

Safeguard Business and Personal Reputations Using the Sharp Tool of a Defamation Action

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I. INTRODUCTION

You are your reputation. A good one is a prized possession for businesses and individuals alike. And, as with most valuable assets, what takes years to painstakingly build may take only a day or a few keystrokes to destroy.

Particularly in today’s digital era, the impact of a false accusation or unfair negative characterization against an individual, business, or other organization can be disastrous. The damage quickly and intensely escalates as information spreads like wildfire through social media and other online platforms and communication avenues. When a competitor, customer, reporter, podcaster, consumer advocate, watchdog organization, or other party libels (makes false written remarks about) or slanders (makes harmful spoken remarks about) your client or your client’s business, the damage can be devastating in the short term. It can also be virtually impossible to undo in the longer run.

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Fortunately, the law provides ways to fight back, minimize future damage, and, to some extent, undo past harm done. With the benefit of having both pursued and defended many defamation actions, we will describe, in practical terms designed to be helpful whether you are bringing or defending an action, the key promises and pitfalls of defamation lawsuits. We will sketch out a roadmap for bringing a successful defamation action while also identifying some of the less-understood challenges litigants will likely face along this unusual litigation voyage.

II. SETTING THE SCENE

In today's popular consciousness, "defamation" likely brings to mind conspicuous cases involving shredded personal reputations. Think *Depp v. Heard*, *Judge Judy v. National Enquirer and InTouch Weekly*, *Freeman v. Giuliani*, or *Favre v. Sharpe*.¹ Although splashy cases like these produce salacious headlines and are chum for the media, lawyers and laypersons alike may not realize that alleged defamatory wrongdoing happens daily and in far more mundane contexts. Businesses and individuals, often through little fault of their own, routinely find themselves the subject of orchestrated defamation campaigns. On the other hand, loose or otherwise unguarded language can quickly land a person or company in legal hot water.

If not responded to appropriately, being on the wrong side of defamatory smears shared with customers, business associates, and government regulators and enforcers can potentially be business-ending and personally ruinous. Consider the Dominion Voting Systems defamation action brought against Fox News.² Dominion alleged that Fox News had spread false statements about the company's involvement in allegedly rigging the 2020 presidential election.³ That case resulted in a nearly \$800 million settlement.⁴

Similarly, "Judge Judy" Scheindlin filed a lawsuit alleging damage to her hard-earned reputation (her stock-in-trade). According to Scheindlin, the "Defendants tarred that reputation in an instant by blasting out lies about [her]

¹ See *Depp, II v. Heard*, No. CL-2019-0002911, 2022 WL 2342058 (Va. Cir. June 24, 2022); Complaint, *Judge Judy v. Accelerate360*, No. 11-2024-CA-001004-0001-XX (Fla. Cir. Ct. 2024) [hereinafter *Judge Judy Complaint*]; *Freeman v. Giuliani*, No. 24-MC-00353 (LJL), 2024 WL 4546883 (S.D.N.Y. Oct. 22, 2024); *Favre v. Sharpe*, No. 2:23-cv-42-KS-MTP, 2023 WL 7132949, slip op. at *1 (S.D. Miss. Oct. 30, 2023). By referencing lawsuits in this article, neither the authors nor Perkins Coie LLP intends to make any comment or analysis of the merits of the lawsuits. Rather, the authors merely reference these lawsuits to help illustrate how best to position a defamation claim. Any comment or statement in this article that appears to relate to the merits of the lawsuits is not intended as such and should not be interpreted in that manner.

² See David Bauder et al., *Fox, Dominion Reach \$787 Settlement Over Election Claims*, AP (Apr. 18, 2023), <https://apnews.com/article/fox-news-dominion-lawsuit-trial-trump-2020-0ac71f75acfac52ea80b3e747fb0afe> [<https://perma.cc/J8TY-T2RB>].

³ *Id.*

⁴ *Id.*

to millions.”⁵ Her pending case is based on the reasonable premise that her personality is a *de facto* business.⁶

Black’s Law Dictionary accurately notes that defamation claims are “extremely difficult to prove in court.”⁷ Capable defense counsel will know how to poke legal and factual holes in defamation claims, particularly if brought by attorneys who do not understand or fail to properly advise their clients that every perceived slight does not justify filing a defamation action. The good news for plaintiffs with a sound case is that, with the necessary preparation and a sound legal strategy, a well-crafted defamation action can provide needed, and in most cases likely the only source of, relief.

We will spend the balance of this article covering central pointers and pitfalls of defamation actions we’ve encountered over the years. Our hard-earned lessons will hopefully benefit you.

By way of a quick summary, our higher-level pointers (many of them seemingly self-evident, yet in our experience often only honored in the breach) include (1) before filing the complaint (or approaching the other side with a settlement proposal), thoroughly investigate critical elements of the potential claim(s), as well as possible counterclaims; (2) if possible, carefully articulate the defamation *per se*⁸ in the defamatory statement, but plead both defamation *per se* and defamation *per quod*; and (3) lay the groundwork for an early summary judgment motion by locking in statements of those who heard/received the defamatory remarks as soon as possible. The *pitfalls* include (4) failing to anticipate and inoculate your complaint against potential defenses; (5) improperly alleging the fault and malice of the speaker; and (6) leaving yourself open to counterclaims.

