



TRIBUTE TO JAMES PATRICK MURPHY (MURPH) AUGUST 28, 1959 TO JUNE 16, 2011



Murph started and ended his 26-year law career at Berry Moorman. He was a hard-driving and determined trial attorney who championed numerous cases to successful conclusions. Clients knew Murph as a man of integrity and a trusted counselor who truly cared about them. To us at Berry Moorman he was a highly valued partner, colleague, mentor, and dear friend.

While Murph worked very hard, he also enjoyed a good party. Each year he would add a touch of class to our firm's Christmas party by wearing his traditional Scottish kilt. He loved being with people and they loved being with him.

Three years ago Murph married Maria (Maru) E. Flores. As Maru put it, they were living a fairy tale. He and Maru bought a home in Grosse Pointe Farms within walking distance of the Crescent Sail Yacht Club where they were members and kept their sailboat. Murph was also an avid cyclist and member of the Detroit Athletic Club.

As Murph would say, "Don't mourn for me but lift your glasses high." We shall forever hold Murph in our hearts.

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DIGITAL MILLENNIUM COPYRIGHT ACT OFFERS COPYRIGHT OWNERS PROTECTION FOR INTERNET CONTENT

By **Richard R. Zmijewski, Sr.**

Picture it: Your significant time and effort creating a content-rich, customer friendly business website is paying off with rave reviews and new business. Now picture this: a few months after the launch of your website, you stumble across a website that has taken content from your website and reused it.

It's not clear whether a competitor is trying to appeal to the same customer base or whether an opportunist is using your content in order to raise ad revenue with banner ads. Whatever the reason, you want the infringing content taken down now. There is a solution that can bring immediate results and may avoid having to file a lawsuit.

In 1998, the Digital Millennium Copyright Act ("DMCA") was passed to increase copyright protection on the internet. Under the Act, a copyright owner can send a DMCA takedown notice to the host of a website that contains the infringing content. In order to avoid liability, the host, usually an internet service provider ("ISP"), must remove any infringing material. Prior to passage of the DMCA, a copyright owner was required to file suit against the infringer in order to have infringing content removed.

However, in order for the notice to be effective, it must contain the following four elements –

1. The notice must identify the copyrighted work. If there are multiple copyrighted works on the same site, the notice should list all the copyrighted works.

2. The notice must identify the location of the infringing material that is to be removed.

3. The notice must contain a statement that the copyright owner (or the letter writer) has a good faith belief that the copyright owner or the law does not permit the use of the material.

4. The notice must contain a statement that the information is accurate and include contact information for the copyright owner.

If the notice does not substantially comply with these four requirements, an ISP has no obligation to comply with the request.

The DMCA requires the ISP to promptly notify the infringer while also blocking public access to the claimed infringing material. The infringer may file a counter notice with the ISP. In that case, the ISP is then required to reinstate the blocked material within 10-14 days. At that point, the copyright owner's only option to stop the reinstatement of the infringing material is to file an action in court against the violator.

An ISP is motivated to respond to a takedown notice since the DMCA offers the ISP a safe harbor, or immunity from liability, if it falls within one of the four excluded categories and it complies with the takedown letter. The four excluded categories cover a broad range of ISP activities including transitory communications (publishing without editing or selecting the material), system caching (temporary storage), storage (at the direction of the user without benefit to the ISP), or search engines. To avoid liability, the ISP must also promptly comply with the takedown request.

Although sending a DMCA takedown notice to an ISP is straightforward, there are some other considerations that apply when drafting the notice. It is important to keep in mind the inherently public internet age. A scathing takedown notice might seem like a good idea until it is posted on the internet for all to see. As a result, your image could be significantly tarnished. Many copyright owners have been ridiculed for their over-the-top and baseless takedown notices (take a look at chillingeffects.org to see some examples). Bottom line: taking public relations into consideration when drafting your takedown notice can go a long way to promoting your image while also protecting your legal rights.

While a valid takedown notice requires that technical requirements are met, the DMCA can provide an economical and swift solution to stop the infringement of copyrighted material.

This is part of a larger initiative by the IRS to recoup lost revenue from uncollected employment taxes on fringe benefits. It is common for a nonprofit to overlook its obligation to report the value of the benefits paid or provided to an executive when determining total compensation paid. The IRS is taking the position that the failure to properly tax or include fringe benefits when reporting an executive's compensation on a form W-2 results in an automatic excess benefit

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NONPROFIT BENEFITS - THE CURRENT IRS TARGET

By **Thomas M. Sullivan**

May 2011

The Internal Revenue Service ("IRS") has recently turned its sights on benefits given by nonprofit organizations to their executives. Its weapon is the intermediate sanctions provisions of Internal Revenue Code § 4958 which allow the IRS to penalize a nonprofit entity and a disqualified

person through taxes, penalties, and other remedies. A "disqualified person" is a person in a position to exercise substantial influence over the affairs of the nonprofit organization and who has received from the organization what the IRS has determined to be excess benefits.

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thus subjecting the nonprofit organization to intermediate sanctions.

