

# **GARDEN STATE CLE LESSON PLAN**

**A 1.5 credit course**

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## **INTRODUCTION TO FIRST AMENDMENT LITIGATION**

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**With**

**F. Michael Daily, Jr., Esq.**

**And featuring**

**Robert Ramsey, Senior Instructor**

### **Program description**

This 1.5 credit CLE presentation takes a look at litigating a First Amendment case. These quintessential American legal issues occur at an intersection of federal & state law. Learn about the current landscape – locally & federally – in this specialized area of practicing law.

**I. Introduction**

- **F. Michael Daily, Jr., Esq.**

**II. Type of cases/practice**

- **Fee shifting - If prevailing party, court awards fees depending on time spent on case**
- **Some cases are long and drawn out and others not**
- **Local ordinance – easy to resolve quickly**
  - **Most often gives municipal official unbridled authority over free speech, i.e. boardwalk performers in Atlantic City required permit to get from a municipal official and a particular level of insurance**
- **Mixture of cases – most current are based on internet bloggers**
- **Internet bloggers – heightened status, courts refer to anonymous pamphleteering as part of our first amendment jurisprudence, someone is getting take to task by bloggers and they want to find out who the blogger is to file a lawsuit**
  - **NJ Coalition Against the Way in the Middle East v. J.M.B. Realty Corp, 138 NJ 326 (1994) – free speech, leafleting case in shopping mall**
  - **Committee for a Better Twin Rivers v. Twin Rivers Home Owners Association, 192 NJ 344 (2007)**
- **NJ caselaw – starts with presumption that anonymous blogger is protected and the person who wants discovery of who the blogger is must meet certain requirements before information is to be turned over in litigation**
- **Jurisdiction is where person is being harmed – where person harmed resides**
- **General litigate in federal court under federal constitution – sometimes NJ gives broader protections but that is mostly in criminal area as opposed to free speech – free speech under federal and NJ constitution is the same**
- **NJ state policy is to provide enhanced protection to free speech issues**
- **Uston v. Resorts International Hotel, 89 NJ 163 (1982) and “Princeton case” (State v. Schmid, 84 NJ 535 (1980)) – NJ courts say that even if private property, if it is the equivalent of the town square, then free speech is going to be protected; business open to public has duty to make available to all**

**members of the public – NJ has gone further than federal government and other state in this area of the law**

- **Freedom of religion**
  - **Holden v. Board of Education, 46 NJ 281 (1966) – child did not want to stand for pledge of allegiance in public school**
  - **West Virginia State Board of Education v. Barnette, 319 US 624 (1943) – student would not participate in pledge of allegiance – court said cannot be compelled to do that**
- **Practice mostly in federal court - most of the time you will find a federal case that supports the facts that you have in your case**
  - **Out of circuit caselaw is not binding but advisory and district courts will most likely take into consideration**
- **Political speech is given higher standard of protection**

### **III. Adult Entertainment Business**

- **Need resources to fight ordinances that regulate these businesses**
- **Potential for damages prevents people from litigating when fighting permitting and business inspection issues**
- **Barnes V. Glen Theatre, Inc., 501 US 560 (1991) – part of first amendment protection – “outer limits” of first amendment protection**
- **Regulations that address adverse secondary effects of adult businesses are content neutral, even though regulations by their terms say that they apply to that type of business**
- **Zoning issues – state statute, NJSA 2C:34-7 Sexually oriented business; location, building requirements; penalty. Unless a municipality opts out of it, you cannot open an adult business (specific definition) within 500 feet of another such business, church, playground, residence, etc.**
  - **Result is that only place to have such a business is where there is an industrial park without customers**
  - **US Supreme Court has said right of expression not right to make a profit**
  - **Political issue – but ill advised – Cherry Hill case – town lost \$500,000 and had to pay business owner**
  - **Does the majority of American citizens care about this issue??**

- **Classic adult bookstore place cannot make money anymore because of internet – only places surviving have live entertainment – can be strictly regulated**
- **Ben Rich Trading, Inc. v. City of Vineland, 126 F3d 155 (3<sup>rd</sup> Cir. 1997) – town had passed an ordinance that prohibited doors on conversation booths**
- **Live entertainment – statutes can put in distance requirement requiring women to be a particular distance between customers and dancers (2 separate US Supreme Court cases)**
- **No alcohol licenses if there is complete nudity in entertainment establishments – when liquor comes involved no longer 1<sup>st</sup> amendment issue**
- **Alcohol is licensing of potentially dangerous substance is compelling just interest of the government that can trump other issues involved**
- **In re Thompson, 197 NJ 464 (2009) – defendant went to Russia to fulfill sexual fantasy and then prosecuted upon his return; able to find someone on the internet that will cater to any sexual fantasy**
- **No problem with law enforcement addressing biggest issue of child pornography issue – technology in hands of government to scan messages looking for particular words and phrases gives government powerful tools for prosecution of these types of offenses – outside of 1<sup>st</sup> amendment protection**
- **Internet makes communication easier and people can connect in ways that are voluntary and lawful – people are opening themselves up to embarrassment, but not necessarily governments business to get involved**
- **What about when images of children are not actually human beings – 1<sup>st</sup> amendment protection?**
  - **There is an argument to be made**
- **Internet has changed adult entertainment industry**
- **Acceptance of these types of businesses changes over time**
- **Tinker v. Des Moines Independent Community School District, 393 US 503 (1969) – children were wearing arm bands during school in support of war, court said that children do not shed constitutional rights at schoolhouse door**
  - **Last time this issue was won by the petitioner because maintaining order and decorum in schools has become more important**

