



# BULLETIN

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LDRC JUROR ATTITUDES STUDY III:  
Private-Figure (Gross Irresponsibility)/Newspaper/Defense Win

Introduction

This is the Libel Defense Resource Center's third Juror Attitudes Study.\*

The first LDRC Jury Study dealt with a major newspaper defendant in a public figure's libel action. (See LDRC Bulletin No. 14 at 1-33.) That case was lost at trial and the jury awarded damages approaching one million dollars, based on an arithmetical compromise, 45% of which was denominated as compensatory damages and 55% of which was denominated as punitive damages. LDRC's Study of that case revealed that the jury considered the case to be one largely focused on the truth or falsity of the underlying allegations, even though the newspaper had previously retracted the erroneous portion of the subject article prior to any claim being made, acknowledged and expressed regret over what it said was an innocent mistake, and did not seek to defend the truth of that portion of the publication at trial. According to LDRC's findings, the jury in its very brief deliberations on the liability issue never really seemed to focus on the pivotal issue of actual malice, although the judge's instructions on this issue were excellent.

LDRC's second Jury Study also dealt with a case lost by the media, this one involving a major television defendant in a private figure's libel and false light privacy action. (See LDRC Bulletin No. 15 at 1-26.) In that case, LDRC found that at least half of the jurors (all of those interviewed) had begun their deliberations favoring the defendant. A lengthy and meticulous deliberation, focusing on the judge's instructions (the full text of which was given to the jury) and a special verdict form, led the jury unanimously to conclude that the law required a verdict for the plaintiff. (LDRC's Study concluded that aspects of the charge misled the jury and a subsequent appeal decided that the verdict was erroneous as a matter of law, reversed the judgment and dismissed the plaintiff's claims.) Having reached this conclusion as to liability, the jury in this bifurcated proceeding then in short order entered an award of \$1.25 million, \$250,000 in compensatory damages -- this despite the fact that the jury did not particularly sympathize with the plaintiff and did not feel he had been especially harmed financially over and above his legal costs -- and \$1 million in punitive damages -- despite the fact that the jury was not particularly angry with the media defendant (at least half of them having initially favored defendant on the liability issue).

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\* LDRC gratefully acknowledges the invaluable assistance of Thomas A. Hartnett, second-year student at the New York University School of Law, in the preparation of LDRC Jury Attitudes Study III.

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In this third Jury Study LDRC sought to select a case in which the media defendant had prevailed. The case ultimately chosen dealt with a newspaper defendant, this time in a private figure's libel action governed by a "gross irresponsibility" fault standard. As indicated below, although judgment was entered for the defendant based on a failure to establish the requisite degree of fault, even in this defense win the jury split its verdict, voting in favor of the plaintiff on the issue of falsity.

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Methodology

LDRC followed the same basic methodology in this Study as it had in the previous two Jury Studies. Briefs, opinions, jury instructions and requests to charge, along with alternative versions of a special jury verdict form, plus portions of the trial transcript (including the opening and closing statements of both plaintiff and defense counsel) were reviewed to achieve an independent understanding of the issues, arguments and proofs in the case. In addition, LDRC interviewed one of defendant's "in-house" counsel, who had sat in on both trials in the case, and defense counsel retained for this trial. A list of the jurors' names and counties of residence was obtained from the information routinely provided to the attorneys by the court clerk's office. Then, using the limited information available, addresses and/or telephone numbers were located for all six jurors, and four of the six alternates. Letters were written to most of these jurors explaining the nature of the LDRC Study, asking for their voluntary cooperation and promising confidentiality.

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Three of the regular jurors and two of the alternates agreed to meet with LDRC for detailed interviews. These face-to-face interviews lasted between 1-1/2 and 2-1/2 hours. A 23-page written script was loosely followed by the interviewer during these meetings. In addition, one other juror and one alternate were interviewed by telephone following a somewhat abbreviated version of the script. In sum, a total of seven of the twelve jurors were interviewed in the Study -- four out of the six regular jurors and three of the six alternates. In addition, the basic positions of the regular jurors who had not been interviewed, as to the three questions on the special verdict form, were revealed to some substantial extent by the four regular jurors who were interviewed. Finally, LDRC became indirectly aware of some of the specific views of the other three alternates. Of the five jurors not interviewed, one was spoken to by telephone but declined to be interviewed. Another scheduled an interview but did not appear, and LDRC was thereafter unable to contact her; another failed to respond to a series of letters; and two jurors were never contacted due to insufficient information as to their place of residence. Although not every juror and alternate was interviewed, the jurors who did participate in the Study provided sufficient information such that it is confidently believed that LDRC's understanding of the jury's basic attitudes and decision-making process in this case is essentially complete and accurate.

Background of the Case

The case arose out of a Pulitzer-Prize-winning series of newspaper articles, later republished in book form, which investigated drug smuggling into the U.S. Plaintiff was a wealthy foreign businessman. Defendants were the newspaper which printed the articles, three of its reporters and its managing editor, and the publisher of the subsequent book based on the articles.

1. The Articles

The defendant newspaper had conducted a wide-ranging, investigative study of drug trafficking, from production centers abroad to the drugs' final destination in the U.S. The result was a long and detailed series of articles on the narcotics trade. Brief portions of two of those articles linked plaintiff to foreign drug trafficking, and depicted him as a profiteer who specialized in smuggling over a particular route. Three hundred other alleged drug traffickers were named in the article, but no one other than the plaintiff ever contacted the newspaper, or asserted a claim denying the allegations. The newspaper based its allegations against plaintiff on information it had received from two drug smugglers and an "underground chemist." In addition, defendant contended its allegations were reviewed and verified by three knowledgeable police officials in plaintiff's locale, and by a CIA agent stationed in the area. However, during the libel action the three police officials denied ever making the statements attributed to them by the

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reporters, and one of the three actually testified at trial on behalf of the plaintiff. Furthermore, the CIA agent was unavailable to testify on behalf of the reporters. Approximately a year after the articles were published, the newspaper authorized a paperback book version of the series to be printed and distributed by another publisher. The book essentially repeated the allegations made against plaintiff in the newspaper series. As noted, at the time of the paperback license no claim had been received from the plaintiff or from any other person mentioned in the articles.

### 2. Plaintiff's Claim

Ten months after the paperback republication, and over two years after the original newspaper series ran, plaintiff commenced the instant libel action. He asserted three causes of action for libel, and included as defendants the newspaper, its managing editor, the reporters who prepared the articles, and the publisher of the book based on the articles as defendants. Recovery was sought for allegedly libelous statements in both the book and the newspaper series. Plaintiff argued that the accusations against him were false, and that his reputation as a legitimate businessman in his homeland had been injured as a result of the defamatory statements about him.

### 3. Summary Judgment

Plaintiff's first cause of action, based on the original newspaper publication of the allegations, was initially dismissed because the applicable statute of limitations had expired. The other two causes of action, based on the republication of the allegations in book form, were treated as timely. Following discovery, all six named defendants moved for summary judgment, arguing that plaintiff had failed to produce evidence sufficient to defeat their qualified privilege as journalists under the "gross irresponsibility" standard applicable in the jurisdiction. The trial court ruled in favor of defendants and dismissed the complaint, holding that the quality of the reporting was sufficient to disprove a claim of gross irresponsibility. But an intermediate appellate court reversed, holding that an issue of fact existed as to whether or not the accusations were republished in "good faith." Finally, the state's highest appellate court, in a divided opinion, agreed with the trial court that dismissal was appropriate as to the reporters and the editor because they had not been involved in authorizing the republication, and the book publisher because that publisher had no knowledge of any alleged fault on behalf of the newspaper or its reporters and had a right to rely on the apparent care with which the newspaper series had been put together. However, a bare majority denied summary judgment as to the newspaper, holding that its corporate liability for any allegedly irresponsible conduct by its employees during the investigation would carry forward to any republication of that material, and finding material issues of disputed fact based on affidavits from the police officials denying that they had been sources for the charges against the plaintiff.



#### 4. The Trial

When the case was originally tried it resulted in a mistrial. The mistrial came about after several weeks of trial, when delays in the trial process led to a number of jurors being excused for personal reasons. This left too few jurors to continue with the case. A new judge sat on the second trial and new defense counsel were retained. In that second trial both parties maintained the same basic positions they had held to in the first. The defense argued that the references to plaintiff in the book were true, and that in any event the defendant and its reporters had solid sources for their information and had, in any event, not been grossly irresponsible in printing those allegations. The plaintiff's position was essentially that the newspaper's story was incorrect as to plaintiff and that despite its allegedly extensive investigation the newspaper had failed to check obvious sources that would have established the falsity of its information as to plaintiff. More specifically, plaintiff's counsel sought to demonstrate that defendants were lying about, or had fabricated, much of the information that allegedly formed the basis for their publication about plaintiff and that allegedly connected him to drug trafficking.

When the trial began the defense had some serious evidentiary problems with both of those positions. On the question of the truth or falsity of the references to plaintiff, the defense did not have any witnesses directly linking plaintiff to drug dealing. Those who had originally provided the reporters with the information regarding plaintiff were unavailable to testify, and the foreign police officials who defendant claimed had verified its story denied ever making those remarks. On the question of whether or not the reporters had acted in a grossly irresponsible manner, the trial judge made several important evidentiary rulings against the defense. The reporters had kept detailed contemporaneous notes of their investigative work, that were regularly transcribed into detailed memoranda, but the judge refused to admit those notes on the reporting process into evidence. His decision was based on the concept that their admission would be highly prejudicial to plaintiff in that the jury might tend to consider them with regard to the issue of truth rather than fault and that the written materials might also unduly "bolster" the reporters' testimony about their methods in preparing the investigative series. The judge also refused to allow any mention to be made of the fact that the series of articles had won the Pulitzer Prize.

During the trial the defense portrayed the journalists as hard-working, thorough professionals who had more than adequately checked their story. Defense counsel also attacked the one foreign police official who testified on behalf of plaintiff, and during cross-examination attempted to expose inconsistencies in his testimony. Several federal drug agents testified that plaintiff was suspected of being a drug smuggler. Also, with two weeks remaining in the trial, the defense found and produced a surprise witness. That witness was a former smuggler and U.S. government informant who

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testified that he had participated in a prior drug transaction with the plaintiff. This testimony was the only direct evidence produced by the defense to show that plaintiff was, in fact, a drug smuggler. Defense counsel's style seems to have been a consciously low-keyed one, preferring to build his case slowly through careful cross-examination rather than through impressing the jury with pyrotechnics. On a tactical level, defense counsel reports attempting to keep his objections to a minimum, since the presiding judge had demonstrated some disposition to rule against an objecting party during the proceeding. While this low-keyed approach was ultimately successful, it did leave some of the jurors wondering, at least for a time, about the strength of counsel's case.

Conversely, plaintiff's counsel had a boisterous and argumentative style that impressed a number of the jurors, although to an extent it turned off some other jurors. Ultimately, plaintiff's counsel failed in his attempt to persuade the jury that not only had the reporters printed allegations regarding plaintiff without having adequately verified them, but that they had actually attempted to cover up their mistake by lying in claiming that their information had been corroborated by local police officials. Testimony to that effect by one of those police officers was the cornerstone of plaintiff's case. Plaintiff himself testified as to the legitimate nature of his business enterprises and his personal aversion to drugs of any kind. His daughter and son-in-law also testified to that effect, painting the plaintiff as a pillar of the community who had been unjustly libelled. On the question of gross irresponsibility, plaintiff's counsel portrayed the reporters as a group enjoying a foreign vacation, who were not acting in a professional manner. Counsel argued that the reporters were arrogant and cavalier in making serious and unsubstantiated allegations. He focused on the fact that the reporters had not confronted plaintiff with their allegations before printing the story as evidence of gross irresponsibility.

Plaintiff's counsel also attempted to point out inaccurate details in defendant's story as indicative of the reporters' capacity for error and of the obvious steps they could have taken, but did not take, to check their facts prior to publication. For example, the reporters had written that plaintiff owned a particular nightclub, but plaintiff claimed that in fact his brother owned the club. The reporters had also written that plaintiff owned "villas" in certain foreign cities, but plaintiff claimed they were not villas but "apartments." Finally, plaintiff testified concerning the damage that the allegedly libelous statements had done to him. He and his family testified in a general way as to damaged reputation and emotional distress. Plaintiff alleged no special damages and the court did not allow testimony on plaintiff's claim of lost business profits to be admitted. Plaintiff also claimed that he was in constant fear of being detained when he travelled internationally because of the smuggling allegations, but this claim was seriously hampered by the exclusion of evidence as to one such incident. Despite the lack of specific evidence of financial loss, plaintiff's counsel nonetheless, during his closing argument, asked the jury to award his client \$5 million.

