ANNUAL REPORT
TO THE BOARD OF DIRECTORS OF THE SOCIETY OF PROFESSIONAL JOURNALISTS AND THE SIGMA DELTA CHI FOUNDATION

October 3, 2007
Washington, D.C.

Bruce W. Sanford, Esq.
Bruce D. Brown, Esq.
Laurie A. Babinski, Esq.

Baker Hostetler
Counsel to Market Leaders

I. Introduction

Two years ago, no one would have expected the media to achieve a wholesale procedural overhaul of the Freedom of Information Act. And two years ago, in the midst of the jailing of *New York Times* reporter Judy Miller, no one would have thought that a reporters' shield law had any chance on either side of the Hill. What a difference two years makes.

The Society has seen some remarkable advances in free press legislation in the 110th Congress, including the passage by both the House and Senate of the Openness Promotes Effectiveness in our National ("OPEN") Government Act of 2007 (H.R. 1309 and S. 849) and the increasing widespread acceptance of a federal shield law for journalists, legislation that proceeded further in this Congress than ever before. And while the Society and other media organizations have found a formidable foe in Sen. Jon Kyl (R-Ariz.), whose opposition to free press legislation and proactive efforts to enact a *de facto* "Official Secrets Act" have plagued the press lobby for the last few months, greater coordination and grass-roots innovation have allowed the Society to minimize his potentially disastrous effect on the free speech agenda.

What follows is a report of the legislative and judicial activities the Society has participated in over the last year. The report first addresses the unprecedented progress federal shield bills have made in the House and Senate, followed by a discussion of the passage of significant procedural FOIA reform in both houses of Congress, a list of additional legislative activities undertaken by the Society, and summaries of decided and pending cases in which the Society has submitted *amicus* briefs in the past year.

II. Federal Shield Law

Efforts to enact a federal shield law in the 110th Congress have seen bills both in the House and Senate proceed further through the legislative process than they ever have before. While passage of any law often takes many years, the federal shield law in particular will continue to be a struggle filled with many compromises. However, a solid foundation has been set for moving forward.

When both shield bills were introduced in the House and Senate on May 1, the identical pieces of legislation reflected not only the ideal language media organizations would like to see enacted, but also the many years of compromises made in an effort to move the bill through Congress. The bills as drafted provided a qualified privilege for the protection of both confidential and non-confidential sources and included significant compromises, honed in previous versions of the bill, including:

- A broadened definition of who is covered by the shield law, which extended the law's protections to persons engaged in journalism, defined as "the gathering, preparing, collecting, photographing, recording, writing, editing,

reporting, or publishing of news and information for dissemination to the public";

- A lowering of the standard of evidence the federal government is required to show before it is allowed to compel a journalist to provide testimony or produce documents from "clear and convincing" to "preponderance of the evidence"; and

- A lowering of the standard for how important the information sought must be to the successful completion of the matter in which either testimony or documents are sought from "critical" to "essential."

These and other concessions were a combination of the realistic assessment of the media organizations involved in a coalition led by the Newspaper Association of America as well as by the request of several powerful opponents, particularly the business community led by the U.S. Chamber of Commerce. For example, efforts to appease the Chamber early on included inserting into the House bill additional protections for trade secrets and personal medical or financial information and heightened protections for national security and significant bodily harm where confidential sources are involved.

As the bills progressed to markup, more bargaining led to more changes. In the House, the Free Flow of Information Act of 2007 was marked up and voted out of the Judiciary Committee in early August. The most noteworthy changes in the House came by way of a Manager's Amendment entered by Rep. John Conyers, Jr. (D-Mich.), chairman of the Judiciary Committee. That amendment:

- Narrowed the definition of a journalist to only those who "engage in journalism . . . for financial gain or livelihood";

- Changed the definition of a journalist to specifically deny protection to foreign powers, agents of foreign powers, and foreign terrorist organizations as defined by existing statutes (*i.e.,* FISA and the Immigration and Nationality Act);

- Clarified that the privilege does not apply to state libel suits brought in federal court under, for example, diversity jurisdiction, where the court will still apply the applicable shield of the state law being argued in the case; and

- Lowered the national security exception bar from requiring disclosure where there is "imminent and actual harm to national security" to requiring disclosure "to prevent an act of terrorism against the United States or other significant specified harm to national security."

