The *Ultimate* Beginner's Guide To Defamation Law

Special Report Brought To you By

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Legal

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Shhh…Don't Tell Anyone. . .

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It is very, very rare for a defamation attorney to write this kind of report. Many other defamation attorneys do NOT want you know this information because they typically charge their clients BIG bucks to learn what I'm about to share with you. Please take the time to read it carefully. In fact, if you are—as I hope—very interested in making sure that you armed with the information you need to take the next step, then

I urge you to get comfortable, ask not to be disturbed, and STUDY this report—it IS that important! It reveals vital information that you NEED to know!

FYI: I've broken the information down into small, bite-sized chunks to help you immediately begin understanding what defamation law is all about.

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What Is Defamation?

Defamation is known by many names: libel, slander, disparagement, defamation of character, etc.. Many of the terms refer to the same idea, however; a false or unjustified injury of the reputation of another person. It's known as a "Tort," which is a fancy term lawyers use which simply means a "civil wrong."

So defamation seems like a pretty basic concept, right? Someone says or writes something "bad" about another person and then **BOOM!** They're liable for defamation. Right? Not. Even. Close.

It is a very a complex and highly specialized area of law, especially when you are start talking about Internet Defamation, which we'll get into later.

Note: Different countries/states have different rules with regard to Defamation so we're going to focus on California Defamation Law because that's what I'm most familiar with.

What Are The Two Kinds Of Defamation?

Defamation comes in one of two forms: Slander and Libel. Slander is defined as an oral defamation and Libel is a written defamation (also pictures and video, and any defamatory statement on the internet).

Slander is specifically defined in *California Civil Code* section 45, as ". . . a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

4. Imputes to him impotence or a want of chastity; or
5. Which, by natural consequence, causes actual damage.

Libel is defined under California law as, "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

Practically every word quoted above has a particular legal meaning which has been interpreted by California courts. But we're not going to go into that level of detail because it's outside the scope of this report.

Cool tip: Did you know you can look up the law for FREE? It's true. When I first started out as a lawyer I didn't have the money to buy expensive legal research books or subscribe to fancy online resources, like Westlaw or LexisNexis. So I had to find out a way to get the law for free. Here's how I did it. If you like to do things online, you can go to this site and get a copy of pretty much every California law out there: http://www.leginfo.ca.gov/calaw.html. Or if you want to get actual cases decided by judges you can go to http://www.findlaw.com/casecode/ or http://www.courtinfo.ca.gov/opinions/.

And if you want to look at the actual books you can go to your local legal library. Here is a list of locations in Los Angeles: http://lalaw.lib.ca.us/about/location/

What Are The *Essential* Elements Of Defamation?

In order to prove defamation in California, a person must prove the following elements by a preponderance of the evidence, that is, it is more likely than not that each element is satisfied based on the evidence.

1) Defamatory - the statement must be defamatory. What does that mean? It has been defined as any statement that tends to lower the reputation of a person in the community, and/or subject that person to contempt, ridicule, or obloquy, or cause the person to be shunned or avoided. For example, what if a newspaper described a person as being "gay?" Would that be defamatory? Well, it depends on the community. Obviously, in most places in California and, indeed in the United States, such a statement would clearly not be defamatory. But what if that statement was written in a small town newspaper in the south, for example? In that situation, the statement may be found to be defamatory.

2) Statement of Fact - the statement must be a fact. Generally, you would not be able to prove defamation if the statement is an epithet, hyperbole, or is merely an opinion. That is not to say that all opinions are created equal. Some statements that appear to be opinions may be construed to be factual statements if the statement implies a provably false statement. This is one of

the most misunderstood concepts relating to defamation law. I talk more about this here.

3) Falsity - the statement or statements must be false.

4) Of and Concerning - The average reasonable person must understand that the statement refers to the plaintiff, and not someone else, or a group of other people.

5) Publication - this element is a bit misleading. A statement can be published in a number of ways, including orally, in writing, by photograph, or other fixed means, and, it must be conveyed to a third party. So, if Mr. Jones comes up to you and claims that you've been convicted of a crime, it's not going to count as defamation unless a third party heard the statement.

6) Causing - The statement must cause the plaintiff harm to his or her reputation.

7) Damages - Damages are presumed and therefore do not need to be proved if the statement is slanderous on its face or if it is libelous. A statement is slanderous on its face if it falls into on one of the four categories listed on pages 5-6. A statement is libelous if it is in permanent form. For instance, any statement on the Internet would be libelous; any photograph that is defamatory would be libelous as well since it is fixed. See what I mean?

Let's get into some of these elements in a little more detail . . . especially the ones that give people a little bit of trouble . .

What is The "Of And Concerning" Element About?

