Note From the Chair
By Laura Lee Prather

It's hard to believe that 2010 is coming to an end already. This newsletter comes to you in the midst of one of the most exciting times of the year to be a media lawyer. With the Media Law Resource Center (MLRC) Annual Dinner and the Practising Law Institute’s annual Communications Law in the Digital Age CLE in New York, the Women in Communications Law Committee (WICL) is once again taking advantage of having such a dynamic group of women in one place by holding its annual Theatre Night and Networking Luncheon on November 11 and 12, respectively.

As you know, the WICL theme for the year has been *Reinventing Your Practice in the Modern Media Age*, and one of the things we’ve gleaned most from our discussions with each other is that in order to keep up with the “modern media age” we have to learn how to manage our practice rather than letting our practice manage us. It’s so easy to feel beholden to every type of electronic device imaginable and, instead of allowing the BlackBerry, the smart phones or the social networks to provide us with more freedom, we can become enslaved to the devices or the media and view them as another demand on us. No one is advocating ignoring progress. There’s just something to be said for a good, old-fashioned meal, dinner or other “get together,” in person or by phone, that helps foster those relationships far more and in direct contrast to the constant barrage of electronic communications.

At our April meeting in Las Vegas, we had a lively discussion on “Time Management Tips” led by WICL co-chair Kathleen Kirby. There were many good tips discussed, such as partitioning your hour so that you have uninterrupted time away from your computer for 75 percent of the hour and dedicated time on e-mail for 25 percent of the hour, or separating your electronic devices so that you can have a personal device and a work device. Not surprisingly, the conversation evolved into a discussion about different communication methods used by different generations. There was some hesitating acknowledgement that, in a way, those of us in our 40’s and 50’s may be the “tweeners” of the electronic era because we are still beholden to e-mail but also must keep up with social networking. Those in their 20’s and 30’s feel more comfortable putting it all out there on Facebook and actually do less in the way of e-mail.

So … drum roll please …. In an effort to keep up with the times and to be consistent with our theme this year, **WICL now has a Facebook page.** We would love for each and every one of you to join us on Facebook and help keep these and other discussions going in this vital environment. This will be an excellent opportunity for us to share thoughts and inquiries, and make connections between our January, April and November meetings. One of the messages heard loud and clear in Las Vegas was that while modern technology can help facilitate relationships and communication, it cannot replace them. With our Facebook page, we hope to further develop those relationships and bridge the geographic divide between our personal gatherings so that when we do see each other in person, we can feel more connected.

In addition to connecting with all generations through Facebook, we also have made an unprecedented change to our WICL Theatre Night this year by opening it up to “Future Women in Communications Law” – a.k.a. the daughters of our WICL members! We thought it would be a great opportunity for our daughters to be as inspired by our fellow WICL members as we are and a wonderful opportunity to get to know each other on a different level for a night out on the town. This year’s Theatre Night is slated to be the most well-attended in the history of WICL. A huge “thank you” to Susan Grogan Faller, partner at
Note From the Chair continued

Frost Brown Todd LLC, for generously giving her time and energy to coordinate this event, and a special “thank you” as well to Patricia Clark, partner at Sabine, Bermant & Gould LLP, for ensuring that we got the best deal in town and actually getting us the tickets.

After Thursday night’s festivities, WICL will be hosting its Annual Networking Luncheon at Natumi Restaurant. Thank you to Carolyn Foley, partner at Davis Wright & Tremaine, for keeping our networking luncheon operating like a well-oiled machine. Carolyn makes it look easy to put on a small soirée for 50 of your closest friends in midtown Manhattan! A great debt of gratitude also goes to the sponsors of this year’s luncheon: Wiley Rein LLP; Scarola Ellis LLP; Sedgwick, Detert, Moran & Arnold; Davis Wright & Tremaine; SNR Denton; Hogan Lovells; Levine Sullivan Koch & Schulz, LLP; and Frost Brown Todd LLC. What a great way to kick off the holiday season by getting some “down time” with some of your favorite colleagues!

Exciting News Abounds

This newsletter could have never come to fruition were it not for the tireless (and, yes, I am wondering if she sleeps!) efforts of our Newsletter Committee Chair – Catherine Van Horn. She has been the perfect taskmaster to produce the stellar 2010 WICL newsletters! We are hoping we can convince her to stay on as chair next year. She’s also been helped with a phenomenal newsletter committee consisting of: Jeanette Melendez Bead, Genelle Belmas, Ann West Bobeck, Karen Chesley, Cynthia L. Counts, Guylyn Cummins, Erin Dozier, Sarah El Ebiary, Judith Endean, Rosemary Harold, Tyra Hughley, Sheri Hunter, Kathleen Kirby, Katharine Larsen, Lindsay LaVine, Jane Mago, Judith Mercier, Suzanna Morales, Sinead Murphy, Trisha Rich, Natalie Roisman, Joan Stewart, and S. Jennell Trigg.

In the pages of this newsletter, you will find Profiles on fabulous lawyers who have each made unique and significant contributions to the communications industry. Read on to learn more about your fellow WICL members and icons of the media bar: Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press; Teresa Artis, General Counsel of Capitol Broadcasting Company; and Guylyn Cummins, partner in the San Diego office of Sheppard, Mullin, Richter & Hampton, LLP. Thanks to WICL members Rosemary Harold, Erin Dozier, and Judy Endean for writing these profiles and helping to bring the insight of these WICL legends to life.

There are two featured articles in this issue that will make you think about the direction of our bar and help you anticipate where the courts may be headed. Both “Is Wikileaks’ Disclosure of Confidential Afghanistan War Documents the Digital Era’s Pentagon Papers Case?” and “The FCC’s Indecency Policy: Back to the Drawing Board” highlight the state of uncertainty in legal regulations governing our changing industry. Thank you to Genelle Belmas and Kathleen Kirby for keeping us informed and engaged through your thought-provoking articles.

We are also reporting on a number of substantive legal issues, including updates on pending legislation and recent case law developments. For the latest on Capitol Hill, turn to our “Federal Legislative Update: Libel Tourism Law, Anti-SLAPP Bill and DISCLOSE Act” article written by WICL member Karen Chesley, or if your interest lies in the Free Flow of Information Act, turn to Catherine Van Horn’s “Update on Shield Laws” to find out which states are the latest to adopt these statutes and the status of the federal legislation. We also have a number of case law updates found in the “Access Law Roundup” written by Genelle Belmas and the “Interesting Legal Development Roundup” entries by Suzanna Morales and Catherine Van Horn.

For those of you who could not attend some of the incredible conferences, webinars, and seminars held earlier this year, we’ve got summaries of them that likely will help you gain some knowledge about what you may have missed. We’ve written about theABA Privacy/Data Security Conference, the Forum on Communications Law session on “How Media Covers the Law” held during the ABA Litigation Section’s Annual Conference, the NAB Representing Your Local Broadcaster Seminar (and the WICL meeting held in conjunction with that seminar), the Right of Publicity Seminar held at the ABA

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W.I.C.L.  
November 2010

ABA Forum on Communications Law – Women in Communications Law Committee
Annual Meeting in San Francisco, and the Forum on Communications Law Webinar series. Many authors, male and female, contributed to these reports: S. Jenell Trigg, George Freeman, Genelle Belmas, Judy Endean, Richard Goehler, and Steve Zansberg.

Also, as a special treat, Genelle Belmas has written an article on The Livescribe Pulse Smartpen, which might prove to be a tremendous benefit to all of us in our multi-tasking efforts and our recounting of what transpired at the meetings, hearings or depositions we attend. She was able to do her writeup on the NAB meeting from information she had recorded through her smartpen!

The WICL mentoring program continues to be a huge success, and it’s never too late to sign up to be a mentor or mentee. The mentoring guidelines and the registration form for the 2010-2011 programs are contained at the end of the newsletter, and we encourage everyone to be a part of this wonderful initiative chaired by Martha Heller.

This newsletter also includes our regular features: Noteworthy Women and Women in Leadership Positions. The first notifies our readers about recent job changes and promotions or awards received by our membership, and the second lists women who volunteer their time in leadership positions for the Federal Communications Bar Association, the Media Libel Resource Center, or the American Bar Association's Forum on Communications Law and media law committees. Our Calendar of Events notifies WICL members about upcoming activities for professionals in the communications bar, and the popular Heard Around Town column highlights tidbits about our profession of particular interest to women. Finally, the Report from the Hinterlands gives us a flavor of what innovative functions our regional representatives are putting together. If you have contributions to any of these columns throughout the year, please feel free to send them our way for inclusion online and in our next issue of the WICL newsletter. And, a big thank you goes to Debbie Berman, Katherine Larsen, Catherine Van Horn, and Karen Chesley for keeping these columns current and vibrant.

Finally, we are fortunate to have two highly relevant reprints in this issue of the WICL newsletter. The Reporters Committee for Freedom of the Press beat us to the punch by doing an article on “Justice Kagan’s Media Law Background” and graciously granted us the right to reprint. In keeping with the theme of the impact women judges can have on the appellate bench, we are also reprinting an article originally published in the ABA Perspective magazine titled “One Woman on an Appellate Bench Makes a Difference,” which discusses studies on appellate court decision-making dynamics that suggest that having a third woman on the Supreme Court will have an exponential effect on the influence of the women Justices. Thank you to the authors and publishers for allowing us to share these interesting and timely articles with our members.

On a personal note, I’d like to thank the members of the Sedgwick, Detert, Moran & Arnold marketing team – Terry Rather, Royal Simpkins and Mary Jo McHugh, who have put forth countless hours in producing, designing and making the final product of the WICL newsletters look so professional each issue. Many people may not be aware that oftentimes it is the law firm of the WICL co-chair that takes on the responsibility of producing, printing and publishing the WICL newsletter. This is time, material, expertise and talent donated by the law firm. Over the last three issues, we could not have asked for a better team than the marketing crew at Sedgwick.

Upcoming Fun: Meetings, Goals & Initiatives

In my prior column I mentioned making a pledge to try to see WICL members when I traveled throughout the year. By doing so, I had the pleasure of getting together with some wonderful women that I otherwise would not have gotten to know so well through e-mail. We are so fortunate to have such a dynamic group of women in WICL and taking the time to get to know your fellow WICL members can be truly inspiring and a lot of fun! I plan to continue this practice in the years to come and would encourage each of you to do so as well. If you make it to Austin, Texas – margaritas are on me!

If you’ve got ideas about what you’d like to see WICL doing, please don’t hesitate to let us know. In the meantime, continue to recruit those who you know who are practitioners in the communications, telecommunications, broadcast, radio, media insurance, public relations, or other related industries to our group. It costs nothing to join, and we can all benefit from the shared knowledge. Please also feel free to share this newsletter with friends and pull up past issues on the web at: www.tinyurl.com/ABAWICL or from our WICL Facebook page. Thanks to everyone for being a part of this wonderful group — we wish you a happy, healthy, peaceful and prosperous holiday season and hope that you have the opportunity to truly enjoy it with family and friends. Our next meeting will be held in conjunction with the Annual Forum on Communications Law Conference in Rancho Mirage, California — February 3-5, 2011. We look forward to seeing you there!

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A summary of the media-law background of Supreme Court nominee Elena Kagan

Prepared by The Reporters Committee for Freedom of the Press
May 13, 2010

Elena Kagan has worked on free-speech and free-press issues more than any recent high court nominee, but her writings tend to explore the underpinnings of current doctrines and standards, rather than argue for or against any particular approach. She has also expressed skepticism with how workable the “actual malice” libel standard and a reporter’s privilege are, and whether those standards need to be reworked.

After her judicial clerkship following law school, Kagan worked for Williams & Connolly, a Washington, D.C., law firm with a well-respected media law practice that has long represented The Washington Post, the National Enquirer, and many other media outlets.

When she turned to an academic career, she wrote on libel law and government regulations of speech before ultimately turning to other topics. Since becoming solicitor general, she has personally argued a First Amendment issue before the Supreme Court in one case, Citizens United v. FEC, but her office has brought other speech cases, including United States v. Stevens, the case over the criminalization of depictions of animal cruelty.

All of her non-academic experience — at the law firm, and with the Solicitor General’s office — reflects the fact that she was advocating the position of a client, so it cannot be considered useful as insight into her own beliefs. However, it does demonstrate her familiarity with the issues.

Libel

When Kagan was a Williams & Connolly associate from 1989 to 1991, she handled at least five lawsuits that involved First Amendment or media law issues.

In her Senate questionnaire, Kagan said she played a significant role in three libel actions. These cases included the representation of a publishing company in a libel action arising from an allegation that the plaintiff was in prison for child molestation, the representation of Newsweek in a matter where the plaintiff claimed he had been defamed by being identified as a subject of a fraud investigation, and the representation of the National Enquirer in a libel action brought by a person mistakenly identified in the
publication. Kagan’s work on these matters show a familiarity with the legal standards applied in libel cases, such as the “actual malice” standard and the “libel-proof plaintiff” doctrine.

After leaving private practice for academia, Kagan took a more academic approach to libel law.

Writing a “Libel and the First Amendment” update for the second edition of the Encyclopedia of the American Constitution, she expressed surprise at the lack of reform in the complex standards developed under New York Times v. Sullivan, “given the breadth and depth of dissatisfaction that this doctrine has engendered.”

Among the problems she sees with libel law is the case law’s complexity and its categorization of speech on public figures versus private figures.

Kagan finds the complexity of libel law to be in conflict with broader First Amendment theory. She writes in this update, “The intricate, even convoluted nature of this categorical scheme, governing as it does every important aspect of libel litigation, ill comports with the Court’s usual concern for certainty and predictability in matters affecting freedom of speech.”

Kagan seems most skeptical that the “actual malice” heightened proof requirements in public figure cases is beneficial as a whole, stating that it “deprives falsely defamed individuals of the ability to obtain monetary damages” and “prevents the public from ever learning of the falsity of widely disseminated libelous statements.”

She finds the well-established area of law has a “surprising air of permanence” and notes that the Supreme Court took few cases in the late twentieth century, closing the entry by saying that the “rootedness” made reforms unlikely.

This theme is somewhat echoed in her 1993 book review of Make No Law: The Sullivan Case and the First Amendment, by Anthony Lewis.

She criticized Lewis’ spinning Sullivan’s story of a sheriff suing the New York Times as support for the broad application of actual malice to all public figures, saying that he “he uses these facts as springboard to justify principles of libel law and First Amendment law applicable to a much wider range of cases.”

“The drawing of morals from a story may be more or less apt; so, too, may be the creation of legal rule and principle,” Kagan writes. “The adverse consequences of the actual malice rule do not prove Sullivan itself wrong, but they do force consideration of the question whether the Court, in subsequent decisions, has extended the Sullivan principle too far.”

In one part she lambastes the press for a perceived arrogance, writing, “Today’s press engages in far less examination of journalistic standards and their relation to legal rules. Rather than asking whether some kinds of accountability may in the long term benefit
journalism, the press reflexively asserts constitutional insulation from any and all norms of conduct. Lewis himself notes this air of exceptionalism and entitlement.”

In her review, she suggests other approaches to application of actual malice, including the application of the “rule to all (but only) those cases involving speech on governmental affairs” and alternatively, weighing “the respective power of the speaker and the subject and the relation between the two.”

Still, she writes, “Questions of this kind in no way prove that the Court decided Sullivan incorrectly or that the Court now should reconsider its holding.”

Furthermore, she uses lofty language to describe First Amendment values in the general sense, saying of the book, “It is an account of the development of certain core free-speech principles: that the people are sovereign in a democracy; that wide open debate is necessary if the people are to perform their sovereign function; that government regulation of such debate should ever be distrusted. In turn, these principles provide the measure of current First Amendment problems. Thus, Lewis makes a compelling case that the greatest of all obstacles to a flourishing system of freedom of expression is governmental secrecy. . . .”

A logical extension of these admittedly decade-old beliefs could indicate that if she became a Supreme Court justice, she might take an interest in new judicial interpretations of well-established libel law, which is potentially problematic for those who have come to rely on New York Times v. Sullivan since the mid-twentieth century.

**Reporter’s privilege**

Kagan also dealt with reporter’s privilege issues at Williams & Connolly, often on behalf of Washington Post reporters. In a Harvard Law Bulletin interview in 2005, Kagan said the Post’s legal strategy to quash subpoenas grew from former editor Ben Bradlee’s assertion that a reporter’s privilege exists whether the Supreme Court says it does or not. She expressed surprise that boilerplate motions to quash subpoenas had such efficacy in court.

> [W]hat was shocking is that sometimes we won notwithstanding that there wasn't a whole lot of law in these motions. The prosecutors would back down often after we convinced them that the reporter didn't know anything or wouldn't say anything particularly useful. Or the judge would rule for us on the ground that there wasn't any necessity for the reporter's testimony. And the client — the reporter — never, ever ended up in jail.

However, one Post reporter was indeed threatened with jail at that time. Linda Wheeler was held in contempt of court for refusing to disclose the source who tipped her off about a police raid. The Wheeler case led to the enactment of the D.C. shield law the next year.
In the *Bulletin* interview, she also talked about the likelihood of the Supreme Court reviewing some of the reporter subpoena cases at the time, such as the Judith Miller subpoena seeking information in connection with the revelation of the identity of CIA operative Valerie Plame. Though she noted that high-profile cases could prompt the justices to take up the issue, she noted that at any rate, the “status quo isn’t so bad, really.”

It’s hard to think of important prosecutions that have not gone forward because reporters have refused to give information. On the other hand, it’s hard to make the argument that freedom of the press has been terribly infringed by the legal regime that’s been set up. So it may be that the Supreme Court looks at the status quo and says: “Nothing seems terribly wrong with this. People are ignoring a little bit what we said, but it seems to have results that are not too bad, from either perspective.”

She also commented on the problems with the shield law then (and still) before Congress, particularly the difficulty in determining who it should cover, likening including bloggers to shielding “you, and me, and everybody else in the world … once that happens, there’s a real problem for prosecutors seeking to obtain information.”

But then she continued to say the Supreme Court hasn’t distinguished among different mediums of the press and there is likely a good reason it has avoided doing so. “First Amendment law is already very complicated … [t]here are lots and lots of different kinds of press entities and other speakers. And if each one gets its own First Amendment doctrine, that might be a world we don’t want to live in.”

**Obscenity**

Kagan also gained familiarity with the obscenity standard when she was one of the attorneys at Williams & Connolly who wrote a friend-of-the-court brief in the appeal of *Luke Records v. Nick Navarro*, in which a federal district court held that a rap recording by the group 2 Live Crew was obscene. According to Kagan’s questionnaire, she drafted a brief in the case that focused on the problems with declaring a musical recording obscene under constitutional law. The court found that the local prosecutor who had won the obscenity ruling had failed to prove that the material at issue was obscene.

**Court access**

Kagan also worked on one case involving open access to court documents. In *In re Application of News World Communications, Inc.*, Kagan represented the *Post* and the local NBC affiliate in a media coalition’s effort to compel the public release of the unredacted transcripts of audiotapes that were used as evidence in a criminal trial. The case involved balancing the public right of access to the courtroom with a defendant’s
right to a fair trial – a common judicial test in open court cases. Kagan argued two motions before Judge Charles Richey of the U.S. District Court in Washington, D.C., to compel release of the transcripts and to prohibit redaction. Judge Richey granted both motions.

