# TIME, PLACE & MANNER: REGULATING NON TRADITIONAL SPEECH

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## I. LEGAL BACKGROUND

One of the most useful features of social media is the ability for interaction between the public and the government. However, this interactive aspect can quickly become a potential minefield of legal issues for governments, particularly where comments and speech are involved. As this area of law is yet undeveloped, the public sector should proceed, if at all, with caution so as to avoid running afoul of the First Amendment.

Whether a social media site is considered a "public forum" is an open question, raising concerns as to whether a government can remove allegedly objectionable Facebook comments without implicating First Amendment protections. The classic forum analysis will provide different protections to speech and other First Amendment rights depending on the forum in which such speech or rights arise.

A traditional public forum includes places that are traditionally used for assembly, debate, and other "expressive activities," including streets, sidewalks, and parks. Traditional public forums are places that have "the physical characteristics of a public thoroughfare, . . . the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, [and] historical[ly] and traditional[ly] ha[ve] been used for expressive conduct." A government creates a public forum "only by intentionally opening a non-traditional forum for public discourse" and "does not create a public forum by inaction or by permitting limited discourse." If a government tries to place restrictions on the content of speech in a traditional public forum, these restrictions must be necessary to serve a compelling government interest.

A designated public forum is a nonpublic forum that is not historically open to speech- and assembly-related activities but that the government agency has purposefully opened up for public dialogue on a limited or permanent basis. Examples of a designated public forum include university meeting facilities, municipal theaters, and school board meetings. Although the government is not required to maintain designated public forums on a permanent basis, the government is bound by the same standards of traditional public forums as long as it does keep them open. Government may restrict content-neutral speech as long as it is a narrowly tailored restriction that leaves open alternative channels of communication, and any content-based speech restrictions must withstand a strict scrutiny analysis, i.e., the restrictions are necessary to achieve a compelling government interest. Analogizing this to social media sites, some argue that a municipal Facebook site is a designated public forum once the government has opened up its site to public comments.

There is a subset of designated public forums known as "limited public forums." A limited public forum generally includes the same setting as designated public forums, but the

government limits and restricts the discourse to certain speakers and certain subjects. The main difference between these two standards is the protection afforded to the speech—in limited public forums, speech restrictions need only be reasonable and viewpoint neutral. In a limited public forum, a government agency can freely restrict and reserve access to the forum to certain topics and certain groups as long as the restriction is not because of the opinion or ideology of the speaker or group. A government must be careful to monitor and enforce the restrictions and limits on the topics and groups as designated or run the risk of having the forum deemed a designated public forum subject to the stricter test. Courts have found city council meetings to be limited public forums. Government has the power to remove people from meetings as long as they are *actually* disruptive. For example, a public agency was found to have acted properly to eject a member of the public when he continued to actively disrupt the meeting by yelling, interrupting, and trying to speak over the members of the board when it was not time for public comments. On the other hand, a government erroneously ejected a man from a city council meeting when he disagreed with the council members by silently giving them the Nazi salute.

At the other end of the spectrum lies the government speech doctrine, which protects the government against First Amendment claims in situations where the government has complete control over the message that it disseminates and retains the right and ability to exclude others. This doctrine was applied by the Fourth Circuit Court of Appeals to a school district website. In *Page v. Lexington County School District One*, 531 F.3d 275 (4th Cir. 2008), a county resident brought an action against a school district seeking access to, among other things, the school's website to disseminate information that supported upcoming state legislation. The citizen took issue with the school district's use of its own website to advocate against upcoming legislation—often through linkage to third-party publications. The resident claimed that by including links to other websites, which could be updated without the school district's consent or approval, the district had incidentally created a "limited public forum." The court rejected the challenger's argument, finding that because the school "wholly controlled its own website, retaining the right and ability to exclude any link at any time" as well as including a disclaimer on the website addressing this exact situation, there was no limited public forum created; and further, the school was protected for its views under the government speech doctrine.

