 93-4094, decided on July 25, 1994, involved a claim for tortious interference with an advantageous business relationship brought in Florida state court against Shirley McGreal, chair of the International Primate Protection League (and one of the original defendants in the noted New York Court of Appeals decision in *Immuno A.G. v. Moor-Jankowski*).

Plaintiff, a corporation engaged in the commercial wildlife trade, based its claim on two letters sent by Dr. McGreal to one of Plaintiff's customers. In these letters Dr. McGreal noted that Plaintiff had been criticized by the Department of Agriculture and its license to import primates at one point suspended by the Center for Disease Control. In both instances Dr. McGreal had attached the confirming documents to the letters. The attachments, however, were not part of Plaintiff's complaint.

Dr. McGreal, a South Carolina resident, promptly removed the case to federal court based on diversity jurisdiction and filed a motion to dismiss. When that was denied, Dr. McGreal filed a motion for summary judgment. Plaintiff failed to file a timely response to the motion, subsequently requesting a dismissal stating that its president had recently been indicted for violating federal laws relating to the sale of animals and that participation in discovery could potentially affect the criminal case. The district court dismissed the case.

But Dr. McGreal had filed a motion for sanctions against

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University Top-Cop is Public Official in Case Against Student Newspaper

In *Waterson v. Cleveland State Univ.*, 1994 Ohio App. LEXIS 1420 (10th Dist. 1994), the court ruled that a high-ranking official in the Cleveland State University police force was a public official for purposes of his libel suit against a campus paper. The policeman, Bill Waterson, sued the paper after it ran an editorial stating that he had a reputation for using excessive force and that he had shown racist and homophobic behavior. The trial court dismissed the case, and the judgment was affirmed on appeal.

The appellate court cited *Rosenblatt v. Baer*, 383 U.S. 75 (1966), saying that a libel defendant will be deemed a public official where his or her government position is of such importance that the public has an "interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees," and where the government employee's position naturally "would invite public scrutiny and discussion of the person holding it" apart from the specific controversy reported upon.

In the court's view a high-ranking University police official met this standard. The court said the campus community, particularly the readers of the campus paper, had a "significant interest in the qualifications, performance and conduct" of University police officers, especially high-ranking ones. The court further cited Ohio case law stating that "police officers acting within the scope of their official capacities are public officials." *Bross v. Smith*, 80 Ohio App. 3d 246 (1992).

LDRC 50-State Survey

The order forms for the ***50-State Survey*** have been mailed. You probably have one in your mailbox. Many of you have already sent them in. Please note that there is a discount for members whose orders are received on or before November 1, 1994.

This year's ***Survey*** features an update of the federal circuit-by-circuit outlines. In addition, each of the state outlines will include statutory citations and case materials on eavesdropping and related taping issues, with a special report on the Federal Wiretap Statute and relevant Communications Act provisions.

The Books Made Me Do It

Two different trial courts in California last month sustained Demurrers in cases brought against authors, and others, claiming that they were responsible for Plaintiffs' beliefs that their false memories of childhood abuse were real. The authors, Laura Davis and Ellen Bass, between them wrote a trade book, *The Courage To Heal*, and Laura Davis wrote a subsequent *Workbook*, intended to assist those who were, or might have been, the victims of childhood abuse. Neither court issued written opinions, but in each instance dismissed the claims against the authors without leave to amend.

In *David v. Jackson*, Case No. 540624, filed in the Sacramento County Superior Court, plaintiffs brought suit against a number of therapists, as well as both authors setting forth a total of twelve causes of action, the sum total of which was the accusation that the therapists and the books induced plaintiff Deborah David to believe, falsely, that her memories of childhood sexual abuse were real. The complaint alleged that one of the books made false and misleading factual statements with respect to the subject of repressed memory.

In *Mark v. Zulli*, Case No. CV 075386, filed in the San Luis Obispo County Superior Court, plaintiffs also sued a number of therapists and Laura Davis, alleging that *The Courage to Heal Workbook* induced plaintiff Kimberly Mark to believe, erroneously, that her memories of childhood sexual abuse were real. Her claims against the author were ones of negligence and negligent misrepresentation.

While one might regret that the courts in these cases did not file written opinions, it is heartening that these claims against the authors were dismissed at the demurrer stage. Neil L.

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Liz to Court: First Amendment No Bar to Enjoining Unauthorized Bio; Court to Liz: No Way

In a brazen assault on the First Amendment, Elizabeth Taylor recently sought a prior restraint in Los Angeles Superior court against the publication of her unauthorized biography and the production of a mini-series based on the as-yet unwritten book. In addition to libel, her multiple "legal theories" included unauthorized commercial use of name and likeness, intentional misappropriation of right of publicity, false light invasion of privacy, and intentional interference with prospective economic advantage. In an attempt to advance her end-run around the First Amendment, Taylor also asserted trademark infringement and unfair competition claims based on a trademark used for her line of perfumes and jewelry.

