

Newsletter

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LETTER FROM ERIC...

"No one writes anymore" was once a common lament. That statement is now dead because the Internet spawned an explosion of written communication.

The pace of written communication used to be slow. Writers took more time to think before sending a letter. Fax machines made it a little faster and slightly less expensive. Now, we can bang something out on a keyboard and hit Send very quickly, often without a lot of concern for the consequences.

Surprisingly, the new forms of written communication are also more permanent. An email is permanently held on the hard drive of the sender and it leaves a copy wherever it goes. Similarly, web pages and other online forums archive their content for long periods of time.

We can all benefit from giving more thought to what we are writing and who we send it to. Since communication also affects the business deals we make, my closing article suggests new ways to think about how you approach your next business transaction. Enjoy.

I hope that you are prospering and well.

Sincerely,

Eric D. Morton

DEFAMATION AND THE INTERNET

Since the advent of the Internet and the subsequent growth of online communications, I have seen an increasing number of cases of defamation. Something about the Internet and computers gives many people the short-sighted boldness to write outrageous and stupid things about others.

By defamation, I mean publishing false statements that damage the reputation of another person. There two types of defamation – slander and libel. A defamatory statement made verbally is called slander, and written statements are called libel.

If the defamation concerns a business or a business' products, it is called trade defamation. Defamatory statements are those made to a third person. Telling someone he is a crook is not defamatory, but if you make that statement to someone else in an ill-conceived email, you may have published a defamatory statement. It need not be published in a magazine or formal communication.

Defamation of either type was rare when I started practicing law. Every so often I would handle a case in which someone was slandered. For instance, years ago, a real estate agent came to me about some individuals who were telling others that he was dishonest. I

wrote a cease and desist letter and that was the end of it.

Libel used to be extremely rare. Just about the only way to commit libel was to get something published in a newspaper. Newspapers are careful about what they publish, even letters to the editor and advertisements, so there was very little libel. (Letters from one person to another are usually not considered libel and, in those instances when letters are libelous, the letters are rarely shared).

In the past fifteen years, we have experienced an explosion in the use of personal computers and Internet. We now have websites, chat rooms, bulletin boards, discussion forums, personal web pages, and so on. All of which present wonderful opportunities to libel others.

When the Internet became popular, many people had unusual attitudes about it. Initially, many people thought that the certain laws did not apply if they were in this new alternate universe called Cyberspace. I had one client tell me that he thought anything on

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the Internet was in the public domain. I quickly informed him this was definitely not true.

The same laws apply in full force to computer users who publish things through their computers and on public or private servers.

For example, in the mid and late 1990s, there were a large number of high-profile lawsuits defining the law on the Internet. For instance, Playboy Enterprises successfully sued many persons for downloading pictures from the Playboy website and posting those pictures on their own websites. Playboy showed that copyright laws apply on the Internet like everywhere else. The cases involving Napster also showed that there is nothing special about the Internet and the application of copyright laws.

Domain name squatting was also popular for a time. Individuals would register and use names associated with famous trademarks (like Home Depot and Starbucks). The owners of those trademarks successfully sued for trademark infringement.

About ten years ago, the courts began hearing defamation cases arising from the Internet. In one case heard by an appellate court, a woman thoroughly defamed a former friend in a chat room. The former friend sued for libel and was awarded damages. The woman argued that libel law should not apply to a chat room or the Internet but the courts disagreed.

But while business people seem to understand that they can't abuse trademarks or steal copyrighted materials, they continue to defame one another over the Internet. In the past, when print was the only way to libel someone, you had to type a letter, take the paper out (or print it), fold it up, put it in an envelope, seal it, stamp it, and take it to the mailbox. All those steps meant many chances to think about what you were sending. Furthermore, the only way to publish something defamatory was either through a newspa-

per, newsletter or magazine, or through a letter sent to one person.

But now we have the Internet and you are just one step away from clicking the Send button and committing libel. As you know, it's easy to send a single email to hundreds of people using your personal computer. And to make matters worse, it's just as easy for the recipients to forward the message, or to cut, paste, and post that message to an even wider audience. Libel has always been considered a worse form of defamation than slander since libel is in permanent form.