Some commentators suggest that government social media sites should be treated the same as websites. The U.S. Court of Appeals for the Fourth Circuit appears to anticipate that issue in the *Page* decision, as follows:

> Had a linked website somehow transformed the School District's website into a type of "chat room" or "bulletin board" in which private viewers could express opinions or post information, the issue would, of course, be different. But nothing on the School District's website as it existed invited or allowed private persons to public information or their positions there so as to create a limited public forum.

The *Page* decision should give pause to some governmental agencies as it suggests just how easily a nonpublic forum can be transformed into a limited public forum—merely by providing a link to some page that allows private users to express opinions or post information.

A recent case may eventually shed some light on this open issue of whether social media is a public forum (traditional, designated, or limited) or is protected government speech. In

*Hawaii Defense Foundation v. City of Honolulu, et al,* a legal defense group sued the City claiming it violated its First Amendment rights by removing comments posted on the city police department's (HPD) official Facebook page and banning those individuals from the site. The lawsuit claims that the HPD's Facebook page was a traditional public forum, like a public park. At the very least, according to the plaintiffs, the City had created a designated public forum when it set up its Facebook page and allowed comments to be posted. According to the complaint, the HPD had removed comments that were critical of the police department solely based on the content or viewpoint of the speech rather than for violation of the HPD's Facebook use policy. That policy prohibits comments that are obscene, sexually explicit, racially derogatory, or defamatory, solicit or constitute an advertisement, or suggest or encourage illegal activities. The plaintiffs seek a declaratory judgment that the City's administration of its Facebook page, specifically its removal of plaintiffs' comments, violated the First Amendment. The lawsuit also claims that the City's ban of certain plaintiffs from posting comments violated their due process rights under the Fourteenth Amendment. While we do not yet know what the City's defense will be (and may not know if the case ultimately settles), it is likely that the City will argue that its Facebook page involves government speech and should not be subject to a forum analysis. This case certainly bears watching to see what analysis the court will use and, whether the court will find that the City's Facebook page is a public forum or government speech.

## II. CASE LAW UPDATE

### A. GOVERNMENT USE OF SOCIAL MEDIA

**Can a Public Entity Delete Comments From Facebook?**

The Illinois Attorney General was asked this question in a recent complaint filed with the Public Access Counselor's office. The issue centered on criticism by a community member about a village's Facebook page. The page came under scrutiny after a village trustee (who maintains the village's Facebook page) deleted certain comments from the page. As with most Facebook "fan" pages, users are allowed to comment on the "wall" of the page, but those comments can be deleted unilaterally by the administrator who maintains the page. The trustee justified the deletions by citing a number of violations of the village's social media policy.

The community member that brought the action, a former part-time police officer of the village, was one of the individuals whose comments were deleted. The community member first argued that the village's actions violated the Illinois OMA. The Attorney General found that, in Illinois, public entities *can* post updates on their Facebook page about upcoming meetings without violating the OMA. But it found also that public entities are not *required to* post such information on their Facebook pages, even if their Facebook page is their only webpage. The Attorney General's analysis on the latter point hinged on its interpretation of the OMA requirement that, if a public body "has" a website and a full-time staff member maintains that "public body's website," the public entity must post public meeting notices on that website. The Attorney General found that a Facebook page is neither "under the control of or maintained by a public body" and so does not fall within the statutory language.

The community member also argued that the village's actions violated his First Amendment free speech rights. The Illinois Attorney General declined to address this issue since

it does not have jurisdiction over First Amendment claims. As a result, the question remains whether deleting comments is a constitutional violation.

Unfortunately, there is very little legal authority on the issue. A recent lawsuit filed by the Hawaii Defense Foundation against the City and County of Honolulu could provide answers, although the case may be settled. Public entities should consult with legal counsel before deleting comments from social media sites to address the constitutionality of that action.

**City Council Bans Social Media During Meetings**

The Rochester City Council recently enacted a ban on tweeting and other social media activities during City Council meetings. The policy came after one of the city council members tweeted about a council discussion of a vacant house that had become a public hazard. After concerns were raised about the appropriateness of the tweets, the mayor suggested that the council members impose the ban.