Government regulation of speech

Academic writings

On the whole, Kagan's academic writings on free speech adopt a weighty and divorced academic tone and do not necessarily advocate for specific reforms within the First Amendment legal sphere. Rather, her scholarship more often presents possible explanations as to how First Amendment law has developed and suggests ways that laws restricting speech could be permissible under those constructed views.

Her work can best be summarized as an exploration into how the motivations behind enacting laws restricting speech have guided the development of free speech jurisprudence, while at the same time being critical of the doctrinal lines of law that have developed regarding how strictly the Supreme Court scrutinizes prohibitions on speech.

Kagan's most known work is a 1996 University of Chicago Law Review article entitled “Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine.”

The major premise of the article is that the evolution of First Amendment jurisprudence can best be explained as an implicit examination into government motives when enacting a speech regulation. According to Kagan, it is this approach to First Amendment law the Supreme Court uses when determining the constitutionality of a law restricting speech, rather than relying on models focusing on expanding the speech opportunities of individuals or those focused on the quality of speech an audience encounters.

Kagan argues that impermissive government motive — defined as hostility for or promotion of a particular message — is the implicit but central inquiry in determining whether a speech restriction should be upheld. She believes the court has attempted to determine when the probability of improper motive is greatest through the varying levels of judicial scrutiny it has developed. For example, laws prohibiting specific content (e.g., racist speech) are subject to heightened levels of review than those that are content-neutral (e.g., laws regulating all speech which may invoke a violent reaction, no matter its specific message) because it suggests the government is favoring one message over another. Conversely, speech restrictions that do not suggest ill motive would be subject to less exacting constitutional review.

When Kagan applies the ill-motive model, she does not necessarily agree that the Supreme Court has developed proper distinctions between content-based and content-neutral laws that properly ferret out motive. Kagan believes that the actual effects a
speech restriction has are often more important in determining ill motive than whether the law as written appears to be neutral in terms of promoting particular content or viewpoints.

Therefore, Kagan writes that the current judicial doctrine that a content-neutral law should always receive less scrutiny than a content-based law fails to recognize that a content-neutral law may in practice restrict more speech — and even the message of a particular speaker — much more so than a content-based law. In that case, the content-neutral law would, because of the greater possibility of improper government motive, be subjected to a more rigorous judicial review. Of course, Kagan also concedes that under an impermissible motive approach, there may be instances when a content-based law has minimal impact on one's ability to speak freely and therefore should be subjected to a lesser standard of review.


Here, Kagan presented an early look at what effect a speech regulation has on the ability of one to speak freely, despite whether the language of the law appears to be viewpoint-neutral. This article uses the laws at issue in the R.A.V. case (a law prohibiting racist speech that would arouse anger or resentment) and the Rust case (a law preventing federal subsidies to medical providers engaged in pro-abortion services) to illustrate how the government often selectively chooses to prohibit or dissuade a particular message.

Kagan defines “content-based underinclusion” as situations when the government picks and chooses what messages will be heard when it has authority to regulate speech in much broader terms. In the R.A.V. case, the Supreme Court acknowledged that a broader law covering all kinds of speech amounting to “fighting words,” which are not constitutionally protected, may have passed muster. Only including racist speech, therefore, would be an underinclusive law. In the Rust case, the government had wide authority to support speech through federal funding but chose not to fund speech promoting abortion.

Kagan uses these cases to again argue that a possibility of ill-motive arises even when the government appears to be acting constitutionally. Under a motives-based approach, it is of little consequence whether Congress could constitutionally restrict racist fighting words because they were but a subset of the larger class of fighting words that can be regulated. Likewise, in Rust, it does not matter that the government can and does engage in its own speech agenda. In both cases, what results is a viewpoint-based discrimination against particular kinds of speech that requires heightened judicial review.

In another article, “Regulation of Hate Speech and Pornography after R.A.V.,” Kagan explores how hate speech and pornography may be regulated in ways that may avoid the
admonition in *R.A.V.* against viewpoint discrimination. She offers, again in a detached academic manner, four means by which this may occur.

First she suggests a greater focus on laws proscribing particular conduct rather than speech. Laws, for example, targeting sexual exploitation or pimping or focusing on the harms associated with hate crimes rather than any message conveyed may better avoid *R.A.V.* viewpoint-based problems. Second, Kagan argues that enacting laws that are more viewpoint neutral (e.g., prohibiting all fighting words or a broader range of sexually explicit materials irrespective of the actual message) are a possible means. Third, she suggests that redefining obscenity to focus on actual harm to women rather than the actual content or message expressed would aid in demonstrating that there is an interest independent of speech for which the government is justified in regulating. Finally, she points out that the government could argue for limited exceptions to viewpoint-based discrimination that highlight the gravity of the harm caused by speech, which would justify regulation.

In Kagan's final piece, a 1996 comment entitled “*When is a Speech Code a Speech Code.*” she again explores the notion that the Supreme Court’s conceived speech doctrines can be viewed through a motives-based approach. In this article, Kagan takes issue with the perceived belief that direct restraints on speech (as opposed to incidental restraints) are presumptively more harmful to speech and should be subject to greater scrutiny. Kagan again discusses her belief that motive is key in determining whether a speech restriction is constitutional.

*Citizens United*

Kagan argued a First Amendment case before the Supreme Court as solicitor general just last fall in *Citizens United v. FEC*. While the argument cannot truly be attributed to Kagan as her position, as she was arguing on behalf of the government, it may be illustrative of how she will act on the bench. It is particularly useful because of how she reshaped the argument from the initial brief and initial argument before the court — the court asked for additional briefing on the question of whether the law was unconstitutional on its face — that took place before she worked for the office.

The most dramatic change in the government’s argument was in how it proposed to apply the law. During the first round of arguments, the associate solicitor general then handling the case suggested that Congress had the authority to limit or prohibit political campaign speech in many forms, including books.

In her oral argument, however, Kagan explained that the government was backing off this position. “We went back, we considered the matter carefully, and the government’s view is that although [a different campaign-finance law] does cover full-length books, that there would be quite good as-applied challenge to any attempt to apply [that law] in that context.”

She added that the Federal Election Commission has never attempted to enforce the law against book publishers and there is no reason to believe it would. She said it would apply to pamphlets, as those are “pretty classic electioneering.” Kagan drew a distinction between election activities by corporations and those of individuals and nonprofits and between books and typical election activities.
Kagan’s argument was unsuccessful, as the Supreme Court chose to overturn the entire law in question, rather than narrow it or affirm the lower court. However, the arguments Kagan endorsed and the care she took to distinguish the different kinds of speech involved in the case may be indicative of how she’d treat a case involving a media organization or member of the press in the future.

*United States v. Stevens*

In *United States v. Stevens*, the Solicitor General’s office (during the Bush Administration) asked the Supreme Court to hear an appeal of the dismissal of charges against a man convicted of selling videotapes that included footage of dog fights. The U.S. Court of Appeals in Philadelphia (3rd Cir.) had struck down the law as unconstitutional on its face.

The law at question was enacted to combat the appearance on Internet sites of “crush videos” — clips of small animals being crushed by women in bare feet or high heels. But the law was broadly written to include all images of animal cruelty, which included any images of the killing of animals.

The solicitor general is charged with defending all federal laws before the court. But in the brief on the merits of the case (filed after Kagan took over as Solicitor General), the office went farther than just defending this particular law, and instead argued that Congress can create entire categories of unprotected speech any time it finds that the value of the speech does not outweigh its cost to society.

Such a broad standard would surely open the door for a wide range of speech restrictions, and is almost impossible to reconcile with the plain meaning of the First Amendment.

**Cameras in court**

At the Ninth Circuit’s Judicial Conference last summer, Kagan was interviewed by conference chair Kelli Sager, a noted media lawyer. Sager asked Kagan “a question that I’m interested in personally” — if the members of the Court were to ask Kagan for her views on whether they should allow television cameras to cover their proceedings, what would she say?

Kagan first said she has “a feeling that they’re not going to ask me,” and backed off from stating a definite position. Then she added:

“They’re going to make this decision themselves and they probably should make this decision themselves. They’re the folks who best know the dynamics on the court and I wouldn’t pretend to give them advice on this. But I will say this: . . . if cameras were in the courtroom, the American public would see an amazing and extraordinary event. . . . I think if you put the cameras in the courtroom, people would see . . . an institution of their government working at a really high level. So that’s one plus factor for doing it.”
The Difference Even One Woman Makes on an Appellate Bench

By Stephanie B. Goldberg

If Elena Kagan is confirmed as a Supreme Court justice, three of the nine justices will be women. It’s an unprecedented event for the nation’s highest court, causing pundits to speculate whether women will have gained “critical mass” on the Court so that it is no longer perceived as a male institution.

Yet appearances can be deceiving. According to the National Women’s Law Center (NWLC) in Washington, D.C., women account for only 29 percent of the 161 active judges on the federal courts of appeal. Many circuits are “vastly underrepresented,” the NWLC reports. The Eighth Circuit has only one woman judge, Diana E. Murphy, who is the first woman appointed to that circuit. Other circuits singled out by the NWLC for their low percentages of women on the bench are the Tenth Circuit (18 percent), the Third Circuit (21 percent), and the Fourth and Eleventh Circuits (25 percent each).

The Difference Theory

There is a broad consensus among scholars, bar groups, and centrist politicians that it’s important to have women on the bench as role models and to lend diversity of experience. However, the proposition that women will decide cases differently than men on the basis of their life experience is a prickly one. Former Justice Sandra Day O’Connor told a women’s magazine in 1981, “Yes, I will bring the understanding of a woman to the Court, but I doubt that alone will affect my decisions. I think the important thing about my appointment is not that I will decide cases as a woman, but that I am a woman who will get to decide cases.”

In her book The Majesty of the Law, O’Connor summed it up succinctly: “The power I exert on the court depends on the power of my arguments, not on my gender.”

Justice Ruth Bader Ginsburg, a lifetime opponent of special treatment for women, was equally uncomfortable with the so-called difference theory, which builds on the work of linguistic scholar Carol Gilligan and holds that women tend to prize relationships, context, and an “ethic of caring.”

In a 2009 interview with the New York Times, Justice Ginsburg expressed her skepticism of empirical legal studies suggesting that women judges exert a particular influence on the bench. “I certainly know that there are women in federal courts with whom I disagree just as strongly as I disagree with any man. I guess I have some resistance to that kind of survey because it’s what I was arguing against in the ’70s. Like in Mozart’s opera Cosi fan Tutte: that’s the way women are.”

Yet even she conceded that her life experience as a woman may have helped educate her fellow justices to hold in Safford v. Redding (2009) that a strip search by school authorities of a 13-year-old girl, suspected of having ibuprofen, violated her constitutional rights. “I think it makes people stop and think,” she told the New York Times, “maybe a 13-year-old girl is different from a 13-year-old boy in terms of how humiliating it is to be seen undressed. I think many of [the male justices] first thought of their own reaction. It came out in various questions. You change your clothes in the gym, what’s the big deal?”

The Impact of Gender

A growing body of research suggests that women exert a pattern of influence on their male colleagues and may exhibit differential voting practices in cases dealing with...
sexual harassment and other types of employment discrimination. But the scholars in the field of empirical legal studies are cautious about generalizing from their results—for example, they will not assume that what may hold true in sexual harassment cases extends to other areas of the law.

As a student at Yale Law School in 2005, Jennifer Peresie examined 556 sex discrimination and harassment federal appellate decisions from 1999 to 2001. Peresie found that when a woman judge was part of the panel, plaintiffs won their claims 34 percent of the time compared to 17 percent with an all-male panel. When two women judges sat on the panel, the figure jumped to a 43 percent likelihood of winning.

Peresie hypothesized that male judges accorded women judges a measure of deference in this area and also may have voted with them in the hopes of winning concessions later on. Another interpretation was that having women on the panel moderated male behavior, regardless of how the women voted. Her conclusion was that women judges mattered, not simply for appearances’ sake but in how cases were decided.

Peresie’s study was among the first to show the impact of gender. Other studies were inconclusive because of failures in design, too few women judges in a sample, or a failure to compensate for ideology.

In 2008, Washington University’s Christina L. Boyd and Andrew D. Martin and Northwestern University School of Law’s Lee Epstein analyzed the outcomes of a variety of cases from 1995 to 2002. Again, the most striking evidence of gender impact was in sex discrimination claims. They found male judges were 10 percent more likely to rule against plaintiffs in these cases but were 15 percent more likely to rule in their favor when a woman judge was part of the panel.

In addition, the authors state that the findings are consistent with an “informational” view of judging—that the life experience of women judges regarding discrimination is viewed as a valuable type of knowledge and is accorded respect by their male colleagues. Likewise, in areas in which a woman’s life experience is irrelevant or identical to that of her male colleagues, the gender impact will be imperceptible. As Epstein summed it up, the results show that “women have an effect on the law, but it’s a small effect because sex discrimination is a small part of what courts do.”

In a way, these findings represent a middle ground between “difference feminists” and those who deny that women bring a different viewpoint to the law. How relevant is it to jurisdictions like the Eighth Circuit, where the fight has waged for the last five years to increase the number of women on the bench?

The Omega Project

University of Minnesota professor Debra Fitzpatrick, interim director of the Center on Women and Public Policy, makes it clear that the struggle will rage on regardless. The center spearheaded the Omega Project as a means of educating the public and legislators on the need for more women on the appellate bench. According to Fitzpatrick, the project employs a multipronged approach of grooming and counseling women interested in public service, assembling lists of qualified women, and keeping the pressure on.

“We’re working all the way back to law schools to get younger women engaged from the get-go,” says Fitzpatrick, pointing out that Elena Kagan targeted the goal of sitting on the Supreme Court as an undergraduate. “We’re thinking about the pipeline and the long-term foundational work so that when a nomination is open, no one can make the case that there aren’t any qualified women.”

Instead of positioning gender balance on the appellate bench as a women’s issue, there’s awareness that the dearth of women is an embarrassment. “We’re the worst,” Fitzpatrick sighs, “the absolute worst.”

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The Gender Gap in Federal and State Courts

The Center for Women in Government & Civil Society at the Rockefeller College of Public Affairs & Policy at the State University of New York (SUNY)—Albany recently issued a comprehensive report on the representation of women in federal- and state-level judgements. The report, which analyzed quantitative data from a variety of sources, concludes that the under-representation of women “cannot be attributed to the lack of women who are qualified to serve on the bench, but to the lack of opportunity and access afforded to women.”

Findings include the following statistics:

- Women occupy only 22 percent of all federal judgements and 26 percent of all state judgements.
- At the federal level, only New Jersey and Connecticut achieved 33 percent representation. Women account for 10 percent or less of the judges in eight states. No women hold judgements in the Montana and New Hampshire federal courts.
- No women serve on the U.S. district or magistrate benches of the U.S. Northern District of New York despite a pool of 359 female judges in New York state courts.
- Women are also absent from the U.S. bankruptcy courts for the districts of Alaska, Hawaii, Idaho, Indiana, Iowa, Maine, Mississippi, Montana, Nebraska, New Hampshire, Oklahoma, South Dakota, Vermont, Virginia, and West Virginia.
- The picture is somewhat brighter at the state level, where women hold at least 33 percent of the judgements in eight states. Yet in 13 states, women hold 20 percent or less of all judgements. There are no women judges on the supreme courts of Idaho, Indiana, and Mississippi; or on the Alaska Court of Appeals.

Federal Legislative Update
By Karen Chesley

The Libel Tourism Law (enacted)

On August 10, 2010, following unanimous approval by both Houses of Congress, President Barack Obama signed into law the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, Pub. L. 111-223. The SPEECH Act is the first nationwide law protecting American authors and publishers from “libel tourism,” a type of forum shopping in which the plaintiff brings a defamation suit in a foreign country where the libel laws favor the plaintiff, even though that country may have only a minimal connection to the subject publication. Typically, the American defendant in such cases fails or refuses to travel to the foreign jurisdiction to contest the defamation charges, and the plaintiff often is awarded a hefty default judgment.

The SPEECH Act cannot prevent the entry of a foreign default judgment, but it authorizes American courts to refuse to enforce foreign libel judgments that exceed the bounds of the First Amendment, thereby protecting American authors from any seizure of their U.S. assets under such a judgment. The Act also creates a private right of action against any foreign libel plaintiff who files suit to attempt to deprive an American of the right to free speech.

The legislation was endorsed by the Association of American Publishers, the American Society of News Editors, the American Library Association, and the ACLU, among others. WICL member Laura Handman, a partner in the Washington, D.C. office of Davis Wright Tremaine, testified in support of the bill during hearings before the House Committee on Commercial and Administrative Law in 2009.

The Anti-SLAPP Act (pending)

On December 16, 2009, Representatives Steve Cohen (D-TN) and Charlie Gonzales (D-TX) introduced the Citizen Participation Act of 2009, H.R. 4364, which seeks to create a mechanism for federal courts to quickly dismiss lawsuits filed primarily to intimidate one’s opponents into silence, or into otherwise failing to enforce their First Amendment rights – so-called “strategic lawsuits against public participation,” or SLAPP suits. Twenty-seven states currently have such anti-SLAPP laws.

The proposed federal anti-SLAPP Act would enable federal courts to dismiss such cases quickly, thereby avoiding high litigation costs for defendants, by allowing defendants to file a special motion to dismiss shortly after a SLAPP complaint is served. If the case is dismissed pursuant to such a motion, the plaintiff must pay the defendant’s legal fees. The Act also would permit SLAPP suits filed in state courts to be removed to federal court.

On April 26, 2010, the bill was referred to the House Judiciary Committee’s Subcommittee on Courts and Competition Policy. It had not yet been sent to the floor when this newsletter went to press.

The DISCLOSE Act (pending)

Congress also considered the “Democracy Is Strengthened by Casting Light on Spending in Elections” (DISCLOSE) Act this term. The Act was drafted in response to the U.S. Supreme Court’s decision in Citizens United v. Federal Election Commn, 558 U.S. 50 (2010), which struck down as unconstitutional campaign finance laws limiting corporate funding of political broadcasts. (For additional information on the Citizens United decision, see “Justice Kagan’s Media Law Background” on p. 4 and the discussion under “Open Meeting Laws” on p. 16.)

The Act seeks to increase transparency in national campaigns by requiring organizations involved in political campaigning to disclose the identities of their donors, thereby preventing donors – especially large donors – from hiding their identities behind the groups that they fund. It also would require politically-active organizations to include on their websites a link to the Federal Election Commission website, which will provide users with a list of the organization’s donors. Covered organizations include corporations, unions, and certain I.R.C. § 501(c) or 527 not-for-profit groups, thereby capturing the donor lists of those newly-popular groups that hide their political viewpoints behind innocuous-sounding or patriotic names.

The Act also contains several provisions that would impact broadcast media. Specifically, the Act would limit the amount broadcast media can charge for political ads, forbid preemption of political ads, and require the Federal Communications Commission to audit broadcasters, television networks, cable operators, satellite service providers, and radio broadcasters to ensure compliance with the Act.

The House of Representatives passed the DISCLOSE Act on June 24, 2010. The Senate conducted hearings on the Act, but when the Act came up for a vote in July, Democratic leaders in the Senate failed by three votes to obtain the 60 votes necessary to overcome a Republican filibuster of the bill. A second attempt to invoke cloture and break the filibuster failed by one vote on September 23.

