

## Publications

### Court: Defamation Plaintiff Must Provide Evidence to Unmask Unknown Avvo.com Poster

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A Washington appellate court offered defamation plaintiffs a friendly reminder last week: if you want to unmask the identity of an unknown internet poster, you better present evidence to back up your defamation claims.

In a July 6 opinion, the Court of Appeals of Washington ruled that a Florida attorney failed to provide such evidence in moving to compel Avvo.com to produce identifying information in response to her subpoena. Deborah Thomson had alleged the content in the particular negative Avvo review was defamatory but – as the court noted – the family law attorney did not provide any support for her motion, such as through an affidavit or declaration.

A footnote on the last page of the opinion perhaps sums up this case best: “In fairness to Thomson, when she filed her motion, the requisite showing was unclear. And, Avvo brought no motion challenging the adequacy of Thomson’s pleadings. But, because Thomson did not produce any supporting evidence, her claim fails...”

#### *Alleged Defamation on Avvo*

A July 13 review of Deborah Thomson's [Avvo page](#) shows 11 reviews, 10 of which are five-star reviews. The exception is a September 24, 2013 review by an unknown “Divorce client,” who rated Thomson one star and wrote the following:

I am still in court five years after Ms. Thomson represented me during my divorce proceedings. Her lack of basic business skills and detachment from her fiduciary responsibilities has cost me everything. . She failed to show up for a nine hour mediation because she had vacation days. She failed to subpoena documents that are critical to the division of assets in any divorce proceeding. In fact, she did not subpoena any documents at all. My interests were simply not protected in any meaningful way.

Thomson refuted the truth of this post, asserting that the unknown author of the review was not an actual client. She brought claims for defamation, defamation per se, defamation by implication, and intentional infliction of emotional distress.

In order to identify the poster of this review, Thomson issued a subpoena requesting that Avvo produce identifying information of the unknown poster. According to the appellate court's opinion, an Avvo executive/general counsel – after notifying the unknown poster of the review of the pending subpoena and corresponding with him or her – indicated to Thomson that he had reason to believe the poster was, in fact, an actual client.

On the basis of Avvo's correspondence with the poster, Avvo refused to produce the requested documents and asked Thomson to withdraw her subpoena. Thomson instead moved to compel Avvo to produce the identifying information, continuing to allege the content of the review was defamatory – but without any additional evidentiary support.

The trial court denied Thomson's motion.

### *Consideration of Established Standards*

It is well-established that defamatory speech is not protected by the First Amendment. In terms of what evidentiary showing was required to compel disclosure of an unknown speaker's identity in Washington, that question had not yet been established.

Many states and federal courts have wrestled with the issue, with the most popular standards being those set forth in *Dendrite Int'l. Inc. v. Doe No. 3*, 342 N.J. Super. 134, 140, 775 A.2d 756 (2001) and *Doe No. 1 v. Cahill*, 884 A.2d 451, 456 (Del. 2005). Both of these cases are frequently cited outside their respective jurisdictions.

Under the *Dendrite* standard, plaintiffs must do the following:

Attempt to notify the anonymous defendants that their identities are the subject of a subpoena, and explain how to present a defense;

1. Identify the precise allegedly actionable statements;
2. Allege all elements of the cause of action and present evidence supporting each claim; and
3. Prove to the court the right to identify the speaker outweighs the First Amendment right of anonymous free speech.

*Cahill*, meanwhile, requires that reasonable efforts be made to notify the person of the subpoena and plaintiffs must satisfy the standard for summary judgment.

(Notice was not an issue here, as Avvo – like most third parties – satisfied this prong itself by notifying the defendant of the subpoena.)

### *Adopting the Appropriate Standard*

The Washington appellate court stated that the appropriate evidentiary standard must match the relevant First Amendment interest. As the court noted, the defendant's speech was entitled to "intermediate" protection, between that provided to commercial speech (lower) and political speech (higher).

After rejecting a good faith showing standard (argued by Thomson), as well as a motion to dismiss standard – the latter only requiring that a plaintiff allege each element of the claims – the court weighed the remaining standards: the prima facie standard from *Dendrite* and the summary judgment standard from *Cahill*.

While the court did not find that the final prong from *Dendrite* (balancing) was justified in this case, it did side with *Dendrite* in holding that "where a plaintiff subpoenas a third party without the defendant's involvement—the summary judgment standard is too severe and a prima facie standard should be applied."

### *Takeaways*

In short, Thomson was on the losing end in the trial and appellate courts because she did not provide evidence to support her defamation claim. Had she submitted an affidavit or declaration in support of her motion to compel that refuted the assertions in the poster's review, the case likely would have come out the other way.

While the standards vary by jurisdiction and based on unique set of circumstances in each case, it is important that defamation plaintiffs provide evidence to the court supporting their defamation claims when seeking to compel a third party to provide identifying information about a poster. Relying merely on allegations in the complaint might not be enough and is never worth the risk.

While a declaration and affidavit are usually not initially necessary when subpoenaing a third party (recognizing that Ripoff Report generally does require the inclusion of affidavits from plaintiffs with their subpoenas), defamation plaintiffs must be prepared to support their defamation claims when moving to compel production of the requested documents.

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