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Lawyer Bad Behavior Is Case For Courts

By **Matt Masich**
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DENVER — Lawyers have latitude to say defamatory things in court about the opposing party, but there is no such latitude for lawyers to defame opponents on Twitter. That's what Westwood College argues in a lawsuit that recently survived a motion to dismiss in Denver District Court.

Denver-based Westwood, a for-profit school with 17 locations around the country, last year sued Florida law firm James Hoyer Newcomer & Smiljanich, alleging its lawyers used social media to denigrate the school and interfere with its business.

At the time Westwood filed its lawsuit, the Florida firm was already representing clients in litigation against the school for allegedly misleading its students about the cost and value of its education. The firm set up websites with negative stories about Westwood, which Westwood claims constitutes a smear campaign.

"The goal seems to be using this over-the-top rhetoric to encourage the subject of their attention [Westwood] to settle," said Bill Ojile, Westwood's chief legal counsel and compliance officer.

James Hoyer and its lawyers deny this in court documents and say Westwood's lawsuit was filed in retaliation.

Westwood takes flak

For-profit colleges have been the subject of government scrutiny during the last few years. Westwood's parent company, Alta Colleges Inc., agreed two years ago to pay the U.S. government \$7 million to settle a lawsuit accusing its schools in Texas of submitting false claims for federal student aid.

James Hoyer attorneys have filed five putative class-action lawsuits or demands for class arbitration against Westwood on behalf of former students, though no classes have been certified.

James Hoyer's case in Colorado began in May 2009 with a demand for class arbitration. The plaintiffs claimed Westwood engaged in high-pressure recruiting, misrepresented how much it would cost students and overhyped the value of the school's degrees.

When the arbitrator denied a class in July, the firm filed a putative class-action lawsuit in Denver federal court along similar grounds. Judge William Martinez presided last week over a hearing in which Westwood moved to dismiss the lawsuit and compel individual arbitration.

Trying case on Twitter

James Hoyer didn't limit its advocacy to court filings, which prompted Westwood's lawsuit against the firm. Westwood alleges defamation, interference with contract, interference with prospective business relations, disparagement, violation of the Colorado Consumer Protection Act, and civil conspiracy.

The firm's most egregious action,



Left, Perkins Coie attorneys Markus Funk and Norton Cutler, right, flank Westwood College General Counsel Bill Ojile in this photo taken in Perkins Coie's Denver office. The Westwood legal team is suing a Florida firm for defamation. | LAW WEEK PHOTO JAMIE COTTEN

according to Westwood, was its Twitter campaign. James Hoyer attorney Jill Estes sent unsolicited Twitter messages to people who mentioned they were excited about having just enrolled at Westwood.

Estes sent "tweets" such as: "Molly, Westwood College is not regionally accredited, and why does it cost \$70,000? Many complaints at <http://bit.ly/westwood>"; "problems with Westwood College? You are not alone <http://bit.ly/westwood>"; "You are not alone, There's some more info about Westwood College here <http://bit.ly/westwood>."

All links directed back to Westwood-

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You have a lawyer going on Facebook and Twitter and commenting on a bulletin board, egging people on negatively without saying, 'I'm a lawyer and I have a class-action coming,' ”

— Norton Cutler

Scammed.Me. Similar messages were posted on Facebook and other social media, Westwood alleges.

"You have a lawyer going on Facebook and Twitter and commenting on a bulletin board, egging people on negatively without saying, 'I'm a lawyer and I have a class-action coming,'" said Norton Cutler, the Perkins Coie attorney in Denver who leads Westwood's outside legal team in its lawsuit against the Florida firm.

The firm also operates "ConsumerWarningNetwork.com," a website with lawyer-penned negative articles about Westwood. This site presents itself as an independent consumer advocacy group.

The firm also has a website called "WestwoodScammed.Me," which has dozens of posts suggesting problems with

Westwood, updates on the Westwood class-actions, and an invitation to current or former students to contact James Hoyer. A main theme of the posts, many of which were written the firm's attorneys, is that Westwood scammed students into enrolling so the school could benefit from the federal aid money they brought in.

"When you use words like 'scam' and 'rip-off,' those are statements that are very charged and designed to elicit an extreme negative reaction," Ojile said. Specifically, Westwood alleges the statements were intended to dissuade

prospective students from enrolling, encourage current students to leave, and drive down the school's revenue.

Lawyers can write whatever they want in court filings, but the things they write on the Internet are subject to the same defamation laws as ordinary citizens, Westwood's lawyers contend.

Lawyers are allowed to make defamatory remarks in the courtroom because of the "litigation privilege." But the privilege doesn't extend to remarks lawyers make on the courthouse steps, or anywhere else outside the court proceeding, said Markus Funk, a Perkins Coie partner who has consulted on the case.

"Simply because you are an attorney who filed a lawsuit does not convey to you *carte blanche* permission to exit the

courthouse and utter defamatory statements about the defendant," Funk said. "The lesson is that, although the law renders statements made in the context of litigation non-actionable, counsel who exceed the boundaries of what constitutes 'litigation' do so at their own peril."

There are precedents that guide what lawyers are allowed to say on the courthouse steps, but comparatively few rulings to guide what they can say on the virtual courthouse steps: Twitter, Facebook and other websites, Ojile said.

"A lot of the case law and certainly the ethical pronouncements have not necessarily caught up with technology," he said.

Courts might be gradually catching up. Denver District Court Judge Sheila Rappaport denied the James Hoyer defendants' motion to dismiss Westwood's lawsuit. While the defendants argued that all Westwood's claims are barred by "an absolute litigation privilege," Rappaport disagreed.

The defamation case can now move forward. Meanwhile, Westwood and James Hoyer continue to fight it out in the prospective class-action cases — and in the press.

Ojile is not only Westwood's chief legal counsel, he's also become something of a PR guru. He takes part in a weekly "PR crisis call" with internal and external people, plus a similar monthly call that involves a broader team including lobbyists and lawyers.

As Westwood states in its lawsuit, James Hoyer took out Google ads to display when someone searches for Westwood College. To counteract that, Ojile has overseen extensive search-engine optimization to make sure official Westwood sites are the first that show up on a search engine's results. •

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