WHETHER WEBSITE PRESENCE EXPOSES PUBLISHER TO LAWSUITS IN WISCONSIN ANALYZED IN RECENT CASE

Most people would probably assume that simply maintaining a website would not expose the creator to being sued wherever the website can be viewed. Courts in this country have generally agreed, and have ruled that the mere act of operating a website that can be read within a certain state does not, by itself, give the courts of that state jurisdiction over the entity running the website.

In a recent opinion, the Wisconsin Court of Appeals affirmed this principle. In *Salfinger v. Fairfax Media Limited*, the court concluded that the mere fact that an Australian company published an article on a website, which could be accessed in Wisconsin, did not give the court jurisdiction over that company. This was true even though the plaintiff's claim was for defamation based on the content in that article. Rather, to be consistent with the Due Process Clause of the United States Constitution, there must have been some purposeful conduct within Wisconsin by the company that would make facing suit in Wisconsin foreseeable.

Even more importantly, the court also considered whether the targeted advertising on the website changed the result. Like many companies, Fairfax Media Limited used online advertising programs, such as through Google or Double Click, that placed advertisements on its website targeted to the reader based on his or her geographic location—for example, placing ads for a Wisconsin business on its website next to the article if the reader was located in Wisconsin. Ultimately, the court concluded that this still was not enough Wisconsin-related conduct to give the court jurisdiction over the publisher and expose it to being sued in Wisconsin.

The Court did note that the question of jurisdiction depends on the facts in each particular case, so it is unclear whether even one change in the circumstances, such as a company mentioning Wisconsin in a website article, could change the result and open the company to lawsuits in Wisconsin. These questions will ultimately have to be resolved in future cases.

FEDERAL JUDGE RULES IN FAVOR OF E-RATE

PROGRAM WHISTLEBLOWER

On January 20, a Wisconsin federal judge ruled in favor of a private telecommunications auditor, Todd Heath, who filed a lawsuit claiming that Wisconsin Bell defrauded the federal E-Rate program by overcharging schools and libraries. The lawsuit was brought under the False Claims Act (FCA), a federal law encouraging whistleblowers to come forward when they discover "false claims" or fraud committed on the federal government.

The E-Rate program was established by the Telecommunications Act of 1996 to provide schools and libraries with subsidies needed to upgrade their telecommunications equipment and improve access to the Internet and related services. Here's how Propublica described why the E-Rate program matters: "E-Rate was set up… at the dawn of the Internet era to avert a digital divide between rich and poor students by subsidizing telecommunications services to schools and libraries… [The program] requires providers to set rates for schools and libraries at the lowest prices offered to comparable customers… [to] help schools in less-wealthy areas provide their students with access to the Web."

E-Rate is funded by "Universal Service" charges, which federal law authorizes Wisconsin Bell and other telecommunications companies to include on business and consumer telephone bills nationwide. The funds collected are administered by the Universal Services Administrative Company (USAC) under the direction of the FCC.

Wisconsin Bell argued that the E-Rate Program did not involve any "federal funds" and, therefore, Wisconsin Bell could not be liable under the FCA for the overcharges being alleged. United States District Court Judge Lynn Adelman rejected these arguments, pointing out that the E-Rate program was established by the federal government and that E-Rate funding would not exist if not for the government's actions. He also rejected Wisconsin Bell's argument that it had no liability under the FCA because USAC was not acting as a government "agent" when administering E-Rate. He noted: "It seems difficult to dispute that USAC was acting on the FCC's behalf and subject to its control while administering the subsidy fund."

Wisconsin Bell asked to appeal Judge Adelman's decision to the Seventh Circuit Court Appeals immediately, which would have put the trial court case on hold indefinitely, but Judge Adelman rejected this request in his January 20 court order, meaning that the lawsuit can continue toward trial.

The law firm of O'Neil Cannon Hollman DeJong and Laing SC represents the whistleblower in this case. If you believe you have information that an individual or company is defrauding the federal government, contact Doug Dehler at OCHD&L for a confidential consultation about your rights and options at (414) 276-5000.

TAX AND WEALTH ADVISOR ALERT: BUILDING A GREAT PLAN: IT ALL STARTS WITH VISION

Building any successful plan, whether a strategic plan, estate plan, or succession plan, requires capturing a specific vision. The question is, "what exactly is vision?" It is not some weird, new age concept that finds its way into the movie *Office Space*. While the term "goal" is a good analogue, "goal" is not quite right—because it lacks the emotional heft of vision. In my world, vision is a present tense narrative of a future state that focuses on the author's **why** and **how** he or she feels having achieved those results. Let's break that down:

- The vision is a description of future state. The reason for that, in the planning context, is obvious and straightforward—it is where we want to go. Stated another way, it is the very reason for the plan.
- The vision is written in the present rather than future tense. The power of present tense is that the vision becomes commitment rather than aspiration. To show how this works, read the following two visions and ask yourself which one is more compelling:
    1. "By December 31, 2019, the Company's annual revenue will be $10,000,000."
    2. "It is December 31, 2019, and the Company is celebrating a year with $10,000,000 of revenue."

