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LDRC Libel Defense Resource Center

DEFENSE COUNSEL SECTION

Special Procedures and Innovative Techniques for Trying Media Libel Actions Before Juries: A Survey and Report

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Background: Recognizing The Need for New Approaches To Jury Trial Practice in Media Libel Actions

Data developed by the Libel Defense Resource Center (LDRC) presents a powerful empirical case for reform of the jury trial process in media libel actions -- both from the point of view of libel defendants and libel plaintiffs.

On the one hand, since the beginning of this decade, to the great concern of the defense community, media defendants have been losing, on average, 3 out of every 4 libel jury trials. Indeed, during one two-year period (1980 - 82), the defense loss rate approached a startling 90%! Compare LDRC Study, "Defamation Trials and Damage Awards -- Updating the Franklin Studies," LDRC Bulletin No. 4 at 5 (August 15, 1982) with LDRC Study, "Defamation Trials, Damage Awards and Appeals: Two-Year Update," LDRC Bulletin No. 11 at 6-12 (November 15, 1984), and LDRC Study, "Defamation Trials, Damage Awards and Appeals III: Two-Year Update (1984-1986)," LDRC Bulletin No. 21 at 5-12 (October 31, 1987).

On the other hand, to the chagrin of libel plaintiffs and their attorneys, related LDRC data during that same period documents that, after trial and on appeal, upwards of 3 out of 4 of these favorable plaintiff's verdicts were either reversed as to the jury's finding of liability (in more than 60% of the cases), and/or were modified (in an additional 10-plus percent of the cases) by reducing the amount of damages finally affirmed. And these reductions of juries' initial damage awards were dramatic -- from an average initial award at or around $2 million, to an average finally affirmed award at or around $100,000. Compare LDRC Study, "Defamation Trials and Damage Awards -- Updating the Franklin Studies," LDRC Bulletin No. 4 at 7 (August 15, 1982) with LDRC Study, "Defamation Trials, Damage Awards and Appeals: Two-Year Update," LDRC Bulletin No. 11 at 18-21 (November 15, 1984), and LDRC Study, "Defamation Trials, Damage Awards and Appeals III: Two-Year Update (1984-1986)," LDRC Bulletin No. 21 at 21-26 (October 31, 1987).

So dramatic a statistical dichotomy -- as between a 75% rate of pro-plaintiff jury verdicts at trial and a 75% rate of pro-defendant judgments after trial -- raises the most serious questions as to the integrity, the efficacy, and indeed the common sense, of the current jury trial process in media libel litigation. For surely, from all perspectives, the system should be striving for a far greater congruence between trial verdicts and ultimate judgments than is currently being experienced in media libel actions. And this is particularly true where, as in such cases, the mere pendency of the claim, or the high cost of any unnecessarily prolonged defense, can have a chilling effect on the exercise of constitutional rights.

It is not only LDRC or its media defense constituency that has recognized the problem of pervasive jury error in media libel litigation and the consequent need for reform. No less a jurist than former Court of Appeals Judge Robert Bork, of the D.C. Circuit, not known as either a liberal reformer or as a media apologist, has observed that "[t]he evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment and are much more likely than judges to find for the plaintiff in a defamation case." Ollman v. Evans, 750 F.2d 970, 1006 (D.C. Cir. 1984). Judge Bork's suggestions in Ollman for solving this problem[, however,] focused largely on keeping (or taking) libel cases away from the jury -- a highly appropriate approach as has been demonstrated in the continuing high grant rate of pretrial motions to dismiss or for summary judgment in media libel actions -- see, e.g., "LDRC Study #8 -- Summary Judgment Motions in Libel Actions: Two-Year Update (1984-86)," LDRC Bulletin No. 19 (May 31, 1987).

An approach more specifically focused on improving jury performance in libel trials, and thus more relevant to this Report, was recently suggested by another judge on the D.C. Circuit. Thus, in a concurring opinion in Tavoulareas v. Washington Post, Judge Ruth Bader Ginsburg turned her attention to the means for assisting libel juries in better performing their function. Initially, Judge Ginsburg agreed, citing and reiterating Judge Bork's concerns, that "[k]eeping the jury on track poses a formidable challenge for the judge in a libel case governed by the 'actual malice' standard of New York Times v. Sullivan," 817 F.2d 762, 806 (D.C. Cir. 1987) (en banc). But Judge Ginsburg nonetheless suggested a variety of means that trial judges should employ "to reduce the risk that the protective benefits of the Sullivan rule [will become] mythical." Id. at 807. Among such techniques Ginsburg mentioned and discussed approvingly were variations of the innovative procedures employed by Judges Leval and Sofaer in the Westmoreland and Sharon cases, including pre-charging, "mid-stream" instructions, interim summations and seriatim special verdicts. She also adverted to other general jury practice literature suggesting a variety of other available techniques to improve communications with jurors, to make jury instructions linguistically more understandable and to reinforce juror education as to the governing legal standards through, inter alia, the provision of written instructions to be taken into the jury room. In sum, according to Judge Ginsburg, "[c]areful efforts by judges to make the legal rules more genuinely accessible to jurors may reduce some of the turbulence in this unsettling area of the law." Id. at 809.

It is not only appellate judges who have recognized the problems inherent in libel litigation. For example, a recent law review article by an experienced federal district court judge has made note of "[t]he high capacity for libel law to frustrate the interests of both sides" to a libel litigation. Leval, The Non-money, Non-fault Libel Suit: Keeping Sullivan in Its Proper Place, 101 Harv. L. Rev. 1287 (1988). Judge Leval, who presided over probably the longest and most widely-publicized libel trial of this decade if not of all time, has also observed that, despite this high probability that neither party will be satisfied with the

results of libel litigation, the "trial proper" of a libel action is nonetheless "likely in most cases to be complex, time-consuming and expensive." Id. at 1295. From these observations Judge Leval draws support for his far-reaching proposal to create a completely new form of libel trial that could fundamentally alter the remedies and legal standards applicable to at least some libel claims by "public" plaintiffs.

However, these recognized problems also lend strong support for a variety of less ambitious -- and therefore presumably less problematical and less controversial -- reforms in the trial process of the kind suggested by Judge Ginsburg in Tavoulareas. Such procedural reforms hold out the promise of at least reducing the likelihood of error, and of the misapplication of governing constitutional principles, by juries in libel actions. Indeed, as noted, many of the special or innovative techniques that can be used to improve the trial process and reduce jury error were most prominently employed in the libel context by none other than Judge Leval in Westmoreland v. CBS. And, although the jury in Westmoreland never had occasion to decide that case, which was settled at the eleventh hour, a videotaped LDRC interview with a group of several of the Westmoreland jurors left the clear impression that Judge Leval's approach had indeed succeeded in educating that jury to the stringent requirements of New York Times v. Sullivan.

The LDRC Defense Counsel Section Jury Trial Techniques Survey

In order to identify such special procedures and innovative trial techniques, and to assess the extent to which these procedures and techniques have been proposed by trial attorneys and employed by trial judges, perhaps departing from what might otherwise be standard practice in their particular jurisdictions, LDRC's Defense Counsel Section recently completed a detailed Survey inquiring as to the use of such procedures and techniques by media defense attorneys in five general areas of jury trial practice: (1) trial preparation; (2) trial-related motions; (3) jury selection; (4) specific trial procedures; and (5) procedures used at the jury verdict stage.

The Defense Counsel Section Survey was circulated to a total of 78 attorneys/law firms known to be active in libel defense work on behalf of the media. 60 of those surveyed were members of the Advisory Committee of the Defense Counsel Section. Also surveyed were an additional 18 attorneys, identified as having tried recent libel cases, but who are not members of the Defense Counsel Section. The Survey was undertaken in two phases. First, a written questionnaire was sent out. Ultimately, 20 attorneys responded to the Survey in writing. Thereafter, a telephone follow-up effort, working from essentially the same Survey questionnaire, yielded an additional 35 completed responses.

In all, 55 out of 78 attorneys replied to the Survey, or a response rate of 70%. Of the 55 respondents, 49 had actually tried at least one libel case. Of the remaining 6, all but 1 nonetheless had some experience with trial preparation, even though none of the libel cases they had defended ultimately went to trial. The 49 respondents with actual trial experience provided information on more than 100 specific libel cases that were tried in a total of 24 states and the District of Columbia, either in state or federal court. Although the exact trial dates are not known for all of these cases, it would appear that most of the cases surveyed were tried since 1980 and more than 25% of the cases to have been tried since the Westmoreland and Sharon cases at the end of 1984 and the beginning of 1985.*

Results of the Defense Counsel Section Jury Trial Survey

(i) Special Approaches to Trial Preparation

It has been suggested, in efforts to explain the media's notable lack of success at the trial stage of libel cases, that many jurors are either unable to comprehend the complex issues and counter-intuitive legal standards applicable in such cases, or else that they are unwilling to apply the strict legal standards that often favor a libel defendant, perhaps because of a predisposition to rule against the media in such cases. While the small number of studies LDRC has done of jury behavior in libel actions does not support a simple conclusion of wide-spread juror incompetence or bias, it is certainly clear from those studies, as well as from the high rate of error in libel trials discussed supra, that special efforts to locate potential juror problems are more than justified.

