

Fighting anonymous online defamation

By Mitchell L. Marinello and Andrew P. Shelby

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Over a several month period, a physician notices that some of her patients have moved to other doctors and that her office is seeing fewer new patients than usual.

She thinks it is just coincidence or a bad economy, but a friend pulls her aside at a medical conference and asks whether she is aware of the nasty rumors circulating about her practice. The doctor searches the Internet and discovers that 12 months earlier three purported patients of hers anonymously and falsely accused her of flagrant medical malpractice on an Internet message board.

A job-searching executive is repeatedly rejected for positions for which he is well-qualified. He eventually learns that prospective employers are seeing false accusations of fraud and financial misdeeds about him on an anonymous "public" Facebook profile. The executive utilizes pre-suit discovery procedures to learn the identity of the poster, but it takes a year before his anonymous defamer is unmasked.

Janet, a married woman with three children, is contacted by a friend who has received an e-mail about her. The e-mail contains a lot of personal information about Janet, including the names of her husband and children and her husband's employer.

It expresses sympathy for Janet, because, it says, Janet's husband has been having sex with prostitutes and has given Janet AIDS. The statements are not true, but the e-mail has been sent to a large number of Janet's family, friends and business associates, many of whom are contacting Janet to express their concerns.

The person under whose name the e-mail was sent does not exist. Janet has ideas about who the author might be, but she has no proof and it takes her more than one year to make any headway.

Once they discover the identities of the people who have publicly made false allegations about them, can the physician, the executive and Janet sue the anonymous libelers for defamation? Not in Illinois, because the one-year defamation statute of limitations, 735 ILCS 5/13-201, began to run the second the defamatory material was posted on the Internet (for the doctor and executive) or the instant it was discovered (for Janet).

This is true when the victims do not learn of the defamation for several months and even when the authors of the defamation hide their identities. It does not matter if the victims immediately take legal

action to find out the identity of the defamers. It also does not matter if the material is posted on the Internet and, like a billboard on the highway, is seen each day by new people passing by.

And, here's another rub: Under federal law, the Internet site that posted the defamation has no legal responsibilities whatsoever for the defamation. The Internet site cannot even be required to remove the defamatory material through a court order. It is immune from suit. See, e.g, *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

Illinois law

To seek timely redress for defamation, the Illinois victim must discover the defamatory statements, discover the identity of the author and file suit within one year of publication. That's it. It does not matter what the legal hurdles are or how well the anonymous defamer has hidden his, her or its tracks.

If the Internet provider takes a long time to respond to subpoenas designed to elicit information about the defamers, then that simply puts more deadline pressure on the victim. It does not help to try to file a "John Doe" suit until the identity of the anonymous perpetrators can be uncovered: Illinois law does not allow them.

Proposed amendment

It is to address situations like the ones described above that we have written a modest amendment to the Illinois statute of limitations for defamation. The amendment would serve to toll the statute of limitations during the time that a person uses Illinois Supreme Court Rule 224, or a similar procedure, to try to identify an anonymous defamer.

The proposed statute has made it through The Chicago Bar Association committee structure with flying colors, receiving near unanimous support at each level. Last month, the CBA Board of Managers unanimously approved the draft statute. The proposed legislation now goes to Springfield where the CBA will work with the General Assembly to make sure this important legislation becomes law.

Rep. Scott Drury, D-Highwood, is the chief sponsor of the legislation (HB5278), which he anticipates will receive a hearing before the House Judiciary Committee in the coming weeks.

Drury looks forward to advocating for this legislation. "Technology has made it easier than ever for a person to anonymously defame individuals, often causing great harm" said Drury.

"This legislation is part of my ongoing commitment to protect the public from online harassment."

For more information about Internet defamation and related issues, contact [Mitchell L. Marinello](#) or [Andrew P. Shelby](#) at 312-419-6900, mmarinello@novackmacey.com or ashelby@novackmacey.com.