Rochester isn't the only government considering or adopting similar bans. Some government boards have found that social media activities by members can be distracting during meetings. Others are concerned that these activities might implicate open meetings laws. In Illinois, electronic communications during meetings (even on privately-owned devices) are subject to release under the Freedom of Information Act, leading some Illinois governments to adopt policies prohibiting or discouraging social media or other electronic communications by board members during meetings.

**School District Sued by Student for Use of Facebook Photo**

As part of a seminar presentation on the risks of social media, a Georgia school district used as an example a photo from a student's Facebook page showing the student in a bikini standing next to a cardboard cutout ad for "Blast," a malt liquor beverage, with the title "Once it's there, it's there to stay." The former student (she is now a Freshman in college) sued shortly after learning that her image had been used by the district. She claims that she only thought friends and friends of friends could see the photo, and that she had not given permission to the school district to use her photo in the presentation. She is asking for $2 million from the school district, arguing that the school district violated federal law, state law and the student's constitutional rights, and that she did not give up her rights by posting images on Facebook.

The school district may not have made the wisest decision in using a student's photo without her permission, but it remains to be seen how the district's conduct rises to the level of a constitutional violation.

## B. NEGATIVE SOCIAL MEDIA SPEECH AGAINST GOVERNMENT

**Student Can Be Disciplined for Off-Campus Social Media Activities**

A high school student was suspended from school following a school district hearing because of threatening social media posts and text messages. The student's conduct included threatening to shoot people at the school and raping students, along with racist, sexist, and anti-Semitic comments. Friends of the disciplined student had raised concerns about the messages

with a high school coach, who brought the allegations to the principal. After the school district suspended the student for 90 days, the student and his father sued the school, administrators, and county under Section 1983 for violation of the student's First Amendment rights. The district court ruled in favor of the county. *Wynar v. Douglas County School District*, No. 11-17127 (9th Cir. Aug. 29, 2013).

The Ninth Circuit Court of Appeals affirmed the district court, citing a U.S. Supreme Court ruling. *Wynar v. Douglas County School District*, No. 11-17127 (9th Cir. Aug. 29, 2013). Under *Tinker v. Des Moines Indep. Cmty. Sch. Dist*, schools can prohibit speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities or that collides with the rights of other students to be secure and to be let alone." Here, the court had no trouble finding that it was reasonable for school authorities to foresee a substantial disruption of school activities and act based on the student's speech. Specifically, the Court held "[w]hatever the scope of the 'rights of other students to be secure and to be let alone,' without doubt the threat of a school shooting impinges on those rights. [Wynar's] messages threatened the student body as a whole and targeted specific students by name. They represent the quintessential harm to the rights of other students to be secure."

**Teen's Conviction of Harassment for Facebook Post is Upheld**

A Pennsylvania court recently upheld a teen's conviction for the crime of harassment after she appealed her conviction. *Commonwealth v. Cox*, 2013 P.A. Super 221 (2013). The 18 year old had posted a comment on her Facebook page that the 15 year old victim "has herpes, Ew, that's gross. She should stop spreading her legs like her mother." The post received several "likes" from Cox's friends before it was deleted. The victim's mother reported the post to police, and the 18 year old was charged with the crime of harassment, which makes it illegal to communicate "to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures" with the intent to harass, annoy, or alarm the other person. A jury found the teen guilty of harassment, and sentenced her to 6 months probation.

The appellate court held that the evidence was sufficient to support the verdict and that the defense provided no evidence that the posting was for any other purpose than harassment of the victim. "Contrary to Cox's view and in light of the totality of the evidence, her misuse of the internet and social media was criminal," the appellate court ruled.

