MARTIN CLEARWATER & BELL LLP

DEFENSE PRACTICE UPDATE

JUNE 2015

Social Media and the Physician – Potential Pitfalls

BY: NANCY J. BLOCK AND JESSICA A. BRESNAN

In a world where social media is seemingly everywhere, it is not surprising that physicians are increasingly using it both personally and in their practice of medicine. The internet is a powerful tool and can facilitate sharing of critical information and advances in health care. While the use of social media in most instances can be harmless and valuable to medical practitioners and their patients, there are certain risks that must be understood and appreciated. The challenges physicians face when incorporating social media into his/her practice include maintaining patient confidentiality (PHI), professionalism and ethical standards. Additionally, the physician needs to be aware of potential medicolegal risk.

Legal Considerations

Physician websites are exceedingly helpful to patients or prospective patients in that they often provide information about the practice, the specialties of its practitioners, and services offered, allowing patients to make educated choices about their healthcare. However, when creating websites and engaging in other social media activities such as blogging, physicians must be aware that their statements may be considered advertising. New York State's General Business Law (GBL) permits a private cause of action if physician advertising is found to be deceptive or misleading to a reasonable person, causing an injury.[1] Medical malpractice plaintiffs can rely on this statute to claim that they were induced to seek treatment with the defendant physician based on the representation on a website. We often see this when physicians advertise their superiority in some fashion. For instance, advertising that Dr. X is the best doctor, has performed more surgeries than any other doctor, uses a state-of-the-art technique that no other physician uses, or is successful at curing a high percentage of patients, absent objective supportive evidence, can expose a physician to potential GBL claims. Unlike common law malpractice claims, this cause of action allows the successful plaintiff to obtain attorneys' fees, and quality assurance statutory protections do not apply.[2]

Significantly, online statements are treated in the same manner as any other statement a defendant physician has authored. Thus, they raise the same evidentiary concerns and can be used to cross-examine a defendant physician or a physician testifying as an expert witness. This is another reason that a practitioner must be thoughtful and accurate in his/her remarks. In one of the more notable cases, a defendant physician using the online name "Flea" blogged about his medical malpractice trial, writing about discussions with his attorney, the defense strategy and commenting on the plaintiff's attorney.[3] During questioning by plaintiff's counsel, the physician was asked if he had a medical blog and if he was "Flea," and he admitted that he was. The case

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1 NYS General Business Law §§ 349, 350, and 350-a.

2 *Ryan v. Staten Island University Hospital,* E.D.N.Y., No. 04-2666 (decided Dec. 5, 2006).

3 *See, e.g.*, Jonathan Saltzman, Blogger Unmasked, Court Case Upended, available at http://www.boston.com/news/local/articles/2007/05/31/blogger_unmasked_court_case_upended/?page=full

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promptly settled.[4]

Plaintiffs also may be entitled to discovery of the physician's website, blog or online postings. Accordingly, a physician must be mindful of the requirement of preservation of the site when litigation is reasonably anticipated. For example, if a physician advertises specific percentages of cure rates, particularly in cancer treatment, or specific percentages of potential complications, a savvy plaintiff will not only request all of the evidence in support of these claims, but also all iterations of the website to see if the percentages or claims changed over time, in an effort to discredit the information.

An additional consideration is that physicians risk opening themselves up to liability when responding to a question or providing medical advice. If a patient-physician relationship is established, then that advice is considered to be medical treatment, which can expose the physician to claims of malpractice – regardless of whether the patient presented in the office for an examination. This is especially of concern given the surge of telemedicine, e-medicine and virtual visits. Only this January, Governor Cuomo signed a telemedicine law requiring insurers to offer the same reimbursement to patients who receive services via telehealth and telemedicine.[5]

Professional and Ethical Considerations

In using social media, a physician must also be mindful of his/her own professional and ethical conduct. Violations can expose a medical provider to inquiries and investigations by the Office of Professional Medical Conduct (OPMC), as well as criticisms from professional organizations.

