LITIGATION ALERT

October 2010

Message From The Chair

Douglas Cooper

Welcome to the October 2010 *Litigation Alert*. This is an exciting time for our Litigation Department. After more than 10 years as Co-Chairs of the Department, Mark Mulholland and Doug Good have assumed new roles at the Firm. Mark recently became the Firm's sole managing partner and will continue as an active member of the department. Doug, former President of the Nassau County Bar Association, has become the department's first Chairman Emeritus. Doug will continue to provide insightful guidance and advice in all matters relating to commercial litigation and the judicial system.

I am very pleased to follow Mark and Doug as Chairman of the Litigation Department and to lead a team of the finest litigators anywhere. In this *Litigation Alert*, you will read about a major victory RMF obtained in the Second Circuit on behalf of clients wrongfully named in a civil rights lawsuit. In addition, you will learn how the ever-evolving landscape of social media can affect litigation.

I personally welcome your ideas for future issues. You may reach me at 516-663-6576 or dcooper@rmfpc.com.

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RMF Obtains Major Attorney's Fee Award on Behalf of Municipal Client

By Jonathan C. Sullivan, Esq.

Jonathan C. Sullivan

The Second Circuit recently affirmed a $908,638.50 attorney's fee award in favor of several present and former Village of Sea Cliff officials following a major civil rights trial in which the Village and its officials defeated the plaintiff's religious and political discrimination claims relating to the plaintiff's efforts to open a coffee shop in Sea Cliff. The plaintiff sued the Village and individual defendants under the civil rights statute (42 U.S.C. § 1983), claiming that the defendants conspired to delay his application and imposed unreasonable conditions on his coffee shop because he is Jewish and based on his political affiliation. This despite the fact that the plaintiff purchased the property subject to a restrictive covenant which expressly prohibited the cooking or preparation of food on the premises.

RMF served as lead defense counsel during the trial in the Eastern District of New York. RMF successfully moved to dismiss the majority of plaintiff's religious and political discrimination claims at the close of plaintiff's case and obtained a jury verdict in favor of the defendants on the remaining civil rights claims.

RMF moved for attorney's fees shortly after the trial. A prevailing defendant is entitled to attorney's fees under 42 U.S.C. § 1988 if he can demonstrate that the plaintiff's claims were frivolous and groundless – yet courts rarely grant such awards to victorious defendants because of the potential chilling effect on legitimate claims. This is particularly true if the plaintiff's claims are allowed to proceed to trial.

The District Court granted RMF's application and awarded attorney's fees to several of the individual defendants, noting that the plaintiff failed to mention some of them by name at trial. The Second Circuit affirmed the District Court's determination in its entirety, concluding that the plaintiff failed "even to attempt to adduce any evidence that the dismissed Defendants' alleged differential treatment of Plaintiffs was based upon impermissible considerations, an essential element of their selective enforcement claims under 42 U.S.C. § 1983, *see LaTriets Rest. & Cabaret Inc. v. Vill. Of Port Chester*, 40 F.3d 587 590 (2d Cir. 1994), leaving it within the district court's discretion to conclude that Plaintiffs' allegations had been without substance from the start."

The Second Circuit's decision is a significant victory for municipal defendants and stands as a stark warning to plaintiffs that would pursue frivolous and groundless claims against municipal officials.

Please contact **Jonathan C. Sullivan** at 516-663-6603 or jsullivan@rmfpc.com with questions on this or any litigation-related topic.

Social Media May Provide a Fertile Source of Information For Litigants

By Kimberly Malerba, Esq.

Kimberly Malerba

For many litigators and the companies that retain them, e-discovery has been difficult to grapple with, particularly where there is a seemingly insurmountable number of emails and other documents and data. In this age of social media, Web-based sites such as Facebook® and Twitter® are creating an uncontrolled and largely unmonitored minefield, which may be helpful, or hurtful, to those embroiled in litigation.

Information that can be glommed from social-media sites may be useful for both sides involved in litigation, and may be particularly useful when preparing for trial. While the law is still developing concerning how much and what types of social media-based information a court will order a party to produce in discovery, as well as what will be deemed admissible at trial, it is nevertheless extremely useful for the lawyer to take it upon him or herself to review any social-media or Web pages maintained by parties or witnesses. You may inadvertently come across information that contradicts a witness's testimony, or otherwise uncover details that are prime for cross-examination. Social media provides an avenue to discover admissions made by a party who had no idea that you were listening or "watching."

There are several areas of litigation for which social media may have an acutely significant impact. Employment discrimination and sexual harassment litigation are two of those areas. For example, in a scenario where your corporate client finds itself defending a claim of discrimination based on a protected classification such as religion, a good plaintiff's lawyer will likely look on social-media pages maintained by the corporate supervisor to see whether he or she has a particular religious affiliation or has made any statements, comments or has posted any pictures that would support the employee's claim of discrimination. This readily available information may be accessible without any court order or subpoena if the individual has made the information publicly available (or failed to properly secure it with appropriate privacy settings).

On the other hand, employers may also use this electronic information as a sword. In an on-going litigation in a federal court in Indiana, two employees asserted sexual harassment claims against a company, claiming among other things, that they had suffered severe emotional distress as a result of the alleged sexual harassment. The court permitted limited discovery of the two employee's Facebook® pages, including the production of pictures and other items that may relate to the employee's mental or emotional state, as the Court determined that these had been put at issue by the plaintiff's claims. While this particular court had put some limits on the discoverable information in that case, it is likely that such information will become more widely discoverable as the courts continue to adapt to the ever-expanding electronic landscape in which we live.

E-discovery will likely continue to play an increasing role in other types of litigation, as well as including personal injury and divorce cases because of the vast amount of personal information on the litigants that may be available. As a result, those advising litigants need to be aware of the potential pitfalls that public exposure of your clients on the Internet can create, while simultaneously being mindful of the concerns surrounding destruction of evidence. It is also equally, if not more important, to advise clients prior to litigation to consider these issues so that they make thoughtful decisions as to what business policies should be adopted concerning the use (and to curtail the abuse) of social-media sites.

Please contact **Kimberly Malerba** at 516-663-6679 or kmalerba@rmfpc.com with questions on this or any litigation-related topic.

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