**Online Posts Found to Be Opinions Rather than Assertions of Fact**

In *Redmond v. Gawker,* A132785, 2012 Cal. App. Unpub. LEXIS 5879; 2012 WL 3243507, the court addressed the nature of opinions posted on online forums like blogs, discussion boards, Facebook walls, and the like. A tech start-up sued the defendants for an article criticizing the company's potential product. On appeal, the appellate court held that the defendant's article "constituted statements of protected opinion rather than assertions of verifiable fact." Since the article provided links to other web sites, Twitter feeds, and online articles expressing the same skepticism as the authors, blog readers were free to evaluate the claims on their own. In fact, several of the article's commentators disagreed with the author's statements. Viewed in this light, the court viewed the blog posting as a "freewheeling discussion and the airing of (often outrageous) opinions that invite consideration and possibly research by

the readers."

In other words, bloggers criticizing public employees, officials, or government itself might find immunity behind anti-SLAPP statutes if they can prove their post or article invited readers to perform additional research on their own, through the inclusion of outside links.

## C. REGULATING EMPLOYEE SOCIAL MEDIA USE

**A Facebook "Like" is First Amendment Speech**

A few years ago, a Virginia judge held that clicking "like" on a candidate's Facebook page was not protected speech under the First Amendment. *Bland v. Roberts*, 857 F. Supp. 2d 599 (Va. 2012). That case involved employees of the local sheriff who supported the sheriff's opponent in the election. To the employees' misfortune, their supported candidate lost the election, and the sheriff terminated them. The employees sued, claiming that the sheriff retaliated against them in violation of their First Amendment rights by terminating them for engaging in protected speech activities - in this case, clicking "like" on the candidate's Facebook page. The district court judge ruled in favor of the sheriff, finding that the mere action of clicking "like" on Facebook was not "speech."

The employees appealed to the U.S. Circuit Court of Appeals, Fourth Circuit. That court issued its opinion today reversing the district court and finding that the employees did engage in protected speech activities in their conduct on the sheriff's opponent's Facebook page. *Bland v. Roberts*, 2013 WL 5228033 (4th Cir. September 18, 2013).

First, the court reviewed the Supreme Court political speech retaliation cases in determining which of the employees were protected and which employees were exempt as occupying a "policymaking or confidential position." Under the Supreme Court's decisions in *Elrod v. Burns* and *Branti v. Finkel*, a public employee who has a confidential, policymaking, or public contact role has substantially less First Amendment protection than a lower level employee. The purpose of the *Elrod-Branti* test is to ensure loyalty with employees in certain policymaking or confidential positions. In this case, the court determined that the plaintiff deputy sheriffs were not in policymaking positions where their political allegiance to the sheriff was a job performance requirement.

Second, the court looked at the conduct of the employees to determine whether their activities (supporting the sheriff's opponent on the opponent's Facebook page) were a substantial motivation for the sheriff's decision not to reappoint the employees. The court looked at the sheriff's conduct as well, including his statements to employees that those who openly support his opponent would lose their jobs, and specifically referencing his disapproval of the decision of some employees to support his opponent's candidacy on Facebook.

Third, the court addressed the question whether the employees' activities were speech. As noted above, the district court had ruled that merely clicking "like" on Facebook was not speech. The appellate court disagreed, stating that *"clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement."* (emphasis added). Particularly in this context, clicking "like" on a candidate's Facebook page sends a message that the user approves the candidacy. The court found this to be

pure political speech, as well as symbolic expression - a "thumbs up" symbol that the user supports the campaign by associating the user with it. As the court noted, liking a candidate's campaign page "is the Internet equivalent of displaying a political sign in one's front yard."

Finally, the court addressed the sheriff's argument that he is entitled to qualified immunity for not reappointing the employees. The court determined that the sheriff is entitled to qualified immunity concerning the claims of the three sworn deputy sheriffs, because a reasonable sheriff could have believed he had a right to choose not to reappoint his sworn deputies for political reasons, including the deputies' support of his opponent. However, qualified immunity only applies to the employees' money damages claims, not their reinstatement claims.

One justice issued a concurring/dissenting opinion, disagreeing with the majority's ruling applying qualified immunity to the sheriff's actions. The dissenting justice stated that the sheriff should be held accountable for political retaliation.

