

Tobacco Row

By Michael McMenamin

A "don't ask, don't tell" policy for journalists

IN THE PAST FEW MONTHS, WHO has done the most harm to First Amendment freedoms? This is a sophisticated test, so pay attention. Was it:

- (a) the tobacco industry
- (b) Energy Secretary Hazel O'Leary
- (c) U.S. District Court Judge John Feikens
- (d) CBS's *60 Minutes*
- (e) all of the above

No, it's not (e). That kind of guess may fly on the SAT but not here.

The tobacco industry? Not really, unless you believe the First Amendment, properly applied, means no one has a protectable interest in their reputation. The tobacco industry obviously spends more in legal fees each year than their reputation is worth, but, small thing that it is, they treasure it and they are welcome to it.

Hazel O'Leary? Get serious. A run-of-the-mill Clinton appointee who has so far managed to avoid having her own special prosecutor, she is notable only for the frequent trips she takes out of Washington at taxpayer expense, including a number of foreign junkets. What normal American can blame her for wanting to get out of town? While it's true she spent \$45,000 of your money to compile what some call a Nixon-like "enemies list" of unfriendly reporters, that kind of money is barely a blink of the eye in Washington. Admit it, were you really shocked to learn that a public official kept lists of friendly and hostile reporters?

Judge John Feikens is the wrong answer also, but picking him shows your sophistication in this area and, accordingly,



you get extra credit if you knew he is the judge who issued the patently unconstitutional prior restraint against *Business Week* and its story on Procter & Gamble's lawsuit against Bankers Trust. Indeed, but for the crew at *60 Minutes*, Feikens would have been the correct answer. A Nixon appointee who barred *Business Week* from publishing a story with documents legally obtained by its journalists, he never once cited the landmark Pentagon Papers case in his decision, thus enshrining forever the principle that avoiding embarrassment to a leading financial institution will trump the First Amendment where national security will not.

SO, THAT LEAVES ONLY ONE CHOICE: *60 Minutes*, the oldest and most respected investigative journalism broadcast. Still, it's possible to blame Feikens's ruling for *60 Minutes* being the correct answer. That's because New York media types and their lawyers were talking about little else in early November. Feikens threw out a heretofore inviolate rule: no prior restraints on publication. Period. Hence, it fell to *60 Minutes*'s legendary Mike Wallace to come to the rescue of the First Amendment as the *Business Week* lawyers and as his own CBS lawyers had not. Unfortunately, instead of protecting freedom of the press, the heedless, hubris-

ridden Wallace has done it great harm.

A brief history: *60 Minutes* prepared a story on the tobacco industry. One of their confidential sources was a former Brown & Williamson Corp. vice president, Jeffrey Wigand. In the story, which never aired, Wigand accused his former employer of using an additive in pipe tobacco that causes cancer in laboratory animals and of dropping plans to develop a new, safer cigarette. Wigand was, as you

might expect, a disgruntled former employee. He had been fired by Brown & Williamson in 1993, and pursuant to a post-employment settlement agreement that restored his severance package and health care benefits, he agreed to what his lawyer terms "a Draconian confidentiality agreement."

When that agreement was reviewed by CBS lawyers, they recommended against airing the Wigand portion of the story because they believed Wigand would be violating his confidentiality agreement, and CBS might be sued by Brown & Williamson for interfering with its agreement with Wigand and inducing him to breach it. CBS executives, including CBS news president Eric Ober, followed their lawyers' advice.

So far, so good. As a libel lawyer who has advised both print and broadcast media prior to publication, I can assure you this was no big deal. It happens all the time. Sometimes the client takes your advice. Sometimes it doesn't. What happened next, however, will have a lasting and chilling effect on journalism and the First Amendment, especially business journalism.

Don Hewitt, executive producer of *60 Minutes*, and Mike Wallace, principal correspondent on the tobacco story, went public with their complaints about the

CBS decision, including the fact that it was based on lawyers' advice. They did so after apparently not prevailing in internal corporate discussions.

Hewitt was grudgingly accepting of the decision. "That doesn't make me proud, but it's not my money. I don't have \$15 billion. That's Larry Tisch," he said, referring to CBS's chairman and largest shareholder.

Prior to the 60 Minutes affair, it wouldn't have occurred to most journalists to ask a whistle blower if he had an employment contract that prohibited him from blowing the whistle. Now, it's on everyone's mind.

MIKE WALLACE, BY CONTRAST, WAS OFF the wall. "It's the first time that we really feel...let down by my company." The sky was falling, and the First Amendment was in jeopardy because CBS had dared to follow the admittedly cautious advice of its cowardly lawyers. "It became so obvious...we were simply dead wrong, that we were caving in." A media frenzy ensued, as only the media can do it. *Nightline* devoted an entire show to the subject. So did Charlie Rose. Likewise CNN's *Reliable Sources*. A critical *New York Times* editorial followed. Journalists learned a new phrase, "tortious interference with a contract." Most admitted they had no idea what it meant, but agreed that CBS had been cowardly in caving to the tobacco industry.