If taxable fringe benefits are not included in the W-2s prepared by your nonprofit, the position of the IRS is that it will find your organization to be engaged in an excess benefit transaction. Some examples of targeted benefits and perks are unsubstantiated business expenses, discretionary spending allowances, first class travel, companion travel, club memberships, personal use of cell phones, and the like.

What can a nonprofit entity do? Form 990 points the way. It highlights the importance of the nonprofit entity reviewing its internal compensation decisions, the policies and practices used in making those decisions, and the governance policies and controls associated with fringe benefits.

The bottom line is:

1. Develop a structure for making compensation decisions and ensure that the structure is transparent and independent,
2. Establish sound policies and procedures with respect to the compensation process including, finding

out what other similarly situated nonprofits are paying where appropriate,

3. Establish an independent group of individuals to make compensation decisions, whether composed of independent members of the Board of Directors or a duly organized and authorized compensation committee or similar group, and

4. Be sure the independent group adheres at all times to the policies and procedures established.

If your organization takes these four steps, efforts to ward off the IRS should be successful.



CYBER HARRASSMENT, DEFAMATION, AND EXTORTION

By **Randolph M. Wright**

Introduction

The internet provides a low cost public forum and a global audience. This allows people to easily publicize their grievances and promote their personal agendas. For example, a disgruntled employee may air his or her complaints against a former employer on a blog or on what is known as a "gripe site." These forums provide an opportunity to publicly criticize or attack anyone, including the rich and powerful, governments, politicians, and multinational corporations.

We have all seen postings on the web that are crude, rude, and unfair. As with many things in life, someone always oversteps the bounds of common decency or the civil or criminal law.

Cyber Harassment

Using the internet to harass individuals and businesses has become rampant. However, if the communication does not meet the criteria of a civil or criminal offense, it likely will not make sense to invest a lot of money or time responding.

If an individual or business is the target of unfair accusations or harassment, there are a number of actions that can mitigate the impact. If a blogger has authored the post, contact him or her and ask that they take the communication down. If that is not successful, consider having an attorney write a strongly worded letter demanding removal and indicating that if the material is not eliminated and the harassment continues, legal action will be taken. In many cases, this will produce a result.

If the harassment continues and there is a threat to the reputation of an individual or business, consider having a company that specializes in online image management address the problem. Two such companies are www.reputationHawk.com and www.reputationdefender.com.

Cyber Defamation

Generally, defamation is a false statement of a material fact that damages the reputation of the target. The use of the internet to broadcast or publish these

false statements is called cyber defamation. Cyber defamation includes statements made with the intent to harm the individual's or company's reputation and cause damage. In most states, cyber defamation is covered by statute and common law.

The Michigan statute defines "libel" as a statement which is false in some material respect, which has a tendency to harm the libeled person's reputation, and which is communicated to a third person by printing, writing, a sign, or a picture. The communication could be made, for example, by posting a written comment or a picture on Facebook.

Michigan law defines "slander" as a statement which is false in some material respect, which has a tendency to harm the slandered person's reputation, and which is communicated by words or gesture to a third person. The statement could be made, for example, by spoken words or gestures on YouTube.

Under the statutes and common law of many states, including Michigan, certain accusations are defamatory per se (from Latin "of itself"). For example, it is defamatory per se if a former employer falsely tells a third party that a former employee extorted money from his company.

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Generally, defamation per se is actionable if it falls into one of four categories 1) imputations of criminal conduct, 2) allegations injurious to another in their trade, business, or profession, 3) imputations of a loathsome disease, and 4) imputations that a woman is unchaste (which has evolved into such assertions against a minor female).

If you or your business is the subject of defamatory actions or statements, consider fighting back. However, by definition, a defamatory statement must be a false statement. Truth is a defense to a claim of defamation.

In bringing a defamation lawsuit, it is important to provide proof of the defamation. Print a hard copy of the statement or, if the statement is contained in a blog, take a screen shot of the blog displaying the false statement and any third party responses. If the statement is made in a verbal conversation on You Tube, record it. If the defamatory statement has been removed before it could be recorded, a written notarized statement of a witness who saw it may provide proof that the statement was made.

Exemplary damages are available in Michigan for egregious circumstances. In order to recover exemplary damages, the plaintiff must prove 1) the defendant published the statements complained of in bad faith or with ill will, 2) the plaintiff demanded a retraction from the defendant and allowed enough time for the retraction to be given before starting the lawsuit, 3) the plaintiff incurred some incremental or increased injury attributed to a sense of indignation and outrage, and 4) the increased injury was caused by defendant's bad faith or ill will.

Cyber Extortion

One of the more severe cyber crimes is internet extortion. Cyber extortion occurs when the extortionist makes a demand on a person or a company under the threat of causing harm. The extortionist often demands money, but can also demand other types of payment such as

sexual favors or illicit drugs.

At least five types of internet extortion have been identified –

1. The internet or a computer network is used as a medium of extortion. For example, an extortionist uses false identities or encrypted messages to post attacks on a victim on a public forum like a computer bulletin board. The extortionist may post libelous or slanderous statements and then demand money from the victim to stop.

