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Cease and desist? Tweet!

The latest tactic in trademark battles: social media warfare.

BY SHERI QUALTERS

When Vermont T-shirt maker Bo Muller-Moore started printing "Eat More Kale" shirts in 2001, he said, he had never heard of Southern chicken restaurant empire Chick-fil-A Inc. and its "Eat Mor Chikin" ad campaign. A kale farmer suggested the kale catchphrase to Muller-Moore, and he started making the T-shirts as a hobby with his autistic foster son.

Although Chick-fil-A has no Vermont restaurants, the company eventually heard of Muller-Moore. In 2006, he fended off cease-and-desist letters from the company with help from a pro bono lawyer. Last year, Chick-fil-A surfaced again to oppose his 2011 trademark application, which is still pending.

Intellectual Property TRADEMARKS
A Special Report

This time Muller-Moore, of Montpelier, dug in for a fight against what he considered Chick-fil-A's "trademark bullying."

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BO MULLER-MOORE


JACK MCCOY

JO ANNE SIMON: "This is something that has been percolating for a long time."

Heat is on for law school test

Feds add to pressure to make the LSAT more accessible to the disabled.

BY KAREN SLOAN

A 29-year-old congressional aide claims his dyslexia impairs his ability to read and write. A San Jose, Calif., woman who is paralyzed in all four limbs says she cannot write without a brace. A sports marketer from Maryland alleges that pain from her scoliosis and attention deficit hyperactivity disorder make it difficult to concentrate.

The three reside in different parts of the country and have different physical or cognitive disabilities, but they have one thing in common: Each claims that the Law School Admission Council violated their rights by denying them extended time on the Law School Admission Test. They are among the 22 would-be LSAT takers on behalf of whom the California Department of Fair Employment and Housing and the U.S. Department of Justice have filed suit, alleging that the council's accommodations process violates the Americans With Disabilities Act.

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Campaign controversy: Two former state high court chief justices, both GOP appointees, decry what they call the politicization of retention elections for three Florida justices.

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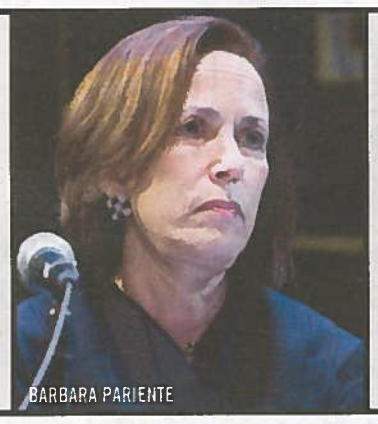
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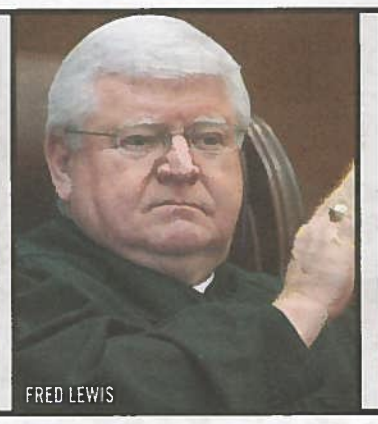
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The P.M. who sued his country

BY MICHAEL D. GOLDHABER

In this month's Georgian vote, the billionaire Boris Ivanishvili was effectively elected as that nation's next prime minister. The apparently peaceful transition from Rose revolutionary Mikheil Saakashvili might be likened to the historic transfer of power after the U.S. election of 1800. Except that Thomas Jefferson didn't sue his country for $186 million three weeks before he was elected.

Last month Ivanishvili, a French citizen, filed a claim with the International Centre for Settlement of Investment Disputes (ICSID) under the Franco-Georgian investment treaty. The notice of dispute—written by lawyers at Skadden, Arps, Slate, Meagher & Flom—accuses the Saakashvili regime of a shamelessly inventive campaign of political intimidation.

Ivanishvili was stripped of Georgian citizenship within days of entering politics in October 2011. A week later, armed officers with video cameras staged a made-for-TV-news raid to inaugurate a money laundering investigation of Ivanishvili's Cartu Bank,

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which according to the claimant was never backed up or explained. Then Georgia really got creative. The next month, it gave tax liens priority over all other security interests. The prime minister-in-waiting claims that the state used this new law to systematically defraud his bank (and only his bank) in collusion with opportunistic customers. In the few months this law was on the books, Georgia allegedly stripped Cartu Bank of its interest in nearly 200 assets.

Government of Georgia counsel Louise Roman Bernstein of Dechert did not respond to an email inviting comment. Georgia's defenses, whether factual or legal, cannot therefore be assessed.

What's certain is that Saakashvili no longer smells like a rose. His regime stands accused of entrapping another Skadden client, who made the mistake of entering Georgia after winning his ICSID case. Of greater import, his downfall was sealed by secret videos that surfaced before the election, and appear to show state torture.

