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YOUR ONLINE REPUTATION

PROTECTING YOUR COMPANY FROM SOCIAL MEDIA DEFAMATION

BY DAVID GOVERNO, ESQ. AND WILLIAM GALLITTO, ESQ.

“It takes 20 years to build a reputation and five minutes to ruin it.”

—Warren Buffett

You have worked hard for years to build a well-respected, profitable business in the cleaning and restoration industry. Yet things are slow. You search for an answer. You Google your company’s name and find misleading, negative reviews. But the reviews mention locations where you have never done work. Is the author a disgruntled ex-employee or an underhanded competitor hiding behind a fake Internet persona? What do you do?

While social media has revolutionized how businesses and consumers interact, it has also created new legal risks and challenges for businesses attempting to capitalize on the Internet’s vital role as a source of consumer information. Facebook and Twitter are now common ways for businesses to connect with their customers. Similarly, consumers use a host of other social media platforms, including Yelp, Google, YouTube and blogs to share their experiences and opinions—both good and bad—of a company’s product or service.

Legal developments typically trail behind societal changes. The same is true in the social media context: Our society’s almost universal use and reliance on social media is now just beginning to reveal a number of legal risks to businesses, including two primary risks: (1) consumers or competitors posting false negative reviews that adversely impact sales, profits and the company’s reputation, and (2) a company creating its own liability by posting false (or confidential) information online.

Communicating untrue information that negatively affects a person’s or a business’ profits, sales or monetary gain is known as defamation. These statements are either slander (spoken defamation) or libel (written defamation) and can be the basis of a lawsuit. The laid-back, shoot-from-the-hip style of most social media users for posting their comments online can have monumental consequences for the reputation and liability of your business.

WHAT IS DEFAMATION?

Although there is some variation from state to state, defamation generally occurs when Person A makes a false statement to Person B about Person C, and that false statement causes economic loss to Person C. In the resulting lawsuit, Person C sues Person A for defamation.

Damages that can be recovered in a defamation lawsuit are not only the monetary losses from the defamatory statements, but sometimes also include attorneys’ fees, based upon the theory that the action was intentional and meant to interfere with an existing or anticipated contractual relationship. The potential award of

attorneys’ fees is an important feature because, in most lawsuits, each party pays his or her own legal fees. Thus, the potential to force your opponent to pay whatever damages he or she causes, plus your attorneys’ fees, can help victims of defamation fully recover the actual harm caused by the defamatory statements.

However, one powerful defense used by defendants in defamation litigation is the First Amendment of the Constitution, which protects speech, one of the most well-established constitutional freedoms. Even though defamation is not protected under the First Amendment, courts are reluctant to issue orders restricting speech. They are, however, more willing to award monetary sums in response to damages caused by defamatory statements. Some states have even gone as far as to criminalize defamatory statements in a business context.¹

PROTECTING YOUR ONLINE REPUTATION

At one time, a word-of-mouth recommendation was the most trusted and valued endorsement a company could earn. While word-of-mouth still exists today, it takes on a modern format: Internet reviews, product or service ratings and user comments. This information creates a company’s reputation in the 21st century.

With today’s ever-increasing reliance on the Internet, a company’s online reputation is one of its most valuable assets. A recent market survey by Cone, a Boston-based market research firm, found that 80 percent of people have changed a product or service decision due to a bad review.² Therefore, it is not surprising that companies go to great lengths to protect, maintain and improve their online reputations.

Historically, companies avoided confronting negative reviews under the theory that more attention would heighten the damage. But recently, this trend has been changing. Companies are more quickly responding to defamatory comments by taking legal action against the authors of false and misleading online reviews.

The emerging trend of companies using defamation lawsuits to protect their online reputation and recoup lost profits is best exemplified by a recent Massachusetts case, *Clay Corporation v. Colter*. The dispute began in 2012 after the owner of Clay Corporation (“Clay”) terminated a female employee. In response, the employee’s brothers began a social media smear campaign by launching a Facebook page and website dedicated to boycotting Clay’s business. They claimed on these sites that Clay terminated their sister “because she had cancer,” that it had

terminated other cancer patients and that it had a policy of discriminating against employees with cancer.

Clay filed a defamation lawsuit against the brothers alleging that they published false statements using social media that interfered with Clay's business relations with current and prospective customers. Clay sought monetary damages and a court order to prevent the defendants from publishing further defamatory statements.

The court determined there was no factual basis to support the brothers' statements. It found that Clay's service manager—who was aware of the employee's illness when she was hired and accommodated her illness during her employment—terminated her one year later due to inappropriate interactions with customers and employees. Moreover, the court noted that the statements made by the brothers were a "far-reaching, extremely aggressive social media campaign" lacking in factual support. Even so, the court *refused to prohibit* the brothers from making these statements, citing the First Amendment right to free speech.

The court did find, however, that Clay's business was "severely and adversely impacted" by the defendants' social media campaign and that it suffered more than \$100,000 in losses. It also found that Clay was likely to prevail on its defamation claim and issued a \$1.5 million attachment on the defendants' real estate holdings and bank accounts. The Massachusetts Court of Appeals upheld the trial court's decision, but reduced the attachment to \$700,000 because of the speculative nature of the damage to the business.

This case is just one example of many social media defamation lawsuits being litigated across the country. Doctors, restaurants, manufacturers, restoration businesses and other victims of untruthful reviews are taking action to protect their reputation and their business. As the Clay case illustrates, defamation lawsuits are a powerful tool to combat social media defamation. The perpetrator faces negative publicity and runs the risk of paying a large monetary award.

