

Founded in 1852
by Sidney Davy Miller

MILLER CANFIELD

MICHAEL P. COAKLEY
TEL (313) 496-7531
FAX (313) 496-8454
E-MAIL coakley@millercanfield.com

Miller, Canfield, Paddock and Stone, P.L.C.
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
TEL (313) 963-6420
FAX (313) 496-7500
www.millercanfield.com

MICHIGAN: Ann Arbor
Detroit • Grand Rapids
Kalamazoo • Lansing
Saginaw • Troy

FLORIDA: Tampa

ILLINOIS: Chicago

NEW YORK: New York

OHIO: Cincinnati

CANADA: Toronto • Windsor

CHINA: Shanghai

MEXICO: Monterrey

POLAND: Gdynia

Warsaw • Wrocław

September 30, 2011

Clerk of the Court
Ingham County Circuit Court
Veterans Memorial Building
313 W. Kalamazoo Street
Lansing MI 48933

VIA HAND DELIVERY

Re: *Thomas M. Cooley Law School v John Doe I, et al*
Case No.: 11-781-CZ
Honorable Clinton Canady III

Dear Clerk:

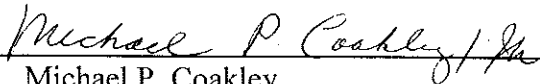
Enclosed for filing is an original of the following:

1. Plaintiff Thomas M. Cooley Law School's Response Opposing Public Citizen's Motions for Leave to File Memorandum as Amicus Curiae, and to Admit Paul Allan Levy to Appear Pro Hac Vice.
2. Plaintiff Thomas M. Cooley Law School's Brief in Opposition to Public Citizen's Motions for Leave to File Memorandum as Amicus Curiae, and to Admit Paul Alan Levy to Appear Pro Hac Vice.
3. Proof of Service.

Judge's copy was personally delivered to him. Thank you for your assistance in this matter. If you have any questions, please feel free to contact me.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By: 
Michael P. Coakley

Enclosures

cc: John T. Hermann (w/enclosures)
Barbara Harvey (w/enclosures)

19,380,405.3\018763-00020

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

THOMAS M. COOLEY LAW SCHOOL,
a Michigan nonprofit corporation,

Plaintiff,

Case No. 11-781-CZ

vs.

Hon. Clinton Canady III

JOHN DOE 1, JOHN DOE 2, JOHN DOE 3,
and JOHN DOE 4,

Defendants.

RECEIVED

SEP 30 2011

Clerk of the Court
30th Judicial Circuit

MILLER, CANFIELD, PADDOCK AND STONE, PLC

Michael P. Coakley (P34578)

G. Alan Wallace (P69333)

Paul D. Hudson (P69844)

Attorneys for Plaintiff

150 West Jefferson, Suite 2500

Detroit, MI 48226

(313) 963-6420

coakley@millercanfield.com

wallace@millercanfield.com

hudson@millercanfield.com

BARBARA HARVEY (P25478)

Attorney for Public Citizen

1394 E Jefferson Avenue

Detroit, MI 48207-3104

(313) 567-4228

blmharvey@sbcglobal.net

JOHN T. HERMANN, P.C.

John T. Hermann (P52858)

Attorney for Defendant

John Doe 1

2684 11 Mile Road

Berkley, MI 48072

(248) 591-9291

hermannlawoffices@comcast.net

PAUL ALAN LEVY (DC 946400)

Attorney for Public Citizen

Public Citizen Litigation Group

1600 20th Street NW

Washington, DC 20009

(202) 588-1000

plevy@citizen.org

**PLAINTIFF THOMAS M. COOLEY LAW SCHOOL'S RESPONSE OPPOSING
PUBLIC CITIZEN'S MOTIONS FOR LEAVE TO FILE MEMORANDUM AS
AMICUS CURIAE, AND TO ADMIT PAUL ALAN LEVY TO APPEAR
PRO HAC VICE**

Public Citizen has recently filed two motions in this case. First, it seeks leave to file an *amicus curiae* brief "Supporting Doe's Motion to Quash or for a Protective Order." Second, its Michigan counsel has moved for the *pro hac vice* admission of Washington DC counsel to represent it. Plaintiff Thomas M. Cooley Law School, through its attorneys Miller, Canfield, Paddock and Stone, PLC, opposes both motions. As more fully stated in the incorporated brief:

1. The Motion for Leave to File Memorandum as *Amicus Curiae* should be denied because Public Citizen does not meet the standards for *amicus curiae*. It does not have any impartial information that would be useful to the Court.

2. The Motion to Admit Paul Alan Levy to Appear *Pro Hac Vice* should be denied as moot upon denial of Public Citizen's motion to file its *amicus* brief. Alternately, it should be denied because it does not meet the requirements of MCR 8.126.

