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Nexsen Pruet Creates an Alternative Energy Group

Attorneys from Nexsen Pruet's [Intellectual Property Group](#) and other practice areas recently formed an [Alternative Energy Group](#). The attorneys have direct experience helping new and expanding businesses throughout the country. Through industry knowledge, as well as practical experience, our firm is able to partner with alternative and renewable energy companies as they seek to grow their business by providing sustainable and environmentally-friendly sources of fuel and power generation. Our practice addresses all aspects of starting and running a successful alternative energy company with a broad base of skills that ensures we bring what those companies want – and, more importantly, what they need – even before they ask.

*For an article related to Alternative Energy, please see John Perkins' article "South Carolina and the Wind Energy Debate" below.

South Carolina and the Wind Energy Debate

By [John Perkins](#)

The environmental arena has begun to look like a game of Jeopardy: there are answers of every sort and only a few people asking the right questions. So what should we be asking about wind energy? Perhaps we should start with the basics: What part

of our energy needs can wind energy provide? How does wind fit into the array of alternative energy possibilities? How does wind compare financially? Where is wind most effective?

These are important questions because South Carolina is quickly becoming the epicenter of the U.S. wind energy debate. In fact, most of the research that will ultimately decide these questions is underway right in our back yard. But more on that later. Many tout the fact that the Upstate has the strongest foreign investment per capita in the United States, but few know that we are also home to two of the main players in wind energy. As the engineering headquarters of GE Energy's Renewable Systems and world class engineering and construction company, Fluor Corporation, it is only natural that significant research initiatives are under way in South Carolina which may well shape the role of wind energy.

Much of the wind energy debate here and abroad seems to center on offshore wind technology. The winds off U.S. coastlines are a well-known and excellent source of clean, renewable energy. So it's not surprising that generating electricity with advanced wind turbine technology is the fastest growing renewable energy technology in the world. With an annual growth rate as high as 30 percent, wind turbines accounted for 42 percent of all new generating capacity in the U.S., representing a staggering investment of over \$250 billion according to the American Wind Energy Association's 2008 Annual Wind Industry Report. But most U.S. wind power capacity has been installed inland in areas such as the Midwest, West Coast and Appalachian regions due to easily accessible, land-based wind resources. Yet nearly 78 percent of the nation's electrical demand arises from the fastest growing population centers along our 28 coastal states, where readily available wind resources are capable of generating all or most of current and future demand. One would expect that environmental groups and long-time environmental supporters would be universally in favor of these efforts. Not so.

Some environmental supporters who would otherwise favor the idea of coastal wind energy as a renewable resource often find that concerns over the impact of these 200 to 300 foot tall structures, especially along scenic coastlines, raise other issues that must be addressed before full-scale adoption of wind energy can move forward.

So why are we at the epicenter? Well, not only are we producing most of these wind turbines in Greenville, it turns out that much of the most important research underlying the offshore wind debate is being conducted by Nicholas C. Rigas, Ph.D., Director of Renewable Energy at the Clemson University Restoration Institute and the S.C. Institute on Energy Studies. His team leads the state's efforts to develop alternative energy technology from his Charleston-based facility. Because many of the concerns over wind energy have not yet been studied outside of the industry, his team has led the effort to place monitoring stations along the coast to answer many of the questions and address many of the concerns raised by opponents. The first wind monitoring station was installed in June on Waties Island in Horry County, and the second went up in July at the Clemson University Restoration Institute in North Charleston. A third monitoring facility is planned for a location near Myrtle Beach. The monitoring towers are equipped with wind gauges, a barometer, temperature gauge and a solar sensor. Data will be collected for one year to assess the potential for large-scale power generated from coastal winds, with plans to install a commercial-scale wind turbine in North Charleston to support future energy research. That data will also be used to address many of the criticisms raised by those who fear that large wind turbines create more problems than solutions.

As is often the case, complaints range from real to purely farcical. Often opponents of offshore wind energy emphasize the 'industrial' nature of wind turbines and their danger to birds and bats. They say the machines are noisy, make some people sick, kill local tourism and real estate values. In a bizarre episode earlier in June, a respected New Jersey doctor was arrested for making online threats to a nearby carwash owner who uses a wind turbine as part of his environmentally friendly carwash. The doctor

claimed that the wind turbine kept him up at night. But most often the real reason behind the opposition is aesthetics, placing many longtime environmental stalwarts at odds with promoters of offshore wind energy.

