

1 IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT
2 CUMBERLAND COUNTY, ILLINOIS

3
4 THE PEOPLE OF THE STATE OF ILLINOIS,)
5 PLAINTIFF,)
6 VS.) No. 02-CF-23
7 PRISCILLA A. SCHROCK,)
8 DEFENDANT.)

9
10 EXCERPT OF REPORT OF PROCEEDINGS OF MOTION TO QUASH
11 SUBPOENA in the above-captioned case on June 21, 2002,
12 before the Honorable Tracy W. Resch, Judge of said Court.

13 APPEARANCES: MR. STEVEN J. BECKETT
14 Beckett & Webber, P.C.
15 508 South Broadway Avenue
16 P.O. Box 988
17 Urbana, IL 61801-0988
18 Appearing on behalf of the Defendant
19
20 MR. JOSEPH D. MURPHY
21 Meyer Capel,
22 a Professional Corporation
23 306 West Church
24 P.O. Box 6750
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 Appearing on behalf of Cumberland County
 Internet

25
26 MARY DANLEY
27 Official Court Reporter
28 CSR # 084-003016
29 Coles County Courthouse
30 Charleston, IL 61920

1 (Following is an excerpt of proceedings held in
2 the above-captioned cause on the above-captioned
3 date:)

4 THE COURT: Court believes the first question to
5 be asked in analyzing the issues that are presented is
6 what kind of evidence is being sought by the subpoena and
7 what is its relevance? Putting aside the argument with
8 respect to the relationship of proposed need for this
9 information and the motion for change of venue, I'm going
10 to address just the argument with respect to bias or
11 evidence of bias at trial.

12 The defendant has identified particular postings on
13 the internet message board. The content of the messages
14 is known. The identity of the parties is not. The
15 subpoena duces tecum seeks to discover whether any of the
16 postings were made by persons whose names have been
17 disclosed by the State as potential witnesses, at least 35
18 of the names. Five of the names are not listed as
19 potential witnesses.

20 Since the messages themselves are available, it makes
21 sense to analyze the content of these messages. What
22 information do they hold? That goes to the question of
23 what relevance they might have at a trial.

24 No argument is made that the messages contain factual

1 detail concerning any financial transaction which is an
2 issue. Indeed, no one has pointed to any piece of
3 information in any message which is of a factual nature
4 and which might or could be relevant or material to an
5 issue in this case.

6 There is no claim that the messages identified any
7 new witnesses or sources of information or contained
8 information that is not already known to both sides.

9 There is no contention that prosecutors or law
10 enforcement personnel have allegedly engaged in improper
11 prosecutorial conduct that is revealed in the posted
12 messages.

13 What the messages do contain, if it's possible to
14 generalize, is critical personal comment about the
15 character, conduct, and reputation of the defendant, who
16 is an elected county official.

17 The messages are vigorous expressions of personal
18 opinion. The tone is generally negative, sometimes
19 mocking, and not infrequently vague.

20 It is, as I think Mr. Murphy analogized in his legal
21 memorandum, the internet equivalent of a public kiosk
22 where messages are publicly posted anonymously. It is the
23 internet equivalent of the coffee shop, except that those
24 around the table are anonymous.

1 It is in the broadest sense of the term political
2 speech. It is talk about a public official. It is debate
3 over her supposed conduct. The speech is more vigorous
4 because she is a public official.

5 What is the relevance of the subpoenaed records which
6 might identify whether potential witnesses have engaged in
7 political speech about the defendant? The defendant
8 contends that it must know if any of the State's witnesses
9 have posted any of the critical messages because, if so,
10 the credibility of the witnesses can be impeached for
11 bias.

12 It is not for the Court to make an evidentiary ruling
13 at this point. Even if the documents are produced
14 pursuant to subpoena, they do not become admissible at
15 trial because of production. Whether a subpoenaed
16 document is admissible is a matter to be determined at
17 trial, not now.

18 Nevertheless, it's necessary to explore the relevance
19 and importance of the subpoenaed material in determining
20 whether the subpoenas should be upheld or quashed.

21 A witness' bias is a proper subject of
22 cross-examination because it goes to the credibility that
23 the trier of fact may assign to the witness' testimony.
24 Precluding cross-examination on matters of bias or

1 prejudice is a denial of a defendant's constitutional
2 right to confront and cross-examine witnesses.

3 Evidence of bias takes different forms. Bias may be
4 inferred from evidence that a witness has a financial
5 interest in the outcome of a case. Bias may be inferred
6 from evidence that a witness may have been coerced by
7 threats of force or by threat of prosecution or by promise
8 of leniency by prosecutors. Bias may be inferred from
9 evidence of conflict growing out of personal dealings
10 between a witness and a party.

11 In this case, the posted messages do not disclose any
12 conduct, relationship, event, or transaction involving a
13 witness which gives rise to bias against the defendant.
14 Rather, these messages are expressions of political
15 speech hostile to the defendant.

16 The defense is well able to cross-examine witnesses
17 about any conversation or internet posting the witness may
18 have had concerning the defendant without regard to the
19 production of subpoenaed documents.

20 This is not a situation where documents are
21 subpoenaed that might disclose relationships, events,
22 transactions, or conduct that is the cause of bias or
23 prejudice or gives rise to a reasonable inference that it
24 has caused bias or prejudice.

1 At trial, witnesses are often examined about any
2 hostility they may feel or hold toward a litigant or a
3 defendant. The defendant has argued that the subpoena to
4 Cumberland Internet should be tested on the part -- on the
5 basis of a two-part Fourt Amendment analysis and cites
6 three cases; U.S. vs. Kennedy, U.S. vs. Hambric, and
7 Guest, et. al. vs. Leis, et. al.

