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Business Defamation

Can one business sue another for defamation of character just like a slighted individual might bring a claim? You bet. Many business arenas are highly competitive and in a quest to get an edge over one's competition, caution has to be exercised when making comments about one's competitor – unless you enjoy spending money on legal fees and wasting time in depositions and in the courtroom.

Let's start with some definitions. Defamation is simply an injury to another's reputation, typically broken down into either libel or slander. Slander constitutes oral utterances (remembered as "s" for slander or spoken) whereas libel is in the form of a writing. Statements which injure a person's business are equally actionable and the action can be brought either by the individual business owner, such as a sole proprietorship, or by a corporation. These do not have to be words limited to claims of dishonesty or fraud. A wider net is cast. Any kind of accusations of incompetence can be actionable.

The advent of the internet has opened a whole new arena devoted to business defamation. Websites for reviews of a business, comments and critiques – opportunities for competitors to trash one another often times under the perceived cloak of animosity. Conversely, statements are boldly made under the presumption of being

protected by a fundamental right of free speech. Free speech, however, has its limits. As my constitutional law instructor, Cliff Lehman, used to quote: "The right of free speech does not give you the right to call out 'Fire!' in a crowded theatre." So to is it with limits on the ability to criticize a business competitor, despite the opportunities which are now afforded through websites.

I had a client come to me just recently who is in a field where taking down one's competitor through disparagement seems to be more the rule than the exception. The client was in some trade websites and gave negative opinions about his competitor, critiques about being slow to react, with slow turnaround, problems with various services they had provided. He compared their heavy handedness to that of the Frankenstein monster. The close nature of the competitors and the nature of the website and issues discussed made it clear to my client's competitor who was doing the complaining. The next thing my client knows, a lawsuit is coming down the pike. My client protests. The underlying facts were true. His competitor did have slow turnaround. The instance to which he was referring was indeed handled by the competitor in a very heavy handed manner. Is that a defense? The problem lies with giving the opinion. Often times there is a perception that opinions should

not be actionable. Yet if my client said, factually, that of the last five services provided by his competitor, four took more than 30 days, and it was true, he would be in pretty good shape as far as defending a defamation action. However, if my client was to say he would not recommend using the competitor because they are always slow, never get the job done on time, he just bought himself an expensive defamation suit.

Businesses use these opportunities to beat up on their competition and every once in a while you will see a verdict in a newspaper which runs into the seven figure range. Usually the large, well established businesses are very sophisticated in their approach, touting how they are better than their competition, but being very careful not to demean the competition. Yet opaqueness will not prevent a lawsuit. Words which are defamatory via innuendo are just as actionable if, though indirect, would be accepted as conveying a defamatory meaning. In this sense defamation cannot be disguised.

The best advice, legally speaking, is for a business to take the high road, advancing its products or services through their worth so that they shine brightly to consumers, rather than to get into a mud slinging contest where everyone ends up looking dirty.