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At the conclusion of the trial the judge, in his instructions to the jury, clearly stated that the burden of proof rested on the plaintiff on both the question of whether the references to plaintiff had been "substantially false," and of whether the defendant had acted in a "grossly irresponsible" manner. His other instructions on the central substantive elements of the case, although not models of clarity, were largely correct in their statement of the law. The judge also undertook to marshal the evidence presented for the jury. He expressly instructed the jurors that they were not to consider the accuracy of details written about plaintiff when determining whether what had been printed was "substantially false." He instructed the jury that the details he mentioned, specifically questions about the ownership of a nightclub and villas that had been explored at length by plaintiff's counsel during the trial, were only to be considered in the context of the defendant's alleged gross irresponsibility. On the issue of falsity, the judge instructed the jury to consider only the testimony of the plaintiff, the defendant's surprise witness, and the foreign police official testifying on plaintiff's behalf. Finally, the judge also instructed the jury that the reporters' elaborate overall investigative procedure was not the issue in this case, and that the only relevant issue was whether the reporters had acted in a grossly irresponsible manner in publishing the particular passages concerning the plaintiff. A special verdict form, with three interrogatories, was given to the jury to take into their deliberations. Question one dealt with the issue of truth or falsity; question two with gross irresponsibility; and question three, to be addressed only if the answers to questions one and two favored the plaintiff, dealt with compensatory damages. The issue of punitive damages was bifurcated at this stage.

The Jury's Verdict

1. The Deliberation Process

The jury was excused at approximately 3 p.m., after receiving the judge's instructions on the law with regard to libel. It deliberated until 6 p.m. on the first day. During that period the jurors returned to the courtroom, at their request, to have certain testimony of the foreign police official appearing on behalf of the plaintiff re-read. That testimony involved his confirmation of the drug activities of a long list of persons named in the book, but his vociferous denial that he had included plaintiff among them. On the second day, the jury deliberated until shortly after noon before reaching a verdict. During that second day the jurors had the judge's charge re-read "as to the weight of the evidence." The total time of deliberation was approximately six hours.

According to the special verdict form it completed, the jury unanimously found that the references in the book to plaintiff concerning his involvement in illegal drugs and drug trafficking were "substantially false." However, it also found that the



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defendant newspaper, acting through its reporters, had not acted in a "grossly irresponsible" manner. It thus decided that plaintiff had failed to prove his libel case and, according to the special verdict form, the jury did not consider if, and to what extent, plaintiff had been damaged by the allegedly libellous statements. This seemingly straightforward split verdict belies the far more complex attitudes and beliefs which underlay the jury's final decision.

2. Truth/Falsity: Initial Vote

As noted, the jury answered yes to question one on the special verdict form: "Were the references to the plaintiff in the book, concerning his involvement in illegal drugs and drug trafficking, substantially false?" This decision would not in itself appear unusual except that at the time the final vote was taken on this question it now appears that as many as five of the six regular jurors did think that plaintiff was a drug smuggler, and the sixth felt he was at least "involved" in drug smuggling. All three alternates polled also felt plaintiff was a drug smuggler.\* Half of the jury was convinced of this fact after only a couple of days of the more than four-week trial, because it concluded plaintiff and the foreign police official testifying on his behalf were lying. In concluding that plaintiff was in fact a drug smuggler, several of the jurors were strongly influenced by their perception that plaintiff had become wealthy in shipping and transport businesses involving the exporting, among other items, of fish and automobile tires. These jurors speculated that this could have provided plaintiff the means of smuggling drugs. No evidence suggesting that this was the case was introduced at trial, yet several jurors apparently reached this conclusion independently. Two other jurors were convinced by the appearance of the defendant's surprise witness near the end of the trial, and the final juror decided that plaintiff must have been involved after listening to the re-reading of the police official's testimony. The question then becomes, how could the jury have voted that the references to the plaintiff were substantially false? The answer is not a simple one, since it was a convergence of several distinct circumstances and strains of thought which, as best can be determined after the fact, led to the decision on question one.

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\* As noted, in this Study four of the regular jurors were interviewed. References in this discussion of the deliberation process to the views of all six jurors is based on the consistent recollections of the four jurors interviewed regarding the views of the remaining two jurors. One of those jurors was consistently reported to have been strongly disposed against the plaintiff's position; the other was reported to have been among the group of jurors who, while they suspected plaintiff, felt that the newspaper had failed to prove these serious charges -- see discussions of truth/falsity herein; see also Juror Profiles section, infra. It cannot be known for certain to what extent those two jurors would now agree with these reports by the other jurors.

Clearly, the root of the problem lay in the judge's instructions and interrogatories as reflected on the special verdict form given to the jury. In the proposed interrogatories defense counsel submitted to the court, its question on truth/falsity read, "Has plaintiff proved by a preponderance of the evidence that the statement in the book that he was a drug smuggler was false?" However, in the final interrogatory submitted by the court to the jury that construction was altered in three important respects. First, the reference to the plaintiff's burden of proof was omitted. Second, the specific focus on "drug smuggl[ing]" was replaced with a far less definite formulation regarding "references ... in the book ... concerning ... illegal drugs and drug trafficking." And finally, "falsity" was changed to "substantial falsity". These seemingly innocuous changes worked in tandem with certain events during the course of the deliberations to change the jury's vote on question one in this surprising manner.

Once in the jury room, the jurors spent some time examining the exhibits given them by the court. Immediately afterward, they took a vote on question one. Most of the jurors were surprised when the vote ended in a 3-3 tie. Three jurors focused on a statement in the judge's instructions asking the jurors to apply their "common sense" and, having concluded that plaintiff was a drug smuggler, they voted "no" on question one -- i.e., that the references to plaintiff were not substantially false. The other three jurors voted "yes" on question one -- that the references to plaintiff were substantially false -- for two distinctly different reasons.

Two of those three jurors voted "yes" on question one, despite their suspicions regarding his involvement in drug smuggling, because they felt that defendant had not proven that plaintiff was a drug smuggler. They were thus apparently confused as to the burden of proof, and apparently none of the other jurors focused on this confusion as to burden in attempting to convince these jurors to shift their vote on question one. Indeed, it appears the jurors never discussed the burden of proof, as such, during the deliberations. In fact, only one of the regular jurors interviewed correctly recalled all aspects of the judge's instructions on burden of proof.

This misapplication of the burden of proof may have been partially a result of prior experience some of the jurors had had with criminal trials. The severity of allegations of drug smuggling may have led these jurors to conclude that such allegations cannot be made without "concrete" proof of their truth. During LDRC's interviews, several jurors expressed their belief that "you can't just go around calling someone a drug smuggler without evidence to back that up." Apparently, defendant's effort to demonstrate that it had sufficiently verified its allegations did not satisfy these jurors.

It therefore becomes apparent that, had a reminder that the burden of proof rests on the plaintiff been retained in the

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interrogatory, a great deal of confusion might have been avoided. A correct instruction on the burden of proof was included in the judge's charge to the jury; however, that instruction was buried in the middle of a 39-page charge and most of the jurors were unable to remember exactly what the judge had stated on this point. The jurors did not have a copy of the judge's instructions in the jury room during their deliberations.

The other juror who initially voted "yes" on question one was the only one of the regular jurors who realized the burden of proof rested on the plaintiff on both questions one and two in this case. Thus, her decision to vote "yes" on the question was the result of a very different analytical process than that undertaken by the other two jurors initially voting "yes". This juror was confused by the words "substantially false" in the first question on the special verdict form. She interpreted these words as meaning that details printed in the passage -- such as whether or not plaintiff owned a particular nightclub, owned a villa, or smuggled on the particular route mentioned in the book -- were relevant in deciding whether the plaintiff had been libelled. A definition of what constitutes "substantial falsity," and an admonition that the truth or falsity of details in the passage referring to the plaintiff were irrelevant in deciding question one, was contained in the court's charge. However, once again information was lost on a juror amidst the mass of information presented by the judge. This same juror believed that plaintiff had met his burden of proof with regard to the falsity of the aforementioned details. Therefore, when defendant did not come forward with evidence to refute that put forward by the plaintiff on the inaccuracy of details in the allegations, she ultimately concluded that the law compelled her to vote that the references to plaintiff were substantially false.

3. Truth/Falsity: Vote Swing

The jury in this case spent the vast majority of its deliberation time attempting to answer question one. After the initial vote, the jurors began explaining their positions to one another in an attempt to reach a consensus on the question. Those jurors who had initially voted "no" on question one -- i.e., that the publication was not substantially false -- knowing that their fellow jurors also believed that the plaintiff was in fact a drug smuggler, questioned the consistency of the position that the references were substantially false. Basically, those jurors retorted that defendant had failed to prove that the references were true, and that one could not accuse someone of such a serious crime without proof. Two or three more votes on the question were taken and, despite some wavering by two of the jurors who had voted "yes" on question one, the jury apparently remained deadlocked at 3-3. At this point the discussion took on a rancorous tone, as both sides became frustrated at the impasse in the deliberations. Shouting and heated arguments began to take place among some of the jurors. As the jurors went home at 6 p.m. on the first day of the deliberations, no progress had been made in resolving the deadlock on question one.

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On the second day of the deliberations, the jury began to search for new approaches so as to break its deadlock. It asked for, and received, a re-reading of the charge as to the weight of the evidence. Following this re-reading the perspectives of the jurors changed to such an extent that, within a short period of time, they reached a unanimous decision that the references to plaintiff were substantially false and, therefore, that question one should be answered in the affirmative. It is difficult to say precisely why this occurred. There is seemingly nothing in that portion of the court's charge which was re-read which should necessarily have broken the jurors' impasse on this question. No mention was made in the re-reading of the burden of proof, the definition of substantial falsity or the irrelevance of the truth or falsity of certain details reported in the book. One juror focused on the judge's re-reading of the instruction that the jurors should determine which side had presented the "preponderance" of the evidence, and favor that party. Since she believed the plaintiff had presented more relevant evidence than the defendant, particularly with regard to the "details," she voted in his favor on question one. It is not clear whether or not this passage in the re-read instructions may have similarly influenced other jurors as well.

Two accounts of how the jury achieved unanimity on question one have emerged, neither of which provides a fully satisfying explanation for the unanimous answer to question one and the process by which it was achieved. In the first account, which most of the jurors adhere to, the key is that after the re-reading the jurors focused on what was actually written in the passage at issue, rather than their personal beliefs regarding the underlying question of plaintiff's drug dealing. Consequently, the three jurors who had originally voted "no" on question one decided that insufficient evidence had been presented by the defendant to prove the specific allegations in the passage -- presumably focusing significantly on the "details" rather than the basic charge of drug trafficking. In so doing these jurors also implicitly accepted the misapplication of the burden of proof propounded by two of the three jurors who had originally voted "yes" on question one. It is clear that when the deliberations began, five of the six jurors were convinced plaintiff was a drug smuggler, and the sixth ultimately accepted the fact that plaintiff was "involved" after the foreign police official's testimony was re-read. It therefore seems safe to say that the vote swing which occurred was not a result of any juror changing his or her mind on that factual issue, but merely of the manner in which the legal question was ultimately approached. As one juror who changed his vote stated, "When the judge re-read the law, it seemed we couldn't come out and say he was legally guilty, according to the law, even though in our hearts we knew he was guilty."

The other account by one juror of the manner in which a decision was reached on question one described the vote swing as the product of a pure compromise. This juror, who was the last to accept plaintiff's involvement in drug smuggling, suggested to the forewoman that they decide that what was printed in the book wasn't



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true, but that the reporters weren't grossly irresponsible. "We made a deal," she said. The other jurors denied that an outright compromise had been made on the verdict, but this juror's suggestion did provide a method for those jurors favoring the defense to break the impasse on the first question without hurting the defendant financially. It may well be that three jurors changed their votes shortly after the re-reading of the judge's instructions on the weight of the evidence because they genuinely concluded that they were approaching the analysis of question one in the wrong manner. On the other hand, it may also be the case that the re-reading provided a convenient excuse for the implementation of an implicit compromise that hurt neither side while enabling the jury to go home. This conflict in the jurors' accounts must remain unanswered, although there may be some element of truth to both explanations.