III. THE SCENARIO: DEFAMATION OF A BUSINESS OR INDIVIDUAL

Businesses and individuals can be defamed in many ways. Here are some representative examples loosely based on select cases we have been involved in:

⁵ Judge Judy Complaint, *supra* note 1, at para. 48. Particular aspects of Judge Judy’s Complaint are examined in greater detail below.

⁶ *See id.* at para. 6–7.

⁷ *See How Do You Prove a Defamation of Character Claim?*, THE L. DICTIONARY, <https://thelawdictionary.org/article/how-do-you-prove-a-defamation-of-character-claim> [<https://perma.cc/2D44-J4L7>].

⁸ Defamation *per se* is a statement that is defamatory without the need to prove damages resulting from the statement. *See Actionable*, BLACK’S LAW DICTIONARY (11th ed. 2019). In other words, the statement on its face harms the reputation of the target. As an example, a statement that attributes criminal conduct to the target is defamatory *per se* because calling someone a criminal hurts that person’s reputation. Defamation *per quod*, on the other hand, is a defamatory statement that requires proof of the damage that results from the statement because its tendency to harm the reputation of the target is not as obvious. *See id.*

Business Example 1: Business A and Business B are both car manufacturers. At a widely attended industry trade show, representatives of Business A tell employees of a vendor attending the trade show that Business B secretly uses refurbished parts, as opposed to original new parts, in the new cars it manufactures. In reality, the Business A representative has no basis for making this damaging claim.

Business Example 2: Business A manufactures popular cosmetics and highlights its social consciousness and cruelty-free testing procedures in its marketing campaigns. Business B engages in a covert social media campaign to spread false claims about Business A's products being tested on animals.

Business Example 3: Businesses A and B are publicly traded companies operating in the manufacturing industry. During a popular industry conference, representatives of Business A tell representatives of a lender attending the conference that Business B is underreporting its losses for the last quarter. The representative of Business A over drinks heard about such allegations but never spent any time actually researching them before sharing the false story.

Individual Example 1: Individual A is a local celebrity chef and restaurateur. An envious competitor appears on a national podcast falsely claiming that Individual A has for years sexually harassed employees.

Individual Example 2: Individual A is the general manager of a country club. During an alcohol-fueled argument at a local bar, a disgruntled former employee shares a made-up story that Individual A has been stealing money from the country club's bank account for years.

Such false and misleading statements, some made with knowledge of their falsity and others simply negligently or recklessly shared without any concrete basis in fact, can spread almost instantly, driving away customers, making third-party stakeholders such as lenders and investors nervous, and drawing the unwanted attention of government enforcers and regulators. In other words, time is not the defamation victim's friend. Immediate action is required.

IV. SURVEYING THE ELEMENTS: MORE THAN A NASTY COMMENT

Elements of Defamation. Defamation law varies by state, but the essential elements overlap considerably and apply equally to individuals and organizations. Those key common elements are (1) a false and defamatory statement; (2) publication of that statement to a third party; (3) lack of privilege to publish the statement; (4) some level of fault by the publisher (i.e. negligence/failure to exercise reasonable care in verifying the truth for private individuals; actual malice for public figures), making the statement knowing it was inaccurate or failing to exercise reasonable care in verifying its truth); and (5) special damages resulting from the statement, *or* actionability of the statement per se.⁹

“Public Figure” Status. Being court-classified as a “public figure” can be game-changing because it *significantly* impacts the required proof level. The burden is on the defendant to establish to the court’s satisfaction that a plaintiff is a public figure.¹⁰ To qualify as a public figure, the individual or company must be involved in matters of public interest or significantly impact society.¹¹ Once a plaintiff has been court-qualified as a public figure, the plaintiff must prove actual malice (that is, that the defendant either knew the statement was false or acted with reckless disregard for whether it was true or false),¹² immediately placing a heavy evidentiary burden on plaintiff’s counsel.

The three primary categories of public figures are:

General Public Figures: Individuals who have achieved pervasive fame or notoriety. Celebrities, high-profile athletes, public officials and candidates for public office, and well-known business leaders often fall into this category.¹³

Limited-Purpose Public Figures: Individuals who have voluntarily injected themselves into a particular public controversy to influence its outcome. They are considered public figures only in the context of that specific issue.¹⁴

⁹ See RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977) (emphasis added). See also 112 Causes of Action 2d 443, Westlaw (originally published in 2024). Claims of defamation involving a public figure and matters of public concern often involve heightened consideration of constitutional issues. See, e.g., *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982) (“Resolution of two of appellants’ contentions on appeal requires a determination of the status of appellants and of the nature of the matter involved—that is, whether appellants are public officials, public figures, or private figures, and whether the issues involved are matters of public or general concern.”). The exact contours of such a claim are beyond the scope of this article.

¹⁰ See generally *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 592 (1st Cir. 1980); see also *Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 204 (1st Cir. 2006).

¹¹ See *Bruno & Stillman, Inc.*, 633 F.2d at 384.

¹² See generally *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Franchini v. Bango Publ’g Co., Inc.*, 109 F.4th 13, 31–35 (1st Cir., 2024).

¹³ See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351–52 (1974) (cited in *Franchini*, 109 F.4th at 30-35).

