

How to Keep Your Clients (and Yourself!) From Getting Sued for Defamation

A Discussion of the Law & Tips for Limiting Risk

Presented to Colorado Bar Association Real Estate Law Section

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Ashley I. Kissinger

(303) 376-2407

kissingera@ballardspahr.com

Defamation



What Generates Defamation Risk?

Website	Social Media Posts	Marketing Materials
Press Releases	White Papers	Reports
Op-Eds	Emails/Letters	Oral Statements
Text	Photos	Video

Good News: Communication is Speech

- It often implicates the First Amendment (opinion, independent appellate review)
- It often implicates special state law procedural devices (*e.g.*, anti-slapp statutes, retraction statutes, shorter statutes of limitation, case law emphasizing importance of dispositive motion practice)
- Judges are usually not familiar with the stringent substantive and procedural requirements attendant to claims involving speech

Proper framing of the issues is critical to success

Overview

- Anatomy of a defamation claim
- Defenses to a defamation claim
- Online wrinkles
- Best Practices
- Q & A

What Is Defamation?

- A **published** statement of **fact**
- That is **defamatory** (*i.e.*, harmful to reputation)
- That is **about the plaintiff**
- That is **materially false**
- There was no legal **privilege** to publish it
- The defendant is at **fault** (at the requisite level)
- The statement **caused injury** to the plaintiff

Is it Fact or Opinion?

A defamation claim cannot be based on a statement of **opinion**.

Factors Courts Consider

- Can you prove it true or false?
- Is it reasonably understood as conveying an actual fact?
- Does it have a precise and readily understood meaning?
- Does it imply undisclosed, false facts?
- Context may matter

Legislator files libel lawsuit against founder of advocacy group



by [Nolan Clay](#) • Published: January 17, 2016 •

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Richard Morrisette (D-OKC) criticizes and asks a question to interim superintendent Dave Lopez at a town hall meeting at NW Classen High School Hudson Performance Hall on Monday, April 7, 2014. Photo by KT King, The Oklahoman

A state legislator who also is a lawyer has filed a libel lawsuit against the founder of an advocacy organization created to expose problems in nursing homes.

Rep. Richard Morrisette, D-Oklahoma City, is asking an Oklahoma County judge to prohibit Wes Bledsoe from contacting his clients and from attempting to further defame him. He also is seeking thousands of dollars in damages.

The legislator sued Jan. 8. In an online statement that day, Bledsoe wrote, "If telling

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Statements of Fact or Opinion?

“Then of course, there was the disappointment in Richard Morrisette! His unethical actions and incompetence has cost his law clients thousands of dollars while receiving little more than rude lip service in return. As well, many of these clients are worse off after hiring Morrisette!”

When is a statement “false”?

When it is false in a **material** way

In other words . . .

The First Amendment protects statements that are **“substantially” true**, even if not precisely true.

What Degree of Fault Must Be Shown?

If Public Official or Public Figure Is Suing

- “Actual malice”
 - You entertained serious doubts about whether it was true.
- This a high bar

If a Private Figure Is Suing

- Colorado: Actual malice IF its a matter of public concern
- Negligence (Did you take reasonable steps to ensure accuracy?)
- NY: Gross irresponsibility (a pretty high standard)

Who Are Public Officials and Figures?



Evidence of Actual Malice

- Failure to consult obvious sources who can confirm truth/falsity
- Reliance on one person's account when others contradict it (or there are other reasons to doubt that person's veracity)
- Inherently improbable* (*What does that mean now??)
- Based wholly on anonymous source

Disparagement

- Criticism of business in general or its products or services
- Intent or recklessness
- Malice
- Might have different limitations period (jurisdictions differ)

Disparagement (cont'd)

- *Teilhaber Mfg v. Unarco Materials Storage*, 791 P.2d 1164 (Colo. App. 1989)
- Based on distribution of report evaluating competitor's product to employees and distributors
- Opinion defense failed (based on false facts; omission of critical true fact)
- Held plaintiff needn't point to specific lost sales
- Jury verdict: \$1.7 million. Affirmed.

Defenses to Defamation Claims

- Plaintiff failed to plead/prove essential element of claim
 - Opinion
 - Substantial Truth
 - Not “of and concerning” the plaintiff
 - Failure to sufficiently plead actual malice
- Privilege
- Retraction Statutes
- (No End Run principle helps defeat tag along claims)

Privileges

- Fair Report of Official Actions/Proceedings
- Conditional/Qualified Privileges
- Absolute Privilege

Fair Report Privilege

- You can rely on official government proceedings or documents
- Key requirements:
 - Fair and accurate summary
 - Attribution to the source
- Scope of privilege varies by state

Fair Report Privilege Via Hyperlink

[Tell Romney to Reject Adelson's Dirty Money]



As you saw during the Republican primaries, GOP mega-donor Sheldon Adelson dumped millions of dollars into supporting Newt Gingrich's feckless campaign. Now he's doing the same for Mitt Romney—with no plans to stop. But perhaps the most alarming aspect of Adelson's potentially unlimited contributions is where the money comes from.