None of these changes was unexpected. Indeed, the Society and other media supporters of shield legislation had already agreed to some of them, for example, the inclusion of "for financial gain or livelihood" in the definition of a journalist, in past versions

of the bill. Others, such as the denial of protection to foreign powers and terrorist organizations, reflected continuing negotiations in the name of national security. These compromises won the legislation the support of the Chamber of Commerce and the American Bar Association, leaving the Department of Justice the only significant objector. The House bill awaits a full floor vote.

With the House bill through committee, the Society turned its attention to the Senate version of the bill, S. 1267, introduced by Sens. Richard Lugar (R-Ind.) and Chris Dodd (D-Conn.). That bill was derailed early in the process in an attempt to compromise with Sens. Arlen Specter (R-Pa.) and Charles Schumer (D-N.Y.). With the support of Sens. Lugar and Dodd and the use of S. 1267 as a template, Sens. Specter and Schumer drafted a compromise bill, S. 2035, and introduced it in the Senate last month. S. 2035 is more limited than the original bill – it covers only information obtained from confidential sources, narrows the definition of a journalist to a person who regularly engages in journalism, clarifies that no privilege applies when a journalist has witnessed a crime or tort, and relaxes the national security requirement to require disclosure to "assist" in preventing a specific case of "terrorism against the United States" or "significant harm to national security." The bill does not contain exceptions for trade secrets or personal medical or financial information as the House version does, but the Chamber of Commerce has already suggested the addition of those provisions in exchange for dropping its opposition. The Senate Judiciary Committee began its markup of S. 2035 last Thursday with more than 20 amendments offered. Several minor amendments passed, and Sens. Leahy (D-Vt.), chairman of the Judiciary Committee, Specter and Schumer admirably fought off several harmful amendments. The markup will continue tomorrow.

The road to passage of both bills through the House and Senate is still a long one. Opponents are principally divided into two key camps – those who are concerned with the national security implications of the bill and those that still do not believe that journalists deserve a privilege. Press organizations are engaged in a continuing effort to educate legislators and the public alike regarding the importance of a shield law, an effort that was given a significant boost by the Society's lobbying trip to the Hill in June. The full agenda over two days gave the Society the opportunity to hear from those who will be most affected by the law and enhance its profile on the Hill. In a pleasant surprise, Senator Ken Salazar (D-Colo.) agreed to sign on to the shield bill as a co-sponsor during the Board's visit to his office. The Society also contributed to the educational effort through comprehensive online coverage of the need for a federal shield. As journalists continue to fight for a shield, the Society should to look for innovative ways, perhaps through its website, to encourage its members to get involved.

III. FOIA Reform

The Society's lobbying paid also off this year with the passage of FOIA reform bills in both the House and Senate. The OPEN Government Act passed the House 308-117 in March and the Senate by unanimous consent just before the August recess. A push in the House in beginning in 2006 gave FOIA reform the momentum it needed to make it through

both houses of Congress. The effort kicked off in July 2006, when Rep. Todd Platts (R-Pa.) held a hearing to outline FOIA's problems. After the mid-term elections, the Society and the other nine members of the Sunshine in Government Initiative continued the push, making countless visits to members of the House Oversight and Government Reform Committee, which had jurisdiction over the bill, and organizing a grassroots effort to draw attention to the bill.

In substance, the OPEN Government Act is a procedural bill that reforms the way federal agencies process requests for documents under FOIA. The legislation specifically creates a tracking system with individualized identification numbers assigned to specific requests, implements a meaningful 20-day deadline within which agencies must act on FOIA requests or face the loss of any fees due to the agency, establishes the position of a federal government ombudsman within the newly created Office of Government Information Services in the Administrative Conference of the United States to help requesters use FOIA and avoid and resolve disputes, institutes more stringent reporting requirements to make it easier to determine whether agencies are complying with FOIA, and provides a legal mechanism to simplify recovery of legal fees to requestors who must sue for records.

On Feb. 14, Clark Hoyt, former Washington bureau chief for Knight Ridder and current public editor of the New York Times, testified on behalf of the Sunshine in Government Initiative in a House Oversight and Government Reform Committee hearing on the OPEN Government Act of 2007, emphasizing the importance of FOIA reform using stories from his own career as well as the stories written by other journalists that would not have been possible without FOIA. When the Society visited the office of Sen. Mary Landrieu (D-La.) in June, her staff made it clear that making overtures to legislators based on stories important to their constituents is essential to securing votes. Sen. Landrieu herself signed on as a co-sponsor to the OPEN Government Act as the direct result of the problems securing information from FEMA following Hurricane Katrina.