New York State Education Law defines professional misconduct as advertising not in the public interest that is false, fraudulent, deceptive, misleading, sensational or flamboyant; represents undue pressure; uses testimonials; guarantees any service; or makes a claim of professional superiority which cannot be substantiated; and so forth.[6] Likewise, an American Medical Association advisory opinion on this issue permits physician advertising as long as the communication does not omit "necessary material information," contain "any "false or misleading statement," or "otherwise operate to deceive."[7] The opinion cautions against "[a]ggressive, high-pressure advertising and publicity," and practitioners' claims regarding experience and competence

"...when advertising or engaging in other online activity that may be construed as advertising, physicians must understand the potential implications of their statements, particularly if they contain patient testimonials or make detailed claims about the physician's success rates and qualifications."

"may be made only if factually supportable."[8] Furthermore, because of an ethical obligation to share medical advances, it is unlikely that a physician will have a "truly exclusive or unique skill" and claims implying such "can be deceptive."[9] Thus, when advertising or engaging in other online activity that may be construed as advertising, physicians must understand the potential implications of their statements, particularly if they contain patient testimonials or make detailed claims about the physician's success rates and qualifications.

In one Appellate Division, Third Department case, the Court upheld OPMC's determination that the physician engaged in fraudulent advertising where he represented in a newspaper advertisement that he was "Subspecialty trained in Allergy, Immunology and Rheumatology – Children and Adults." The problem was that the physician did not complete the necessary training and did not have hospital privileges in those specialties.[10]

Notably, professional associations have established additional ethical principles that must be maintained by their member physicians in the context of advertising, which would include social media. For example, the American College of Obstetricians and Gynecologists emphasizes that physicians must also consider how

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4 *Id.*
5 NY Governor Signs Telemedicine Law While Other States Make Progress with New Proposals, available at http://www.americantelemed.org/news-landing/2015/01/07/ny-governor-signs-telemedicine-law-while-other-states-make-progress-with-new-proposals#.VSvUvKPD_Gg
6 NYS Education Law § 6530(27) and § 29.1(b)(12) of the Rules of the Board of Regents.
7 AMA Advisory Opinion 5.02 – Advertising and Publicity (updated June 1996).
8 *Id.*
9 *Id.*
10 *Saunders v. Administrative Review Board for Professional Medical Conduct,* 265 A.D.2d 695 (N.Y. App. Div. 1999).
11 ACOG Committee Opinion Number 510, November 2011.
12 AMA Opinion 9.124 – Professionalism in the Use of Social Media.

Zero Tolerance for Blatant Sexual Harassment and Gender Discrimination in the Workplace Does Not Excuse More Subtle Differentiations

By: Adam G. Guttell and Michael J. Nesse

Recently, the case of *Ellen Pao v. Kleiner Perkins Caulfield and Byers (KPCB)*[1] has provided insight into the culture and atmosphere at a large, high-profile venture capital firm. The defendant, KPCB prevailed at trial, but the publicity in this case revealed unflattering details of those involved. Ms. Pao alleged she was subjected to months of inappropriate sexual approaches and advances by a KPCB partner. Subsequently, she allegedly succumbed to the partner's advances and engaged in an affair. Ms. Pao claims that after ending the relationship, the partner retaliated against her by: excluding her from numerous business meetings; excluding her from email discussions in which she had initially been included; failing to share information that she required for her job; and preventing her from interviewing new employees. Additionally, Pao claimed that another senior partner at KPCB gave her a book entitled "The Book of Longing" that contained many sexual drawings and poems with strong sexual content as a Valentine's Day present.

Similarly, in a recently filed federal court lawsuit, Elizabeth Bailey, an ex-Nelson Levine De Luca & Hamilton, LLC attorney, claimed that the department in which she worked had a sexist "frat-house" atmosphere. Ms. Bailey alleged that she was subjected to: comments by a male superior who stated she and another female co-worker should pose for a girl calendar; comments by male partners telling her that she was "in the big boys' club now"; exclusion from department meetings and from information that she needed to do her job; and inappropriate comments by a male partner about a case involving allegations of rape and domestic violence. In both the Bailey and the Pao cases, complaints allegedly were made to and ignored by Human Resources.[2]

Both of these cases deal with questions as to whether the allegations, if true, amount to harassing or discriminatory behavior (and whether such conduct could be construed as welcomed or accepted). Whether discriminatory, harassing or neither, both cases raise issues of problematic conduct in the most sophisticated of work environments. The Bailey and Pao cases, as well as others, demonstrate a type of harassment and discrimination lawsuit that would never have been brought 30 or 40 years ago.