8 These cases are distinctively different than the case
9 at hand. None of the cases deal with the challenge --
10 with the challenge of a non-party witness to a subpoena
11 issued by a defendant in a criminal case.

12 Rather, in each of these cases, internet records were
13 seized by the government as part of an investigation of
14 criminal activity allegedly perpetrated through the
15 internet. The records seized constituted evidence of such
16 activity, and in two of the cases, the legality of the
17 search and seizure was before the Court on motions to
18 suppress filed by the defendant.

19 Cumberland Internet has challenged the validity of
20 the subpoena on First Amendment, not Fourth Amendment,
21 grounds. It's entitled to do so. It's entitled to raise
22 the constitutional protections that it deems are
23 applicable.

24 No cases cited by either of the parties which

1 addresses this specific issue. Those cases cited on
2 behalf of Cumberland County Internet, in particular
3 Columbia Insurance Company vs. Seescandy.com and
4 Subpoenas Duces Tecum to America Online and John Doe vs.
5 2TheMart.com, Inc., are helpful. They contain persuasive
6 language, but they are different than the case at hand.

7 This case unquestionably does have First Amendment
8 implications. The First Amendment is valued highly in our
9 society as well as in the law. That's why this -- this
10 subpoena is being challenged because of the role of the
11 First Amendment in the law and in American political
12 society.

13 The First Amendment unquestionably extends protection
14 to anonymous free speech. Certain types of speech is more
15 highly protected than others. The most highly protected
16 speech is core political speech, which is what this case
17 is about. The nature, the content of the messages is core
18 political speech.

19 The First Amendment is less concerned with other
20 types of speech. It's less concerned with commercial
21 speech. If this subpoena were directed toward the records
22 of a car dealership, the First Amendment implications
23 would be substantially different than they are being
24 directed at what constitutes a private media outlet.

1 The subpoena is a broad one. The subpoena does
2 require a private media outlet to perform investigative
3 acts or otherwise disclose reams of data.

4 Compare this subpoena to a subpoena that might be
5 directed at a newspaper, asking the newspaper to identify
6 a name-withheld-by-request letter. Typically, a newspaper
7 is going to receive a letter, which they require, often,
8 to be signed. They, however, upon request, will publish
9 it as a name-withheld-by-request.

10 If a subpoena is directed to that newspaper, assuming
11 for purposes of argument that the Court finds that the
12 subpoena is a valid one, all the newspaper has to do is
13 identify a name, a name on a signed letter; perhaps
14 they've made a telephone call to the person who signed the
15 letter and confirmed that that individual wrote the
16 letter. The newspaper is not required to investigate its
17 records, to compile data, to draw conclusions, to put
18 together different types of data and infer who made a
19 posting. So the intrusion of this subpoena is a greater
20 intrusion by reason of the nature of the information
21 that's being sought.

22 To that extent, it is a -- it has degrees of breadth
23 that don't exist with other types of subpoena. The
24 subpoena is overbroad to the extent it seeks to identify

1 persons who are not witnesses. The subpoena is certainly
2 broad, even as it relates to witnesses the State has
3 identified as potential witnesses, insofar as the issue of
4 the subpoena or the party requesting the Court to issue
5 the subpoena draws no connection between the nature of a
6 witness' testimony and the need for the requested
7 information.

8 First of all, not all of the messages are
9 self-evidently expressions of bias. In addition, bias of
10 this nature is not self-evidently a tool of
11 cross-examination for all witnesses. To the extent that
12 this case becomes a case about a paper trial -- trail, as
13 Mr. Murphy has characterized it, it would not be typical
14 or common and it would be unusual frequently to examine
15 witnesses who are merely producing documentation or who
16 are not offering credibility-type testimony, it would be
17 unusual to subject them to cross-examination on issues of
18 bias.

19 It's not for the Court to decide, and the Court does
20 not propose to decide how the defendant chooses to
21 cross-examine witnesses. The defendant has a right to
22 cross-examine witnesses for bias, and the Court does not
23 intend to restrict that right.

24 A message board is something on the order of a

1 community self-published newspaper. Forcing disclosure of
2 the types of information that's requested by that subpoena
3 has a chilling effect. It may chill in a variety of ways.
4 It may affect who posts messages. It may affect what
5 messages are posted. Because not everyone understands how
6 a message board operates or what data exist. It may even
7 affect people who choose to access the message board
8 simply to view what is there, or there may be some people
9 who believe that simply by accessing that message board,
10 their identities may be disclosed, and the timid made be
11 discouraged from exercising their First Amendment right to
12 participate, in effect, in what is a community
13 self-published newspaper.

14 The First Amendment protects both responsible and
15 irresponsible speech. It protects all political speech.

16 Mr. Murphy has advocated that the Court should apply
17 an exacting scrutiny analysis. The Court is not going to
18 apply an exacting scrutiny test. I am applying what I
19 will characterize as a reasonable likelihood test,
20 whether there is a reasonable likelihood that quashing the
21 subpoena will interfere with a fair trial. The Court does
22 not find that there is a reasonable likelihood that
23 quashing the subpoena to Cumberland Internet will
24 interfere with a fair trial. For that reason, the

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5 I, Mary Danley, Official Court Reporter for the
 6 Circuit Court of Coles County, Fifth Judicial Circuit of
 7 Illinois, do hereby certify that I reported in shorthand
 8 the proceedings in the above-entitled cause; that I
 9 thereafter caused the foregoing to be transcribed into
 10 typewriting, which I hereby certify to be a true and
 11 accurate transcript of the proceedings had before the
 12 Honorable Tracy W. Resch, Judge of said Court.

13 Dated at Charleston, Coles County, Illinois, this
 14 26th day of June, 2002.
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16 Mary Danley
 17 Mary Danley, CSR, RMR
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