### 4. Gross Irresponsibility

Once the jurors had completed their deliberations on the truth/falsity question, they reached a decision on whether or not the defendant had acted in a grossly irresponsible manner almost immediately. They determined that it had not acted with gross irresponsibility. In a sense, plaintiff's counsel never really attempted to make a case on the issue of gross irresponsibility. He chose instead to build plaintiff's case on a theory of deliberate lies and falsification. This strategy was perhaps unavoidable since from the outset of the case the defense claimed to have had numerous sources for their accusations against the plaintiff, including high government officials. If this defense claim were accepted, proof of gross irresponsibility would presumably be impossible. Plaintiff on the other hand, had successfully resisted summary judgment because these government officials, for whatever reasons, subsequently denied that they had given plaintiff's name to the reporters and in some cases that they had even met with the reporters. It was therefore perhaps inevitable that the trial would center around the resolution of this stark conflict in the testimony rather than around a more abstruse consideration of quantum of journalistic fault under the rubric "gross irresponsibility." There was no expert testimony presented on behalf of either side on this issue and plaintiff's case regarding fault centered on the contention that defendant's reporters had been careless in their investigation and had then sought to cover up their errors by lying about their sources. When plaintiff lost the fundamental battle of credibility as to these basic contentions there was perhaps little question but that a jury thus predisposed would not find the defendant "grossly irresponsible."

In fact, there was little discussion in the jury room of the fault issue (question two), and no one during the deliberations ever attempted carefully to evaluate the concept of fault based on a standard of gross irresponsibility. Given plaintiff's trial strategy, this is entirely understandable. Indeed, when the deliberations began, only one juror thought that the defendant had been grossly irresponsible. She felt the newspaper had been grossly



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irresponsible "in what it was saying and the picture it tried to give" of the plaintiff, because she believed defendant reported incorrect information and didn't check it and because its reporters lied to cover up their mistakes. However, because she was the juror who believed a compromise verdict had been struck, she voted with the majority on question two without demanding any significant substantive discussion regarding the resolution of that question.

During LDRC's interviews the other jurors were firm in their view that the reporters had not acted in a grossly irresponsible manner, although most felt the reporters had to a greater or lesser extent been sloppy regarding details in the case. Nonetheless, most of the jurors felt that the reporters had done a basically responsible job under dangerous circumstances. And regardless of whether they felt that what was printed was actually or, as one juror put it, "legally" true, almost all of the jurors did believe that the defendant's reporters had received information about the plaintiff's involvement in drug trafficking and that the information received had been verified by foreign police officials. As to the jurors' reactions to specific reporters, one reporter who was subjected to a particularly intense cross-examination by plaintiff's counsel, nonetheless impressed the jurors LDRC interviewed as basically believable. Another, however, left a weak impression on the jury. One juror referred to him as pompous and condescending; another thought he was too defensive on the stand; while a third got the impression that his testimony was too "rehearsed" and, therefore, not entirely credible. The one juror LDRC interviewed who was impressed with this reporter, nonetheless concluded that he knew how to "play tricks with words." In sum, despite the fact that the jurors were not entirely disposed against all of the reporters and did not find credible the most extreme of plaintiff's charges about lying and falsification, it is fair to say that the reporters as a group certainly did not convince the jury that their investigative reporting, however extensive or elaborate, was beyond question in terms either of methods or results.

Plaintiff argued that the reporters could have and should have gone abroad again, once this suit was initiated, to collect more evidence supporting their charges. This argument met with mixed success. Four jurors thought the reporters should have gone back, although only one of the four thought a failure to do so supported a finding of gross irresponsibility on the defendant's part. Likewise, the jurors were almost evenly split on whether the reporters should have confronted the plaintiff with their allegations. Some felt it would be too dangerous. Several jurors compared confronting the plaintiff to personally accusing a Mafia figure of committing crimes, and rhetorically asked, "Would you do that?" The vote on gross irresponsibility, as opposed to the raised-hand votes on truth/falsity, was taken by verbal acclamation.

##### 5. Damages

Because on question two of the special verdict form the jury found that the defendant had not been grossly irresponsible, it was

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not required to consider the question of damages. However, if it had, it seems clear that the plaintiff would not have fared well on that issue. All but one of the jurors interviewed believed that the plaintiff had not been damaged by the book, and consequently they were not prepared to award him any damages. The jurors didn't believe that anyone in Plaintiff's country had read the book, and they were unwilling to accept plaintiff's argument that he was nervous when travelling internationally because of its publication. Plaintiff's inability to introduce any evidence of alleged financial loss due to the book thus virtually denied him the possibility of recovering significant compensatory damages. The only mention of damages in the jury room occurred when one of the jurors suggested that they award plaintiff one dollar and send him home. The judge had instructed the jurors that they could award the plaintiff nominal damages, but this suggestion was apparently treated as a rebuke and not as any acceptance of plaintiff's claims of injury or damage. Another factor which appears strongly to have influenced the jury's attitude towards plaintiff's request for damages was the jurors' perception that plaintiff was a wealthy man. Although specific evidence as to the extent of plaintiff's wealth was not admitted, the jurors were aware that plaintiff had a rather luxurious lifestyle and they assumed that he must have incurred significant legal expenses in pursuing his case. They therefore considered any damage which the book might have caused as miniscule by comparison.

The one juror who told LDRC that she had felt the plaintiff deserved damages was also the juror who felt the reporters had been grossly irresponsible and who appeared most disposed to believe plaintiff's claim of lack of involvement in drug smuggling. She based her belief that the plaintiff should receive damages on what she felt was the traumatic effect the allegations in the book had on plaintiff's family. This one juror did not indicate what amount she felt was appropriate to be awarded and it may be that she had never arrived at any specific figure in her own mind. It does not appear that she had mentioned her view of the damages issue to the other jurors during the deliberations.

As noted, the judge bifurcated the issue of punitive damages in this case, so that the jury did not initially receive evidence on defendant's net worth and it did not receive legal instructions or a special interrogatory on the punitive damages issue. Because it decided the reporters had not acted in a grossly irresponsible manner, the jury never received either. By all appearances, however, they had no inclination to award punitive damages in this case.

Juror Profiles

The regular jurors in this case were quite similar from a demographic standpoint. Five of the six jurors were women, five of the six jurors were members of minority groups and at least four

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jurors came from urban, lower middle-class or working-class households. Only one of the four jurors interviewed was a college graduate and it appears that at least one if not both of those not interviewed also did not have college degrees. Politically, a majority of the jurors interviewed described themselves as either Democrats or Liberals.

In terms of attitudes toward the media, three of the four regular jurors interviewed felt the media does a good job overall and believe most of what they read in the print media or watch on television. However, one of these jurors did say that subsequent to this trial she had been misquoted in a newspaper article but, aside from that incident, none of these three jurors seems to have had any personal experience with the media and they displayed no significant pro- or anti-media bias. The fourth juror LDRC interviewed had at least one previous experience wherein a former business associate had been, he felt, badly misquoted and he cited this experience as evidence of the manner in which, he felt, the media distorts the truth. All of the alternates interviewed expressed certain negative feelings toward the media. One had had a personal experience suggesting media inaccuracy and was generally "skeptical" about what appears in the media; one had detected some inaccuracy and "bias" in the media from time to time and the third alternate interviewed was prepared strongly to accept the plaintiff's contention in this case that professional reporters would lie on the witness stand and fabricate information in a publication.

Three of the four jurors interviewed expressed their concern over the extent of drug abuse in the United States. The fourth juror interviewed, while not expressing a strong personal viewpoint on the drug issue, did express her impression that most of the jurors had a keen interest in the subject. This interest ultimately manifested itself in two ways. First, it led to an apparent reluctance on the part of several of the jurors to grant a damage award to a person they suspected of drug dealing. Second, it appeared to lead many of the jurors to adopt a "street-wise" attitude in analyzing the testimony of witnesses and the contentions of the parties. This attitude was clearly detrimental to the plaintiff in that these jurors appeared quite willing to believe that someone who they perceived as having accumulated substantial wealth through business enterprises consistent with drug dealing might well be a drug dealer, despite his adamant denials and despite the fact that he may never have been formally charged or convicted of such activities.

1. Regular Jurors

Juror A

Juror A is a woman in her mid-thirties. She is presently employed as a social worker's aide, and is taking college courses in order to complete a bachelor's degree in social work. Juror A was named the forelady of the jury because of her first position in the

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jury box. She had a strong interest in the case; she feels strongly about the drug problem, and thinks that it was important that the defendant cover this story. She even asked the defense attorney for a copy of the book in question after the trial. A enthusiastically agreed to speak with LDRC, and commented at length on her impressions of the trial.

Juror A decided to "vote for the defendant" after hearing what she felt were clearly contradictory statements by plaintiff's witnesses. A thought that both the plaintiff's daughter and the foreign police official testifying on plaintiff's behalf contradicted themselves on the stand. She thought those witnesses and the plaintiff himself lied throughout their testimony. At one point during the trial, A said to her fellow jurors, "I'm not listening to any more of these lies." On the other hand, A felt the reporters were believable witnesses who had not acted in an irresponsible manner. She also believed the testimony of defendant's surprise witness that he had participated in a drug deal with the plaintiff and felt his testimony was the key evidence that plaintiff was a drug smuggler, although she suspected the witness had not been fully forthcoming in his testimony concerning his own previous involvement in drug trafficking. A also believed the U.S. drug agents who testified on behalf of the defendant.

Plaintiff's attorney greatly impressed juror A. She described him as a good lawyer who worked hard and made a good case, but who at times was too aggressive. A mentioned that the defense attorney didn't speak a lot, or get excited, and the jury began to wish he would. His silence bothered the jury at the time, but she concluded that he must have "an ace in the hole," and when the defense produced their surprise witness, she felt her suspicion had been confirmed. She described the judge as stern and without pity for anyone, but she thought he was fair and in fact liked him.

As forewoman and a vocal advocate for the defendant, A appears to have been a dominant figure in the deliberations. She was one of the three jurors who originally voted that the references to plaintiff were not "substantially false," and she vigorously attempted to persuade other jurors to accept her position on that question. In doing so she focused on the judge's instruction that the jurors should use their "common sense" in reaching a verdict. While the other jurors recalled the original vote tally on question one as being 3-3, A rather optimistically characterized it as being 4-2, with her recollection being that four jurors initially voted that the references were not substantially false.

It was A's attempts to convince the other jurors to vote "no" on question one which frightened juror D into suggesting a compromise verdict, and it may have been A's ultimate decision to change her vote on that question which broke the impasse among the jurors. A's justification for changing her vote on question one is somewhat unclear. She said she changed her mind when she began to "focus on the passage" in relation to the requirement of "substantial



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falsity." However, she believed the reporters' accounts of the details in the case and thought they were nevertheless irrelevant in answering question one, recognized that the plaintiff bore the burden of proof and still believed he was a drug smuggler. She also denied that she had changed her vote simply to reach a compromise verdict. If this is in fact the case, her change seems to have flowed from a misapprehension of the meaning of "substantial falsity" -- twisting its meaning completely around -- rather than any change of heart regarding the plaintiff's alleged drug smuggling. In fact, juror A was one of the most vociferous in complaining about the framing of question one. Her conclusion was that if the jury's role was to decide whether or not plaintiff was a drug smuggler, the question should directly have been asked.

A did not think the reporters were grossly irresponsible, and did not think that the plaintiff should have been awarded any damages. A has had no personal experience with the media. Although she doesn't believe everything she reads in newspapers, she does believe investigative stories. She reads newspapers occasionally, and usually watches television news on NBC, ABC or CNN.

Juror B

Juror B is a woman in her 30's who has attended four years of college and works as a clerk for a regional transportation agency. B lives in a working-class neighborhood and considers herself a liberal. She was one the three jurors who initially voted that the references to plaintiff were "substantially false." Despite this vote, B says she believed that the plaintiff was a drug smuggler from early on in the trial, when she heard the testimony of the plaintiff and the foreign official who testified on his behalf. B asked that the officials' testimony be re-read during the deliberations, and concluded from that re-reading that he was lying in insisting that plaintiff should be excluded from the long list of drug traffickers he had confirmed to the reporters. She believed the testimony of the defendant's surprise witness, although she stated it didn't have any effect on her because at that time she was already convinced of the plaintiff's "guilt." Similarly, B believed the federal drug agents when they testified that the plaintiff was a suspected drug dealer, reasoning that they had no reason to single out the plaintiff and lie on the stand.