During the 60s and 70s, even after the enactment of Title VII of the Civil Rights Act of 1964, many American companies and businesses were considered "Boys' Clubs" with workplace cultures analogous to that of stereotyped fraternity houses. Egregious and inappropriate behavior by male co-workers and supervisors towards women in the workplace was often accepted. Society has moved forward with employment equality and the number of women in the professional leadership positions has risen. Although it is the rare workplace where blatant and egregious discrimination and harassment are tolerated, the Pao and Bailey cases suggests conduct may persist in more subtle and nuanced versions.

When real-life *Mad Men*-like escapades occur, they become front-page news. This does not mean sexual harassment and discrimination rarely occur. Rather, the number of sexual harassment charges filed with the Equal Employment Opportunity Commission (EEOC) or other Fair Employment Practices agencies have only declined about 9% between 1997 and 2011, and of the 11,364 charges that were filed in 2011, 29% had been resolved before proceeding to trial.[3] Frequently, many sexual harassment cases go unreported for fear of retaliation or embarrassment. Further, 26,027 sex-based discrimination charges were filed with the EEOC in 2014.[4] Thus, allegations of sexual harassment and gender discrimination permeate a fair portion of workplaces.

The Association of Women for Action and Research lists five industries with high levels of sexual harassment incidents: business, trade, banking and finance; sales and marketing; hospitality; civil service; and education, lecturing and teaching.[5] Still, it is important to recognize that it may be challenging for the employers to identify discriminatory or harassing conduct when

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1 Complaint at 1–6, No. CGC-12-520719 (Cal. Super. Ct. May 10, 2012).
2 Daniel Siegal, Ex-Nelson Levine Atty Alleges 'Frat House' Sexism, LAW360 (Apr. 7, 2015), http://www.law360.com/articles/640019/ex-nelson-levine-atty-alleges-frat-house-sexism.
3 U.S. Equal Employment Opportunity Commission, Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1997 - FY 2011, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm.
4 U.S. Equal Employment Opportunity Commission, Sex-Based Charges: FY 1997 - FY 2014, http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm.
5 Association Of Women For Action And Research, Research Study on Workplace Sexual Harassment (2008), http://www.aware.org.sg/wp-content/uploads/AWARE_Research_Study_on Workplace_Sexual_Harassment.pdf

Will the Connecticut Supreme Court *Byrne v. Avery Center for Obstetrics an* Change the Evaluation of New York

BY: THOMAS A. MOBILIA AND DANIEL L. FREIDLIN

BY now, most healthcare professionals are well aware of the civil and criminal penalties they can incur if they disclose individually identifiable patient health information in violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Notwithstanding potential penalties, inadvertent disclosure by healthcare providers can still occur during pre-litigation and pending litigation matters. Disclosing a patient's medical record in response to a defective HIPAA authorization, or, in response to a proper HIPAA authorization, providing a copy of a plaintiff's medical record containing another patient's diagnostic reports, are but two examples. There is now a new area of potential professional liability exposure for inadvertent disclosures: recent decisions in state courts have made it possible for individuals to bring private causes of action for negligent disclosure of protected health information, including compliance with defective subpoenas.

HIPAA's "Privacy Rule" regulates the disclosure of "protected health information" (PHI) by "covered entities" and their "business associates," including health insurers, physicians, healthcare providers, their independent contractors, and others. Under the law, an individual who believes that his PHI was disclosed improperly could file a complaint with the Department of Justice, eventually resulting in the imposition of penalties, sometimes amounting to millions of dollars.[1] HIPAA, however, does not provide for individuals instituting their own lawsuits against healthcare providers who have violated its regulations.[2] It has been suggested that absent any financial incentive for an individual to bring a HIPAA violation to the government's attention, some percentage of violations go unreported. However, a series of more contemporary decisions may well lead to a resolution of these concerns, and also provide a mechanism for awarding damages to the aggrieved patient.