The Defense Counsel Section Survey identified several techniques currently being used by media defense attorneys, in their preparations even prior to trial, for the purpose of identifying jurors capable of avoiding such problems and errors, and of shaping issues and trial strategies most effectively to communicate with and to persuade such jurors. Strictly speaking, these trial preparation techniques are not innovative, in the sense that they have

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* LDRC gratefully acknowledges the cooperation and assistance of all those who participated in the Jury Trial Survey; of the two Defense Counsel Section Subcommittees that helped to develop and analyze the Survey, particularly their Chairs, David C. Kohler of Richmond, Virginia and Thomas B. Kelley of Denver, Colorado; of the Section's Co-chair, Eugene L. Girden of New York City; and finally, of LDRC interns Linda M. Poust, of the Benjamin N. Cardozo School of Law, and Thomas D. Jaycox of the Hofstra University School of Law.

previously been employed by attorneys, not only in libel actions, but in all kinds of cases where the additional expense and attorney time required to use them has been considered warranted. Nonetheless, the fact that these potentially costly techniques are increasingly being employed in libel actions suggests that media defense counsel view these less-frequently used techniques as both necessary and justified in many cases.

-- Use of Survey and Marketing Data

For example, in their libel trial preparation, in a total of 23/55 instances (42%), media defense attorneys now report using some kind of "survey" data in determining demographic profiles or community attitudes. In 12 instances, demographic surveys were undertaken; and in 5 instances, community attitudes were examined. Finally, in 6 instances pre-existing marketing surveys prepared by their media clients were examined in an effort to assay potential juror attitudes toward the client as a libel defendant.

In contrast to this frequency of usage, a survey done by LDRC just three years ago found, based on a study of 25 libel cases tried prior to 1985, that in none of the 25 cases did the attorneys contacted use demographic studies, nor did they commission any. In none of those earlier cases did the attorneys contacted use community attitude surveys, nor did they commission any. And in only two of those cases did attorneys use pre-existing market or other surveys of media listeners or readers. Libel Defense Resource Center, Jury-Related Information in Recent Libel Trials: A Survey of Attorney Awareness (Unpublished, 1985). [hereafter LDRC Attorney Awareness Study].

-- Use of Trial Simulations, Mock Trials and Jury Consultants

In addition to use of such broad-based studies of possible juror attitudes, media defense attorneys in the current Survey also sought to enhance their trial preparation by means of trial "simulations" or "mock jury" trials. In a total of 13/55 instances (24%) such techniques were employed prior to trial. In addition, one attorney, whose case ultimately did not go to trial, was reported to have seriously considered the use of a "shadow" jury, during the actual trial itself, to continue the process of checking trial strategies against the attitudes of lay persons reacting to the trial presentation. Again, the frequency of use of such pre-trial techniques was up from the prior LDRC survey. In that Study attorneys in only 1 of the 25 cases utilized a full-blown, professionally supervised trial simulation. In only 3 other cases had attorneys even informally "moot courted" their cases among their office staffs. LDRC Attorney Awarness Study at 4.

Finally, the current Survey identified a quite dramatic increase in the reported use of professional jury consultants. Thus, 10/55, or 20%, of the 1988 Survey respondents had used jury consultants. In contrast, just 3 years ago, the LDRC study found that only one jury consultant was reported used out of 25 cases studied. LDRC Attorney Awareness Survey at 3.

(ii) Creative Use of Motions in Limine

As in many other types of well-prepared cases, media defense counsel in libel actions not infrequently seek to shape or limit the contours or scope of the trial by means of pre-trial motions in limine. In fact, the great majority of all attorneys who responded to the Defense Counsel Section Survey reported that they regularly used such motions in their libel cases, over and above any previous motions to dismiss the complaint or for summary judgment -- early motions themselves often made in media libel actions. While many of these motions in limine were also not "innovative" in any strict sense, a number of them were uniquely focused on libel-type issues and are thus worthy of special mention.

Out of the 49 attorneys responding to the Survey who went to trial, 37 (76%) made motions in limine that dealt with issues specifically related to media libel claims. These motions fell into roughly the following categories.

--Motions limiting particular kinds of libel-related evidence were made in 14 instances, with 8 respondents reported making motions addressed to limiting evidence of libel damages and 6 making motions seeking to exclude portions of publications -- e.g., portions of publications not mentioning the plaintiff and not otherwise relevant to the libel claim.

--Motions limiting the use of certain libel-related, definitional terms were made in 5 instances, particularly attempting to limit use of the often confusing terminology of "actual malice". For example, as in the Westmoreland case, at least one attorney sought by motion in limine to use the more neutral term "state of mind" in lieu of "actual malice". (A copy of that brief motion is attachment 1 to this Report.)

--Motions to utilize special procedures, also particularly related to the needs of libel trials, were made in 11 instances: 6 attorneys sought by pre-trial motion to secure trials bifurcated as to liability and damages; 2 requested unique and more extensive types of voir dire; 1 requested use of "interim summations" (see section on "trial procedures" below); 1 requested notetaking by jurors and 1 dealt with written questions by jurors during the course of the trial.

--Motions seeking to restrict certain kinds of testimony were made in 15 instances: 6 to bar the use of expert witnesses and 1 to permit expert testimony; 3 to exclude testimony concerning publications or incidents occuring subsequent to the allegedly libellous publication; 2 to restrict testimony about impact of the publication on plaintiff's family members; 2 to restrict testimony relating to journalistic standards and 1 to restrict testimony "generalizing" about "all journalists".

--Motions seeking to establish the plaintiff's status prior to trial were made in 6 instances: 5 to establish that plaintiff was a "public figure" and 1 to declare that the plaintiff was "libel proof".

--And, finally, a pre-trial motion in limine was made in 1 case to establish the availability of a common law privilege.

(iii) Innovative Jury Selection Techniques

If there is any potential that jurors in the venire may be biased against the media or that they may be unable or unwilling to comprehend or apply the strict constitutional standards that govern the trial of libel claims, or if there are other considerations suggesting that the particular libel action, or those participating as parties or witnesses, might already be known or controversal to members of the jury pool then, once again, there is certainly justification for a fully adequate, if not searching, inquiry into factors related to juror eligibility, qualifications and selection.*

-- Written Questionnaires, Proposed Voir Dire Questions and Other Techniques for More Searching Voir Dire

In this regard, the Defense Counsel Section Survey identified 17/49 attorneys (35%) who submitted, for the judge's consideration, pre-voir dire written questionnaires. Out of those 17, 12 were designed specifically to focus on particular libel issues deemed pertinent to the jury selection process.

Additionally, 18 attorneys, out of the total of 49 attorneys who went to trial (37%), reported that they employed, or attempted to employ, special voir dire techniques or avenues of inquiry. Thus, 7 of the attorneys made or sought to make, either

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* The problem of juror bias is, of course, a concern in any civil or criminal action. It is well to recall, however, that juror bias in a libel action implicates concerns of constitutional dimension as to unwarranted abridgement of first amendment rights.

directly or through proposed questions to be asked by the trialjudge, inquiries as to the media habits of the prospective jurors and to any biases those jurors might have against the media. (Excerpts from such a set of Defendants' Proposed Voir Dire Questions is attachment 2 to this Report.)

Moreover, 5 out of the 17 attorneys were able to obtain an individual, private voir dire of each prospective juror -- an unusual procedure not normally granted in their jurisdictions -- either because the plaintiff was a public figure or because of the sensitive nature of the alleged libelous publication. (A copy of a Defendants' Request to Conduct Sequestered Voir Dire In Part is attachment 3 to this Report.)

-- Other Miscellaneous Techniques/Juror Education During Voir Dire

In one case the defense was able to secure a larger than normal jury venire because a higher number of challenges for cause were anticipated in the particular libel action; 1 was permitted to play a portion of the challenged broadcast during jury selection; and 2 reported beginning the process of educating jurors to the concept of actual malice at the jury selection stage. In securing the grant of an unusual defense request, in a jurisdiction which does not have attorney voir dire, 1 of these 2 attorneys was allowed to make an opening statement on behalf of the defense to the entire jury panel.