With Congress back in session for a new term, the DISCLOSE Act has a second chance. In the first cloture vote last term, three Republican senators who support a political finance disclosure law – Olympia Snowe, Susan Collins, and Scott Brown – refused to join the Democratic majority to end the filibuster. In the second attempt, Snowe and Collins continued to hold party lines. However, if Democrats can negotiate a compromise with some or all of those senators this term, the Republican leadership will be unable to use a filibuster to prevent a vote on the Act.

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Roundup of Recent Issues in Access Laws
By Genelle Belmas

The past year has been active in access issues, from the Open Government Directive issued at the end of 2009 by President Barack Obama to the bombshell Wikileaks release of thousands of classified documents on the Afghan war in July 2010 to the September 2010 announcement by the Judicial Conference that it plans a pilot project on whether to allow cameras into federal civil courtrooms. Following are the highlights of recent decisions on the federal Freedom of Information Act (FOIA), state open records laws, and state open meetings laws.

Federal Freedom of Information Act Cases:

**High 2/Low 2.** The Supreme Court has agreed to take on the “High 2/Low 2” distinction that has split the Circuit Courts of Appeals in their interpretations of FOIA Exemption 2 relating to agency internal rules and practices. Some Courts have adopted a dual-level interpretation of the exemption, holding internal trivial information to be exempt under “Low 2,” and information of a more significant nature, the release of which could risk circumvention of agency regulations, to be exempt under “High 2.” The Supreme Court upheld the “Low 2” exemption in Department of Air Force v. Rose, 425 U.S. 352 (1976). But the status of the “High 2” exemption was left open. Some Circuits have adopted it, and some have not.

The Court will hear the “High 2” case, Milner v. Department of the Navy, during this term. The plaintiff, a resident of Puget Sound, filed a FOIA request for information about weapons stored at Washington’s Naval Magazine on Indian Island, then brought suit for records that had been denied. Both the district court and the Ninth Circuit Court of Appeals affirmed the use of Exemption 2 to withhold the records. The precise question to be addressed by the Supreme Court is “whether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the ‘High 2’ expansion created by some circuits but rejected by others.”

**SEC Exemptions in the Dodd-Frank Act Revoked.** On October 4, President Obama signed into law a bill revoking the new FOIA exemptions for the Securities and Exchange Commission (SEC) that were granted under Section 929I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which the President had just signed into law in late July. A public outcry over the new SEC exemptions arose shortly after they became effective, when the SEC invoked them in response to a FOIA request from Fox Business News for records pertaining to Bernie Madoff, who has been convicted of running a Ponzi scheme that defrauded numerous investors, and Fox News filed suit seeking release of the withheld records. The subsequent outcry included allegations that Section 929I would completely exempt the SEC from all FOIA obligations. The SEC hastened to assure critics that the claim that it was completely exempt from FOIA disclosure obligations was not true and that it would self-police its use of the new carve-outs. On September 15, the SEC issued a staff guide limiting the use of the Section 929I exemptions to:

…information obtained pursuant to the Commission’s examination authority [about] entities not already clearly deemed as “financial institutions” under FOIA Exemption 8. . . . [and] only where:

1. the request seeks information obtained pursuant to the Commission’s examination authority from an entity the Commission is responsible for regulating, supervising or examining;

2. the examined entity may not be clearly recognized as a “financial institution” under Exemption 8; and

3. Exemption 8 would protect the information if the entity were clearly deemed a “financial institution.”

(See http://www.sec.gov/news/section-929i-guidance.htm). Nonetheless, Rep. Darrell Issa (R-CA) called for a repeal of the new SEC carve-outs and Congress promptly reacted. The new exemptions for the SEC were repealed less than three months after they were enacted.

**Allegedly Illegal Intelligence Methods.** A federal district judge recently ruled that the CIA’s use of Exemption 3 to withhold information about intelligence sources is not subject to district court review, despite allegations that those sources and methods were illegal. In American Civil Liberties Union v. Department of Defense, 2010 U.S. Dist. LEXIS 70907 (D.D.C 2010), the district court said that the question of whether the material under consideration was an “intelligence source [or] method” under the National Security and CIA Acts could not be limited to “lawful” sources or methods, adding, “Courts are not invested with the competence to second-guess the CIA Director regarding the appropriateness of any particular intelligence source or method.”

**Open Records Acts:**

**Massachusetts Recordkeeping Requirements Resisted.** A new Massachusetts Open Meeting Law, G.L. ch. 30A, §§ 18-25, took effect on July 1, 2010. Under the law, “minutes of any open session, the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used...
at the session” must be gathered and retained, rather than just the minutes. Several cities have complained about the additional recordkeeping requirements mandated by the new law. City officials say that the requirements are onerous and will result in them being overrun with paper, and question whether electronic copies of documents will satisfy the law’s requirements.

**New York City Surveillance Records Secret.** In *Dinler v. City of New York (In re City of New York)*, 607 F.3d 923 (2d Cir. 2010), the Second Circuit Court of Appeals held that the City of New York did not have to turn over field reports of the surveillance for terrorist activity it had undertaken prior to the 2004 Republican National Convention to protesters arrested for demonstrating at the convention. Relying on the “law enforcement privilege,” the Second Circuit authorized an emergency appeal to overturn the district court ruling that the reports should be turned over. The law enforcement privilege, said the court, is not absolute, but once established, there should be a “pretty strong presumption” against lifting it. The field reports were reviewed *in camera* by the Second Circuit, which determined that they were substantially similar to the end user reports that had been released by the city; therefore, the court held that access to the field reports was unnecessary: “Because the Field Reports do not undermine the information previously disclosed to plaintiffs, we have no difficulty in concluding that plaintiffs do not have a need, much less a compelling need, for the Field Reports.”

**Hawaii Vexatious Requester Law.** In response to numerous requests for President Obama’s birth certificate, the Hawaii Legislature passed a law that allows state agencies to label a person a “vexatious requester” if that person makes repetitive or duplicative requests that have already been filled. The law also allows state agencies to ignore public records requests that are substantially similar to previous requests or that are duplicative of previous requests.

**Wisconsin Teachers’ Personal E-mails are Not Public Records.** Personal e-mails sent by teachers over school computers were held not to be “records” under the Wisconsin Public Records Law by the Wisconsin Supreme Court in *Schill v. Wisconsin Rapids School Dist.*; 2010 WI 86, 2010 Wisc. LEXIS 116 (Wis. 2010). The requester of the records asked the court to hold that all e-mails that are sent or received on school computers are considered public, whether work-related or personal. But the court declined to do so, saying that, because the teachers’ personal e-mails “have no connection to a government function,” they cannot be treated as public records under the state’s public records law merely because they were sent or received on school computers. However, the court added that there may be circumstances under which personal e-mails could become public records; for example, if used as evidence in a disciplinary proceeding or in an investigation of misuse of government resources.

**Washington Anti-gay Marriage Petition Signers Stay Private—For Now.** After the Supreme Court’s opinion last term in *Doe v. Reed* repudiated the arguments put forth by the signers of the Protect Marriage Washington petition that their identities should be protected from disclosure, the case was remanded to the district court, which, in August, held that the names could remain secret for the time being, pending further proceedings. In the Supreme Court’s opinion, Chief Justice John Roberts had suggested that Protect Marriage Washington might prevail on its claims in this particular case if it could show evidence of actual threats or harm. The new stay imposed by the district court will allow the organization time to attempt to make that showing.

**Open Meetings Laws:**

**Texas Open Meetings Law Under Attack.** A lawsuit has been filed by more than a dozen public officials alleging the Texas Open Meetings Act violates their free speech rights. The Act imposes a fine and potential jail time for any quorum deliberating in secret. The public official plaintiffs had argued that the Supreme Court’s decision in *Citizens United v. FEC* last term, which expanded the speech rights of corporations, should apply equally to cities, an argument that the judge has rejected. The judge also recently declined to allow a group of Texas cities to join the suit. The Act was upheld by the Fifth Circuit Court of Appeals, sitting *en banc*, earlier this year in *Rangetoro v. Brown*, 566 F.3d 515 (5th Cir. 2010), which dismissed as moot a challenge by two former City Council members who had attempted to challenge charges that they had held an illegal closed meeting by alleging that their First Amendment rights had been chilled. Because that case was dismissed as moot, because the plaintiffs were no longer in office, the courts have not yet ruled on the merits of such a First Amendment challenge. The new suit may permit a First Amendment challenge to be decided.

**Nebraska Open Meetings Law Limited.** The Nebraska Supreme Court agreed with a lower court that the state public meetings law had not been violated when city officials participated in facility tours and attended restaurant dinners that were not publicized. *Schauer v. Grooms*, 280 Neb. 426 (2010). The members of the City Council of Ord, Nebraska had accepted an invitation for dinner and a tour of an ethanol plant from a development board in connection with its consideration of annexing land on which to build such a plant. The plaintiffs, whose land abutted the land under consideration for annexation, also were invited to the dinner and tour but declined to attend. Instead, they sought to have the annexation agreement that they claimed had resulted from the dinner and tour voided, as they claimed the planned ethanol plant would be a nuisance. The tour at issue had been split into two groups – to avoid an obvious quorum, the plaintiffs suggested – and the City Council members insisted that no business had taken place over dinner. The successful annexation vote took place several days later. The court found no evidence that the council was attempting to conduct business in secret, and it did not consider the dinner to be a “meeting,” noting that “there is no meeting
of a public body based upon the unspoken thoughts of council members who happen to be sitting in the same room.”

Virginia Board Ruling Voided Due to Open Meetings Violation. In what may be the first time that a Virginia judge has voided an action taken in violation of the state open meetings law, a judge invalidated the Augusta County Board of Equalization’s raising of a property assessment in a closed meeting on grounds that the meeting violated the state Freedom of Information Act. A property owner sued after the board raised his assessment in a meeting that took place without recorded minutes in a small room behind a closed door with a sign on it that deterred public entry. The board’s decision to raise the plaintiff’s assessment, made during that meeting, was voided. The county attorney pledged to ensure that the board understood the law and would, in the future, make sure that its meetings were public.

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Update on Reporters’ Shield Laws

By Catherine A. Van Horn

Efforts to enact a federal reporters’ privilege statute continue to be stalled. Although the Senate Judiciary Committee finally sent the bill to the floor last December – after the senators, the intelligence community, and the Obama administration reached a compromise on its content – the publication by Wikileaks of thousands of confidential Afghanistan War documents once again raised fears that passing the bill would result in unrestrained bloggers wreaking havoc with people’s lives via the Internet and then escaping punishment by invoking the protections of the federal shield law. As a result, the compromise bill was never called to the floor for a vote.

However, two new states – Kansas and Wisconsin – enacted shield laws this year, and Maryland replaced its old law with a more modern, more comprehensive statute that expressly provides protections in the two areas that have generated the most controversy with respect to shield laws in recent years: new media and student journalists.

These new shield laws are of particular interest now because of the ongoing debate over the appropriate scope of protection for online publications, and, in particular, whether the test for determining when electronic publications are entitled to protection should be based on the activities of the writers or the activities of the publisher. Each of the new statutes takes a different approach.

Coverage: The Kansas law, K.S.A. §60-480 et seq., is activity-based: it covers “journalists” when “acting as journalists,” which includes those who collect or publish information for an “online journal.” And, because it does not require that the “journalist” be paid, it permits students to be included. The Wisconsin law, W.S.A. § 885.14, focuses on the entity, including “[a]ny business or organization that, by means of print, broadcast, photographic, mechanical, electronic, or other medium, disseminates on a regular and consistent basis news or information to the public, including a newspaper, magazine, or other periodical; book publisher; news agency; wire service; radio or television station or network; cable or satellite network, service, or carrier; or audio or audiovisual production company.” It does not mention Internet publications or student journalists. The new Maryland law, by contrast, protects both “electronic means of disseminating news and information to the public” and student journalists. Md. Cts. & Jud. Proc. Code. § 9-112.

Balancing Test: The new statutes also reflect the ongoing debate over the showing needed to quash a media subpoena. The test varies from statute to statute; however, like most of the statutes already in effect, each of the new shield laws employs a multi-pronged balancing test. The Kansas statute requires a party seeking disclosure to show, by a preponderance of the evidence, that the information could not be obtained elsewhere through reasonable effort, and that it is both “material and relevant” and “of compelling interest,” which includes “prevention of a certain miscarriage of justice” and “an imminent act that would result in death or great bodily harm.”

The Wisconsin statute imposes an absolute ban on compelling the disclosure of confidential information or sources, information that would tend to identify a confidential source, or any news obtained or prepared in confidence by a newsperson. All other types of information can be disclosed, provided the information is “highly relevant,” “necessary” to the requesting party’s claim or defense, and “not obtainable from any alternative source.”

The Maryland law takes a little from both of these statutes. Like the Wisconsin statute, it prohibits the compelled disclosure of confidential sources and material. But, like the Kansas statute, it permits disclosure of non-confidential materials if the requestor can show, by clear and convincing evidence, that it is relevant to a significant issue in the case, cannot be obtained elsewhere despite due diligence, and there is an “over-riding public interest” in the disclosure.

The Impetus: The primary impetus for passage of the Kansas shield law this year was a Feb. 10, 2010 state court ruling citing Dodge City Daily Globe reporter Claire O’Brien for contempt, and imposing a $1,000 per day fine, for refusing to either disclose the identity of the confidential source or turn over to prosecutors her unpublished notes of a jailhouse interview from a story suggesting that the victim of an alleged attempted murder may have threatened the accused because of his Hispanic background. O’Brien appealed the subpoena up to the Kansas Supreme Court, but lost. She also lost her job. However, the article based on the confidential information, including excerpts from the jailhouse interview and the statements...
made by the confidential source, was awarded first prize for news stories by the Kansas Press Association.

In summary, these new statutes present in a microcosm the issues raised by today’s changing media environment and the broad spectrum of possible solutions to the problems of balancing conflicting rights and protecting online journalists.

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**Interesting Legal Developments:**

**Link to Third-Party Blog Is Not Just Defamatory, But Actual Malice**

*By Suzanna Morales*

In an unusual – perhaps even unprecedented – decision, a federal bankruptcy court held that an individual can become liable for defamation by simply transmitting an e-mail that includes a link to a blog written by a third party, if the content of the blog is defamatory and the defendant made “no serious attempt” to verify that content. The court also held both that sending the message constituted “publication” of the defamatory material and that merely including a link in an e-mail was sufficient to satisfy the “actual malice” standard applicable to public officials.

The defamation claims asserted in *In re: Will Clay Perry*, Case No. 08-32362-H4, in the U.S. Bankruptcy Court for the Southern District of Texas, resulted from a business relationship gone bad among the debtor, Will Clay Perry; the mayor of Sugar Land, Texas, David Wallace, who also was a congressional candidate; and another business partner. The February 2010 decision lists a host of allegedly false oral statements that Perry purportedly made about Wallace and the other business associate, including comments about how the blog postings might affect Wallace’s political career, but the “publication” requirement for the defamation claim was based solely on Perry’s circulation to “several individuals” via – without additional comment – of the link to the third-party blog.

The blog at issue falsely insinuated that Wallace was an arms dealer linked with the son of former British Prime Minister Margaret Thatcher in an attempt to overthrow the government of Equatorial Guinea. Perry was not aware of the identity of the author of the blog, did not provide information to the blog, and did not know whether the information in it was true or false. The court nonetheless found that Perry acted with actual malice because he made “no serious attempt to verify the information on the Blog” and awarded $100,000 in actual damages and $100,000 in punitive damages to Wallace.

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**Angry E-mails Entitled to First Amendment Protection**

*By Catherine A. Van Horn*

In contrast to the decision in *In re Perry*, above, in *State v. Drahota*, -- N.W.2d --, 280 Neb. 627 (Neb. 2010), the Nebraska Supreme Court overturned the conviction of a student who sent insulting, profanity-laced e-mails to his former political science professor, who was then a candidate for public office, accusing him of treason and of sympathizing with al Qaeda.

Darren Drahota, a student at the University of Nebraska-Lincoln, initiated an e-mail correspondence with political science professor Bill Avery, via Avery’s university-issued account. The two shared a passion for politics and, though of opposite political persuasions, exchanged a series of e-mails on political issues such as the war on terrorism, the Bush presidency and the Clinton impeachment. Drahota’s e-mails were laced with profanity and his tone was “provocative and confrontational.” For example, he stated that all liberals, including Avery, had a mental disease, desired the destruction of America and were cowards. The exchange came to a head in early February 2006. Drahota sent a lengthy message to Avery suggesting that Democrats, including Avery, were full of hate and that indiscriminately massacring those in the Middle East would save American lives. Avery, a veteran, said he had served his country honorably for four years and suggested that Drahota “sign up for duty in Iraq right away and put all your claims to the test.” He concluded that “of course” Drahota would not do so, because he didn’t “have the guts.” Drahota sent a very angry response, repeatedly threatening retaliation, in very coarse language. He subsequently apologized, but Avery told Drahota not to contact him again, or he would call the police. The s stopped, for a while.

Four months later, Avery received two anonymous e-mails “laced with provocative and insulting rhetoric” from averylivesalquaeda@yahoo.com, accusing him of being anti-American and a traitor, and “the lowest form of life on this planet.” Avery called police, who traced the e-mails to a computer where Drahota lived. Once confronted by the police, Drahota confessed. After a bench trial, he was convicted of disturbing the peace and fined $250. The Court of Appeals rejected Drahota’s First Amendment claim on the grounds that the e-mails consisted of “fighting words” not protected by the First Amendment.

The Nebraska Supreme Court disagreed. After surveying First Amendment “fighting words” jurisprudence, and concluding that the proper test for “fighting words” was whether the speech was likely to provoke an immediate breach of the peace, the Court overturned Drahota’s conviction. First, the Court noted that, even if Drahota’s words would provoke immediate retaliation in a face-to-face confrontation, immediate retaliation was not possible here, as Avery did not know who sent the e-mails or where to find the author. Moreover, because they were sent in the context of an ongoing
political debate, at a time when Avery was running for office, they were entitled to the highest level of First Amendment protection. Therefore, the two e-mails at issue did not constitute “fighting words.”

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Heard Around Town
By Karen Chesley

Diversity Benefits Everyone, But Law Firms Lag

Why is diversity in law firms important? Because different points of view lead to better results, according to a recent Chicago Tribune article titled “Managed Well, Diversity Can Lead to Innovation” (9/6/2010).

The article describes the diversity efforts initiated by Chicago law firm Quarles & Brady, which is chaired by John Daniels Jr., an African-American partner. “It’s been demonstrated that by having exceptional people with diverse backgrounds, you get the best solutions,” Daniels told the Tribune.

While many corporations have successfully integrated a more diverse workforce, the article notes that in the legal profession, “change has come more slowly for women and minorities.” The article cites several familiar ABA statistics—only 16 percent of equity partners are women, approximately the same percent as 20 years ago, and female minority partners comprise only 1.4 percent of all equity partners. The article noted one reason for these results is that 86 percent of female minority attorneys leave their firms before their seventh year due to “inferior assignments, less meaningful access to networking opportunities and comments reflecting bias.”

