Former Supreme Court reporter talks about the court

New York, N.Y. – Anthony Lewis is a friend of the First Amendment. But the former *New York Times* Supreme Court reporter said last week that the court had gone too far in recognizing the free speech of hateful funeral protesters and corporations that spend big money on politics.

Lewis said the current Supreme Court is "reluctant to draw any lines" on the First Amendment. The court's approach seems to be so simplistic as to say "it's speech so it's free."

Lewis, who wrote books popularizing First Amendment history, made the comment Wednesday evening at a Media Law Resource Center dinner where he was receiving the Brennan Defense of Freedom Award, named after the late Justice William J. Brennan Jr. award.

The next day, at an annual media law conference, attorney Paul M. Smith pointed to Lewis' remarks as proof that these are Halcyon days for the First Amendment. When the liberal and conservative members of the U.S. Supreme Court are more pro-First Amendment than Anthony Lewis, then this is truly a free speech court.

Kathleen M. Sullivan, a Stanford Law professor, added, "The court is out of the business of creating new categories" of unprotected speech, such as the traditional categories of obscenity or fighting words. As proof, she and Smith pointed to a decision this year throwing out the California law against violent video games and last term tossing out the law prohibiting videos of animal cruelty.

Floyd Abrams, long one of the nation's leading First Amendment lawyers, said that if the virulent funeral protests of the Rev. Fred Phelps' Topeka church are protected, "what isn't?

"….A funeral, a dead soldier, grieving parents, wacko sexist, homophobic people saying outrageous, offensive things. You have to live in America for this to be protected. No other democratic society would come out this way."

Abrams acknowledged that one criticism of America's protection of free speech is that it protects what Justice William Douglas once called "miserable merchants of unwanted ideas," who have no chance of bringing about social change.

Here are some of the important developments in First Amendment law highlighted at the Practising Law Institute's annual session:

Espionage and WikiLeaks

– The Espionage Act prosecution of St. Louisan Jeffrey Sterling – a Washington University Law School graduate and former CIA agent – raises some of the most important issues in years relating to journalists' protection of confidential sources. U.S. District Judge Leonie M. Brinkema ruled that *New York Times* reporter James Risen does not have to testify against Sterling, allegedly his source for a book chapter on a failed CIA operation in Iran. Brinkema is the first judge in years to recognize First Amendment support for the privilege and the first in history to quash a subpoena for a reporter in both the grand jury and trial jury stages of a prosecution.

– A prosecution of Julian Assange for the WikiLeaks publication of secret diplomatic cables would be "the worst thing for the press since the Pentagon Papers," said James C. Goodale who represented the *Times* in the Pentagon Papers case 40 years ago. Goodale said that Assange should be classified as a publisher and a journalist, but he feared the government will call Assange a hacker and use anti-hacking laws to prosecute him. Goodale also fears that the Obama administration may press a criminal conspiracy prosecution

against Assange in the same way that the Nixon administration considered a conspiracy prosecution of Neil Sheehan, the reporter who broke the Pentagon Papers story.

– One casualty of the WikiLeaks disclosures was the federal shield bill that was nearing passage a year ago, but now seems dead. Congress did not want to pass a law under which Assange might claim to be a protected journalist.

Lucy A. Dalglish, director of The Reporters Committee for Freedom of the Press, said she had found the remark of one Obama administration official to be especially chilling: "He said the Risen subpoena is the last one you are going to see because we don't need subpoenas to know who you are talking to."

– Courts continue to provide as much or more protection to anonymous posters on Internet web sites as they do to reporters' confidential sources. Some top newspaper lawyers, such as Freeman of the Times, thinks this doesn't make sense because news organizations don't know who the posters are, nor have they vetted them or checked out their information.

– The Obama administration, despite rhetoric and some substantial actions to improve functioning of the Freedom of Information Act, still rejects almost as many requests as the Bush administration. It just issues longer rejection memos, one FOIA advocate joked.

Europe's Right to be Forgotten

– Europeans are enamored of a new "right to be forgotten" that would allow users of social media sites to hit an erase button and remove their personal information. But U.S. legal experts are concerned that such a right could run into freedom of information interests. A law barring the use of information lawfully obtained in the past would violate the

First Amendmen

t, lawyers said.