Sure, some words are added like "celebrating," but that is the point. The present tense narrative of the future state picks you up and places you in the winner's circle, allowing you to describe the emotions of the victory. It is reflecting on how victory feels, that makes the sacrifice of preparing for the game worth it. It is why world class athletes "play the game in their minds" over and over again before they get on the field.

Visualizing the victory is the essence of a compelling vision. It focuses on the **why**. If you think about **what** you do every day, there is usually nothing that gets the blood pumping. If you think about **how** you do what you do, it is like reading the owner's manual for your car; boring. But, if you focus on **why** you are doing it, that is where the motivational power lies.

- For example, if the vision is "The company will have $10,000,000 of revenue," that is the **what**; no juice. If it is "We will be at $10,000,000 of revenue by growing our sales force by 10 people and increasing our customer base by 20% per year," that is the **how**; a little more specific, but no more exciting. But, if the vision is "We will be at $10,000,000 of revenue, which will allow us to be the predominant consulting company in Southeastern Wisconsin, and we will have owners and employees who get the first call when a client needs a problem solved," now that sounds like a great place to be. You can literally feel how much you would want to work there. That is the **why**. THAT IS VISION.

But vision is not limited to businesses or owners. Vision is critical in all types of planning. For example, a great retirement plan starts with a compelling vision; a vision so clear and concise I can smell the grass on the golf course and can see the blue ocean off the Tuscan coast. Or, a phenomenal estate plan begins with visualizing the happiness the great grandchildren will derive upon their graduation from Harvard. I know I have assisted my clients with an awesome succession plan when they tear up discussing the impact their business is having generations later; when they begin to clearly see the impact their plan will have on countless families, not just theirs.

And why is vision critical? We will dig into that in the next few blog posts, but it comes down to this: planning is fun, execution is hard. But a plan with no execution is just a daydream. Execution is hard work, sacrifice, preparation, perspiration. Without a compelling vision, without knowing what we are fighting for, the sacrifice and hard work known as "execution" never gets done.

Why do we have a retirement savings crisis in this country? Why do only 30% of Americans have an estate plan? Why do so many closely held businesses fail to survive their founders? No one sat down and thought about, cared about, and documented the amazing future that was the inevitable result of that sacrifice. No one created a compelling vision.

THE NOMINATIONS ARE IN FOR THE LEADERSHIP DEVELOPMENT SUMMIT

Our very own Trevor Lippman was 1 of 24 attorneys selected by the State Bar of Wisconsin's Leadership Development Committee to participate in this year's Leadership Development Summit. This nomination follows up on Trevor's recent three-year appointment by the State Bar President, Mr. Ralph Cagle, to serve on the Continuing Legal Education Committee of the State Bar of Wisconsin.

Trevor was selected to participate in the Leadership Development Summit because his nominator felt that he has demonstrated a commitment to civic-mindedness, has shown a capacity to lead, and possesses the personality and leadership skills that make others want to follow his direction. These are attributes the State Bar of Wisconsin seeks in developing the next generation of its leaders.

The Summit will be held on Friday, April 1, 2016, at the Monona Terrace in Madison for the purpose of developing and encouraging the next generation of leaders both for the State Bar and in the legal profession. The Summit brings participants together with key State Bar

leaders for direct interaction and discussion on leadership in the State Bar and legal community today.

TAX AND WEALTH ADVISOR ALERT: A TOOL TO SOLVE THE FIRST SIN: THE VISIONARY ORG CHART

For those of you who have read this blog, you know that the first of the seven deadly sins of succession planning is not putting leadership first. You cannot have a successful succession planning without answering a critical, threshold question: “if not you, then who?”

Sometimes that answer is simple, oftentimes it is not. Frequently the current owner or owners need guidance and direction in answering that question. In those situations, one of the most helpful tools I use in working with my clients is a visionary org chart. The way a visionary org chart works is that we pick a time in the future—maybe three years out, maybe five. The discussion focuses on what the vision is for the company at that time—what markets will the business be in, what will the revenues be, who will be the competitors, etc. Then, the focus shifts to what roles need to be filled for the company to achieve that vision. Those roles are mapped out on the company’s visionary org chart. In other words, what does the company’s org chart need to look like on ____, 2019 for the company to achieve the vision?