Sen. Landrieu's involvement with the bill epitomizes perhaps the most important lesson media organizations learned from the effort it took to get the OPEN Government Act through Congress – the unique power the Society has to use the press to put pressure on both legislators in general and, in particular, key legislators whose opposition could potentially stop a bill in its tracks. For example, Society President Christine Tatum's Sunshine Week editorial, which ran in more than 40 publications, not only drew attention to the OPEN Government Act, but also to the Society's active role in the process. As a collective, the Sunshine in Government Initiative placed strategic editorials in papers all across the country aimed at specific Senators and Representatives who were on the fence or who posed a risk to the bill. Many of these targeted stories were made possible not only by the extensive connections within the Society and the Sunshine in Government Initiative at large, but also by a searchable database, developed by the Sunshine in Government Initiative, of stories that would never have been published without FOIA. The database, a limited version of which is now public, gave the Initiative members a powerful tool to provide reporters at papers across the country local examples of the need for FOIA.

It wasn't, however, only articles and editorials that made the difference. The Society's website also played a fundamental, wide-reaching role in motivating the masses. The blogging of hearing summaries and other updates informed its members, and immediate calls for support in opposing or supporting certain provisions of the bill paid off as well. The Society's website, of course, was also the vehicle for the Society's much-lauded effort to successfully "out" Sen. Kyl as the anonymous hold on S. 849. Ultimately, it was that effort that forced him to come to a compromise and allowed the bill to pass by unanimous consent. In effect, the website has allowed the Society to reach its membership in a speedy and efficient way and, as the Society has learned time after time in the legislative process, it is hearing from constituents that has the most impact on legislators.

The Society still faces several roadblocks before the bill can go to President Bush for his signature. Minor differences exist between the House and Senate versions of the bill, which the Society is working with Sen. Leahy and Rep. Henry Waxman (D-Calif.), chairman of the House Committee on Oversight and Government Reform, to resolve. Their decision may result in the House taking the Senate bill, the Senate taking the House bill, or a conference to resolve the differences. Because of strong opposition in the Senate by Sen. Kyl, sending the House bill back through the Senate for its approval or going into conference, where deals behind closed doors may lead to unfavorable changes to the bill, are both disfavored. Asking the House to take the Senate bill, however, also has its drawbacks – a grammatical error (an "or" as opposed to an "and") drafted into the Senate version as language was flying back and forth in the last few hours before its passage may have a negative impact on the proliferation of exemptions under section b(3) of the Freedom of Information Act. Yet another alternative is allowing the House to take the Senate version with a commitment from Sen. Leahy and Rep. Waxman to introduce another piece of legislation to remedy the problem immediately after the OPEN Government Act is signed into law, thus engineering a "fix" without putting the entire bill at risk. The Society has weighed in with Sen. Leahy and Rep. Waxman, both of whom are discussing the options and will have the final say on how to proceed.

Both offices have reaffirmed their commitment to making the OPEN Government Act law over the next few weeks, and it is likely the bill will be signed before the 110th Congress gets tied up in the politics of the 2008 presidential election cycle. Once the OPEN Government Act is enacted, the Society should take a moment to rest on its laurels before considering initiating or contributing to other FOIA reforms. Among those discussed within the Sunshine in Government Initiative are drafting a more substantive FOIA reform bill, finding a way to halt the proliferation of bills in Congress that have b(3) exemptions attached to them, and assisting whistleblowers and other government workers in making sure internal guidelines do not prohibit them from speaking to the press or expressing points of view that may not be popular within the government. This will be a good opportunity to reassess the Society's open government priorities and discuss what reforms it would like to see in the next few years.

IV. Other Legislative Activities

While the focus of the past year has understandably been on FOIA reform and a federal shield law, the Society has participated in other lobbying efforts. For example:

- In late February, the Society mobilized both on the Hill and through its website to fight off several proposals Sen. Kyl floated, including an amendment to the federal data mining bill that would have in effect created an "Official Secrets Act" criminalizing the publication of classified information. The outcry from the Society and other media and public interest organizations forced Sen. Kyl to drop the amendments. This display of the Society's influence likely played a role in its subsequent effort to expose him as the hold on the OPEN Government Act and his eventual assent to its passage.