B correctly understood that the burden of proof rested on plaintiff in this case. However, in the jury room she insisted that the references to plaintiff were substantially false. This was a result of her belief that what the jury was asked to decide was "not what we heard on the stand, but what we read in the book." In other words, B apparently believed that question one's focus on the "references" to plaintiff in the book meant that the jury was to decide, not the underlying question of whether plaintiff was or was not a drug smuggler, but rather to decide the accuracy of specific details referring to the plaintiff in the book. Since in her view the defendant had not proffered sufficient evidence to refute that



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of the plaintiff on issues such as villa and nightclub ownership, or the specific route used in smuggling, B concluded that she was legally bound to vote that the references to plaintiff were "substantially false."

B believed the reporters had acted responsibly. While she felt they could have returned to the site of their research for further investigation, she believed that they had originally had their information verified by the foreign police officials. She consequently agreed that no damages should have been awarded. B felt that plaintiff's attorney had a tendency to put words in his witnesses' mouths, and that defendant's attorney -- while rather unassertive at the outset -- got progressively stronger as the case went along. She thought the judge was fair, and didn't favor either party, but also felt that his instructions were confusing. B is an avid reader, regularly reading all the local newspapers, and newsmagazines such as Time and Newsweek. She doesn't believe everything she reads, however. B watches TV news occasionally, and frequently informational programs such as 20/20.

Juror C

Juror C is a woman in her late 30's. C was contacted by telephone and invited to participate in this Study, but she declined to do so, stating that she was through with the case and did not want to be involved. According to the jurors interviewed, juror C initially voted "yes" to question one -- i.e., that the references to the plaintiff were substantially false. However, C appears to have vacillated during the deliberations, and indeed juror A recalled that C had originally voted "no" on the question of substantial falsity. Jurors interviewed reported that C did think that the plaintiff was a drug smuggler, but that she believed that the burden was on the defendant to prove him as such. C thought that the reporters had not acted in a grossly irresponsible manner and voted that way on question two. C apparently made no mention of damages during the deliberations.

Juror D

Juror D is a woman in her mid-30's who attended two years of junior college and who now works as a word processor. This was the third time that D had served on a jury, the other two cases being criminal in nature. She was extremely pro-plaintiff in outlook, admitting that she hoped throughout that the plaintiff would win this case. D voted that the references to plaintiff were substantially false because she felt that it was the defendant's burden to prove that plaintiff was a drug smuggler and the truth of the other details it printed, and in her opinion defendant had not done so. In fact, D was the last of the jurors to acknowledge that plaintiff was "involved" in drug smuggling, doing so only during the deliberations after the foreign police officials' testimony was re-read.

D believed most of the plaintiff's denials of involvement in drug trafficking, although she felt that the police officer testifying on plaintiff's behalf was lying throughout. D gave little credence to defendant's surprise witness, coming into the trial at such a late date. D also did not think highly of the U.S. drug agents, stating that "I don't have much love for police."

In the jury room D was convinced that the references to plaintiff were substantially false, and that the reporters had been grossly irresponsible in painting a false picture of the plaintiff. She disbelieved most of the reporters' testimony. However, when she concluded that the other two jurors voting with her on question one, jurors B and C, might weaken and change their votes she suggested to juror A that a compromise verdict be reached. She would vote "no" on gross irresponsibility if the jury voted "yes" on substantial falsity. D was willing to vote this way because she eventually came to believe that the plaintiff was under suspicion for drug smuggling, and that the reporters had received his name from Turkish police officials. This led her to conclude that plaintiff probably had been "involved" in drug smuggling in one way or another.

As noted, D was candid in admitting her belief that a compromise verdict had been agreed upon by the jurors. She was disturbed by some of the other jurors' impatience to conclude the deliberations, and the tension and verbal sniping that attitude engendered in the jury room. D was the only juror who believed that the plaintiff should have received damages because of the effect she believed the book had on his family. D felt plaintiff's attorney did a very good job on the case, except that he should have had the plaintiff admit that he did spend time in a nightclub described in the book, since she believed his denials were unbelievable. D also thought defendant's attorney had done everything he could do, and had been especially resourceful in bringing in a surprise witness. She thought the judge was fair and impartial, although she recalled his repeated reprimands of plaintiff's attorney for his outbursts.

D reads a local tabloid newspaper daily, and watches TV news occasionally. She watches Nightline regularly, and reads Time and Newsweek often. She believes that newspapers do take sides on questions, and while she would hope to believe that most of what she reads in the paper is true, she suspects that sometimes it is not. Her feelings against drugs did not appear to be as strong as those of most of the other jurors.

#### Juror E

Juror E is a 43-year-old man who has a bachelor's degree in education and works as a disability analyst for a government agency. In that position he reviews claims and frequently comes in contact with attorneys. E describes himself as a Democrat and had never served on a jury before being selected in this case. E has a brother who is a rehabilitated drug addict, a fact which he indicated did not come out in the voir dire; however, E claims this

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fact did not affect his consideration of this case. E was one of the three jurors who initially voted that the references to plaintiff were not substantially false.

E concluded that plaintiff was a drug smuggler near the end of the trial. He suspected that the plaintiff was lying on the stand, but thought that he generally presented his case well. Similarly, he believed the foreign police official who testified on plaintiff's behalf was also lying. Yet what ultimately convinced E that plaintiff was a drug smuggler was defendant's surprise witness who connected plaintiff to another alleged drug transaction. This, he felt, was the key testimony in the case. Although E realized that details printed in the passage were irrelevant in answering question one, E ultimately switched his vote on that question because, in his words, he felt he was "pinned down by the court's language." Focusing on the passage as printed, and failing to apply the correct burden of proof, E decided that the defendant had not presented sufficient concrete proof of the truth of the allegations contained in that passage.

While E was strongly against plaintiff on the issue of truth of the underlying allegations, he also felt that the reporters had been rather sloppy in their information-gathering, and should have gone back to obtain more evidence. However, he did believe that their information had been verified by police officials in the plaintiff's locale. He characterized the reporters as "a little" irresponsible and consequently he voted "no" on question two. E did not want to award plaintiff any damages, since he didn't believe anyone in plaintiff's homeland had read the book.

E called plaintiff's counsel a "real actor -- a good action lawyer." He had concluded that the defense attorney was confused and perhaps even unprepared at the outset of the trial, and E was afraid he would be "eaten alive" by plaintiff's counsel. However, by the end of the trial he had substantially changed his mind, commenting that the defense attorney had gotten stronger as the trial progressed and giving him an "A-plus" on his summation. E noted the annoyance the judge often displayed with plaintiff's attorney, but he felt the judge was impartial and E liked him.

E had previous experience with the media that was quite negative. He stated that while working at a previous job a local newspaper badly misquoted someone on a subject he was familiar with. "I have the feeling that (the media) can get things wrong," E said. E feels that sometimes writers may twist a story for an editor, to get a juicy story. They twist words out of context. Despite his very strong feelings about drugs, E doubted how important it was for the newspapers to undertake a story such as this since people at the street level already fully know what is going on regarding drug trafficking. In fact, E stated his belief that the police and FBI already know who the drug smugglers are, and that it is difficult for "outsiders" such as the defendant's reporters to really "get inside" this type of story. E used to read

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the paper regularly but he "swore off reading long ago." He does read the business and stock sections of the newspaper and watches some TV news.

Juror F

Juror F is a woman in her 30's who works for a local hospital. She originally agreed to meet with LDRC for an interview, but failed to appear. LDRC subsequently tried to contact her, but without success. According to the other jurors, F was quite adamant in her belief that plaintiff was a drug smuggler from the very outset of the trial. Her disbelief of the plaintiff's basic testimony led her to that conclusion. During the deliberations F apparently stood firm in this adamant belief and is reported to have largely declined otherwise to join in the deliberations. Juror F originally voted "no" to question one -- i.e., that the references to the plaintiff were not substantially false. It is reported that F ultimately changed her vote on that question immediately after the forewoman, Juror A, changed her vote. F did not think the reporters had acted in a grossly irresponsible manner, and voted "no" on question two. F was the juror who, on the first day of the deliberations, suggested that the jurors "give the man one dollar," but this suggestion appears to have been treated as a facetious one both by the other jurors and by F herself. It certainly appears that F did not want to award plaintiff any damages.

2. Alternate Jurors

Juror G

Juror G is a 36-year old man who works as a social worker at a psychiatric center. G has a B.S. in Psychology and a Masters degree in Social Work. Of all the jurors and alternates LDRC contacted, G had the most accurate understanding of the judge's instructions on the applicable law and the most complete recall of the evidence in the case.

From an early point in the trial, G found himself disbelieving the plaintiff's statements on the stand, however he worked hard to follow the judge's instructions to keep an open mind as the evidence was presented and only became convinced that plaintiff was a drug smuggler after hearing the testimony of defendant's surprise witness. He thought the surprise witness was credible and was, in fact, the key witness on truth. G initially believed the testimony of the foreign police official who appeared on plaintiff's behalf, but defense counsel's cross-examination suggested to him that the official wasn't telling the truth. When the judge instructed the jurors that the accuracy of any details the defendant printed was irrelevant in deciding question one, G was surprised but he understood that instruction and was not confused by the charge as to "substantial falsity." G also had a clear recollection of where the burden of proof lay on both questions one and two. These instructions convinced G that a verdict for the defense was legally required.

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Therefore G said he was shocked when after the trial he learned of the jury's decision on the first question, and felt that for that decision to have been reached the charge must have been amended after the alternates had been excused. G would have voted that the references to plaintiff were not substantially false. He reasoned, "This was a suit for damages, and the issue -- the only thing that could be damaging to (plaintiff) -- was whether or not he was a drug smuggler. So the 'substantive' issue is whether or not he was involved in drug trafficking."

G did not concern himself greatly with the reporters' performance, since he would never have reached the second question on the special verdict form. He thought not interviewing the plaintiff was sloppy on their part, but after the testimony of the surprise witness that fact did not matter as much to him, since he felt the reporters had "gotten the goods" on the plaintiff. He did not think the reporters had been grossly irresponsible, and did not think the plaintiff deserved to be awarded any damages.

Although G thought plaintiff's attorney was too flamboyant and repetitious and made outrageous requests to the witnesses, G still felt that he did a basically "good job." However, at one point during cross-examination of the surprise witness G even began to feel that plaintiff's counsel was acting like a "Mafia mouthpiece." G also thought the defendant's attorney did good work, and that he won the case by producing his surprise witness. He thought the judge was fair, kept a tight rein on plaintiff attorney's objections, and was running a tight court overall.

G had no strong personal feelings or experiences regarding drugs. Because of the heavy workload in his job he rarely gets a chance to read daily newspapers, but he does watch TV news and reads a Sunday newspaper. G recalled one instance in which a newspaper article about a psychiatric center at which he had worked presented what he considered a distorted view, and the article angered him. He is uncertain whether reporters lie when working on a story. "I think people frequently operate out of self-interest, so I'm generally skeptical of everyone," G said.

Juror H

Juror H is a woman in her late 20's who works in the printing department of a large communications company. H's initial reaction to the case was that the defendant was "guilty," although she considered the plaintiff "one of the biggest drug smugglers you'll ever see," and didn't think he proved anything. However, H's understanding was that the burden was on the defendant to prove "their charges." This perception may have flowed from the fact that H had previously served as a juror in an eight-month criminal trial.

H thought the plaintiff did a good job on the stand, but that the police official who testified on his behalf "lied from beginning to end." The defendant's surprise witness proved to H that he had



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completed an earlier drug deal with the plaintiff, but she did not consider that enough evidence for the defendant to win the case. Not only did H confuse the burden of proof, she also felt that details written in the passage concerning plaintiff were relevant in answering question one. She therefore criticized the defendant for not being able to prove the truth of these incidental details. Had H been involved in the deliberations, she would have voted that the references to plaintiff were substantially false.

H thought the reporters were lying during the trial, and had a "who cares?" attitude about their reporting. She felt they should have gotten more information, confronted the plaintiff with their charges, and in general should have done more work. She did think the reporters originally received their information on the plaintiff from foreign sources, and was unable to say whether they had been grossly irresponsible or not. H did not think the book's publication had disturbed the plaintiff's life, and did not think he deserved anywhere near the amount of money he was requesting.