Once we have the visionary org chart created, we begin to fill in the roles with the company’s current talent. As part of that process, a few critical issues almost always come to a head:

- We almost always have critical roles that have no current talent to fill them
- We almost always have talent without a role
- Sometimes we have a great discussion about a currently poor fit between company talent and current roles, and the potential to reemploy that talent into a better role for company success
- Because people will be three years (or whatever period of time in the future we use) older, transition of talent becomes a stark reality
- This process almost always results in a change in the company’s current org chart. In other words, pulling the leadership team out of the day-to-day and having them think about the future success of the business, causes them to recognize issues that need to be addressed immediately

So what does your visionary org chart look like? What weaknesses does it reveal? What opportunities does it highlight? Addressing these challenges will inevitably help maximize the

value of your business and best take care of the people you care about.

ATTORNEY GREGORY S. MAGER RECOGNIZED AS A BOARD CERTIFIED FAMILY LAW TRIAL ADVOCATE

The National Board of Trial Advocacy (NBTA) has recognized attorney Gregory S. Mager, a shareholder at O'Neil, Cannon, Hollman, DeJong and Laing S.C., as a Board Certified Family Law Trial Advocate. The NBTA is the first American Bar Association accredited attorney board-certifying agency in the world. The organization certifies specialists, predicated on high standards of demonstrated competence and integrity.

"*With less than 4% of all practicing lawyers certified by an ABA-accredited or state-sponsored certification board, board certification is not only highly important to the profession of law but also paramount to consumer protection. In so doing, it differentiates such attorneys for having objectively established their specialized proficiency in the practice of law*."
http://www.nbtalawyers.org/

Contact Greg today for assistance with your family law matters at 414-276-5000 or Gregory.Mager@wilaw.com

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EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES DRAFT PROPOSED ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES

Recently, the U.S. Equal Employment Opportunity Commission ("EEOC") published Draft Proposed Enforcement Guidance on Retaliation and Related Issues in order to get public input. The EEOC handles employment discrimination laws, including retaliation claims by employees who engage in "protected activity," such as employees who complain about discrimination, file a charge of discrimination, or participate in an employment discrimination proceeding. Despite the fact that retaliation is the most frequently alleged type of charge filed with the EEOC, it last published guidance on the matter in 1998. It has used this Draft Proposed Guidance as a way to clarify its stance on certain points of law and an attempt to

expand the definition of retaliation.

Among the proposed changes is the EEOC's rejection of the "manager rule," whereby an employee who has a job responsibility that involves policing discrimination in the workplace (e.g., human resource manager) is not engaged in "protected activity" if that person is simply performing his or her job. The EEOC proposes to focus on the "oppositional nature of the employee's complaints or criticisms" instead of the employee's job duties. Therefore, while someone such as a human resources manager would not always be protected under the retaliation provisions, that person would also not have to step outside of their role and assume a position adverse to the employer to receive protection.

The EEOC considers internal complaints to be included in the "participation" aspect of retaliation, regardless of whether a formal charge is filed. Additionally, the EEOC proposes that an individual engaged in "participation" in an employment discrimination proceeding does not have to be "reasonable" in either the belief that discrimination occurred or in how the employee presents himself. In fact, the participation could be wrong, defamatory, or malicious. Oppositional activity must still be objectively reasonable to be protected.

In a nod to the National Labor Relations Board, which has held that discussing compensation among employees constitutes protected, concerted activity, the EEOC's Draft Proposed Guidance state that conversations about pay "may constitute protected opposition under the equal employment opportunity laws, making employer retaliation actionable based upon the facts of a given case." The EEOC gives the example of an employee who discusses the fact that she is being discriminated against due to her gender, as evidence by her lower pay than similarly situated male employees.

The Draft Proposed Guidance also expand on the definition of "materially adverse employment action" to include: disparaging the employee to others or in the media; making false reports to government authorities; threatening reassignment; scrutinizing the employee's work or attendance more closely than that of other employees, without justification; giving an inaccurately lowered performance appraisal or job reference, even If not unfavorable; removing supervisory responsibilities; engaging in abusive verbal or physical behavior that is reasonably likely to deter protected activity, even if it is not sufficiently "severe or pervasive" to create a hostile work environment; requiring reverification of work status, threatening deportation, or initiating other action with immigration authorities; and taking any other action that might deter reasonable individuals from engaging in protected activity. Although the EEOC acknowledges that some courts would find these actions insufficient to constitute a materially adverse employment action, it believes that this interpretation is supported by Supreme Court reasoning.

