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EARLELAW NEWSLETTER

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Internet “Reputation Management” for Small Businesses

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Issue Number: 2010-15

Q. We own a small business in northern California, which provides both products and services to individual consumers.

Because our success depends, in large part, on repeat business, we follow various Internet sites that post customer reviews of our business. Many of our customers have posted positive reviews. However, as the saying goes, we can’t please all of the people all of the time.

Negative postings have the potential to significantly harm our business. What can we legally do to protect ourselves from the occasional – and inevitable – disgruntled customer who publishes a negative review of our business?

A. The First Amendment to the United States Constitution states, in part, that: “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” Prior to the Civil War, the First Amendment prevented only the federal government from censoring speech. It was not until passage of the 14th Amendment, that the First Amendment became a bar against state censorship of speech.

A government engages in censorship when (among other things) it allows private parties to use its courts to sue others based on what others publish, either verbally or in writing.

The First Amendment, however, has never been understood to protect against all government censorship. For example, it does not create or protect a constitutional right to make false statements; falsely yelling “fire” in a crowded theater is not protected speech.

Long before the First Amendment banned state government censorship of speech, state laws provided civil causes of action for defamation, the general definition of which is “[a]n intentional false communication, either published or publically spoken, that injures another’s reputation or good name. . . .” Defamation includes both libel and slander.

In the landmark U.S. Supreme Court case New York Times v. Sullivan, the court made a distinction between, on the one hand, public officials/public figures and, on the other hand, all others. For a public official/public figure to recover defamation damages, the Court said that a plaintiff must prove the defamatory statement was published with malice. Malice, in this context, means that the defamatory statement was published with knowledge of its falsity or with reckless disregard for whether it was true or false.

Mere opinions, by definition, are not capable of being either true or false and, thus, are not actionable.

For the purpose of defamation law, the term “public figure” includes businesses. Thus, in order to prevail against a person who publishes a negative review, the business must be able to show that the posting is both false and made with malice. In most cases, the business will not be able to prove falsity, as most such postings are merely the reviewer’s opinion. In cases where falsity can be proven, past court cases inform us that proving malice is usually impossible.

Furthermore, in California, as in many other states, there exists a law against “Strategic Lawsuits Against Public Participation,” or “anti-SLAPP” law,

which allows a defendant to obtain summary dismissal of such cases and which mandates an order requiring the plaintiff to pay the successful anti-SLAPP defendant's reasonable attorney fees.

Thus, businesses who seek to manage their reputations should: (1) provide the best product/service possible, at a fair price; (2) comply with all laws, regulations, and industry standards; (3) engage in a good-faith attempt to satisfactorily resolve disputes; (4) consult with their attorney regarding whether to respond to negative reviews; and (5) have their attorney draft, or at least review, any response to an adverse review that the business intends to publish in rebuttal.

As the U.S. Supreme Court recently said in a case involving censorship of political speech, which was presented in the context of so-called campaign finance reform, "when government seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."

Earle Law Offices provides trial and appellate litigation, as well as non-litigation, legal services in the areas of bankruptcy, business law, constitutional and civil rights law, family law, real estate law, tax law, and trusts and estates.

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Mr. Earle received his law degree from the Santa Clara University School of Law, where he served as an Editor of the school's Law Review, and where he received awards for academic excellence. He received his undergraduate degree, with honors, in business administration from the University of La Verne.

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