

## FROM THE CHAIR

### Thoughts at 30,000 feet

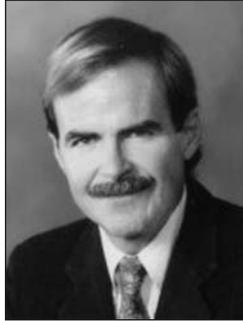
Some poets and songwriters try to add charm to their work by telling their audience they are expressing thoughts that came to them while traveling on scheduled conveyances, e.g., on a train from Chicago to New Orleans, an airplane from the Motor City to L.A., or a boat from Long Beach to Encinada. So, this humble column is being written 30,000 feet over the Four Corners region, en route to Denver from Phoenix after the Forum's Annual Conference in Scottsdale.

By most accounts, the conference was a success, albeit a character-builder at times because of inclement weather. One quirk of Arizona's unique desert culture is obliviousness to the possibility of rain, the chances of this weather phenomenon occurring being so slight that no one considers it worthy of anticipation. Gathering clouds that seem to promise a storm usually fizzle after releasing some virga<sup>1</sup> and a few drops that evaporate before they hit the ground. Considerable portions of improved real estate are dedicated to outdoor use, and the few roofs, eaves, and awnings protect from the sun but not water. When a Phoenician is caught outdoors in a deluge of rain, complaint is not considered an appropriate response; one is to exult over a dousing in the rare liquid, as did James Dean in the crude oil spewing from the west Texas field in the movie *Giant*. Teresa Uçok, the Forum's ABA staff manager, deserves our thanks for her heroic efforts, despite a ghastly illness, to make things work, rain and all.

The Scottsdale conference presented our traditional array of "hot topics" workshops on the subjects of libel/privacy, newsgathering, entertainment, and the Internet. These were up-to-date interactive "tune-up" sessions that were facilitated by the leading experts among us, too numerous to mention here.

The plenary sessions began on Friday

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Thomas B. Kelley

morning with a hypothetical "role play" interchange entitled "Newsgathering in the Shadow of Terrorism," designed and executed by George Freeman, who makes the difficult role of moderating this type of panel look easy. The discussion focused on the media's concern over the sealing and closing of proceedings involving detention and prosecution of suspected terrorists. Panelist

Randy Hamud, a criminal defense attorney and civil libertarian, eloquently chal-

lenged our complacency over the myriad ways (secrecy being just one of them) in which civil liberties are being denied under the USA PATRIOT Act and other antiterrorist programs pursued in the wake of 9/11. Ironically, it appears that the same administration so committed to secrecy in the name of national security may be prepared to conduct an unpopular war in Iraq with journalists "embedded" in our fighting force, thereby providing the media an unprecedented opportunity to observe what is happening in all phases of the military campaign. Is

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this administration so confident of vindication that it will remain committed to such openness and accountability? We'll see.

In the second plenary session, I moderated an exposition of the many jury reforms that were implemented in Arizona during the 1990s, and that are beginning to take hold in other jurisdictions. Many of these neoterisms are the same "innovative" trial techniques—pretrial and midtrial instructions on the law, midtrial summations, and bifurcation of issue determination—that were pioneered in libel cases, such as *Westmoreland v. CBS* and *Sharon v. Time, Inc.* Thought to be the salvation of the defense in jury trials of media libel cases, most of this newfangledness was resisted by tradition-bound state and federal judges, until the Arizona revolution spurred courts throughout the country to consider them. Notably, the Arizona innovations were issued by the state's supreme court after experiments in which the entirety of fifty civil trials, including jury deliberations, were videotaped and studied. More recently, the court has authorized videotaping (with consent of the participants) of jury deliberations for broadcast to the public.

### Declining Interest in Libel Trials?

Although our audience's interest in the changes that have taken root in Arizona jury practice was respectable, it was evident that angst over the prospect of a libel trial is not what it used to be in the '80s and early '90s, even though the rate at which media organizations achieve summary judgment continues to decline. Why so? Are media organizations losing their appetite for the kind of aggressive reporting that generates hotly contested libel cases? Or are they tiring of the expense and the risk and therefore settling more cases out of court?

At lunch on Friday, we were honored by an appearance from Arizona Governor Janet Napolitano. After being introduced by David Bodney, who had persuaded her to speak to us, Governor Napolitano spoke largely of the successes achieved and challenges faced by the State of Arizona and displayed a knack for warming and stimulating the audience. A lively question-and-answer session followed her talk.

### Oliphant Draws Cartoons During Presentation

On Saturday morning, the final plenary session was a retrospective on *Hustler Magazine, Inc. v. Falwell*, in which Lee Levine led a panel that included original lawyers for the parties and amici; leading libel treatise writer Judge Robert D. Sack of the Second Circuit Court of Appeals; and editorial cartoonist Pat Oliphant, who performed live drawing of cartoons to accompany his comments and those of other panel members. The discussion focused on the major theme of the amicus brief that panelist Roslyn Mazer filed on behalf of editorial cartoonists. We saw examples of how the work of these lampoonists most effectively demonstrates why emotional distress is an affordable cost of open discussion of public affairs. It reminded me of one of my own cases decided several years before *Falwell* in which the claim of a private figure beauty pageant contestant was foiled by an analogy to Gary Trudeau's satirical depictions of real people in "Doonesbury."