Legally, the next question is whether a head of state's claim against that state can and should be maintained. I say: Why not? For Ivanishvili, maintaining the claim would provide a form of political insurance. He'll be stuck in an awkward power-sharing arrangement with Saakashvili, who remains president, for at least a year, and the average length of an ICSID case surpasses the two years that Ivanishvili predicts he'll need to save Georgia, before he retires like Cincinnatus to his dacha. The arbitrators should demand a firewall, to ensure that the political arms of the state cannot control the actions of the respondent, and ideally the prime minister should also place his claim in the hands of a blind trustee. But if the arbitrators have jurisdiction, then their work is not done until the alleged injustice is addressed.

When an oligarch is persecuted, I'm on the side of the oligarch. If a persecuted oligarch has temporarily taken the reins of state, then I'm still for checking the permanent power of the state. May Ivanishvili fulfill his promise more fully than Saakashvili—and may his case protect dissidents of more modest means.

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Law students gain allies against test

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The council has been sued countless times since the 1990 passage of the ADA by individuals whose accommodation requests it denied. It is a frequent target for disability rights advocates who charge that its accommodations policy is burdensome and illegal.

The Justice Department's proposed class action, filed this spring in U.S. District Court for the Northern District of California, escalated the battle. If successful, it could force widespread changes to the way the council handles the approximately 2,000 accommodation requests it receives annually. (The council typically approves about half.)

Also lining up against the council are California lawmakers, who recently passed legislation barring it from "flagging"—that is, alerting law schools to LSAT takers who got extra time. And the American Bar Association's House of Delegates in February unanimously urged the council to end flagging and to make its accommodation decisions timelier and more transparent. "This is something that has been percolating for a long time," said disability rights attorney Jo Anne Simon, who has represented LSAT takers who were denied accommodations. "But now they're coming under fire from a lot of different quarters. I hope we're at a turning point."

POLICY DEFENDED

Council administrators acknowledge that they are under more pressure than ever over accommodations, and that their screening procedures are more rigorous than nearly all other standardized test givers. However, they deny that their process—aimed, they insist, at protecting their test's integrity and making it fair to all—violates anyone's rights. Moreover, accommodation requests deserve scrutiny because the LSAT plays an such an outsized role in law school admissions, said general counsel Joan Van Tol. "As the stakes get higher, the degree of rigor in review gets higher as well," she said.

RICARDO LARA: The California assemblyman hopes that his legislation will reverberate beyond his state's boundaries.

Other standardized testing companies rely on the recommendations by an applicant's doctor or psychologist rather than conduct their own reviews of the test taker's documentation, said James Vaseleck, the council's senior director for public affairs. By contrast, LSAT takers must provide extensive disclosure of any previous accommodations they received on standardized tests or in academic environments, plus evaluations by doctors or psychologists of their impairments and recommended accommodations.

The applications are evaluated by the council's two in-house psychologists and by outside experts if needed, Van Tol said. The evaluators want to establish whether the applicant really has a disability; whether it hampers his or her ability to take the LSAT under standard conditions; and whether any accommodation sought is appropriate. Extra time is the most frequent request, but bids for additional break time between section distraction-free testing envir ment and use of a computer also common. Applicants more likely to prevail if t have a proven track record receiving accommodations, about half of those who received no accommodations either the SAT or ACT, wh raises questions, according Van Tol. Simon and other ability rights lawyers charge t the council's hard line is m vated by fear that accommo tions erode the LSAT's value think the biggest problem is t suspicion that everyone w is asking for extended tim trying to game the system," said. "The reality is, in this w there will always be some doing something they should I don't think that's most peop

The lengthy paperwork medical evaluations the co cil demands, and its refusa explain denials in some cases, are po of contention and litigation, with cri and plaintiffs charging that the pro is confusing and time-consuming. National Association of Law Stude With Disabilities publishes a guide c taining advice from students who h navigated the process.

It urges test takers to be realistic. you are thinking that you're a shoe for LSAT accommodations since you accommodations in undergrad, th again," the guide reads. "In fact, it is known that receiving accommodati on the LSAT is very difficult. Why? no one but the evaluating panel kn the truth."

Disability advocates have also ta issue with the cost of extensive med or neuropsychological evaluations the council requires, which can run the thousands of dollars. "It does req

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Suit calls test fundamentally unfair

While the U.S. Department of Justice and other organizations push to make it easier for disabled people to gain accommodations on the Law School Admission Test, a Michigan man is attempting to prove that the test at its core discriminates against the visually impaired.

Angelo Binno last year sued the American Bar Association in the Eastern District of Michigan, alleging that the organization violates the Americans With Disabilities Act by requiring all prospective law students to sit for an exam that is fundamentally unfair to the blind. Binno has taken the LSAT multiple times, but his low scores have prevented him from getting into law school, according to the complaint.

The lawsuit argues that about a quarter of the LSAT's multiple-choice questions involve "analytical reasoning," asking test takers to solve logic questions that often involve diagramming and spacial relationships.