– European law provides greater protection of privacy than U.S. law. As a result, the European Parliament blocked this year an agreement for sharing airline passenger information with the United States. In addition, European firms are being advised not to use U.S. cloud computing because U.S. authorities can obtain information from the cloud under the Patriot Act. The European restrictions on computer privacy are creating new tech jobs in Europe that otherwise would be in the United States.

Broadcast, Mobile and the Net

– The Supreme Court seems willing to give more protection than in the past to commercial speech and broadcast television, while proving less susceptible to pleas to protect children. The Federal Communication Commission's "fleeting expletives" policy, used to punish unscripted use of the f-word and other expletives, is likely to fall this year, the experts predicted. The court might even use the occasion to give broadcast TV as much First Amendment protection as Cable TV.

– The FCC's efforts to regulate the Internet and promote "net neutrality" may fail because courts have ruled that the FCC does not have legislative authority to regulate the Internet. Net neutrality bars the gatekeepers to the Internet from discriminating against a particular kind of content, by slowing the speed at which it travels across the Net.

– Two mobile companies – AT&T and Verizon – would control 80 percent of the mobile traffic if the merger of AT&T and T-Mobile is approved – an action opposed by consumer advocates and the Justice Department. Although AT&T maintains it needs the extra spectrum to provide 4G and improve its

service, it could already accomplish those objectives by running its system more efficiently, said Gigi B. Sohn, president of the consumer group Public Knowledge.

– Traditional broadcasters are wary of proposals to prod them to voluntarily return parts of the TV spectrum so that it can be auctioned off to mobile companies. Some stations would have worse reception if Channels 2-51 were consolidated into 2-31. In addition, because of international treaties with Canada, U.S. stations in Detroit and some other northern cities could find themselves without usable space on the spectrum. Broadcasters are particularly wary that the budget-cutting committee in Congress will try to come up with money from this reallocation of the spectrum. Still, Sherrese M. Smith, a lawyer at the FCC, points out that the number of mobile phones has now surpassed the number of personal computers in the U.S. and that the number of app downloads is in the billions each month.

– Federal Trade Commission guidelines on bloggers' testimonials, discriminate against the online media because they do not apply to traditional media. The FTC requires bloggers to disclose whether they get benefits from a brand they favor in a testimonial or review. Traditional media are not covered on the assumption, sometimes faulty, that newsroom ethics will take care of the problem, said Jane E. Kirtley, a law and ethics professor at the University of Minnesota.

– A majority of states now have laws against cyberbullying. These come at a time when a recent survey by the American Association of University Women found that 30 percent of students in 7^{th} to 12^{th} grade received unwanted photos or comments online. Bills that would prohibit online companies from tracking children are gaining traction in Congress.

– Google made a mistake in the way it designed Google Buzz because a person's private information was automatically

transmitted to contacts when a person joined the social network. Twitter failed to create a robust enough password system for its network, prompting the FTC to force it to put into place the first privacy protection program.

Newsgathering

– Newspapers generally no longer have to pay damages for stories disclosing that a person is gay because of changing social attitudes toward homosexuality. References to a person being born out of wedlock may similarly get a legal pass now that 40 percent of children are born out of wedlock.

– Court decisions in Illinois and Massachusetts have struck down strict state laws against eavesdropping that had been used to prosecute citizens taping the actions of police officers in public. But an ACLU suit in Chicago, seeking approval of a program to videotape police stops, could limit a citizen's right to record officials' actions in public.

– Courts continue to allow reporters to use undercover techniques to gather information, even when those techniques involve misrepresentation. NBC's Dateline reporters obtained broker's licenses from Alabama to attend Broker's Choice of America training sessions revealing high pressure tactics for selling annuities to senior citizens. NBC won in the lower courts.

– Illinois has a new anti-SLAPP (Strategic Lawsuit Against Public Participation) law that could enable news organizations to get lawsuits dismissed long before trial. Similar laws in California have proved a boon to media defendants who avoid discovery and trial.