WHEREFORE, Cooley respectfully requests that the Court deny Public Citizen's motions, award Cooley its costs and fees, and award such other and further relief the Court deems appropriate.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: Michael P. Coakley by JJK (P67667)

Michael P. Coakley (P34578)
G. Alan Wallace (P69333)
Paul D. Hudson (P69844)
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
coakley@millercanfield.com
wallace@millercanfield.com
hudson@millercanfield.com
Attorneys for Plaintiff

Dated: September 30, 2011

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

THOMAS M. COOLEY LAW SCHOOL,
a Michigan nonprofit corporation,

Plaintiff,

Case No. 11-781-CZ

vs.

Hon. Clinton Canady III

JOHN DOE 1, JOHN DOE 2, JOHN DOE 3,
and JOHN DOE 4,

Defendants.

MILLER, CANFIELD, PADDOCK AND STONE, PLC
Michael P. Coakley (P34578)
G. Alan Wallace (P69333)
Paul D. Hudson (P69844)
Attorneys for Plaintiff
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
coakley@millercanfield.com
wallace@millercanfield.com
hudson@millercanfield.com

JOHN T. HERMANN, P.C.
John T. Hermann (P52858)
Attorney for Defendant
John Doe 1
2684 11 Mile Road
Berkley, MI 48072
(248) 591-9291
hermannlawoffices@comcast.net

BARBARA HARVEY (P25478)
Attorney for potential Amicus Curiae
1394 E Jefferson Avenue
Detroit, MI 48207-3104
(313) 567-4228
blmharvey@sbcglobal.net

PAUL ALAN LEVY (DC 946400)
Attorney for potential Amicus Curiae
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
plevy@citizen.org

**PLAINTIFF THOMAS M. COOLEY LAW SCHOOL'S BRIEF IN OPPOSITION TO
PUBLIC CITIZEN'S MOTIONS FOR LEAVE TO FILE MEMORANDUM AS
AMICUS CURIAE, AND TO ADMIT PAUL ALAN LEVY TO APPEAR
PRO HAC VICE**

INTRODUCTION AND STATEMENT OF FACTS

This case arises from defamatory comments posted online about Thomas M. Cooley law school. The bloggers posting these comments used pseudonyms such as "Rockstar05" to attempt to avoid any consequences for defaming Cooley. Unable to ascertain the legal identities of the bloggers, Cooley filed this lawsuit against four John Doe defendants in order to be able to prosecute its claims for defamation. Cooley then issued a subpoena to the host of Rockstar05's blog, Weebly, to try to ascertain the identity of John Doe 1.

Claiming a First Amendment right to defame Cooley, Rockstar05 filed a motion to quash the subpoena, or for a protective order. The motion argued that, under the *Dendrite* and *Seescandy* cases from other jurisdictions, Cooley should have to all but prove its claims against the anonymous defendants before being able to discover their true identities. The motion also argued the merits, namely that Cooley had failed to state a claim for defamation or tortious interference, or to support those claims with evidence.

Before the September 7, 2011 hearing on this motion, Weebly, unprompted by Cooley, sent an email correspondence to counsel for Cooley attaching information responsive to the subpoena. In the response, Weebly provided identifying information relating to Rockstar05, including email addresses and IP addresses.

Initially, based on the information from Weebly, Cooley mistakenly believed the legal identity of John Doe 1 was a Cooley student named A___ S___. Cooley sent Weebly's subpoena response to Mr. Hermann on August 18, 2011. In the letter accompanying the response, Cooley informed Mr. Hermann of its intent to amend its Complaint to name Mr. S___ as John Doe 1. Cooley also sent Mr. Hermann a draft Amended Complaint substituting the name of Mr. S___ for John Doe 1. Mr. Hermann did not reply to Cooley, but forwarded the letter and

draft Amended Complaint to Washington DC attorney Paul Levy. When he did so, Mr. Hermann undoubtedly told Mr. Levy that his client had been incorrectly identified in these documents. By the time of the September 7, 2011 hearing on the Motion to Quash, Cooley had discovered John Doe 1's real identity and had filed a First Amended Complaint naming Mr. Hermann's true client.

At the hearing on Doe 1's motion, Doe 1 argued that Weebly had made an inadvertent disclosure when it responded to the subpoena, and that Cooley should not be able to make any use of the information Weebly sent it. This Court agreed the disclosure had been inadvertent, and ordered an in camera review of the Weebly response to determine what use Cooley may make of the information it received. This Court stated that its focus was protecting Doe 1's rights to privacy, and that it was not making any rulings regarding the First Amendment. 9/7/2011 Hearing Tr at 19:13-24; 20:3-10.