Seeking to cut through to the heart of the matter, NBC and its producer Lester Persky (represented by Loeb and Loeb in Los Angeles) moved to strike all the claims for injunctive relief. When defendants sought the aid of *amici curiae*, Henry Kaufman submitted a supporting brief on behalf of PEN American Center and Reporters Committee for the Freedom of the Press. Citing well-established black letter law, both defendants and *amici* argued that Taylor's claims were wholly inadequate to justify the extreme measure of a prior restraint. Given the well-established maxim that "equity will not enjoin a libel," *amici* pointed to the absurdity of plaintiff's attempt to enjoin an as-yet unwritten and therefore unproven libel. Noting that the expense of defending a meritless suit can be as chilling to free speech as the fear of the outcome of the suit itself, *amici* urged that summary dismissal was the proper remedy. Opposing Taylor's misappropriation theories, *amici* also quoted from the final draft of the soon-to-be-published *Restatement (Third) of Unfair Competition*, to the effect that the First Amendment "fundamentally constrains" the right of publicity.

At a hearing on September 12, 1994, the Court granted defendants' motion to strike Taylor's claims for injunctive relief, agreeing with defendants and *amici* that any such order would represent an unconstitutional prior restraint, and rejecting Taylor's argument that the defendants' activities merely involved unprotected "commercial speech." In holding that Taylor's trademark and unfair competition claims were insufficient to support an injunction, Judge Diane Wayne observed "[i]f merely registering one's name as a trademark would insulate all media comment, then economic interests would automatically trump constitutional guarantees, a prospect inconsistent with settled law."

Inexplicably, however, the Court granted Taylor leave to amend her complaint. At a hearing on the amended complaint, on September 29, the two original *amici* were joined by the Association of American Publishers, National Association of Broadcasters, Radio Television News Directors Association, and Writers Guild of America, West. In a second brief, the *amici* also urged the court to award sanctions against Taylor for her frivolous claims under California's anti-SLAPP suit law. (For further information on the California statute, see *LDRC LibelLetter* July, p. 3; September, p. 3.) Although Judge Wayne again struck all claims for injunctive relief and denied Taylor's motion for a preliminary injunction without leave to amend, she rejected defendants' contention that Taylor's suit was a "SLAPP" suit, finding — inexplicably — that the claim was "brought in good faith and represented sound legal thought and reasoning and reflects as an articulate and extremely professional presentation of the position of the plaintiff by her attorneys."

The case now moves to a different department of the Superior Court, for consideration of defendant's demurrer to the underlying claims.

Books Made Me Do It

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Shapiro and Ross D. Tillman of Landels, Ripley & Diamond in San Francisco, represented the authors. They provided LDRC with copies of the complaints in these two cases and the opening legal memoranda in support of the demurrers.

Other Sanctions Cases?

If you have litigated or are aware of any libel or privacy or other media/First Amendment cases in which sanctions were sought and awarded, or not awarded, LDRC would like to know about them. Please send us citations for opinions, or copies of unpublished opinions, and briefs on motions for sanctions where available.

Braden v. News World Communications

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knowledge prior to the challenged news report, and the report concerned a professional and business interest affecting a large viewership. But even assuming that the report included issues of "private" concern, the court said that *Dun & Bradstreet* did not support a contention that a less stringent fault standard was applicable in a public figure case regardless of whether the material was deemed "private" or not. Braden's claim that CNN was a "non-media" defendant was "so unfathomable as to border on the frivolous."

Braden's argument that defendant had acted with actual malice also failed, the court stating that the evidence in the case did not come close to proving such a fault standard.

The court ordered defendants to submit itemized accounting of the reasonable expenses incurred because of plaintiff's unfounded contentions. A determination of the amount of sanctions is pending.

Stuart Pierson of Davis Wright Tremaine represented CNN. Allan V. Farber of Green, Stewart & Farber represented News World.

Worldwide Primates

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Worldwide under Rule 11, arguing that the lawsuit was legally and factually baseless; that it was brought for no other reason than to harass the defendant. The district court denied the sanctions motion. The Court of Appeals reversed.

While noting that Rule 11 did not apply to the complaint which had been filed in state court, the Rule did apply to subsequent pleadings. Plaintiff had failed to plead any damages, which were a necessary element of its claim. Further, Plaintiff had never alleged that anything in defendant's letters was false. Worldwide could maintain no cause of action for interference with business relations when all that Dr. McGreal had done was supply a customer with truthful information.