Robert F. Kennedy Jr., a high-profile environmentalist, has been criticized by Greenpeace for opposing development of a wind farm off the coast of Cape Cod. He defends his position by stating that "there are appropriate places for everything...and if you want to put them out in the water you probably want to put them out of sight." In reality most of these wind farms would be built at distances from shore where they would be barely visible, especially in hazy sub-tropic coastal environments like South Carolina. But that seems to matter little to landowners along our coastlines. The battle rages on, and the questions remain unasked.

Politics aside, most experts agree that, properly deployed, wind and solar together are capable of delivering up to 20% of our nation's total energy needs. So wind fits into the array of possibilities as a significant player, currently more so than solar from a purely financial perspective because solar is from 2 ½ to 3 times more expensive to deliver, where wind is fast approaching the cost per kilowatt hour of nuclear energy. As solar energy continues to close the gap, perhaps the real point is that these cost assessments reflect policy incentives. Without social and political support, wind becomes less economically competitive. And finally, wind – like solar – is well-suited only and obviously to places where its force can be measured and maximized. For wind, that is best accomplished off our coastlines.

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Damages in Patent Cases

By Dan Leonardi

This is the third edition of a three-part article on damages in patent cases. The first installment was directed to the basic measure

of damages, namely lost profits and royalties. The second installment was directed to the circumstances under which a plaintiff may recover enhanced damages, such as treble or tripled damages. This third installment addresses the circumstances under which a plaintiff may recover its attorney's fees.

Federal law specifically empowers courts to award attorney fees to the prevailing party in patent litigation. Specifically, Section 285 of Title 35 of the United States Code states: "The court in exceptional cases may award reasonable attorney's fees to the prevailing party." In other words, the court can award reasonable attorney's fees only in "exceptional cases," only to the "prevailing party," and even then awarding attorney's fees is discretionary. This raises three questions: (1) who is the "prevailing party;" (2) what kinds of cases are courts likely to find "exceptional;" and (3), of those cases, what circumstances are likely to lead a court, exercising its discretion under the statute, to award reasonable attorney's fees?

Regarding the first question, courts interpreting the statute have made it clear that a party need not prevail on all of its claims to be deemed the "prevailing party." Courts can consider a mixed verdict when deciding whether a party is entitled to recover attorney's fees. So, for example, a party that prevailed in showing infringement as to some claims of its patent but failed to show infringement as to others, may still be deemed the "prevailing party" and seek its attorney's fees (or a portion thereof) pursuant to the statute.

Regarding the second question, courts have found cases "exceptional" both because of an infringer's conduct before the litigation began as well as an infringer's conduct after the litigation began. For example, courts have found cases to be exceptional because the infringing party, before the litigation began, willfully infringed, did not deal honestly with the Patent Office, or engaged in bad faith. Likewise, courts have found that cases are exceptional because the infringing party, after the litigation began, engaged in a vexatious litigation strategy, filed frivolous motions, or abused the discovery process.

Finally, regarding the third question, it is clear from the language of the statute

that a court is not bound to award attorney's fees once it finds that a case is exceptional. The court uses its discretion in deciding whether to award attorney's fees. Accordingly, a trial court's award of attorney's fees or refusal to award attorney's fees, when reviewed on appeal, will not be overturned except upon a finding that the trial court abused its discretion. This is a deferential standard and appellate courts have largely left it to the trial courts to engage in the fact-specific inquiry necessary for determining whether to award attorney's fees.

VIRTUAL MEDIATION

By [Michael A Mann](#)

Mediation is a way to resolve a dispute among parties without litigation. If the parties cannot come to a settlement of the dispute among themselves, they may want to enlist a third party, usually a trained mediator, to help them. The mediator is neutral, that is, she is chosen so that neither side believes her to be favoring the other side and may also be selected because she has knowledge of the general area of law or business involved in the dispute and will quickly come to understand the nature of the dispute.

While mediation techniques vary, typically, the parties are all together in one room for some parts of the mediation but leave the room when they need to caucus among themselves or speak privately with the mediator.

Recently, I mediated a dispute involving a plaintiff on one side and several defendants on the other. Unfortunately, it was impossible for the parties to meet in one place at one time. What to do?