- The Society has engaged in a continuing effort to educate legislators about the harm of indiscriminately adding exemptions under b(3) of the Freedom of Information Act to new legislation.

- In March, the Society submitted comments on the proposed Utah reporters' privilege, Utah Rule of Evidence 509, in order to fight off a version of the rule that contained no protection for whistleblowers, did not allow for the protection of unpublished information gathered by reporters without a promise of confidentiality, and created exemptions so wide-reaching as to eviscerate any meaningful protection under the proposed rule.

- The Society has submitted numerous letters on its own, through the organizations of which it is an active member (including the Sunshine in Government Initiative, the shield law coalition led by the Newspaper Association of America, and the Committee of Journalists for Open Government), and through public interest and other organizations to lobby the Hill for FOIA reform, the shield law, and other free press legislation and against detrimental legislation, such as Sen. Kyl's "Official Secrets Act" amendments.

V. *Amicus* Activities

A. Decisions within the past 12 months

American Historical Association, et al. v. National Archives and Records Administration, et al., No. 1:01CV02447 (D.D.C.)

In November 2001, President Bush issued Executive Order No. 13,233, which purported to establish procedures for implementing the Presidential Records Act of 1978 ("PRA") but in reality permits both former and incumbent presidents to prevent or infinitely delay the release of many presidential and

vice-presidential records. The American Historical Association and several other groups, including the Reporters Committee for Freedom of the Press, sued to challenge the Executive Order on the grounds that it is an illegal attempt to circumvent the PRA, which was passed in the wake of Watergate and is designed to open the records of former presidents to the public 12 years after the ends of their administrations. The Society in February 2002 joined several media organizations to submit an *amicus* brief supporting the plaintiffs' motion for summary judgment. After a somewhat complicated procedural history, the legality of the Executive Order was briefed again at the end of 2005 in the context of an amended complaint, and on November 30, 2005, the Society and several media organizations submitted an *amicus* brief almost identical to the one filed in 2002. The brief argued that the Executive Order reverses the policies in favor of public release that are embodied in the PRA by giving incumbent and former presidents, former vice-presidents, and their representatives nearly unlimited powers to prevent the release of their records by means of even unfounded assertions of privilege. The brief also explained the profound potential harm to the interests of the *amici* and the public in being able to study the performance of the executive branch. On Oct. 1, the judge granted in part and denied in part the motion for summary judgment, tossing out part of the Executive Order and holding that the government's reliance on the Order to delay release of the papers of former presidents was "arbitrary, capricious, an abuse of discretion and not in accordance with law."

Forensic Advisors, Inc. v. Matrixx Initiatives, Inc., et al., 907 A.2d 855 (Md. App. 2006), *cert. granted*, 912 A.2d 648 (Md. 2006), *dismissed as moot*, 397 Md. 396 (2006).

In late January, the Society signed on to an *amicus* brief in support of the owner/founder/president of a company, Forensic Advisors, that publishes a newsletter about publicly traded companies. Matrixx sought the owner's testimony in a defamation lawsuit Matrixx filed in Arizona against several named and unnamed defendants (not including Forensic Advisors) because the he may know the unnamed defendants' identities or have other pertinent information. The publisher sought to quash the subpoena using Maryland's shield law, but a lower court said that he had to go ahead with the deposition and invoke the shield on a question-by-question basis. The *amicus* brief sought to overturn that decision and argued that, once the publisher invoked the shield law, the court should have put the burden on Matrixx to show why the shield law didn't apply before ordering the publisher to comply with the subpoena. Before oral argument, however, Matrixx dismissed the defamation suit in Arizona, making the case in Maryland moot. The Maryland's highest court, the Court of Appeals, dismissed the appeal in March.