"You shouldn't require someone who is blind to draw a picture," said attorney Richard Bernstein, who represents Binno. Bernstein, who also is blind, entered Northwestern University School of Law in 1996 without taking the LSAT because the ABA at the time allowed law schools to waive the test. "A blind person doesn't think visually. It's cruel."

For their part, officials at the Law School Admission Council, which administers the LSAT, countered that they offer visually impaired test takers screen-reading technology and scribes when needed. "The analytical-reasoning portion of the exam asks you to apply rules to a set of facts," spokesman James Vaseleck said. "How you hold facts in your head is up to you. Some people use diagrams, but that's not the only way."

U.S. District Judge Denise Page Hood dismissed Binno's suit on September 30, agreeing with the ABA's argument that Binno lacked standing because the ABA did not design the LSAT and hadn't denied him admission into law school.

Binno has already filed a notice of appeal, and Bernstein said he is preparing to file a parallel lawsuit against the council. "The only way you can be a bully is if someone gives you the power to bully," Bernstein said. The ABA, he said, is "the entity that requires a discriminatory exam that is the problem."

—KAREN SLOAN

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the expenditure of money to get tested, but that's the way Congress sorted it out when they passed the ADA," Van Tol said. "If you are requesting accommodation in the post-secondary world, you are responsible for paying for the testing, and we, the testing organization, are responsible for providing the accommodation at our cost. That's the balance."

The council is not the only testing agency struggling with when and how to accommodate people who claim disabilities. The U.S. Government Accountability Office in 2011 audited eight testing organizations (the council was the only one that declined to participate in the audit, citing uncertainty about the survey's goals). It found that test administrators were having a difficult time ensuring fairness for takers while also maintaining the reliability of their tests. The report, released just five months before California filed its suit against the council, recommended that the Justice Department develop a strategic approach to ensuring that test companies comply with the ADA.

California Assemblyman Ricardo Lara wasn't willing to wait around. The Democrat proposed legislation earlier this year that would prevent the council from flagging LSAT scores when California test takers received extra time. The law requires "the process for determining whether to grant an accommodation to be made public" in a timely manner.

The administrators of the SAT and ACT gave up score-flagging about a decade ago. The Law School Admissions Council, along with the body that administers the Medical College Admission Test, are the only testing agencies that still flag scores when takers receive extra time.

The council opposed Lara's bill, pointing to its own research findings that students who received extra time on the LSAT did not fare as well during their first year of law school did as students who scored the same on the test without additional time. The council is a membership organization comprising law schools, and those schools want to know when applicants received extra time because the LSAT is the only apples-to-apples comparison they have among applicants, Van Tol said.

'LESS LEGITIMATE'

On the other hand, flagging scores discourages disabled people from seeking accommodations, according to the California lawsuit. "It makes you feel less legitimate as an applicant because it identifies you as different," said Elizabeth Hennessey-Severson, a plaintiff in the California class action who suffers from ADHD and additional learning disorders. She initially was denied extra time on the LSAT, but received that accommodation a year later with the help of an attorney. "If the idea of accommodations is to level the playing field, why do they need to alert schools that the playing field has been leveled?"

California Governor Jerry Brown signed Lara's bill into law on September 26. The flagging ban goes into effect on January 1. "It is my hope that with [the legislation] the test sponsors of the LSAT will adjust their policies and end discriminatory practices once and for all for individuals with disabilities, not just in California, but across the nation," Lara said when the bill passed.

Council administrators declined to discuss how they plan to respond to the California law, but called the measure "vague, internally inconsistent and legally vulnerable" in an August letter urging Brown to veto it.

The proposed class action in California survived an early motion to dismiss in September, and on October 12, U.S. District Judge Edward Chen approved the Justice Department's bid to join the suit.

This is not the first time the Justice Department has objected to the council's operations. It sued in 1999 on behalf of four physically disabled test takers who sought accommodations. That case was settled in 2002 after the council agreed to give "considerable weight" to the opinions of doctors and other evaluators and swear off unnecessary diagnostic or functional testing.

The Justice Department also helped the council reach an agreement last year with the National Federation of the Blind to make its law school application website accessible to blind users without their having to rely on assistance from someone over the telephone.

Hennessey-Severson hopes the new lawsuit will prevent other disabled test takers from suffering the lengthy and disheartening process she endured. "Ultimately, I would like to see [the council] change their policy in a way that is consistent with the Americans With Disabilities Act," she said. "There are already enough hurdles, be it physical or mental, that people don't need another one to overcome."

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Accommodations to the Law School Admission Test

- 1,827 people requested accommodations during the 2011-12 testing cycle.
- 50 percent of those people received some form of accommodation.
- Extra time on the test is the most frequently granted accommodation, accounting for nearly 40 percent of those granted during the past five years.
- Test takers who received extra time tended to have slightly higher scores than those who took the test under standard conditions, while those who received accommodations other than extra time had lower scores.
- 33 percent of test takers who received accommodations during the past five years had learning disorders. The next most common classification was attention deficit hyperactivity disorder, at 17 percent.

—KAREN SLOAN

Source: The Law School Admission Council