Judge Sack offered his penetrating observations concerning the Chief Justice's elliptical opinion in *Falwell*, too malleable to be called broad or narrow. (Judge Sack mentioned that these thoughts came to him 30,000 feet over the State of Iowa, while on the plane from New York to Phoenix.) The specifics of this and other sessions will be reported in future issues of this journal.

But this is my column, so I will address my personal peeve about the *Falwell* opinion: It lures many who read it, whether casually or carefully, to conclude that the rule apparent—that the constitution bars recovery for emotional distress that is intentionally inflicted through pure speech unless the publication has conveyed a false factual impression—applies only when the plaintiff is a public figure. Granted, the Chief Justice uses the term "public figure" at least a dozen times in referring either to the Rev. Falwell or the issue presented, but only in the context of the rule that requires such plaintiffs to prove "both that the statement was false and made with" actual malice. The Court made it clear that the absence of net factual falsity found by the jury in *Falwell* was by itself sufficient to bar the claim for intentionally inflicted emotional distress. In *Hepps*, the Court held that the

Constitution requires that all plaintiffs prove factual falsity when a statement of public concern is at issue, and reaffirmed that notion in *Milkovich*.

One foible of satirical portrayals like the *Falwell* Campari ad is that their "leg-pulling" quality inevitably creates the risk that some examples of the species may not "get it" and take the matter literally, at some level, for some period of time. The satire jurisprudence that has evolved, before and after *Falwell*, allows, sub silentio, for "breathing space" for potential "hooking" of some members of the audience, lest the gullibility of a few deprive an entire audience of one of the most effective forms of expression, particularly where the matter is the subject of public discussion in which correctly any misimpression is likely. However, as Judge Sack noted, the Texas Court of Appeals recently bucked that trend in *Isaacs v. New Times* by holding actionable a column that satirized a controversial prosecution of a child, based upon what appears to be a relatively remote possibility of misimpression. Let's hope the case remains an aberration.

Moot Court for Kids, as always, was marvelous. These kids are smart. I never, ever, want to oppose David Smallman's daughter.

After we heard words of thanks from Trevor Hayes and Jaclyn ("Jackie") Bruce, winners of the Forum's scholarships to the Conference, the program closed with another lively luncheon session of George Freeman's "Journalism Jeopardy." George and his partner Landis Best (billed as an all-Cahill team) won the tennis tournament (postponed a day because of rain).

I declare the eighth of our annual conferences a success if for no other reason than it captured that special sense of selfless professional and personal fondness we feel for one another in our bar. The old are willing mentor the young, the young are willing to tolerate the old, and among contemporaries, old and young alike, mutual respect and affection is presumed.

The matter of the warmth within our ranks brings me to what was the most important component of the Conference program, the diversity workshop. The goal of this session was mutual education on diversity as a business imperative (that it is a moral imperative seemed well presumed by all) for our clients and ourselves, and the difficul-

ties that must be expected and overcome in the process of building a diverse community within any organization. That goal was achieved, but I also perceived the sentiment that we could become not only more credible as spokespersons and advocates for our clients, but also an even warmer and more mutually respectful college if our members included more faces of color.

At the annual business meeting in Scottsdale, Jerry Birenz was nominated to become the Chair-Elect of the Forum. Jerry is our webmaster, principal author of the CommLaw Alert new development reporting system, and unsurpassed rock-and-roll historian. Jon Avila, Guylyn Cummins, Henry Hoberman, and Laura Lee Stapleton were elected to the Governing Board. They replace retiring members Maria Arias, Andrea Hartman, Betsy Koch, and John Hart, who will be missed. I have appointed Amy Newhardt to succeed Laura Stapleton as co-editor of this journal.

As our 737 descended over the Colorado Rockies, I turned my thoughts to the Forum's next conference, Representing Your Local Broadcaster, on the Sunday before the NAB convention in Las Vegas. This conference has a different atmosphere because it focuses content issues plus the practical problems of operating a broadcasting facility under an F.C.C. license. The NAB convention, with state-of-the-art exhibits, is dazzling. Jerry Fritz, chairman for the Forum's program several

years now, has outdone himself each year (with ideas that have occurred to him while traveling through New Jersey on the Acela Express between D.C. and New York) in making this program punchy, hard-hitting, and interesting. Try it this year on April 6.

After Las Vegas, we will be trying something new in Philadelphia on June 5. There, we will present a recast version of George Freeman's "Newsgathering in the Shadow of Terrorism" panel to the National Conference of Minority Lawyers. Jon Avila deserves our thanks for his tireless efforts in organizing this program, which we hope will help us draw lawyers of color to our work. We would love to see you in Philly.

Although plans are still in a state of flux, it appears likely we will round out the year with a presentation on the subject of misappropriation and the right of publicity at the ABA Annual Conference in San Francisco in August.

Finally, the Ninth Annual Conference of the Forum is scheduled for January 22–24, 2004, in Boca Raton, Florida. Be there. 

#### Endnotes

1. Virga, also known as dry rain, is "rain or snow that evaporates as it falls into a layer of dry air near the earth's surface . . . [w]hile virga can happen at any time during the year, it is most common during winter, when low-level air is very dry." U.S.A. TODAY, *Weather Basics: Dry Air Causes 'Invisible Rain,'* at [www.usatoday.com/weather/tg/wvirga/wvirga.htm](http://www.usatoday.com/weather/tg/wvirga/wvirga.htm) (last visited Feb. 24, 2003).

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