Finding that the lawsuit against Dr. McGreal had no basis, either factual or legal, points that Worldwide either knew or should have known even as it pursued the claim in federal court, the Court remanded the action to the district court for determination and imposition of an appropriate sanction against Worldwide and for consideration as to whether or not sanctions against Worldwide's counsel was also appropriate. A motion to determine the amount of the sanctions is currently pending before the district court.

Thomas Julin and Edward M. Mullins of Steel Hector & Davis in Miami represented Dr. McGreal on this matter. Philip Byler of Layton Brooks & Hecht in New York City, who provides counsel to Dr. McGreal in New York, was kind enough to provide the LDRC Brief Bank with copies of the appellate briefs.

ABC News Sanctions Award Totals $256,360

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favorably than defendants' counsel; and finally, (6) in the most egregious and flagrant disregard of the standards of conduct, Mr. Mendel's final words to the jury were: 'I know his Honor forty years or more, I know that man would have long ago blown it [the lawsuit] out of here and you would never have heard it, if it was a fake. It's not a fake and we ask for some justice.' " The Court concluded that "[t]his record unquestionably demonstrates Mr. Mendel's total disregard of the standards of conduct imposed by the rules of professional responsibility. This unparalleled display of arrogance by a person of Mr. Mendel's experience and standing at the bar is difficult to comprehend."

The defendants' sanctions motion was not filed pursuant to Rule 11 of the Federal Rules of Civil Procedure, since Rule 11 applies only to assertions contained in or relating to papers filed in court. Instead, sanctions were sought and imposed under the federal courts' inherent power to impose sanctions upon parties and their attorneys where they engage in bad faith conduct which abuses the judicial process. *Chambers v. NASCO*, Inc., 501 U.S. 32, 111 S. Ct. 2123 (1991). This inherent power "extends to a full range of litigation abuses," including those which are not encompassed within the ambit of Rule 11. 501 U.S. at 46, 111 S. Ct. at 2134.

The significant sanctions imposed upon Dr. Regal and his attorney should send a clear message to putative libel plaintiffs and their attorneys everywhere: even though unsuccessful plaintiffs are generally not required to pay the defendants' counsel fees, such a requirement may well be imposed in those instances where a plaintiff fails to testify truthfully, an attorney fails to adhere to the governing professional standards of conduct, or the plaintiff's suit is found to be frivolous. Thus, the prospective libel plaintiff should know that, even if the case is being handled on a contingency fee basis, nonetheless there *is* considerable downside risk in the event the suit is ultimately unsuccessful.

Sullivan Down Under

New York Times columnist Anthony Lewis reports in his column of October 21, 1994, that the High Court of Australia has adopted key elements of *New York Times Co. v. Sullivan* in a pair of libel decisions handed down earlier this month. Although the Australian Constitution contains no counterpart to the First Amendment, the court held, in a 4 to 3 ruling, that the press can prevail in a public official's libel suit if it demonstrates that (1) it was unaware of the falsity, (2) it did not publish recklessly, and (3) the publication was reasonable in the circumstances. Despite the addition of a third element to *Sullivan* and the apparent retention of the common law burden of proof on defendants, the High Court's decision is a dramatic turnabout in a country whose defamation law is derived from the draconian British system. LDRC is obtaining copies of the ruling and the parties' briefs for the brief bank and will report further in the next *LibelLetter*.

Hidden Camera Claim

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were dismissed on ABC's demurrer. The court, however, in an odd procedural turn, bifurcated the trial of the remaining issues and ordered that the claim based upon the penal eavesdropping statute be tried first. The jury found for ABC on that claim, finding expressly that while there was evidence that plaintiffs may have expected confidentiality for their conversations, they were made under circumstances where they could be heard.

The court then determined that the next claim to be tried would be one for intrusion into seclusion from the photographing of the plaintiffs alone. The same jury heard and rendered a plaintiffs' verdict on that claim.

The judgment has yet to be entered and ABC is considering its post-trial options. The decision of the trial court to allow a claim based upon intrusion into seclusion as a result of taking pictures within a non-private workplace is difficult to defend under the basic rules for intrusion claims. Under the facts of this case, it appears untenable. Obviously, the media community will be interested in any appellate review of the issues in the case.

Request for Jury Instructions, Expert Witnesses

The LDRC wants to remind all of our members that we are still actively seeking any recent sets of jury instructions submitted in recent libel cases. Also of help are Plaintiff's Request for Jury Instructions, and transcripts of Charges to Jury.

In addition, we are also requesting that members send us any information that they may have on Expert Witnesses, regardless of whether they are designated as used by Plaintiff's or Defendant's side.

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*.