-- Special or "Blue Ribbon" Juries

One final jury selection technique, attempted by 2 respondents, could dramatically change the composition of juries in libel cases where utilized. This is the effort to secure a special, or "blue ribbon" jury. This technique is perhaps most frequently used to try very complex issues such as antitrust claims. The new findings of the Defense Counsel Section Survey suggest that special juries might also be available in appropriate libel actions. Thus, in one recent libel case, the defense moved for a "special jury" under a rarely-used state statute permitting the trial judge broad discretion to select a jury from outside the normal jury pool. That case involved politically-sensitive issues with strong racial overtones where the plaintiff was black and the defendant was a conservative city newspaper not well-liked in the black community. The newspaper moved to select jurors, not from the local jury venire, but from surrounding counties. The motion was reportedly seriously considered by the trial judge but ultimately not granted. Subsequently the case was tried before an all-black jury which awarded the plaintiff a sizeable verdict, later substantially reduced on appeal.

In a second case, a similar motion, made pursuant to a statutory provision applicable in that jurisdiction, was initially denied, but then later granted on the judge's own motion. In that action the defendant's motion to empanel a blue ribbon jury was not based on the unpopularity of the media defendant within a predominant segment of the local jury venire. Rather, the defendant's initial motion focused on the complex nature of the prospective libel trial and the importance of the constitutional issues involved. Because the local statute provided that, at the judge's discretion, a jury could be selected from a persons with special educational qualifications, it was argued that such a jury would be appropriate to consider such complex and significant issues. The trial judge initially denied the motion. However, before a regular jury was empanelled, the plaintiff took the position that the defamatory implications of the publication at issue -- a newspaper subscribed to by a well-educated and affluent readership -- should be evaluated based on the standards of the newspaper's readership rather than the public at large. It was thus ironically plaintiff's own contentions on another issue that provided the judge with the basis for reconsidering and ultimately granting, on his own motion, defendant's request for a blue ribbon jury.

It would appear that the opportunity to, in effect, obtain a jury comprised of those who would normally read (or view) the publication (or broadcast), might not infrequently be presented and ought to be given serious consideration. On the other hand, seeking a blue ribbon jury may not be the best approach in every libel case. For example, one of the libel jury verdicts studied in depth by LDRC seemed, ultimately, to have been influenced, if not actually determined, by the "street smarts" of a less well-educated, blue collar/ethnically-composed jury. See "LDRC Juror Attitudes Study III: Private Figure (Gross Irresponsibility)/Newspaper/Defense Win," LDRC Bulletin No. 22 at 1-28 (July 31, 1988). On the other hand, if it is correct that in many if not most cases the complexity of the legal issues in a libel action will suggest that a more educated jury would be better able to comprehend them and to render an unbiased verdict, then certainly a motion to empanel a special or blue ribbon jury should be given serious consideration.

(iv) Special and Innovative Procedures During the Trial

In light of the growing evidence that jurors may fail fully to appreciate or apply the strict limitations, often constitutionally-based, that govern media libel actions, a more systematic effort to educate jurors to these legal constraints must be given the highest priority throughout the libel trial. The Defense Counsel Section's Survey identified a number of techniques employed by media defense counsel for the purpose of emphasizing governing legal principles to their juries.

-- Libel-Specific Pre-Charge

First, in order to introduce the jury as early on as possible in the trial proper to the legal standards to be applied, there is a growing trend, used with notable effect in the Westmoreland trial, to "pre-charge" the jury on certain legal or factual issues particular to the libel case, at the very outset of the case. For example, of the 49 trial attorneys surveyed by LDRC, 23 (47%) had requested such a pre-charge and 19/23 (83%) received the requested charge. In at least 5 of these cases, such a pre-charge diverged from the standard procedure in the jurisdiction not to give such a preliminary charge. (An example of such a libel-specific pre-charge is attachment 4 to this Report.)

-- "Midstream" Charges on Libel Issues

Another procedure employed by Judge Leval in the Westmoreland case, which has the effect of continuing to reinforce and emphasize to the jury the governing legal standards, are so-called "mid-stream" instructions. Despite the Westmoreland precedent, however, such mid-stream instructions were not used in any of the cases surveyed, perhaps because few if any of those trials were as long as the Westmoreland case, which ran some four-and-one-half months before it was settled.

-- "Interim" Summations by Attorneys

On the other hand, another technique employed in Westmoreland, of "interim" summations by the attorneys, which also can be effective in emphasizing and reinforcing points to be decided by the jury, was reported to have been used in at least two of the post-Westmoreland cases surveyed. In one of those cases, interim summations were used because of the unusual length of the trial. In the other case, such summations were permitted when the trial had to be adjourned for ten days and the judge allowed them for the purpose of refreshing the jury's recollection after the trial was reconvened. Several other attorneys surveyed noted that they would request interim summations when the length of their libel trials warranted. One respondent observed that such summations can be of particular assistance to defense counsel in the early stages of a trial by keeping the jury apprised of the defense position until its case can directly be developed later on.

-- Use of Special Terminology

Another technique that has been employed in media libel actions to attempt to clarify the governing legal standards to the jury is the use of special terminology to define the concept of "actual malice", a term of art otherwise highly confusing to lay

jurors. This has been done both in pre-charges (see above) and throughout the trial. In addition to the "state of mind" formulation employed in the Westmoreland case, 7 attorneys in the Survey reported employing simpler formulations, without use of the actual words "actual malice", based either on the definition of actual malice in New York Times v. Sullivan or in St. Amant v. Thompson.

-- Use of Charts and Graphics

Yet another innovative technique employed by Judge Leval in Westmoreland was use by the Judge of a so-called "X" chart, graphically emphasizing the distinction between evidence admitted in a "public" plaintiff's libel action for purposes of establishing the media defendants' "state of mind," on the one hand, and evidence admitted for the purpose of establishing the underlying truth or falsity of the allegedly defamatory publication. This was one more way in which, throughout the trial, Judge Leval undertook to educate his jurors to the governing legal and evidentiary standards of a libel case governed by New York Times v. Sullivan. An X-chart, or similar graphic techniques were reported used by 7 attorneys surveyed, in post-Westmoreland trials. One of these attorneys was permitted to use a graphic, much like the "X" chart, separating the allegedly libellous story and the evidence that related to it, from evidence relating to the reporter's investigation. Another attorney used a chart to help the jury differentiate among three types of "malice" applicable in that case -- viz., constitutional "actual malice" applicable to liability under New York Times v. Sullivan; malice as defined under a state retraction statute; and common law malice for purposes of considering punitive damages (over and above the Gertz requirement of constitutional malice) in that jurisdiction. The remaining 5 attorneys used other kinds of charts, or blowups, to similar effect.

-- Juror Notetaking and Related Procedures

Notetaking by jurors is another technique that has been exploited by media defense counsel in a number of libel trials. While juror notetaking is not unusual in an apparently growing number of jurisdictions, libel defense counsel are more frequently requesting notetaking or, where granted, are attempting to take advantage of its potential benefits, particularly for the purpose of emphasizing governing legal standards. In the Defense Counsel Section Survey 20 attorneys reported trials where notetaking occurred. In 2 of those cases notetaking was not normally allowed in the jurisdiction, but was requested and allowed in the libel trial. To exploit notetaking, most of the 20 attorneys reported using a variety of visual aids such as charts, blow-ups of the allegedly defamatory publication, or videotapes of the broadcast,

diagrams, transcripts of the reporter's notes, blackboards or overhead projectors -- all, presumably, to emphasize critical points, thus to get them solidly into the jurors notes if not their recollections.

(v) Accessible and Understandable Jury Instructions, Forms of Special Jury Verdicts and Deliberations, and Related Procedures

Again because of the many, heavy legal and constitutional burdens which inure in favor of the libel defendant, it is of critical importance that these burdens be emphasized, or better yet be re-emphasized, as the case is given to the jury for resolution. This can and should be done both by the judge, in formal instructions to the jury, as well as in other methods that can follow the jury right into the jury room.