¹⁴ *Id.*

Involuntary Public Figures: Some individuals may occasionally become public figures not through their own actions but due to their involvement in a significant public event.¹⁵

Key Public Figure Considerations.

Geography: Although subject to specific jurisdictional nuances, in general, an individual might be considered a public figure in one geographic area but not another. For example, a local politician or business leader might be a public figure within their community but not on a national level. The same is true for a person frequently covered by local media. Such a person will be considered a limited-purpose/local public figure.¹⁶

The Scope of Publication: Unsurprisingly, the broader the dissemination of the statement, the greater the potential harm to the plaintiff's reputation and the larger the potential damages figure.¹⁷ Statements published widely on popular websites or television broadcasts can substantially impact more than those shared in a private conversation.¹⁸

The Target Audience: If the statement is published to an audience that holds the plaintiff in high regard or is significantly interested in the plaintiff's reputation, the damage can be more severe. For example, defamatory statements about a professional shared within their industry can be particularly harmful.¹⁹

Intent and Context: The context in which the statement is made and its intent can also influence the case.²⁰ Statements made in a context where they are likely to be taken seriously can be more damaging than those made in a clearly joking or hyperbolic context.

Reputation in the Community: The plaintiff's reputation within the community where the statement is published is also essential. If the plaintiff is well-known and respected in that community, defamatory statements can cause more harm. Of course, the converse is also true. Experienced counsel will, therefore, spend significant time seeking to fully understand how a plaintiff or defendant's reputation will potentially impact the outcome of a case.²¹

¹⁵ *Id.* at 345.

¹⁶ *See generally id.* at 352.

¹⁷ Jeffrey Standen, *Republication Liability on the Web*, 105 MARQ. L. REV. 669, 671–72 (2002).

¹⁸ *Id.* at 672.

¹⁹ *See World Wide Ass'n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132, 1138 n.1 (10th Cir. 2006) (identifying allegations of “conduct that is incompatible with the exercise of a lawful business, trade, profession, or office” as a type of defamation *per se*).

²⁰ *Examination Bd. of Pro. Home Inspectors v. Int'l Ass'n of Certified Home Inspectors*, 519 F. Supp. 3d 893, 907 (Colo. 2021) (“When applying the reasonable person standard, courts consider the phrasing of the statement, the context of the entire statement, and the underlying circumstances surrounding the statement.”).

²¹ *See generally Bolduc v. Bailey*, 586 F. Supp. 896, 900 (D. Colo. 1984) (“The gravamen of an action for defamation is the damage to one's reputation in the community caused by the defamatory statement(s).”), *cited in Denver Pub. Co. v. Bueno*, 54 P.3d 893, 901 (Colo. 2002).

Organizations as Public Figures: Organizations, like individuals, can be court-qualified as public figures. As with individuals, widespread recognition, a public presence, involvement in public debates or controversies, and media coverage can result in a plaintiff company having to clear the higher actual malice state of mind.²²

Too often, plaintiffs will decide to lodge their civil actions without sufficiently considering these many times outcome-determinative issues.

Punitive Damages. In most states, a plaintiff may recover punitive damages by proving malice. The type of malice (typically constitutional or common law) required for punitive damages varies by state.²³ For example, in Delaware, punitive damages are available on a showing of constitutional malice (knowledge that the statement is false or reckless disregard for its falsity).²⁴ In contrast, in Iowa, punitive damages are available on a showing of common-law malice (ill will or spite toward the target or reckless indifference to the target's rights).²⁵ About half the states require a showing of constitutional malice, while the other half require a showing of common-law malice.²⁶

Defenses. There are also a host of defenses available in defamation cases that can be difficult to overcome unless the supporting facts are properly nailed down.²⁷ Chief among these are the following: (1) the statement was substantially true; (2) the statement was a matter of opinion rather than an allegation of fact; and (3) the statement was privileged.²⁸

V. SETTING UP SUCCESS: PUTTING YOUR DEFAMATION CLAIM IN THE BEST LIGHT

As with any legal action, pre-litigation positioning of a defamation claim is vitally important. Considering the centrality of the defamatory statement and the available defenses detailed below, doing the challenging pre-litigation work is critical. It will provide a clearer picture of how you will prove the claim and guide you to ways of defeating potential defenses.

Understand Your Factual Case and Legal Strategy. The prepared litigator will do what is necessary to develop a detailed understanding of and, if possible, lock in the essential facts. These facts include (1) precisely *what* was said that was defamatory; (2) *who* made the defamatory statement; (3) *to whom* the defamatory statement was made; (4) *when and where* the defamatory statement

²² See generally *World Wide Ass'n of Specialty Programs*, 450 F.3d at 1136–37.

²³ See 104 Am. Jur. Proof of Facts 3d 221 § 9 (originally published in 2008).

²⁴ See *Kanaga v. Gannett Co.*, 687 A.2d 173, 183 (Del. 1996).

²⁵ See *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984).

²⁶ 104 Am. Jur. Proof of Facts 3d 221 § 9 (originally published in 2008).

²⁷ *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 270 (S.D.N.Y. 2013), *aff'd*, 807 F.3d 541 (2d Cir. 2015), and *aff'd*, 622 F. App'x 67 (2d Cir. 2015) (recognizing that an organization can qualify as a public figure in the context of a defamation claim).

