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TO: MEMBERS OF THE LONG ISLAND JEWISH ORGANIZED MEDICAL STAFF

New York Downtown Hospital employed a medical scientist and also a Vice President of Research and Chair of the Institutional Review Board (IRB) of the institution.

The medical scientist (later to be the plaintiff in the litigation) was charged with the responsibility of developing materials for a clinical trial of a compound designed to treat those with metastatic cancer.

New York Downtown terminated both persons claiming that they had violated the hospital's conflict of interest policy in that they had taken money from the developer of the compound. The terminated employees, in turn, filed a complaint with the FDA contending that the patients being treated might not receive adequate supervision from the institution.

It was during the investigation conducted by the FDA that the acting medical director of Downtown made certain negative statements about the medical scientist (not revealed in the decision) but noted as having been made by and to the FDA. Upon learning this plaintiff commenced a defamation action contending that her professional reputation had been compromised by the acting medical director.

The trial court denied a motion to dismiss but this was reversed at the appellate level with the court finding that there was an absolute privilege granted to the defendant in this type of proceeding. The matter then went to the Court of Appeals.

New York's highest court held that for an absolute privilege against defamation to be found in an administrative proceeding the party allegedly defamed must have had an opportunity to be present and participate before the administrative body could take action. Thus, where this opportunity to defend or explain was missing one could not liken the setting to a quasi-judicial type of hearing. In the instant proceeding the plaintiff had no opportunity to participate and protect her reputation.

There was a strong dissent in which it was argued that the speaker-defendant was participating in a public function (FDA proceeding) and thus statements made should be privileged and be free of defamation accusations. One could certainly argue that it was not the fault of the losing defendant that the FDA can conduct business without all sides being present but that was not the view of the majority. The case is a warning signal for those who may be caught up in this type of proceeding.

Respectfully submitted,

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