The importance of fully accurate instructions, provided to the jury in clear and accessible form, cannot be underestimated. This is forcefully demonstrated in three in-depth jury studies recently conducted by LDRC. Thus, in LDRC's first jury study, based on extensive personal interviews with the jurors who actually deliberated in the particular libel action, a reasonably accurate set of legal instructions on the actual malice issue -- not, however, given to the jury in written form to take with them into the jury room -- was largely ignored during deliberations by a jury predisposed against the defense on the issue of falsity. The jury ultimately entered an award of close to a million dollars in actual and punitive damages that was only recently thrown out on appeal. See "LDRC Juror Attitudes Study I: Public Figure/Newspaper," LDRC Bulletin No. 14 at 1-33 (June 30, 1985). In LDRC's second such in-depth study, confusing deficiencies in the complex legal instructions given -- a full set of written instructions was sent into the jury room only after the jury had requested the re-reading of some charge language -- may have led a jury otherwise sympathetic to the defense to misapprehend the law and to conclude that a verdict for the plaintiff was legally required, thereafter awarding one and a quarter million dollars, a million of that in punitive damages. That judgment, too, was ultimately thrown out on appeal. See "LDRC Juror Attitudes Study II: Private Figure/Broadcast," LDRC Bulletin No. 15 at 1-26 (October 31, 1985). Finally, in LDRC's third jury study, the jury's failure to recall crucial elements of the judge's charge -- they had not been permitted to bring a written copy of the charge with them into the jury room -- combined with a confusingly framed special interrogatory, led to a split verdict giving the defense a harrowingly narrow victory that belied the jury's near unanimous underlying factual view of the case which clearly mandated the jury's ultimate verdict for the defense. See "LDRC Juror Attitudes Study III: Private Figure (Gross Irresponsibility) /Newspaper /Defense Win," LDRC Bulletin No. 22 at 1-28 (July 31, 1988).

-- Intelligible Jury Instructions

With regard to jury instructions, 21 of attorneys who responded to the Defense Counsel Section Survey indicated that they had been at least partially successful in their attempts to secure the use of simpler, clearer and thus more understandable, language in the jury instructions given in their cases with regard to the key standards governing libel liability. Another 3 attorneys felt that the "pattern" jury instructions in their state were already easy for the jury to understand. Finally, in 5 cases media defense attorneys successfully requested that the instructions to the jury be structured in a "seriatim" fashion whereby the jury could be guided, step-by-step, through the process that their decision would have to take.

-- Special Verdict Forms

Regarding the form of the jury's verdict, of the 49 trial attorneys reporting 33, or over two-thirds, reported that non-general verdicts of one kind or another had been used in their cases. Some of those attorneys had requested such non-general verdicts in more than one case. Special verdicts were used or requested in a total of 30 cases; in 7 cases general verdicts accompanied by interrogatories were used or requested; and in 5 cases "seriatim" special verdicts were used or requested, such as those used in the case of Sharon v. Time, where the jury was not only guided through the various stages of their decisionmaking by the form of a special verdict or set of interrogatories, but the jury was actually instructed to come back into the courtroom to announce each stage of its verdict. (A perhaps uniquely detailed special verdict form, showing the complexity of the decision trail required in many libel cases, is attachment 5 to this Report.)

Although specific figures are not available, it is likely that this rather extensive degree of useage of non-general verdicts in libel actions is significantly greater than such useage in all civil trials. This greater useage is more than justified given the complex and multiple standards and burdens applicable in media libel cases; it is also justified as another aspect of the effort to assure that jury error is kept to a minimum in cases that have both constitutional overtones and an all-too-frequent history of jury error, if not abuse.

-- Written Instructions in the Jury Room

Another technique than can be employed to avoid jury error on issues of law is the simple expedient of sending a full set of written jury instructions with the jury into the jury room. There should be no reasoned objection to this technique and there is apparently a growing trend to permit this in all civil trials. In

the Defense Counsel Section Study just under half -- 24 -- of the 49 trial attorneys reported that a copy of the instructions had been given to the jurors in one or more of their libel cases. In 5 of these cases this procedure had not previously been the norm in that particular jurisdiction. And in 3 of these 5 cases, the grant of defense counsel's unusual request was expressly premised on the lengthy or complex nature of the libel trial. In only 2 cases was a special request for giving the jury a copy of written instructions reported to have been denied.

-- Bifurcation/"Trifurcation"

Finally, a more aggressive technique for attempting to control the jury's verdict, or the nature of its deliberations, is the "bifurcation" of the trial, usually by completely separating out the damages from the liability phase of the libel trial. This is a technique that appears to have been sought and granted in a number of libel cases,although its effectiveness is still the subject of some debate and controversy. Thus, according to the Survey, 10 attorneys reported that one or more of their libel cases had been bifurcated. Of these, 2 attorneys reported requesting "trifurcation" -- i.e., a separation not only of damages from liability, but also a separation of the consideration of punitive damages from actual damages.

Conclusion

Without unduly extending this already lengthy presentation, suffice to say that the LDRC Defense Counsel Section's Jury Trial Techniques Survey documents the availability and increasing utilization -- by both attorneys and trial judges -- of a range of special procedures and innovative techniques intended to improve the trial process in media libel actions -- a process already widely recognized as in need of meaningful reform. Certainly, [while] more fundamental and far-reaching reforms are also worthy of continued consideration. But it is to be hoped that the Section's Survey and this Report can be of perhaps more immediate assistance in the equally-[indispensable] important effort to reform trial processes and procedures in order to eliminate, or at least to reduce, the gross disparity between trial and post-trial results in media libel actions. Independent judicial and appellate scrutiny of libel claims, verdicts and judgments must always be an indispensable aspect of the protection of constitutionally-guaranteed rights in the libel field. However, in those relatively few cases that cannot be (or at least are not) dismissed prior to trial, it is also vital that preservation of constitutional rights -- and those procedures best able to secure them -- be made an integral part of the trial -- and not only the pre- and post-trial -- process in libel litigation.

Attachments (5):
1. Motion in limine: "Actual Malice"
2. Proposed Voir Dire Questions (excerpts)
3. Defendant's Request to Conduct Individual, Sequestered Voir Dire
4. Libel-Specific Pre-Charge (excerpt)
5. Form of Detailed Special Libel Verdict

ATTACHMENT 1:

Motion in limine: "Actual Malice"

r45a:djj:4

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

BILLY D. COLLINS Plaintiff vs. STORER COMMUNICATIONS, INC., et al. Defendants	)	CASE NO. 97710 JUDGE HARRY JAFFE

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE USE OF THE TERM "ACTUAL MALICE"

Defendants move this Court for an Order, in limine, precluding the use of the term "actual malice" at any time during the trial of this matter, including jury voir dire, witness examinations, and opening and closing statements within the jury's hearing.

As grounds for this Motion, Defendants submit that the term will only confuse and mislead the jury, all of which is more fully set forth in the Brief in Support attached hereto.

Respectfully submitted,

F. Wilson Chockley, Jr.
Marcia E. Hurt
Kenneth A. Zirm

WALTER, HAVERFIELD, BUESCHER
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Attorneys for Defendants
Storer Communications, Inc.,
et al.

r45ab:djj:3

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

BILLY D. COLLINS Plaintiff vs. STORER COMMUNICATIONS, INC., et al. Defendants	)	CASE NO. 97710 JUDGE HARRY JAFFE

BRIEF IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO EXCLUDE USE OF THE TERM "ACTUAL MALICE"

I. INTRODUCTION

This is a libel action by Billy D. Collins, the proprietor and franchisee of the Howard Johnson's Lakefront Hotel and Restaurants in Cleveland, Ohio, based upon an award winning series of investigative broadcasts, during the summer and early fall of 1985, by Cleveland area television station WJW TV-8 ("TV-8"), in which the station revealed that: (1) various contractors who had done work on the hotel and restaurant had not been paid;1/ (2) the hotel and restaurant apparently practiced racial discrimination against blacks; and (3) the hotel and restaurant had significant local tax problems.

1. The Court has previously ruled that, as a matter of law, the stories regarding nonpayment of contractors do not give rise to a cause of action in libel.

Two of the stories which Plaintiff claims are defamatory were based upon information contained in government documents and court pleadings. Because these broadcasts are based upon government and public records, they are subject to Ohio's Records Privilege, codified at O.R.C. §2317.05. (See Defendants' Trial Brief). Thus, to establish a prima facie case against Defendants based upon these broadcasts, Plaintiff must show by clear and convincing evidence that Defendants broadcast these stories with actual malice.

II. ARGUMENT

A. USE OF THE TERM ACTUAL MALICE TO REFER TO THE ELEMENT OF CONSTITUTIONAL FAULT IN THIS CASE IS HIGHLY PREJUDICIAL AND WILL CONFUSE THE JURY; USE OF THE TERM "STATE OF MIND" IS THE MOST APPROPRIATE LABEL

Plaintiff must prove with convincing clarity that the articles regarding Plaintiff's tax delinquencies were false and were published with the knowledge that they were false or with a reckless disregard of their probable falsity. New York Times Co. v. Sullivan, 376 U.S. 254 (1965); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

This element of proof was given the label of "actual malice" in Sullivan, supra at 280. Since then, the choice of the term and its obvious confusion with common law malice has been criticized by a variety of courts, including the Supreme Court. In Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52, n. 18 (1971), Justice William Brennan suggested that the term "actual malice" not be used in a jury's presence.

