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published by the Louisiana State Bar Association

MEDIATION CONFIDENTIALITY TRUMPS FIRST AMENDMENT RIGHTS

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In answering a question about same-sex marriage during the Miss USA pageant of 2009, reigning Miss California, Carrie Prejean, expressed her belief that marriage “. . . in my country, in my family . . . should be between a man and a woman, no offense to anybody out there.” The controversy that ensued led to Prejean finishing 2nd in the pageant; personal attacks against Prejean by the executive directors of the Miss California USA pageant; the resignation of one of those directors when Donald Trump refused to strip Prejean of her Miss California crown; Prejean becoming the darling of family-oriented conservative groups; Prejean ultimately being stripped of her Miss California crown; and, inevitably, a defamation lawsuit by Prejean against the executive directors, amongst others.

The parties went to mediation in November, 2009 with JAMS, signed a JAMS confidentiality agreement, and reached a settlement that included an agreement by the parties and their attorneys to maintain “the strictest confidentiality” regarding the mediation and Settlement Agreement. A day after the conclusion of the mediation conference, TMZ reported details of the agreement, including that Prejean dropped her monetary demands after being shown a compromising sex video that she made. In subsequent reports, more details of the mediation conference continued to come out in the media: that Prejean first denied that she was the female on the tape, then was “rendered speechless” when the camera angle changed to show her face; that her mother was present in the room and turned “sheet white” when the video was played; and the amount of fees paid to Prejean’s attorney, Charles LiMandri. Given that one of the defendants and his attorney were the only members of the defense in the room during the video showing, the court noted that the list of who leaked the information was “considerably limit[ed].”

In November of 2010, Charles LiMandri filed suit on his own behalf for breach of the JAMS confidentiality agreement and of the Settlement Agreement, amongst other claims. His argument was that he agreed to less than his usual fee in the Settlement Agreement in order to prevent his client from being “essentially blackmailed with the private photos and videos” and that he had a “right to financial privacy in the amount of his fee award.” The defendants attempted to have LiMandri’s claims dismissed through the application of California’s Strategic Lawsuit Against Public Participation (SLAPP) provision (Code Civ. Proc., Section 425.16). The intent of the anti-SLAPP statute is to protect the valid exercise of the constitutional right of freedom of speech in matters involving public significance from lawsuits brought primarily to chill that right. The defendants argued that since Prejean is a public person and the disclosures regarding her sex tape were made on television (a public forum), that they were within their 1st Amendment rights to disclose that information.

The Court of Appeals did agree with the defendants that Prejean was a public person and the disclosures were made in a public forum; however, it affirmed the trial

court's decision to deny the motion to strike plaintiff's claims. The court pointed out that it is possible to waive constitutional rights by contract, even the 1st Amendment right to freedom of speech. The act of signing a confidentiality provision does "[prevent] a party from disclosing the circumstances surrounding a settlement agreement." Further, the court noted that the "confidentiality provision of the Settlement Agreement *expressly* applies to the attorneys for the parties". As such, even though the defense attorney did not sign the Settlement Agreement as a party, he "is bound by the confidentiality provision to the same extent as [his] client." Therefore the defense attorney's statements to TMZ and other media outlets about Prejean were not protected speech, and the lawsuit could proceed.

Limandri v. Wildman, Harrold, Allen & Dixon, No. B234460 (Cal. App. 2d Dist., June 6, 2013) and LiMandri v. Moakler, No. B237158 (Cal. App. 2d Dist., June 6, 2013).