

# Protect your reputation

Advice for victims of Internet defamation **Interviewed by Troy Sympton**

**T**he Internet gives many people the false sense that they can say whatever they want about a person or business with no repercussions. This is due, in large part, to the nature of the Internet, which allows people to express their opinions anonymously and seemingly without accountability.

“Internet message boards and review sites provide a venue where users — customers and pretenders alike — can offer anonymous evaluations and judgments about restaurants, hotels, medical and legal professionals and businesses,” says Mitchell L. Marinello, a partner with Novack and Macey LLP. “Unfortunately, sometimes these reviews cross the boundary between mere opinion and defamation.”

When they do, they can cause great damage, because they can linger on the Internet for years. But if a company is the victim of Internet defamation, it has remedies. Through diligent effort, a company can identify the defamers, take action to have defamatory statements removed from the Internet, require the defamers to pay damages and obtain injunctions prohibiting the defamers from doing it again.

*Smart Business* spoke with Marinello about Internet defamation and what a company can do to protect itself.

## What is the definition of defamation?

In Illinois, defamation is divided into two categories: defamation *per se* and defamation *per quod*. Illinois recognizes four categories of statements that constitute defamation *per se*: words that impute the commission of a criminal offense; impute infection with a loathsome communicable disease; impute an inability to perform or want of integrity in the discharge of duties of office or employment; or impute a lack of ability in his or her trade, profession or business. Statements that constitute defamation *per se* are thought to be so obviously and materially harmful to the plaintiff that injury to his or her reputation may be presumed.

Statements are defamatory *per quod* when the defamatory character of the statement is not apparent on its face and extrinsic circumstances are necessary to demonstrate its injurious meaning; and where the statement is defamatory on its face but does not fall within one of the limited categories of statements that are actionable *per se*. Unlike a defamation *per se* action, a plaintiff bringing a defamation *per quod* claim is not presumed to have suffered damages and instead must plead and prove special damages in order to prevail.



**Mitchell L. Marinello**  
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## What is the difference between nonactionable opinion and defamation?

Even if the words used could be considered defamatory, they must be statements of fact or mixed statements of fact and opinion to be actionable. This is determined by considering the totality of the circumstances and whether the statement can be objectively verified as true or false.

An opinion can be defamatory if it implies that undisclosed defamatory facts are the basis for the opinion. Such statements are considered to be mixed statements of opinion and fact and are actionable.

To determine if a statement is opinion or factual, Illinois courts consider whether the statement has a clear meaning for which a consensus of understanding exists; whether it is verifiable, i.e., capable of being objectively characterized as true or false; whether the literary context would influence the average reader's readiness to infer that a statement has factual content; and whether the broader social context or setting in which it appears signals a usage as either fact or opinion.

A defamatory statement will not be characterized as nonactionable opinion unless it meets a stringent standard: only statements that cannot reasonably be interpreted as stating facts are protected. A statement of fact can also be protected as opinion if it is an obvious exaggeration.

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## What should you do once you learn you've been defamed?

The first step is to evaluate the comments and the amount of publicity they are likely to receive and make a judgment about how harmful they are and what should be done. Overreacting to negative comments can create more bad publicity or cause a disgruntled critic to become even more vocal. At the first instance, Internet defamation needs to be treated like a public relations problem.

The second step may be to ask the site if it will remove the statements. Sometimes, such comments violate a site's policies. Defamatory comments also can be resolved over time if you believe they will be drowned out by positive comments from people pleased with your goods or services. You cannot sue the Internet provider for allowing defamatory statements to be published on its site, as Internet sites are immune from defamation suits under federal law. If the statement is so harmful that legal action is contemplated, you need to determine who posted the statements. It may be necessary to file a petition for pre-suit discovery and then to serve a subpoena on the Internet site requesting the poster's identity.

Posters may try to prevent you from learning their identities by filing a motion to quash the subpoena, alleging they have a First Amendment right to remain anonymous. Although certain types of anonymous speech are protected, there is no constitutional right to defame. The Illinois Appellate Court recently held that it is overly broad to assert that anonymous speech, in and of itself, warrants constitutional protection. Thus, such motions should fail. All private businesses and individuals have a right to protect their reputations.

## What defenses and privileges do defendants have in defamation cases?

Illinois courts recognize several privileges and defenses, including substantial truth, the fair reporting privilege, the innocent construction rule and nonactionable opinion. A successful plaintiff will likely have to overcome one or more of these.

## What damages can be recovered for defamation?

There have been substantial monetary judgments issued for defamation. The judgment can include both compensatory and punitive damages. <<

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