**Police Officer's Facebook Posts Not Protected Speech**

In an unpublished opinion, the 11th Circuit Court of Appeals recently addressed a police officer's lawsuit against the City of Atlanta alleging that the chief failed to promote the officer in retaliation for a comment she posted on Facebook criticizing another officer. *Gresham v. City of Atlanta* (11th Cir., October 17, 2013).

The officer had posted a comment on her personal Facebook page criticizing a fellow officer for interfering in an unethical manner with plaintiff's investigation of a suspect for alleged fraud and financial identity theft. Although the officer's Facebook page's privacy settings allowed only "friends" to view posts, her comments found their way to the City's police department's office of professional standards. Plaintiff was investigated for an alleged violation of the department's work rule requiring that any criticism of a fellow officer be directed through official department channels, and not be used to the "disadvantage of the reputation or operation of the Department or any employees." Plaintiff argued that the reason she was not promoted when eligible was in retaliation for her comments, which were being investigated at the time of departmental promotions. The City argued that she was not promoted because department policy prohibited any promotions during pending disciplinary investigations.

The district court ruled in favor of the City, and dismissed the officer's Section 1983, First Amendment lawsuit. The 11th Circuit agreed, applying the four-part Pickering test for employee speech requiring the court to determine whether (1) plaintiff's speech involved a matter of public concern; (2) plaintiff's interest in speaking outweighed the government's legitimate interest in efficient government service; (3) the speech played a substantial part in the government's challenged employment decision. If plaintiff establishes the first 3 prongs, then she will prevail unless defendants can prove that (4) they would have made the same employment decision even in the absence of protected speech.

Here, the court determined that the government's interest in avoiding disruption outweighed plaintiff's interest in speaking on this matter. Furthermore, plaintiff violated a clear departmental rule in commenting on a fellow officer outside of official department channels.

Finally, the court determined that plaintiff's speech interest was not a strong one, and merely reflected "venting her frustration with her superiors." Thus, the appellate court agreed with the district court's decision to dismiss plaintiff's claims against the City.

**Nurse Fired for Facebook Posts Shared by Coworker "Friend"**

A nurse and paramedic at a non-profit hospital maintained a Facebook page with privacy settings that limited access only to her Facebook friends. Although the nurse did not list any hospital supervisors as "friends," she was Facebook friends with several of her coworkers. One of those coworkers turned out to be less than "friendly" when he shared with hospital management the following statement posted by the nurse on her Facebook wall in 2009:

> An 88 yr old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards....go to target practice.

Shortly after the nurse's coworkers took a screenshot of the post and showed it to a hospital manager, the nurse was suspended with pay. She filed a complaint with the National Labor Relations Board (NLRB), but lost when the NLRB ruled in favor of the hospital. Two years later, after the nurse had accrued an extensive number of disciplinary "points," the hospital terminated her. The nurse then filed a lawsuit in the district court of New Jersey against the hospital, challenging her termination on a variety of grounds, including violations of the Federal Stored Communications Act (SCA) and Invasion of Privacy relating to her Facebook postings from 2009. *Ehling v. Monmouth Hosp. Serv. Corp*., (U.S. Dist. Ct. NJ, August 20, 2013).

The court first determined that the Facebook posts were covered under the SCA because the communications were private based on the security settings on her Facebook account. However, the court applied the "authorized user" exception because the coworker who accessed and shared the Facebook postings with hospital management provided the communications voluntarily to hospital management, and was not coerced or pressured to provide this information. The coworker was determined to be an "authorized user" because he was a Facebook friend of the nurse's. Therefore, the hospital was not liable under the SCA.

With respect to the nurse's claim that the hospital violated her right to privacy in accessing her Facebook account, the court found no intentional invasion by the hospital because the information was voluntarily provided by the nurse to the coworker, who in turn voluntarily provided it to hospital management.

In finding in favor of the hospital on all counts, the court concluded that there "may have been a violation of trust, but it was not a violation of privacy."