Probably the most damaging type of libel are statements directed toward a person's professional or business community. Twenty years ago, the only way to libel someone in their occupational capacity was to get something printed in a trade magazine or newsletter or community newspaper. Now, every trade, profession, hobby, or community of every kind and variety, have websites, bulletin boards, chat rooms, discussion boards, and email lists that automatically send messages to dozens—or even hundreds and thousands of subscribers. If you have ever belonged to an online community, you know that members can easily get out of control. I have seen bitter arguments about the most esoteric issues, so-called "flame wars," and while some are amusing, it is easy to step over the line and commit the worst sort of libel. People do it all the time.

For example, suppose Joe buys a product from Jim. Joe is unhappy with the product or the service. They exchange a few emails which are unnecessarily nasty. Joe is angry and decides to exact revenge, so he cuts and pastes a few emails and posts them on a discussion forum where most of Jim's customers and fellow business owners are subscribers. Maybe Joe adds a few choice words that Jim is a liar and a cheat. It only takes Joe about 30 seconds but he has now committed libel and Jim may sue him. Furthermore, the law provides that if you are defamed in your occupation or trade, you need not

prove actual damages; a court may award a judgment for money simply based on a presumed damage to reputation. Even worse for Joe, Jim can sue him almost anywhere in the world since Joe's defamation was published worldwide. Needless to say, these cases can, and sometimes do, turn into a nightmare for individuals who were simply venting, but made the mistake of venting to the world.

Obviously, the only advice I can give regarding libel is simple – don't do it. Refrain from the urge to tell others about that rotten person. Don't post disputes on public forums and don't forward email messages about your disputes. It is too easy for those remarks to be forwarded again to others. And if you *receive* a defamatory email, don't ever forward it; you are guilty of libel if you do so, even if you weren't the author.

The same advice goes for password-protected sites or a MySpace-type pages that can only be accessed by "friends." Finally, find another way to vent your anger rather than typing it out and clicking Send. You will be much happier if you do.

RESTRAINT OF TONGUE AND PEN...AND MOUSE

The old adage, "restraint of tongue and pen," is simple but sage advice. I'm convinced that many of the disputes I see could be avoided—or alleviated—by saying and writing less in the heat of conflict. A quick way to make a dispute worse is to say or write something to the other party that is unnecessarily antagonistic.

Although most of us avoid making a snap comment on the phone or in a formal letter, it's surprising how many people don't hesitate about sending nasty emails to others.

In the past ten years, I have handled an increasing number of disputes that were made much more bitter, and

more difficult to settle, because the parties exchanged unnecessarily argumentative emails when the dispute arose. Business owners or sales representatives will accuse each other of bad faith or fraud at the outset of a disagreement. For some reason, they vent their frustration and anger in an email and send it off without a thought to the consequences. The fundamental problem is that when parties begin a dispute in that manner, it is much more likely to lead to litigation. It also tends to lengthen the litigation and make it more costly.

As suggested by my article on defamation, I have seen email bring out the worst in people, both in my professional life and personal life. Fellow hobbyists engage in bitter and immature tirades on discussion boards; teenagers post cruel and damaging comments on MySpace; colleagues at work let loose a barrage of thoughtless comments in an email message and needlessly copy the whole department. I am convinced that most people don't realize the impact of their words when they write them on a computer and click Send to email or post them. But their words do have an impact. An inflammatory statement inflames people, period.

As an attorney, I see a number of problems with this behavior. First, the problem with defamation, to which I devoted an entire article in this issue of the Newsletter. Second, it makes disputes more difficult to settle, particularly if the communication gets out to third persons. It's easy to libel someone and get sued for it; but more often, defamatory comments needlessly worsen a contract or other dispute, leading to more (and longer) lawsuits. In the past few years, I have handled several lawsuits which would have never been filed, or never gone to trial, if the parties involved had exercised restraint of tongue and pen. Or keyboard and mouse, as the case may be. It is too easy to get your ego invested in a dispute.