²⁸ See, e.g., RESTATEMENT (SECOND) OF TORTS § 566 (AM. L. INST. 1977); Colo. Jury Instr., Civil 22:16–17, 21.

was made; (5) *what events* led up to the defamatory statement; (6) *what was said* in response to the defamatory statement; (7) *what immediate impact* the defamatory statement had; and (8) *what financial and reputational or other damage* the defamatory statement caused.

Determining the evidence available to prove these critical points, as well as any potential counterclaims, helps the prepared litigator identify gaps in understanding. More to the point, this preparatory work allows the litigator to fill those knowledge gaps well before deciding to contact the other side about negotiating a resolution or filing a defamation action.

Lock In Key Facts. At the risk of stating the obvious, establishing most of the information outlined above is comparatively easy with written defamatory statements. However, if the statement was oral, getting the necessary information can be more of a challenge. This is where doing your homework as a litigator is most critical.

Assessing credibility and biases, probing the accuracy of recollections, and looking for corroboration requires work and, unfortunately, increases the client's associated costs. But here, where nuance can mean everything, there are no shortcuts. As litigators, we need to know what we have in hand before filing a complaint and engaging in discovery.

One additional practice pointer often overlooked is locking in key testimony (even before the formal discovery process). Are third parties willing to provide affidavits? Are they willing to give recorded statements? If so, then seize the opportunity. As any experienced litigator knows, the ability to strike while the iron is hot (before the speaker gets cold feet or, for other reasons, is no longer as willing to speak honestly and openly) cannot be overvalued.

Don't Let Offense Become the Best Defense—Understand the Potential for Counterclaims. Another aspect of this critical pre-litigation work most relevant to plaintiff's counsel is ensuring plaintiff's own legal house is in order. Defamation claims, with their tit-for-tat nature ("you claim I said X, but I only said that because you said Y"), frequently generate defamation counterclaims.²⁹ In short, if Business A claims to be a victim of defamatory statements made by Business B, Business B may claim that Business A made defamatory statements about it first and that Business B was only defending itself by correcting the record.

The prepared practitioner will early on strive to get a firm grip on what counterclaims their defamation action may bring to the surface. If the investigation reveals that the potential defendant may have a strong counterclaim, serious consideration must be given to whether the defendant's claims are worth pressing.

Be Aware of Anti-SLAPP Considerations. Most states now have enacted anti-SLAPP legislation.³⁰ These statutes are purpose-built to provide defendants

²⁹ Shannon Jankowski & Charles Hogle, *SLAPP-Ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, Winter 2022 COMM. LAW. 29, 29.

³⁰ "SLAPP" stands for strategic lawsuits against public participation. *See id.*

with a quick and easy way of having the court dismiss meritless lawsuits involving matters of public interest.³¹ Successful defendants can also recover attorneys' fees and costs.³² By definition, defamation lawsuits are a natural magnet for such anti-SLAPP claims.³³

The understandable impetus behind the legislation is to protect people's free speech.³⁴ To avoid running afoul of anti-SLAPP legislation, the complaint should emphasize that the defamation is a matter of a *private* business nature—as opposed to a matter of public interest.³⁵ Additionally, before filing a defamation action in a particular state, determine whether that state has an anti-SLAPP statutory scheme, evaluate what carve-outs may exist for business disputes, and then tailor the complaint to align with such provisions.

Understand Potential Defenses. Finally, the pre-litigation work can also bring to the surface defenses likely to be pled in response to the defamation claim. For example, suppose the purported defamatory statement, without context, is somewhere between a factual statement and a statement of opinion. Understanding the hearers' subjective impression of the statement and appreciating whether that subjective understanding is objectively supportable will be critical to determining whether a jury will ultimately agree that the assertion was a statement of fact. The prepared litigator will work this background information into the complaint to preemptively rebuff that defense.

The statements were substantially true. We start our survey of potential defenses with the most common one, namely, that the allegedly defamatory statements were, in fact, substantially true.

As an example, in *Ingber v. Lagarenne*, the appellate court affirmed the dismissal of the defamation claim because, at the summary judgment stage, the defendant had established the truth of his statements regarding the plaintiff's forging his signature on a check:

Here, the defendant proffered both an admission made by plaintiff Keith G. Ingber that he endorsed the defendant's signature to the subject check without the defendant's knowledge or specific consent and his own affidavit denying that he ever gave the plaintiff authority to sign his name to either this or any other such check. Upon such proffer, we find that defendant set forth sufficient

³¹ *Id.*

³² *Id.*

³³ See, e.g., The Eds., *Michael Mann Owes Us \$1 Million*, NAT'L REV. (Mar. 13, 2024), <https://www.nationalreview.com/2024/03/michael-mann-owes-us-1-million> [https://perma.cc/V58A-H7CP].

³⁴ See, e.g., Colo. Rev. Stat. § 13-20-1101(1)(a) ("The general assembly finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process.").