**Plaintiff's Termination for Facebook Post Upheld**

After an employee was fired from his job as a teacher's aide at a preschool center, he sued claiming that the center violated his civil rights by discriminating against him because he was

male and for defamation. The center claims the plaintiff was fired because of derogatory comments he posted on his Facebook page about a family situation (his boss at the center was also his mother). The district court ruled in favor of the center, finding that plaintiff did not provide any evidence that the firing was a pretext for discrimination. The Seventh Circuit Court of Appeals agreed, upholding the ruling in favor of the employer. *Smizer v. Community Mennonite Early Learning Center* (7th Cir. Oct. 25, 2013)(unpublished opinion).

Although the decision was not published, it provides some guidance to employers who may be hesitant to take any action with respect to social media activities because an employee can simply deny having posted a particular comment. In this case, the center could not provide actual evidence of the social media posting; nevertheless, the court found that the employer believed that the plaintiff wrote the post, providing the center with a legitimate basis for the firing. The court concluded that plaintiff did not carry his burden to show that the purported reason for this firing (the Facebook post) was a pretext for gender discrimination.

**Teacher Dismissed for Calling Students "Future Criminals" on Facebook**

*In the Matter of the Tenure Hearing of Jennifer O'Brien* (N.J. Super. Ct. App. Div. N.J. 2013 2013 WL 132508), a New Jersey appellate decision upheld the dismissal of a teacher for derogatory comments she made on her personal Facebook page. New Jersey District Dismisses Teacher Who Called Students "Future Criminals" on Facebook. Both the Administrative Law Judge and the New Jersey court ruled that the teacher's Facebook posts were not protected speech under the First Amendment because they were not made on a matter of public concern.

The teacher's posts included the following statements:

"I'm not a teacher—I'm a warden for future criminals!"

"They had a scared straight program in school—why couldn't [I] bring [first] graders?"

Another good example of why you should be careful what you post on social media!

**Anti-SLAPP statute does not prohibit public officials from bringing defamation claims**

In *Sandholm v. Kuecker* (2012 WL 169708), the Illinois Supreme Court construed the state's anti-SLAPP statute as intended to apply only to actions based *solely* on the defendant's petitioning activities, and not to provide blanket immunity or create a new privilege for defamation. In this case, high school students had posted various statements on social media about their basketball coach who also served as the athletic coordinator. The comments included calling the coach a "psycho nut who talks in circles and is only coaching for his glory." He was fired from his coaching position, and sued for defamation. The students defended the lawsuit by claiming that the Anti-Slapp statute protected their conduct and speech. The court disagreed, holding that public employees and government officials may sue citizens who attack their character and ability to perform their official duties for defamation and related torts, if the true nature of their lawsuit is to recover damage to their reputations.

**Employee's Facebook Posting About Mayor is Protected Speech**

In, *Mattingly v. Milligan* (E.D. Ark. 2011 WL 5184283) (unreported case), an at-will employee in the city clerk's office was let go after criticizing mayor on Facebook. After the new mayor had terminated a few employees in the clerk's office, the employee posted about the terminations. Her posts reached a number of community members who expressed their displeasure with the new mayor's decision to terminate the employees. The new mayor then terminated the employee based on her postings. She sued, claiming that her comments were protected speech because they related to a matter of public concern. The court agreed, finding that her speech was protected because she posted as a citizen, her speech related to a matter of public concern, and the posts did not upset the operations of the clerk's office.

**Mayor's Facebook Post Calling Fire Company Trustees "Cowards" Not Protected Speech**

In *Dunkle v. Mt. Carbon/North Manheim Fire Co.*, 2013 WL 4813401 (M.D. Pa.), the trustees of the local fire company suspended the plaintiff's volunteer membership. The plaintiff, who also happened to be the mayor of Mt. Carbon, posted on Facebook that the trustees were "cowards," tagging several of them to the post. After he was suspended, the mayor sued the group arguing his comments were protected public employee speech. The district court disagreed, dismissing the plaintiff's claim because he failed to allege a free speech violation. Without "content, form, and context" of the mayor's speech they could not determine if his post was made as a citizen or a public official. Second, the court wanted to know the mayor's privacy settings to determine if his "statements were intended for public consumption."