One of the basic elements of a defamation lawsuit is that the alleged defamatory statement must be of and concerning the Plaintiff. At common law this was called colloquium. What this is means is that the average reasonable person must understand that the statement is about the Plaintiff.

Here's an example of what I'm talking about: Suppose I wrote in a widely read newspaper that "officials" from XYZ organization were diverting funds for their own use and agitating terrorism. Now let's suppose that the CEO gets wind of my statement and wants to bring a lawsuit. Arguably, the statement in the newspaper is defamatory, but is it sufficiently specific enough so a reasonable person would know I was referring to the CEO? I would argue no.

Suppose instead, that I wrote that the Vice-president of XYZ organization was an adulterer and used illegal drugs. And suppose further that there is only one Vice-president of XYZ. This would probably be specific enough to meet the colloquium element of defamation.

What Is "Publication" Really?

Publication is a term of art. This means that it has a specific legal meaning. A statement is deemed "published" if the statement has been communicated to a third party, whether orally or in writing. For example, if John Doe comes up to you and says that you're a crook and that you've been convicted of murder and no one else hears it, the publication element is not met. But this is the easy scenario.

What happens if someone merely passes along the alleged defamatory statement? Are they liable to the same extent as the original person who published the statement? The answer is yes.

The law calls this "republishing" and will hold the republisher just as liable as the original publisher. So let's take the example from above: suppose someone overhears John Doe and then relays the statement to Joe Shmoe's employer, Bill Breaker. In this case, the person who relayed the information to Bill Breaker would be liable to you in the same way that John Doe would be liable to you.

The Important Distinction Between Fact & Opinion

The most misunderstood concept in defamation law is the distinction between fact and opinion and its relation to liability. Most people (very smart ones included) mistakenly believe that only facts are actionable as defamation. But in California opinions are actionable as well if they can ". . . reasonably be understood as declaring or implying actual facts capable of being proved true or false."

This is the way it works: a court will examine the totality of the circumstances starting with the alleged defamatory statement itself to determine whether the statement is factual or implies a fact that can be proven false. If the answer is yes, the statement may be actionable assuming the other elements of a libel or slander claim are met. If not, it's over.

But don't be fooled. The distinction between a fact and an opinion is very gray, and is often one of the most difficult questions a court must consider, with the exception of calculating damages. The reason is that language is susceptible to multiple meanings and is made in a variety of contexts.

Further, courts have held that rhetorical hyperbole, figurative language, or epithets are not actionable. So what exactly is the line between rhetorical

hyperbole and an actionable opinion?

Some examples are obvious. For instance, saying someone is a "traitor," is clearly hyperbole when you mean to say that that person is despicable, not that the person is guilty of treason. Or if a politician calls another politician (what a surprise) a "thief" or a "liar," clearly, this too would qualify as rhetorical hyperbole.

Still some calls are harder to make. For example, what if someone said, "I think Smith is an alcoholic." One could easily make the argument that the statement implies undisclosed facts that are known to the person making the statement, which may be capable of being proved true or false, and therefore might be actionable. On the other hand, one could also successfully argue that the person making the statement was merely expressing his personal opinion or belief.

As you can see, the line is not clear between what constitutes a fact and what constitutes an opinion. Don't believe for a minute that your stated opinions are necessarily protected under the First Amendment. They may not be.

What Are The 3 Different Types of Damages?

A California court may award three kinds of damages to an aggrieved party in a defamation case. What are damages? Damages are monetary compensation for loss or injury to a person or property. In defamation cases, a court is attempting to measure the plaintiff's loss of reputation as a result of the alleged defamatory statement or statements. There are three types of damages that may be sought in a defamation case according to California Civil Code section 48a, et seq.

(1)General Damages - these include "damages for loss of reputation, shame, mortification, and hurt feelings";

(2)Special Damages - these "are all damages plaintiff alleges and proves that he has suffered in respect to his property, trade, profession or occupation including such amounts of money as the plaintiff alleges and proves he has expended . . ."; and

(3)Exemplary Damages - "are damages which may be in the discretion of the court or jury to be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice."

What is The Standard Of Fault?

There are different standards of fault applied to a given case depending on whether the plaintiff is deemed to be a private person or a public figure. Private person plaintiffs must only show negligence. Public figures, however, must show that the statement was made with constitutional malice, that is, that the defendant knew the statement was false at the time it was made, or with a reckless disregard for the truth. This is a much higher standard of proof which why you rarely see celebrities, athletes, or politicians suing for defamation.

How Long Do YOU Have To File A Defamation Lawsuit?

In California, you have one year from the date of publication in which to file an action for libel and slander. Code of Civil Procedure § 340(c). That's right. Only one year. Lawyers call this a "statute of limitations."