Days later, attorney Levy posted an article regarding the Court's ruling on a blog sponsored by Public Citizen. See Ex A. The article painted Cooley and its counsel as the wrongdoers, treating as fact Doe 1's allegation that Cooley manipulated statistics, and echoing Doe 1's sentiment that there should be a First Amendment right to defame. The article took issue with Cooley for its efforts to protect itself and discover the true identity of Doe 1, insinuated Cooley's counsel was unethical, and claimed that Cooley's counsel deliberately violated the Michigan Court Rules. (This despite the Court's finding that neither Cooley nor its counsel did anything wrong, see 9/7/2011 Hearing Tr at 17:20; 20:15). The blog also expressed Levy's intention to file an *amicus* brief regarding the now moot *Dendrite* issue that Doe 1 had raised in his Motion to Quash.

When counsel for Cooley saw the blog, he discovered it contained links to the August 18, 2011 letter and a draft Amended Complaint in which Cooley had expressed its mistaken belief that Doe 1 was A___ S___. Though Mr Hermann had undoubtedly told Mr. Levy that Mr. S___ was not his client when he gave Mr. Levy a copy of these documents, Mr. Levy published the letter and proposed Amended Complaint on the blog without any redaction of the student's name or notation in his article that Mr. S___ was not in fact Doe 1. Counsel for Cooley has made numerous requests to remove from the blog the links to the documents that contain Mr. S___'s name. Inexplicably, Mr. Levy removed the link to the draft Amended Complaint, but has refused to remove the link to the letter. The blog continues to give readers the false impression that Mr. S___ is Doe 1.

As promised in his blog, Public Citizen filed a motion for leave to file an *amicus* brief, and a motion for *pro hac vice* admission of Mr. Levy shortly thereafter. The stated purpose of the *amicus* brief is to support Doe 1's motion to quash, despite the fact that the Court has already heard this motion. Like his blog, the proposed *amicus* brief strongly advocates for Doe 1. It echoes Doe 1's arguments from the Motion to Quash that the Court should apply the *Dendrite* test. Straying far from a pure analysis of law, it also echoes Doe 1's arguments regarding the merits of this particular case. In short, the proposed *amicus* brief is a biased regurgitation of arguments already raised by Doe 1, on issues unlikely to aid the Court in its in camera review of the Weebly response. It is completely contrary to the intended purpose of an *amicus* brief, which is supposed to be an impartial submission that aids the Court in determining purely legal issues. Public Citizen's request for leave to file its "*amicus*" brief should be denied.

Upon dismissal of Public Citizen's *amicus* motion, its motion for the *pro hac vice* admission of Mr Levy should be dismissed as moot. But that motion should also be dismissed

because Mr. Levy's blog epitomizes his unsuitability to act as counsel for *amicus curiae* in this case. It reveals both his extreme bias against Cooley and in favor of Doe 1, and his propensity to ignore the rules of professional conduct that apply to counsel in this State. As Cooley cannot identify any proper purpose for his utter refusal to protect the privacy rights of Mr. S___, his treatment of Mr. S___ appears to violate MRCP 4.4. And if Mr. Levy's extrajudicial comments regarding the lawsuit do not currently violate MRCP 3.6, any continued blog postings following his admission certainly would. Mr. Levy has no business appearing as counsel for *amicus* in this case, and this Court should not extend to him the privilege of practicing *pro hac vice*.

ARGUMENT

I. PUBLIC CITIZEN SHOULD NOT BE GRANTED PERMISSION TO FILE ITS *AMICUS CURIAE* BRIEF, AS THE BRIEF DOES NOT CONTAIN IMPARTIAL INFORMATION LIKELY TO ASSIST THE COURT

This Court should deny Public Citizen's motion to file an *amicus* brief because Public Citizen does not meet the standards for *amicus curiae*. An *amicus curiae* is "one who interposes 'in a judicial proceeding to assist the court by giving information, or otherwise....' *US v State of Michigan*, 940 F2d 143, 164 (6th Cir 1991) (internal cites omitted). Its purpose is "to provide impartial information on matters of law about which there was doubt, especially in matters of public interest. The orthodox view of *amicus curiae* was, and is, that of an impartial friend of the court- not an adversary party in interest in the litigation." *Id* at 164-65. Participation as an *amicus* is a privilege within the Court's discretion upon a finding that the proffered information of *amicus* is timely, useful, or otherwise necessary to the administration of justice." *Id* at 165. Public Citizen fails to meet these standards in nearly all respects.