³⁵ See L. Offs. of Mark B. Plummer v. Alai, No. G062355, 2024 WL 1926594, at *6 (Cal. Ct. App. May 2, 2024) (affirming denial of anti-SLAPP motion aimed at complaint involving defamation claim after plaintiff—following previous remand—removed allegations regarding public interest, e.g., the plaintiff attorney's professional qualifications).

evidence establishing his statements as “substantially true,” such that dismissal of the complaint was warranted as a matter of law.³⁶

The statements were a matter of opinion. The defense that the statement was a matter of opinion rather than an allegation of fact can be tricky as facts and opinions can blur at the edges. Providing a good example of a successful opinion defense, consider *Scholz v. Delp*, a case involving claims arising out of the suicide of Brad Delp, lead singer of the band Boston.³⁷ In that case, the court determined that statements by the singer’s former wife regarding the cause of his suicide were nonactionable opinions because it was clear the statements were based on speculation: “[i]n context, a reasonable reader would consider the statements about the cause of Brad’s suicide to have been nothing more than conjecture or speculation, reflecting the opinion of the speaker.”³⁸

A sound way to anticipate this truth defense when drafting the complaint is to include allegations tending to show that the statements were not based on speculation or conjecture (that is, were not based on an opinion) and that the hearers did not understand them to be such. As pointed out above, the court in *Scholz v. Delp* hung its analytical hat on the finding that the defendant’s statements were speculative.³⁹ This allowed the court to conclude that the statements were not actionable.⁴⁰ Thus, to avoid that case’s outcome (dismissal), it is best to emphasize that the statements are not based on speculation and were not interpreted as such.

In *Cottrell v. Smith*, the court ruled that defendant’s alleged statement that plaintiff was “not trustworthy” and that in “his activities with the women he has deceived and taken money from are criminal” constituted mere opinions in part because it did not allege any specific crime.⁴¹ The court also found the statements true, “at least to a certain degree.”⁴² Once again, it stands to reason that more rigorous pre-filing research and careful pleading could have either prevented the case from being dismissed (in this case via a judgment notwithstanding the verdict and earlier directed verdict rulings) or persuaded plaintiff that the case was not worth filing in the first place.

Public figure claimant. Another key defensive consideration is whether the claimant is a public figure. Though not an affirmative defense, if the claimant (whether individual or entity) is court-qualified a public figure, then, as noted, they must prove by clear and convincing evidence that the statements were made with actual malice.⁴³ This is a high burden for the claimant to meet, and

³⁶ *Ingber v. Lagarenne*, 750 N.Y.S.2d 172, 174 (N.Y. App. Div. 2002) (citation omitted).

³⁷ *Scholz v. Delp*, 41 N.E.3d 38, 40–41 (Mass. 2015).

³⁸ *Id.* at 47.

³⁹ *Id.*

⁴⁰ *Id.* at 41.

⁴¹ *Cottrell v. Smith*, 788 S.E.2d 772, 784–86 (Ga. 2016).

⁴² *Id.*

⁴³ *Gertz*, 418 U.S. at 335.

confirming early in the case that the claimant must meet this high burden can create an advantageous dynamic for the defendant early on.

The statements were privileged. Finally, we have the defense that the allegedly defamatory statement was privileged. Generally, two varieties of privilege can shield a speaker from liability for defamation: absolute privilege and qualified privilege.⁴⁴ Examples of the former include statements made by witnesses during legislative or judicial proceedings.⁴⁵

The defendants in *Feggans v. Billington*, a case involving statements in a petition by the plaintiff's former co-workers, won a reversal and succeeded in having the plaintiff's defamation claim dismissed based on a qualified privilege.⁴⁶ The court sided with the defendants and determined that the qualified privilege applied because the allegedly defamatory statements related to a common interest: "[t]he statements made by [defendants] in their petition are entitled to protection from suit by a qualified privilege regardless of whether those statements were defamatory. The statements were made about a common interest, *i.e.*, each employee's interest in the condition of their work environment."⁴⁷

In *Westwood College, Inc. v. Estes*, two for-profit educational institutions sued class-action counsel, alleging that they made false and defamatory claims about plaintiffs.⁴⁸ These statements included setting up a website named "Westwoodscammedme.com."⁴⁹

The court summarized that "attorneys are absolutely privileged to make defamatory remarks during preparation for a judicial proceeding so long as the remarks have some relation to the proceeding."⁵⁰ On the facts of that case, however, the court added that "some of the alleged remarks and published matter do not have 'some relation to the proceeding' and therefore are not protected by the litigation privilege."⁵¹ The court further ruled that "remarks and published matter that were made when the Attorney Defendants were acting as consumer advocates, as alleged, would not be privileged, as the Attorney Defendants were not acting as attorneys."⁵²

VI. FOLLOWING THROUGH: HOW TO PLEAD THE CLAIM

Once counsel has carefully investigated the claim, assessed the strength of the evidence, settled on an affirmative strategy, considered potential counterclaims, and evaluated potential defenses, it is time to put fingers to the

⁴⁴ See, e.g., *Shell Oil Co. v. Writt*, 464 S.W.3d 650, 654 (Tex. 2015).

⁴⁵ See RESTATEMENT (SECOND) OF TORTS § 588, 590A (AM. L. INST. 1977).

⁴⁶ *Feggans*, 677 A.2d at 776–77.

⁴⁷ *Id.*

⁴⁸ *Westwood Coll., Inc. v. Estes*, No. 2010CV2196 (D. Colo. May 10, 2011).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

keyboard and plead the case. As with other civil proceedings, determining what to omit from the complaint at the pleading stage is as, or more, difficult as determining what to include.