Simply put, if you don't need to say it or write it, then don't do either. Train yourself and train your employees to not respond in anger if a dispute arises. Whatever you do, don't involve third parties. If it isn't any of their business, don't drag them in. It is too easy to type out a bunch of nonsense and buy yourself an expensive lawsuit with the click of a mouse. Try this approach instead:

- Walk away from your computer until you cool down and can calmly deal with the situation.
- If you reply by email, then you should read and re-read your response. Take out any adjectives that describe the other party's behavior and delete any reference to any motive of the other party. We don't know people's motives and we always assume the worst about them.
- If you are angry, don't send your response. Send it to an advisor, such as an attorney, or simply let it sit overnight. Always be factual, clear, and unemotional.
- Finally, if you don't need to respond, then don't.

Taking these steps is harder than it appears. We want to respond to something that makes us angry. But if you are mindful that language has a powerful effect, you will use it carefully and wisely.

A BARGAIN'S A BARGAIN

I hate to see a distressed client who has made a deal that turns out to be a bad bargain. Unfortunately, there is often very little I can do about it. For better or for worse, if you have a valid contract, the law says you get the benefit of your bargain, even if the "benefit" turns out to be a costly burden.

In fact, courts have not considered what is called the "adequacy of consideration" for more than 200 years. This

means that the bargain you make is the bargain you get, whether the price turns out to be an asset or a liability, because the courts are loathe to second-guess your business decisions.

So beware: once you make a deal, you may be stuck with it, even if you are paying too much, your profit doesn't exist, or you simply found a better price somewhere else. And this, of course, cuts both ways. Protect yourself by doing your homework, negotiating the very best deal you can, and getting contract advice before you sign and commit yourself to the deal.

However, there is also very little that a legal advisor can do to keep you out of a bad deal, if you don't consider and weigh the terms realistically, using your best business sense. Clients often come to me to draw up a contract for a deal they have made. The deal points are locked down and I ask them if they really want to go ahead. They enthusiastically tell me about the prospects, what a great deal they've made, and how they need to act right away. Too often—months later—those same enthusiastic clients come back to report that the bargain wasn't what they had hoped for and they are now paying too much, or they entered into a business partnership with the wrong person. Although they want to get out of the contract, we typically review it and find that it is fully enforceable and legally binding. After all, it's my job to make sure your contract is legally sound. But only you know if it's going to make business sense. What to do?

1. Temper your enthusiasm. Let the initial rush of excitement of the best deal of year (or the decade, or the best deal ever) cool. Give it more thought, talk to someone neutral, and sleep on it. Just don't agree to something right away if you are particularly excited by the prospect. Wait until you can fully and objectively weigh all the terms.

This is particularly true if you are considering a business partnership. You must look at that person objectively as to what role he or she going to play.

Remember: the very best craftsperson or professional may have none of the skills needed to run a business.

2. Do your due diligence. Always verify the representations made by the other party and any assumptions you are making. Often people don't dig into the facts because they trust the other party, don't want rock the boat on an important deal, or simply feel uncomfortable asking for facts, figures, and documents. Make sure that the other party can perform as required or the offer is as valuable as you would like to think. Only you can protect yourself.

Of course, there are exceptions, such as fraud, where you may have reasons to rescind a contract, should a trading partner tell an outright lie to you. But even there, courts expect parties to investigate the business realities behind the contracts they sign.

3. Don't get in over your head. Optimism and stretching to grow is one thing. But promising more than you can realistically deliver can be disas-

trous. It is a common problem for companies to promise too much for too little. This is particularly true in construction contracts. Contractors sometimes take on a job that is just beyond their ability, experience, or capacity. Eventually, they are faced with the choice of two undesirable alternatives: completing the job (if they can) and losing significant money, or not completing it and getting sued.

Often getting in over your head is a matter of taking on something that you and your company might be ready for in another year or two. Be frank with yourself and the other party. You might lose the deal now, but your integrity will be intact and the other party will remember your candor.

In the end, honesty and realism are the keys to staying out of bad deals. Be honest about what you can and can't do. Make sure that you are dealing the real facts and that you are realistically evaluating the other party and what it has to offer.



ABOUT THE NEWSLETTER...

The *NEWSLETTER* is published in Carlsbad, California. We welcome your suggestions for future issues. If you would like to be removed or added to our mailing list, please let us know.

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