It's well known that Adelson makes tremendous sums of money through his casinos in China which—according to 2008 Republican presidential candidate [Senator John McCain \(AZ\)](#)—means that Chinese “foreign money” (to quote McCain) is flooding our political system. But this week, reports surfaced that in addition to his [anti-union](#) and allegedly [corrupt business practices](#), Adelson “personally approved” of prostitution in his Macau casinos.

Absolute Privileges

- Statements made in the course of, and reasonably related to, judicial, quasi-judicial, and legislative proceedings.
E.g., Lininger v. Knight, 123 Colo. 213 (1951) (letter to county commissioners asking for revocation of a liquor license was privileged)
- Statements made in course of judicial proceeding (including allegations in a complaint)
- Statements made by attorney in course of litigation
 - But NOT statements by the attorney to the press or on the internet to publicize her case. *Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc.*, 438 F. Supp.2d 1288 (D. Colo. 2006)

Conditional (Qualified) Privileges

- Common, legitimate interest in subject matter
- Actual malice and regular malice defeats privilege

Retractions

- Some states have “retraction statutes” (Colorado doesn’t)
- They vary from state to state.
- They can reduce your legal exposure, and they have strict time limitations that must be followed.

The “No End Run” Principle

Things to Watch Out For . . .

Repeating is the same as publishing

Every repetition of a defamatory statement is a new “publication,” so the repeater may be held liable, too

But: Plaintiff must show fault as to the repeater.

Note: U.S. courts say hyperlinking to a defamatory statement is not a republication

Incidental Plaintiffs

- The main subject of a publication is not the only one who can assert a claim for defamation.
- Pay attention to all persons and organizations mentioned.
- (Companies and other organizations can sue, too)

Implications

- Defamation by implication: Where the reasonably understood (but unstated) implications of a statement are defamatory.
- Defamation by implication claim can arise from:
 - Juxtaposition of photos with text
 - Arrangement of words
 - Omission of material point
 - Suggestive section headings

Arrangement of Words

- Newspaper CORRECTLY reported that man “shot and killed” wife
- Stated two paragraphs later that police had determined the shooting was an accident.

Gannett Co. Inc. v. Anderson,
947 So. 2d 1 (Fla. Dist. Ct. App. 2006)

Juxtaposition

Porn industry shuts down with immediate effect after 'female performer' tests positive for HIV

By JAMES NYE

PUBLISHED: 01:10 EST, 22 August 2013 | UPDATED: 01:10 EST, 22 August 2013



0 View comments

The adult film industry in San Fernando Valley in California, announced a moratorium on the making of porn films Wednesday after an actor tested positive for HIV.

The performer was not immediately identified and officials didn't say when the positive test was recorded.

The actor's sex partners are currently being tested by doctors with Adult Production Health and Safety Services, which works with the porn industry.

X-Biz, an adult industry trade magazine, reported that the performer with the HIV-positive test is female and new to the industry says the *Los Angeles Daily News*.



Site		Search
Web		

FEMAIL TODAY

• She's crossed the borderline! Madonna, 55, shows off her gold grills as she pays a visit to the Hard Candy fitness studio in Rome
Striking accessory



• Hold on tight! Kourtney Kardashian protectively cradles daughter Penelope close as she continues to model her array of micro shorts
Doting mother-of-two



• Lady Gaga finally censors herself with pixelated glasses...but still can't resist a cheeky peek of cleavage
Pop star stepped out in NYC



• Isn't basketball season over? Lamar Odom seen loading large amounts of luggage into his car amid continuing reports of marriage trouble
In Calabasas, CA



ALL-NATURAL HERBAL CURE FOR GUM DISEASE

NATIONAL
Examiner
January 16, 1989

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daytime dramas

SOAP
DISB

**COPS
THINK
KATO
DID
IT!**

—he fears they
would film for
perjury, say pals



EXPOSED!

**REGIS
DIVORCE
SHOCKER**

Why he split from
his wife



—the story he didn't
tell in his new book

**WHITNEY'S
BADBOY
HUBBY
FALLS FOR
STUNNING
SOAP STAR**
—pals reveal red-hot rendezvous



**CIA USES PSYCHICS TO
STEAL FOREIGN SECRETS**



Photo Alterations/Graphics





From: Will Dana

To: Joe Hutchinson, ritterillustration@gmail.com, Mark Maltais

This is great!