The public has until February 24, 2016 to submit input, and after that, final guidance will be published. Although, even when finalized, the guidance is simply a reference tool for

investigators and not law, employers should be aware of the EEOC's new proposed guidance, particularly the above points. Not only will the EEOC be using these in order to issue initial determinations, but these are items the EEOC is likely to aggressively pursue in litigation as well.

ADA WEBSITE COMPLIANCE CASES MOVE FORWARD; SENATORS URGE REGULATORY ACTION

As we discussed in a recent article, class action lawyers have been sending demand letters and filing lawsuits claiming that websites belonging to businesses and organizations are "places of public accommodation" and are in violation of the Americans with Disabilities Act (ADA) because they are not accessible to people with visual and hearing impairments.

On January 29, 2016, several consolidated cases in the Western District of Pennsylvania moved forward after a scheduling conference. While claims against some of the defendants have resolved through settlement, claims against the National Basketball Association and Toys "R" Us, among others, are moving forward rapidly, with the parties scheduled to complete depositions in March 2016, and with trial scheduled for May 2, 2016.

Meanwhile, nine Senators from across the country, all Democrats, have sent a joint letter to the Office of Management and Budget urging it to complete its review of the proposed regulations regarding accessibility standards for websites and to impose strict ADA compliance regulations for companies. While the Senators commended the Department of Justice's prosecution of various institutions for having websites that are allegedly not compliant with the ADA, they stated their concern that companies were "exploiting the lack of regulatory clarity" by maintaining non-accessible websites, which the Senators believe to be in violation of the ADA.

These developments show that the issue of whether your company's website complies with the ADA is not going to go away soon. Plaintiffs' lawyers representing visual and hearing impaired groups will likely continue to broaden the scope of who they sue for alleged ADA violations. If you receive a letter demanding action or requesting a settlement, it is important to know your rights before agreeing to anything.

If you have any questions, please contact Attorney Erica N. Reib of O'Neil Cannon at 414-276-5000 for more information.

THE WILAW CONNECTION QUARTERLY NEWSLETTER

- Tax Court Affirms Discount for Family Partnership
- Is Your Company's Website Compliant with the Americans with Disabilities Act (ADA)?
- New Law Changes Wisconsin Sales and Use Tax Rules for Construction
- IRS Delays Affordable Care Act
- Why I Would Rather Be a Beneficiary… Part One: Trusts Protect People from Themselves and Others
- Proud to Be a Member of Meritas, A Multi-National Network of Business Law Firms
- Pleased to Announce:
    - Congratulations to Our Attorneys Listed in the 2015 Edition of Super Lawyers
    - Recognized as One of the Top Business Law Firms in Wisconsin
    - Attorney Gregory S. Mager Board Certified Family Law Trial Advocate by the National Board of Trial Advocacy



EMPLOYMENT LAWSCENE ALERT: NLRB HOLDS THAT POLICY PROHIBITING RECORDING DEVICES IN THE WORKPLACE VIOLATES EMPLOYEES' SECTION 7 RIGHTS

In a recent decision, the National Labor Relations Board (NLRB) struck down an employer's work rule that prohibited employees from recording workplace meetings and conversations without management approval, finding that such a policy could prevent employees from engaging in protected activity, which is protected by Section 7 of the National Labor Relations Act (NLRA).

In this case, the employee handbook had, like many employee handbooks, a policy prohibiting employees from recording company meetings and other aspects of the workplace. These policies are typically put in place to protect employees' privacy and to protect employers' confidential information and trade secrets. However, a 2–1 majority of the NLRB found that employees could reasonably understand such a rule to prohibit unionization efforts or engagement in other collective or concerted activities to advance their job-related interests. The NLRB held that photo, audio, and video recording at the workplace could be a

protected activity under certain circumstances, such as documenting picketing activities, unsafe working conditions, discussions regarding terms and conditions of employment, or an employer inconsistently applying workplace rules. Because the rule in question was simply a blanket rule prohibiting recording, the NLRB ordered the company to remove the policy.

The NLRB is showing no signs of slowing down in its quest to expand the reach of Section 7 far beyond the traditional view of "protected, concerted activity." Employers should carefully review and consider their workplace policies in light of this ruling and other NLRB decisions that have found other workplace rules infringing upon employees' Section 7 rights. Employers' rules restricting use of recording devices need to either be tied to particular employer interests, such as maintaining a customer's privacy or an employer's trade secrets, or be narrow enough to only prohibit recording in limited circumstances. Otherwise, employers, even non-union employers, could be subject to an NLRB unfair labor charge challenging their workplace recording policies.