

You Shouldn't Have Said That

By Michael L. Zupan, ESQ.

For community associations to function well, members must communicate with each other and with association volunteer leaders. Because discussions frequently involve peoples' homes (their most significant financial and emotional investment), the subject of the discussions is personal and on occasion, those discussions may become emotionally charged. With the increasing use of electronic communication, the communications are more likely to be part of an e-mail, or a post on a blog or an internet-based forum. Frequently, people forget the acceptable boundaries in these less personal forms of communication and write things they would not otherwise say face-to-face. All too often, something is said that shouldn't have been said. That something may be defamation.

Defamation potentially applies to a wide variety of statements. Black's Law Dictionary defines defamation as a statement "which tends to injure reputation; to diminish the esteem, respect, goodwill or confidence in which [a person] is held or to excite adverse, derogatory or unpleasant feelings or opinions against him." Defamation includes both libel (written defamation) and slander (oral defamation).

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A defamatory statement can be any statement that tends to harm the reputation of a person, subject him or her to scorn, ridicule, shame, or disgrace. The defamation does not have to be direct. False statements by inference, implication, or insinuation may be defamatory. However, the statement must be a statement of fact. Statements of opinion are not defamation. The statement must also be false. If the statement cannot be proved to be false, there is no defamation.¹

Defamation can be intentional or negligent. A defamatory statement is intentional if it was made on purpose, in reckless disregard of the truth or falsity of the statement, or if the person making the defamatory statement acted with gross indifference or some sinister or corrupt motive, such as hatred, revenge, personal spite, ill will, or a desire to injure the plaintiff. If the intent of the speaker does not meet this definition of intentional conduct,

the statement may be considered negligent defamation, if a reasonably prudent person would not have made the statement under the same or similar circumstances.

Finally, the defamation must be heard or read by a third party. If the only two people involved are the person making the statement and the person about whom the statement is made, there is no harm to reputation, and the individual is not subjected to scorn, ridicule, shame, or disgrace in the community, and there is no defamation.

For certain categories of statements the injury to a person's reputation is considered obvious. Statements in these categories are called defamation per se. In general, there are four categories of statements that are considered defamation per se:

- False statements imputing the commission of some criminal offense involving moral turpitude (lying, cheating, or stealing).
- False statements imputing that a person is infected with some contagious disease (generally sexually transmitted diseases).
- False statements imputing unfitness or lack of integrity in the performance of an office or employment.
- False statements which prejudice a person in his or her profession or trade.

Not all derogatory statements are defamation. In certain situations, the law encourages the free flow of information without concern for claims of defamation. For example, statements made in judicial and governmental proceedings are absolutely privileged. In other situations, the privilege is qualified. The qualified privilege may arise when a statement is made in good faith by someone with an interest or duty relating to the subject matter of the statement made to another with a similar interest or duty. Frequently, leaders of private organizations (such as community associations) are the object of criticism by others within the organization who have a legitimate interest in the organization and how it is run. In such circumstances, the qualified privilege may apply. However, the qualified privilege will be lost if a party makes a false statement due to spite, ill will, or with utter disregard for the truth or falseness or knowledge of falseness.

If defamation has occurred, what is the remedy? Three types of damages are available for defamation. General damages are damage to reputation, humiliation, and embarrassment. The circumstances of the publication, the character of the statements, the language used, the probable effect on the injured party (including standing in the community), the mental suffering involved, and injury to reputation are all considered. If the defamatory statement is defamation per se, the injured party can recover general damages without proof of actual loss. If the statement is not

Five Rules to Help Avoid Defamation

1. Be civil. Do not write what you would not say in an open meeting.
2. Stay on point. Keep the comments focused on the issue being discussed, avoid personal attacks.
3. Stick to the facts. Do not make up things. Do not exaggerate.
4. Check your facts. Make sure that your assertions of fact are correct.
5. Always Tell the Truth.

defamation per se, the injured party must prove actual loss. Special damages are those damages that are not generally expected, but are specific to the injured party (i.e. loss of a position, office, or opportunity). These damages are in addition to the general damages and must be proved to have been caused by the defamation.

Punitive damages may also be available. Punitive damages are intended to punish the wrongdoer, rather than compensate the injured party. To recover punitive damages, the injured party must prove that the statements were made intentionally, i.e., on purpose, in reckless disregard for the truth or falsity of the statement, or the person making the defamatory statement acted with gross indifference or some sinister or corrupt motive, such as hatred, revenge, personal spite, ill will, or a desire to cause injury. In most cases, punitive damages are not recoverable if there are no general damages. However, if the statements were defamation per se, punitive damages may be recovered even if there are no general damages. The laws of defamation are intended to compel people to write and speak about others in a reasonable manner. Hopefully, community association members will think before they write or speak. Hopefully, what is said or written will be truthful and in good faith. When it is not, a defamation lawsuit may end up in court and you just might hear a judge say: "You shouldn't have said that." 📺

¹ Although it is often said that "truth is a defense" to defamation, it is actually the injured party's obligation to prove the statement false. The speaker does not have to prove that the statement was/is true.

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