It would not have been proper for me to go to the party plaintiff's location and talk only by telephone to the other party. That would have provided an opportunity for the plaintiffs to have more access to me than the defendants would have and would naturally raise the question of whether greater access might result in greater influence. Likewise, it would not have been efficient to travel back and forth over several days to visit with each party personally, as Henry Kissinger did in his shuttle diplomacy in the

1970s in trying to mediate issues between Egypt and Israel. For one thing, not all the defendants could be in the same place either so the shuttling would have been among more than two parties.

Fortunately, with the help of the Nexsen Pruet IT department, three virtual rooms were created within our teleconferencing system. One virtual room was designated the joint room and the other two virtual rooms were designated the breakout rooms. These “rooms” were teleconference lines being held open by me as mediator while the parties could move from the main teleconference to their party conference just by switching lines. The party plaintiff did not know the number of the teleconference for the party defendants and vice versa, so neither party could inadvertently stumble into the teleconference of the wrong party and overhear conversation he was not supposed to hear. I could only talk on one teleconference line at a time, and, since the telephone lines were labeled, the chances of me making a mistake and entering, say, the party plaintiff’s teleconference thinking it was the party defendant’s teleconference was very low.

I will state flatly that it is better to get the parties together in one place so that they can see and hear each other. However, when there are multiple parties and schedules are tight, using this system of multiple teleconference lines being held open so those parties can enter the joint teleconference or switch to their party teleconference when they wish, is a useful back-up position.

Before too long, there will be video-conferencing and not just teleconferencing of mediation which will bring us a big step closer to a truly virtual mediation. That will be offer another improvement and be an even better option when the parties simply cannot arrange to meet in one location.

LIABILITY RISKS FOR CORPORATE NETWORKING WEBSITES

by Lica Colwell

With the increased use of social media, many companies have begun to establish a presence on platforms such as Facebook, LinkedIn and Twitter. While these networks

present significant opportunities for corporate users, they also raise a number of liability issues that should be considered before developing and implementing online strategies.

Facebook

Many companies already have established Facebook “fan” pages. The fan pages are a newer development to Facebook, which started out as a social networking site for individual users, specifically college students. But as Facebook has grown in popularity among individuals, it has also developed into a popular site for targeted marketing by companies.

Facebook allows individual page owners to control content, searchability and viewability of their pages. Facebook’s most current “Terms of Use” indicate that “fan” pages differ somewhat since such pages can only post content and information under the “everyone” setting. In other words, a company cannot block viewing or searching of its page.

The page’s administrator can control the content shown on the site. The “settings” tab permits administrators to block “wall” postings; i.e., whether viewers of the page may post content. “Content” includes the posting of comments on the page. Allowing comment posting – particularly by employees of the company owning the page – can lead to a host of possible legal problems.

One of the most obvious is the possibility that false or deceptively misleading statements of fact by an employee about an individual or a company could create a risk of defamation/trade libel liability. Posts could also easily give up trade secret or other confidential information of the company or one of its clients. Trademark and copyright infringement, as well as invasion of privacy torts, must also be considered since these could result from even a single posting mentioning a trademark or copyrighted work that is owned by another. Remember that website posts are an easy place for disgruntled employees to voice complaints due to the perceived anonymity.

If desired, a Facebook page can just show information pertaining to the company without giving viewers of the site, fans, friends or anyone else the ability to post commentary. This would be more like a conventional webpage. Using the Facebook page in this way would still let a company to be locatable on Facebook while avoiding issues that could arise if posting comments were allowed. It would also avoid any question of the company collecting personally identifiable information about individual consumers.

In addition to comment posting, providing links on a Facebook page (or any website) to another website can also be problematic. Such posting can lead to an allegation that the company providing the link should be held secondarily responsible for something on the linked site. Such posting might also be construed as a "republication" for defamation purposes. Minimizing the risk of any such claim could be achieved by careful selection of the links that are provided on the company's webpage and also including a notice disclaiming responsibility for and affirmatively denying any endorsement of any products, services or information contained outside of the site.

Finally, depending upon how the Facebook page is used, state laws may come into play as well. For example, the state of California has a statute addressing internet privacy requirements that applies not only to web site operators who live in California but also to operators of web sites who collect personally identifiable information about consumers who reside in California. Facebook does not prevent pageholders from collecting personally identifiable information from page viewers. However, Facebook does require compliance with specific Terms of Use under these circumstances. It would be a company's responsibility as the pageholder to be aware of Facebook's rules and any state statutes that might govern web activity and ensure that no violations occurred.