Mind the Gap

Not only does the percentage of female equity partners continue to lag far behind their male colleagues, but the gender-based pay gap remains firmly entrenched. And recent studies show that those problems are causing anger among female equity partners.

Female equity partners, on average, make $66,000 less per year than their male counterparts, according to a recently released results of a nationwide study by the Project for Attorney Retention and the Minority Corporate Counsel Association: “New Millennium, Same Glass Ceiling?” The study was based on surveys of 700 female partners nationwide and was the subject of a Newsweek article, “Even Female Law Partners Suffer Wage Disparities” (7/9/2010). Of particular note was the study’s conclusion on the causes of the continuing disparity. It found that the usual reasons cited for the gender-based pay disparity — that women are less ambitious, more distracted, and less productive than men due to their focus on family responsibilities — cannot explain the gap. Instead, the study cited causes such as stereotyping, gender bias, bullying, lack of transparency, and intimidation. And the women being subjected to those practices are becoming increasingly angry.

Joan Williams, the study’s author and a professor at UC Hastings College of the Law, told Newsweek she was taken aback by the ire evident in the surveys. “The anger comes from the fact that they see these patterns of gender bias, double standards, and double binds in their everyday lives . . . It’s very clear that senior women lawyers are just incensed about their firms’ compensation systems.” Women in the study also explained they are caught in a “double bind,” deemed unlikeable if they engage in self-promotion but unrecognized if they do not.

A second study, conducted by professors at Temple University and the University of Texas-Pan American based on five years of statistics, confirms that the gender-based pay disparity does not result from women working fewer hours due to family responsibilities, because female attorneys are equally as productive as male attorneys. Looking at data from the nation’s 200 highest-grossing law firms during 2002-2007, the study, “Statistical Evidence on the Gender Gap in Law Firm Partner Compensation” (9/9/10), found that a firm’s revenue per lawyer was not impacted when the firm had a larger percentage of female attorneys. The study’s authors concluded, “If these women are underpaid and undervalued in terms of rank despite their conformity to a lockstep pattern, the inequalities could be due to intentional discrimination.” The full paper can be accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674630.

Women Leading the Way on Top 50 Law Reviews But Underrepresented at the Top

Women are making significant progress in attaining equal participation on influential law reviews, although they have not yet attained equality in the top, editor-in-chief position.

According to a new study released by Ms. JD, “Women on Law Review: A Gender Diversity Report” (8/23/2010), based on data from flagship law reviews at the top 50 law schools from 2008-2010, nearly half of all law review editors and editors with leadership positions are women. Overall, the study found that women made up 44.3 percent of these law journals’ membership, and that 46.2 percent of the leadership positions were held by women. Ms. JD noted that these numbers correlate strongly to the number of women who were awarded law degrees during the past two years (45.7 percent). However, the study found women are still underrepresented at the top—only a third of all editors-in-chief are female.

Ms. JD intends to continue the study for the current year, exploring “not just the representation of women in law review staff and leadership positions, but also the representation of women of color and the method of staff and leadership selection.”
The Power of Three  [or “Is Three the Magic Number?”]

With the recent confirmation of the Supreme Court’s third female justice, Elena Kagan, legal commentators are wondering whether the presence of a third woman on the Court will cause an exponential increase in the influence of the female justices.

In the editorial “The Female Factor” (8/27/2010), Slate’s Dahlia Lithwick suggests that the decision-making process may change even if the outcomes do not. Lithwick described a 2006 study by the Wellesley Centers for Women that found that when three women are members of a corporate board, the group reaches a “tipping point” at which the functioning of the group fundamentally changes. According to the study, when this tipping point is reached, the board’s dynamic “becomes more collaborative and more open to different perspectives” because of the influence of its female members.

Based on that study, Lithwick argues that the presence of an additional female voice on the Court can empower all three female justices to share their respective points of view. This, she says, can assist the Court in reaching just outcomes. “[A]s the justices continue to decide the cases that affect the ways in which women in America are educated, hired, compensated, and afforded control over their bodies,” Lithwick writes, “it can only be a good thing to have three voices at the table with actual experience in the field.” (For a similar study in the context of appellate judging, please see pp. 12-13).

The New Girls’ Network

Notable female attorneys were honored at InsideCounsel’s Transformative Leadership Awards on May 25-26, 2010, in Chicago, Illinois. The awards are given to female general counsel and law firm partners who have demonstrated commitment to advancing the empowerment of women in corporate law. Gwen Marcus, EVP & General Counsel of Showtime Networks, and Elizabeth McNamara of Davis Wright Tremaine won The Sharing the Power Award, which is given to a general counsel and a law firm partner pair “who have collaborated to increase the economic empowerment of women in that firm.”

In her acceptance speech, Marcus explained she had met McNamara at Paul Weiss in the 1980s. “Who says the old girl network doesn’t work?” joked Marcus. “Emphasis on girl, not old.”


Work It: Four Law Firms Again Among 100 Best Companies For Women

Four law firms were named to Working Mother’s list of 100 “best companies” for women for the second consecutive year: Arnold & Porter, Covington & Burling, Katten Muchin Rosenman, and Pillsbury Winthrop Shaw Pittman. All four firms also appeared in the 2009 list, which honors companies that strive to help women achieve work-life balance. For example, Arnold & Porter, which was also named “best in class” for its parental leave policies, offers on-site childcare facilities and 18 weeks of paid leave for new mothers.

Karen Chesley is a law clerk for U.S. District Court Judge Juan R. Sánchez in Philadelphia and is also a member of the WICL Newsletter Committee.

Noteworthy Women
By Katherine Larsen

Award-Winning Women

Laura Lee Prather, a partner with Sedgwick, Detert, Moran & Arnold LLP in Austin, Texas, was presented the “Legacy Award” by the Texas Daily Newspaper Association (TDNA) for her instrumental role in the passage of the Texas Free Flow of Information Act and her contributions to the TDNA and the Texas newspaper industry as a whole. Laura is the first woman and the first non-publisher to win the Legacy Award, which has only been given five times during the 90-year history of the TDNA.

S. Jenell Trigg of Lerman Senter PLLC in Washington, D.C., received the prestigious Federal Communications Bar Association (FCBA) 2010 Distinguished Service Award for her exemplary service to the FCBA over the past 16 years. Jenell was instrumental in the creation of the FCBA’s Privacy and Data Security Committee and continues to serve as the founding co-chair of the Committee. In addition to contributing to many other successful FCBA projects over the years, Jenell recently assisted in organizing the Fifth Annual Privacy and Data Security Symposium, served as a Celebrity Auctioneer for the Young Lawyer’s Charity Auction, and has been a guest speaker for various CLEs and brown bag luncheon seminars.

Women on the Move

Erin L. Dozier was promoted to Senior Vice President and Deputy General Counsel, Legal and Regulatory Affairs, at the National Association of Broadcasters in Washington, D.C.

Sarah El Ebiary earned her juris doctorate from Southwestern Law School in Los Angeles, California.

Shaina Jones, who recently completed a clerkship with the Honorable Raymond A. Jackson of the United States District Court for the Eastern District of Virginia, has joined the Washington, D.C. office of Levine Sullivan Koch & Schulz, LLP.
Kathleen Kirby, WICL co-chair and a partner in the Washington, D.C., office of Wiley Rein LLP, was promoted to co-chair of the firm's Media practice group.

Jennifer L. Richter, a partner with Patton Boggs, LLP, in Washington, D.C., was promoted to co-chair of both the firm’s Public Policy Department and its Technology and Communications Practice Group.

Aimee E. Saginaw was named a partner in the New York office of McLaughlin & Stern, LLP, a 70-attorney firm based in Manhattan.

S. Jenell Trigg, with Lerman Senter PLLC in Washington, D.C., served as co-chair of the Fifth Annual Privacy and Data Security Symposium, which was co-presented with the ABA Forum on Communications Law.

Katherine Larsen is an associate in the Philadelphia office of Levine Sullivan Koch & Schulz, L.L.P and is also a member of the WICL Newsletter Committee.

Profile:
Lucy Dalglish
By Rosemary Harold

There’s nothing like being tied up in a libel case for seven years to prompt a journalist to start thinking seriously about law school.

The story that pulled Lucy Dalglish, now the Executive Director of the Reporters Committee for Freedom of the Press, into a courtroom as a litigant for the first time was a classic example of the type of local investigations that only daily newspapers tend to do — or used to, at least. In the 1980s, Dalglish and a more senior colleague at the St. Paul Pioneer Press uncovered and documented highly questionable dealings concerning the prices set for government purchases of land for a ring road around the Twin Cities. The reporters got a tip that eminent domain payments in Dakota County, on the south side of the metro area, were 60 percent or more higher than payments made in any of the other jurisdictions affected by the road-building project.

It turned out that some of the major landowners in Dakota County had connections to the state land-appraisal process — as appraisers or as members of the court-appointed commissions that set prices for eminent domain purchases. It also turned out that those individuals did not appreciate having those conflicts of interest pointed out in a big-city newspaper. One of them sued, and the litigation fun began.

“It was my first exposure to libel law,” said Dalglish, who went on to make defamation, public access laws and other journalism-oriented legal issues the major focus of her professional life. “And it was my first time being deposed, to being raked over the coals for doing what I thought was the right thing.” Her eyes still flash at the memory.

The experience also provided her some insights into the collective wisdom of the reporter’s trade — such as the value of following old-timers’ advice to throw out notes soon after a story is published. “Actually, I was taught to be careful to either throw them all out or keep them all,” said Dalglish, who graduated with a journalism degree from the University of North Dakota in 1980. “I kept all my notes but my partner threw out all of his. “So,” she chuckled, “guess who got deposed endlessly and who got out in 20 minutes?”

The case ended successfully for the Pioneer Press and Dalglish, but she took a needed break from daily deadlines in the interim: a one-year fellowship at Yale Law School. That break, in turn, eventually set her on a different path: full-time law school at Vanderbilt, big-firm litigation practice at Dorsey & Whitney in Minneapolis, and then back to a more overtly public interest post that marries the different segments of her career.

For the last decade, Dalglish has headed the Reporters Committee, a small but well-respected nonprofit legal organization that is revered among working journalists. The tiny staff — three full-time lawyers, plus a small cadre of legal fellows and journalism interns who typically work for a year or less — serves as an information clearinghouse, a first-line source of legal assistance and, more recently, as a policy advocate. Through online and print publications, the Reporters Committee points a spotlight on legal developments that affect journalists’ ability to gather and report news, including battles over federal, state and local government secrecy; reporter’s privilege laws; privacy issues; and defamation. The organization provides a free, 24/7 telephone hotline to field questions from journalists or their attorneys and, when necessary, to match up journalists in need with lawyers willing to provide pro bono assistance on a longer-term basis.

The Reporters Committee also has been active as a court defender of the media and the public’s right to know since its founding 40 years ago, when a group of journalists rallied around Earl Caldwell, a New York Times journalist threatened with jail time for refusing to disclose confidential sources inside the Black Panther Party. The resulting 1972 Supreme Court decision, United States v. Caldwell, found that the First Amendment conferred no privilege on reporters to protect sources, but that loss sparked the passage of reporter’s privilege statutes in many states.

In the intervening years, the Reporters Committee has appeared as a litigant, intervenor, or amicus curiae in virtually every press freedom case heard by the high court, while routinely filing briefs in other federal and state appellate courts as well. Recent Supreme
Court submissions include an amicus brief in Snyder v. Phelps, a tort case that raises questions about the First Amendment rights of anti-gay groups to hold public protests at U.S. military funerals. The Reporters Committee has joined with 21 other media entities to urge the Court to find that intrusion and intentional infliction of emotional distress claims cannot be upheld where the harm is based upon the publication of controversial speech about matters of public concern. The Supreme Court heard oral argument in the case on Oct. 6, 2010, during the first week of the new term.

Jumping into a high-profile legal career may seem like an odd way for a journalist to take a break from a worrisome bout of protracted litigation, but the energetic move was quintessentially Lucy-like. After all, this is a woman who began her journalism career by blasting her own father's parenting practices in her elementary school newspaper. As the sixth-grade editor of her Grand Forks, N.D., school paper, she wrote an editorial on parental censorship of TV that criticized her father's limitations as “unreasonable and unfair.”

Sitting in her high-rise office across the Potomac from Washington, D.C., more than three decades later, Dalglish smiled as she noted that she "learned an important thing about the First Amendment then. My dad was really angry. He said, ‘You may have a First Amendment right to publish but you don’t have a right to embarrass your father before the whole neighborhood.’ And he still remembers that—he brought it up again during his toast at my wedding.”

Which wasn’t that long ago, for Dalglish got married for the first time — at age 51 — in July 2010. She and her husband, Mark McNair, a securities law specialist in private practice in Washington, dated for more than three years before taking the proverbial plunge. They were married by her uncle, an Episcopal priest, at a historic house set in the rolling “hunt country” region of Northern Virginia.

She juggled wedding planning at the same time that she directed logistics for the Reporters Committee’s major fund-raising event of the year, a 40th anniversary black-tie gala staged in New York City just a month and a half before the wedding. The business travel schedules of both the bride and groom dictated the schedule, buttressed by the need to honor the vacation schedules of far-flung relatives with school-age children. “So it was total bedlam,” Dalglish laughed. “Let’s just say that I wouldn’t do it that way again.”

But Dalglish has proven adept at multitasking. She demonstrated that skill at a graver juncture years ago when, shortly after moving to Washington for the Reporters Committee job, she was diagnosed with breast cancer. With perspective gained over time since then, she mused that “to be honest, the thing that was harder and more complicated to pull off was the wedding.” Marriage had always been a goal, but it took some time before she found “a pretty nice man who was looking for the same things in life that I was.” (In Midwestern speak, the adjective “pretty” is used as an intensifier — meaning that she’s, well, pretty crazy about the guy.)

Still, “when you’ve been on your own as an adult for 30 years, joint decision-making is weird,” Dalglish allows. The couple, who negotiated the contract on a house while sitting in a jewelry store to pick out their rings, now owns an older home in the Virginia suburbs that has both charm and “issues.” Dalglish finds little in their private interaction that reflects their legal training but did admit that her husband, who primarily negotiates deals, did present her that morning with a list asking for her priorities among home renovation options.

The move out of the city has brought with it a new lifestyle that Dalglish is enjoying: “For the first time in my life I feel part of a community. We’re going to church together; we have ‘our’ grocery; we have ‘our’ neighborhood.”

Dalglish had a different type of community to support her during the critical phase of her bout with breast cancer. Because she was diagnosed shortly after moving to Washington, she lacked a ring of close personal friends like the circle she developed in the Twin Cities during 13 years as a newspaper reporter and five years as a practicing attorney there. So her Minnesota friends came to her: Members of her old sisterhood of upper Midwestern “Ya-Yas” took turns flying out on weekends to care for her during her months of chemotherapy.

Among the stalwarts was Deborah Howell, her former editor at the Pioneer Press, who by that time had moved to Washington, first to oversee the Newhouse newspapers’ D.C. bureau and later to serve as ombudsman for the Washington Post. A legend among the first wave of female journalists to advance up the editorial ladder, Howell was not reluctant to “interfere with your life” as well as edit your stories, Dalglish said with a smile. Howell had told Dalglish years earlier that she would make a better lawyer than a reporter.

Once informed about Dalglish’s cancer, Howell immediately offered psychological counseling recommendations and set up a regular schedule of monthly lunches. “Then, two years later when she came down with breast cancer, we did it in the reverse,” Dalglish said.

Howell died in January 2010, not of breast cancer but as the result of a traffic accident while on vacation. “ Losing her has been really hard,” Dalglish whispered, struggling to maintain her composure. “She saw me through three or four career changes. . . . She had a way of just telling it like it was.”

Having had breast cancer has, of course, had an effect on Dalglish that continues on into the remission stage. “It’s made me slow down and softened me up a bit. I had some hard edges. I’m much more willing now to accept generous offers of help—I recognize them as a gift.”
“Most important, it’s made me kind of fearless when I hear that someone else has it. Now I always call them, and I’ve been able, I hope, to help them out. And when it comes to funerals, I just make the assumption that I’ll go unless specifically told to stay away. I’m not one to go around wearing pink ribbons; I just try to be steadfast” in quietly supporting others who are grappling with the experience.

Her then-new colleagues at the Reporters Committee saw Dalglish’s strengths in action at the time of her diagnosis, too. It came in the summer of 2001, just before the nation’s reaction to the 9/11 terrorist attacks triggered a sharp increase in government secrecy that, in turn, made reporters’ jobs considerably more difficult. Dalglish managed to time her treatments so that she missed only 14 days of work overall. “We were quite amazed with her perseverance and determination,” said Gregg Leslie, a 16-year veteran of the organization who now serves as its Legal Defense Director.

John Henry, a longtime newspaperman and 25-year member of the organization’s Steering Committee, calls his support for Dalglish’s hiring “probably the smartest decision I ever made in journalism.” He noted that although Dalglish had “a horrible time” with her cancer treatment, she made smart moves in coping with it. One strategy was “to make better use of the staff – to lean more on them to share the job of attending meetings, making public appearances, and beating the drum for press rights. By letting others do it, she didn’t wear herself out as much.”

And in continuing to do so, Dalglish has helped to raise the Reporters Committee’s profile, “not only out in the rest of the country but inside the Beltway, too,” Henry said.

The Reporters Committee recently has stepped into a limited advocacy role on Capitol Hill. It’s a move “fraught with peril” in the eyes of several members of the Steering Committee. That includes Henry, who like many career journalists is wary of getting involved with legislators because “what they can give you with one hand they can take away with another.” But Lucy Leslie convinced him and others that the cause was worth the effort: passage of the Free Flow of Information Act, a federal shield law that would provide journalists with a qualified right to protect confidential sources — and thereby avoid potential jail time for refusing to divulge the information. It’s precisely the issue that gave rise to the Reporters Committee in the first place. The bill passed the House of Representatives in 2009 but as of this writing remains stalled in the Senate; advocacy work on this front may have to continue.

Another task that never ends is soliciting donations to keep the Reporters Committee going. “The primary burden of fundraising falls on Lucy, and she’s out there working on it all the time,” Leslie said.

“It seems to be popular right now for funding sources, especially foundations, to look out for what’s next in the evolution of journalism, in ‘re-inventing’ journalism. Lucy is very good at keeping us in that conversation, wherever it will lead. She keeps pointing out that there is a need for the same level of knowledge, skills and ethics among journalists working in the new media, and they will have the same legal problems” as their traditional media predecessors. “And they will need us just as much, if not more than, journalists in the past,” Leslie noted, because there may not be much corporate media money available in the diffuse digital era to hire lawyers.

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Henry also credits Dalglish with fundraising prowess that has helped to stabilize the Reporters Committee's finances over time. But Dalglish herself said she faced a steep learning curve in the area, and it's a skill that she continues working to master. "In my other jobs, I never had to worry about how to keep the lights on. When I first started, inside I kept thinking like a journalist: 'On the one hand, give us some money, but on the other, I can see why you might not want to.' Fundraising still doesn't come naturally to me."

Even apart from her personal skills in the area, the impact of the emerging digital era on traditional media business models has had implications for the Reporters Committee's financial base. In plain English, it has gotten a lot harder to obtain contributions from the large news organizations that once were the organization's primary source of deep-pocket support. "Just as they are trying to figure out how to survive, we're going through the same thing," Dalglish said.

