

Court Hits Pause in Case Involving Internet Video of Deposition

By Sean T. Carnathan, Litigation News Associate Editor

Posting pretrial discovery on the Internet is one of the latest tactics being used by tech-savvy litigants, spawning a debate between rights of free speech and concerns of tainting the jury pool.

A small Texas consumer fraud claim became news in late 2008 when the plaintiff's lawyer posted an excerpt from a video deposition of the chief financial officer of an auto dealer defendant on YouTube and on his own firm website. The excerpt was captioned "It's not a kickback. It's a fee," referring to monies paid to the dealership for arranging automobile financing for the plaintiff. The caption was a direct quotation from the CFO's deposition.

The Harris County Civil Court in Houston ordered that the video be removed after the defendant argued the excerpt was misleading. The court noted that the deposition transcript had not been filed with the court and was not public record. The court order restrains the plaintiff from posting the edited deposition, whether in writing or video, throughout the pendency of the case.

The plaintiff's counsel promptly filed the deposition transcript with the court, making it public record, and reposted the video excerpt. The defendant then filed a motion for enforcement of the protective order and for contempt. After receiving that motion, plaintiff's counsel reset the video excerpt to "private," so that it is no longer viewable by the public through his website. The defendant's motion noted that at the time the court issued the original protective order, the excerpt had been viewed 58 times on YouTube, but as of the filing of the enforcement motion, YouTube reflected 646 views.

At a hearing in February 2009, the court again ordered the plaintiff not to post the deposition excerpt, but reserved ruling on sanctions.

This case implicates important First Amendment rights, but it also raises concerns over the integrity of the jury system. "The First Amendment provides for a presumption of openness in the court systems and court proceedings," notes Laura Lee Prather, Austin, TX, cochair of the First Amendment and Media Litigation Subcommittee of the Section of Litigation's Business and Commercial Litigation Committee. Nevertheless, "the judge can balance the public's right

agrees Gregory A. Beck of Public Citizen Litigation Group, Washington, D.C. "One of the reasons court proceedings are public is so that information affecting the public's health and safety comes to light," says Beck. "The defendants had an opportunity to negotiate a confidentiality agreement beforehand and failed to do so," he notes.

"If the transcribed deposition is filed with the clerk's office, then the deposition may be read by anyone who looks at

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to know and have access with the need to protect its proceedings if there is an overriding state interest in doing so," she says.

"While a case is pending, the lawyer should properly be constrained in the ability to put this sort of material out there for the world to see," says Lamont Jefferson, San Antonio, TX, cochair of the Section's Commercial and Business Litigation Committee.

"What's troubling to me is that a lawyer can try to gain an advantage through Internet publicity," says Jefferson, referring to Texas Bar Rule 3.06—"Maintaining the Integrity of the Jury System"—as possibly applicable.

The plaintiff's counsel Jeffrey L. Weinstein, Houston, disagrees. He sees the issue as having First Amendment ramifications. No Texas bar rule specifically deals with posting materials on the Internet, he notes.

A court should not restrict the public from viewing material like this without good reason and specific findings that there is no less restrictive alternative,

the court file. It is usually a public record depending on the rules of the court or state," observes Michael Alexander Garcia, Miami, cochair of the Section's Internet Litigation Subcommittee of the Business and Commercial Litigation Committee. Garcia agrees with the Texas court, however, that before a deposition is filed and a matter of public record, "it is not considered ethical for the contents of a deposition to be used in any other manner other than to refute a witness's statements in a courtroom."

"Posting public records on the Internet should be encouraged, not discouraged, because of its potential to inform so many more people about issues that otherwise would remain obscure," says Beck. There is nothing misleading about posting a defendant's own words, says Beck. He suggests that if the defendant feels that the quotations have been taken out of context, then the defendant's proper remedy is to post a response and provide the context, not to seek an order censoring the material altogether. ▀