First, Public Citizen is not an independent advisor to this Court as required by *US v State of Michigan*. The title of Public Citizen's proposed brief acknowledges that it is "Supporting

Doe's Motion to Quash or for a Protective Order." True to that title, Public Citizen's proposed brief advocates heavily for Doe 1. Far from a general discussion of law and policy, it goes so far as to argue the merits of this particular case. See *Amicus Br* at 16-30 (arguing Cooley failed to state a claim for defamation or tortious interference, that there is a lack of evidence to support Cooley's claims, and that the *Dendrite* test has not been met on the record in this case). In fact, Public Citizen's motion reads more like a motion to dismiss than an *amicus* brief. Rather than assisting the Court, the brief is aimed at assisting Doe 1. This is not the appropriate focus for an *amicus* brief. See *Ryan v Commodity Futures Trading Commission*, 125 F3d 1062, 1063 (7th Cir 1997) ("The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse.") As observed by the *Ryan* court, Public Citizen's proposed brief parrots and expands upon arguments already raised by Doe 1 in his motion to quash. Public Citizen acknowledges Doe 1 already "invoked the *Dendrite* test as a basis for his motion," *Amicus Br* at 2, but similarly lobbies for its application. Public Citizen then argues, just as Doe 1, that Cooley failed to state a claim, failed to support its claims with evidence, and that the *Dendrite* test has not been met here. See *Amicus Br* at 16-30; Doe 1 Br Supporting Motion to Quash at 10-12. As in *Ryan*, its brief is an abuse.

Second, in arguing the merits of this particular case, Public Citizen's brief goes far afield of simply providing information on matters of law. The reasons to limit *amicus curiae* to impartial, legal arguments are clear. Public Citizen does not have any unique information regarding the facts of this case; the parties themselves are better suited to argue the merits to this Court. And Cooley should not have to defend the merits of its case against the arguments of a non-party, who is not bound by any judgment in this action.

Third, the information in Public Citizen's proposed brief is not useful to the Court. Public Citizen's *amicus* brief is intended to bolster the arguments Doe 1 made in support of his Motion to Quash, a motion that this Court has already heard. At the September 7, 2011 hearing, this Court granted Doe 1's motion in part and ordered an in camera review of the subpoena response from Weebly to determine what use Cooley may make of the information it received. This Court stated that its focus was protecting Doe 1's rights to privacy, and that it was not making any rulings regarding the First Amendment. *See* 9/7/2011 Hearing Tr at 19:13-24; 20:3-10. Public Citizen's brief, which addresses solely First Amendment concerns, will be of no help to the Court as it performs that review. Public Citizen's interference in the lawsuit will only unduly complicate the case, multiply the litigation, and unfairly add to the expense of the litigation. Its request for leave to file its *amicus* brief should therefore be denied.

II. **THE MOTION TO ADMIT PAUL LEVY PRO HAC VICE IS MOOT, AND DEFICIENT UNDER MCR 8.126**

As Public Citizen should not be permitted to file an *amicus* brief in this case, its request for the *pro hac vice* admission of the brief's author, Paul Levy, is moot and should be denied. Alternatively, the motion should be denied because it fails to meet the requirements of MCR 8.126.

MCR 8.126 requires that the motion be filed by a Michigan attorney "who appears of record in the case," and be filed with that attorney's appearance. But, as Public Citizen is not a party to this lawsuit, and permission to appear as *amicus curiae* has not been granted, it currently has no interest in this case. As such, its Michigan counsel, Ms. Harvey, has not and cannot file an appearance. The *pro hac vice* motion is premature.

MCR 8.126 also requires that an attorney appearing *pro hac vice* be familiar with and abide by the rules governing the practice of law in this State, including the Michigan Court Rules

and Michigan Rules of Professional Conduct. However, Mr. Levy's actions to date have already gone afoul of these rules.

In the short time that he has sought involvement in this case, Mr. Levy's participation has been wholly unorthodox, demonstrating either a total lack of understanding of or respect for the Michigan Court Rules. As mentioned above, Mr. Levy has put the cart before the horse, skirting MCR 8.126 and seeking *pro hac vice* admission before he even has a client with an interest in this case. Presumably, Public Citizen jumped the gun in the hopes that if it forced a quick decision on its motions, it could participate in the October 3, 2011 in camera hearing. In fact, Mr. Levy submitted a letter to this Court on September 29, 2011, listing supplemental authorities he intends to raise "in the course of oral argument on Monday afternoon." As his client is not yet involved in the case, he has not yet been admitted to practice in this State, and there are not any rules permitting the submission of legal argument by letter to the Court, the very fact that the letter was submitted is perplexing. But its contents demonstrate a further lack of understanding of the Michigan Court Rules: even if both motions were granted, Public Citizen could not participate in Monday's hearing. Absent special permission, the role of *amicus curiae* is limited to filing a brief. See MCR 7.212(H)(2) ("An *amicus curiae* may not participate in oral argument except by court order"); *City of Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921) ("it is not the practice to permit the *amicus curiae* to argue the case or to go further than to file his brief.") If permitted to represent Public Citizen in this case, Mr. Levy will doubtless continue his practice of doing whatever he wants, regardless of the Court Rules.