Griffis v. Pinal County, 156 P.3d 418 (Ariz. 2007)

In February, the Society joined the Reporters Committee on an *amicus* brief to the Arizona Supreme Court in support of The Arizona Republic in an open records case involving the suspension of Stanley Griffis from his job as county manager after he used public funds to purchase $21,000 worth of sniper rifles, ammunition and other related gear without approval. Phoenix Newspapers, which owns The Arizona Republic, was seeking 90 e-mail records from the time when state officials were investigating Griffis for this conduct. Griffis claimed that these e-mails were private and related to his personal travel and online shopping, and thus were exempt from the Arizona Public Records Act. Phoenix Newspapers argued that the e-mails (which it has not seen) were so closely related to Griffis' breach of his official duty that they were clearly public documents as defined by the Arizona Public Records Act. The *amicus* brief asked the Arizona Supreme Court not to examine whether private messages on a government-owned computer system can ever be exempt from the state open records law, but rather to determine that the particular e-mails in question are so closely related to Griffis' breach of his official duty that they cannot be considered exempt. (No state exempts from its open records laws documents related to the breach of an official duty.) The *amicus* brief stated: "It was Griffis' purchase of guns and ammunition with public dollars that makes these e-mail messages public records, not the simple factual fortuity that he used a public computer to relay those e-mail messages." The *amicus* brief also argued as a procedural matter that allowing Griffis to claim that such records are private, without any evidentiary showing or judicial review of the documents, would render the Arizona Public Records Act useless since organizations petitioning for the release of such records are unable to show otherwise. In a partial victory in April, the Arizona Supreme Court remanded the case back to the trial court for a review in chambers of the documents to determine whether they qualified as public records.

Lane, et al. v. Simon, et al., Nos. 05-3266 and 05-3284, 2007 U.S. App. LEXIS 17814 (10th Cir. July 26, 2007), *petition for rehearing en banc denied* (10th Cir., August 20, 2007)

In December 2005, the Student Press Law Center led a group of nine journalism organizations, including the Society, in urging the United States Court of Appeals for the Tenth Circuit to reverse a lower court ruling that upheld the Kansas State University's dismissal of the student newspaper adviser after a "content analysis" of the publication. In an *amicus* brief, the group said that a June 2005 decision by the United States District Court for the District of Kansas will have a dangerous chilling effect on college journalists and "goes to the very heart of the First Amendment rights of student journalists on public college and university campuses." The editors of

the Kansas State Collegian, Katie Lane and Sarah Rice, sued university officials in 2004 after they removed Ron Johnson, long-time adviser of the newspaper, based on a "content analysis" of the publication by the chairman of the journalism department. The content analysis concluded that the paper's news coverage was lacking as it related to "diversity" issues. However, the university neither alleged nor presented evidence that Johnson had any control over the content of the publication or played any role in discouraging coverage of such issues. District Court Judge Julie A. Robinson noted in her decision that courts have recognized that the First Amendment does not permit public colleges and universities to take punitive action against student newspapers based on their content. However, Judge Robinson held that the students' First Amendment rights were not violated because the university's "content analysis" focused only on the newspaper's "overall quality," which was somehow distinct from its content. The *amici* asserted in their brief to the 10th Circuit that this rationale defies logic. In July, the 10th Circuit vacated the district court's decision, holding that the students' case was moot because they were no longer editors of the paper. The Society also joined an *amicus* brief in the students' petition for review in front of the entire 10th Circuit. The court denied *en banc* review in August.

U.S. v. Libby, Crim. No. 05-394 (D.D.C.)

The prosecution of I. Lewis "Scooter" Libby, Karl Rove's former Chief of Staff, provided several access challenges over the last year. In January, the Society joined The Washington Post, CNN, AP, and the Reporters Committee in the filing of an application for access asking that the initial questioning of potential jury members, also known as *voir dire*, be conducted in public in U.S. District Court for the District of Columbia, and that any questionnaires filled out by potential jury members be released to the press. Judge Reggie Walton denied the motion, but essentially did exactly what the group of media organizations asked him to do, ensuring that all proceedings, with a few carved-out exceptions for personal questions, be conducted in public. The Society also joined the same organizations in an application for access to the daily audio recordings of the trial. Judge Walton denied that request using the same arguments heard time and time again opposing access to cameras in the courtroom. He said that the broadcast of prior proceedings during the trial will make it more likely that the jury will be influenced by "sensationalized" media coverage – a view that is unfortunately shared by many federal judges.