The reason for the potential confusion is the fact that the definition of common law malice is not the same as the constitutional definition of actual malice. As pointed out in Cantrell v. Forest City Publishing, 419 U.S 245, 252 (1974), the actual malice requirement is quite different from common law malice, which focuses on the defendant's attitude toward the plaintiff, and not on the truth or falsity of the material published.

Inherent danger in the use of the word "actual malice" can be avoided, just as it was avoided in Westmoreland v. CBS, Inc., 596 F. Supp. 1170 (S.D. N.Y. 1984). In a pretrial order in that case, Judge Pierre Leval directed that the term "state of mind" be substituted for "actual malice". His discussion provides persuasive authority for this Court to avoid the prejudicial confusion likely to result at trial if the term "actual malice" is employed to describe the element of constitutional fault.

Judge Leval stated:

> Since what is meant [by "actual malice"] is something distinctly different from malice in its everyday sense; spite, ill will or hatred, the addition of the adjective "actual" seems to me to do little to avert confusion . . .
>
> The possibility of confusion is not so pernicious in written judicial opinions, since these are read primarily by lawyers and make clear that the words are used only as a code symbolizing the element. The problem is far more serious, however, in the context of a jury trial where the use of the term malice or worse--actual malice--carries a significant potential for prejudice. For example, it is clear that a reporter is not liable for accusations that are responsibly researched

> and sincerely believed, no matter the extent of his ill will towards the subject of the accusation. But if the jurors are repeatedly told throughout the trial that evidence is being received on the issue of "malice", they are likely to find an unwarranted liability notwithstanding the few instances when the court instructs at length.

Id. at 1172, n. 1.

In deciding that some other term must be used before the jury to preclude the prejudicial affects of "actual malice", Judge Leval suggested that neutrality must be the upper most consideration. Id. He and counsel in the case considered a number of alternatives, but settled on the term "state of mind".

> The term 'state of mind' is the most appropriate label to use in the presence of the jury to identify the element described in [New York Times v. Sullivan] and other leading cases as 'actual malice'. I believe this term is more precise and less likely to inflict prejudice . . .

Id. at 1178.

Defendants request that this Court similarly hold that "state of mind" is the most appropriate label to utilize in substitution for "actual malice", and that it is less likely to irreparably prejudice Defendants.

B. *THIS COURT MAY EXCLUDE USE OF A TERM IF ITS VALUE IS OUTWEIGHED BY ITS HARMFUL AFFECTS*

Under Ohio Rule of Evidence 103 and 403, this Court has the power to exclude use of a term that is irrelevant or presents the dangers of unfair prejudice or other harmful affects. Rule 103(C) requires that proceedings be conducted "so as to prevent inadmissible evidence from being suggested to the jury by any means", while Rule 403 allows the exclusion of

relevant evidence if its value is outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury and undue consumption of time.

As has been demonstrated above, use of the term "actual malice" to refer to the fault plaintiff must prove with regard to the tax delinquency stories would confuse and mislead the jury, significantly increase the potential for irreparable prejudice to Defendants, and needlessly consume time at trial for explanation. The Court should exercise its powers under the Rules of Evidence to decide the use of the terms described above for trial, so that the proceedings in this case can be conducted in a fair and expedient manner.

III. CONCLUSION

For these reasons, Defendants respectfully request that this Court enter an Order, in limine, precluding the use of the term "actual malice" at any time during the trial of this matter, and requiring the use of the term "state of mind" in its place.

Respectfully submitted,

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Attorneys for Defendants
Storer Communications, Inc.,
et al.

ATTACHMENT 2:

Proposed Voir Dire Questions
(excerpts)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING MACHLEDER and FLEXCRAFT INDUSTRIES, INC.,

Plaintiffs,

-against-

ARNOLD DIAZ, CBS INC., WCBS-TV, ANN SORKOWITZ, FRANK PIVALO, THOMAS GALLAGHER, and DENNIS P. COYNE,

Defendants.

79 Civ. 4373 (PKL)

DEFENDANTS' PROPOSED VOIR DIRE QUESTIONS

Defendants Arnold Diaz, CBS Inc., Ann Sorkowitz, Frank Pivalo, Thomas Gallagher and Dennis P. Coyne respectfully request that the attorneys be allowed to ask prospective jurors the following questions, or alternatively, that the Court ask the following questions:

1. This action was begun by Irving Machleder and Flexcraft Industries, Inc. Do any of you know or have you heard of Irving Machleder or any members of his family? Do any of you know or have you heard of Flexcraft Industries?

2. Irving Machleder and Flexcraft Industries are represented by the law firm of Wien, Malkin and Bettex of New York, New York. Mr. Robert Machleder, from that law firm, is appearing on behalf of Irving Machleder and Flexcraft Industries.

14. Have you or a member of your family or a close friend ever been involved in a law suit or claim which involved a claim of defamation of character, slander or injury to reputation? What kind of claim or case was it? How were you involved? Who were the parties involved? What was the outcome of the case?

15. Have you or a member of your family or close friend ever been involved in a law suit or any claim against a radio or television station, newspapers, magazine or other publication? What kind of case or claim was it? What was the nature of your involvement? Who were the parties involved? What was the outcome of the case or claim?

16. (a) How much time each week would you say you spend watching television?

(b) What kind of programs do you primarily watch?

(c) How often do you watch television news?

(d) At what hour do you usually watch the news?

(e) Do you regularly watch any news program? If so, which one?

(f) What are your feelings about the types of reports appearing on television news?

17. Have you ever watched or heard or read anything about the news program which WCBS-TV airs at 6:00 p.m. nightly?

What are your feelings, including likes or dislikes, with respect to that program?

18. Do you recall seeing a series of news reports by Arnold Diaz in 1979 concerning the dumping of chemical wastes in New Jersey? What did you think of that series? If you have watched WCBS-TV's 6:00 o'clock news, do you recall seeing a news report by Arnold Diaz concerning his investigation into a particular chemical waste dump on Avenue P in Newark which was broadcast on May 22, 1979? What did you think of that news report?

19. What feelings do you have about the reporting, investigation or interviewing which is done by television news reporters or other newspeople? Do you believe that news personnel and reports should interview people who they believe have been involved in events or have knowledge of events in which the public has an interest?

20. Have you or a member of your family or a close friend ever been the subject of a news report on television, or on radio or in the newspapers? What kind of a story was it? What was your involvement? What kind of story was it? What was you reaction?

21. Has any member of the press including television news reporters interviewed you? By whom were you interviewed? Do you believe that the press, including radio and television reporters, have the right to comment critically and to broadcast facts and pictures on matters in the public interest?

22. Have you ever considered bringing a lawsuit because you felt that someone had made false or defamatory statements about you? Has a member of your family or a close friend ever considered bringing a lawsuit because he/she felt that someone had made false or defamatory statements about them. What kind of statements? What was the outcome? Who was involved?

23. Have you ever served as a juror before? How many times? In what kind(s) of case(s)? Was the case tried to a verdict? If it was a civil case, did the plaintiff or the defendant prevail? If it was a criminal case, was the defendant acquitted or convicted? Was your jury service in State or Federal court?

24. Have you ever had any experience as a juror which you found to be difficult or unpleasant?

25. One of the plaintiffs in this case, Irving Machleder, is more than 70 years old. What are your feelings about older people? Do you feel that Machleder's age alone would

29. The law requires that the plaintiffs have the burden of proving their claims in this case. The defendants are to be presumed by you to be not liable unless plaintiffs prove otherwise. What does that mean to you? Also, as jurors, you are not to reach a decision until all of the evidence is in, including defendants' presentation. The mere fact that there is a trial here does not mean that liability has been established. Can you accept that?

30. Is there any reason now whatsoever why you feel you might not be able to be a fair and impartial juror in reaching a decision in this case?

Respectfully submitted,

PATTERSON, BELKNAP, WEBB & TYLER

By: _____
A Member of the Firm

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New York, New York 10112

COUDERT BROTHERS

By: _____
A Member of the Firm

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Attorneys for Defendants

ATTACHMENT 3:

Defendant's Request to Conduct Individual, Sequestered Voir Dire

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

FILED IN OFFICE

OCT -9 1984

DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

BILTMORE HOSPITALITY PARTNERS and ROCCO CAPPUCCITTI,

Plaintiffs,

vs.

COX ENTERPRISES, INC.,

Defendant.

