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February 16, 2010

Hand Delivered

Hon. Robert W. Gettleman
United States District Court
Northern District of Illinois
219 South Dearborn Street
Chambers 1788
Chicago , IL 60604

Re: In re John P. Messina, d/b/a The Law Office of John P. Messina
No. 09-cv-1739

Dear Judge Gettleman:

On January 31, 2007—that is, two years before this Court was assigned to this appeal—I notified the Chapter 7 trustee that I intended to post on the internet the record of any future litigation, including any appeal. The notice came at pp. 9-10 of a 17-page Memorandum describing certain claims of the estate; a copy of the relevant excerpt is enclosed.

I mention the date of my notice to underscore an important point: the concerns underlying my decision to give the public unfettered access to the record on appeal arise out of a history that was completed before this Court had any role to play.

A few weeks ago I launched a website that published the briefs in this appeal, along with the appendices and the papers relating to Mr. Kowal's Rule 11 motion. The URL is http://jpm-law-chicago.com. Clicking on "The Record" will bring up a screen with links to copies of the aforementioned filings.

There are other elements to the website, most of which are still under construction.

I am also enclosing hard copies of the following essays that are, or will soon be, published on the website:

Result-Oriented Judging: A Process-Oriented Definition

Judge Posner's Measure of a Fraudulent Litigation Narrative

Money to Burn: A Literary Brief for Result-Oriented Judging

The Modern Lawyer's Role in Combating Result-Oriented Decisions: Lessons From 600 Years of English History

Sincerely,

John P. Messina

cc: David Leibowicz
Steven Kowal
Mark J. Altschul
(w/enclosures)

Memorandum

Privileged & Confidential

To: David P. Leibowitz

CC: Stuart D. Cohen

From: John P. Messina

Date: January 31, 2007

Re: Memorandum No. 1: Introduction to the estate's claims

This is the first in a series of Memorandums that will present the facts and legal issues underlying certain claims of the estate. The core claim is for tortious interference with economic relations.

* * * *

E. The benefits of contemporaneous scrutiny of judicial decisions when the underlying materials are available on the World Wide Web.

The First Amendment treats public access to judicial proceedings "as an important check, akin in purpose to the other checks and balances that infuse our system of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (Brennan, J., concurring) A judge's awareness that court proceedings are "subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," *In re Oliver,* 333 U.S. 257, 270 (1948). "[Without] publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Id.* at 271, *quoting* 1 J. Bentham, RATIONALE OF JUDICIAL EVIDENCE 524 (1827) [internal quotes omitted].

The landmark decisions regarding public access to judicial proceedings were issued during the 1970s and 1980s, before the advent of the World Wide Web. The focus of these decisions was on the role of witnesses in the fact-finding process that takes place in open court. The Court asserted that popular attendance at trials—or having the press attend as the public's representative—aided accurate fact-finding in two respects. First, "[p]ublic trials come to the attention of key witnesses unknown to the parties." 448 U.S. at 596-97, *quoting In re Oliver,* 333 U.S. at 270 n. 24. These witnesses may then come forward and give important testimony. *Id.*

Second, experience shows that "open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public

and solemn tribunal." 3 Blackstone, COMMENTARIES, at * 373, *quoted at* 448 U.S. at 597.

Unlike live testimony in open court, the written decisions of appellate and trial judges are all but impervious to meaningful public scrutiny, for three reasons. First, the decisions are created behind closed doors, in chambers that are off limits to the press and the public. Second, even if judges were to compose their opinions in the fishbowl of a public courtroom, the mental processes underlying the composition of the decision would remain inscrutable.

Finally, scrutinizing a written decision by applying Judge Posner's litmus test for fairness and accuracy—*i.e.*, testing whether the decision is principled or result-oriented—requires access to the underlying briefs and trial court records. While these papers are, in theory, public records, they are, as Judge Posner has pointed out, "difficult and time-consuming to obtain." R. Posner, CARDOZO: A STUDY IN REPUTATION 132 (Univ. Chicago Press 1990). *See also* R. Posner, FRONTIERS OF LEGAL THEORY 330 (Harvard University Press 2001) (observing that trial court records are essentially inaccessible to most of the press and public).

The World Wide Web cures this problem. The briefs and trial court records underlying the Contempt Order can be posted on-line; so can the briefs and trial court records underlying the subsequent decisions. Lawyers, judges, reporters, and the general public can assess for themselves whether these decisions were principled or result-oriented.

If and when future courts are presented with claims regarding [alleged judicial misconduct], they will adjudicate the claims knowing that the fairness and accuracy of their decisions will be subject to informed scrutiny.

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