LinkedIn

LinkedIn is another social networking site that is similar to Facebook but targets professionals rather than individuals. One particular feature of LinkedIn allows

professionals to make recommendations on their pages about other professionals. The potential problem is that the recommendation may be construed as an endorsement attributable to the company as well as to the individual employee. There may be rules to particular professions that can be violated simply by posting such recommendations. For example, attorneys must be extremely careful about making recommendations that can be construed as advertising and making false or misleading statements within that advertising. Companies should be aware of any rules governing their advertising and remind their employees that LinkedIn recommendations might violate these rules.

Finally, whether a company has a Facebook or LinkedIn site or a conventional website, if it is subject to Securities and Exchange Commission regulations attention must be paid to the SEC's statements on corporate websites. Very recently, on August 1, 2008, the SEC issued an interpretive release containing guidance on the use of corporate websites. According to this release, all communications made by or on behalf of a company are subject to the antifraud provisions of the federal securities laws. As the release further explains, there exists a "...general prohibition on making material misstatements and omissions of fact in connection with the purchase or sale of securities." All postings from any company that is subject to SEC regulations would have to comply with the guidelines to avoid any potential liability. In short, any misrepresentations, false, deceptive or forward-looking statements could put a company at risk of SEC regulation violations.

Twitter

Twitter raises different questions than conventional websites or even Facebook sites, because courts have not yet had an opportunity to analyze how Twitter posts, or "tweets," should be treated.

Twitter operates by letting its user make short posts (140 characters) that are broadcast to the poster's "followers." The followers can share posts via "retweets," which are forwards of the post to other users of the website. Legal commentators are

questioning whether retweeting leads to exposure to liability for republication of a defamatory statement. No cases dealing with Twitter posts have been considered by any court, though a libel case based on a "tweet" was filed this past summer in Cook County, Illinois. Without any analyses of Tweets by any court to date, it is also unknown whether retweets will fit into a definition that might provide for immunity under the federal Communications Decency Act. Legal commentators are looking for guidance from the Cook County case if it goes to trial.

Develop Written Social Media Policies

The surefire way to avoid any risk is to avoid sponsoring any type of social media page that allows employees to mix with customers and engage in commentary. But, regardless of whether a company actually sponsors its own social media or blog, it should have a written policy addressing employee use of social media and blogging websites. The policy should be made part of the employee handbook and discussed with the employee at orientation and other appropriate times.

Lawyers should be consulted in the creation of these guidelines to ensure that prohibitions likely to be included do not violate other corporate policies. Employment law draws lines between what can and cannot

be allowed. For example, Employers cannot create policies disallowing all speech on certain subjects such as wages and terms and conditions of employment. At the same time, they can provide specific guidance to employees on what subjects they may or may not blog about. Several "go-by" sample guidelines are easily accessible on the web. The key is to undertake a competent review of any draft guidelines to ensure that any "do's and don'ts" are not overbroad.

If a company does sponsor a Facebook page, in addition to all points previously discussed, the company should also post its own "Terms of Use" for its Facebook site. Facebook provides a tab for such posting that can be accessed by any viewer of the Facebook page. The content of these terms varies, ranging from a few general paragraphs to multi-page documents having very specific terms. Whatever the level of detail, simply putting terms on the site would be helpful to an argument for limitation of alleged liability on the company's part.

Liability risks associated with social networking is a current hot topic for legal commentary. Social networking is a new frontier, so it is not yet known just how many risks exist or how the courts will apply principles of law that were developed to resolve cases involving newspapers and television. We'll be watching...

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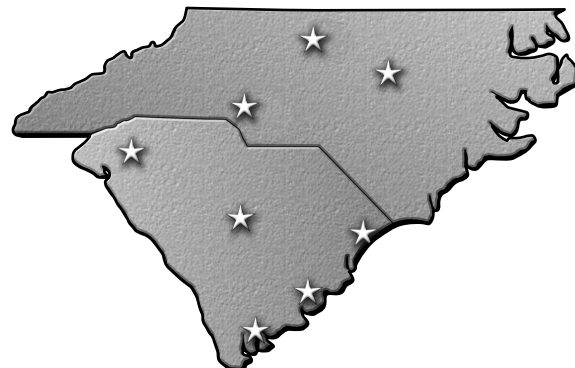
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