2. Digital technology is the target of the threat. The internet extortionist may deface a victim's website by altering the pages so they contain obscenities or a web link to a competitor.

3. The internet is used as a medium for disclosing embarrassing or harmful information. The extortionist threatens to post humiliating pictures of a celebrity or public figure unless payments are made or certain actions taken.

4. A digital information system is used to enable extortion payments to be made to multiple jurisdictions quickly and beyond the reach of the authorities.

5. Digital technology is used as an instrument in an extortion scheme. In this case, "harvesting" software and search engines could be used to gather embarrassing information about the victim.

Most countries around the world have adopted laws against cyber extortion. For example, in the US, the 1996 Computer Fraud and Abuse Act criminalizes any act of extortion involving computerized means.

In April 2010, a California man was charged with cyber extortion after he threatened to send out millions of emails criticizing New York Life Insurance Company unless it paid him \$3 million. The man was upset because the company refused his demand to refund to him a \$50,000 policy premium. He registered the domain name "newyorklifeproducts.com" to post nega-

tive comments about the company. He also communicated to New York Life "I think you get the idea, I'm going to drag your company name and reputation through the muddiest waters imaginable. By the way, yes, I'm crazy. Yes, I am vindictive. Yes, I am extremely upset."

Libel and slander actions must be pursued in the civil court system. In contrast, the criminal courts adjudicate the crime of cyber extortion. Obviously, the judge or jury will have to balance the facts of the case against the First Amendment freedom of speech rights of the defendant.

If you or your company are threatened by any of these means, contact an attorney or law enforcement agency. Often, a letter from an attorney or detective stating that the matter is being investigated and legal proceedings are being considered will result in the wrongdoer or criminal disappearing into the shadows or moving on to a different cyber target.

Call Randolph M. Wright (248) 645-9680 for a free confidential consultation protected by the attorney-client privilege.

The material discussed in Law Notes is meant to provide general information and, given the limited space, is necessarily only an overview of each issue discussed. The information contained in this newsletter is not intended to provide legal advice and should not be acted upon without obtaining legal advice that is tailored to your facts and circumstances.

IRS Circular 230 Disclosure: *To insure compliance with Treasury Regulations, we are required to inform you that any tax advice contained in this communication was not intended or written by us to be used, and may not be used by you or anyone else, for the purpose of: (i) avoiding penalties imposed by the Internal Revenue Code; or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed in this communication.*

FIRM NEWS

Berry Moorman hosted a presentation by First American Title regarding the packaging of due diligence services in commercial real estate transactions

Randolph M. Wright and **Simon Edelstein** recently led a trade mission to Russia which focused on the Russian forestry and railroad industries. Mission participants were manufacturers of equipment used in these industries who are steadily growing their market share. These companies successfully entered the Russian market two years ago as a result of a trade mission that was also led by Randy and Simon.

Randy also gave a presentation on the legal aspects of doing business in Russia at an event exploring new opportunities for US suppliers in the Russian automotive sector. The event was sponsored by the East Michigan District Export Council.

David M. Foy, Sheryl A. Laughren, and **Linda M. Reyna** represented Berry Moorman at the recent Michigan Nonprofit Association SuperConference. The SuperConference is Michigan's premier conference for nonprofit professionals. Over 500 attendees participated, including Governor Rick Snyder. The association provides support to almost 900 member organizations and is open to all nonprofit organizations and governmental entities as well as the businesses and consultants that serve them. The Berry Moorman exhibit highlighted the firm's expertise in nonprofit law.

Sheryl A. Laughren spoke on corporate governance before the Michigan Assisted Living Association ("MALA") annual conference. MALA is a nonprofit organization representing 4,200 assisted living, residential, and vocational services programs that serve over 40,000 individuals statewide.

Thomas M. Sullivan, at the request of the Membership Committee of a nonprofit entity, gave a presentation on April 29, 2011 to the nonprofit's Board of Directors with respect to officers and directors duties and obligations regarding governance responsibilities.

David M. Foy spoke to Garden City Hospital and Oakwood Hospital residents this spring on the topic of key terms of employment agreements including at-will provisions, noncompetition agreements, and bonuses.

Dave and family also hosted University of Michigan Football Coach Brady Hoke and recent Super Bowl champion Charles Woodson at an April fundraiser in Grosse Pointe Farms supporting the University of Michigan Mott Children's Hospital.

John J. Schrot, Jr.'s article, "Marital Agreements," was published May 16, 2011 in *Michigan Lawyers Weekly*.

Donald F. Carney, Jr. performed classic rock with his band, AnTekes, at the Detroit Athletic Club on June 24 and at Birmingham's Shain Park on July 20. Berry Moorman is a gold sponsor of the 2011 Summer Concerts in the Park. These are free concerts which take place every Wednesday from June 22 through August 10 at Shain Park.

Harvey B. Wallace II has been appointed chairman of the Employee Benefits in Estate Planning Committee of the American College of Trust and Estate Counsel ("ACTEC") for a three year term beginning June 2011.

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