

FAIR TRIAL/FREE PRESS CONFERENCE
New York University Law School
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Discussion Hypothetical

With only a few weeks to go before Election Day and with polls too close for comfort, the gubernatorial election season in the prairie State of Candor was heating up rapidly. Accusations, denials, counter-accusations and counter-denials flew back and forth, all eagerly ingested and reported by the mainstream and not-so-mainstream media and all quickly viral on social media.

Casting a shadow over incumbent Governor Kevin Krock's reelection prospects were the hotly contested divorce and custody proceedings approaching a trial date in Candor Superior Court. To bolster her custody application, Bea Bernard, the Governor's wife, provided her attorneys at the boutique law firm of Laws and Laws, LLC, with copies of a Family Court temporary order of protection that had been issued against the Governor six years earlier and a related police "Domestic Incident Report" stemming from the incident. Both the Governor's wife and their then five-year old daughter, Kimberly, had been injured and, while not addressed in Family Court at that time, the police report contained Bea's allegation that her husband had sexually molested Kimberly. Both Bea and the Governor had succeeded in keeping the domestic violence case out of public view then but Bea was now determined that the voting public should be aware of his abuse. She also knew that her attorneys had just received a response to their discovery request: a trove of documents, both digital and paper, that included financial records from the Governor's substantial interests in the real estate partnership he had established, all of which had been placed in a blind trust when he took office, as well as bank records that revealed a suspicious series of transactions with a particular local developer doing business before the State. Bea urged her attorneys to release information both from the domestic violence case and the financial records, but her lead attorney, Lawrence Laws, cautioned that, apart from the questionable ethics of releasing such information – and, indeed, having any media coverage of the matrimonial trial – it would not be at all helpful to her case and may cause trauma to Kimberly. Bea, however, was adamant that the public had a right to know.

Lawrence Laws wanted to tread softly and carefully. Angela Archer, a young associate at the firm, told him that Gail Gladwyn, a trusted, close friend, worked in public relations and knew many journalists. With his approval, Angela contacted her friend and provided her with a flash-drive containing the information without mentioning her firm's client or how she came into possession of the information. Gail volunteered to act as intermediary and to contact Jenny Journaux, a reporter at the *Candor Courier*. Gail provided the flash-drive to Jenny, while keeping her promise to Angela to keep Angela's and her firm's identity, position and motives confidential. Jenny agreed to keep Gail's identity secret and to ask no further questions regarding the provenance of the flash-drive, its contents or how Gail came to acquire it.

As a journalist, Jenny saw immediately that she was in possession of dynamite. She readily explained the sensitive nature of the information to both her editor and the *Courier's*

counsel: the family violence and as-yet unproven child sexual abuse allegations, in which the victims' names would inevitably be obvious, as well as the financial details of the partnership, disclosure of which the other real estate partners would undoubtedly oppose. Would the public's interest in light of the upcoming election trump the interests in confidentiality? And would the limited information Jenny had regarding the source and, concomitantly, the accuracy, of the information justify publication?

Assume the answer to these questions was a resounding yes. The *Candor Courier* published the story, giving it a burst of publicity as local television, cable outlets, blogs and social media picked it up and republished it. The Governor's staff quickly arranged a televised press conference in the Governor's press room, but Jenny, much to her dismay, was denied entry by the Governor's press secretary acting on his boss' orders. She noted that she had a valid press pass. On what grounds was it suddenly suspended?

At the press conference, Governor Krock denounced the *Courier* story as "fake news!" and boldly asserted that both the order of protection and the police report of the family violence incident were forgeries. TV and print reporters thereupon peppered both the police department and the Family Court with questions: "Were these documents real?" "Could they obtain copies of the original documents?" "What was the outcome of the case?" "Was a final order of protection issued?" "Was the child sexual abuse proven?"