That development, in turn, means that the Reporters Committee must cast a wider net among potential benefactors who lack a hands-on understanding of what trained reporters do and the obstacles they confront. The "transparency community," comprising Silicon Valley and other tech corridors, has focused on the importance of online access to data, but doesn't seem to care as much about traditional journalism, Dalglish said. At the same time, some traditional media-oriented foundations seem more intrigued with exploring new technologies rather than old newsgathering issues.

"The struggle now is to get all of them to focus on the actual content, not just the new modes of delivery," Dalglish said with a note of frustration in her voice. "I don't think I'm a lone voice in the wilderness on this issue, but I find it disheartening when people confuse journalism with the dumping of raw information. I still think there is a value in having trained people who are able to tell a story, to explain a situation, to tell you why you should care."

"For example, it would be great if my suburb of McLean, Va., were to just dump all of its government finance information online. But really, who has the time to go through all that material? Can't somebody just tell me how high my taxes are going to be and why?"

Dalglish remains hopeful that, in time, most other Americans will appreciate the value of professional journalism, regardless of the medium that delivers it. "Technology is changing, but the law isn't
engaged in public policy debates and civil rights litigation. hub of civil rights activity, gave Teresa significant exposure to lawyers which fostered interests in both journalism and the law. In addition, news on the investigations, hearings and speeches about Watergate, particularly the work of [Senator] Sam Ervin and [Representative] Barbara Jordan. Teresa followed with interest the by Watergate, particularly the work of [Senator] Sam Ervin and [Representative] Barbara Jordan. Teresa followed with interest the

Teresa’s career has been marked by a willingness to take calculated risks, a desire to meet challenges in demanding academic and professional environments, and perhaps more than anything, an insistence on following her passions, even if it meant that the path forward had to be forged anew. As General Counsel of Capitol, she must meet the needs of a company known for both edgy innovation and great diversification. The owner of the first station to broadcast in HDTV, Capitol also boasts a telecommunications division (Microspace, which operates one of the world’s largest satellite broadcasting networks for business applications), a mobile division with a high-ranking iPhone app that aggregates and distributes the content of more than 140 television stations to every major phone carrier, a baseball team (the Durham Bulls), and American Tobacco Campus (a mixed-use development and registered historic site). As a result, the legal expertise required for Teresa’s job ranges from negotiating content licensing and distribution agreements, to weighing in when necessary on newsgathering matters (“I’m also blessed with Amanda Martin as great First Amendment counsel,” she says), to ensuring compliance with Federal Communications Commission regulations, among other things. While the range of subject matter alone would present a challenge for most, Teresa also is expected to address these legal issues in the context of an ever-changing business, led by CEO Jim Goodmon, whom Teresa calls a “visionary.” Teresa’s career has been marked by a willingness to take calculated risks, a desire to meet challenges in demanding academic and professional environments, and perhaps more than anything, an insistence on following her passions, even if it meant that the path forward had to be forged anew. As General Counsel of Capitol, she must meet the needs of a company known for both edgy innovation and great diversification. The owner of the first station to broadcast in HDTV, Capitol also boasts a telecommunications division (Microspace, which operates one of the world’s largest satellite broadcasting networks for business applications), a mobile division with a high-ranking iPhone app that aggregates and distributes the content of more than 140 television stations to every major phone carrier, a baseball team (the Durham Bulls), and American Tobacco Campus (a mixed-use development and registered historic site). As a result, the legal expertise required for Teresa’s job ranges from negotiating content licensing and distribution agreements, to weighing in when necessary on newsgathering matters (“I’m also blessed with Amanda Martin as great First Amendment counsel,” she says), to ensuring compliance with Federal Communications Commission regulations, among other things. While the range of subject matter alone would present a challenge for most, Teresa also is expected to address these legal issues in the context of an ever-changing business, led by CEO Jim Goodmon, whom Teresa calls a “visionary.” Teresa’s career has been marked by a willingness to take calculated risks, a desire to meet challenges in demanding academic and professional environments, and perhaps more than anything, an insistence on following her passions, even if it meant that the path forward had to be forged anew. As General Counsel of Capitol, she must meet the needs of a company known for both edgy innovation and great diversification. The owner of the first station to broadcast in HDTV, Capitol also boasts a telecommunications division (Microspace, which operates one of the world’s largest satellite broadcasting networks for business applications), a mobile division with a high-ranking iPhone app that aggregates and distributes the content of more than 140 television stations to every major phone carrier, a baseball team (the Durham Bulls), and American Tobacco Campus (a mixed-use development and registered historic site). As a result, the legal expertise required for Teresa’s job ranges from negotiating content licensing and distribution agreements, to weighing in when necessary on newsgathering matters (“I’m also blessed with Amanda Martin as great First Amendment counsel," she says), to ensuring compliance with Federal Communications Commission regulations, among other things. While the range of subject matter alone would present a challenge for most, Teresa also is expected to address these legal issues in the context of an ever-changing business, led by CEO Jim Goodmon, whom Teresa calls a “visionary.”

Teresa is ideally suited for her current position as counsel to a fast-moving organization that combines established business lines such as broadcasting and baseball with leading products and services in the relatively nascent wireless video market. Following her childhood dreams of becoming a lawyer, Teresa majored in public policy and economics as an undergraduate at University of North Carolina at Chapel Hill. By the end of college, however, Teresa’s vision of her role as a lawyer was very different from the models that originally had inspired her. What interested her most then was the idea of working side by side with non-lawyers, helping to address legal issues as they arose in the context of business operations, rather than litigating matters in a trial or appellate court. At the time, she recalls that careers as in-house counsel were not commonly known to college students, and the career path for someone with her interests was not so clear. So, when it was time to apply to graduate school, Teresa initially sought an MBA. Then, while earning her MBA at Harvard Business School, she chose to apply for a law degree as well, boldly explaining to the Harvard Law School admissions committee that she was only interested in the law “as it relates to business.” In spite of (or perhaps because of) her candid statement (a statement she now considers somewhat naïve), Teresa was accepted to the JD program at Harvard and was well on her way to forging the career path that suited her best.

After earning her MBA and JD at Harvard, Teresa began her career in private practice, which she credits with giving her great experience at drafting agreements. As a third-year associate, she began hearing about other employment opportunities. At first, the in-house counsel...
positions she learned about were in company legal departments, which she didn't find very attractive. Teresa recognized that these jobs were probably not very different from working for clients at law firms because the legal teams and operating divisions were separate and working within their own distinct areas. Then she learned about a position at Turner Broadcasting, Inc., that seemed tailor-made for her: “What attracted me was that this position was not even in the legal department and did not report to the [general counsel] – it was in cable sales.” At the time, she says, approximately one-third of Turner’s attorneys were in nontraditional roles outside the legal department. The “line attorneys” worked in business teams known for being “lightly staffed, lean and mean.” She took the job, and was again rewarded for taking a calculated risk. Teresa was given the opportunity to get involved in the very kinds of decisions about business strategy and marketing that she’d always hoped to be making, an opportunity that simply “wouldn’t have been possible at a more layered organization.” Teresa remembers the company as having a bold, entrepreneurial spirit, personified by its CEO, Ted Turner, who was incredibly curious about the transformative power of every technology and platform. Teresa says Turner’s distribution strategy in those days could be easily summarized as: “I don’t care what it is—I want to be on it!” In sales, she was dispatched to handle any legal issues associated with licensing content via alternative technologies, which required hours of learning from engineers about how various technologies worked. The technology-neutral approach she learned at Turner proved critical to the next several steps in her career, including her current work at Capitol. Teresa watched the launch of many networks while at Turner, as well as the development of several new distribution platforms. At the time, direct broadcast satellite, satellite master antenna television, and wireless cable were the newer distribution players. These were formative years for Turner, and also turned out to be formative years in Teresa’s career as well: “Because I worked on deals across various media platforms at a very early point in my career, I have now licensed content across almost every kind of technology.”

Since her time at Turner, Teresa has continued to seek out opportunities to work with visionary, creative entrepreneurs. She worked as the Vice President of Licensing and Business Development for Internet retailer Art.com and another media and technology start-up before accepting her current position at Capitol. What Teresa learned early in her career makes her more responsive and effective in her current position—when it comes to providing counsel to a CEO with a vision: “They don’t want to hear ‘no’. . . they don’t want to hear about precedent, which is the lifeblood of an attorney.” Instead, you have to “be a problem-solver and find a way to make it work. To deal with a visionary, that’s a quality you have to have.”

Teresa is, in her own words, a “doting aunt and godmother.” Her passions include travel, teaching and genealogy. Teresa also makes time to promote the academic and career development of others. She currently serves on the board of the General Alumni Association of the University of North Carolina at Chapel Hill and previously served on the executive committee of the T. Howard Foundation (which promotes diversity in the media industry) and the national board of Women in Cable Telecommunications. When advising those interested in working in media and communications (whether law or business), Teresa urges both students and professionals to follow the technology: “If you are interested in this industry, become comfortable with and knowledgeable about the technology.” Teresa believes that this approach will both promote advancement and avoid the pitfalls of a career that is too narrowly defined: “We work in a business where we can see very quickly the results of our work. It affects everyday people. The more you know about what technology can do, for, and with content, the better you can determine how to get that content to more eyes and ears” – which is so critical to success in an industry that constantly tallies viewers, listeners, downloads, and clicks. At the same time, she observes, exposure to multiple technologies can prevent a lawyer or other media professional from “finding yourself in a company whose technology becomes obsolete.” Teresa also encourages those who enter the field to embrace the constant pace of change: “The great thing about this field is that if you don’t like the way things are now—don’t worry, they’ll change!” She reminds those who seek her advice that their next job is likely to involve “something that’s not invented yet.”

Looking back on the days when she was first inspired to pursue a legal career, Teresa recalls her excitement at watching the coverage of Watergate hearings and investigations, which highlighted the roles of both journalists and lawyers. She says that today, one of the most fulfilling things about her career is that it allows her to marry these two longstanding interests. Teresa considers herself lucky to be in a role where she can “provide legal support to journalists.” She finds it “very rewarding to be close to the day-to-day operations of Capitol’s newsrooms,” ensuring that important stories reach the stations’ viewers, even when she is answering the “sometimes scary” but recurring question: “Are we going to get sued?!”

Erin Dozier is an attorney with the National Association of Broadcasters in Washington D.C. and is also a member of the WICL Newsletter Committee.
Profile:
Guylyn Cummins
By Judy Endejan

Guylyn Cummins has come a long way from her childhood in Elwood, Nebraska (population 507) to her current life in San Diego as one of the premier media lawyers in the United States. Guylyn, a partner with Sheppard Mullin Richter & Hampton LLP, is a leader in the legal profession, having just finished a stint as Chair of the Governing Board of the American Bar Association Forum on Communications Law. She will continue to serve on the Forum Board in an emeritus capacity and is helping to plan Forum events for 2011. She also is thrilled about the way the Forum’s Women in Communications Law (WICL) Committee has expanded in recent years!

Guylyn majored in journalism at the University of Nebraska, with a dual specialization in advertising and broadcasting. Her life changed when she had to choose between graduate programs at Columbia and the University of Southern California (USC). Guylyn opted for sunshine and started the USC program in the fall of 1979. She met her future husband, Scott, during her first week at USC, fell in love and moved to San Diego to be with him. She then commuted from San Diego to finish her graduate degree at USC in 1982. After that, she found herself newly married and with nothing to do in San Diego. While most people in that position would be petting animals at the famous San Diego Zoo or enjoying San Diego’s beautiful beaches, Guylyn instead opted to take the LSAT. That led her to the University of San Diego law school, where she obtained a JD magna cum laude in 1985.

Guylyn recounts that her husband, Scott, a plaintiff’s personal injury lawyer, did not want a wife who worked. Clearly, he was in for a surprise. Nonetheless, she says he has always been encouraging with respect to her career.

Guylyn went to work for Gray Cary in San Diego after graduating from law school and has never quit practicing law. She is one of the few who has been able to devote her practice primarily to media law. Initially, Guylyn did a lot of work for San Diego media outlets seeking to obtain access to court proceedings and records. In fact, one of her first assignments was to work on a U.S. Supreme Court amicus brief in Press Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984), which dealt with the constitutional right of access to criminal proceedings. Over time, she began to represent national major media companies involved in litigation in Southern California.

When asked about her most memorable court experience, Guylyn recalled working on a highly publicized, tense case involving David Alan Westerfield, who was convicted of the murder and child molestation of Danielle Van Dam in 2002. At least once a week, Guylyn was called into court over media access issues in the Westerfield case, and she handled four or five appellate writs during the course of the trial. She said she found it fascinating to watch a criminal trial unfold during the fast-paced proceedings.

Guylyn describes her current practice as primarily content-based litigation involving traditional defamation, invasion of privacy, access, right of publicity, and copyright and trademark fair use matters. She also is recognized by the California State Bar Association as a certified appellate specialist. To obtain this certification, Guylyn had to pass a special test and devote approximately a third of her time to writs and appeals. A large number of the appeals in which she is involved are appeals under California’s stringent anti-strategic lawsuit against public participation (anti-SLAPP) statute, which requires an automatic appeal whenever an anti-SLAPP motion is granted or denied. She also said that, because of the stringent provisions of the California anti-SLAPP statute, very few cases ever go to trial.

When asked about her next mountain to climb, Guylyn described a new program she is developing at the University of San Diego School of Law. She is hoping to establish a clinic for students to do public access work for the media. There is a real need, Guylyn said, for this work because these days the cash-strapped media simply cannot afford to litigate access issues that they might have litigated in more lucrative times. Guylyn plans to start teaching a class on access issues in January of 2011. Thereafter, a clinic would be established and students would be assigned cases to prepare and handle in court. Guylyn sees this sort of a clinic as beneficial to law students by providing discrete, practical, hands-on experience. In addition, she sees a great societal benefit in litigating access issues because, in her view, the minute the press stops watching, public officials have a tendency to stray far afield. Guylyn hopes that her program will be replicated on a national basis.

Guylyn has two children: Elyse, a senior at Stanford University, and James Blake, a high school senior. Guylyn said she always wanted children and also wanted to be able to work at the same time. Her solution to the never-ending work/life balance issue associated with practicing law and parenthood was to have live-in help until Blake turned 16. That help allowed Guylyn and Scott to focus on being active parents and active lawyers, without having to deal with the day-to-day issues associated with running a household.

When asked for advice about how to be a full-time attorney and a mother, Guylyn said that every attorney needs to find her own personal solution. There is no “right answer.” Some women need live-in help to avoid the “6:00 p.m. issue” associated with having to scramble to pick up a child at 6:00 p.m. when a daycare closes. Others have nannies. Other women choose to work part-time.

Guylyn and Scott have a sailboat that they enjoy. Guylyn enjoys oil painting with a pallet knife, an interest learned from her grandmother, who was an artist. She also loves to cook and play classical music. She
said her love of cooking fuels her running, which she does a lot of in order to remain so trim.

Guylyn has always been active in media-related Bar activities, having participated in the ABA Forum on Communications Law for the past ten years.

Guylyn is particularly excited about WICL and hopes that increasingly more women assume leadership positions in the organization. Her words of advice to WICL members: First, recognize how lucky WICL members are to practice in the area of media law, which involves important and interesting constitutional questions. Second, for her, her children were a good antidote to work. Third, her Midwestern upbringing has taught her that you have to work hard and make good decisions about how your life will proceed.

Guylyn is very philosophical about her life and lifework. In her view, you just have to not stress out because life does not stay the same from day-to-day. You have to take your job and your life a day at a time, recognizing the inevitable ups and downs. Finally, don’t be afraid to try new things. If you don’t like it, there will always be an opportunity to change.

Finally, Guylyn hopes that WICL members will attend the February ABA Forum on Communications Law gathering in California because she is planning a terrific program!

Judith A. Endejan is an attorney with Graham & Dunn in Seattle and a member of the WICL Newsletter Subcommittee.

Is Wikileaks’ Disclosure of Confidential Afghanistan War Documents the Digital Era’s Pentagon Papers Case?

By Karen Chesley

Last July, the Wikileaks website disclosed nearly 92,000 confidential war documents relating to the U.S. war in Afghanistan. The documents were unedited, were not reviewed for national security issues or other supposed “secrets” and were released without accompanying comments of any kind. The 92,000 pages stood alone. That release caused commentators worldwide to debate not just the nature of the Afghanistan war, but also the role that Wikileaks played in bringing the documents to light. Are the site’s founders muckraking journalists, First Amendment zealots, or treasonous criminals? Is Wikileaks’ posting of these confidential Afghanistan War documents the digital era’s analog to the publication of the Pentagon Papers? The answer is:

it’s complicated. So, too, is the traditional media’s view of Wikileaks, which is either that it is an illegitimate information dump or a new, important mechanism for improving the free flow of information to concerned citizens, depending on which media professional you ask. Like Wikipedia, its namesake, Wikileaks allows users to upload a wide variety of information. However, unlike Wikipedia, Wikileaks’ express goal is to encourage the disclosure of sensitive information in order to expose government and corporate secrets. The website tells users that it “is an uncensorable version of Wikipedia for untraceable mass document leaking and analysis… where whistleblowers can post documents anonymously and untraceably.” To that end, the site has taken several precautions to protect itself, including using strong encryption, creating mirror sites with identical content hosted in various countries, and masking the identity of its owners. While the site was developed primarily to expose oppressive regimes across the world, it contains documents ranging from training manuals from Guantanamo Bay, to a report revealing government corruption in Kenya, to sections from a secret handbook on Scientology. These documents have served as sources for stories in major media outlets, including the New York Times, the BBC, and Wired magazine.

If the U.S. government pursues charges against Wikileaks for revealing confidential military documents about the war in Afghanistan, it would not be Wikileaks’ first legal battle. In February 2008, a bank – angry about the site’s disclosure of confidential documents purporting to show that some of the bank’s customers evaded taxes – persuaded a federal judge to grant its ex parte motion to disable the site’s domain name. In response, the Internet community sprang into action, directing anyone who searched for “Wikileaks” to copies of the site hosted under different domain names. Ultimately, the judge entered an injunction permanently disabling the site’s domain name (which was stipulated to by the domain name registrar) and entered a temporary restraining order (TRO) prohibiting Wikileaks from posting any of the bank’s data.

As news of the injunction spread across the web, Internet and media advocacy groups rallied to the defense of the site, arguing that the injunction violated the First Amendment. The Electronic Frontier Foundation (EFF) and American Civil Liberties Union jointly filed a Motion to Intervene based on the First Amendment right to receive information. Attorneys from Davis Wright Tremaine brought together a group of media-related entities, including the Reporters Committee for Freedom of the Press (RCFP), the Associated Press, and 10 others, to file an amicus brief opposing the injunction and TRO. In the words of WICL member Laura Handman, a David Wright Tremaine partner who co-authored the media organizations’ amicus brief, the media groups believed important free speech rights were at stake and “sounded the alarm” to come to Wikileaks’ defense. The New York Times described the case as “a major test of First Amendment rights in the Internet era.”