Recently, the Connecticut Supreme Court ruled

Under the law, an individual who believes that his PHI was disclosed improperly could file a complaint with the Department of Justice, eventually resulting in the imposition of penalties, sometimes amounting to millions of dollars.

that individual plaintiffs are permitted to bring private causes of action under state law for negligence and negligent infliction of emotion distress due to a health care provider's breach of its duty of confidentiality in the improper disclosure of PHI. In *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, the plaintiff brought an action against the defendant medical practice for negligently disclosing her ob/gyn records pursuant to a subpoena issued by a local family court.[3] Plaintiff, who received obstetrical and gynecological care from the practice, explicitly instructed it not to disclose her records to a specific individual. A paternity suit was brought against her by the same individual, who then served the defendant practice with a subpoena for a copy of her obstetrical records. Without notification to the patient, and likely without seeking legal counsel, the practice sent her records to family court, where they were subsequently reviewed by the individual to whom she had explicitly prohibited disclosure. When the plaintiff learned that her records had been disclosed, she successfully filed legal papers to seal her records, though the damage had already been done.

Although the plaintiff argued that the defendant practice negligently disclosed her PHI and violated her privacy, defense counsel raised a valid legal argument that such claims must be dismissed because they were preempted by federal law, as HIPAA does not permit

1 http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/cignetpenaltyletter.pdf ($4.3 million fine levied against Cignet Health for violations of HIPAA).

2 42 U.S.C. Section 1320d–6.

3 102 A.3d 32 (Conn. 2014).

t's Decision in *nd Gynecology, P.C.* Breach of Fiduciary Duty Claims?

private causes of action. While the Connecticut lower court agreed with the defense position and dismissed the claims, the Connecticut Supreme Court held, on appeal, that the plaintiff's lawsuit was viable. The Court reasoned that the claims were not preempted, because they were brought under state negligence law, not HIPAA, and Connecticut's privacy law was not "contrary" to HIPAA. Importantly, the Connecticut Supreme Court determined that the plaintiff can use HIPAA to establish the "standard of care" for her negligence claim involving the handling of medical records.

Lawsuits stemming from negligent disclosure of personal information can result in large jury verdicts. Recently, an Indiana jury verdict of $1.44 million was upheld on appeal; the plaintiff in the case claimed that a Walgreens pharmacist had accessed the medication records of her husband's former girlfriend to find out if she was at risk of a sexually transmitted disease.[4]

Historically, New York courts have permitted claims for negligent disclosure of personal information obtained during the course of treatment. In *MacDonald v. Clinger*,[5] the Appellate Division, Second Department, concluded that the negligent disclosure of personal information amounts to a breach of the fiduciary duty of confidentiality that a physician owes to his patient. This duty of confidentiality arises from New York Public Health Law § 4410(b). Eighteen years later, in *Doe v. Community Health Plan*,[6] the Appellate Division, Third Department, reiterated that the duty not to disclose confidential personal information arises from the express promise of trust stemming from the physician-patient relationship. In determining what constitutes an actionable wrongful disclosure, New York courts have examined whether the disclosure was justified. Whether a physician is justified in disclosing personal information without the consent of the patient is a factual issue which hinges on the specific circumstances that gave rise to the disclosure weighed against the public policy of protecting confidential information. This is ultimately an issue that may be decided by a lay jury.

Although New York has historically permitted plaintiffs to bring lawsuits against their physicians for disclosure of confidential information, the *Byrne* decision may give rise to actions against health care providers who comply with defective subpoenas. It remains to be seen if New York courts will follow *Byrne* in imposing liability for compliance with defective subpoenas or by looking to HIPAA to define the standard of care in such lawsuits.

Given the significant exposure that inadvertent PHI disclosure may pose to a physician, healthcare providers must establish office and staff protocols to prevent it from occurring. Providers must make sure that subpoenas or medical authorizations received by their office comply with the requirements of HIPAA before disclosing the medical records. If they are uncertain as to whether such policies or staff education is both compliant and fully effective for avoiding HIPAA violations, as well as potential state court civil actions, providers should consider training in compliance and consultation with an attorney.