The *Twombly* standard has led to a need to plead more detail in the complaint to avoid dismissal.⁵³ This is where the thoughtful and rigorous pre-litigation investigatory work pays off. The prepared litigator will have a compelling story, making a pre-litigation settlement more likely and helping clear the hurdles erected at the motion to dismiss stage.

Of course, the factual details included in the complaint must match the elements of defamation. The particulars should address the standard who, what, where, when, and how questions we have already discussed.

In addition, a litigator will conserve time and effort by crafting a complaint that anticipates and heads off the likely affirmative defenses. To do this, practiced counsel will explicitly include (1) factual allegations addressing the falsity of the statement; (2) the factual (as opposed to opinion) nature of the statement; and (3) the lack of any privilege (e.g., the statement was not made within the context of a judicial proceeding).⁵⁴

Fault: The Speaker's Knowledge That the Statement Was Not True. Pleading the speaker's fault (i.e., the fact that the speaker made the statement despite knowing it was inaccurate or acted recklessly about the accuracy of the statement) accomplishes two goals. It allows a claim for punitive damages to remain viable in states where such damages are recoverable. Further, it bolsters the claim as a whole, giving the judge a view as to why this particular instance of defamation rises above the din of the everyday nasty comments that otherwise circulate.

Let us briefly return to Judge Judy's complaint, which provides an excellent example of alleging fault correctly. The complaint provides multiple reasons the defendants should have known—and, in fact, actually *did* know—that their statements regarding Judge Judy were false.⁵⁵ For example, the complaint alleges that after the online version of the story regarding Judge Judy circulated, defendants were served with litigation hold notices that advised them of the story's falsity.⁵⁶ Nevertheless, the defendants published the statements about Judge Judy as a front-page article in the print edition of the *National Enquirer*.⁵⁷

Damages: The Losses Resulting From the Defamatory Statement. Another indispensable decision plaintiffs must make is to plead damages. The two available avenues are either pleading defamation per se or per quod.

⁵³ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

⁵⁴ This allegation will likely be taken care of if the claim includes strong allegations regarding the "where" component of the defamation.

⁵⁵ Judge Judy Complaint, *supra* note 1, at 14.

⁵⁶ *Id.*

⁵⁷ *Id.*

Defamation Per Se.⁵⁸ Defamation per se involves an actionable statement without proof of special damages. The statement is so defamatory on its face that there is no need to prove special damages. Examples of such more inherently egregious defamatory statements include allegations that the victim of the defamation engaged in criminal conduct, was afflicted with a “loathsome disease,” and lacks the ability or ethics to perform their profession.⁵⁹

Defamation Per Quod. Alternatively, the claim could allege defamation per quod. This pleading standard requires proof of special damages (the damages resulting from the defamatory statement).⁶⁰

If the facts support it, the plaintiff should allege *both* defamation per se and the actual damages that resulted from the statement. This approach benefits the plaintiff by entitling them to the presumption of damage that comes with defamation per se while also providing a picture of the tangible harm resulting from the defamation. This picture of the tangible harm will make the complaint narrative more engaging and help the plaintiff get past a motion to dismiss.⁶¹ For example, if the plaintiff can point to actual marketing costs incurred to counter the defamatory statement, this will succinctly and concretely communicate to the court why it had damaging consequences and needs to be redressed.

Moving from the semi-theoretical to the truly practical, the plaintiff’s counsel should first see whether there is a defamation per se hook for the statement. In the context of defamation of a business, did the statement allege any financial crime related to how the target operates (e.g., raising investment dollars based on misrepresentations)? Did the defamatory statement claim that

⁵⁸ *Black’s Law Dictionary* describes Defamation Per Se, in pertinent part, as follows: “In the law of defamation, words actionable per se are inherently libelous or slanderous. For example, if a person says of a fiduciary, ‘That person embezzles client funds,’ the utterance is actionable per se. The plaintiff does not have to allege or prove special damages.” *Actionable*, BLACK’S LAW DICTIONARY (11th ed. 2019). *But see* 4 Modern Tort Law: Liability and Litigation § 35:22 (2d ed.) (describing the evolving nature of this area of law and the differences between jurisdictions as to whether there is a distinction without a difference between defamation per se and per quod).

⁵⁹ Notes to Colo. Jury Instr., Civil 22:1. Note that, per the substantial truth doctrine, claims of involvement in criminal conduct can be presented as a defense even if the plaintiff was never formally convicted of a crime. *See generally* Philadelphia Newspapers v. Hepps, 475 U.S. 767, 778–79 (1986) (allowing defendant to move forward with defense that plaintiff was involved in criminality even in the absence of any evidence that plaintiff was ever convicted of a crime); Walker v. Colo. Springs Sun, Inc., 538 P.2d 450 (Colo. 1975) (holding that truth is a defense against defamation claims involving allegations of criminal conduct). Further, describing someone as “a criminal,” depending on the context, can either be defamatory (if it implies a factual assertion that the person has committed a crime) or an opinion (if it is framed as an opinion that cannot be proven true or false).