After a cadre of media lawyers appeared at a hearing 10 days after the injunction and TRO were issued, the judge was persuaded to dissolve
the permanent injunction disabling Wikileaks’ domain name. The TRO restraining Wikileaks’ content expired of its own terms. See Bank Julius Baer & Co., Ltd. v. Wikileaks, 535 F. Supp. 2d 980 (N.D. Cal. 2008).

So Wikileaks was back in business, thanks, in part, to the efforts of the media. However, media organizations and lawyers have not been so universal in their support for Wikileaks in connection with its posting of the Afghanistan war documents. Cognizant of the public outcry over the leak of the documents, many free press advocates have sought to distance themselves from Wikileaks. For example, representatives of the newspaper industry, including the Newspaper Association of America, lobbied Congress to exclude Wikileaks from the protection of a proposed federal shield law. Lucy Dalglish, executive director of the RCFP, which supported Wikileaks in the bank injunction case, expressed concern about Wikileaks’ lack of content control and accountability during an interview conducted shortly after the Wikileaks disclosure. Speaking to USA Today in July, she opined that the site does not engage in true journalism because it does not analyze the data it receives, fails to conduct interviews, and does not provide context to help the public understand the information it provides. (“Wikileaks Shrouded in Its Own Secrecy,” USA Today, 7/27/2010). Even the EFF, once one of Wikileaks’ most vocal defenders, has been largely silent following the July disclosure. (Please also see the Lucy Dalglish profile on p. 21.)

First Amendment veteran Floyd Abrams expressed ambivalence about the site, telling the Wall Street Journal’s Law Blog that Wikileaks’ disclosure of the Afghan documents was not like The New York Times’ actions in the Pentagon Papers case, in which The Times and other media outlets released only edited versions of the Vietnam War documents at issue. (“First Amendment Guru Floyd Abrams on the Wikileaks Situation,” Wall Street Journal Law Blog, 7/28/10).1 Echoing Dalglish’s concerns about a lack of editorial oversight, Abrams said, “This is a dump on the world of 92,000 documents. And so I don’t know—and I bet they don’t know—if there’s anything in there which is harmful in a real way.” However, despite his qualms, Abrams would not support a prior restraint against Wikileaks. “I don’t think there should be much in the law that really provides remedies to stop publication,” he said. “And the technology makes it all but impossible, anyway.” (Id.)

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\footnote{1 Abrams, now a partner with Cahill Gordon & Reindell in New York and a visiting professor at the Columbia University Graduate School of Journalism, represented The New York Times in the Pentagon Papers case, New York Times Co. v. United States, 403 U.S. 713 (1971), in which the U.S. Supreme Court upheld the right of The Times and the Washington Post to publish the then-classified Vietnam War-related documents under the First Amendment.}

The FCC’S Indecency Policy: Back to the Drawing Board?

By Kathleen Kirby & Joan Stewart

Despite judicial backlash, Federal Communications Commission (FCC) Chairman Julius Genachowski has affirmed his position that the FCC can and should continue to be invested in regulating content on radio and television broadcasts, especially content accessible by children. Yet a recent court action invalidating the agency’s so-called “fleeting expletives” policy placed a central component of the Commission’s current regulatory regime — the restriction of broadcast indecency — in doubt. Indeed, the question as to whether the FCC’s rules governing the broadcast of indecent material are constitutional may soon reach the Supreme Court.

In July 2010, the U.S. Court of Appeals for the Second Circuit issued a decision in Fox Television Stations v. FCC, Inc. (“FCC v. Fox”) that struck down the Commission’s fleeting expletive policy as unconstitutional and arguably unraveled the FCC’s entire indecency enforcement regime. That ruling followed an April 2009 decision by the U.S. Supreme Court that, while vacating and remanding the appellate court’s rejection of the fleeting expletive policy on administrative law grounds, instructed the lower court to consider the constitutional questions presented in the case. The appellate court’s decision on constitutionality, which the Commission is expected to appeal to the Supreme Court, is but one of several indecency cases currently winding through the courts. In fact, in the same month that it vacated and remanded FCC v. Fox, the Supreme Court also vacated and remanded the Third Circuit’s decision in FCC v. CBS Corporation (“FCC v. CBS”), which involved fines imposed following Janet Jackson’s now-infamous “wardrobe malfunction” during the Super Bowl in 2004. That case remains pending, as do others involving fleeting expletives and/or alleged indecency on the broadcast television shows “Married by America” and “NYPD Blue.”

Meanwhile, the state of the FCC’s indecency policy remains in limbo. The agency faces a reported backlog of more than 1 million indecency complaints, all of which bear on broadcasters’ ability to renew their licenses and sell their stations. While some interpreted the Second Circuit’s decision in FCC v. Fox to mean that broadcasters are now free to air racier language and visual content, the agency’s fleeting indecency policy remains subject to judicial scrutiny, and broadcasters accordingly continue to proceed with caution. In large part, this is because the financial stakes of a misstep are high. In 2006, Congress increased the maximum penalty for broadcasting indecent material on radio and television tenfold — from $32,500 to $325,000. Moreover, the Commission can choose to fine each allegedly indecent incident within a single program, potentially raising total sanctions into the millions.

Indecency Defined: The FCC defines an indecent broadcast as one that includes language or “material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as
measured by contemporary community standards for the broadcast medium.” Deciding whether material is “patently offensive” requires a further three-pronged inquiry. To make this determination, the Commission weighs: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander, is used to titillate, or seems to have been presented for its shock value.

Although indecent broadcasts are generally prohibited, licensees may air indecent material between the “safe harbor” hours of 10 p.m. to 6 a.m., when children younger than 17 are less likely to be in the audience. In addition, the agency typically investigates potentially indecent programming only when it has received complaints from viewers or listeners.

The “Fleeting Indecency” Policy: The FCC historically has taken a restrained approach to its enforcement of broadcast indecency and has been forgiving of broadcasters that aired fleeting (i.e., isolated and/or unanticipated) expletives or images, particularly during live programming. However, in the clamor following the Janet Jackson/Justin Timberlake performance during the 2004 “Super Bowl Halftime Show,” both the agency and Congress moved to toughen the regulation of such content. As noted above, Congress increased the broadcast indecency fines by an order of magnitude, and the Commission adopted policies that made broadcasters liable even for isolated visual images or errant utterances. Specifically, in 2006 it sanctioned CBS for the Jackson/Timberlake incident and later that year it found that unscripted uses of the “F-” and “S-” words during the 2002 and 2003 “Billboard Music Award Shows” were actionably indecent.

The Supreme Court’s 2009 Fox Decision: A coalition of broadcasters led by Fox Television Stations, Inc. appealed the FCC’s decision regarding the “Billboard Music Award Shows” to the Second Circuit. In June 2007, that court issued an opinion siding with the broadcast industry. In so doing, it relied solely on applicable standards of administrative law and determined that the Commission had failed to provide a “reasoned basis” for the sharp departure from its well-established policy of permitting the inadvertent broadcast of “isolated, non-literal, fleeting expletives.” The court declined to rule on the broadcasters’ broader constitutional arguments. On appeal, the Supreme Court disagreed with the Second Circuit’s conclusion and found the Commission’s policy sound under the standards of the Administrative Procedures Act (“APA”) but remanded the matter for a constitutional analysis.

In its narrow decision in Fox v. FCC, the Supreme Court made two significant findings regarding the standards of judicial review applicable to agency actions. First, it noted that administrative agencies do not necessarily face additional procedural burdens when changing existing policies. Specifically, agencies “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.” While observing that policy changes sometimes may require higher justification — such as, for instance, where a new policy’s factual underpinnings contradict those of the prior policy or where reliance interests are at stake — the Court found that the Commission’s indecency enforcement policy change did not warrant more searching review.

Perhaps more importantly, the Court rejected broadcasters’ arguments that the APA’s “arbitrary and capricious” test is more stringent when agency actions implicate constitutional liberties. In essence, the Court divorced the analysis of the question whether the administrative act of modifying the Commission’s “fleeting expletive” policy was “arbitrary and capricious” from the constitutionality of the policy. Although the Court found that the FCC properly implemented the policy under APA standards, it remanded the case to the Second Circuit with instructions to determine whether the “fleeting expletive” policy is indeed constitutional. As reported above, the Second Circuit then concluded that the policy was not constitutional.

It is, of course, impossible to predict how the Supreme Court ultimately would rule on the First Amendment issues implicated in Fox v. FCC if the case should come before the Court once again. That said, several justices have strongly hinted at how they might approach the constitutional question. For example, Justice Clarence Thomas devoted his concurring opinion in FCC v. Fox to “the questionable viability” of Red Lion and Pacifica—the two precedents that establish the lower level of First Amendment scrutiny that applies to the FCC’s authority to regulate broadcast indecency (and, more broadly, broadcast content regulation in general). He concluded by stating that he is “open to reconsideration of Red Lion and Pacifica in the proper case.” While Justice Thomas agreed to uphold the “fleeting expletive” policy as valid under the APA, his concurring opinion suggests that he may not believe that the policy is constitutional.

In her separate dissent, Justice Ruth Bader Ginsburg also gave some indication that she doubts the constitutionality of the Commission’s “fleeting expletive” policy. After observing the “long shadow the First Amendment casts over what the Commission has done,” she expressed reservations regarding whether the agency’s policy fits within the Court’s “tightly cabined” ruling in Pacifica. Justice John Paul Stevens, on the other hand, included a footnote in his dissent disagreeing with Justice Thomas’ views on the viability of Pacifica. Justice Stevens, of course, has now been replaced by Justice Elena Kagan, whose views on these issues are largely unknown.

The Second Circuit’s 2010 Fox Remand Decision: As noted above, the Second Circuit vacated the FCC’s fleeting expletive policy on constitutional grounds in its decision on remand from the Supreme Court in July. Specifically, the Second Circuit found that the “fleeting indecency” policy is impermissibly vague in that it fails to provide “a discernible standard by which broadcasters can accurately predict
what speech is prohibited.” In so finding, the court focused on several aspects of the underlying enforcement action. First, it noted that the FCC did not provide sufficient reasoning why certain derivatives of the “S-word” were patently offensive — and thereby subject to sanctions — while other words or phrases with sexual or excretory origins were not. For example, the agency found that “bulls—” was patently offensive in an episode of “NYPD Blue,” but the phrases “pissed off,” “up yours,” and “kiss my a—” were not patently offensive.

The court went on to criticize the FCC’s twin exceptions to the absolute ban on the broadcast of the “F-” and “S-” words. Under FCC policy, these words (and their derivatives) may be used in bona fide news programs or out of artistic necessity. Under these exceptions, the FCC found that the use of the word “bulls—er” during an interview on CBS’s “The Early Show” and the repeated use of the “F-” and “S-” words in a broadcast of “Saving Private Ryan” were not actionably indecent. The Second Circuit, however, noted that the FCC’s discretion to use (or not) these exceptions could have a chilling effect on free speech, especially when the FCC in oral argument could not advise the court whether a hypothetical program for teenagers warning about the dangers of pre-marital sex would qualify for either exception. According to the Second Circuit, the result is “a standard that even the FCC cannot articulate or apply consistently.” As a result, the court was not swayed by the agency’s assurances that it would “bend over backwards” to safeguard broadcasters’ editorial discretion and stated that the Commission should instead “bend over backwards to create a standard that gives broadcasters the notice required by the First Amendment.”

The Third Circuit Super Bowl Case: In July 2008, the U.S. Court of Appeals for the Third Circuit invalidated the indecency fines the FCC had issued in connection with the 2004 “Super Bowl Halftime Show.” Produced by then-CBS owned MTV Networks International, the now-notorious Jackson/Timberlake performance culminated in Timberlake’s removal of a portion of Jackson’s bustier, exposing her breast to broadcast audiences for a fraction of a second. Following a rash of complaints about the program, the agency fined CBS — the licensee of numerous owned-and-operated television stations — $550,000 for violating the indecency prohibitions. The Commission, however, did not fine or impose any form of sanction against any of the licensees of non-CBS owned affiliates or the performers involved in the show. As noted above, the Supreme Court granted certiorari and remanded the case back to the Third Circuit in April 2009 for re-evaluation in light of FCC v. Fox. Based on the Second Circuit’s invalidation of the FCC’s entire indecency regime in its Fox remand decision, the Commission has requested that the Third Circuit defer issuing a merits decision on the pending Super Bowl case until the Second Circuit has ruled on the Commission’s petition for rehearing and rehearing en banc in the Fox proceeding.

“NYPD Blue” and “Married by America”: The broadcast networks and the Commission are battling over the limits of indecency regulation on other fronts as well. Running up against a five-year statute of limitations, the FCC in February 2008 levied a $27,500 fine on each of 45 ABC owned-and-operated and/or affiliated stations in connection with a 2003 episode of the drama “NYPD Blue.” The scene that prompted the $1.2 million in fines depicted a woman disrobing to take a shower when a small boy walks into the bathroom and inadvertently sees her unclothed. Responding to a spate of viewer complaints, the agency found that the scene’s exposure of an adult woman’s buttocks was actionably indecent. The network and its affiliates appealed the decision in various appellate courts, and the cases have been consolidated in the Second Circuit. Oral arguments were held in February 2009, but as of this writing, the court has not yet issued a ruling.

Also in February 2008, the Commission imposed a $7,000 forfeiture on 13 Fox television stations — for a total of $91,000 — in connection with a 2003 broadcast of the long-defunct reality program “Married by America.” As with the “Super Bowl Halftime Show” and “NYPD Blue,” the agency opted to sanction instances of fleeting visual indecency. In this case, the FCC found actionably indecent certain scenes from bachelor and bachelorette parties involving sexually charged atmospheres and pixilated nudity. Fox and an owner of affiliated stations have refused to pay the fines. In response, the FCC, through the Department of Justice, filed complaints in several federal district courts to compel payment, and the cases have been consolidated in the U.S. District Court for the District of Columbia. The consolidated case was stayed pending the Supreme Court’s review of the Second Circuit’s decision in FCC v. Fox. In June 2009, Fox moved to dismiss the suits to compel payment of the forfeitures. The court has not yet ruled on the network’s motion.

Back to the Drawing Board? With the FCC’s indecency regulations invalidated by the Second Circuit’s most recent decision, it remains an open question whether the agency can defend its indecency policy on appeal or whether the FCC must head back to the drawing board to try again to formulate a new indecency policy that can withstand judicial review.

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Digital Diva:
The Livescribe® Pulse™ Smartpen
By Genelle Belmas

Have you ever wished that your notes could talk back to you, reminding you about what else was said at the time you took them? Or that you could search your handwritten notes as easily as if you had typed them? Or that you could double-check what you wrote against what actually happened? All of this, and more, is possible with a Livescribe® Pulse™ smartpen. Part pen, part graphics tablet, part digital recorder, the Pulse™ functions as a regular pen and digital recorder in one, and, if used on special paper, can record every stroke and play it back in conjunction with recorded audio. This article is about the 1-gig version of the Pulse™ smartpen used by the author. However, pens with more memory and different designs are now available (see www.livescribe.com).

In addition to its audio functions, the Pulse™ has an infrared camera that captures and saves anything that’s drawn or written on special paper printed with a grid of microdots. The paper functions like a GPS system to record exactly what’s written. If the audio recorder also is enabled, the pen records the associated audio as well and links the audio and the written notes together. When you download the pen’s contents into your computer with Livescribe’s Desktop software, your notes are connected to the audio. Then, when you click on the image of the words on the screen, the application takes you to the audio that was recorded at the time. The text is searchable, although not as perfectly as if it were typed (an informal test resulted in about 85 percent accuracy searching this writer’s handwriting). The recordings also can be uploaded to Livescribe’s website and made public.

Once the Pulse™ is turned on, it is controlled by tapping on the commands printed on the bottom of every page of Livescribe paper. Users can pause the recording, turn it on and off, and add bookmarks using those commands. The interface is straightforward for basic usage; there are also other features such as using the pen as a calculator or playing music on a hand-drawn “piano,” as well as a selection of other free and paid apps available on the Livescribe website. Notes taken by the pen can be exported as a .pdf file, and its audio recordings can be exported in a variety of formats, including .aac and .wav. “Pencasts,” the combination of the written and audio recordings, can be exported and imported into the Livescribe Desktop for viewing there. Some users are wildly creative in their uses of this technology; it’s worth a quick browse of the public “pencasts.”

The Pulse™ has a wider girth than a regular pen, more like a highlighter or Magic Marker. It is recharged and synched with a computer via a USB cradle. According to the Livescribe website, the 2-gig version of the Pulse™ (which has approximately 200 hours of audio) retails for $129.95 and includes a USB cradle, case, extra ink refills, starter paper, and a recording headset. For users who feel that the Pulse™ version is too bulky to be comfortable over long note-taking sessions, the newer Echo™ models have a more streamlined design. Microdot paper can be purchased in notebooks and also can be printed from the Livescribe website with a 600-dpi laser printer. Target stores also carry the pens and some accessories; a package of four 200-page spiral bound notebooks of microdot paper is about $20 there.

The pen’s uses are obvious: meetings, depositions, phone calls, lectures, interviews – the list goes on. I used my Pulse™ for the first time at the Las Vegas National Association of Broadcasters conference, where I recorded more than five hours of audio and notes for later use, and shared parts of them with a colleague who could not attend. I was sold on it – even though I write very quickly, I can never capture everything, and with the pen, I don’t have to! I plan to buy one with more memory and the somewhat sleeker design in the near future. At less than $200, it’s not only a fun toy with a great “oooh” factor but a really useful tool for easily created and sharable note-taking. But remember to check out your state’s laws on audio recording before recording another person. (The Reporters Committee for Freedom of the Press (www.rcfp.org) and Citizen Media Law Project websites (www.citmedialaw.org) have useful recording guides).

Genelle Belmas, Ph.D., is an associate professor of communications at California State University, Fullerton, with a research and teaching emphasis in media law. She is co-author with Wayne Overbeck of Major Principles of Media Law (Cengage). She is also a member of the WICL Newsletter Committee.

Join our Listserv

The ABA Forum on Communications Law has a listserv of all of its members. WICL also has a separate listserv, where we sometimes (very infrequently) send messages to our members. Unlike the Forum listserv, the WICL listserv is “opt in” only. If you are not on the WICL listserv and would like to be, please let Laura Lee Prather know (laura.prather@sdma.com).
Regional Meetings of WICL

WICL Regional meetings provide WICL members and other women in communications law opportunities for additional networking and professional development, which can be especially important for those unable to attend the various conventions and seminars spread around the country. Under the leadership of our volunteer Regional Representatives, successful inaugural events were held in most regions during the past year, and the Chicago Region, represented by Debbie Berman, already has held its second lunch meeting (see Debbie’s report on that meeting, below).

The current Regions and Regional Representatives are listed below. Contact your representative if you would like to help plan an event in your Region. If you live in a city or region not represented by the existing representatives and would like to serve as the regional rep for your region, please contact one of the WICL Committee Co-Chairs, Laura Lee Prather (laura.prather@sdma.com) or Kathleen Kirby (kkirby@wileyrein.com). Those simply interested in learning about upcoming meetings in their regions need only make sure they have signed up with the WICL listserv on the ABA’s website.

