

The Sticks And Stones Of Internet Libel: What Legal Recourse Do You Have If An Anonymous Internet Poster Defames Your Business?

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The Internet makes it relatively easy for anyone to anonymously post negative and untrue comments about your business. If you discover that someone is posting derogatory or false comments about your business on an Internet website, blog, or forum, you can sue that person for defamation (and possibly other business-related claims). But if the comments are posted under a username which offers no clues to the Internet poster's identity, can you take legal action to require the owner of the website to reveal the name of the anonymous Internet poster? The

answer involves a balancing act between the Internet poster's constitutional right to remain anonymous and your right to seek judicial relief against the Internet poster.

The Internet Poster's Constitutional Rights: Are Anonymous Comments Posted on the Internet Protected Under the First Amendment?

Generally, yes. The First Amendment free speech provision ("Congress shall make no law ...abridging the freedom of speech"), which the courts have held also applies to the states, protects anonymous speech. Under the First Amendment, an author generally is free to decide whether or not to disclose the author's true identity based on the rationale that having anonymous writings enter the "marketplace of ideas" outweighs the public's interest in knowing the writer's identity. Courts therefore typically protect anonymity under the First Amendment where literary, religious, or political speech is concerned. This First Amendment protection extends to anonymous speech/writing on the Internet, which (at least in theory) allows more participants to engage in public discussion and debate without fear of reprisal.

Different types of speech, whether anonymous or not, receive different levels of constitutional protection. Because of its significance in this country's history, political speech is accorded the highest level of protection. Commercial speech, which is expression related solely to the economic interests of the speaker/writer and the audience, is given a lesser level of protection and will not be protected if it is misleading or related to unlawful activity. Defamatory speech, explained below, generally is not entitled to any First Amendment protection.

Your Right to Sue: What Constitutes Defamation?

Defamation is an intentional false communication that harms the reputation of a person in the eyes of the public. In legal jargon, a plaintiff asserting a claim for defamation must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which statements were published to a third person and caused injury to the plaintiff's reputation. The two types of defamation are **slander**, which is

defamation involving an oral communication, and **libel**, which is defamation expressed by print, writing, pictures, or signs.

The defamatory words must be communicated to some person or entity other than the defamed person or business. For example, if someone sends an e-mail or a private Facebook message to you or your business without copying anyone else or posting it so that others can see it, it does not constitute defamation, even if it is false.

If the slander or libel consists of statements about your business or profession and the words are defamatory by themselves, without further explanation, it is considered defamation "per se." That means you do not need to prove in court that you or your business were damaged by the defamation; such damages are presumed. If the defamation is not "per se," you would need to prove that the defamation caused you an actual monetary or economic loss.

The Balancing Act: The Internet Poster's Right to Anonymity Versus Your Right to Sue

In a recent decision, a federal court in North Carolina examined under what circumstances it would require a website owner to reveal the identity of anonymous Internet posters in order for them to be sued for defamation or other related claims. In that case, an investment firm alleged that individuals it believed to be competitors were conducting a "smear campaign" against the firm by anonymously posting defamatory comments about the investment firm on the website whocallsme.com. The postings included statements like:

"yes, this number is a scam. It's a company who poses as a legitimate investment firm...but they sell you stocks that don't exist" and,

"this number belongs to a company that steals contact data...to try getting people's money for supposed investment opportunities."

Because the investment firm did not know the Internet posters' names, it brought suit for defamation and other claims against "John Does 1-10." The firm then asked the court for leave to subpoena the website owner of whocallsme.com to reveal the Internet posters' identities so they could be substituted as the defendants in the lawsuit.

The court first decided that the Internet posters' statements involved commercial speech because they disparaged the investment firm's business practices, and the firm alleged that the Internet posters were competitors. In determining if it would use its subpoena power to identify the Internet posters, the court set forth a two-part test. The test balanced the Internet posters' right to anonymous commercial speech (entitled to a lower level of protection) against the investment firm's right to assert legal claims against anonymous Internet posters of false information. To prevail, the investment firm would be required to:

- Prove that at least one of the claims the firm asserted in its complaint would survive a hypothetical motion to dismiss. That means the firm had to set out the legal elements of the claim and explain how the factual allegations in the complaint supported each of the elements (a relatively easy legal burden to meet); and,
- Provide the court with proof that the firm had attempted to locate and notify the Internet posters that they were the subject of a possible subpoena, including posting notification of its request for the Internet posters' identification on the relevant website discussion boards.

The Take-Away

You *can* take legal action if anonymous Internet posters defame your business on the Internet. However, your

right to subpoena a website owner to disclose the identity of the Internet posters will be weighed against the Internet posters' First Amendment right to remain anonymous. At a minimum, you should be prepared to prove that at least one of the claims you will assert against the Internet posters has legal merit and that you have taken reasonable steps, without success, to identify and notify the Internet posters and need the court's subpoena power for that purpose.

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