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Litigation Alert – Reputational Recovery

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Personal and Corporate Reputation: Five Lessons from 2016

1. You Can Prove a Negative

On November 19, 2014, Sabrina Erdely's *Rolling Stone* article "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA" went viral. The article depicted the violent gang rape of a University of Virginia student ("Jackie") at a Phi Kappa Psi fraternity party. The online article was viewed 2.7 million times. Rolling Stone issued a contemporaneous press release, while Erdely promoted the article in media appearances. In April 2015, *Rolling Stone* issued a formal retraction after the premise of the article fell apart. UVA administrator Nicole Eramo, Phi Kappa Psi and an individual fraternity member sued *Rolling Stone* for defamation. Last month, a jury awarded Ms. Eramo $3 million in damages.

The critical first step for those harmed by the article was a time-tested method for reputational recovery: assembling court-admissible evidence. Interviews revealed that the reporter failed to interview (1) the alleged assailants (or obtain their full names) or (2) the individuals who discovered Jackie on the night in question. Interviews revealed that UVA students had informed the reporter that her portrayal was inaccurate. Interviews further revealed that the reporter never obtained critical corroborating documents. An investigation demonstrated that the fraternity did not host a party on the night of the alleged attack and that no members of the fraternity matched Jackie's description of the alleged assailants. The investigation also revealed that Jackie told the UVA administration a completely different story than the version she provided to Rolling Stone. While courts will continue to make the aggrieved parties whole, the thorough investigation ensured that the facts replaced the discredited article in the permanent record.

2. Truth Is Not Always a Defense

In September 2012, an editor for the website Gawker received a DVD by mail. Less than a month later, Gawker published the contents of the DVD—an excerpt of a sex tape involving Terry Bollea aka Hulk Hogan. The video went viral, with more than five million views. On March 18, 2016, a jury sitting in Florida state court awarded Hogan approximately $140 million in damages, effectively putting Gawker out of business. What perhaps got lost in the news coverage is that the case centered not on defamation or whether the publication was false, but on privacy interests or whether the subject matter was "newsworthy."

The verdict may have implications for other cases involving the publication of leaked or stolen data, including bank records, medical records and other confidential information. Victims of data breaches often have few options when leaked data is published online, even when the records are stolen or leaked in violation of an employment agreement. As a general rule, media outlets are not liable for publishing documents obtained by third parties where the media outlet played no role in the interception and the records are a matter of public concern. The Gawker case may signal a shift in what is considered a matter of public concern. To borrow from Justice Oliver Wendell Holmes, the law is how judges and juries act.

"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."1[1] Publishers of online clearinghouses of bank records and other confidential information may find themselves on increasingly precarious legal footing.

3. Publishers of "Fake News" Are Not Immune to Legal Action

Much has been written about the political implications of "fake news" or purposefully fabricated news accounts, but such fake news stories can also damage corporate reputation. Organizations are increasingly confronting false stories or negative reviews that appear to be the work of a business competitor. Courts can be a powerful tool to shine light on the persons or entities behind the publication. Strategic litigation offers discovery tools to identify an anonymous threat and ultimately remove false and defamatory online content.

4. Public Statements Involving Whistle-Blowers Warrant Caution

Organizations continue to struggle with public statements involving whistle-blowers. In 2001, Michael McQueary witnessed Jerry Sandusky engaging in inappropriate sexual activity with a young boy in a Penn State athletic facility. McQueary reported the incident to his superiors, who declined to notify law enforcement. On November 5, 2011, two Penn State administrators were charged with perjury and failure to report following McQueary's testimony before a grand jury. That day, former Penn State President Graham Spanier issued a statement expressing confidence in the university's handling of the allegations and stating that "the record will show these charges are groundless." The seemingly innocuous press statement would come back to haunt the university. On November 30, 2016, McQueary was awarded more than $12 million in Pennsylvania state court, in part because the press statement was found to be an effort to discredit and retaliate against a whistle-blower.

Multinational companies also face conflicting legal frameworks when deciding whether to report whistle-blower claims to law enforcement. While the United States has strong whistle-blower protection laws, companies are often faced with reporting whistle-blower claims involving alleged conduct in countries without such protections. For example, several Asian countries have no legal protections for whistle-blowers. Some countries have whistle-blower laws with gaping libel exceptions that undermine any purported legal protections. Other jurisdictions do not protect statements made to third parties, including statements to the media and law enforcement in some circumstances. In order to minimize the risk of a defamation claim by an individual accused of misconduct, organizations should engage in a careful analysis of the implications of reporting whistle-blower claims in all jurisdictions where the organizations operate.

5. The Rise and Fall of the "Bogus Lawsuit"

This year again confirmed the nearly ironclad immunity afforded to Internet Service Providers (ISPs) under Section 230 of the Communications Decency Act for content created by third parties. While ISPs are a critical partner in identifying an anonymous online threat, it often takes a court order to prompt an

[1] Oliver Wendell Holmes, "The Path of the Law" (1897), *The Collected Works of Justice Holmes,* vol. 3, 393.

ISP to remove online content. The rigidity of Section 230, coupled with the importance of online search results to corporate and individual reputation, perhaps invited the mischief known as the “bogus lawsuit,” or a fake lawsuit designed to remove inconvenient webpages.

More than two dozen recent cases followed a similar three-step pattern. First, a plaintiff sued a fake defendant for a comment posted on a webpage. Second, the defendant almost immediately (1) executed an affidavit acknowledging that the statement was false and (2) agreed to an injunction. Third, a court entered a “consent” order declaring the material defamatory. With the court order in hand, the plaintiffs were able to convince search engines to remove entire webpages, even where the bogus lawsuits involved a single comment on the webpage. A federal judge has reportedly asked the U.S. Attorney’s Office for the District of Rhode Island to investigate the parties and lawyers engaged in this fraud upon the courts. In other words, the most effective way to have a webpage taken down is to have a lawyer communicate with the publisher.

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