Even before filing his motions in this case, Mr. Levy has demonstrated a lack of concern for the Michigan Rules of Professional Conduct as well. The motion to appear as *amicus* is not the first that the parties have heard from Mr. Levy. Shortly after this Court's September 7, 2011

hearing on Doe 1's Motion to Quash, Mr. Levy posted an article on a blog sponsored by Public Citizen. In the blog, as in Public Citizen's *amicus* brief, Levy advocates heavily for Doe 1, opining that Cooley's defamation claims lack merit and "condemning Cooley's manipulation of statistics." *See* Ex A. Attacking not only Cooley but also its counsel, Levy accused Cooley's counsel of "sharp" practices and claimed Cooley's counsel intentionally violated MCR 2.302(B)(7) regarding inadvertent disclosures, despite the fact that he had in his possession the transcript in which this Court repeatedly acknowledged neither Cooley or its counsel had done anything wrong or tried to circumvent the process. *See* 9/7/2011 Hearing Tr at 17:20; 20:15.¹

When counsel for Cooley reviewed the blog, it was discovered that the article contained links to an August 18, 2011 letter from Cooley's counsel to Doe 1's counsel and to a draft Amended Complaint, both of which expressed Cooley's then belief that the true identify of Doe 1 was a student named A___ S___. Counsel for Doe 1 knew that Mr. S___ was not his client, and undoubtedly told Mr. Levy that fact when he gave Mr. Levy a copy of the letter and draft Amended Complaint. Yet Mr. Levy published these documents on the blog, without any redaction of the student's name or notation in his article that Mr. S___ was not in fact Doe 1. Counsel for Cooley has made numerous requests that the documents containing Mr. S___'s name be removed from the blog to protect the privacy interests of this student. Ironically, though Mr. Levy claims to advocate for such interests, he has refused to remove all references to Mr. S___'s name from the blog. The link to the proposed Amended Complaint is now gone, but the link to the August 18, 2011 letter remains. The blog continues to give readers the false impression that Mr. S___ is Doe 1.

¹ Cooley did not and does not think that MCR 2.302(B)(7) applies here. *See* Cooley's Supplemental Brief and Motion for Reconsideration.

Mr. Levy's actions underscore his lack of impartiality, and unsuitability to act as an *amicus* in this case. But more disturbingly, they suggest a cavalier attitude towards the Michigan Rules of Professional Conduct. MRPC 4.4 states,

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Mr. Levy is perfectly able to express Public Citizen's views on the legal issues involved in this case without suggesting that Mr. S___ is Doe 1, or wrongfully asserting that Cooley's counsel intentionally violated the Court rules. Cooley is at a loss to identify any proper purpose for these statements or Mr. Levy's conduct.

Further, when Mr. Levy made these statements, he knew he would be seeking to become involved in the proceeding. *See Ex A* ("...because the case illustrates so well the need for *Dendrite* protections, we are preparing an *amicus* brief to express Public Citizen's views on that subject.") As his numerous links to pleadings, correspondence, and transcripts illustrate, Mr. Levy had been investigating the matter on behalf of Public Citizen. As such, MRCP 3.6 likely applies. Under that rule,

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Mr. Levy has seen the pleadings, and is fully aware this is a jury case. Given the argumentative nature of the post, and blatant attempts to paint Cooley and its counsel in black hats, there is no question that it is intended to sway opinion, including that of prospective jurors, against Cooley. His blog therefore likely violates MRPC 3.6. It certainly will if he continues posting should he be admitted, which he should not.

CONCLUSION

For the aforementioned reasons, Cooley respectfully requests that this Court deny Public Citizen's Motion for Leave to File Memorandum as *Amicus Curiae* and Motion to Admit Paul Alan Levy to Appear *Pro Hac Vice*, award Cooley its costs and fees, and award such other and further relief the Court deems appropriate.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: Michael P. Coakley by LJK (P67667)

MILLER, CANFIELD, PADDOCK AND STONE, PLC

Michael P. Coakley (P34578)

G. Alan Wallace (P69333)

Paul D. Hudson (P69844)

150 West Jefferson, Suite 2500

Detroit, MI 48226

(313) 963-6420

coakley@millercanfield.com

wallace@millercanfield.com

hudson@millercanfield.com

Attorneys for Plaintiff

Dated: September 30, 2011

19,449,699.1\018763-00020

EXHIBIT A

CL&P Blog

Friday, September 09, 2011

Thomas Cooley Law School's Attack on a Critic's Anonymity Hits Some Snags

by Paul Alan Levy

The litigation reported last month in which Thomas Cooley Law School sought to stanch adverse publicity by suing anonymous critics has taken a couple of odd turns. At the outset, the case presented the enticing possibility of having the Dendrite rule adopted in Michigan, whereby, as often discussed on this blog, a party trying to use a subpoena to identify anonymous speakers has to meet procedural and substantive standards designed to ensure that the First Amendment right to speak anonymously is not needlessly lost.