4 *Hinchy v. Walgreen Co., et al.*, No. 49D06 11 08 CT029165 (Marion Co. Sup. Ct., Ind., filed August, 1, 2011), affirmed *Walgreen Co. v. Hincy No. 49A02-1311-CT950* (Ind. Ct. App. 2014).

5 84 A.D.2d 482 (Second Dept. 1982)

6 268 A.D.2d 183 (Third Dept. 2000)

Thomas A. Mobilia is a Senior Partner at Martin Clearwater & Bell LLP, who has defended major teaching hospitals, medical practices and individual physicians in high exposure neurosurgery, obstetrical, cardiothoracic, and ophthalmology malpractice cases for over 20 years. He also represents physicians and health care professionals in disciplinary proceedings brought by the New York State Department of Health, Office of Professional Medical Conduct, and by the Office of Professional Discipline. He has counseled and represented hospitals in physician staff credentialing proceedings and he is a frequent lecturer to risk management departments of major medical centers.

Daniel L. Freidlin is a Partner at Martin Clearwater & Bell LLP. Mr. Freidlin focuses his practice on the defense of medical malpractice and professional liability cases and represents major teaching hospitals in New York as well as individual physicians.

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it does not tilt to the egregious end of the spectrum. For example, behavior that may be interpreted as, or in some cases can lead to, harassment or discrimination includes inappropriately complimenting one's clothing, providing co-workers with certain gifts (or excluding certain co-workers from receipt of gifts), making sexual or gender-based jokes or innuendos, excluding workers from teams, meetings or events based upon their sex, and even sexual relationships between co-workers. Even paternalistic behavior by male managers towards female subordinates may be discriminatory in nature. Although employers cannot completely insulate themselves, affirmative steps can and should be taken to avoid such lawsuits.

To set the tone for a healthy work environment and one that is not conducive to harassment or discrimination, employers must implement effective measures and swiftly and appropriately respond to complaints once they arise. Employers must ensure their employee handbooks and workplace policies are up to date, and that they specifically address workplace relationships, allegations of sexual harassment and gender discrimination. In addition, these issues can and should be addressed before employees formally complain to human resources by providing the entire workforce, especially managers and supervisors, with proper training as to how to effectively identify and handle these concerns, and, more importantly, how to conduct themselves appropriately.

Policies, handbooks, and effective human resource management are a must; but, employers can do more. Creating an inclusive culture and tone in the workplace goes a long way towards litigation avoidance. When employees feel included, they are more satisfied with their jobs. Effective managers need to recognize when they are making decisions that impact subordinates in a negative manner. Each manager need not be charged with being a social worker or counselor, but a positive company attitude can be cultivated from the top down. When employees are rewarded for the quality of their work product alone, favoritism is discouraged, and company celebrations are professional rather than juvenile, employees will be more productive and litigation less prevalent.

For appropriate guidance on how to properly plan for and address these issues, speak with one of the attorneys in Martin Clearwater & Bell LLP's Employment and Labor Practice Group.

Adam G. Guttell is a Partner in Martin Clearwater & Bell LLP's Employment & Labor Practice Group. He has extensive experience advising employers of all sizes in diverse industries including health care, finance, manufacturing, transportation and hospitality. As a member of MCB's Employment & Labor Practice Group, he represents clients in employment-related issues ranging from discrimination and harassment to violations of all state and federal fair employment law.

Michael J. Nesse is an Associate at Martin Clearwater & Bell LLP. He is a member of the Employment & Labor Practice Group and also works on the defense of medical malpractice and general liability matters.

SAVE THE DATE

Summer Employment & Labor Webinar

Thursday, July 16th
9:30 – 11:30 AM

Presented by MCB's Employment & Labor Practice Group • Greg Reilly, Esq. & Adam Guttell, Esq.
This program is approved for 2 New York State CLE Credits.
To register, e-mail Courtney Scott at scottc@mcblaw.com or call (212) 471-1235.

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the advertisement is perceived by the public.[11] Breaching these ethical guidelines can expose the physician to reprimand and even potential expulsion from the association.