## D. SOCIAL MEDIA AND ANONYMOUS SPEECH

**Delaware Supreme Court Defines Standards for Protecting Anonymous Internet Speech**

In September of 2004, an anonymous visitor to a Smyrna, Delaware community weblog posted comments about city councilman Patrick Cahill, which Cahill believed to be damaging to his reputation. Cahill filed a defamation lawsuit. Because he did not know the identity of the anonymous commenter, he filed suit against "John Doe," and began procedures under Delaware law to discover Doe's true identity. Cahill learned that Doe used Comcast as an Internet service provider, and obtained a court order requiring Comcast to disclose Doe's real name.

As required by the federal Cable Communications Policy Act of 1984, at 47 U.S.C. §551(c)(2), Comcast notified Doe of the request for information about his identity. In response, Doe sought an emergency protective order to bar Comcast from turning over his information. The trial court denied Doe's request for a protective order, and held that Cahill could obtain Doe's identity from Comcast. Doe appealed directly to the Delaware Supreme Court. On appeal, the Court reversed the lower court's decision.

In *Doe v. Cahill*, 848 A.2d 451 (Del., 2005), the Delaware Supreme Court determined that the trial court had applied too low a standard in testing whether Comcast should be ordered to turn over Doe's identity. The trial court had applied a "good faith" standard, namely, that disclosure was warranted because Cahill had established through his pleadings that he had a legitimate, good faith basis on which to bring the defamation claim.

The Supreme Court held that such a low standard was not sufficient to protect one's right to speak anonymously. The lower, good faith standard might encourage meritless lawsuits

brought merely to uncover the identities of anonymous critics. Accordingly, the Supreme Court adopted a standard "that appropriately balances one person's right to speak anonymously against another person's right to protect his reputation."

The Court held that before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process, he must come forth with facts sufficient to defeat a summary judgment motion. Said another way, before a Delaware court will order an anonymous speaker to be unmasked, the plaintiff has to present evidence creating a genuine issue of material fact for each element of the defamation claim.

Applying that standard to the present case, the court held that "no reasonable person could have interpreted [Doe's] statements to be anything other than opinion." The court observed that its conclusion was supported by the "unreliable nature of assertions posted in chat rooms and on blogs." The case was dismissed.

**Google Must Identify Anonymous Blogger in Defamation Suit**

A New York attorney who was the subject of online harassment from anonymous bloggers who created two websites directed at the attorney (frederickschulmancrookedattorney.com and stopfrederickschulman.blogspot.com) succeeded in obtaining an order to compel Google to produce the names and email addresses of those who registered the blogs, as well as the IP addresses for the two blogs. The attorney had filed a defamation lawsuit against the anonymous bloggers and was seeking their identities through court discovery procedures. A New York Supreme Court judge ordered Google to contact the users and notify them that they have 15 days to object to the disclosure.

In one of the blogs, the blogger calls the attorney and his firm "shady lawyers" and claims the firm is guilty of "illegal activities" and mistreatment of people. The author of the stopfrederickschulman.com blog (whose occupation is listed as "stopping corrupt lawyers") defends his postings by stating that they are opinion only and, therefore, protected by the First Amendment to the U.S. Constitution. The blogger states that he or she is "only exercising my right to speak freely and any decision you make should not be influenced by anything read on this blog, what you do is up to you!!!"

This is not an unusual order from a court. A few years ago, a Cook County, Illinois circuit court ordered Comcast to release information regarding the identity of an anonymous online commenter in connection with a defamation lawsuit filed by a Buffalo Grove Village Trustee. The test applied in that case was similar to that applied by the New York judge - whether the petitioner has alleged sufficient facts to support a establish a meritorious cause of action and that the information he or she seeks is necessary to the case.

While anonymous speech is provided some protection under the First Amendment to the U.S. Constitution, that protection is not limitless. If a plaintiff can establish a meritorious claim for defamation against an anonymous speaker, the speaker's anonymity may be short-lived as courts continue to order internet service providers to uncloak online speakers' identities.