Wallace, however, was less than forthcoming in his description of the facts. As *The Wall Street Journal* subsequently revealed, Wallace had not disclosed that: 1) CBS promised Wigand that the interview would not be aired without his permission; 2) he had previously been paid \$12,000 as a consultant for help on an earlier *60 Minutes* report; 3) CBS had agreed

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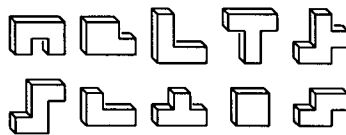
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to indemnify him against any libel action resulting from the broadcast; and 4) CBS had refused Wigand's request to indemnify him against any legal action against him based upon his breach of contract with Brown & Williamson.

Wallace not only failed to reveal this additional information publicly, he also kept it from his colleague, Morley Safer, whom he induced to appear on *The Charlie Rose Show* in defense of the First Amendment. The hapless Safer asserted on the show that the source "wasn't paid, he wasn't threatened, he wasn't promised anything other than an opportunity...to exercise his First Amendment rights" on *60 Minutes*. When Safer later found out all the facts, he apologized to Charlie Rose and his audience and publicly criticized Mike Wallace for having "sandbagged" him by deliberately suppressing the facts, leaving him "twisting slowly in the wind."

Wait. It gets worse. Someone at *60 Minutes* then leaked to the New York *Daily News* the script of the unaired show, including the segment of the interview with Jeffrey Wigand, whom the *Daily News* identified for the first time, as the confidential source. The next day, CBS agreed to what they had previously refused to do: indemnify Wigand against a legal action by his former employer for breach of contract. Good thing for Wigand, because the day after that Brown & Williamson filed a breach of contract, theft, and fraud complaint against Wigand in state court in Kentucky. The judge in the suit promptly issued a temporary restraining order prohibiting Wigand from revealing any further information about his employer, as Wigand was scheduled to give a deposition November 29 in a Mississippi case against tobacco manufacturers. The Mississippi court ordered him to testify anyway.

Lost in all the furor was the one thing that interested journalists and their lawyers in the first place about the dispute: Could companies shut off their employees' access to journalists through invoking a standard confidentiality clause in employment agreements? When this was

the only question—before all the details came out—the CBS lawyers looked timid. The theory was untested in court, and a company's rights in this regard had never been balanced against the First Amendment rights of the press. But, coming as it did on the heels of Judge Feikens's prior restraint against *Business Week*, journalists and their lawyers were understandably concerned.

If it were me, and there were a good behavior clause in Mike Wallace's contract, I'd offer him the option of resigning or paying CBS's legal fees defending the source he helped burn.

BUT FOR MIKE WALLACE'S MASSIVE EGO and poor judgment, they shouldn't have been that worried. Not every intentional interference with a contract is improper or illegal. In determining whether interference is improper, a court would consider, among other things, the nature and motive of the journalist's conduct; the interests of the other party to the contract with which the journalist's conduct interfered; and the interest sought to be advanced by the journalist, as well as the interest of society in promoting and protecting the freedom of the press as weighed against the contractual interests of the company.

Moreover, there's a special defense to a wrongful interference action based on giving the source honest advice within the scope of a request for the advice. So, for example, if the source asks whether his conduct will violate an agreement he has with his employer, lawyers for the news organization can offer their "honest advice" to the contrary—if that indeed is the case.


But the better advice to a news organization is not to get involved in counseling a source on his legal obligations. Indeed, the best defense a news organization can

have against a tortious interference with contract claim is ignorance: We didn't know our source was bound by a confidentiality agreement. If you don't know it exists, you can't induce a breach.

All of this leads to the best advice to give journalists newly educated to the perils of tortious interference with a contract: "Don't ask, don't tell."

Don't ask your sources whether they're under any contractual prohibitions. Prior to the *60 Minutes* affair, it wouldn't have occurred to most journalists or their lawyers to ask a whistle blower if he had an employment contract or other agreement that prohibited him from blowing the whistle. It simply wasn't on their radar screens. Now, thanks to the irresponsibility of the *60 Minutes* journalists, it's on everyone's mind, including companies who want to keep their employees from talking to the press.

"Don't tell" means that if your lawyers tell your superiors not to run a story for a particular reason, don't whine to the world about what the lawyers did. Don't emulate irresponsible journalists such as Mike Wallace and Don Hewitt by taking an internal dispute public when it doesn't go your way. By violating "don't tell," all Mike Wallace has done is validate that his ego is more important to him than the First Amendment.