However, some sharp practices by the plaintiff's lawyer, whose zealous advocacy for his client took him close to the ethical edge in my view, and a weak surrender by the Doe's web hosting service, brought some other issues to the fore, and combined to put an anonymous blogger at risk. Both Internet posters with trenchant criticisms to advance and lawyers who seek to defend them can learn some lessons from these developments. The developments may also show a need for California to add some protections to its perhaps too-easy method for lawyers to obtain California subpoenas in support of discovery to identify anonymous posters

The case has its origins in Cooley's efforts to attract students by developing a rating system that shows Cooley to be the second best law school in the country based on such vital statistics as the number of seats in its library. A former Cooley student established a blog entitled Thomas Cooley Law School Scam, and included a detailed critique of Cooley's practices. Others began raising questions about whether Cooley was inflating its graduates' employment statistics to encourage students to apply. As the ridicule piled on, and as a class action firm prepared to file suit over misrepresentation of placement statistics, Cooley apparently decided on a preemptive strike against its critics, suing both the plaintiffs' firm and several anonymous bloggers for their criticisms.

Representing the creator of the blog, Michigan lawyer John Hermann filed a motion to quash the subpoena to Weebly, the California company that hosted his client's anonymous blog. That motion was dated August 5, 2011, and was filed in the Michigan state court where the case was pending. Because no appellate court in Michigan has yet addressed the applicability of the Dendrite standard, the case raised a potentially important issue. The same day, Hermann contacted Weebly's staff to let it know that he had filed such a motion; on August 9, Weebly told Hermann that he could safely "consider the subpoena squashed at this point," promising that Weebly would "keep you informed of the situation."

Plaintiff Gets Tough — and the ISP Caves In

Playing hardball, the next day Cooley's lawyer, Michael Coakley from Miller Canfield, notified Hermann that he had served a California subpoena on Weebly, seeking production of documents on August 25. For the first time, he provided Hermann with a copy of the subpoena. That afternoon, Weebly wrote back to Hermann explaining that it had received a subpoena, asking how long he needed to get a court order, and suggesting that he needed to get an actual order quashing the subpoena by August 22. Hermann promptly responded that a California subpoena could be quashed and suggesting that Weebly might want to contact EFF to find the name of a lawyer who could represent it about the subpoena.

Hermann was thus quite surprised to get an August 18 letter from Coakley announcing that Weebly had produced identifying information concerning his Doe client. Coakley had the gall to announce that this disclosure made the motion to quash moot, to threaten sanctions if Hermann failed to withdraw it, and to threaten to file an amended complaint publicly identifying Hermann's client if the Doe did not retract his complaints about Cooley, identify the anonymous individuals who had posted comments on his blog, and comply with other, as-yet-unspecified conditions.

The Court Protects the Blogger – at Least for Now

In fact, because Coakley knew that he had obtained this information in the face of a pending motion to quash the subpoena asserting that the Doe had a First Amendment privilege to speak anonymously, he not only had no right to obtain had no right to use the information against Doe, but he had an obligation to return the information pending a resolution of the discovery dispute. That is because Michigan, like most jurisdictions, has a discovery rule protecting against the misuse of information that has been obtained despite a claim of privilege. In Michigan, Rule 2.302(B)(7) provides that

- If information that is subject to a claim of privilege or of protection as trial-preparation material is produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Because Coakley is the head of the litigation department at a prominent Detroit law firm, he must have been aware of this rule. In fact, his letter could be read as expressing some defensiveness about his obligations, because he began by emphasizing that the disclosure really wasn't his fault: the disclosure had occurred, he said, "without direction from us (other than the subpoena itself)." But the California subpoena was served after the motion to quash was filed in Michigan, and the threat to use the privileged information to exact concessions from Doe, and the subsequent filing of an amended complaint and other papers prominently displaying Doe's name, seem to have been deliberate violations of the rule. Coakley has not responded to my requests for information and for comment on my concerns.

Given how marginal his client's defamation claims against the Doe are, Coakley may have felt he had no choice but to skirt the ethical edge by violating this rule. (The linked complaint is the original; by the time it filed the amended complaint, Cooley had used the disclosure to identify the Doe and put that name in the complaint). Coakley markets himself to potential clients by proclaiming his reputation as "a scrapper in protecting their interests." As I see it, Coakley's scrappiness took him a few steps too far in this case.

Cooley responded to the motion to quash by arguing, among other things, that the motion to quash was moot; Hermann's responsive brief focused on the disclosure rule and the trial judge agreed, ordering that the disclosed information was to be sequestered and delivered only to the Court for in camera examination, and that plaintiff's papers naming the defendant were to be stricken from the record. The transcript of his ruling is here.