Chicago Region
By Debbie L. Berman
Regional Representative

Tuesday, March 16, 2010, the Chicago Region held its second annual WICL lunch at the new offices of Regional Representative Debbie L. Berman’s employer, Jenner & Block LLP. Here is her report:

Over lunch we discussed a wide range of topics, including recent trends in cases we are handling, how the Internet has changed (or has not changed) our practices, and how Facebook affects the natural progression of gaining and losing touch with people over time. Due to some last minute conflicts, we were a small, but mighty, group consisting of: Shari Albrecht of Mandell Menkes; Cheryl Balough of Balough Law Offices; Debbie L. Berman of Jenner & Block LLP; Leslie Davis of Sonnenschein Nath & Rosenthal; Natalie Harris of Mandell Menkes; Lindsay LaVine of Mandell Menkes; Trisha Rich of Holland & Knight; and Kristen Rodriguez of Sonnenschein Nath & Rosenthal. Between the two events that we have held, we have had more than 20 women, from both firms and the industry, participate. We look forward to our next get-together.

Debbie L. Berman is a Partner at Jenner and Block LLP in Chicago.

The current Regional Representatives and their addresses are:

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Fifth Annual Privacy Symposium Focuses on Electronic Issues
By S. Jenell Trigg

“Increasingly, consumers do not understand the types and amount of information collected by businesses. Consumers do not understand how that information might be collected and used or even why personal information might have commercial value. The implications often do not become clear until after sizable amounts of data have been collected or after some tangible harm actually has occurred. By that point, it is too late to stuff the proverbial genie back into the bottle.”

The opening keynote address by outgoing Commissioner Pamela Jones Harbour of the Federal Trade Commission (FTC), excerpted above, was one of the many memorable moments of the Fifth Annual Privacy and Data Security Symposium presented by the ABA Forum on Communications Law and the Federal Communications Bar Association Privacy and Data Security Committee on March 11, 2010 in Washington, D.C. WICL members S. Jenell Trigg, Partner at Lerman Senter PLLC, and Maureen K. Ohlhausen, Partner at Wilkinson Barker Knauer LLP, were the co-chairs of the Symposium, which was sponsored by Arnold & Porter LLP; Lerman Senter PLLC, Sonnenschein Nath & Rosenthal LLP, Wilkinson Barker Knauer LLP, and Wiley Rein LLP.
In one of her final public appearances before her term at the FTC expired in April, Commissioner Harbour explained that the FTC “expects companies to maintain reasonable procedures to protect consumer sensitive personal information and to constantly reevaluate those procedures as new vulnerabilities arise.” She also stressed the importance of businesses providing full disclosure regarding the collection and use of personal information to enable consumers to provide informed consent. Regarding the need for a greater substantive convergence of global standards for data transfer across various jurisdictions, Commissioner Harbour remarked that “[t]his approach is, I believe, the best way to protect consumers while also encouraging and stimulating cross border economic growth, thus ensuring the long-term health of our global economy.”

The Symposium also featured three substantive sessions, each with a diverse selection of distinguished panelists from the private sector, trade associations, federal and state governments and public interest organizations. The first session, “Government’s Role for Privacy & Data Security,” was moderated by Maureen Ohlhausen and featured panelists Dennis Cuevas, Chief Counsel and Director, Consumer Protection Project, National Association of Attorneys General; Maneesha Mithal, Associate Director, Division of Privacy & Identity Protection, Bureau of Consumer Protection, FTC; Sherrese Smith, Legal Advisor, Office of Chairman Julius Genachowski, Federal Communications Commission (FCC); and Berin Szoka, Director and Senior Fellow, Center for Internet Freedom, the Progress and Freedom Foundation. This topic facilitated a lively debate about the roles of federal and state governments, with divergent views regarding the necessity, value and degree of enforcement needed to protect consumers’ personal information. Despite their other differences, the representatives of both the state and the federal government agreed that governments need to have adequate enforcement efforts to ensure that consumers are free from unwanted intrusions, that data does not fall into the wrong hands, and that consumers get the benefit of their bargain when conducting business, both online and offline. However, some public interest advocates expressed concern about government intervention, noting that the government may be the biggest demonstrable threat to privacy and that well-intentioned enforcement efforts can cross the line into harmful regulatory efforts – unnecessarily taking decision-making power away from consumers and making unreasonable decisions on their behalf.

The second session, “Due Diligence, Contract, and Insurance Requirements for Relationships with Service Providers,” was moderated by Randy V. Sabett, a partner with Sonnenschein Nath & Rosenthal, LLP and co-chair of the firm’s Internet & Data Protection Practice Group. The panelists for the session were David Medine, Partner, WilmerHale LLP; Paul Miskovich, Vice President, Cyber/ Tech Product Manager, AXIS PRO; and Laura Stack, Staff Attorney, Division of Privacy & Identity Protection, Bureau of Consumer Protection, FTC. Two basic principles regarding service providers were emphasized: 1) the entity that collects personal information from a consumer is ultimately responsible for the protection of the personal information, even if the personal information is transferred to a service provider; and 2) when service providers are used, the principal takes on an affirmative duty to oversee and monitor a service provider. The panelists agreed that it is also important that privacy policies make accurate representations based on the actual business and security practices of a service provider, and that they include specific provisions describing the regulatory and security obligations of the service provider in the user agreement, including requirements for compliance with state security breach notification laws and the FTC’s Red Flag Rules. The panelists also discussed the importance of insurance coverage for service providers, which will vary depending on the types of personal information collected and used. They agreed that, ideally, a service provider should carry significant insurance coverage for network security liability and that the principal should be named as an additional insured. They also discussed other forms of insurance protection for companies collecting private data, including new forms of business income loss coverage, security breach notification coverage, and computer system extortion coverage.

Panelists for the third session, “Telemarketing and Mobile Marketing in a Digital Age,” which was moderated by S. Jenell Trigg, were Scott Delacourt, Partner, Wiley Rein LLP; Yaron Dori, Partner, Covington & Burling LLP; Lois C. Greisman, Associate Director, Division of Marketing Practices, Bureau of Consumer Protection, FTC; and Erica McMahon, Chief, Consumer Policy Division, Consumer & Governmental Affairs Bureau, FCC. They discussed a wide range of telemarketing issues, including the numerous, complex and often confusing regulatory requirements for mobile marketing via telephone and computers. Various federal laws govern mobile marketing – the form of the call or text message and how the text message is transmitted determine whether the Telephone Consumer Protection Act, the Telemarketing Consumer Fraud and Abuse Prevention Act, or the CAN-SPAM Act apply, as each have different requirements. Businesses using text messaging may have difficulty ascertaining which laws apply, especially when specifics about the nature of the text message are unknown. The panelists also explored the differences between FCC and FTC regulations and enforcement efforts. A unique feature of this session was a practical discussion of real-world hypotheticals involving sweepstakes text promotions and “bounce back” text messages, which may or may not include accompanying commercial messages such as couponing, upsell advertising, and sponsor identification.

A DVD recording of the entire Symposium, including a wealth of additional written material, is available for sale through the FCBA’s website, www.fcba.org.

The Sixth Annual Symposium is scheduled for March 16, 2011. Please contact S. Jenell Trigg for sponsorship opportunities at strigg@lermansenter.com or 202-416-1090.

S. Jenell Trigg is a Partner at Lerman Senter PLLC in Washington, D.C. She is also a member of the WICL Newsletter Committee.
Panelists Conclude Lawyers Can Help to Improve How the Media Covers the Law

By George Freeman

More than 400 people attended the plenary program on “How the Media Covers the Law – and How Lawyers Should Deal With the Media” sponsored by the First Amendment and Media Litigation Committee during the ABA Litigation Section’s Annual Conference in New York last April. The speakers were entertaining, eloquent and elucidating, and included Dan Abrams, the Chief Legal Analyst for NBC News; Judge Kimba Wood, of the U.S. District Court for the Southern District of New York; Adam Liptak, the Supreme Court Correspondent for The New York Times; Ashby Jones, lead writer and legal editor for the Wall Street Journal's Law Blog; David Lat, who runs the legal blog “Above the Law”; and Alison Frankel, senior writer at American Lawyer. George Freeman, VP & Assistant General Counsel for The New York Times Company, moderated.

The session started with a discussion about the kind of news about legal cases the media – old and new, print, television and web – are likely to run. While there obviously were differences depending on the type and seriousness of the media entity involved, the common theme was that a good story either had to be truly newsworthy and groundbreaking, or had to have a human interest element. The journalist panelists also made clear that the more lawyers communicated with reporters, the more helpful their role in developing a story might be. Many reporters at the session bemoaned the fact that lawyers historically have not viewed communicating with the press as part of their jobs. Since legal battles often are played out simultaneously in both the court and the arena of public opinion, especially in high-visibility cases, most of the panelists agreed that it is counterproductive for lawyers to take such a narrow view.

However, the panelists agreed that the world is changing, and that lawyers more than ever are beginning to view press relations as among the services their clients expect from them. The panelists also offered several suggestions for lawyers to improve their relationship with the media, including getting to know reporters better to engender trust, using more layperson’s language when being interviewed or in statements to the press, being more cognizant of reporters’ deadlines, and not being overly suspicious of the press. Although all acknowledged that ethical rules prevent lawyers from trying their cases in the press, the journalists noted that there are a number of safe harbors in those rules, and that the rules don’t preclude giving basic information about pending legal matters.

One example showing that the tide is beginning to turn is in the responses given by defense counsel when they are interviewed on the day a complaint is filed against their clients. A response of “no comment” or “we haven’t seen the papers yet” is, the journalists argued, an opportunity lost, since it is unlikely that the case will warrant a story after the one on the filing of the complaint. If defense counsel do not get their side of the story into print then, they probably never will. Therefore, it was strongly suggested that either defense counsel or the client’s communications office should use that opportunity to communicate their most basic points to the public at the outset of such a case.

Judge Wood noted that even judges sometimes had valid reasons to communicate with the press that are consistent with ethical rules. She said that she also occasionally writes a paragraph or two early in an opinion in terms she hopes reporters and readers will focus on and understand, rather than speaking solely to the parties in the case.

In general, the program was lively and informative. Ultimately, all agreed that, although lawyers have become more conversant and comfortable in dealing with the press, they still have a long way to go in fully exploiting the opportunities that press coverage gives them and their clients.

George Freeman is VP & Assistant General Counsel for The New York Times Company and Co-Chair of the ABA First Amendment & Media Litigation Committee.

The Scramble for Content and Delivery: It’s “Up in the Air” — Representing Your Local Broadcaster 2010

By Genelle Belmas

The 2010 ABA program “Representing Your Local Broadcaster” was, as usual, full of lively discussions on legal topics as diverse as sponsorship ID, payola, indecency, ownership regulations, behavioral advertising, localism, diversity and competition. Rather than attempting to present a complete overview of the numerous topics addressed during the conference, this article focuses on one key topic from each of the four conference sessions: the revised Federal Trade Commission (FTC) endorsement guidelines, the Satellite Home Viewer Extension and Reauthorization Act (SHVERA) and the Satellite Television Extension and Localism Act of 2010 (STELA), Communications Decency Act (CDA) and Digital Millennium Copyright Act (DMCA) developments, and the use of social media by broadcasters.

The FTC Endorsement Guide

The revised FTC Guide for endorsements was discussed in the first session: “The Hangover: Federal Regulations and Broadcast Advertising on the Morning of Digital.” The Guide, which was revised in December 2009 and is available at http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf, has been the subject of a number of concerned articles and discussions in the blogosphere. It describes the FTC’s revised approach to endorsements as requiring disclosure of material connections between advertisers and endorsers that are not
reasonably expected by consumers. The Guide’s primary features include an examination of endorsements by consumers, experts, organizations, and celebrities; the required disclosure of material connections between advertisers and endorsers; the requirement that information contained in endorsements be accurate; and the requirement that claims made be substantiated. For example,endorser claims about product use must be based on actual experience, and must be substantiated when made.

One of the biggest unsung changes in the Guide is the change with respect to “results not typical” disclaimers. Unlike under the previous version of the Guide, these disclaimers are no longer safe harbors because the FTC’s research revealed that these kinds of disclosures have not “adequately reduced the communication that the experiences depicted are generally representative.” Under the current Guide, both advertisers and endorsers can be held liable for false, unsubstantiated endorser claims – even if the advertiser does not control what the endorser says.

The Guide applies only to advertisements, on-air patter, talk show discussions, and bloggers. Traditional media, which are not covered by the Guide, are not required to disclose any relationships between a reviewer and the company. Therefore, those who argue that a review should be subject to the same requirements as an endorsement say that there is a disparity between the FTC’s requirements for traditional media and those for “new” media.

SHVERA and STELA

The SHVERA, addressed in the second session: “‘Extraordinary Measures’: Legislative and Regulatory Gammatics to Preserve Ownership Regulation and Next-Gen SHVERA,” was originally signed at the end of 2004. The Act extended for five years the statutory blanket copyright license in Section 119 of the Copyright Act for satellite carriers retransmitting over-the-air television broadcast stations to their subscribers. The Act was to expire at the end of 2009, but there have been three short extensions. Considered “must-pass” legislation during the 2009-2010 session of Congress, two extension bills were pending in Congress at the time of the Conference: one that would have extended the license for five years, and a second that would have extended it for 10 years. The five-year extension was passed in May 2010 as STELA.

STELA is important for satellite carriers as it is the primary mechanism by which they obtain copyright clearance to transmit programming – the analog of the cable compulsory license. Although both cable and satellite compulsory licenses have been updated to address the recent digital television transition, STELA contains a few elements that are potentially problematic for broadcasters. Under STELA, unserved households are defined as those unable to receive signals using any kind of antenna, not just those unable to receive signals using outdoor antennas, as under prior law. This change in language probably will increase the number of households entitled to receive competing distant network signals, thus potentially reducing programming exclusivity protections for local broadcasters. Multicast channels affiliated with a network will be protected under the revised “unserved household” definition. STELA also eliminates “Grade B bleed:” where an over-the-air signal from Market A could bleed over into Market B, thereby moving those who received the bleed out of the “unserved” category. Now, only a station’s signal in its market counts as service; therefore, any “bleed” is irrelevant. This change expands the scope of the distant network signal and reduces program exclusivity for local stations.

CDA and DMCA Developments

The third session: “‘Clear and Present Danger’: Guiding Journalists Through the Catastrophic Perils,” dealt with developments under the CDA and DCMA. Under current interpretations of the CDA, the definition of “interactive computer service” has been easy to satisfy for websites associated with broadcasters that encourage users to submit content or images and serve as conduits for user participation, thus permitting them to invoke the protections against defamation and privacy torts available under Section 230, which protects Internet service providers from liability for third party content. But courts sometimes strain to circumvent the protections of Section 230 where a service provider fails to remove egregious third party content. For example, in *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), the Ninth Circuit Court of Appeals permitted a cause of action for promissory fraud under Oregon common law where Yahoo! promised the plaintiff that it would remove fraudulent online profiles about her posted by her ex-boyfriend, but failed to do so. Typical citizen journalism postings, however, are unlikely to support an exception to Section 230.

Section 512 of the DMCA has a number of conditions that must be satisfied before a defendant can invoke its safe harbor to copyright infringement claims. For example, a defendant cannot have actual knowledge that copyright infringement is taking place on its website. In addition, the allegedly infringing materials must have been posted by a third-party user to satisfy the interactivity component. Developments in 2009 should be encouraging to defendants. For example, the now-bankrupt online video sharing site Veoh won several DMCA court battles, including one against the Universal Music Group. In *Universal Music Group v. Veoh*, 665 F.Supp.2d 1099 (C.D. Cal., 2009), the court underscored that the DMCA imposes a burden on the copyright holder to put the defendant on notice of infringement – the defendant is not required to actively scour its site for potential infringements. Moreover, the developing body of law seems to require clear notice and an opportunity to take down infringing content before liability can be imposed. Procedurally, the DMCA requires a designated agent to receive notices of infringement as well as a showing that the site is not actively soliciting infringing content or activity.

Use of Social Media by Broadcasters

Finally, participants in the last session: “‘Avatar’: Navigating the World of New Media and Broadband,” grappled with the challenges
presented by the use of social media and networks by station employees and whether such use should be allowed. Of course, employees already are using social media. Moreover, these forms of external communication can be valuable to a station’s outreach and community. But it is important to distinguish between personal uses and company uses. Therefore, broadcasters should implement a policy to address the use of social media in the workplace. For example, what if a reporter starts a Twitter feed and begins to “tweet” on upcoming stories or ideas? In the public’s eye, the line between the individual reporter and his/her broadcast station employer becomes blurred, so that the public may not know whether the reporter is “tweeting” personally or on behalf of the station. This results in significant potential for liability. Therefore, although the reporter has First Amendment rights, the station’s policy should be clear as to the responsibilities and limitations on the use of this technology. Management also should be aware of who is using what social media outlets, and for what corporate purposes. Newsroom training and awareness of the potential benefits and risks is essential.

A handout from Melodie Virtue at Garvey Schubert Barer suggested several issues that could be addressed in a policy on the use of social media in the workplace:

• Should use of social media be permitted in the workplace?
• If so, should access to certain sites be blocked entirely? Accessed with restrictions?
• Should there be a distinction between company use and personal use?
• If unions are represented, is there a duty to bargain about use of social media?
• If the company is publicly owned, is compliance with securities law assured?
• Who will monitor compliance with policy on social media use?
• What legal review will there be for a proposed termination for social media activity?

Genelle Belmas, Ph.D., is an associate professor of communications at California State University, Fullerton, with a research and teaching emphasis in media law. She is co-author with Wayne Overbeck of Major Principles of Media Law (Cengage).

Report From Las Vegas: Time Management Tips We Can All Use
By Judith A. Endejan

At 7:30 a.m. on Sunday, April 11, 2010, a group of 27 surprisingly bright-eyed women gathered at the Encore Hotel in Las Vegas for a breakfast meeting of the Women in Communications Law Committee (WICL), held in conjunction with the Annual Representing Your Local Broadcaster Program presented by the ABA’s Communications Law Forum, the National Association of Broadcasters (NAB), and the Federal Communications Bar Association. Kathleen Kirby and Laura Lee Prather, the co-chairs of WICL, led the meeting.

The first order of business was Laura’s distribution of the hard copy version of the Spring 2010 issue of the WICL Newsletter, which everybody agreed looked terrific! Laura acknowledged the hard work of the editors and contributors in producing the 40-page publication. She then encouraged attendees to sign up for committees such as the WICL Newsletter committee, to participate in WICL’s mentoring program, and to get together for regional meetings and report back to the group at large. Laura also said that a WICL webinar initiative was being started and encouraged attendees to send in ideas and topics for discussion.

Each of the women then introduced herself to the group (and congratulated Laura on her marriage the prior week).

Kathleen then distributed a handout on time management tips, which morphed into a group discussion about the communications tools that the group members generally use. Many members wondered whether e-mail is now an obsolete communication tool. Others questioned whether a Facebook presence is necessary. Some members said they now tweet specifically about media issues. WICL member and NAB attorney Jane Mago asked if there are any studies that reflect exactly how new media is effective and what are the best forms. The other lawyers present generally felt that the new media provide many helpful new tools for networking that can be particularly effective for people who might be reticent or shy about communications generally. The group then discussed the following tips for controlling the new media so that it truly is a tool rather than impediment:

• devote no more than 15 minutes per hour to e-mail;
• prioritize messages, whatever the medium, because not every message is urgent;
• use form e-mails;
• use Outlook religiously;
• do not use Blackberrys in meetings (this was generally agreed to be a pet peeve);
• and, finally, train yourself to not feel guilty about not immediately responding to an electronic message.