- **Cannot do anything about private schools because not state actors**

#### **IV. Overview of practice**

- **Initially criminal in nature then becomes 1<sup>st</sup> amendment issue**
  - **Preacher case – initially charged with ordinance without permit for amplifier and then charged with tumultuous behavior (improper behavior) – no proof of intent in this case and set of facts**
  - **Preacher using amplifier – Manasquan – if carries sound within a certain number of feet, then must have permit; defense demonstrated that government failed to prove intent to cause annoyance from that type of activity**
  - **Free speech issues – freedom of religion is part of free speech amendment – freedom of expression is real issue**
- **State v. Stampone, 341 NJ Super 247 (App. Div. 2001) – constitutional challenge to improper behavior statute because it does not define what tumultuous behavior means**
- **Civil action for deprivation of rights, 32 USC 1983**
  - **Entitled to punitive damages with a “single digit multiplier” to actual damages**
  - **Law is that you are only entitled to compensatory damages for actual injuries and simply academic damages because of breach of constitutional right is not sufficient**
  - **If no compensatory damages, and rights were violated, nominal judgment amount of \$1 – but NJ case says nominal damages then entitled to punitive damages**
  - **State or federal court??**
    - **NJ has civil rights action that purports the same to be as 1983 however if look at NJ act it seems to say that in order to qualify as plaintiff violation of rights has to be accompanied by threats to do harm and threat must be more than de minimus significance**
    - **NJ act is word for word off of Massachusetts act (G.L. c.12, ss.II H, II I) – Mass courts say that must have some kind of threat, act in response to bussing of students in South Boston – so must have**



- **witness was person who complained, witness said she did not object to what they were saying but objected to level of the noise**
- **Political donations – Citizens United v. Federal Election Commission, 558 US 310 (2010)**
  - **Protective speech**
  - **Ability of corporations to impact elections through donations (exercising 1<sup>st</sup> amendment rights)**
  - **Controlling public opinion – if you can capture a particular group/block of voters where they are going to support you 100%, then you win an election because differential in the rest of the voters is not big enough to overcome 100% block of voters**
  - **Some towns in NJ – give governmental positions to people – then end up getting supporters that can control the elections – this is a bigger issue from the political contributions**
- **1<sup>st</sup> amendment speech based on politics is entitled to higher protections – political and religious speech**
- **Petition to redress grievances issue – correspondence from jail regarding conditions in the jail or bail were not being addressed by the court until the case was scheduled, 1<sup>st</sup> amendment issue?**
  - **When we deal with prisoners the central inquiry on the governments side is what is necessary for the good order of the prison**
  - **Petitions have nothing to do with controlling prisoners**
  - **So interest of jailers in not seeing that grievances are addressed properly...**
  - **Prisoners were denied access to government to even had relief heard – issue of right to petition because there are cases that say right to petition the government includes the right to go to court, to bring claims**
- **Prison issues**
  - **Balance with atmosphere of discipline or security**
  - **Person was terminated because he was having discussion with prisoners about religion – that was his allegation**
    - **State was not doing his job and the religious discussions were what he was doing instead of his job**

- **1<sup>st</sup> amendment rights of public employees**
  - **Garcetti v. Ceballos, 547 US 410 (2006) – grumbling about things related to your work is not a 1<sup>st</sup> amendment issue- not protected conduct, employee cannot become a hindrance by using 1<sup>st</sup> amendment, if you are complaining that your employer is doing something against public policy or harmful to public you have protection under whistleblower law, don't need to involve 1<sup>st</sup> amendment/constitutional issues**
  - **Only type of case now, i.e. teacher went to Board of Ed meeting and spoke about the way the system was running and was later fired; argument is based on being a public citizen – not as officer, teacher, clerk**
  
- V. **Advice to young attorneys**
  - **Want this type of work to be part of your practice, not the only thing**
  - **Procedural hurdles in 1983 actions – lots of pitfalls in this type of work**
  - **Organizations that are looking for people willing to donate time (“Rutherford”, “ACLU”)**
  - **Unpopular clients and causes – ideas far removed from mainstream – you have to be brave!**
  - **Being a lawyer in many areas you have to have a thick skin and representing clients who are not exactly beloved**
  - **What happens to one person can hurt all of us – when we talk about constitutional rights**
  - **Time place and manner restrictions that are in place now would have restricted a number of parts of our history, i.e. Martin Luther King, civil rights marches**
    - **The cases have developed this way from cases interpreting adult entertainment but it has been interpreted to effect everyone**