NAMELESS, FACELESS ACCUSERS

Not all defendants in online defamation cases are as easy to identify as the brothers in the Clay case. Online forum users tend to use nicknames or pseudonyms to hide their identity from other users. While this encourages free and unfettered expression of ideas and opinions without fear of reprisal, it also creates serious identification problems. Determining the author of a post—whether it's an ex-employee, a competitor or actually an upset customer—is vital to determining the merits of a defamation case.

In *Hadeed Carpet Cleaning, Inc. v. John Doe #1*, Hadeed sued seven anonymous Yelp users for defamatory statements made about the company's cleaning business. These reviewers alleged that they were "ripped off," their rugs were shrunk, they were charged for work never

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performed, their property was damaged or they were charged double the price quoted.

In an attempt to combat these negative online reviews prior to filing suit, Hadeed tried to match the negative reviews with customers from its database. After an extensive search, Hadeed found no record that the negative reviewers were actual customers. One negative comment was from outside the area in which Hadeed conducted business. These circumstances led the business to believe one of its competitors was behind the defamatory reviews.

In an attempt to protect its reputation and determine who was behind the negative reviews, Hadeed sued the seven unknown authors for \$1.1 million in damages and issued a subpoena to Yelp seeking documents revealing identifying information about the authors. The Virginia trial court agreed with Hadeed and enforced its subpoena, however, Yelp refused to turn over any identifying documents. Yelp appealed the court's order in an attempt to protect its users' First Amendment rights. Though the Hadeed case is currently on appeal, it is another example of how defamation lawsuits can help protect your business' reputation and recoup lost profits.

RESPONDING TO DEFAMATORY COMMENTS

If someone makes false or defamatory statements about your company, consider taking the following steps: (1) react to the false statement in a positive way, (2) use the site's administrative procedures to remove untrue content, and (3) request a retraction of the statement. If these attempts are unsuccessful or if you wish to pursue a defamation case, be sure to obtain the name and any other identifying information of the author of the untrue statement, take a picture or "screen shot" of the defamatory statement, and keep track of all related business expenses and losses that result from the defamatory statement.

MINIMIZING YOUR OWN LIABILITY

While the Clay and Hadeed cases illustrate how companies can seek damages for defamatory statements, they also highlight how quickly a company's reputation can be damaged online. Companies operating in this environment must recognize they face liability for defamatory statements made by even low-level employees. (We wrote about this risk in "Social Media: Understanding and Controlling Your Liability" in the September 2011 issue of *Cleaning & Restoration*.)²

The central theme of that article bears repeating: A company's public communications, whether made by the CEO or a newly hired employee managing its Facebook or Twitter page, can be actionable for defamation if the statements are untrue and cause monetary damage.

To protect your business from potential social media liability, you should:

1. Have a clear company policy that provides guidance regarding the proper use of social networking sites;
2. Train all employees on your social media policy and the importance of appropriate social media use;
3. Carefully select and limit the number of employees who will be the voice of the company on social media sites;
4. Be careful and respectful. Post only truthful statements, as truth is a defense to defamation; and
5. Obtain appropriate insurance coverage (be sure to understand the scope of the coverage and the exclusions).

Some caution is required in formulating a social media policy, as the National Labor Relations Board (NLRB) has recently decided that these policies can "chill" employees' rights to complain about their employer. However, do not let this deter you from implementing a social media policy. This tool is essential to protect your business. We recommend that you consult with an attorney to be sure you are in compliance with the latest rulings in your state. The most significant mistake we see is the failure to properly

implement the social media policy. Be sure your employees know its importance and how to conduct themselves.

As social media continues to play a vital role in how businesses and consumers interact, be aware that while defamation lawsuits can be a powerful tool to protect your online reputation, they are also something to guard against. Closely monitor online reviews of your company, as they substantially affect your business.

As unscrupulous individuals and businesses use social media to harm others, defamation claims will continue to present one avenue to protect your company. But first, limit the risk. Take proactive steps to avoid inappropriate online posts and manage the unforeseeable risks through company-wide training and the purchase of insurance.

We have counseled clients for decades to protect themselves at all times. Although this remains true, the rules of engagement have changed. Social media is here to stay. It dominates the marketplace. Businesses must accept the challenge of playing in this new arena with new rules. By understanding these rules and turning them to your advantage, you will maximize your chances of dominating the marketplace. **RIA**

[Author's note: This article is not intended to be and should not be interpreted as legal advice. Each legal situation is different; consult with an attorney licensed to practice in your state about specific legal issues.]

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¹ These states include: Florida (Fla. Stat. § 836.01); Louisiana (La. Rev. Stat. § 14:47); Mississippi (Miss. Code Ann. § 97-3-55); New Mexico (N.M. Stat. Ann. § 30-11-1); North Carolina (N.C. Gen. Stat. § 14-47); North Dakota (N.D. Cent. Code § 12.1-15-01(2)); Oklahoma (21 Okla. Stat. § 771); South Dakota (S.D. Codified Laws § 20-11-1); Virginia (Va. Code Ann. § 18.2-209) and Wisconsin (Wis. Stat. Ann. 942.01).

² Cone Communications, Cone Online Influence Trend Tracker, and *Game Changer: Cone Survey Finds 4-out-of-5 Consumers Reverse Purchase Decisions Based on Negative Online Reviews*.

³ David M. Governo, Esq., & Bryna Rosen Misiura, Esq., "Social Media: Understanding and Controlling Your Liability," *Cleaning & Restoration*, 23 (2011).

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