The meeting ended on a high note with many members looking forward to the next event in November in New York.

Judith A. Endejan is an attorney with Graham & Dunn in Seattle and a member of the WICL Newsletter Subcommittee.
Forum Presents Right of Publicity Program at ABA Annual Conference
By Richard M. Goehler

The Communications Law Forum presented a very successful CLE program titled “Right of Publicity: From Hollywood to DC/From Pop Stars to Politicians” during the ABA’s Annual Conference in San Francisco. This program, conducted on August 6, 2010, was based on an excellent telephone seminar that the Forum hosted in October 2009.

The program was moderated by past Forum Chair Dick Goehler of Frost Brown Todd LLC. The well-balanced program panel consisted of Pilar Johnson of Turner Broadcasting System, Inc., who provided an in-house perspective; Rick Kurnit of Frankfurt Kurnit Klein & Selz, who provided the defense perspective; and Marty Singer of Lively & Singer, who provided the plaintiff’s perspective. They successfully covered a very ambitious agenda during the 90-minute program and expertly navigated a multitude of “hot topic” right of publicity issues. Rick’s excellent Power Point® presentation helped to focus the discussion and keep the attendees engaged (and entertained) throughout the program.

Pilar started the program by providing a comprehensive overview of the Right of Publicity claim, including the elements of the claim, the key defenses and related claims. The panel then weaved its way through several key issues, including identification/identity (name/picture/likeness/voice/persona), commercial appropriation, the media exception, First Amendment considerations, websites and celebrity promotions, and issues relating to the descendibility of right of publicity claims. Cases addressed during the discussion and analysis of these key issues included: Cher v. Forum Int’l, Abdul-Jabbar v. G.M. Corp., Carson v. Here’s Johnny Portable Toilet, Onassis v. Christian Dior, White v. Samsung Electronics, Midler v. Ford Motor Co., Wendt v. Host Int’l, Inc., Hoffman v. Capital Cities/ABC, Facenda v. NFL Films, Inc., and several others. Celebrities such as Tiger Woods, Lindsay Lohan, Tony Twist, Woody Allen, the “Abercrombie Boys” and the Naked Cowboy also made it into the panel’s fast-paced discussion, during which Marty and Rick offered their competing views and opinions from the plaintiff’s and defendant’s perspectives, while Pilar provided practical counseling and “best practices” advice from the in-house counsel’s point of view.

The program participants compiled an excellent set of written materials, which is available on the Forum’s website.

Richard M. Goehler, a partner in Frost Brown Todd’s Cincinnati office specializing in media and First Amendment law, is past chair of the ABA Forum on Communications Law and past co-chair of the ABA First Amendment & Media Litigation Committee.

Communications Law Webinars
By Steven D. Zansberg

Final 2010 Program Explores Use of FOIA to Cover Breaking News

In 2010, the ABA Forum on Communications Law continued its successful series of tele-CLE programs under the leadership of Teleseminars/Webinars Committee Co-Chairs Steve Zansberg of Levine Sullivan Koch & Schulz and WICL member Natalie Spears of Sonnenschein Nath & Rosenthal. WICL member Maya Windholtz of NBC/Universal also is an active member of the planning committee.

On October 20, 2010, Zansberg moderated a panel of government and industry experts on the Freedom of Information Act (FOIA) in the Forum’s final tele-CLE program for 2010: “Access to Government Information in the Midst of Breaking Events: Can FOIA Be Used Effectively for Reporting the News?” Panelist Melanie Ann Pustay, who, as Director of the Justice Department’s Office of Information Policy, is responsible for developing FOIA guidelines for federal agencies, discussed the major initiatives undertaken to comply with President Barack Obama’s first-day-in-office memorandum committing his administration to increased transparency. Merriam Nisbet, who is the Director of the Office of Government Information Services in the National Archives, an office established by Congress to serve as “ombudsman” on FOIA matters, discussed the procedures used by her office to attempt to resolve FOIA disputes in lieu of litigation. Lucy Dalglish, the Executive Director of the Reporters Committee for Freedom of the Press, spoke about the substantive and procedural/bureaucratic obstacles that reporters encounter when seeking to obtain information from government agencies. David Sobell, Senior Counsel and chief FOIA litigation attorney for the Electronic Frontier Foundation – an organization dedicated to protecting civil liberties in the digital world – discussed his experiences in litigating FOIA matters in the Obama Administration, which he said has maintained many of the positions asserted by the Bush Administration.

Forum Announces 2011 Tele-CLE Programs on Kiddie Marketing and Online Archives

The first tele-CLE program of 2011 is scheduled for Wednesday, January 12, 2011 at 1:00 p.m. EST, and is tentatively titled “Marketing to Kids: Traps for the Unwary in a Rapidly Evolving Legal Landscape.” The panel discussion will be moderated by WICL member S. Jenell Tigg, a partner with Lerman Senter PLLC in Washington, D.C. who received the 2010 Distinguished Service Award from the Federal Communications Bar Association (FCBA) for, among other things, co-founding the FCBA’s Privacy and Data Security Committee and organizing its annual Privacy and Data Security Symposium in 2010. The panel will include Jonathan D.
Avila, Vice President-Counsel and Chief Privacy Officer at The Walt Disney Company, as well as representatives from both the Federal Trade Commission and the Federal Communications Commission. They will explore various rulemaking proceedings and enforcement actions taken under the Children’s Online Privacy Protection Act, the federal Communications Act, as amended, and other state and federal government initiatives addressing marketing directed to minors. Further information about this program will be posted on the WICL website in the near future.

In March 2011, the Forum will be presenting the second tele-CLE of the year, tentatively titled “Reputation Management in the Digital Age: How Technology and Information Permanency Affect How Businesses and Individuals Are Viewed by Others.” David Bralow, Assistant General Counsel for East Coast Media with Tribune Company, will moderate the panel, which is expected to include a representative from the “reputation management” industry and in-house counsel who handle requests to remove archival data from online databases. The panel will explore the host of legal and ethical issues raised by the existence of online archives and how media companies, and the affected “targets” of negative reports, address those issues. Further information about this program will be posted on the WICL website.

The Forum’s tele-CLE programs are an extremely convenient and cost-efficient means for communications law attorneys to earn CLE credits while obtaining valuable information about the cutting-edge issues that affect their media clients. Forum members pay $85 for 90 minutes and earn at least 1.5 hours of CLE credits (depending upon whether your state is a 50- or 60-minute per hour state). WICL members can participate in and support these valuable Forum programs by registering for and attending them, and encouraging their colleagues to attend, as well. Anyone who has ideas for future program topics and/or would be interested in moderating a panel or appearing as a panelist can contact Natalie Spears at nspears@sonnenschein.com, Maya Windholz at Maya.Windholz@nbcuni.com, or Steve Zansberg at szansberg@lskslaw.com.

Steven D. Zansberg, a partner in the Denver, Colorado office of Levine Sullivan Koch & Schulz, L.L.P., is Co-Chair of the ABA Forum on Communications Law’s Teleseminars/Webinars Committee.

Women In Leadership In Communications Law

This column identifies women who are serving in leadership positions in communications law professional organizations such as the ABA Forum on Communications Law (the Forum), the Media Law Resource Center (MLRC) and the Federal Communications Bar Association (FCBA), and media and communications law bar committees. Please send us any additional information you may have about women serving in such leadership positions so that we may update this column.

Kathleen Abernathy, Chair, FCBA Conference Planning
Stephanie Abrutyn, Chair, MLRC Institute of Trustees; Co-Editor, Forum Communications Lawyer magazine
Teresa Artsis, Co-Chair, FCBA Carolina Chapter
Eugenie Barton, Co-Chair, FCBA Privacy and Data Security Committee
Jeanette Melendez Bead, Chair, Forum Moot Court Competition Committee
Sandra Baron, MLRC Executive Director
Shellie Blakeney, Co-Chair, FCBA Diversity Committee
Ann West Bobeck, Trustee, FCBA Foundation
Katherine Bolger, Co-Chair, MLRC Entertainment Law Committee
Karen Brinkman, Assistant Treasurer, FCBA Foundation
Susan Buckley, Member, Forum Governing Committee
Sally Buckman, Chair, FCBA Transactional Practice Committee
Micah Caldwell, Chair, FCBA Young Lawyers Committee; Chair, FCBA Charity Auction Ad Hoc Committee
Alicia Wagner Calzada, Liaison to the Forum, ABA Law Student Division
Rachelle Chong, Co-Chair, FCBA Northern California Chapter
Linda Cicco, Co-Chair, FCBA International Telecommunications Committee
Christine Crowe, Co-Chair, FCBA Continuing Legal Education Committee
Guylyn Cummins, Immediate Past Chair, Forum
Lucy Dalglish, Member, Forum Governing Committee; Executive Director, Reporters Committee for Freedom of the Press
Monica Desai, Member, FCBA Executive Committee
Parul Desai, Member, FCBA Executive Committee
Monica Dias, Co-Chair, Forum Central Division
Jennifer Dominitz, Co-Chair, MLRC California Chapter
Erin Dozier, Co-Chair, FCBA Continuing Legal Education Committee
Johnita Due, Member, Forum Governing Committee
Donna Epps, Trustee, FCBA Foundation
Nneka Ezenwa, Chair, FCBA Homeland Security and Emergency Communications Committee
Kai Falkenberg, Co-Chair, MLRC Prepublication/Prebroadcast Committee
Michele Farquhar, Co-Chair, FCBA Annual Seminar Planning Committee
Nancy Felsten, Co-Chair, MLRC Advertising/Commercial Speech Committee
Karen Flax, Co-Chair, Forum Central Division
Carolyn Forrest, Member, Forum Governing Committee
Lisa Fowlkes, Co-Chair, FCBA National Telecommunications Moot Court Competition Committee
Alexandra Goldstein, Liaison to the Forum, ABA Law Student Division
Karlene Goller, Member, Forum Communications Lawyer Editorial Advisory Board

Get our Updated Women in Communications Law Directory

Find out how to get in touch with your fellow Women in Communications Law Committee Members. Go to http://www.abanet.org/forums/communication/women_in_co_law/home.html or www.tinyurl.com/ABAWICL
Tarah Grant, Co-Chair, FCBA Transactional Practice Committee
Donna Gregg, FCBA Distinguished Lecturer
Nese Guendelsberger, Chair, FCBA Wireless Telecommunications Committee
K.C. Halm, Co-Chair, FCBA Wireline Committee
Rosemary Harold, Member, FCBA Executive Committee
Regina Harrison, Co-Chair, FCBA Engineering and Technical Practice Committee
Karen Henein, Co-Chair, FCBA Privacy and Data Security Committee
Jennifer Hightower, Co-Chair, FCBA Atlanta Chapter
Catherine Hilke, Young Lawyers Representative, FCBA
Jennifer Hindin, Co-Chair, FCBA International Telecommunications Committee
Lavonda Huff-Reed, Co-Chair, FCBA New York Chapter
Karen Kaiser, Co-Chair, Forum Eastern Division
Julie M. Kearney, Chair, FCBA Foundation
Beth Keating, Chair, FCBA Florida Chapter
Jean Kiddoo, Co-Chair, FCBA Relations with Other Bar Associations Committee
Linda Kinney, Co-Chair, FCBA Comm Law 101 Committee
Kathleen Kirby, Chair, FCBA Mass Media Practice Committee; Co-Chair, Forum Women In Communications Law Committee; Co-Chair, MLRC Legislative Affairs Committee
Ashley Kissingler, Co-Chair, First Amendment and Media Litigation Committee, ABA Litigation Section
Elizabeth Koch, Member, Forum Communications Lawyer Editorial Advisory Board
Jennifer Kostyu, Co-Chair, FCBA New York Chapter
Julie Laine, Chair, FCBA New England Chapter
Christina Langlois, Co-Chair, FCBA Commendations and Acknowledgements Committee
Lindsay LaVine, Liaison to the Forum ABA Young Lawyers Division
Sara Leibman, Co-Chair, FCBA Comm Law 101 Committee
Jane Mago, Co-Chair, FCBA Commendations and Acknowledgements Committee
Katherine Mast, Vice Chair, Media, Privacy and Defamation Committee, ABA Tort Trial and Insurance Practice Section
Rachel Matteo-Bohn, Vice Chair, Media, Privacy and Defamation Committee, ABA Tort Trial and Insurance Practice Section
Jackie McCarthy, Chair, FCBA State and Local Practice Committee
Dana McElroy, Chair, Media, Privacy and Defamation Committee, ABA Tort Trial and Insurance Practice Section
Kris Monteith, Chair, FCBA FCC Enforcement Committee
Karole Morgan-Prager, Member, MLRC Board of Directors
Amy Mushahwar, Chair, FCBA Intellectual Property Committee
Melissa Newman, Co-Chair, FCBA Comm Law 101 Committee
Lynn B. Oberlander, Vice Chair, MLRC International Media Law Committee
Janice Obuchowski, Member, FCBA Executive Committee
Patricia Paoletta, Co-Chair, FCBA Annual Seminar Planning Committee
Laura Phillips, Secretary, FCBA
Laura Lee Prather, Co-Chair, Forum Women In Communications Law Committee; Member, Forum Communications Lawyer Editorial Advisory Board
Elizabeth Ritvo, Secretary, MLRC Defense Counsel Section
Elisa Rivlin, Member, MLRC Board of Directors
Catherine Robb, Vice Chair, Media, Privacy and Defamation Committee, ABA Tort Trial and Insurance Practice Section
Carolyn Roddy, Co-Chair, FCBA Atlanta Chapter
Natalie Roisman, Trustee, FCBA Foundation; Co-Chair, FCBA Comm Law 101 Committee
Kelli Sager, Past Chair of the Forum; Co-Chair, Forum Western Division; Member, Forum Communications Lawyer Editorial Advisory Board; President Emeritus, MLRC Defense Counsel Section
Deborah Salons, Chair, FCBA Law Journal Committee
Davina Sashkin, Co-Chair, FCBA National Telecommunications Moot Court Competition Committee
Susan Seager, Co-Chair, MLRC Membership Committee
Deanna Shullman, Chair, Media & Communications Law Committee, Florida State Bar Association; Co-Chair, Forum Training & Development Committee
Darcey Siegel, Council Representative, Media, Privacy and Defamation Committee, ABA Tort Trial and Insurance Practice Section
Sherrese Smith, Chair, Forum Diversity Committee; Liaison to the Forum, ABA Committee on Racial & Ethnic Diversity in the Profession
Natalie Spears, Co-Chair, Forum Teleconference/Webinar Committee; Co-Chair, MLRC Conference and Education Committee; Co-Chair, Planning Committee, NAA/NAB/MLRC Media Law Conference 2010
Laura Stefani, Co-Chair, FCBA Engineering and Technical Practice Committee
Brita Strandberg, Co-Chair, FCBA Wireline Committee
Karen Pelz Strauss, Co-Chair, FCBA Diversity Committee
Megan Anne Stull, Member, FCBA Executive Committee
Anne Swanson, Chair, FCBA Constitution and By-laws Committee
Michele Thomas, Co-Chair, FCBA New York Chapter
S. Jenell Trigg, Chair, Forum Privacy and Data Security CLE Program Committee; Co-Chair, FCBA Privacy and Data Security Committee
Robin Tuttle, Co-Chair, FCBA Carolina Chapter
Jennifer Ullman, Co-Chair, FCBA International Telecommunications Committee
Corinna Ulrich, Forum Internet Coordinator
Catherine Van Horn, Chair, 2011 Media Law Conference Planning Committee; Florida State Bar Association
Lauren Van Wazer, Treasurer, FCBA
Nancy Victory, Chair, FCBA Broadband Ad Hoc Committee
Barbara Wall, Past Chair of the Forum; Member, Forum Communications Lawyer Editorial Advisory Board
Anita Wallgren, Co-Secretary, FCBA Foundation
Mary Wand, Co-Chair, FCBA Northern California Chapter
Jennifer Warren, Co-Chair, FCBA Relations with Other Bar Associations Committee; Trustee, FCBA Foundation
Elisabeth Washburn, Co-Chair, FCBA Northern California Chapter
Susan Weiner, Member, MLRC Board of Directors
Maya Windholz, Co-Chair, Forum Western Division
Amy Wloverton, Member, FCBA Executive Committee
Mary Kate Woods, Member, MLRC Institute Board of Trustees
Michelle Worrall-Tilton, Vice Chair, Media, Privacy and Defamation Committee, ABA Tort Trial and Insurance Practice Section
Angela Wu, Chair, FCBA Pacific Northwest Chapter
Lisa Youngers, Co-Chair, FCBA Annual Seminar Planning Committee
Susanna Zwerling, Co-Chair, FCBA New York Chapter
Women in Communications Law 2010-2011
Mentoring Program Guidelines

The goal of the program is to match law students and junior or senior attorneys interested in communications law with more experienced mentors. Participants may serve as a mentor, mentee, or both.

The program will be conducted annually. Those interested in participating will be matched with a mentor or mentee from approximately July 2010 (or whenever you begin) through July 2011. At the end of the year, participants may choose to continue their existing match, to sign up for a new match, or to stop participating in the program.

Mentors and mentees should plan to get together approximately once per quarter.

In addition to one-on-one meetings, mentors are encouraged to look for opportunities to invite mentees to bar association or other networking and/or educational events.

Whenever possible, mentors and mentees will be matched based on geographic area. In some instances, however, we may suggest matches between mentors and mentees located in different cities.

To the extent possible, mentors and mentees also will be matched according to their practice area or other common interests noted on the sign-up form.

All discussions between mentors and mentees are confidential.

Thank you for your interest!
We look forward to having you participate in the program.

MENTOR/MENTEE REGISTRATION FORM

I am applying to be a Mentor ____ Mentee ____ Both ____ Today's Date:__________
Name_____________________________________________________________________________________________
Organization_____________________________________________________________________________________
Address_________________________________________________________________________________________
Phone_________________Fax_________________Email_____________________________________________________
Years of Practice in Communications Law: ____ Practice Areas: __________________________________________
Please list your law school, undergraduate and graduate education including school, degree, and graduation dates______
____________________________________________________________________________________________________
What are your hobbies and interests? _______________________________________________________________
____________________________________________________________________________________________________
Please list any other details that you think would help WICL match you with a compatible mentor/mentee
____________________________________________________________________________________________________
____________________________________________________________________________________________________
____________________________________________________________________________________________________
(For Mentors Only) Are you willing to mentor more than one mentee at a time? Yes ____ No ____
(For Mentees Only) Please list your primary goal(s) or reason(s) for participating in the mentorship program.
____________________________________________________________________________________________________
____________________________________________________________________________________________________
THANK YOU FOR PARTICIPATING IN WICL'S MENTORING PROGRAM!
PLEASE RETURN THIS FORM BY EMAIL, MAIL OR FAX TO:
Martha Heller, Wiley Rein LLP
1776 K Street, NW, Washington, DC  20006
Phone: (202) 719-3234  Fax: (202) 719-7049  E-mail: mheller@wileyrein.com