This ruling is important because it makes clear that the concept of rescindable disclosure extends beyond the situation when a party just provides privileged information in discovery because of its own carelessness, and includes deliberate disclosure by third parties who themselves may know that there is a possible claim of privilege but decide to produce anyway. In the *Dendrite* context, the ruling means that all is not lost if the ISP discloses pursuant to a subpoena because the Doe has not been able to obtain a definitive ruling by the deadline in the subpoena. In effect, the rule becomes that the subpoena deadline sets only the deadline for raising the First Amendment privilege objection, not the deadline for obtaining a ruling.

The *Dendrite* issue remains to be decided, of course, and because the case illustrates so well the need for *Dendrite* protections, we are preparing an amicus brief to express Public Citizen's views on that subject.

Why Did Weebly Disclose So Readily?

Still, given the dangers of extra-judicial self-help that form one of the important reasons for the *Dendrite* rule, the fact that the judge in the Cooley case has clawed back the disclosure so that he can make the *Dendrite* determination does not eliminate concerns about Weebly's premature disclosure. I contacted Weebly's leadership to try to understand their reasoning, and I give Richard Huffaker credit for being willing to discuss the matter with me — unlike Michael Coakley, who refused to respond to questions — and for providing some pretty candid reactions to the situation. However, I found Weebly's explanations contradictory, and its assurances about its supposed commitment to protect its customers unconvincing. My bottom line — Weebly is another web host that customers should avoid if confidentiality matters.

Weebly's first point to me was that its email to Hermann saying that he could consider the subpoena "squashed at this point" really wasn't intended to make any commitments — Hermann has been writing "over and over" about keeping his client's identity private, and "I had no idea what he was talking about, so I said it's 'squashed for now' just so he'd leave me alone."

Weebly also said that after it got the California subpoena, it told Hermann that he would actually need to get a ruling from the judge quashing that subpoena no later than August 22, or it would have to obey the subpoena. I have two problems with that — first, even the subpoena did not require compliance until August 25, and the information was furnished on August 17. But more important, Weebly's stance falls well short of the industry standard. In our experience, responsible ISP's, such as Google, and Yahoo!, and Twitter, will simply insist to parties sending them subpoenas that they won't comply with subpoenas to identify users if a motion to quash is filed within a given period, normally about two weeks.

Weebly also told me that the disclosure was made in part because Hermann gave shifting stories about whether the subpoena would be issued by a Michigan court or a California court. I found that argument unconvincing. Hermann was plainly uncertain about the actual subpoena documents, but I could not find the shifting accounts. And in any event, should discomfort with the Doe's lawyer be a reason to shed the Doe's privacy?

Next, Weebly said that its disclosures didn't really matter because it did not provide the customer's actual name, just an email address and various IP addresses. This is not the first ISP that has rationalized subpoena compliance on such grounds. I have got that line from Wikipedia twice, for example. But this case shows why the argument is delusional. The Doe was a former student at plaintiff law school, and the same email address that he gave Weebly was one that he has used while in law school. Thus, when plaintiff got the email address it was able

to identify the Doe, and in fact it named the Doe in its amended complaint and cited his name throughout its opposition to the motion to quash.

Weebly's final explanation to me struck me as the real reason, and it was perhaps the worst part of the explanation. Huffaker said, the subpoena came in on a day when I was out of the office, we have a small staff, we work long hours, we don't have a lawyer on staff, we don't get many subpoenas, and we strongly resist requests to remove material at the request of the targets of its customers' criticism. All of this is understandable, and much of it praiseworthy, but to my mind, protecting customers' privacy is also important, and if an ISP doesn't have a lawyer, it has a responsibility to inform itself of the law governing subpoenas to identify customers and of the industry standard on responding to subpoenas. Moreover, although legal representation can be expensive, Public Citizen often represents smaller ISP's pro bono in opposing subpoenas when the plaintiff does not meet the *Dendrite* test. Indeed, California has made it easy to fund the defense against subpoenas in these cases by passing a SLAPP-like law providing for awards of attorney fees; and Hermann made a point of suggesting that angle. Weebly says that it cares about protecting its customers, but it is hard to take those protestations seriously. Potential customers of Weebly, beware.

Does California's Law on Foreign Subpoenas to Identify Does Need a Tweak?

California took an important step to protect against improper subpoenas in support of cases pending elsewhere by authorizing SLAPP-like attorney fee awards in sections 1987.1 and .2 to its Code of Civil Procedure, but Weebly's reaction to the Cooley subpoena, and Cooley's arguments in the case, point up the need for further procedural reform.