H felt the plaintiff's attorney was loud but effective, and that the defendant's attorney simply needed more time to prepare evidence for a case. H is concerned about the drug problem because she has seen people living around her dying as a result of drugs. H said she had heard of libel issues before this case but was not familiar with a major recent libel case that had been brought against her employer.

Juror I

Juror I is a high school-educated woman in her mid-40s who works as a reservationist for a major airline. She had served as a juror in a previous criminal trial. She complained that she did not know any of the legal standards in this case until the close of the trial. Juror I understood that in this case it was up to the plaintiff to prove that he was not a drug smuggler, and she felt he did not accomplish that. However she found some of his testimony credible and she was not convinced that the plaintiff was a drug smuggler until the end of the trial. Had she taken part in the deliberations, Juror I would have voted that the references to plaintiff were not substantially false.

Juror I never reached a definite conclusion on the foreign police official who testified for the plaintiff, although she felt that he was too involved with the reporters not to have said anything to them. Juror I thought the defendant's surprise witness did a good job testifying, and she did not accept plaintiff counsel's criticism of the late date of his appearance at the trial. Juror I also did not think the accuracy or inaccuracy of the details the reporters printed made much difference in the case. She thought the U.S. drug agents would not have testified on defendant's behalf without some basis, although she didn't like the fact that one of them was paid to testify, believing it was his civic duty to do so.

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Juror I felt that the defendant absolutely did not act in a grossly irresponsible manner. She didn't think the reporters lied or that they had pulled the plaintiff's name from a hat, and she didn't think they were negligent. However, she did feel that they could have consolidated their records more, may have stretched some facts in their reporting and might have done a better job if they had known there would be a libel suit against them in the future. Juror I did not feel the plaintiff was harmed by the book or was in any financial trouble, and she did not feel he deserved to be awarded any damages.

Juror I thought the plaintiff's attorney was over-dramatic and frequently insulted the jurors' intelligence. On the other hand, she felt the defense attorney "got the job done without all the shenanigans." She stated she is "not a big newspaper reader." She said that Time magazine confused her because it "always had contradictions in its statistics." Juror I often sees slight inaccuracies in TV newscasts and thinks the media can be biased, but she doesn't think reporters intentionally report false information. In this case, she "could not see the three reporters conniving to lie." Her belief was that they would not last long in the profession if they did so. Juror I did not have any extensive familiarity with libel but did vaguely remember the Westmoreland and Sharon cases.

Juror J

Juror J is a woman, approximately 40 years of age, who works as a lab technician at a local hospital. J received several letters from LDRC requesting an interview, but did not respond. From conversations with other jurors, it is believed that she also felt plaintiff was a drug smuggler.

Juror K

Juror K is a man in his mid-40's who works as a routeman for a dry cleaners. LDRC was unable to locate or contact Juror K. However, based on conversations with other jurors it is believed he too felt plaintiff was a drug smuggler.

Juror L

Juror L is an approximately 50-year-old man who is presently unemployed. LDRC was unable to locate or contact Juror L. However, based on conversations with other jurors it is believed he also felt plaintiff was a drug smuggler.

LDRC Analysis

The visible results of the jury's deliberations in this case, a split special verdict finding in favor of the libel plaintiff on the truth/falsity issue while at the same time finding in favor of the

media defendant on the issue of fault and thereby granting judgment for the defense, would at face value appear to have been a logical and predictable one. It is a pattern that has been followed not infrequently in previous media libel cases, perhaps most notably in Sharon v. Time. However, an in-depth look below the surface of this seemingly plausible Solomonic outcome reveals a far more complex picture and suggests the very real dangers and pitfalls -- for both plaintiffs and defendants in libel actions -- of entrusting one's reputation, personal or professional, to the common sense perceptions and decisions of even the most well-meaning lay jury.

From the libel plaintiff's point of view -- and assuming for these purposes that the plaintiff is genuinely aggrieved by charges that in fact are false -- the jury's unanimously negative response to the plaintiff's claim of innocence in this case demonstrates the fearsome prospect that is certainly always present when truth/falsity is seriously contested and when the underlying charges are ones that are difficult definitively to prove or disprove -- i.e., the prospect that the jury will ultimately disbelieve the plaintiff and find the charges to be true and that this will be revealed by means of a special verdict or otherwise. Such a result, of course, could leave the plaintiff, after a presumably arduous and costly litigation, in a worse position than if the libel suit had never been brought or pursued in the first place.

From the media libel defendant's point of view -- and again assuming that the journalists were not at fault, actually or at least in the legal sense, in publishing charges that may have turned out to be false -- the jury's at best lukewarm response to the newspaper's claim in this case, not only of lack of fault but of investigative journalism of the highest caliber, demonstrates the perhaps impossibly high standards to which juries may hold the media, even where as in this case the jury has concluded that the underlying charge was both true and highly significant. If this seems to be second-guessing by the jury from hindsight and more than a bit unfair, this case nonetheless forcefully shows that media libel defendants must be wary of jury's propensities to second-guess their methods in this fashion. Based on the findings of LDRC's Jury Studies to date, juries seem quite prepared to agree with a libel plaintiff's contention that you can always do more to check a story and it does not necessarily impress them either that an extensive investigation was undertaken or that the gist of the story is true, so long as details are wrong and something more could have been done to make the publication more accurate. Here most of the jurors agreed with the contention that the journalism was "sloppy" even though they felt the story ultimately published was essentially correct and even though they had no particular sympathy for a plaintiff they apparently all believed was involved in drug trafficking.

In sum, it is almost unavoidable but to conclude that in this case only the slightest shift in the composition of the jury, in the overall impressions conveyed during the trial by plaintiff, his

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say. The human, fundamentally instinctive run for cover. That's what I was doing. Worry about libel insurance. twenty years we had been writing our column and we had been denounced, spat upon, reviled -- why even once, [I] woke up, went outside my house in Georgetown and found a swastika along the side of my house. It was during the Vietnam War, I have no idea why it was there. It wasn't a pleasant experience. I've been attacked by experts.

But we had never been sued before. There's a big difference between waking up on October 20, when the stock market dropped out of sight ... and being sued. The stock market dropped 510 points. We were sued for \$6 million. When the stock market goes up or down the drain like that, [at least] you have every friend in town waiting beside you, you're all in the same boat. When you're sued, you have your partner and your wives. And don't ... you think that 9 out of 10 politicians and bureaucrats in Washington are watching too -- Professor Ollman -- and they're on their knees every night and every morning hoping he's gonna win. 'Cause that would redeem their pretended grievances against us, Evans and Novak, by putting us in the courthouse. ... That's the general attitude, the general feeling we have in Washington.

So first, from the [libel defendant's] view -- and this is before we'd even known that Jim Hoag, who was then the publisher and the editor-in-chief of the Chicago Sun Times, which is our base paper, we didn't even know that Jim was prepared to pick up the tab. We had, of course, no libel insurance. And incidentally, I checked around town last week preparing to come up here -- George Will has no libel insurance. Bill Safire has no libel insurance; Richard Cohen has no libel insurance. We have no libel insurance. Tony, I don't know. You have the New York Times. I doubt if you have libel insurance. At least there is some protection from the great newspapers that some of us work for -- the New York Times, the Washington Post, much later on there was protection from our home paper, the Chicago Sun Times, thank Jim Hoag. And there was an unusual and exceptional and absolutely essential protection for us that we had no idea existed on that February 15, 1979. And that was Dan Feldman, who I hoped would be here tonight who, indeed, is the reason why I'm here tonight. Dan had handled libel litigation in Chicago for some time and he handled my case. He is one of the subtlest artists, in my opinion, in any court of law that Novak and I have ever witnessed.

We knew nothing [of this] on February 15[, 1979]. All we knew was fear. And fear was compounded by the fact that the language in our column that quote, "Professor Ollman has no status within the profession (he was a political scientist) but is a pure and simple activist." End quote. [That language] was accurately attributed by us to an off the record source. We were determined to protect our source and that placed a heavy burden on the shoulders of Mr. Feldman. When we were unable, and we worked hard at it, to persuade our source to reveal himself, but he refused, Mr. Feldman performed an extraordinary maneuver. He based our case on the opinion versus fact argument. ...

During the two years that Professor Ollman's case ran ... I cannot recall a single change in anything Bob Novak and I wrote, or that we investigated or that became one of our five columns a week. I cannot recall anything that was changed by the fear, by fear that was instilled in us by the Ollman case and the prospect of losing \$6 million. But I submit to you that psychologists could have a field day with that. Could we recognize latent fear within ourselves, a fear syndrome that could influence, or change our words subconsciously, take our eye off a juicy target for a column. It's hard to say. What one thinks of when one becomes a libel suit target are school bills, vacations, the wife taking in laundry. Do you think I'm kidding? I'm not. I think Jack made that point. This is the only suit we have ever had and I am telling you it is a chilling, it has a chilling effect. ... Though I cannot be certain that the Ollman suit did not in some subtle and subconscious way have an impact on us, I am certain of this: Novak and I made a conscious decision in a conversation not to let the suit interfere with our reporting or our writing. I think we succeeded -- that is, there was no conscious notching down.

Now there are a few ironies in that decision that the Circuit Court of Appeals in the District of Columbia came out with upholding the District Court's decision to give us a summary judgment. In dissent, Judge Scalia hit us in the solar plexus, writing sarcastically and I quote, "Existing doctrine provides ample protection against the entire list of horrors [supposedly] confronting the defenseless modern publicist," unquote. And he calls our appraisal of Ollman, which I read to you, a coolly crafted libel. Judge Robert Bork, in concurrence with the majority, wrote that libel suits against the press "are ... capable of silencing political commentators forever," unquote. And listen to this: Bork, and I quote again, "Unless we continue to develop doctrines to fit first amendment concerns, we are remitted to old categories which, applied woodenly, do not address modern problems," unquote. Bork. And then Bork went on: "Judge Scalia's dissent implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. ... When there is a known principle to be explicated the evolution of doctrine is inevitable." Pretty interesting, when you think of the politics behind the decision made in Washington ... on Judge Bork's appointment to the Supreme Court. Judge Bork, sad for me say, is still a judge, Scalia's a Justice. Bork, today's he's a judge because he was charged with being imprisoned in the doctrine of judicial restraint. [Yet Bork was not "restrained" when it came to] the general principle of first amendment protection of the press [in libel cases].

But forgetting our own problems, former Judge Arlen Adams has wisely recognized that some huge, defamation verdicts are, and I quote, "a form of de facto censorship." We all know about those extraordinarily huge defamatory verdicts, the few of them, we know about them. But ... common sense, I think, is also found in words recently spoken by Arthur Miller. He thinks the Supreme Court has



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the honor, to use his words, "Of making the American journalist the power it is today." That the Supreme Court has not only kept faith "with the liberal words," as he put it in the first amendment, but has for two hundred years bent and stretched and enlarged the first amendment, so that no one who was around when it was written would even recognize it. The result of that, says Professor Miller, is that libel laws do not restrict journalism to any meaningful degree. And I leave you with this final Millerism, and I quote him: "There is virtually no right of privacy that can stand up straight today ... in the presence of the first amendment." Tony will probably disagree with that. I think it makes pretty good sense.

So if I may close by quoting Joe Biden, and in it I may find my own view today, if I can quote Joe Biden who once said, "We have nothing to fear but fear itself." Thank you very much ladies and gentlemen. [APPLAUSE] Tony, we presumed on your patience.

TONY LEWIS

No you didn't....I'll tell you it's been worth waiting for because there is nothing, I suppose, equal to the reality of being the target of such a libel action. I have not been a target myself. I have never heard it described more graphically or feelingly or more significantly than you just gave us. It is a reality, and it's one I don't have to say to you, I come from a slightly different viewpoint. I share with you fully the sense of how important it is that you not be chilled and the press not be chilled in the important function that you and some others perform of dealing with what makes the society tick, what makes the government work. My doubts ... run to the need to [find] some mechanism [apart from monetary damages] to give offended citizens a chance to repair feelings whose invasion really goes to a sense of physical integrity....

