



Jones Day papers focus of theft case

Diebold information leaked to writer

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Alison Grant

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A criminal case involving Cleveland law firm Jones Day, Summit County voting machine maker Diebold Inc. and an obscure, part-time Hollywood actor is expected to unfold in a Los Angeles courtroom today.

The actor, Stephen Heller, has been charged with felony theft of confidential records from a Jones Day office where he was temping in 2004.

Heller is alleged to have given the records to an investigative writer who had just published a book saying Diebold had installed uncertified voting systems in California. A copy of the records landed in the hands of an Oakland Tribune reporter who used them to report embarrassing details about Diebold's hasty use of uncertified software with its machines.

The prosecution of Heller has raised eyebrows because it is unusual to bring criminal charges in a case like this. Critics say Heller qualifies as a whistleblower who should be protected. Jones Day scoffs at that, saying Heller stole its legal papers and moreover broke a confidentiality pledge he signed when he started at the law firm. The firm also says it's important to defend attorney-client privilege, which it says Heller violated.

However, the case, which the district attorney's office says has already cost Jones Day more than \$1 million in damages, also stirs up fresh negative publicity for the giant law firm.

Heller, who did not return calls, is on record in newspaper accounts as saying he's not a political activist. But he describes himself as a news junkie, and Diebold's name was familiar to him because of media focus on the company as it brought touch-screen voting to California.

Diebold Elections Systems, the Texas subsidiary of Green, Ohio-based Diebold Inc., referred questions on Heller's case to Jones Day.

The Los Angeles County district attorney's office says that on five days over a three-week period in early 2004, Heller copied more than 500 pages of Diebold-related documents. Some were stamped "attorney work product, privileged and confidential." One was an estimated Jones Day budget of \$535,000 to \$925,000 for two months of Diebold work.

Prosecutors say Heller met Bev Harris, founder of the elections watchdog group Black Box Voting, in a Ventura County park and gave her the records. Harris allegedly gave them to a third person, who in turn gave them to California's then-Secretary of State Kevin Shelley. However, no one at that office or the attorney general's office recalls receiving the papers, a spokeswoman for the district attorney's office said.

Harris had earlier become a plaintiff in a lawsuit that charged Diebold with making false claims about the security and certification of its voting systems in Alameda County, Calif.

The Oakland Tribune reported that Jones Day had warned Diebold in late 2003 about using uncertified software. The news story said Jones Day knew Diebold faced the threat of criminal charges and banishment from California elections.

Although the state never charged Diebold criminally, Heller's defenders say the information he uncovered helped trigger an administrative crackdown on Diebold.

Diebold was already under the microscope in California because many of its e-voting systems failed in the March 2004 primary.

Shelley, the secretary of state, called Diebold's conduct in aggressively marketing e-voting equipment "deceitful" and "reprehensible," banning it in several counties.

The state also joined the lawsuit brought by Harris and other activists. Diebold eventually paid \$2.6 million to settle it.

As a new secretary of state reversed California's Diebold ban this year and gave conditional approval to its machines, Heller was about to get hit by the fallout from his three-month stint at Jones Day.

The 44-year-old actor from Van Nuys, Calif., learned in August 2004 that he was under investigation when police officers showed up at his house with a search warrant and seized his computer and various papers.

But it was not until February 2006 that the DA's office charged Heller with felony access to computer data, commercial burglary and receiving stolen property. He pleaded not guilty. Heller could face up to three years in prison if convicted.

His supporters say he should be praised for shedding light on irregularities at Diebold, not charged with theft.

That question - thief or whistleblower? - is central to the case that begins today at a preliminary hearing. Blair Berk, a Los Angeles defense attorney who counts Halle Berry and Reese Witherspoon among her clients, represents Heller.

Berk said Heller's case "will necessarily involve the act of whistleblowing on a multiplicity of levels."

Michael Kohn, general counsel for the National Whistleblower Center, sees Heller as a "quintessential whistleblower" in the vein of Daniel Ellsberg, who released the classified Pentagon Papers to The New York Times in 1971. The Times' publication of lengthy excerpts shed damaging light on the U.S. military's execution of the Vietnam War.

"This is a very rare instance," Kohn said of the Heller case, "in fact the only one of which I'm aware, in which a whistleblower has been charged with a felony. I find it outrageous."

Jones Day rejects casting Heller as a virtuous figure and whistleblower.

"That's a ludicrous defense," said John Majoras, a partner in Washington. "This is a person who stole documents. He purposely released them to someone who had an agenda against [Diebold]."

Jones Day said there's no cause-and-effect, either, between the published memos and California's sanctions against Diebold in 2004.

Majoras noted that state employees interviewed by a district attorney's investigator said the Jones Day records played no role in the state's examination of Diebold.

Earlier, Jones Day had tried to squelch use of the memos by the Oakland Tribune. The firm sued to get the records back and impose a ban on future stories based on them.

Jones Day dropped that effort when the newspaper argued that would be illegal "prior restraint." Jones Day later stopped trying to retrieve the documents, too, saying it was pointless since the information was already out.

Now the Tribune is suing Jones Day for legal fees it incurred in the fight.

No one is suggesting that Heller got any money or other material benefit for his alleged deed. But Majoras said his actions smack of politics.

"If you review the Black Box Web site, you'll see there's a great deal of effort to disparage either electronic voting in general or Diebold in particular," Majoras said. "It certainly implies to me that there was an agenda."

Heller also violated the attorney-client privilege, Majoras said. The privilege protects communications between clients and their attorneys. Legal assistants working on confidential client matters can be held to the privilege.

The DA's office said Jones Day reported more than \$1 million in damages, including fees it had to refund to Diebold. Majoras would not confirm the amount but said, "We certainly, as a result of this, had to reach accommodations with our client, who was upset about it."

Heller has become a cause célèbre to electronic-voting critics, who say he helped prevent voters from being disenfranchised in California. Black Box Voting has contributed \$10,000 to his legal defense fund.

Heller's case is showing up on liberal blogs like Daily Kos and The Huffington Post, where political activist Lyn Davis Lear, the wife of television producer Norman Lear, argued that Heller deserved "a medal of gratitude instead of jail."

As for Heller, he and his wife have covered his legal bills with personal savings and a second mortgage on their home. He was fired from two jobs when employers learned of his criminal case and is, according to his lawyer, "desperately looking for work."

To reach this Plain Dealer reporter:

agrant@plaind.com, 216-999-4758

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