

News from 30,000 Feet

THOMAS B. KELLEY

You're about to read another column written on an airplane en route to Denver, homebound from our annual conference held this year in Boca Raton, Florida, January 22–24.

It was another great conference, but this year preparing for it was pretty wild. We had moved the date from February back to January to avoid the Presidents' Day travel crunch and were jumpy about how the change would affect attendance in a flat economic year for most law firms. Thirty days out we had only about one-quarter of our budgeted sign-ups. Anxious to generate a brisker response rate, the Forum staff assembled an e-list of some 15,000 names and turned it over to the folks who manage the ABA website.

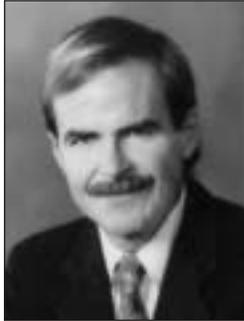
To Err Is Human

Someone who knew better but made a human error e-mailed our invitation without removing the "reply to all" feature. Some thoughtful person responded with regret that he would not be able to attend and mistakenly hit "reply to all." This touched off an avalanche of "reply to all" messages, mostly indignities over a "communications" forum's apparent ignorance of Internet etiquette that strictly forbids the use of "reply to all" in LISTSERV e-mails.

... To Forgive, Divine

A few disagreed, suggesting that adult human beings should easily see their way to ignore such a slip and get on with their lives; but dozens whose identities would surprise you saw things otherwise until the website automatically shut the LISTSERV down after 100 messages. The next day we apologized to all with no "reply to all" available. Our transgression seemed unforgivable; it was comparable

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to, say, wearing white after Labor Day (a social error that drove "Serial Mom" to kill). Somehow we overcame the faux pas and, the week before the conference, exceeded our quota of paid attendees.

YLD's Media Advocacy Workshop

On Thursday, before the conference's opening reception, I was honored to participate

for the third time on the faculty of the Young Lawyers Division Media Law Committee's seventh annual Media Advocacy Workshop. We served as judges for oral argument on cameras-in-the-court and right-of-publicity issues and then as reporters undergoing pre-publication review of a *Shulman*-type privacy and an industrial pollution libel case. We were told to be "mean" in both capacities. That presented no difficulty because most of us had pent-up frustrations from years of bizarre questions from judges and sardonic harangues from reporters.

As always, Friday began with the first set of our "hot topics" workshops on the subjects of libel/privacy, newsgathering, entertainment, ethics, and the Internet. It appears that we continue to find these interactive sessions quite useful and enjoyable. A big thank you is in order for all those who served as facilitators.

Internet versus Privacy

Friday's plenary sessions began with Barbara Wall's panel, "Let the Sun Shine In: The Promise of the Internet, the Threat to Personal Privacy, and Florida's Unique Approach." Most panels on this topic have snooze potential, but not this one. Barbara skillfully wove the discussion in and out of all of the current Internet privacy issues. Using what proved to be the sound bite of the day, the panelists agreed that online "jammie surfing" in the divorce files of private citizens is not the central

lesson that experience and logic teach us about the benefits of public access. But they also could not deny that such information is necessary to assess the fairness of judicial decisions on matters of money, property, and custody.

The interest level was also elevated by the animated repartee between the *Chicago Tribune's* Dave Bralow, who had sought limited access to photos taken during the autopsy of Dale Earnhardt, and Earnhardt family advocate Tom Rumberger. The sparring between those two made Jane Kirtley and Mark Rotenberg, both known as aggressive advocates for the freedom of information and privacy sides, respectively, seem like moderates. These two strains of discussion were punctuated by a detailed report from Sally Keston of the *South Florida Sun-Sentinel* on her Internet search on the life of the Forum's immediate past chair and perennial tennis champ George Freeman.

Herbert v. Lando

After a brief business meeting at which Paulette Dodson (Tribune), Chuck Tobin (Holland & Knight), and Pat Duncan (HBO) were elected to the Forum's Governing Board, Kelli Sager moderated a panel on our keynote topic, a retrospective of the Supreme Court's decision in *Herbert v. Lando*. Virtually all of the original participants were there—Barry Lando and Mike Wallace

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with their attorney Floyd Abrams, as well as Herbert's lawyer Jonathan Lubell, and Judge James Oakes who wrote an opinion in the Second Circuit split-panel decision (concurring in the opinion of the court by the late Chief Judge Irving Kaufman) that briefly recognized a privilege for editorial process and editorial discussions and thoughts on content (until it was reversed by the Supreme Court).