Public affairs officials from both law enforcement and the court system struggled with the question of whether or not to correct the Governor's inaccurate accusations, which would have the effect of revealing information regarding confidential proceedings. Should they correct the Governor's misinformation? The Governor further accused his wife, Bea Bernard, directly of leaking the information, leading to a chorus of demands to Jenny Journaux to reveal her source. Most troubling to Jenny and her editor, as well as to Angela and her colleagues at the law firm, a local blog, CandorTruth.com, stated definitively, but without any evidence, that Jenny had identified Laws and Laws LLC as the source.

John Justice, the local US Attorney, took special note of the information disclosed regarding the suspicious bank transactions. He immediately convened a grand jury to investigate "pay-to-play" allegations regarding a noted developer, who was known to be a close ally of the Governor. In short order, Jenny was served with a subpoena to appear before the grand jury to disclose the source or sources of the information. Panic set into the *Candor Courier* newsroom while the *Courier's* attorney moved to quash the subpoena. Would the federal court agree or was federal shield protection insufficient? The US Attorney also obtained a warrant to search the Governor's office for additional financial information and served subpoenas on the Governor's banks. This prompted a motion by the *Courier's* attorney for access to these documents.

Meanwhile, Governor Krock's attorneys from Standish Partners LLC tried to stem the damage of further publicity as both the matrimonial trial date and Election Day approached. They asked the Candor Superior Court judge to seal the court file, prevent the media from attending the matrimonial trial and prohibit Bea's attorneys from making any public statements. They further demanded that the *Candor Courier* reveal the source of the leaked

documents under Candor's State shield law, although the Candor shield law was more protective of sources than federal law. Additionally, the Governor's former real estate partners sought a protective order from Superior Court shielding the financial information, as well as evidence that may be elicited at the matrimonial trial regarding the partnership finances. Invoking the shield law, the attorney for the *Candor Courier* argued against disclosure of the reporter's source, and, along with the attorney for WCAN-TV, a local station, objected on First Amendment grounds to closure of the courtroom, sealing of the files and the gag order. No other media attorneys were aware of the argument in Superior Court; nor were any blogs, including CandorTruth.com, included. What would the judge order? And if she ordered any restraints, would media or bloggers not present be bound?

Governor Krock, with an eye on his wobbling poll numbers, decided to make one last attempt on the eve of their court date to settle the matrimonial case directly with Bea on his own and without his lawyers. He approached her gingerly as she trimmed the rose bushes in the front yard of the Governor's mansion. His gentle pleading soon devolved into a loud argument, all too reminiscent of the reasons for their impending divorce and custody trial. The Governor grabbed Bea and attempted to strangle her while she, terrified, attempted to break free. They both were oblivious to their daughter, Kimberly, now 11 years old, who stood transfixed on the mansion porch, smart-phone in hand, recording the entire altercation. A neighbor called 911 and police responded quickly. In addition to arresting the Governor, police took a statement from Kimberly and, over her loud protestations, took possession of her cell-phone.

Soon the Governor was in handcuffs and on his way to Candor City Court for an arraignment that provided exciting fodder for the evening news. An attorney from Standish Partners rushed to the courthouse to represent the Governor. In addition to entering a not-guilty plea and arguing for release on recognizance, he emphasized the danger of inflammatory publicity to his client's Sixth Amendment and due process rights to a fair trial. Even more than in the matrimonial case, he argued, the City Court should protect the integrity of the criminal proceeding by closing the proceedings to the public, sealing the records and prohibiting public statements by the prosecution and police. Media attorneys asked to be heard and, in addition to offering First Amendment arguments in opposition, they requested an order directing law enforcement to release Kimberly's smart-phone video and statement.

With the election only days away, each of the three courts (federal, Superior and City) were faced with the challenges of untangling the complex web of proceedings and of striking an appropriate balance among the competing interests in a fair trial, a free press, an informed electorate, accountability of public officials and, at the same time, protection of sensitive personal, privileged and financial information.