



MESSAGE FROM THE PRESIDENT

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“FREE” AT LAST?

This month’s edition of *Nevada Lawyer* addresses that ever-fascinating, intellectually stimulating and endlessly controversial democratic icon: the First Amendment. Who doesn’t enjoy indulging in our still-quintessentially-American festival of self-expression, the noble and responsible exercise of free speech? Well, quite a few people, actually. While there is an enormous amount of verbal noise taking place out there, there is also a healthy contingent of silent (or at least cautious) bystanders among our citizenry, uncertain that the free speech in which they seek to engage is truly “free.”

In the age of social media, 24-hour news coverage, ubiquitous talk radio, and loose or non-existent state-sponsored censorship, it is thoroughly ironic that more and more of our responsible citizens are convinced that free speech is often too costly to exercise. Don’t misunderstand me: more people are “speaking truth to power” than ever before. In fact, they aren’t just speaking; they are screaming their self-proclaimed truths. Yet others are hanging back, watching the spectacle of opinions unleashed, perhaps quietly expressing their own in the safety of the secret ballot. As in Bob Dylan’s

anthem “Maggie’s Farm,” they “have a head full of ideas that are driving [them] insane,” but virtually no space or forum in which to safely share them. It is a tragic development when one of our most treasured rights is left unexercised because of a distinct fear that a free, honest expression of opinions will be punished, whether through verbal abuse, social ostracism or economic sanction. While unpopular speech has always had consequences, it was never the source of so much recrimination. “Agreeing to disagree” seems a quaint vestige of the past.

The reasons behind this phenomenon are rooted in political and cultural developments far beyond the scope of this column. Nevertheless, protection of First Amendment freedoms is the most important task assigned to the legal profession. Bar none. While the chaos surrounding present political and cultural discourse can be disheartening and disgusting, it is through such cacophonous exchanges of words that the nation has traditionally forged progress and, remarkably, sometimes even consensus. Now, however, the chaos seems to have overwhelmed the marketplace of ideas. It is time for lawyers to speak a little order to chaos.

We attorneys are especially suited to this task. As Al Pacino’s character reminds us in the strangely entertaining, but deeply disturbing movie *The Devil’s Advocate*, “The law, my boy, puts us into everything. It’s the ultimate backstage pass; it’s the new priesthood, baby.” It is time to use that backstage pass to tidy up one of the messiest reality shows our republic has ever witnessed before

it utterly destroys the First Amendment rights and privileges of our citizens. The government can’t do it. The media has no incentive to do it. And the leaders of the tech companies don’t understand history well enough to do it. So, it falls to us.

This is not a rallying call for political action. Restoring the power and privilege of the First Amendment does not involve choosing a political or cultural side. At a minimum, it involves educating the public as to what is, and of course, what is not protected speech. Much of the incivility and vitriol masquerading as free expression is the product of ignorance regarding the kind of speech that is protected and the kind that is punishable. It is noteworthy that what passes for modern opinion often involves voicing outrage over what someone else has said. While every day we hear from the people who refuse to be silenced, their reflexive response to competing opinions is to seek to silence *them*. As the backbone of the adversarial justice system, we attorneys know that absolutely nothing can be resolved without the free exchange and vigorous testing of ideas or arguments. Silence may protect feelings, but it also protects ignorance and insularity. An entire generation has been conditioned to reject speech with which it disagrees as bad, unprotected or hurtful. This is the very antithesis of how the First Amendment was intended to operate.

No doubt some will observe that it is not the attorney’s duty to educate or referee the discourse between citizens. After all, at rock bottom, we are advocates. By all means, we should continue to advocate—especially for those without the resources to do so



for themselves. Whether you represent a “me too” survivor or an unreformed sexist, you must advocate zealously and responsibly, within the bounds of the First Amendment. Set an example. Just because you *can* say something, does not mean you *should*. Our clients should understand that free speech does not mean unfettered speech, regardless of what they see others espousing. We need not become reckless to maintain our effectiveness. In fact, that’s why we get paid the not-so-big bucks.

As attorneys, our greatest value to the preservation of First Amendment protections is the ability to look ahead and anticipate the issues to be decided in a rapidly changing society. Most significantly, within this new milieu of expression, our First Amendment jurisprudence and defamation law, as well as judicial ethics, might need a face lift. Unanticipated issues have surfaced in these areas as a result of recent societal, political and cultural change. In light of the legalization of gay marriage, is it still “defamation per se” to inaccurately claim that an actor is gay, based on the old caselaw regarding imputation of sexual misconduct? Is a falsely-accused sexual harasser entitled to claim the defamatory statement necessarily damages his professional prospects (he could lose his job), and is defamation per se? Clearly, in light of recent developments in the news, these are the type of questions in need of resolution.

The shifting landscape regarding what constitutes acceptable speech about public officials (including judges) has placed tremendous pressure on the rules and norms governing judicial interaction with the public. Personal criticism of judges, which used to occur primarily in jail cells or conference rooms, is now displayed on social media. Should a judge be able to publicly respond to attacks on

his impartiality based on his ethnicity or to rebuke those who call into question his honesty? And if non-lawyers have the right to free speech regarding their opinions about certain judges, what is the rationale for refusing to allow lawyers the same rights? Many outside of our profession would argue “that ship has sailed” when it comes to protecting respect for the integrity and reputation of

the independent judiciary. Lawyers will play an indispensable role in addressing and rectifying these concerns as well. Being a judge may never be the same.

Can we save the heart, soul and spirit of the First Amendment from the puerile purgatory to which our public discourse has descended? Of course, we can. As Al Pacino reminds us, we are “the new priesthood, baby.” **NL**

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