



# **COMMONWEALTH of VIRGINIA**

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June 16, 2008

The Honorable Phillip P. Puckett  
Member, Senate of Virginia  
P.O. Box 2440  
Lebanon, Virginia 24266

Dear Senator Puckett:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

### **Issue Presented**

You inquire whether the Buchanan County School Board and the Buchanan County Education Association could initiate a cause of action to enjoin further publication of a certain anonymous advertisement<sup>1</sup> (the "Advertisement") that runs every two weeks in the local newspaper.

### **Response**

It is my opinion that the First Amendment to the Constitution of the United States would protect publication of an advertisement containing allegedly defamatory statements which impute misconduct generally rather than against a specific individual. Therefore, it is my opinion that the Advertisement is unlikely to be enjoined by a court of law.

### **Background**

You state that an advertisement currently runs every two weeks in a local newspaper, *The Voice*, which has circulation in the counties of Buchanan and Tazewell. You have provided a copy of the Advertisement, which states:

### **\$5,000 reward offered**

A \$5,000 reward is offered to a student who is attending or has attended any Buchanan County School, if the student has been a victim of sexual misconduct by a school employee.

The conditions and details for the reward are as follows:

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<sup>1</sup>See *infra* "Background."

The reward is being offered to the first student past or present, under the age of 20, who comes forward to report any sexual misconduct by a Buchanan County school employee, if the information leads to the arrest and conviction of the employee.

**\$1,000 will be awarded at the time of the indictments and the balance of \$4,000 if the person is convicted.** [Emphasis in original.]

You note that the Buchanan County School Board and the Buchanan County Education Association are concerned about the defamatory nature of the Advertisement as well as the implication that such conduct has occurred. Thus, you seek an opinion regarding an injunction to prohibit further publication of the Advertisement.

### Applicable Law and Discussion

The law of defamation represents a complex amalgam of common law principles, constitutional doctrine (both state and federal), and statutes. Such law strikes a delicate balance between two core principles that enjoy a prominent place in the Constitution of Virginia, *i.e.*, the freedom that permits citizens to fully speak, write, and publish sentiments on all subjects and the corresponding requirement that citizens be held responsible for abuse of that right.<sup>2</sup> Attempts by courts to harmonize these dual principles have created a legal patchwork of rules and exceptions.

The law of defamation traditionally requires personal reputational injury to individuals, not to groups, organizations, and associations.<sup>3</sup> While Virginia courts have addressed the legal concept of group libel, that tort requires that the group allegedly defamed have so few members that the defamation necessarily casts aspersion on all of them.<sup>4</sup> Thus, in Virginia for instance, a statement that all lawyers are thieves does not create a cause of action for defamation for any individual lawyer.<sup>5</sup>

The Supreme Court of the United States Supreme has called into question the small group libel theory as applied to government officials.<sup>6</sup> “An allegedly defamatory statement which imputes misconduct generally to [a] governmental group” is not an implicit reference to an individual.<sup>7</sup>

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<sup>2</sup>VA. CONST. art. I, § 12; *see also* U.S. CONST. amend. I (providing that Congress may not enact laws “abridging the freedom of speech”).

<sup>3</sup>*See* *Ewell v. Boutwell*, 138 Va. 402, 409-10, 121 S.E. 912, 914 (1924); *see also* *Gazette, Inc. v. Harris*, 229 Va. 1, 37, 325 S.E.2d 713, 738 (1985) (noting that alleged defamation must be “of or concerning” person complaining of defamation).

<sup>4</sup>*Ewell*, 138 Va. at 410, 121 S.E. at 914; *see also* *Dean v. Dearing*, 263 Va. 485, 489, 561 S.E.2d 686, 689 (2002) (noting that reference to governmental group cannot be treated as implicit reference to specific individual even if that individual generally is understood to be responsible for acting on group’s behalf).

<sup>5</sup>*See, e.g.*, *Shah v. Medical Econ. Co.*, 17 Va. Cir. 162, 162-63 (1989) (finding that foreign medical graduate could not complain about derogatory remarks concerning such graduates since 120,000 such graduates practice in United States).

<sup>6</sup>*See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 291-92 (1964); *see also* *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (“Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.”); *Dean v. Town of Elkton*, 54 Va. Cir. 518, 522 (2001) (noting that after *New York Times v. Sullivan*, small group libel theory has had “little use in Virginia”).

<sup>7</sup>*Dearing*, 263 Va. at 489, 561 S.E.2d at 689; *see also* *New York Times*, 376 U.S. at 292 (holding that criticism of government operations does not constitute libel against official responsible for such operations).

While the Advertisement may be read to imply that sexual misconduct in the school system is occurring or has occurred, it does not point to a particular employee. Therefore, such advertisement cannot be deemed to work a personal, actionable, reputational injury.

Courts are willing to protect anonymity in political expression.<sup>8</sup> I share your concerns that an unscrupulous reader might concoct allegations simply to avail himself of the reward. However, while the possibility of fraud warrants scrutiny by prosecutors, it does not justify prepublication suppression of the advertisement. In this regard, I note that the unidentified person placing the ad offers \$1,000.00 upon indictment and the balance (\$4,000.00) upon conviction.<sup>9</sup>

Since there is little probability that a court would conclude that the Advertisement is defamatory and because "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,"<sup>10</sup> a court is unlikely to enjoin further publication of the Advertisement.<sup>11</sup>

### Conclusion

Accordingly, it is my opinion that the First Amendment to the Constitution of the United States would protect publication of an advertisement containing allegedly defamatory statements which impute misconduct generally rather than against a specific individual. Therefore, it is my opinion that the Advertisement is unlikely to be enjoined by a court of law.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is fluid and cursive, with the first name "Robert" and last name "McDonnell" clearly legible.

Robert F. McDonnell

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<sup>8</sup>McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (holding that prohibition of distribution of anonymous campaign literature abridges First Amendment.); Talley v. California, 362 U.S. 60 (1960) (holding that city ordinance barring distribution of anonymous handbills was facially unconstitutional under First Amendment).

<sup>9</sup>See VA. CODE ANN. § 18.2-209 (2004) (imposing criminal penalty upon person found guilty of knowingly making false statements "concerning any person or corporation" to newspapers, television stations, or other media). It is my opinion that § 18.2-209 is intended for specific accusations against an individual or a particular corporation and is not a general statute.

<sup>10</sup>Elrod v. Burns, 427 U.S. 347, 373 (1976).

<sup>11</sup>See Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977) (noting that injunctions require element of irreparable harm).