In May, the Society joined a brief filed by media organizations in the sentencing phase of the Libby prosecution. Prior to sentencing Libby, Judge Walton received several letters sent directly to him presumably arguing for leniency in Libby's sentence. (The letters are in addition to letters the defense submitted as part of their sentencing memorandum, which will be public record). Two journalists from the Washington Post and the AP asked to see

the letters sent directly Walton, and the judge asked for briefing on the issue from non-parties, including the media organizations (the Society included) that have intervened several times in the past. Law on the issue was inconsistent, and the organizations assumed that Judge Walton probably would not grant access to the letters in their entirety. The brief argued that access should be granted because, among other reasons, the letters are undoubtedly newsworthy. Judge Walton, however, surprised the media organizations and ordered all the letters released in their entirety, with personal information about the writers redacted. Libby was sentenced to 30-months in prison, but was granted partial executive clemency by President Bush.

O'Shea v. West Milford Bd. of Educ., et al., 918 A.2d 735 (N.J. Super. 2007), *cert. denied*, 192 N.J. 292 (2007)

The Society signed an *amicus* brief drafted by the New Jersey Press Association in support of a petition for certification to the New Jersey Supreme Court. Reporter Martin O'Shea was seeking handwritten notes taken by the secretary of the West Milford Board of Education during a closed board meeting. The Government Records Council in New Jersey initially ordered the Board to release the notes to O'Shea, but the Board appealed to the Appellate Division. The Appellate Division sent the case back to the Council, which reviewed the notes in question and subsequently denied disclosure. O'Shea appealed, and the Appellate Division affirmed the Council's decision not to turn over the notes because 1) they were protected from disclosure under the state Open Public Records Act (OPRA) exemption for advisory, consultative, and deliberative opinions, 2) the notes are not government records under OPRA because the secretary isn't legally required to take notes the way, for example, he is legally required to release minutes of the meeting, and 3) the Open Public Meetings Act (OPMA) states that government documents not required by law to be created are exempt from disclosure. However, none of the reasons cited by the Appellate Division were consistent with the intent of either OPRA or OPMA. Despite solid arguments in favor of the notes' release, the New Jersey Supreme Court declined O'Shea's petition.

Prison Legal News v. McDonough, et al., 200 Fed. Appx. 873 (11th Cir. 2006)

In February 2006, the Society joined the Southern Poverty Law Center and the Southern Center for Human Rights in submitting an *amicus* brief on behalf of publisher Prison Legal News (PLN) in its civil rights suit against the Florida Department of Corrections. PLN claimed that the Department of Corrections violated its First Amendment rights by prohibiting even nominal payments to inmates who write articles for PLN's monthly newsletter – thereby discouraging the submission of articles – and by precluding delivery of

publications, including PLN's newsletter, that contain incidental advertising for products or services prohibited to Florida inmates. The *amici* argued that the Florida's prohibition on the conduct by prisoners of a business or profession is unconstitutional because it impedes First Amendment rights and does not advance any legitimate penological interest. In addition, the *amici* asserted that the First Amendment prohibits prison officials from censoring publications solely because they contain incidental advertisements for products or services that are forbidden to inmates. On appeal, the 11th Circuit affirmed the district court's decision, finding that PLN failed to present any evidence that the Florida statute had any impact on its ability to publish the magazine and that the Department of Corrections had a legitimate penological interest in preventing inmates from receiving compensation for contributions to the magazine.

U.S. v. Rosen; *U.S. v. Weissman*, No. 1:05cr225 (E.D. Va.)

In March, the Society joined a Motion to Intervene in the so-called "AIPAC prosecution," which was in its final pretrial phase in the U.S. District Court for the Eastern District of Virginia. The government sought to restrict public access and evidence in the prosecution that charged two former AIPAC lobbyists, Steven Rosen and Keith Weissman, with violating provisions of the Espionage Act that criminalize the transmission of "information relating to the national defense" to individuals not authorized to receive it when there is reason to believe that the information "could be used to the injury of the United States or to the advantage of [a] foreign nation." Rosen and Weissman were charged with passing along to officials of a foreign country and members of the press highly classified information about the government's activities in the Middle East and Central Asia that had been illegally disclosed to them by a Defense Department employee. Access problems arose because at the core of the prosecution was the classified information that Rosen and Weissman allegedly received and disseminated. The information remained classified, and the government invoked the Classified Information Procedures Act (CIPA), which authorizes courts to take steps designed to prevent unnecessary disclosure of such information at a public trial. While the CIPA proceedings all took place in a closed courtroom, the Reporters Committee was tipped off that the government filed a motion seeking to limit public access to certain evidence presented at trial and close some or all of the trial proceedings. Judge T.S. Ellis III denied the Motion to Intervene, but ordered the government to undergo an extensive review process under CIPA to determine what evidence can be admitted in open court.