But that's not our purpose [tonight], so I'm not going to go on, except with one concluding thought. I think when you hear Rowly, you understand one of the reasons why we're here, why the LDRC is here. We never had this kind of problem before twenty-three years ago last March, ladies and gentlemen. There have been libel actions in this country from the beginning. But there had been no sense of libel actions this chilling to the press and its important societal function. What happened twenty-three years ago was that the press really performed that function in the most fundamental issue facing this country at that time, the civil rights movement in the south, the resistance of the south to coming into the 20th century. And it was when those deepest issues were touched on by the press that retribution was attempted and that the Supreme Court stepped in and said the first amendment protected the press in its great function, even in the context of the old common law libel action.

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So that decision has spurred the press to do more, and I think it's inevitable that doing more and doing more serious work, much more serious work, is going to bring more trouble. It's very tough when it falls on an individual or two individuals like Evans and Novak and they're on their own and ... the chill is real. But I guess it's the price of freedom, and we're lucky that you out there are around to help defend us and defend what I think is a principle essential to the safety of this country.

I say "safety," and it may seem like a strange word. But, you know, Hugo Black, who was the great first amendment exponent of our times, had a sister-in-law -- she's still around, Justice Black isn't -- named Virginia Durr. Virginia Durr wrote in a book of hers that when she heard Hugo talk about freedom, and even the most difficult kinds of speech, she felt better. She said, "Hugo makes me feel so safe." And that's what it's about, ladies and gentlemen, that's what this freedom is about. Being able to talk, being ready to stand in the most uninhibited, robust, live and open discussion, and feel safe.

Thank you.

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LIBEL DEFENSE RESOURCE CENTER  
1987 ANNUAL REPORT

Chairman and General Counsel's Note

1987 presented new challenges<sup>1</sup> to the Libel Defense Resource Center (LDRC) and its media supporters. Despite all of our efforts, events proved once again that the battle to control excessive libel verdicts and to advance First Amendment interests in the libel field must constantly and vigilantly be waged. For example, LDRC has long focused attention on outrageous multi-million-dollar jury awards too often imposed against the media in libel actions. Indeed, LDRC will soon be issuing a report documenting a substantial recent downturn in the average of such awards. Unhappily, just as this welcome trend is being reported, we see other, perhaps even greater, threats on the horizon. For, while some of the most outlandish seven and eight-figure awards have recently been eliminated, more high six-figure awards are being imposed than ever before. And now, for the first time, the media's singular success in overturning excessive damage awards on appeal is in jeopardy. If not overturned the first multi-million dollar verdict, ever finally affirmed on appeal, could become a reality in Brown & Williamson v. CBS; another similar verdict, in Newton v. NBC, lurks in the wings.

In 1987 LDRC continued to draw attention to such problems and excesses. LDRC also continued its in-depth studies of other aspects of libel litigation, publishing its third two-year study of summary judgment motions and its third jury attitudes study. LDRC organized its third biennial educational conference, this time in Denver, Colorado, again co-sponsored by the American Newspaper Publishers Association and the National Association of Broadcasters. LDRC also pursued efforts to assure linkage of libel to legislative tort reform efforts in dozens of states around the country. And finally, while there were no significant libel-related developments in the U.S. Supreme Court in 1987, LDRC was active in 1987 in connection with two important cases on the Court's 1988 docket -- Bankers Life v. Crenshaw (LDRC provided backup data in connection with a media amicus brief addressing punitive damages issues in this non-libel action); and Falwell v. Hustler (LDRC helped alert various amicus groups to requests for assistance in this critically-important intentional infliction of emotional distress action).

In the report that follows, more particulars of LDRC's program during its seventh full year of operations are presented. Once again, we hope you will agree, this report reflects a year of continued accomplishment on behalf of LDRC's more than five dozen supporting media organizations -- as well as its more than four dozen new Defense Counsel Section media lawfirm supporters -- all of whom share a common interest in LDRC's purposes and activities.

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Finally, we would, as always, give our thanks to those many, many individuals and organizations who contributed their time and support -- moral and financial -- to LDRC in 1987. We look forward gratefully to continued support as LDRC enters 1988, its eighth year, with another ambitious agenda for positive action as outlined herein.

New York City  
January 20, 1988

Harry M. Johnston, III, Chairman  
Henry R. Kaufman, General Counsel

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### Background

The idea that ultimately led to the formation of the LDRC had its genesis in the late 1970's with the informal meetings and discussions of an "Ad Hoc Libel Group" -- several attorneys representing media organizations concerned about adverse developments in the libel field. Later, in 1979 and early 1980, proposals were entertained to formalize such activities under the aegis of a new "umbrella" organization. Finally, in November, 1980, these efforts culminated in the formation of a Steering Committee, the election of a Chairman and the appointment of a General Counsel for the new entity, the "Libel Defense Resource Center."

In its first years of operation LDRC moved rapidly from theory to reality. Substantial funding was provided by an impressive array of leading trade groups, professional organizations and media entities. An information bank and clearinghouse system were established and utilized by libel defendants and their attorneys. Various special projects and studies were formulated and undertaken. LDRC was increasingly looked to as a source of useful and authoritative information by attorneys practicing in the field as well as by journalists, academics, government officials and others with an interest in libel (and related privacy) developments.

### Organization

LDRC was formally established in 1981 as an unincorporated, not-for profit tax exempt 501(c)(6) association, governed by a Steering Committee comprised of one representative from each of LDRC's supporting organizations. Under its by-laws, LDRC's day to day operations are supervised by an Executive Committee of between 9 and 13 individuals, chosen from the larger Steering Committee, headed by a Chairman selected by the Executive Committee, and administered by a retained General Counsel. LDRC maintains its headquarters and small staff at the offices of its General Counsel. Members of LDRC's Executive and Steering Committees include some of the nation's most knowledgeable libel defense attorneys and representatives of most of the nation's leading media organizations.

### Finances

In 1987, LDRC obtained voluntary financial contributions from 55 of its supporting organizations totalling more than \$140,000. In addition, substantial revenues were also realized from interest on income; sales of LDRC materials, including the 50-State Survey, the quarterly Bulletin and educational videotapes; also, from copying fees; from fees generated in connection with LDRC's biennial educational conference; and from ticket sales in connection with the



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annual LDRC Steering Committee dinner. With these revenues, LDRC was able to fund a total budget (including all special projects and activities) approaching \$250,000 -- to pay for legal fees; fees for administrative staff; stipends for law student interns; fees for other legal research; rent for office space; printing and distribution of LDRC's quarterly Bulletins; the ongoing computerization of more than 1250 records including contributors, subscribers, press contacts, members of the new Defense Counsel Section and LDRC's brief bank digests; the publication of another revised edition of the LDRC 50-State Survey; the publication of several major LDRC studies, reports and papers as summarized in this report; and all other day-to-day operations of the Center.

LDRC Steering Committee

The sixty-one organizations that comprised LDRC's Steering Committee in 1987, including three new supporters signing on during the year,\* represent a broad spectrum of leading media groups, publishers, broadcasters, journalists, editors, authors and libel insurance carriers, some of whom may have never previously worked together in a formal way but all of whom share a common interest in responding effectively to continuing problems in the libel field. They are: American Newspaper Publishers Association; American Society of Journalists and Authors; American Society of Newspaper Editors; Associated Press Managing Editors Association; Association of American Publishers; Authors League of America; Bantam Doubleday Dell Publishing Group; The Boston Globe Foundation; CBS Inc.; CMP Publications, Inc.; Capital Cities/ABC, Inc.; Chronicle Publishing/Chronicle Broadcasting Companies; The Copley Press; Cowles Media/Minneapolis Star and Tribune Companies; Cox Enterprises, Inc.; The Dallas Morning News; Donald W. Reynolds Foundation; Dow Jones & Company; Dun & Bradstreet, Inc.; Employers Reinsurance Corporation; Forbes, Inc.; Gannett Company, Inc.; Harper & Row Publishers, Inc.; The Hearst Corporation; Houghton Mifflin Company; The Journal Gazette; Knight-Ridder Newspapers, Inc.; Landmark Communications, Inc.; Macmillan Publishing Co., Inc.; Macromedia, Inc.; Magazine Publishers Association; McClatchy Newspapers; McGraw-Hill, Inc.; Media/Professional Insurance, Inc.; Meredith Corporation; National Association of Broadcasters; National Broadcasting Company, Inc.; National Newspaper Association; National Public Radio; The New York Times Foundation; The New Yorker; Newhouse Newspapers; News America Publishing, Inc.; Penthouse International, Ltd.; Philadelphia Newspapers, Inc.; Playboy Enterprises, Inc.; Radio-Television News Directors Association; The Readers Digest Association; The Reporters Committee for Freedom of the Press; The Scripps Howard Foundation; Simon & Schuster/Gulf & Western Industries, Inc.; Society of Professional Journalists, Sigma

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\* Chronicle Publishing/Chronicle Broadcasting Companies; Meredith Corporation; National Public Radio.

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Delta Chi; St. Martin's Press; St. Petersburg Times; Student Press Law Center; Time Incorporated; Times Mirror Company; Tribune Company; Warner Communications, Inc.; The Washington Post Company; and Westinghouse Broadcasting and Cable, Inc.

### LDRC 50-State Survey

In 1987 LDRC once again published and marketed an updated volume of its annual 50-State Survey of current developments in media libel and invasion of privacy law. The 1000-plus page 1987 Survey, published in the Spring of 1987, included a Special Report on Foreign Defamation Law prepared by Coudert Brothers, a lawfirm with extensive experience in media libel matters as well as in international law. The 75-page Special Report provided a comparative law overview of defamation and related laws in selected countries throughout the world and, in addition to covering basic legal concepts regarding libel, slander, privacy and related claims, jurisdictional matters as well as practical issues, discussed the potential relevance of foreign defamation laws to U.S. publishers and broadcasters of materials that may be circulated internationally and/or that may be of and concerning foreign nationals. In the Spring of 1988, LDRC plans to publish a revised and updated edition of the 50-State Survey. An extensive re-edit of this year's Survey will be undertaken to assure the continued high quality of this centerpiece publication of the LDRC. This new volume is intended for use throughout 1988 and will contain state-by-state information current through December 31, 1987.

### LDRC Studies, Reports and Scholarly Publications

In working to understand and to describe the objective realities of libel law and litigation in the United States, and in order to reinforce recognition of the need for continued reform in the libel field, during 1987 LDRC published several major studies, reports and papers assessing libel developments from various points of view.

#### (i) LDRC Summary Judgment Study -- Two-Year Update, 1984-86

In 1987 LDRC completed and published its third two-year empirical study of the results of motions for summary judgment in media libel actions. This third study found a slightly higher rate of defense success than even the two previous studies, all of which have consistently documented that some 3 out of 4 of the media's motions for summary judgment in libel actions are granted. With publication of this latest Study LDRC has now reported on the results of just under 400 summary judgment motions since 1980. LDRC's summary judgment studies began just after the Supreme Court's decision in Hutchinson v. Proxmire, a footnote to which questioned the availability of summary judgment in many constitutional libel actions. The cut-off date for the most recent study was the Supreme

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Court's decision in Anderson v. Liberty Lobby, a case adopting a seemingly far more favorable approach to summary judgment in media libel actions. LDRC's latest summary judgment report concluded that Hutchinson had not had a statistically significant impact on the availability of summary judgment and that Anderson would, if anything, increase the frequency with which courts in the future grant summary judgment in public figure defamation actions. Further followup studies are planned to assess the actual impact of Anderson.

(ii) LDRC Juror Attitudes Study III -- Private-Figure (Gross Irresponsibility)/Newspaper/Defense Win

In 1987 LDRC completed and published the third in its series of juror attitudes studies. These juror studies identify libel verdicts of special interest to the media which are then examined in depth. Jurors are personally interviewed in order to ascertain how the particular verdict was arrived at, how the jurors viewed the attorneys, parties, witnesses, legal issues, etc., and what arguments, perceptions or attitudes affected those views. LDRC's first juror attitudes study dealt with a major newspaper defendant in a public figure's libel action, lost by the defendant at trial to the tune of nearly a million dollars in compensatory and punitive damages. The second juror study also dealt with a case lost by the media, this involving a major television defendant in a private figure's libel and false light privacy action. The damage award there was \$1.25 million, with \$1 million of that in punitive damages. LDRC's third juror attitudes study focused on an all-too-rare media defense win, this in a private figure's libel action against a major newspaper decided under a legal standard of "gross irresponsibility." Even in this case, however, although judgment was entered for the newspaper on a finding of lack of the requisite degree of fault, the special verdict was actually a split verdict, with the jury voting in favor of the plaintiff on the issue of falsity. On that issue, LDRC's study concluded that the jury failed to recall crucial elements of the judge's instructions and were confused by language in the special verdict form.