Just as California has changed the procedure for obtaining a subpoena in aid of foreign proceedings to make easier for attorneys from other states to come to California to obtain process in aid of their proceedings back home, without even obtaining local counsel, it should consider making it easier for the opponents of such discovery to oppose it if inappropriate. Cooley argued that the motion to quash pending in Michigan was irrelevant because it had obtained a California subpoena and only a California court could quash that. My guess is that a California judge would have rejected that argument — most jurisdictions in which foreign discovery pending are only too happy to let a judge in the forum state do the work of deciding relevance questions, and when I am representing a Doe, I usually find it possible to express my concerns to smaller ISP's, even those which, like Weebly, do not have lawyers on staff, sufficiently forcefully to get them to give my clients time to get into court even if I cannot get an immediate ruling. However, Does who are represented by solo practitioners need to be able to point out clear language. The statute should make clear that a party opposing discovery is entitled to move to quash in the forum state, just as a party opposing discovery in federal court has the choice of seeking a protective order from the forum district or from the court where the discovery is sought under Rules 26(c)(1) or Rule 45(c)(3)(A).

The statute should also provide that the deadline set by a subpoena to identify an anonymous speaker is automatically extended by such a motion, in either the forum court or the issuing, pending further order of that court. The big ISP's have the toughness and experience to assume that posture, but smaller ISP's might benefit from language in the statute. In the alternative, California might consider adopting the approach taken under federal Rule 45(c)(B), under which the service of written objections is enough to cancel the duty to comply with the subpoena, putting the burden on the plaintiff to obtain an order from a judge commanding compliance. It is crucial, however, that the Doe be able to serve such objection, not just the ISP, because experience has shown that

most ISP's regard themselves as no more than stakeholders on the merits of such controversies.

Final note: I tend to think of all the college and law school ratings as a pile of hoey. My own alma mater began refusing to participate in the US News ranking in the mid 1990's, after the Wall Street Journal publicized the ways in which many institutions were manipulating data to change their numerical rankings. Thus, I feel some gratitude to Cooley for taking this nonsense to its logical extreme. In its own way, Cooley's spurious ranking scheme points out the inherent subjectivity of decisions about what numbers should be counted and calls into question any effort to reduce the relative merit of complex institutions to a numerical ranking. Still, I recognize that potential students pay attention to numerical ratings from supposedly more reputable sources, however foolish they may be, and so I join my colleagues in condemning Cooley's manipulation of statistics.

Posted by Paul Levy on Friday, September 09, 2011 at 01:31 PM | [Permalink](#)

TrackBack

TrackBack URL for this entry:

<http://www.typepad.com/services/trackback/6a00d83451b7a769e201543548f46b970c>

Listed below are links to weblogs that reference Thomas Cooley Law School's Attack on a Critic's Anonymity Hits Some Snags:

Comments



Great post. This case just entered my radar.

Posted by: anon | [Sunday, September 11, 2011 at 11:10 PM](#)

The comments to this entry are closed.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

THOMAS M. COOLEY LAW SCHOOL,
a Michigan nonprofit corporation,

Plaintiff,

Case No. 11-781-CZ

vs.

Hon. Clinton Canady III

JOHN DOE 1, JOHN DOE 2, JOHN DOE 3,
and JOHN DOE 4,

Defendants.

MILLER, CANFIELD, PADDOCK AND STONE, PLC
Michael P. Coakley (P34578)
G. Alan Wallace (P69333)
Paul D. Hudson (P69844)
Attorneys for Plaintiff
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
coakley@millercanfield.com
wallace@millercanfield.com
hudson@millercanfield.com

JOHN T. HERMANN, P.C.
John T. Hermann (P52858)
Attorney for Defendant
John Doe 1
2684 11 Mile Road
Berkley, MI 48072
(248) 591-9291
hermannlawoffices@comcast.net

RECEIVED

SEP 30 2011

Circuit Court
30th Judicial Circuit

BARBARA HARVEY (P25478)
Attorney for Public Citizen
1394 E Jefferson Avenue
Detroit, MI 48207-3104
(313) 567-4228
blmharvey@sbcglobal.net

PAUL ALAN LEVY (DC 946400)
Attorney for Public Citizen
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
plevy@citizen.org

Denise M. Huffman certifies that she is employed by the law firm of Miller,
Canfield, Paddock and Stone, PLC, and that on September 30, 2011; she caused to be
served copies of Plaintiff Thomas M. Cooley Law School's Response Opposing Public
LCitizen's Motions for Leave to File Memorandum as *Amicus Curiae*, and to Admit Paul

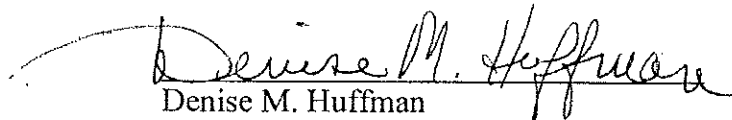
Alan Levy to appear *Pro Hac Vice* and this Proof of Service upon the following individual(s):

John T. Hermann, Esq.
John T. Hermann, P.C.
2684 11 Mile Road
Berkley, MI 48072

Barbara Harvey, Esq.
1394 E. Jefferson Avenue
Detroit, MI 48207-3104

VIA MESSENGER

I declare that the statements above are true to the best of my information, knowledge, and belief.


Denise M. Huffman