

CLIENT ALERTS

False, inaccurate and defamatory online reviews: How to take off the gloves and fight back legally and ethically

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Ok. You asked for it and you got it: You implemented review based websites, customer portals, message boards, blogs, social media, chat rooms, bulletin board posts, and other applications which enable customers and users to communicate with your business and each other by posting information, comments, messages, images, etc. All you want is for everyone to be happy!!

Almost inevitably, some customers or users will be unhappy with their experience and will make negative or inaccurate posts regarding your services or products. The posts may reflect a continuum of constructive, honest criticism to product defamation or misinformation. Some of the comments may be stated as a matter of fact and others as a matter of opinion. Sometimes it is a close call between the two.

Negative online posts have the potential to hit the pocketbook and damage the reputation of businesses. When should businesses ignore online criticism? If a decision is made to respond to unfavorable reviews, what should be said? Does the social media platform used to post the negative statement have rules applicable to such posts – if so, non-compliant content may be removed upon the initiation and intervention of a company or individual. When does a comment on a product or service cross the line to the actionable “tech tort” of cyber defamation? What federal and state laws can companies use to defend themselves when reputations, products or services have been wrongfully maligned or defamed by customers? And what can be done about the posting of misinformation?

The Supreme Court’s recent decision in *Spokeo* relates to a dispute about incorrect information being posted on the internet. Although *Spokeo* involved the Fair Credit Reporting Act and whether the particular Plaintiff had standing to sue for damages, the dispute involved is a common one experienced

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by many businesses – what to do when incorrect, false or defamatory statements of fact are posted about your business, products or services on the web. It appears that *Spokeo* may make it more challenging for companies to assert damages related to misinformation. In the 6–2 decision, Justice Alito stated that "it is difficult to imagine how the dissemination of an incorrect ZIP Code, without more, could work any concrete harm."

Where adverse online posts rise to the level of false and defamatory statements of fact, or otherwise meet the criteria for common law tort or intentional torts, or violate state or federal statutes, the injured company or individual may require more aggressive means of redress.

Laws pertaining to online defamation and trade libel may vary by state, with relevant factors being the state in which the alleged defamer is located, the state in which your company is located, the contacts between two states and the laws of those states. Your company's ability to obtain redress is subject to many factors that require evaluation, particularly in the wake of the *Spokeo* case.

Internet service providers have "Terms and conditions of Service and Use" which identify the service and the website's relationship to its user, and the rights and responsibilities that guide them both. Typical Terms and Conditions include civil and polite discourse in interactions with others, obligations to post in good faith, prohibitions on harassing and abusing others, violating the privacy of others, and engaging in false statements, impersonation, or fraud. For example, Wikipedia website's Terms and Conditions of Service and Use offer more detailed descriptions of prohibited conduct:

- "Intentionally or knowingly posting content that constitutes libel, trade libel or defamation;
- With the intent to deceive, posting content that is false or inaccurate;
- Attempting to impersonate another user or individual, misrepresenting your affiliation with any individual or entity, or using the username of another user with the intent to deceive; and
- Engaging in fraud."

If non-conforming comments are posted on such websites, the website editor may self-edit or use screening devices to edit-out negative or fraudulent posted content on its own initiative in the ordinary course of its management of the site. If such self-policing is not done, non-compliant content may be removed upon the initiation and intervention of a company or individual, with or without judicial involvement.

If Internet service providers refuse to remove libelous user-generated content, the ante is upped. The Communications Decency Act specifically exempts website hosts and ISPs from direct liability for most defamation related claims. Thus, it is important to understand your legal options for discovering the identity of the online poster and pursuing other means of relief.

Reputation management is an important corollary to recouping economic losses. Our attorneys and our forensic experts can help ferret out embedded content so as to maximize remediation efforts.

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