So you're probably thinking, when does the clock start running, or in legal terms, when the does the action begin to accrue? For torts, the answer is generally when the injury occurred. But that's not always the case. In some situations, courts will apply the so-called "Discovery Rule." This rule holds that the statute of limitations will not begin to run on a cause of action until such time the injured party discovered, or reasonably should have discovered, the defendant's alleged defamation.

However, in Shively v. Bozanich (2003) 31 Cal.4th 1230, the court held:

> "[w]hen the basis for a claim has been published in the public record or has been the subject of publicity, several cases have declined to apply the discovery rule, commenting that the plaintiff may be

> expected to be sufficiently diligent to discover the basis for his or her claim within the statutory period."

The court went on to opine:

> "We can see no justification for applying the discovery rule to delay the accrual of plaintiff's causes of action beyond the point at which their factual basis became **accessible to plaintiff** to the **same degree** as it was **accessible** to every other member of the public."

I interpret this to mean that the discovery rule does not apply when the basis for a defamation lawsuit is contained in information available to the public. Since courts have held that information on the internet is public, I believethat under the Shively holding, the discovery rule would not apply in situations where internet defamation involved.

That means you have one year to file a defamation lawsuit from the time it gets published or posted to the Internet.

So do not wait to file a defamation claim or you may lose the right to do so.

Bonus Section: Internet Defamation

The Internet is an amazing human achievement. It allows us to exchange information with others like never before. But while it is an incredible "marketplace of ideas," the Internet is also a "cesspool" of information where people spread false information and use it to destroy the reputation of others.

What is worse is that many legislators continue to treat speech on the Internet differently than they do offline speech. Some people call this "Internet Exceptionalism."

As a result of this phenomenon, many people and businesses are being defamed on a daily basis with no manner of recourse.

This is a massive problem with no easy answers. In fact, most people call me because I'm one of the few lawyers who handle Internet Defamation matters.

So while I can't get into every detail in this report, what I'm going to do is tell you about some common misconceptions about Internet Defamation:

1. **"Safety in Numbers"** - some believe they're safe as long as their target is a public figure or someone who is being defamed by lots of other people. Not so. It will depend heavily on the particular circumstances.

2. **"Aren't I anonymous on the Internet?"** - NO. This is probably the biggest misconception of them all. No one is truly anonymous on the internet. If you don't believe me, check out http://ipid.shat.net/. Scary, isn't it? The truth is, people can find you if they want to. They can employ a whole host of advanced techniques. Also, a lawyer can request a subpoena in certain circumstances to unmask your identity.

3. **"I'm immune, right?"** - Not necessarily. You've probably heard of the Communications Decency Act, which was passed by Congress in the 1990s. It was designed to protect freedom of expression on the Internet, and immunizes internet providers (in certain circumstances) from liability for their users' content. Initially, this law was interpreted broadly. Now, courts are carving out exceptions to the law, and effectively narrowing its scope.

4. "**Only U.S. law applies"** - Wrong again. While the U.S. was the first to tackle internet law, it will not be the last. As more and more countries develop, they will no doubt attempt to put their own stamp on internet law. What will be especially interesting is how this applies in countries with vastly different cultures.

5. **"Any lawyer will do"** - You should know that most lawyers have no idea what they're doing when it comes to the Internet. Don't assume that any defamation lawyer will do when you're dealing with online defamation. You need a lawyer who understands how the Internet works. You need an

internet defamation attorney.

6. "Bumping" a post - Old math says that you should respond to defamatory remarks in order to refute them. But, responding to such posts, or "bumping," only makes the defamatory remarks more significant in search engine indexes.

7. **Traditional PR Approach** - PR professionals will tell you that you should respond to a defamatory remark once forcefully and immediately. Then, they would tell you to then attempt to "replace" the remarks subsequently with positive information. This doesn't work in the online world.

8. **Opinions are not actionable** - This is a common mistake. People believe that only factual assertions are actionable defamation. But opinions in certain circumstances can give rise to a claim for defamation.

9. **Can't Prove Damages** - The trend is to look to a "Market Share Damages Approach" in order to calculate the damage of a particular defamatory statement in instances where there are several sources of defamation.

10. **"Gripe Sites" are absolutely protected** – The newest misconception and proof that a little knowledge is a dangerous thing. The Communications Decency Act was Congress' attempt to ensure that the Internet remained a marketplace of ideas by legislating broad protection for interactive computer services, AKA, websites. But courts are now limiting such protection by in cases where the "Gripe Site" has a financial component (as most sites do, advertising, e.g.), or encourage or assist a user in defaming another.

A Couple Of Final Thoughts. . .

I am so glad you chose to sign up to receive this free report and that you actually read the whole thing! You have spent your time wisely. You are now armed with extremely valuable information.

To learn more about Defamation law please subscribe to my blog, the California Defamation Law Blog. I've included a link to my blog at the bottom of this page.