CIVIL ACTION FILE

NO. C-71943

DEFENDANT'S REQUEST TO CONDUCT SEQUESTERED VOIR DIRE IN PART

Defendant Cox Enterprises, Inc. now moves the Court to permit voir dire to be conducted, in part, by an examination of each prospective juror outside the presence of the others. The motion is made on the following grounds:

1.

In this libel action the defendant newspaper intends to ask certain questions of each juror in addition to the usual questions regarding biographical details of the juror and the juror's family. Among other things, the anticipated questions would probe such topics as the following:

(a) Each juror's familiarity with and attitude toward the newspapers published locally by the defendant;

(b) Each juror's attitude and feelings toward the news media in general;

(c) Each juror's attitude toward reports of crime in general and organized crime in particular;

(d) Each juror's attitude toward the Atlanta Police Department and the Department of Justice, a number of whose officers are expected to testify at trial on the defendant's behalf;

(e) Each juror's feelings as to the likelihood of organized crime ties by persons with Italian surnames;

(f) Each juror's perceptions of the significance of police investigation, particularly where organized crime is concerned;

(g) Each juror's knowledge and understanding of the circumstances which resulted in the closing of the Atlanta Biltmore Hotel;

(h) Each juror's familiarity with the articles in question and attitude toward them at the time; and

(i) Each juror's familiarity with witness Hirsch Friedman's injury by car bomb and whether the juror in any way blames the newspaper for that occurrence.

2.

The defendant submits that candid, frank responses to questions on those various topics can best be obtained if prospective jurors are examined individually, free from any group pressure that might otherwise be inhibiting, and free from the embarrassment that might be caused by an admission of bias, prejudice, or concern. At the same time sequestered, individual voir dire would preclude the possibility of prejudice to the defendant arising from answers that disclose circumstances and opinions predisposing a particular juror against the defendant -- answers which, if heard, could affect other jurors' attitudes toward the case.

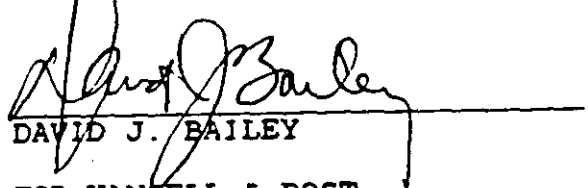
3.

It is not the defendant's intention to abuse its right of voir dire or to prolong voir dire unnecessarily. The defendant would be quite willing to work with counsel for the plaintiff in formulating a list of questions to be asked in sequestered fashion and submit the same to the Court for its review. The defendant anticipates that voir dire conducted in this manner could be conducted expeditiously and without undue delay.

WHEREFORE, the defendant moves the Court to permit sequestered, individual voir dire of the prospective jurors chosen to try the case.

Respectfully submitted,

ALBERT G. NORMAN, JR.



DAVID J. BAILEY

FOR HANSELL & POST
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Attorneys for Defendant

IN THE SUPERIOR COURT OF FULTON COUNTY

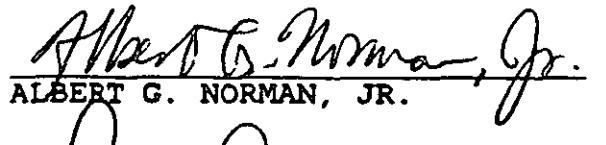
STATE OF GEORGIA

BILTMORE HOSPITALITY PARTNERS and ROCCO CAPPUCCITTI,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION FILE
COX ENTERPRISES, INC.,	)	NO. C-71943
Defendant.	)	

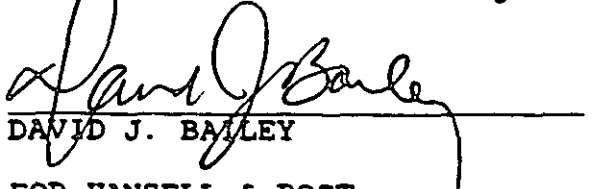
BRIEF IN SUPPORT OF DEFENDANT'S
REQUEST TO CONDUCT SEQUESTERED VOIR DIRE IN PART

The relief sought by the defendant's motion lies within the Court's discretion. E.g., Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981); Claxton Poultry Co. v. City of Claxton, 155 Ga.App. 308, 271 S.E.2d 227 (1980). For the reasons suggested by the motion, that discretion should be exercised here to permit sequestered individual voir dire.

Respectfully submitted,



ALBERT G. NORMAN, JR.



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Attorneys for Defendant

ATTACHMENT 4:

Libel-Specific Pre-Charge
(excerpt)

Excerpt from Trial Transcript
Parsons v. Time, Inc.
Civil Action No. 83-1070-15
U.S.D.C./D. South Carolina

NOW, TO GIVE YOU AN OVERVIEW OF THIS CASE, I'M GOING TO TELL YOU VERY BRIEFLY WHAT IT'S ABOUT, AND I'M GOING TO TELL YOU VERY BRIEFLY WHAT THE LAW IS IN THIS AREA. BUT I WANT TO CAUTION YOU THAT AT THE END OF THE CASE I WILL GIVE YOU DETAILED AND COMPLETE INSTRUCTIONS AS TO WHAT THE LAW IS, AND IT IS THOSE INSTRUCTIONS WHICH WILL CONTROL YOUR DELIBERATIONS IN THIS CASE. BUT IN ORDER TO HELP YOU FOLLOW THE EVIDENCE THAT IS BEING RECEIVED, I WANT TO TELL YOU JUST BRIEFLY WHAT THE CASE IS ABOUT AND WHAT THE LAW IS IN THIS AREA.

NOW, THE PLAINTIFF IN THIS ACTION, PAMELA PARSONS, HAS ASSERTED THREE CAUSES OF ACTION AGAINST TIME, INCORPORATED, THE PUBLISHER OF SPORTS ILLUSTRATED, ARISING OUT OF AN ARTICLE WHICH WAS PUBLISHED IN THE FEBRUARY 8, 1982 ISSUE OF SPORTS ILLUSTRATED ENTITLED "STORMY WEATHER IN SOUTH CAROLINA." THE PLAINTIFF ALLEGES THAT THE ARTICLE DIRECTLY CHARGED AND PORTRAYED THE PLAINTIFF AS AN ADMITTED LESBIAN, A FEMALE HOMOSEXUAL, CARRYING ON AN AFFAIR WITH ONE OR MORE MEMBERS OF HER TEAM, A CORRUPTOR OF THE MORALS OF YOUNG WOMEN AND A PERSON UNFIT TO SERVE

AS HEAD BASKETBALL COACH AT THE UNIVERSITY OF SOUTH CAROLINA OR IN ANY OTHER POSITION OF RESPONSIBILITY. PLAINTIFF CONTENDS THAT THE ARTICLE AS PUBLISHED IN SPORTS ILLUSTRATED, AS A WHOLE AND THE STATEMENTS, QUOTES, AND WORDS CONTAINED THEREIN CONCERNING HER WERE TOTALLY FALSE, WERE INTENTIONALLY, WILLFULLY, WANTONLY AND MALICIOUSLY PUBLISHED BY THE DEFENDANT WITH KNOWLEDGE OF ITS FALSITY AND/OR WITH RECKLESS DISREGARD AS TO WHETHER THE SAME WAS TRUE OR FALSE.

PLAINTIFF'S FIRST CAUSE OF ACTION IS IN LIBEL. IN THE CONTEXT OF THIS CASE, LIBEL MAY BE DEFINED AS A PRINTED OR WRITTEN ARTICLE WHICH HAS A TENDENCY TO FALSELY AND MALICIOUSLY EXPOSE ONE TO PUBLIC CONTEMPT, SCORN, RIDICULE, SHAME OR DISGRACE, OR ATTEMPTING TO INDUCE AN EVIL OPINION OF ONE IN THE COMMUNITY OR INJURE ONE IN HIS OR HER PROFESSION, OCCUPATION OR TRADE.

NOW, PLAINTIFF'S SECOND CAUSE OF ACTION IS BASED ON THE ALLEGED INVASION OF PRIVACY, THAT IS, THAT THE ARTICLE IN QUESTION TENDED TO PLACE THE PLAINTIFF IN A FALSE LIGHT IN THE PUBLIC EYE.

PLAINTIFF'S THIRD CAUSE OF ACTION IS BASED ON THE ALLEGED INTENTIONAL INFLICTION OF

EMOTIONAL DISTRESS, THAT IS, THAT THE PUBLICATION OF THE ARTICLE IN SPORTS ILLUSTRATED WAS SO OUTRAGEOUS IN CHARACTER AND DEGREE AS TO GO BEYOND ALL BOUNDS OF DECENCY.

THE SECOND AND THIRD CAUSES OF ACTION, BASED ON INVASION OF PRIVACY AND THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ARE BOTH PREDICATED UPON THE SAME CONSTITUTIONAL STANDARDS AS THE LIBEL CLAIM.