⁶⁰ *Actionable*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶¹ A comparison of the Colorado jury instructions for defamation per se and defamation per quod demonstrates the differences between the elements of the two claims, including the absence of a need to prove special damages in the former. *Compare* Colo. Jury Instr., Civil 22:4, *with* Colo. Jury Instr., Civil 22:5.

the target company falsely reports its data (e.g., overreporting earnings)? If counsel can point to something in the defendant's statement that alleges or strongly implies criminality, then counsel should detail those statements and allege defamation per se.

Another avenue to alleging defamation per se in the context of a company plaintiff is by alleging that the defamatory statements unfairly prejudiced the company in its trade or business. In her recent complaint, Judge Judy followed this approach.⁶² She alleged that the statements in the articles "injure her in her profession."⁶³ In addition to making this allegation of defamation per se, the complaint also made strong allegations of the specific harm done to Judge Judy.⁶⁴ It included allegations of online comments made about her in response to the articles that are alleged to show the undermining of the reputation she has built over decades as a trusted judge.⁶⁵ Judge Judy persuasively alleged defamation per se and the damage and harm she experienced due to the alleged defamatory comments.

Motive: The "Why?" Behind the Defamatory Statement. Nailing down the motivation of the person making the false claim is integral to telling the story. Although not a required element of the claim, a persuasively alleged motive behind the defamatory statement helps bolster the elements of the claim (including the fault element), helps satisfy the *Twombly* plausibility standard, and makes pre-litigation settlement more likely.

In her complaint, Judge Judy made allegations about the motive behind the allegedly defamatory statements against her. Aided by recent testimony of David Pecker, the former publisher of the *National Enquirer*, in the Donald Trump hush money trial, Judge Judy alleged that the tabloid "frequently used publication, or the threat of publication, to achieve ulterior motives such as 'leverage.'"⁶⁶ The "leverage" referenced by Mr. Pecker during his testimony involved getting something from a celebrity (such as an interview). Still, Judge Judy has not alleged in her complaint what specific leverage the *National Enquirer* was attempting to gain over her. Perhaps if Judge Judy has an opportunity to amend her complaint, she could strengthen her motive allegations by including more details about what leverage, in particular, the publication was seeking to obtain.

VII. THE FIGHT IS ON!: DISCOVERY AND CLAIM PURSUIT WITH AN EYE TOWARD EARLY SUMMARY JUDGMENT ON LIABILITY

Not surprisingly, the first step in the discovery phase is to identify areas where the plaintiff needs to do additional fact-finding to plug any remaining holes and get ahead of potential defenses and counter-claims.

⁶² Judge Judy Complaint, *supra* note 1, at 16.

⁶³ *Id.*

⁶⁴ *Id.* at 17.

⁶⁵ *Id.*

⁶⁶ *Id.* at 18.

Following the standard plan of obtaining written discovery responses before taking depositions may be helpful. But a defamation case might be better served by jumping right to the depositions of the third parties to whom the defamatory statements were made.⁶⁷ This approach is more likely to be available if the plaintiff's counsel has been able to interview the third parties *before* filing the complaint, as discussed above in Section IV, and has a good understanding of their likely deposition testimony.

The potential benefit to taking third-party depositions early is that if the plaintiff is correct about the third parties' testimony substantiating the defamation claim, then preserving that deposition testimony and making it known to the defendant and their counsel early in the case can help lead to an early resolution. For example, if the hearer of the alleged defamatory statement offers testimony broadly supporting the defamation claim, and the plaintiff obtains that testimony early in discovery, that can help push the litigation to an earlier resolution because the writing will be on the wall for the defendant. (And in the spirit of candor, we do not adhere to the common "strategic" approach of being secretive and cagey about what we have in store for the other side; in our experience, being open and honest with opposing counsel about our well-developed case best serves our clients' long-run interests).

In any event, if this early deposition work does not lead to settlement of the claim, it may offer the alternative benefit of positioning an early motion for summary judgment as to liability, if not damages. In other words, if the plaintiff obtains favorable testimony from the third-party hearer of the defamatory statement, that testimony can support an early motion for summary judgment as to the speaker's liability for defamation, even if the issue of damages—which may involve additional fact disputes—needs to be tried. A favorable ruling on such a motion, in turn, can often bring the defendant to the resolution table, even if earlier efforts at resolution have not succeeded. And what if the defendant is still unwilling to resolve the dispute on favorable terms for the plaintiff? In that case, the plaintiff will have a ruling on the defendant's liability heading into the trial, which permits a solid instruction to the jury about the defendant's liability and sets the stage nicely for the damages trial.

VIII. THE ANATOMY OF A DEFAMATION ACTION

A potential format for a pleading that captures the above content and will persuasively position your defamation claim is as follows:

⁶⁷ If the defamatory statement was written, it can also be helpful to take an early deposition of the speaker to establish the authenticity of the writing and to explore the speaker's story around the writing to evaluate and test the defenses.

BASIC COMPLAINT OUTLINE

I. Introduction

- Include a punchy overview of the defamatory statement and the harm it has caused.

II. Parties

- Identify each of the parties to the action.

III. Jurisdiction and Venue

- Include allegations that tie the defamatory statement to the jurisdiction and venue.

IV. Background

- Include allegations that describe both the defamer and the target of the defamatory statement. Detail the industry within which they operate. This will set up the later allegations regarding damages and the absence of a viable defense.