(iii) Tort Reform and Libel: Report Presented by LDRC and Time Incorporated to the American Tort Reform Association

In January, in cooperation with, and with financial support from, Time Incorporated, LDRC presented a major report on Tort Reform and Libel to the American Tort Reform Association (ATRA). The ATRA paper traced the background of the current widespread tort reform movement in the United States. It sought to demonstrate that the case for tort reform in the area of libel is just as compelling as that for reform in any other problem area of civil litigation -- viz., that excessive damages are common in media libel actions; that the cost of libel litigation is excessive and increasing; that the incidence of meritless, and often frivolous, libel claims is high; and that libel insurance costs have skyrocketed, while available coverage has declined. The ATRA paper then reviewed the current

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agenda for tort reform, noting that a number of key reforms, in particular the issues of caps on non-economic damages, caps or other limits on punitive damages, and stronger sanctions against frivolous claims and litigation, are all highly relevant to libel and the media. Unfortunately, some reform legislation, already passed or currently under consideration, is not expressly or definitely applicable to libel and the media. The ATRA paper concluded by analyzing current reform proposals and pointing out how they could be amended so as more clearly to apply to libel and the media. The LDRC paper was formally accepted by ATRA and has subsequently been included in its Legislative Resource Book on Tort Reform. In 1988 this ATRA paper may be republished in revised and updated form as a law review article.

(iv) LDRC Tort Reform Project: Periodic "Updates" and Related Materials, Analyses and Reports

In addition to the ATRA report, and as a part of its Tort Reform project, LDRC published a series of periodic Tort Reform "Updates," circulated to several dozen organizations and individuals interested in LDRC's effort to link tort reform, libel and the media. Update #1 reported on the results of a state tort reform survey, conducted by LDRC, which attempted to assess the positions and activities of state press and broadcaster associations on the issue of tort reform. Also included in Update #1 was an item on the American Bar Association's "Action Commission" report on tort reform and an item on the American Legislation Exchange Commission's "model" tort reform legislation. Update #2 included LDRC's own "model" tort reform legislation packet and an item on the report and proposals of the Alliance of American Insurers regarding tort reform. Update #3 presented a state-by-state legislative status report on tort reform and libel. This report indicated that as of approximately July 31, 1987, as many as 24 states had enacted, or had under serious consideration, reforms of potential assistance to media libel defendants -- (i) caps on non-economic damages (16 states); (ii) limits on punitive damages (12 states); and (iii) sanctions against frivolous litigation (16 states). Finally, in addition to these LDRC Tort Reform "Updates," a variety of other materials related to tort reform, including a series of legislative analyses of specific state tort reform proposals in several states, were prepared during the past year and are available from LDRC.

(v) LDRC Report on Reagan's Supreme Court Nominees

Toward the end of the year LDRC published a report on President Reagan's 1987 nominees to the U.S. Supreme Court. The report reviewed the libel opinions, and related rulings and writings of Judges Robert Bork, Douglas Ginsburg and Anthony Kennedy. The report also reviewed the libel record of Justice Lewis F. Powell, the man they would replace. Powell was the author of Gertz v. Robert Welch and eleven years later he wrote the prevailing plurality opinion in Dun & Bradstreet v. Greenmoss. Powell also

joined in the unfavorable decisions in Herbert v. Lando, Hutchinson v. Proxmire, Wolston v. Readers Digest, Keeton v. Hustler and Calder v. Jones, although in Herbert Powell filed a concurring opinion urging trial judges informally to limit libel discovery in deference to First Amendment interests. Powell joined the favorable majority opinions in Bose v. Consumers Union, Philadelphia Newspapers v. Hepps and Anderson v. Liberty Lobby. LDRC's report noted that Judge Ginsburg has no significant record on media libel issues. Judge Kennedy's record is also sparse, having written only two libel opinions in his 12 years on the Ninth Circuit, and only one of those in a media libel action. In that case, Kennedy expressed the view, later adopted by the Supreme Court in Calder v. Jones, that special "procedural" rules are inappropriate in the libel field, but that "first amendment protections are better developed in the context of substantive defenses on the merits." In the second case, a non-media slander action, Kennedy accepted and applied constitutional protection for statements of opinion; he also rejected a claim for emotional distress. LDRC's report observed that, of the three nominees, it is Judge Bork who had the most extensive record on libel and the record most obviously favorable to the media's interests. Bork's concurring opinion in Ollman v. Evans is well-known, although just how far it would advance constitutional protections in this field, based in part on the kind of empirical findings developed by LDRC, has not always been recognized. Bork's other major libel opinion, not nearly so well known, also reflects a notable concern over procedural problems confronted by libel defendants, including the need for early and sympathetic treatment of summary judgment motions and the need to limit costly discovery in cases of questionable merit. LDRC's report concluded that while a potential champion on libel issues was lost with the defeat of Bork, the record of Judge Kennedy simply leaves open the question of whether and in which direction his accession will or will not move the current balance of the Court on libel and related issues.

(vi) LDRC Legal Developments Videotapes

In conjunction with the ANPA/NAB/LDRC Libel Conference and Training Sessions (see below), LDRC produced two videotapes assessing recent legal developments in the libel field. In one of the videotapes, Professor David A. Anderson, Vinson & Elkins Professor of Law at the School of Law of the University of Texas at Austin, reviewed recent developments on the issues of opinion; state law/common law developments; Greenmoss Builders v. Dun & Bradstreet; and evidentiary questions of plaintiff's reputation. In the other videotape, Professor Rodney A. Smolla, Professor of Law, University of Arkansas School of Law, Visiting Professor, 1987/88, University of Denver Law School, reviewed the issues of independent appellate review; other torts (intentional infliction of emotional distress; false light); punitive damages and the current of future composition and views of the Supreme Court.



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(vii) LDRC Trials, Damages and Appeals Study --  
Two-Year Update, 1984-86

LDRC completed a new two-year study, its third, of libel trials, damage awards and appeals from such awards, to be published early in 1988. While that report will document a significant recent downturn in the average libel award, it will also indicate that this lower average is primarily the result of eliminating some of the most egregious mega-awards, and does not represent substantial relief from a continuing stream of heavy libel awards. Moreover, the media's consistent success in overturning excessive awards on appeal -- no million-dollar award has to date been finally affirmed after all appeals have been exhausted -- may now for the first time be in jeopardy. If not overturned on further appeal, the first multi-million dollar libel judgment ever affirmed and collected could become a stark reality, in Brown & Williamson v. CBS. Another troubling multi-million dollar verdict, in Newton v. NBC, remains on appeal.

ANPA/NAB/LDRC Libel Conference and Training Sessions

In August LDRC, in cooperation with the American Newspaper Publishers Association and the National Association of Broadcasters, mounted its third biennial defense counsel-only educational conference, this year in Denver, Colorado. While LDRC's 1983 "Libel Defense Workshop" had been a broad survey-type panel program, and the 1985 "Libel Trial Symposium" took a more focused look at one particular set of issues, the 1987 ANPA/NAB/LDRC program was entitled "Libel Conference and Training Session," to denominate its dual structure including both plenary conference panels, attended by all participants, and more specialized concurrent "training sessions," determined in advance of the conference by means of a detailed questionnaire to potential attendees, based on their particular areas of practice and interest. Some sessions were geared toward the interests of defense counsel for print media and some for the broadcast media; some addressed issues from the perspective of in-house counsel and some dealt with problems faced by outside counsel; some were geared toward highly experienced attorneys, others to persons with less expertise. And, for the first time in 1987, sessions at the LDRC conference also covered the problems of other media, such as book and magazine publishing, radio and cable. In total, over the two-day conference, some 25 panels and training sessions on a broad range of libel defense topics and perspectives were offered to the 200-plus media defense counsel in attendance. A substantial "conference file," containing several hundred pages of pertinent outlines and materials, was distributed to all attendees. And two legal developments videotapes (see above) were specially produced for, and first aired at, the Denver Conference. Although a final accounting has not yet been completed, it appears that the 1987 Denver Conference produced at least a modest surplus for LDRC that will be used to support additional projects of interest to the media and their defense counsel.

LDRC/Knight Foundation Projects

Early in the year LDRC was contacted by the Knight Foundation with the suggestion that LDRC might wish to consider developing one or more special projects, that could not otherwise be undertaken within LDRC's regular budget, for possible funding by the Foundation. Thereafter, LDRC's Executive Committee authorized staff to explore whether any such special projects might be appropriately developed. Ultimately, two alternative projects were approved by the Executive Committee, both of which would move LDRC into highly significant areas that have not previously been addressed by LDRC for want of adequate funding and staffing. One of the proposals would fund a two to three-year program comprehensively to study and to shed needed light on trends and developments in non-media (and non-establishment media) libel law and litigation. It is believed that the results of such a study will also inure to the benefit of the media in improving public awareness that libel is not only a problem of concern to the media but that it is also of great concern to the public at large. The second proposal, for a "Media Libel Law Development Project," would fund a pilot program of up to 30 months duration whereby LDRC would undertake to identify those trends in the law of greatest benefit or concern to the media that would also be amenable to favorable definition or reform through "friend-of-the-court" or similar non-legislative intervention, but that would not otherwise be effectively addressed without systematic efforts by an organization such as LDRC. The law reform project would fund the preparation by LDRC (on behalf of specifically-named media signatories) of up to six amicus curiae briefs per year during the project period, plus provide additional funds to share in the costs of another six amicus briefs supported by LDRC but prepared by others. As of the end of 1987, the Knight Foundation's Advisory Committee had recommended approval of the funding of the proposed Non-Media Project. Appropriate arrangements were also well underway formally to establish an LDRC/NYU Law School Libel Law Fellowship program that would provide grants to three second or third-year law students to work on aspects of the Non-Media Project for credit at NYU. Finally, plans were underway for the creation of a new charitable arm of LDRC, the LDRC Institute, to receive any grant from the Knight Foundation. It is expected that a final project proposal will be submitted in the Spring of 1988 to the Knight Foundation Board for formal approval before the Summer, with major work on the Non-Media Project and the NYU Libel Law Fellowships to begin in the Fall of 1988. Work will also continue in 1988 to seek funding for the Law Reform Project.

LDRC Defense Counsel Section

In November, by formal vote of the LDRC Steering Committee, the new Defense Counsel Section of LDRC was established. Membership in the new LDRC Section is open to lawfirms (and sole practitioners) representing media libel defendants. More than four dozen firms have already become members of the Defense Counsel Section. They

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are (as of January 20, 1988): Baker & Hostetler (Washington, DC); Brown & Bain (Phoenix); Burch, Porter & Johnson (Memphis); Butzel, Long, Gust, Klein & Van Zile (Detroit); Calfee, Halter & Griswold (Cleveland); Christian, Barton, Epps, Brent & Chappell (Richmond); Cooper & Kelley (Denver); Cooper, Epstein & Hurewitz (Beverly Hills); Cooper, White & Cooper (San Francisco); Cozen & O'Connor (Philadelphia); Davis, Wright & Jones (Seattle); Dow, Lohnes & Albertson (Atlanta); Frank, Bernstein, Conaway & Goldman (Baltimore); Frost & Jacobs (Cincinnati); Gibson, Dunn & Crutcher (New York & Los Angeles); Graham & Dunn (Seattle); Gray, Cary, Ames & Frye (San Diego); Gust, Rosenfeld, & Henderson (Phoenix); Isham, Lincoln & Beale (Chicago); Kaye, Scholer, Fierman, Hays & Handler (Washington, DC); King & Ballow (Nashville); King & Spalding (Atlanta); Kirkpatrick & Lockhart (Pittsburgh); LaFollette & Sinykin (Madison, Wisconsin); Lankenau, Kovner & Bickford (New York City); Lanphere, McBride & Gross (Albuquerque); Lewis & Rice (St. Louis); Locke Purnell Rain Harrell (Dallas); Long, Aldridge & Norman (Atlanta); McGimpsey & Cafferty (North Brunswick, NJ); Morrison & Foerster (San Francisco); O'Melveny & Myers (Los Angeles); Patterson, Belknap, Webb & Tyler (New York); Phelps, Dunbar, Marks, Claverie & Sims (New Orleans); Pierson, Ball & Dowd (Washington, DC; Oklahoma City); Pillsbury, Madison & Sutro (San Francisco); Powell, Goldstein, Frazer & Murphy (Atlanta); Rogers & Wells (New York City); Ross, Dixon & Masback (Washington, DC); Schnader, Harrison, Segal & Lewis (Philadelphia); Shook, Hardy & Bacon (Kansas City, Missouri); Sidley & Austin (Chicago); Sills Beck Cummis Zuckerman Radin Tischman (Newark); Squadron, Ellenoff, Plesent & Lehrer (New York City); Steel Hector & Davis (Miami); Townley & Updike (New York); Waggoner, Hamrick, Hasty, Monteith, Kratt, Cobb and McDonnell (Charlotte, NC); Wahl and Gabel (Jacksonville, FL); Walter, Haverfield, Buescher & Chockley (Cleveland); Weinberg & Green (Baltimore); Winne, Banta, Rizzi, Hetherington & Basralian (Hackensack, NJ).