What he set in motion, with all the resulting publicity, will in fact have a chilling effect on a free press because more companies will now try to duplicate what Brown & Williamson did. They won't be successful most of the time, but Mike Wallace sure as hell has made the job of media lawyers a lot tougher. It's a sign of how important *60 Minutes* is to CBS financially that nothing has apparently been done by CBS to Wallace because of his conduct. If it were me, and there were a good behavior clause in Wallace's contract, I'd offer him the option of resigning or paying CBS's legal fees defending the source he helped burn. 

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Child's Play

By Carolyn Lochhead

The budget debate is deceiving Americans about the fiscal future.

IN THE CLASH BETWEEN Congress and President Clinton over balancing the budget, all the crucial policy details and factual depth have been swept away by two "talking points" that each side is desperately trying to drill into the public consciousness: Republicans say they will save America's children, while Clinton claims that he will save America's values.

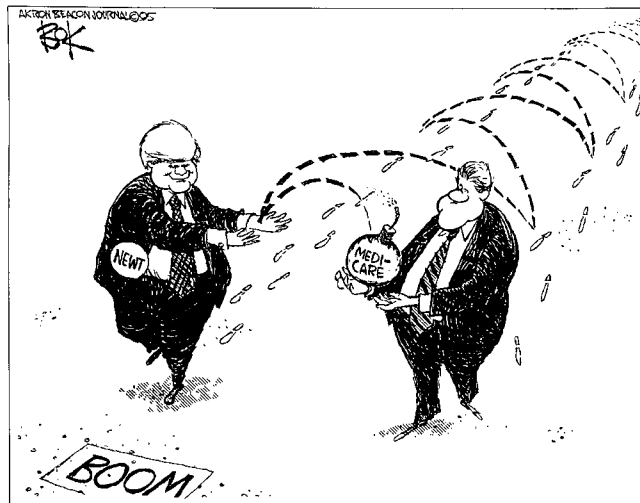
Neither plan does anything of the sort.

Even if the two sides agree on an honest seven-year plan before the 1996 election, it will represent at best only a modest step toward forestalling a problem that will leave American children and American values alike wrecked on the shoals of today's potent elderly voting bloc.

For all the hand-wringing, even the GOP plan leaves the country hurtling off a fiscal cliff around 2010—just eight years after the budget would supposedly be balanced. That's when the 76 million-strong baby boom generation begins to retire and sign up for benefits in the big entitlement programs that now drive the federal budget: Social Security, Medicare, Medicaid, and civil service and military retirement.

"Hitting a zero deficit in 2002 doesn't mean that beyond 2002 the deficit will be zero," says Laurence Kotlikoff, a Boston University economist. "The pain required to keep the deficit at zero is much, much bigger than anybody is talking about publicly."

But if Republicans are guilty of falsely painting their effort as salvation, they at least have taken the first vital step in the right direction. Playing by the conserva-



tive Congressional Budget Office rules that Clinton once advocated, they have proposed many very real and very significant changes in entitlement programs, including ending the entitlement to cash welfare benefits and block-granting Medicaid to the states.

They have walked through the political fire on Medicare, proposing to open the system to competition, introduce medical savings accounts, and most significant of all, cap its out-of-control spending growth. Following advice long urged by economists and long ago adopted by the private sector, the GOP plan "defines," or limits, the per-beneficiary payment, cutting off the blank-check approach for at least part of the vast Medicare program.

DEMOCRATS, LED BY PRESIDENT CLINTON, have for their part stooped to a level of pandering that should make an honest person blush. Upon taking office, Clinton recognized that containing government health care spending was absolutely crucial to braking the deficit. Of course, Clinton proposed to put out the fire by dumping gasoline on it, calling for a government takeover of the private health care market and clamping down with price controls. But even Clinton pro-

posed restraining Medicare spending, arguing cogently at the time that a slowdown of spending growth could not logically be construed as a cut.

Now, he accuses Republicans of planning "crippling cuts" in Medicare and Medicaid that are "bad for America." This can most kindly be described as a gross distortion. Per-beneficiary spending in both programs will continue to soar, which is exactly why the Republican plan falls so short of a fiscal rescue.

The administration has filled the air with glib half-truths and sound-bite discourse calculated to leave a false impression. It panders to the worst impulses of a public that often appears as ill-informed and prone to mood swings as a 13-year-old. (One CNN talk show flashed a "poll" during the partial government shutdown asking people to list themselves as "angry" or "not angry," as if their emotions were substitute for thought.)

PEOPLES CRAVE THE ABSTRACTION OF A balanced budget, but not its specifics. Even the well-informed have a hard time discerning the difference between Medicare (for the elderly) and Medicaid (for the poor), and wouldn't know what a block grant was unless one landed in their personal checking account. Most people seem to believe that budget deficits are driven by military spending, fraud and waste, and foreign aid, rather than the autopilot benefit checks going out to half the population.

If told the facts, however, voters seem quite capable of making rational decisions. Citizens—conservative and liberal alike—who participate in budget-balancing sessions run by the bipartisan Committee for a Responsible Federal Budget