The only person missing was Colonel Herbert himself, but he appeared through a strongly worded letter in which he declined the opportunity to participate in a panel with such a collection of ideologies and biased publishing organizations (referring specifically to the *New York Times*, which had supported CBS as an amicus).

The most telling comments came from Barry Lando, who explained that he had claimed the privilege at the instruction of his attorney, had no reluctance to answer any of the questions asked, and had no difficulty answering them when he was ultimately required to do so (even after twenty-six days of deposition questioning). He also said that the upshot of the decision—knowledge that his editorial decisions and thought processes would be subject to complete scrutiny—did not chill his reporting but made him more deliberate and thorough.

On Friday afternoon, after lunch with a brisk round of "Journalism Jeopardy," Chad Milton, Slade Metcalf, and Hugh Stevens won the golf tournament, and George Freeman and Bob Latham prevailed in tennis over co-finalists Chip Babcock and Becky Fenno.

Women in Communications Law Meet

I attended my first meeting of Women in Communications Law, a committee of the Forum that has had a great year under the leadership of Mary Ellen Roy and Natalie Spears. There was a lot of energy in that very full room as Susan Faller, Susanna Lowy, and Elizabeth

MacNamara gave informal but inspiring accounts of how they had managed to keep balance in their lives during the years when demands of both law practice and child-rearing were at their peak.

Forum Gets High Marks for Diversity

Saturday morning began with a Dialogue on Diversity led by our Diversity Chair, Paulette Dodson. The meeting was well attended, and the discussion, like that of Women in Communications, was charged by a sense of common purpose, itself a big step in meeting our diversity goals.

Upon my return home, I learned that the Forum was named to the ABA's Goal IX Honor Roll for 2002–2003 (with only four other ABA entities) for promoting full and equal participation in the legal profession by underrepresented groups. The report includes a photo-illustrated article on our diversity initiative that featured Ms. Dodson and internship program participants Cedric Scott and Andrew Mar. More on this in a later column.

When the Media Become the News

On Saturday, George Freeman moderated a panel on media scandals that addressed how news media organizations, brilliant at covering the scandals of others, fail miserably in public relations management when they themselves are the focus of the reporting. The panel of speakers had little trouble agreeing that:

- For public relations purposes, a news media organization involved in a scandal must be on record with a credible statement (that includes a complete "owning up") in the first subsequent news cycle, and
- There has been no case—at least none that any panel member found worth mentioning—in which a media organization has done so.

Although the discussion began with a hypothetical, it quickly slipped into ruts and grooves left over from the crashes of CNN's "Tail Winds" report, the *Cincinnati Inquirer's* "Chiquita" series, and the *New York Times*/Jason Blair con-

troversy. Juicy as these affairs may seem, I felt uneasy as a defense advocate. I empathized with Dave Kohler (Tail Winds) and Bob Bernius (Chiquita), both brilliant lawyers, but who to this day are not in a position to talk in any meaningful way about what prevented them and their clients from providing good explanations early on.

We know enough to figure out how media scandals quickly get worse: the combination of need to avoid inaccurate public statements (inculpatory or exculpatory), inability to debrief persons involved with the benefit of attorney-client privilege due to apparent conflicts of counsel interest, and the resultant problems of getting good information. Having been in my share of pickles in which I could not effectively defend my clients or myself, I thought these guys held up well. They must love us to have shown up at all.

George Freeman and Peter Canfield served as affable but inquisitive judges in this year's Moot Court for Kids competition. I watched every kid who stood up to speak and every kid was marvelous. Really.

The final item in the program was the luncheon speech by Gannett News Service Editor Caesar Andrews, who gave his very interesting perspective of the public's perception of the news media and our legal system and the portrayal of both in the popular media.

Kudos

For this great conference, we owe much to our planning committee of George Freeman, Barbara Wall, Lee Levine, and Kelli Sager, and to our sponsors, which are highlighted in the sidebar on this page.

Mark Your Calendars for 2005

Watch out, George Freeman. After returning to Boca for our tenth anniversary conference January 13–15, 2005, our 2006 conference will be in Palm Springs, California, where the sun is certain to shine.