The purpose of the LDRC Defense Counsel Section is two-fold. First, the Section is intended to create a more formal mechanism whereby media defense lawfirms, or individual outside media defense counsel, can become involved in the work of the LDRC. Until now, the direction of LDRC's programs and priorities has been defined exclusively by LDRC's Steering Committee, comprised solely of representatives of media companies and media associations. With the formation of the Defense Counsel Section, media defense lawfirms will be able to participate directly in LDRC's activities. Second, contributions from Section members will provide additional support for current LDRC programs and will also make possible the funding of new projects to be separately undertaken by the Defense Counsel Section. Section Members have already given more than \$40,000 to LDRC, with the range of contributions from \$500 to \$2000 and the average contribution just under \$1000. (The recommended minimum lawfirm contribution is \$500.) In November the Section approved a \$10,000 contribution to LDRC in support of the ongoing LDRC Tort Reform Project, with the balance of the Section's 1988 budget earmarked to support new Section activities, including a major

project to develop and advance innovative libel jury trial techniques and procedures and the development of a cooperative brief bank available only to Section members and to counsel for LDRC supporting organizations. The Defense Counsel Section will be governed by an Advisory Committee, comprised of one designated representative from each of its supporting members, and an Executive Committee of five persons selected from the Advisory Committee. Membership in the Section is limited to media defense counsel only.

### LDRC Bulletin

In 1987 the LDRC Bulletin remained one of the primary means of disseminating information about LDRC's resources and materials. Published quarterly, the Bulletin reports on LDRC special studies and other activities, provides news of recent libel and privacy developments and lists available materials which can be ordered from LDRC. The LDRC Bulletin is available by subscription (\$75 per year in 1987, \$80 in 1988). Income from Bulletin sales is used to support LDRC's general budget. When combined with sales of back issues, special studies excerpted from the Bulletins, indexes and embossed binders, annual subscriptions to the LDRC bulletin generate upwards of \$20,000 in revenues to support LDRC programs. In addition to republishing many of the studies and reports discussed above, during 1987 the LDRC Bulletin covered the following topics, among others: comprehensive listings of Supreme Court actions and developments; ongoing litigation updates, including LDRC's systematic interim reporting of trial results, damages and appeals; LDRC's annual summary of the "key findings" of the 50-State Survey; the texts of important speeches at the LDRC annual dinner; current news items of interest; and ongoing bibliographic listings of briefs available at LDRC, organized by case name and by legal issue, as well as listings of law review articles on libel issues and other pertinent publications.

### Information Services

#### (i) LDRC/CBS Computer Brief Bank

In 1987 LDRC continued to maintain its bank, originally developed in cooperation with the law department of CBS Inc., of substantive and bibliographic information covering some 75 key legal issues in 125 cases and encompassing some 250 legal points made in the digested briefs. Full digests and photocopies of many briefs in the LDRC/CBS Brief Bank can be ordered through LDRC. As of 1985, LDRC discontinued its full brief digesting service due to limited demand. However, in 1986 LDRC began to offer more detailed listings of issues discussed in briefs on file at LDRC and this was continued in 1987. These listings are periodically published in the LDRC Bulletin and copies of the briefs are available on order through LDRC.



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(ii) LDRC Case Files

In 1987 LDRC continued to maintain, update and expand its state by state files of pending libel cases. When received by LDRC, at times in advance of publication, case opinions or litigation documents are indexed by case name, state and legal issues(s) presented. Requests for further information, briefs and other materials are then made regarding important cases and issues and periodic follow-ups are also scheduled. As of the end of 1987, LDRC had developed files of such opinions, briefs and other litigation materials in nearly 750 cases pending in all U.S. jurisdictions.

(iii) Special Issue Files

In 1987 LDRC continued to maintain its active special issue files covering well over 100 key legal issues, closely paralleling libel and invasion of privacy issues identified in the Media Law Reporter's issue classification guide. These files collect materials, in addition to those contained in the active LDRC case files or general archival materials, on high priority issues such as media vs. non-media standards; absolute privilege; libel claims involving reviews and criticism; letters to the editor; libel actions against non-media defendants; appellate review; discovery; burden of proof; motions to dismiss; punitive damages; reporter's privilege in libel actions; state Gertz standards; statute of limitations; summary judgment; counterclaims for malicious prosecution; definition of actual malice and public figure; right of publicity; related editorial torts; bookseller, printer and distributor liability; invasion of privacy; intentional or negligent infliction of emotional distress; venue in libel actions; neutral reportage; chilling effect; insurance and insurance law reform; and tort law reform; among many other issues.

(iv) Other Special Collections

In 1987 LDRC also continued to add to its special collections of law review articles and separate files for jury instructions and other litigation forms. Selected jury instructions are now filed at LDRC according to state and indexed according to key legal issues as organized in the LDRC Jury Instructions Manual (1985) (available to defense counsel only). During 1987 LDRC also continued to expand its files on expert witnesses who have testified, or who are willing to testify, for the defendant or the plaintiff in libel actions. In 1984 LDRC had contacted expert witnesses in 40 states by means of a detailed questionnaire. In 1987 LDRC continued to maintain and expand its listing now of some 150 expert witnesses in its files. This list, and the background materials available in the individual expert witness files, are available to defense counsel only. The list is organized alphabetically and includes the following information, when available: name; affiliation; residence; plaintiff or defense witness; cases in which the expert has appeared; issues on which the expert has testified or is qualified to testify; and available documents regarding the expert or the expert's prior affidavits, reports, deposition or trial testimony.



(v) Responding to Inquiries

In addition to providing general information through mass publication to LDRC's entire constituency, or providing general access to LDRC's collections of materials and files, in 1987 LDRC counsel, law student-interns and staff continued to be available to answer specific inquiries from libel defendants or their counsel and other interested organizations or individuals who contacted LDRC, by telephone or by mail, for special assistance. Such assistance, which is provided either without fee or with the imposition of a modest administrative fee (including photocopying and mailing charges), ranged from simply alerting the caller to recent developments or legal opinions and providing available briefs or materials pertinent to the particular inquiry, to more extensive legal research or investigations initiated by LDRC counsel or staff, at times utilizing LDRC's network of knowledgeable organizations, attorneys and other individuals. Such inquiries -- more than 250 in 1987 -- covered the gamut of issues and problems that can be presented in libel counselling or libel litigation. Inquiries not involving specific litigations or legal issues, primarily from scholars or researchers interested in general developments in the libel field, also demanded the time and attention of LDRC staff. LDRC continued to be called upon from time to time to assist in securing knowledgeable libel counsel for parties in particular libel actions or in alerting potential amici curiae to issues and appeals of interest to them.

Press Coverage

In 1987 LDRC again enjoyed wide coverage in the general and trade press. Requests for information from several dozen news organizations were responded to in 1987. LDRC was mentioned, or LDRC data was specifically cited, in a wide variety of general interest publications, among many others: The New York Times; The Los Angeles Times; The Washington Post and Time Magazine. In addition, LDRC continued in 1987 to receive significant coverage in the trade press. All of LDRC's press releases, studies and publications were covered in the Media Law Reporter, the key publication reaching LDRC's legal constituency. LDRC activities were also frequently noted in 1987 in most of the major media trade publications, including Presstime, Publishers' Auxiliary, The Quill and Folio. Other specialized coverage was secured in New York Law Journal; The Record (NYC Bar Association); Student Lawyer (American Bar Association); and the Journal of American Insurance; and in scholarly citations in law review articles and legal books and treatises.

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### Annual Steering Committee Dinner

LDRC's annual Steering Committee dinner, traditionally scheduled to coincide with the PLI Communications Law Seminar, was held again this year, on November 11. The theme for this year's dinner program was "The Libel Explosion of the 1980's: Can Vigorous Journalism Survive?" Speakers at the dinner, attended by more than 200 media attorneys and executives, were Anthony Lewis, columnist for The New York Times; Jack Anderson, Pulitzer Prize-winning investigative journalist and nationally-syndicated columnist; and Rowland Evans, nationally syndicated columnist. Substantial excerpts from the speeches made at the LDRC Steering Committee 1987 Dinner and Program will be published in an upcoming LDRC Bulletin.

### 1988 Programs and Projects

In 1988 LDRC hopes to embark upon the following major projects among others: continued development of the Defense Counsel Section, including establishment of a committee structure to work on substantive projects, among them a Jury Reform Project, aspects of which will involve studying and reporting on innovative jury trial techniques and possible participation in an American Bar Association annual meeting panel session on that same topic, to be sponsored by the ABA/National Conference of Lawyers and Representatives of the Media, and development of a more comprehensive and accessible libel brief bank available only to Defense Counsel Section members and counsel for LDRC supporters; continuing work on the LDRC Tort Reform Project, possibly including efforts to assure application of newly enacted legislation to libel and the media; continuing work on the Non-Media Project, to be funded by the Knight Foundation and in conjunction with the LDRC/NYU libel law fellowship program, focusing, among other issues, on libel law in the labor context, libel suits by developers or landlords against environmental or tenant activists and a possible study of the fall-out of Greenmoss Builders v. Dun & Bradstreet; possible development of alternative funding sources for the proposed law reform project; a possible additional jury attitudes study, funded with the surplus from the 1987 ANPA/NAB/LDRC Conference; a major re-edit of the 50-State Survey; and an update of LDRC's pre-Bose v. Consumers Union study of "independent appellate review" in libel actions.

### 1988 Budget

As LDRC entered its eighth full year of operations, the Steering Committee approved a budget for 1988 at its annual meeting on November 11. In 1987 it is projected that LDRC essentially broke even in its budget targets for the year. For 1988 the budget has been set conservatively at the level of 1987 expenditures. During 1988, funding of LDRC's budget will continue to be based upon a combination of voluntary contributions from supporting organizations and self-generated revenues, which in 1987 approached \$100,000,

based upon sales of LDRC's books, publications and other materials, including videotape sales and rentals and proceeds from the ANPA/NAB/LDRC Conference and the Annual Steering Committee dinner. In 1988 LDRC's self-sufficiency should either remain at the same level or increase. Despite this continued significant self-reliance, voluntary contributions will remain -- as in the past -- a vitally-important source of LDRC's revenues in 1988. In 1987, for the first time, the number of LDRC's voluntary contributors actually decreased -- largely due to mergers and acquisitions in the media field. As a result, during 1988 LDRC must continue to rely on as close to 100% renewals from current supporters as possible, while at the same time continuing to seek to expand its base of financial support. LDRC will be asking current supporters -- particularly those whose contributions have been lower than the LDRC average (just under \$3000 for corporate contributors in 1987) or whose contributions have not increased in recent years -- to consider increasing their level of support. Several of LDRC's supporters have already renewed their contributions for 1988, with the average of these early donations in excess of \$7500 per contribution. In addition to the basic and 50-State Survey budgets, separate budgets will continue to be established for any special LDRC projects. Each of these separate budgets would either be self-funding or specially-funded. Each special project will be subject to specific review and approval by the Executive Committee under the policy guidelines approved by the Steering Committee in November 1983. Specially-funded projects in 1988 are expected to include projects supported by the new Defense Counsel Section; the Non-Media Project, assuming it is approved by the Knight Foundation; and possible publication of one additional Jury Attitudes Study (funded out of any surplus from the 1987 ANPA/NAB/LDRC Conference).