Anonymity Is Not a Shield

Courts can “unmask” anonymous speakers

Foreign Issues

Defamation laws vary widely outside the United States

U.S. law among most speech-friendly in the world

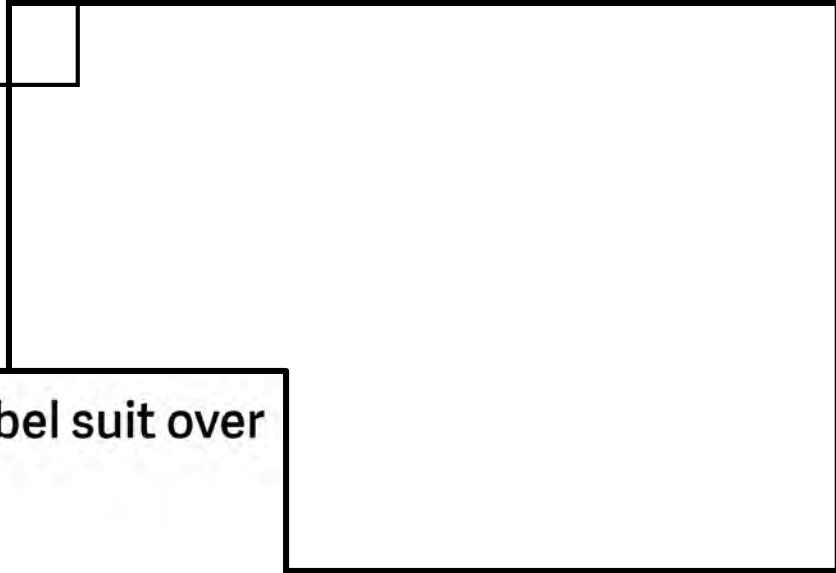
- Example: Under U.K. law, it is the defendant's burden to prove truth, no actual malice standard

SPEECH Act (libel tourism) protections

Social Media & Other Internet Issues



Defamation on the Web



Ciara hits Future with \$15 million libel suit over tweets

Plus, the blurry ethics of mining a relationship for art

by [Lizzie Plaugic](#) | Feb 9, 2016, 12:40pm EST

Attorney Must Face Producer's Defamation Suit Over Tweets

By [Suevon Lee](#)

Can a Tweet Really Be Defamatory?



@APkrawczynski

John Krawczynski

Ref Bill Spooner told Rambis he'd "get it back" after a bad call. Then he made an even worse call on Rockets. That's NBA officiating folks.

24 Jan via TweetDeck 17 Favorite 13 Retweet 6 Reply

NBA ref Bill Spooner sues AP writer John Krawczynski for 'defamation' over Twitter remark

BY LARRY MCSHANE
DAILY NEWS STAFF WRITER

Tuesday, March 15, 2011

A veteran NBA official whistled an Associated Press reporter for an intentional foul. Bill Spooner, a 22-year court veteran, sued writer John Krawczynski over a Jan.

Social Media and Defamation

AFUERA HERBALIES
@AfueraHerbaLIES

Comments made are derived from bearing witness to the EXPLOITATION of our Pueblo!

TWEETS 7,104 FOLLOWING 80 FOLLOWERS 228 LIKES 4,483

Tweets Tweets & replies Media

In reply to Valentina

AFUERA HERBALIES @AfueraHerbaLIES · Apr 2
.@Valz0427 \$HLF

DON'T DRAKE & DRIVE

& DON'T DO HERBALIFE
#STRAIGHTupFRAUD

Who to follow · Refresh · View all

- Mike Lee @SenMikeLee · Follow
- Paul Irish @paul_irish · Follow
- Rachel Cruze @RachelC... · Follow