Taus v. Loftus, et al., 151 P.3d 1185 (Cal. 2007)

The Society in February 2006 joined two dozen media companies and organizations to submit an *amicus* brief in support of several psychologists in

a defamation and invasion of privacy suit. The plaintiff was the subject of a case study published more than 20 years ago relating to allegations that she was abused as a young child. The defendants published scientific articles criticizing the case study, and the plaintiff sued on the premise that they had breached the confidentiality that protected her during the study (though the defendants' articles did not name the plaintiff) and that they wrongfully used information about her private life to publicly challenge the theories and conclusions advocated by the author of her case study. The defendants filed special motions to strike the complaint pursuant to California's anti-SLAPP statute, and the trial court struck the defamation claim as to one defendant and a fraud claim as to another, but upheld the claims for invasion of privacy and negligent infliction of emotional distress. The Court of Appeal dismissed more of the plaintiff's claims, but upheld an invasion of privacy claim against one defendant and a defamation claim against another. In their brief to the Supreme Court of California, the *amici* argued that the Court of Appeal's refusal to strike the plaintiff's invasion of privacy claim ignores the broad legal protections for publishing facts that are true, available in the public record, and newsworthy. The *amici* also asserted that the plaintiff's defamation claim must fail, and that the decision as a whole was inconsistent with the goal of California's anti-SLAPP statute to weed out meritless claims early in the litigation process. In February, the California Supreme Court sided with the defendant and the *amici* on the defamation claim, holding that it should have been dismissed under the anti-SLAPP statute. However, it sided with the plaintiff on the invasion of privacy claim, finding that the defendants' misrepresentation, "if proved, would be a particularly serious type of misrepresentation and significantly different . . . from the more familiar practice of a news reporter or investigator in shading or withholding information regarding his or her motives when interviewing a potential news source." The case was remanded to the trial court for further proceedings on the privacy claim.

Wolf v. United States, 201 Fed. Appx. 430 (9th Cir. 2006)

The Society joined the Reporters Committee for Freedom of the Press and the WIW Freedom to Write Fund to submit an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit in support of Josh Wolf, an independent journalist who was imprisoned on August 1, 2006, for refusing to provide to a grand jury unedited video footage of a 2005 protest rally in San Francisco. On Sept. 1, 2006, Wolf was released from prison on bail pending review of the appeal in the U.S. Court of Appeals for the Ninth Circuit. On appeal, prosecutors asserted that Wolf's footage may have provided information about the vandalism of a police car during the protest. If the grand jury investigating the protest had been impaneled in state court, the California shield law likely would have protected Wolf; however, federal prosecutors asserted that the vandalism of the police car constitutes a federal crime

because the San Francisco Police Department receives money from the federal government. The *amici* argued that Supreme Court precedent compels the recognition of a common-law reporter's privilege that should protect Wolf in this case. One week after Wolf's release, the Ninth Circuit affirmed the lower court's order of contempt. Wolf's attorneys sought an *en banc* review before the entire 9th Circuit, but the court declined to hear the case. Wolf returned to prison on Sept. 22 and remained incarcerated until reaching an agreement with prosecutors at a mediation conference on April 2, 2007. Pursuant to the agreement, prosecutors agreed to disclose the questions that they wanted to ask Wolf on the stand. Wolf answered those questions in a sworn statement and agreed to post all of the footage of the rally on his blog. On April 3, Wolf was released after spending more than seven months behind bars. The Legal Defense Fund agreed to contribute $30,000 to Wolf's defense.

