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Business Day

Unfamiliar Terrain for Lawyer In Planned Parenthood Drama

By BARRY MEIER

Last July, Derek F. Foran, a partner at the large corporate law firm Morrison & Foerster, got an alert that an abortion rights organization was desperately seeking help.

A little-known anti-abortion group had ignited a political storm by releasing secretly recorded videotapes showing what it claimed was a Planned Parenthood official discussing the sale of fetal body parts. The group's director said in interviews that the tapes were part of an undercover investigation that included meetings of a national organization representing abortion providers, and promised more disclosures.

The organization, the National Abortion Federation, had trouble finding a law firm to represent it pro bono. Morrison & Foerster, which previously handled abortion-rights cases, received the request and emailed lawyers at the firm about the inquiry. Mr. Foran raised his hand and, soon after, secured a court order stopping the group from releasing information from the organization's meetings.

It is not unusual for major law firms to take on pro bono cases. But for Mr. Foran, a commercial litigator in San Francisco, who had never worked on an abortion-related lawsuit, his involvement has turned into a full-time job and a wild ride.

The case took a surprising turn this week when the director of the anti-abortion group, the Center for Medical Progress, and an associate were indicted in Texas for using fake driver's licenses. And while a lawsuit filed by Planned Parenthood against the Center for Medical Progress has received more attention, it was the earlier case brought by Mr. Foran that was the first legal counterattack against the anti-abortion advocates.

"I don't like bullies," Mr. Foran, who was born and raised in Ireland, said in an interview this week. "And these guys were not only trying to bully women, they were trying to bully poor women."



JASON HENRY FOR THE NEW YORK TIMES

Derek Foran, third from right, and members of Morrison & Foerster who took a case against the anti-abortion advocates who videotaped at Planned Parenthood.

On Monday, the director of the Center for Medical Progress, David Daleiden, and an associate, Susan S. Merritt, were indicted by a grand jury in the Houston area on criminal felony charges of tampering with a government record; specifically, creating phony California driver's licenses. Mr. Daleiden was also charged with trying to buy human organs, a misdemeanor.

The charges against them represented a turnabout because the Texas grand jury had initially investigated Planned Parenthood for possible wrongdoing. Mr. Daleiden and Ms. Merritt insist the actions they took, including the creation of false identities, were part of a legitimate journalistic investigation of what they described as the "abortion industry."

Their group's videotapes led to lawmakers' calls to investigate Planned Parenthood and cut off its public fund-

ing. And after initial disclosures, Mr. Daleiden said his group had made hundreds of hours of secret recordings and planned to regularly release more videotapes.

At the end of July, when the National Abortion Federation filed its lawsuit in a federal court in San Francisco, several videos had been released. Among other things, the lawsuit asked a judge to temporarily bar Mr. Daleiden's group from releasing footage shot at the federation's meetings because they infiltrated them by falsely posing as executives of a company that procured fetal tissue. They had also signed confidentiality agreements, agreeing not to divulge anything about the meeting, a practice that the abortion federation said it adopted to protect participants from harassment by anti-abortion groups.

Mr. Foran, who pulled together a team of Morrison & Foerster lawyers and summer associates, said that compiling

an initial complaint didn't require extensive research because Mr. Daleiden was vocal about the techniques he used.

"I turned on Fox News and they were open right away about what they did," said Mr. Foran, 45, who moved to the United States in 1993 soon after meeting his future wife, then an American student spending a year in Dublin studying Irish folklore.

Mr. Foran, whose typical adversaries are other commercial litigators, found himself squaring off against a different breed of legal adversary — lawyers whose life's work is defending anti-abortion organizations. These lawyers say that the Center for Medical Progress said it had done nothing wrong and had brought to light crimes committed by Planned Parenthood.

A group of anti-abortion lawyers at an organization called the Life Legal Defense Foundation issued a statement in July saying that it had worked with the Center for Medical Research to expose what it described as Planned Parenthood's trafficking in fetal body parts. In the release, Mr. Daleiden thanked the group for "their initiative and foresight in consulting on and helping to develop this project."

Catherine Short, a lawyer at Life Legal who represents Mr. Daleiden, added that officials of the National Abortion Federation invited him to their conference because they were eager to meet executives of what they thought was a new company procuring fetal tissue.

"They got an email encouraging them," to attend a conference, she said in an interview this week. Ms. Short did not respond to subsequent emails asking if Life Legal discussed the creation of fake driver's licenses with Mr. Daleiden.

Despite Mr. Foran's initial efforts to prevent the release of more tapes, some of the material found its way into public view. In October, after a court allowed the release of tapes to a congressional committee, videos appeared on a website associated with Charles C. Johnson, a blogger.

Ms. Short and other lawyers representing the Center for Medical Progress employed strategies to try to stop discovery by Mr. Foran. One of them was an unsuccessful attempt to have the action halted under a California state law that protects activists from lawsuits intended to chill advocacy on public policy issues. Such actions are known as strategic

lawsuits against public participation, or Slapp suits.

Also, when Mr. Foran sought the testimony of Mr. Daleiden and another defendant on the Center for Medical Progress's board, both invoked the Fifth Amendment privilege against testifying. Mr. Daleiden subsequently dropped that stance and was deposed, but his testimony is under seal. The other defendant, Troy Newman, president of the anti-abortion group Operation Rescue, resigned from the center's board when Mr. Daleiden was indicted.

After legal jousting, the Center for Medical Progress was also required to produce emails between its officers and financial supporters describing its undercover operation before it became public. Those documents also remain under seal.

Mr. Foran, who said he learned about the indictments in Texas about a half-hour before they were publicly announced, plans to press ahead with his lawsuit.

"Our lawsuit is not about pro-choice versus pro-life," he said. "What you can't do is defraud people, lie and go about manufacturing tales. These guys are accountable under the law just like everybody else."