NOW, THAT'S WHAT THE PLAINTIFF CLAIMS IN HER COMPLAINT. NOW, THE DEFENDANT DENIES THAT THE ARTICLE WAS FALSE OR THAT IT WAS PUBLISHED IN RECKLESS DISREGARD OF WHETHER IT WAS FALSE. AND I TELL YOU THAT TRUTH IS AN ABSOLUTE DEFENSE TO A LIBEL ACTION. IN OTHER WORDS, IF THE PUBLICATION WAS SUBSTANTIALLY TRUE, THEN THE PLAINTIFF'S CLAIMS AGAINST THE DEFENDANT MUST FAIL.

NOW, EVEN IF THE ARTICLE WERE NOT SUBSTANTIALLY TRUE, THE CONSTITUTIONAL GUARANTEE, AND I'M SPEAKING OF THE UNITED STATES CONSTITUTION, THOSE CONSTITUTIONAL GUARANTEES REQUIRE A FEDERAL RULE THAT PROHIBITS A PUBLIC FIGURE FROM RECOVERING DAMAGES FROM A DEFAMATORY FALSEHOOD OR LIBEL RELATING TO HER OFFICIAL CONDUCT UNLESS SHE PROVES THAT THE STATEMENTS

COMPLAINED OF WERE MADE WITH ACTUAL MALICE. THAT IS, WITH KNOWLEDGE THAT THE STATEMENTS WERE FALSE OR RECKLESS, OR THAT THEY WERE PRINTED WITH RECKLESS DISREGARD OF WHETHER THE STATEMENTS WERE FALSE OR NOT. AS A MATTER OF LAW, THIS COURT HAS RULED IN THE CONTEXT OF THIS CASE THAT PAM PARSONS WAS A PUBLIC FIGURE AND THE SPORTS ILLUSTRATED STORY CONCERNED HER OFFICIAL CONDUCT. THUS, AS THESE CONSTITUTIONAL GUARANTEES APPLY TO THIS ASPECT OF THE PLAINTIFF'S CASE, THAT IS IF THE ARTICLE IS NOT SUBSTANTIALLY TRUE, THE LAW WILL NOT PERMIT A PUBLIC FIGURE TO RECOVER DAMAGES FOR A DEFAMATORY FALSEHOOD RELATING TO HER OFFICIAL CONDUCT UNLESS SHE PROVES THAT THE STATEMENTS WERE MADE WITH ACTUAL MALICE. THAT IS, WITH KNOWLEDGE THAT THE STATEMENTS WERE FALSE OR WITH RECKLESS DISREGARD OF WHETHER THE STATEMENTS WERE FALSE OR NOT.

NOW, PLAINTIFFS IN LIBEL ACTIONS SUCH AS THIS ARE REQUIRED TO PROVE KNOWING OR RECKLESS FALSEHOOD WITH CONVINCING CLARITY. IN OTHER WORDS, THE PLAINTIFF HAS THE BURDEN OF PROVING ACTUAL MALICE, AS THAT TERM HAS BEEN DEFINED FOR YOU, BY CLEAR AND CONVINCING EVIDENCE, A HIGHER STANDARD OF PROOF THAN IN THE ORDINARY CIVIL CASE

WHERE THE BURDEN OF PROOF IS BY PREPONDERANCE OF THE EVIDENCE. THIS BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE LIES BETWEEN THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE IN MOST CIVIL CASES AND THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT IN CRIMINAL CASES.

NOW, I WANT TO CAUTION YOU AGAIN, WHILE I HAVE GIVEN YOU A SUMMARY OF THE LAW IN THIS CASE, WHICH I FEEL IS BENEFICIAL IN ORDER TO HELP YOU FOLLOW THE EVIDENCE AS IT IS BEING RECEIVED, THAT AT THE END OF THE CASE I WILL GIVE YOU DETAILED AND COMPLETE INSTRUCTIONS AS TO THE LAW WHICH IS APPLICABLE IN THIS CASE, AND IT IS THOSE INSTRUCTIONS WHICH WILL CONTROL YOUR DELIBERATIONS. BUT AS I SAID, IN ORDER TO TELL YOU A LITTLE BIT ABOUT WHAT THE CASE IS ABOUT, WHAT THE LAW IS IN THIS AREA, I WANTED TO GIVE YOU A BRIEF SUMMARY OF THE LAW IN ORDER TO HELP YOU UNDERSTAND AND FOLLOW THE EVIDENCE AS IT IS BEING RECEIVED.

NOW, LET ME GIVE YOU A FEW WORDS ABOUT YOUR CONDUCT AS JURORS. DURING THE COURSE OF THIS TRIAL I INSTRUCT YOU THAT YOU ARE NOT TO DISCUSS THIS CASE WITH ANYONE OR PERMIT ANYONE TO DISCUSS THE CASE WITH YOU, AND THAT INCLUDES AMONG

ATTACHMENT 5:

Form of Detailed Special Libel Verdict

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RAMADA INNS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 83C-AU-56
DOW JONES & COMPANY, INC.	)	
	)	
Defendant.	)	

SPECIAL VERDICT FORM

This special verdict form contains a series of questions for you to answer. Section I contains a series of questions pertaining to the statements in the August 17, 1981 Wall Street Journal article which Ramada claims are libelous and which are highlighted in blue on your copies of the article. The form contains instructions which will direct you either to answer each question or to move on the next set of questions. The instructions will also tell you whether or not you should answer the questions in Sections II and III. Please read and follow the instructions carefully.

SECTION I - THE STATEMENTS

PART A

1. But that isn't the only problem confronting the company. It has been learned that Ramada's hotel-casino in Las Vegas has lost more than $30 million to thefts by employees and outsiders since the company acquired it in December 1979.

employees and outsiders since the company acquired it in December 1979.

2. The company hired Philip R. Manual, a former federal investigator specializing in white-collar and organized crime, to conduct an audit of the casino operations. Using a battery of former Internal Revenue Service intelligence agents who specialize in casino-skimming cases, Mr. Manual allegedly discovered that roughly $30 million had been skimmed from the Tropicana over the past year and a half.

3. Mr. Manual's audit apparently found that about $20 million of casino revenue had been stolen through various schemes.

4. In addition, roughly $11 million in gambling markers, or IOU's, mostly from high-stakes gamblers from Mexico, are apparently uncollectible because of phony credit documents.

QUESTION 1

Has Ramada proved by a preponderance of the evidence that the underlined statement that "roughly $11 million in gambling markers, or IOU's, mostly from high-stakes gamblers from Mexico, are apparently uncollectible because of phony credit documents" in Part A is factual in nature and not an expression of opinion?

Yes 6

No 5 (ABSTAIN - 1)

If your answer to Question 1 is "yes," you may continue to consider the underlined statement concerning alleged uncollectible markers as you continue your deliberations. If your answer to Question 1 is "no," you may not further consider the underlined statement regarding the alleged uncollectible markers as you continue in your deliberations.

QUESTION 2

Has Ramada proved by clear and convincing evidence that any of the underlined statements in Part A is not a substantially true account of the results of the Manuel investigation?

Yes 2

No 8 (ABSTAIN - 2)

If your answer to Question 2 is "no," move to Part B. If your answer to Question 2 is "yes," move to Question 3.

QUESTION 3

Has Ramada proved by clear and convincing evidence that any of the underlined statements in Part A is not a substantially true account of the operations of the Las Vegas Tropicana?

Yes 4

No 7 (ABSTAIN - 1)

If your answer to Question 3 is "no," move to Part B. If your answer to Question 3 is "yes," move to Question 4.

QUESTION 4

Has Ramada proved by clear and convincing evidence that Philip Manuel did not give to Jim Drinkhall the specific information contained in the underlined statements in Part A?

Yes 0

No 12

Move to Question 5.

QUESTION 5

Has Ramada proved by clear and convincing evidence that at the time of publication Jim Drinkhall either knew that any of the underlined statements in Part A was false or acted with a high degree of awareness that the statement was probably false?

Yes 0

No 12

If your answer to Question 5 is "no," move to Part B. If your answer to Question 5 if "yes," move to Question 6.

QUESTION 6

Has Ramada proved by a preponderance of the evidence that any of the underlined statements in Part A is defamatory?

Yes _____

No _____ (No VoTE)

Move to Part B.

* * * *

PART B

5. Further, a New Jersey gambling official, when informed of the alleged thefts, suggests that they could cause problems for Ramada in receiving a license to operate its Atlantic City casino.