Patient Privacy Considerations

The combination of medicine and social media creates obvious privacy concerns. The AMA has emphasized that physicians should maintain patient privacy and confidentiality and appropriate boundaries of the patient-physician relationship if interacting online.[12] HIPAA/HITECH and other privacy laws require the de-identification of patients, including redaction of identifiable information such as name, date of birth, social security number, and medical record number. However, there are circumstances where a patient can be identified without divulging such information. This could occur, for example, if a plastic surgeon posts "before and after" photographs of patients without names or other identifying information and simply redacts portions of the patient's face or body. Such considerations also arise in demonstrations of procedures or techniques using actual photographs, radiographic images, or video.

11 ACOG Committee Opinion Number 510, November 2011.
12 AMA Opinion 9.124 – Professionalism in the Use of Social Media.

Conclusion

It is clear that social media and the internet can be beneficial tools to both physicians and patients, but there are factors that must be considered by physicians engaging in such activity. Website content and online statements must be thoughtful and accurate. While use of social media allows physicians to virtually connect with the world, the potential consequences can be very real.

Nancy J. Block is a Senior Partner at Martin Clearwater & Bell LLP. Her practice encompasses all aspects of medical malpractice litigation from inception through trial. She has defended some of the Firm's largest hospital clients as well as individual physicians. She has worked extensively in complex multi-party federal and state litigation and is well versed in the requirements of electronic discovery and the preservation of electronically stored information and advises on these issues.

Jessica A. Bresnan is a Partner at Martin Clearwater & Bell LLP. Her practice encompasses all aspects of medical malpractice litigation as well as professional and general liability. She represents some of the largest teaching hospitals in New York City.

What's New at MCB in 2015

MCB Featured in Long Island's Top Rated Lawyers as published in *Newsday* and the *New York Law Journal*

Martin Clearwater & Bell LLP was selected for inclusion in *Long Island's Top Rated Lawyers of 2015*. The Firm was featured in Legal Leaders in both *Newsday* and the *New York Law Journal*. The Firm's feature in this publication also highlighted the Firm's Employment & Labor Practice Group. Each year ALM releases listings for the top lawyers in Long Island, to help businesses and individuals identify top-ranked lawyers in the area. To be included in the list, attorneys must have achieved the prestigious AV Preeminent® rating from Martindale-Hubbell®.

MCB Expands Connecticut Practice

Martin Clearwater & Bell LLP expanded its Connecticut practice and now has a has a team of attorneys, including partners and associates, who are admitted and currently practicing in Connecticut. The Firm has experience in handling matters in Connecticut in various areas including medical malpractice, health care law, professional liability, general liability and employment and labor law. For more information, contact Michael Sonkin, Managing Partner or William P. Brady, Head of the Connecticut practice team.

Partner Bruce G. Habian Speaks at American Conference Institute

On June 23 and 24, 2015, senior trial partner Bruce G. Habian will share his extensive trial experience concerning neonatal brain injury cases at the American Conference Institute Obstetrical Program in Philadelphia. The focus will be the timing and causation defenses of severe neurologic injuries.

Partner Nancy J. Block Speaks at New York City Bar Program

Nancy J. Block was invited to speak at the Association of the Bar of the City of New York on May 19, 2015 in a program entitled "The 'How To' of Successful Motion Practice."

Partner Kenneth R. Larywon participates as Instructor at Asia Pacific Ophthalmology Conference in Hong Kong

On April 4, 2015, partner Kenneth R. Larywon spoke at a program entitled "Medical Malpractice Systems Around the Globe: A Comparative Overview" at the 30th Asia-Pacific Academy of Ophthalmology Congress held in conjunction with the 20th Congress of the Chinese Ophthalmological Society in Guangzhou, China.

MCB Welcomes New Attorneys

Crystal E. Dozier
Jonathan D. Hallett
Thomas E. Lamb
Lauren M. Lundquist
Gregory Picciano
Joshua T. Reece
Maxwell Sandgrund
Joseph P. Zangrilli

Defense Practice Update is published by Martin Clearwater & Bell LLP. This newsletter is intended to provide general information about significant legal developments and general information only, and should not be used for specific action without obtaining legal advice. Anyone wishing to retain Martin Clearwater & Bell LLP should contact Michael A. Sonkin, Managing Partner, 220 East 42nd Street, New York, New York 10017, (212) 697-3122.

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