B. Cases still pending

Castellani v. Scranton Times, L.P., 916 A.2d 648 (Pa. Super. 2006), *cert. granted*, 2007 Pa. LEXIS 1217 (Pa. June 6, 2007)

In July, the Society joined an *amicus* brief drafted by the Pennsylvania Newspaper Association in support of a libel case against the *Scranton Times-Tribune*. The case raised the issue of how broad the protection is for confidential sources under Pennsylvania's shield law in the context of leaked information about a grand jury investigation. The underlying libel case came about when two commissioners of Lackawanna County, Randall Castellani and Joseph Corcoran (both of whom are also members of the County Prison Board), sued the *Scranton Times-Tribune* for defamation arising from an article the newspaper published characterizing their testimony before a grand jury that was investigating county prison conditions as "evasive" and calling them "uncooperative." During discovery in that case, the commissioners tried to compel disclosure of the reporter's confidential source for the information about their grand jury testimony, which is, as it is in most states, secret. In response, the paper and its reporter invoked the Pennsylvania shield law. The trial judge ruled that the shield law, which Pennsylvania courts had previously held to afford an absolute privilege to confidential sources, did not apply because the source had violated grand jury secrecy. The paper appealed and the Pennsylvania Superior Court reversed, holding that there was an absolute privilege and that the source was shielded under the law. In doing so, the court noted that it was sympathetic to the commissioners' argument, but that only the Pennsylvania Supreme Court or legislature could change the law. The commissioners took the court's advice and appealed to the Pennsylvania Supreme Court, which granted review. The Pennsylvania Newspaper Association was understandably concerned that the Pennsylvania Supreme Court decided to review the case – had it been satisfied with the absolute protection afforded by the state shield law, it presumably would have declined to hear it. The appeal is pending.

Hammer v. Ashcroft, No. IP 01-558-C-T/G, 2006 U.S. Dist. LEXIS 9306 (S.D. Ind. February 23, 2006)

In August, the Society joined an *amicus* brief in the 7th Circuit filed by the Reporters Committee for Freedom of the Press in an access-to-information case challenging the Bureau of Prisons' policy banning face-to-face interviews with federal death row inmates. David Paul Hammer, who is currently awaiting his death sentence in the federal prison in Terre Haute, Indiana, filed a lawsuit in federal court attacking a BOP policy, which he said infringed his First Amendment rights. The district court granted summary judgment for the government, but the 7th Circuit agreed to hear Hammer's appeal and appointed a well-known Chicago law firm to represent him. The Reporters Committee brief, joined by the Hoosier State Press Association, argued that the in-person interview ban has been implemented for impermissible reasons – the BOP enacted the policy after Ed Bradley's interview with Tim McVeigh on 60 Minutes, which sparked outrage from various high ranking government officials, including then Attorney General John Ashcroft, who criticized the media for giving McVeigh "a platform." The BOP's stance, however, was that the restrictions had nothing to do with criticism it received about the McVeigh interview and that they were put in place for "security reasons." The *amicus* brief asked the 7th Circuit to reject the BOP's justifications and allow face-to-face interviews of death row inmates. In a peripheral issue, the brief also argued that another BOP restriction that bans inmates from discussing certain issues related to their fellow inmates no matter what method of communication they use (telephone, letter, etc.) similarly violates the inmates' First Amendment rights. Thus, the brief asked the court to find that the BOP media policy for inmates represents a broad restriction both the quality and quantity of information the media can obtain from death row inmates. The appeal is pending.

Post-Newsweek Stations Orlando, Inc., d/b/a WKMG v. Guetzloe, Case No. 5D-07-430 (Fla. 5th DCA 2007)

The Society signed an *amicus* brief drafted by the Radio and Television News Directors Association in the Guetzloe prior restraint case in Florida. The case stemmed from an injunction, issued by Orange Circuit Judge Rom Powell, that kept Channel 6's Tony Pipitone from airing for more than one week reports about political consultant Doug Guetzloe's political activities. Pipitone had reported on an 11 p.m. newscast that Guetzloe was hired in an attempt by strip clubs to "take over" Casselberry's City Commission during 2003 city-wide elections. Guetzloe had denied working for strip clubs, but Pipitone found copies of checks purportedly from the clubs to Guetzloe. Guetzloe claimed he did not recall the checks. The case pits Guetzloe's right to privacy – Guetzloe had argued that the boxes contained family medical

records and legal documents that were private – against the station's First Amendment rights. A 10-page order issued by Judge Powell in response to the station's motion to dissolve the injunction noted that there "ain't no case like [this case]" yet decided by a higher court. Powell ordered Channel 6 to give Guetzloe's attorney access to the records, which allegedly came from an auction for non-payment of the contents of a storage unit once rented by Guetzloe, and prohibited the station from reporting on the contents of the records. The station's appeal to the Fifth District Court of Appeal in Daytona Beach is still pending.