6. The New Jersey gambling official--who wasn't aware of the alleged problems at Ramada's Las Vegas casino--says those problems "indicate a question of management ability" to run a gambling operation--a crucial factor in the state's pending decision on whether to grant Ramada a license.

QUESTION 1

Has Ramada proved by clear and convincing evidence that any of the underlined statements in Part B is not substantially true?

Yes 0

No 12

If your answer to Question 1 is "no," move to Part C. If your answer to Question 1 is "yes," move to Question 2.

QUESTION 2

Has Ramada proved by clear and convincing evidence that at the time of publication Jim Drinkhall either knew that any of the underlined statements in Part B was false or acted with a high degree of awareness that the statement was probably false?

Yes _____

No _____ (No Vote)

If your answer to Question 2 is "no," move to Part C. If your answer to Question 2 is "yes," move to Question 3.

QUESTION 3

Has Ramada proved by a preponderance of the evidence that any of the underlined statements in Part B is defamatory?

Yes _____

No _____ (No Vote)

Move to Part C.

* * * *

PART C

7. And it is also understood that Ramada is being sued by the former operators of the Las Vegas establishment, also called the Tropicana, for alleged mismanagement.

8. On top of that, the previous operators sued Ramada earlier this year, charging that Ramada is mismanaging the Tropicana, according to court papers filed in federal court in Los Angeles. The sales price of the company that operated the Tropicana is tied to a multiple of pre-tax income in 1981 and 1982, and the previous operators claim that mismanagement of the operation by Ramada has kept the purchase price below

what it should be. Ramada denied the charges in court papers, and the case is pending.

QUESTION 1

Has Ramada proved by clear and convincing evidence that any of the underlined statements in Part C is not substantially true?

Yes 10

No 2

If your answer to Question 1 is "no," move to Part D. If your answer to Question 1 is "yes," move to Question 2.

QUESTION 2

Has Ramada proved by clear and convincing evidence that at the time of publication Jim Drinkhall either knew that any of the underlined statements in Part C was false or acted with a high degree of awareness that the statement was probably false?

Yes 0

No 12

If your answer to Question 2 is "no," move to Part D. If your answer to Question 2 is "yes," move to Question 3.

QUESTION 3

Has Ramada proved by a preponderance of the evidence that any underlined statement in Part C is defamatory?

Yes _____

No _____ (No Vote)

Move to Part D.

* * * *

PART D

9. A Ramada official, though, says the hotel-casino is likely to end up costing "at least" $350 million, and that it will open in December, "if we're lucky."

QUESTION 1

Has Ramada proved by clear and convincing evidence that the underlined statement in Part D is not substantially true?

Yes 0

No 12

If your answer to Question 1 is "no," move to Part E. If your answer to Question 1 is "yes," move to Question 2.

QUESTION 2

Has Ramada proved by clear and convincing evidence that at the time of publication Jim Drinkhall either knew that the underlined statement in Part D was false or acted with a high degree of awareness that the statement was probably false?

Yes _____

No _____ (No VOTE)

If your answer to Question 2 is "no," move to Part E. If your answer to Question 2 is "yes," move to Question 3.

QUESTION 3

Has Ramada proved by a preponderance of the evidence that the underlined statement in Part D is defamatory?

Yes _____

No _____ (No VOTE)

Move to Part E.

* * * *

PART E

10. In a telephone interview, Mr. Manual confirms that he was hired to do some work at the Tropicana in Las Vegas but says he won't discuss his client's business. Ramada wouldn't comment on whether an audit was conducted.

QUESTION 1

Has Ramada proved by clear and convincing evidence that the underlined statement in Part E is not substantially true?

Yes 4

No 8

If your answer to Question 1 is "no," move to Part F. If your answer to Question 1 is "yes," move to Question 2.

QUESTION 2

Has Ramada proved by clear and convincing evidence that at the time of publication Jim Drinkhall either knew that the underlined statement in Part E was false or acted with a high degree of awareness that the statement was probably false?

Yes 2

No 10

If your answer to Question 2 is "no," move to Part F. If your answer to Question 2 is "yes," move to Question 3.

QUESTION 3

Has Ramada proved by a preponderance of the evidence that the underlined statement in Part E is defamatory?

Yes 0

No 12

Move to Part F.

☆ ☆ ☆ ☆

PART F

11. The New Jersey gambling official--who wasn't aware of the alleged problems at Ramada's Las Vegas casino--says those problems "indicate a question of management ability" to run a gambling operation--a crucial factor in the state's pending decision on whether to grant Ramada a license. Ramada wouldn't comment on the official's statement.

QUESTION 1

Has Ramada proved by clear and convincing evidence that the underlined statement in Part F is not substantially true?

Yes 0

No 11 (ABSTAIN - 1)

If your answer to Question 1 is "no," move to Part G. If your answer to Question 1 is "yes," move to Question 2.

QUESTION 2

Has Ramada proved by clear and convincing evidence that at the time of publication Jim Drinkhall either knew that the underlined statement in Part F was false or acted with a high degree of awareness that the statement was probably false?

Yes 0

No 11 (ASTAIN - 1)

If your answer to Question 2 is "no," move to Part G. If your answer to Question 2 is "yes," move to Question 3.

QUESTION 3

Has Ramada proved by a preponderance of the evidence that the underlined statement in Part F is defamatory?

Yes 0

No 12

Move to Part G.

* * * *

PART G

QUESTION 1

Have you answered "yes" to Questions 2, 3, 5 and 6 in Part A?

Yes _____

No X

QUESTION 2

Have you answered "yes" to each question in Part B?

Yes _____

No X

QUESTION 3

Have you answered "yes" to each question in Part C?

Yes _____

No X

QUESTION 4

Have you answered "yes" to each question in Part D?

Yes _____

No X

QUESTION 5

Have you answered "yes" to each question in Part E?

Yes _____

No X

QUESTION 6

Have you answered "yes" to each question in Part F?

Yes _____

No X

You should not move on to the questions in Section II unless you answered "yes" to one or more of the questions in Part G. If you have answered "no" to all of the questions in Part G, you have found none of the statements in dispute to be libelous and your deliberations are completed.

SECTION II - DAMAGES

In answering the questions in this section, you should consider only the statements in Parts A through F of Section I as to which you answered "yes" to the question concerning that Part in Part G. These are the statements you have found to be libelous.

QUESTION 1

Has Ramada proved by a preponderance of the evidence that one or more statements which you have found to be libelous was the legal cause of any special damages suffered by Ramada in connection with the shareholders' lawsuits?

Yes _____

No _____

If "yes," in what amount? _____

QUESTION 2

Has Ramada proved by a preponderance of the evidence that one or more statements which you have found to be libelous was the legal cause of any damages suffered by Ramada for injury to its reputation?

Yes _____

No _____

If "yes," in what amount? _____

Do not move on to Section III unless you have answered "yes" to one of the questions in Section II.

SECTION III - PUNITIVE DAMAGES

If you answered "yes" to one or more of the questions in Part G of Section I, and if you answered "yes" to one or more questions in Section II, answer the questions below. In answering the questions in this section, you should consider only the statements you have found to be libelous, that is, the statements in Parts A through F of Section I as to which you answered "yes" to the questions concerning that Part in Part G of Section I.

QUESTION 1

Has Ramada proved by clear and convincing evidence that on August 17, 1981, Jim Drinkhall was an unfit reporter in the sense that there was a substantial probability that articles based on confidential sources reported by him would be false?

Yes _____

No _____

If your answer to Question 1 is "no," do not answer any more questions. If your answer to Question 1 is "yes," move to Question 2.

QUESTION 2

Has Ramada proved by clear and convincing evidence that an editor of the Journal who was responsible for Drinkhall's supervision in August, 1981, knew at the time of publication of the August 17, 1981 article, or had a high degree of awareness at the time of publication, that any article written by Jim Drinkhall based on a confidential source presented a substantial probability that the article was false?

Yes _____

No _____

If yes, name the editor or editors. _____

If your answer to Question 2 is "no," do not answer any more questions. If your answer to Question 2 is "yes," move to Question 3.

QUESTION 3

Has Ramada proved by clear and convincing evidence that the editor or editors you identified in Question 2 consciously disregarded a substantial risk of probable falsity by allowing publication of the August 17, 1981 article?

Yes _____

No _____

If your answer to Question 3 is "no," do not answer any more questions. If you answer to Question 3 is "yes," move to Question 4.

QUESTION 4

Do you believe punitive damages should be awarded to Ramada in the circumstances of this case?

Yes _____

No _____

If your answer to Question 4 is "no," do not answer any more questions. If your answer to Question 4 is "yes," move to Question 5.

QUESTION 5

State the amount that the Journal should pay Ramada in punitive damages.

$_____

_____
FOREPERSON