V. The Defamatory Statement

- This heading likely will include subheadings similar to those shown below that align with the content described above. These include:
 - A. Defendant Defamed Plaintiff by Falsely Stating “__.”
 - B. Defendant’s Statement Constitutes Defamation Per Se and Caused Actual Damages to Plaintiff Including “__.”
 - C. Defendant Made the Defamatory Statement With Malice Because “__.”
 - D. Defendant’s Statement Is Not Protected by Privilege or Any Other Defense Because “__.”

VI. Claim for Relief: Defamation

- Include the elements and the color described above, detailing the defendant’s fault, malice, and motive.

VII. Prayer for Relief

- Include the relief sought, specifying damages, costs, and attorneys’ fees as available.

IX. WHAT DAMAGES SHOULD THE PLAINTIFF CLAIM?

Damages resulting from defamation are typically fact-specific.⁶⁸ In other words, a business's or individual's damages will be particular to it. Nevertheless, certain categories of damages tend to arise with some frequency. The two main categories include revenue losses attributable to the defamatory statement and costs incurred to respond to the defamatory statement, e.g., increased marketing costs and costs incurred to set the record straight with third parties such as auditors or other compliance oversight parties.⁶⁹ These amounts can increase quickly. The statement's target should begin tracking these costs early to save the time and effort of digging up that information later.

The defamation case two Georgia election workers brought against Rudy Giuliani is instructive. It vividly demonstrates the serious financial consequences of an adverse finding. In that case, the jury awarded the plaintiffs \$145,969,000 in damages, along with costs and attorneys' fees.⁷⁰ The Court, after noting that the law accords it "substantial discretion over how the property at issue can best be used to discharge the debtor creditor's claim," ordered that Giuliani turn over his New York apartment, checking account, 1980 Mercedes, furniture, various sports memorabilia, television, jewelry, and watches within seven days of the order so that they could ultimately be sold at auction.⁷¹

Defamation claims can also lend themselves to nonmonetary remedies. When a party makes a false and damaging statement about a business, one natural component of a resolution is often to have that party retract their statement and express their regret or apology for having made the false (or sometimes "inaccurate," if that is an easier pill for the defamer to swallow) statement.⁷² This expression of regret should circulate to the hearers of the defamatory statement (of course) and to others who may have been secondary hearers. One way to achieve an appropriate circulation is by pinpointing a popular trade publication or periodical. The defamer can print the retraction/apology in that publication for a few consecutive issues to ensure adequate circulation.

Depending on the nature of a plaintiff's business and the defamatory statements, such a retraction/apology may have greater value than a monetary payment. This aspect of a remedy most often arises in settlement negotiations as opposed to being relief that a court will award. As a result, a retraction/apology is an aspect to consider heading into a mediation or a settlement discussion.

⁶⁸ See, e.g., Colo. Jury Instr., Civil 22:25.

⁶⁹ Todd McMurtry, *Proving Damages in a Business Defamation Lawsuit*, HEMMER WESSELS MCMURTRY ATT'YS AT L. (Sept. 30, 2023), <https://www.hemmerlaw.com/blog/proving-damages-in-a-business-defamation-lawsuit> [<https://perma.cc/23HQ-86H8>].

⁷⁰ *Giuliani*, 2024 WL at *1.

⁷¹ *Id.* at *3, *8.

⁷² See John C. Martin, *The Role of Retraction in Defamation Suits*, 1 U. OF CHICAGO L. F. 293, 296 (1993).

X. AN INITIAL DEFENSE CHECKLIST

There are several key issues defense counsel should consider at the very beginning of the case. These issues warrant special attention immediately because they can impact how the defense is structured and presented. These issues include:

- Is the claimant a public figure?
- Does the alleged defamatory statement involve a matter of public concern?
- If a public figure or a matter of public concern is involved, has the claimant plausibly alleged actual malice? In particular, has the claimant done more than make conclusory allegations of malice and avoided making allegations based on “information and belief.”
- Is the plaintiff alleging defamation per se or defamation per quod?
- Has the plaintiff alleged actual damages?
- Is there truth behind the alleged defamatory statements?
- Are the alleged defamatory statements factual statements or statements of opinion?

Considering that the case law supports early resolution of defamation claims,⁷³ it is valuable to engage quickly on the substantive issues in the case because there will likely be an opportunity to raise the substantive issues at an early stage of the case.

XI. CONCLUSION

Defamation of a person or entity can inflict devastation that is virtually impossible to undo. Strategically and legally sound defamation claims, when properly formulated, supported, and pled, can achieve an early resolution and remediation. They, in short, can stop the bleeding. No defendant wants their wrongful actions detailed chapter and verse in the public eye. But even if trial is unavoidable, holding your fire long enough to harness the key facts, gain a granular understanding of the background context, and inoculate your client against potential defenses will pay off in the long run.

⁷³ *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 138 F. Supp. 3d 1191, 1199 (D. Colo. 2015), *aff'd*, 861 F.3d 1081 (10th Cir. 2017) (“Because the threat of protracted litigation could have a chilling effect on the constitutionally protected right of free speech, prompt resolution of defamation actions, either by motion to dismiss or summary judgment, is appropriate.”).