

## FROM THE CHAIR

I had planned for this to be a rather routine and easy-going column, coming on the heels of my last two pieces, which became strangely controversial.

Two issues ago I criticized the Supreme Court's decision in *Bush v. Gore*; that column was apparently questioned by ABA staffers in Chicago as troublesome, too critical of the Court and outside the scope of the Forum—comments that I felt derived from fears of Forum resignations or as being (at the time of the Bush administration's wrong-headed attack on the ABA's role in evaluating the qualifications of judicial nominees) too stereotypically liberal. More shocking, the draft was worrisome to Washington media practitioners who somehow thought it would alienate the Justices and hurt our chances in the media cases then still before the Court—as if the column said anything terribly original and, more to the point, as if anything I say much matters. Nonetheless, it was suggested, and I agreed, that the editorial board of the *Communications Lawyer* review the column before it was put to print.

Then, in our last issue, I wrote a column criticizing the copyright bar for its narrow view in cases such as *The Wind Done Gone*, and also questioning the lack of participation and support of mainstream communications lawyers and clients to the author's side of that case. While it is unclear how much the imbroglio about this case had to do with it, some weeks after I submitted the article, one of our colleagues was forced to resign her post as chief counsel in part because she had had the gumption to have her client join the amicus brief in support of the First Amendment interest in that case, apparently in opposition to the view of the client's parent.

So as I started to pen this column, I thought I would just write about what I think will be the best Boca Conference ever, February 14–17, 2002. Just on the day I was planning to write, it became impossible to do so because of the ghastly news at the World Trade Center, just three miles south of my office. It truly has been a time of indescribable horror. Boca seems small, irrelevant,



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and awfully distant in the current darkness.

Much of the discussion in the ensuing days has been of what sacrifices we Americans will make in our civil liberties in order to better protect ourselves and to bring the terrorists to justice. My first reaction when that phrase was uttered, as it was many times this week, was that it referred more to our freedom to travel

than to the freedoms that we in particular, but all Americans too, hold, or should hold, dear: the freedoms we try to protect, of speech and of the press. Certainly flying will become a much greater inconvenience in the months to come, but I suppose we will grin and bear it. Our rights of free speech—indeed, our right to criticize our government—should remain untarnished even in these nervous times.

On the other hand, we have to be realistic and show good judgment, too. My colleague Adam Liptak and I have been involved in both access and subpoena matters involving terrorist cases here in New York over the past few years. As hard as it has been to urge that First Amendment interests prevail over the judiciary's, and perhaps society's, interest in having justice done, it certainly will be even harder in the future. My only caution would be to use good judgment and be realistic in such cases in the months to come. Taking strong positions that a judge or other government official will not, or cannot, abide by in terrorism cases and national security matters will do nothing for us in the short run, and might only succeed in injuring our credibility, and that of our clients, in the long run.

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Back to Boca. I am very excited about the three plenary sessions we have planned. Our keynote panel is on *Edwards v. Audubon Society* twenty-five years later, and will consider why the neutral reportage doctrine hasn't taken hold more broadly since its recognition in that case. This discussion will also be an occasion to visit a more basic jurisprudential question of why the media may be liable at all for republishing false and libelous statements of others. This is a long-standing tech-

nical rule, but one that in many contexts, even outside the neutral reportage realm, sometimes makes little logical or philosophical sense.

A second panel on Friday morning will visit one of the conflicts referred to above, that between intellectual property rights and the first amendment. As the subtitle of that program indicates, "Do Rhett Butler, Tiger Woods, Dustin Hoffman, Norm and the NBA Own Information About Them?," a slew of recent cases has pitted copyright and trademark interests against broader first amendment concerns. This panel, which includes litigators on both sides of *The Wind Done Gone* case, as well as lawyers for Tiger Woods and the NBA, should become a spirited debate.

Finally, Saturday morning our plenary session will feature six prominent current or retired jurists, including Kenneth Starr, Stanley Sporkin, Gilbert Merritt, and others who have ruled on interesting First Amendment cases, including the judge who sat on the *Malcolm v. Mason* trial. We plan to question them closely as to their views of the media, and how those views may have been affected by the particular cases they had. We also plan to discuss with them access and open court issues, and whether the relationship between the judiciary and the press need be as antithetical as it sometimes is.

Along with all the social and sportive events we always have, and a new workshop in entertainment law, I think this might be the best Boca ever. Also at Boca, we will elect four new Governing Board members from a slate to be recommended by our last year's Nominating Committee which I have reappointed: Immediate Past Chair Kelli Sager of Los Angeles, Peter Canfield of Atlanta, and Chuck Tobin of Washington, DC.

Please make your travel plans early, as our conference runs into President's Day weekend, and is always an extremely busy one. I look forward to seeing you in Florida.

Finally, though it may be dated by the time you receive this, from all of us in New York (and Washington) to those of you in the rest of the country: Thanks so much for your support and love since September 11. It means more than words can tell. ☐