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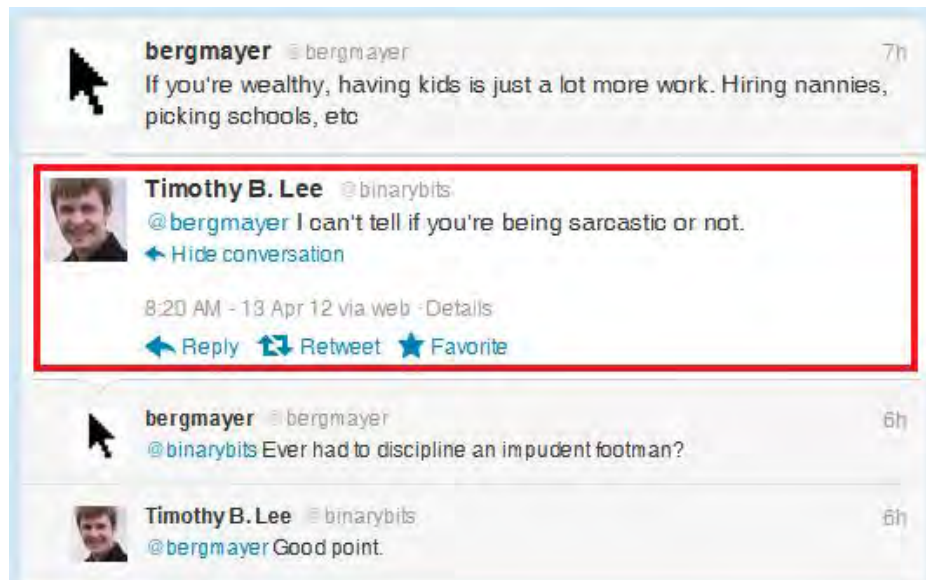
Trends · Change

- #NationalHugANewsPersonDay
Trending for 2 hours now
- #mondaymotivation
79.5K Tweets
- #panamapapers
1.51M Tweets
- Basketball Hall of Fame
17.2K Tweets
- #CapsOn
33.8K Tweets
- Martin Luther King

Risk of (Mis)Interpretation

Analysis of defamatory meaning complicated by:

- Limited context or background facts
- Use of slang, abbreviations, humor

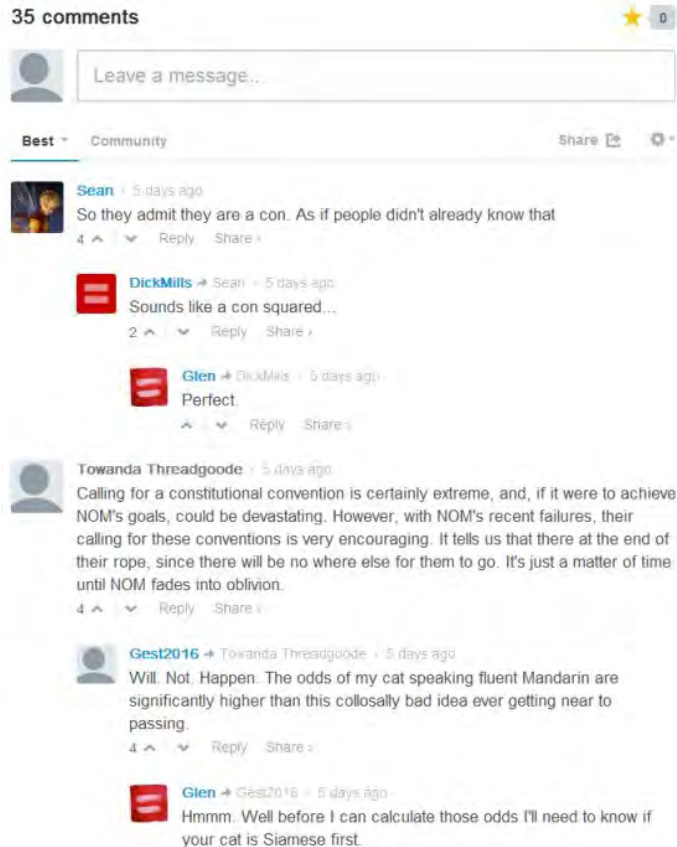


Comments By Website Users

- General Rule: The rules of libel apply with equal force to the Internet.
- Exception: User-created content.
 - Section 230 of the Communications Decency Act (47 U.S.C. § 230): “No . . . user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”



The CDA Protects You if the Content Is the Work of “Another”



- The CDA’s protection from suit applies **only** if the content is created by “**another**” person or company
- So, if an employee or agent is the “creator or developer” of the content, in whole or in part, then the CDA will **not** protect company.

Linking and Re-tweeting

- The CDA generally provides immunity for links to, and re-tweets of, third party content.
- There could be risk, however, if you appear to have **adopted** or **endorsed** the content.

Best Practices

- Disclose facts underlying opinions. (Make sure they are true!)
- Be as precise as possible under the circumstances
- Limit statements about minor players
- Don't omit material facts
- Rely on government documents & statements where possible
- Research potentially applicable privileges in advance

Best Practices (cont'd)

- Vet content that obviously poses defamation risk
 - Comparisons with competitors
 - Press releases discussing other companies or persons in an unfavorable light
- Control communications describing vetted content
- Follow up on retraction demands immediately
- Do not encourage or solicit unlawful information to be posted by others on a website
- Train employees responsible for producing content

Questions?

Ashley Kissinger
Ballard Spahr LLP
kissingera@ballardspahr.com