



owners or residents contain potentially defamatory statements about an individual board member (and that are published/provided to third parties), then that board member may have their own individual legal cause of action against the person and should seek legal advice from their own personal attorney if they want to consider pursuing legal action against someone for a potentially defamatory statement (keeping in mind that defamation claims are subject to a one-year statute of limitations for filing a lawsuit).

In this session we will review the elements of defamation, the remedies that may be available to a board when an association, its directors or managing agents are being defamed and provide suggested strategies for addressing this behavior. Hopefully, your community has not encountered the scenarios covered in this session (and if that is the case perhaps it has been lucky); however, the tips and strategies that follow may be of help if that changes.

I. Defamation

A. Defamation consists of the assertion to another of a false statement that is defamatory in nature regarding a person that causes actual or presumed damages to the person. A statement, to be considered defamatory, must be more than merely critical. The statement must “make the plaintiff appear odious, infamous, or ridiculous.” To be considered defamatory the statement must cause reputational harm to a plaintiff, “holding the plaintiff up to scorn, ridicule, hatred, or contempt.”

B. Elements. Pursuant to Virginia law to prevail in a claim for defamation requires the plaintiff establish the following: (1) a factual assertion (as opposed to an expression of opinion) was made by the defendant; (2) the factual assertion is false; (3) it is defamatory in nature; (4) the assertion is about the plaintiff; (5) and the assertion was made to a third party; (6) in a setting or context that isn’t privileged; (7) with the requisite degree of fault; (8) that causes actual or presumed damages (generally consisting of financial loss, loss of standing in the community, and/or emotional distress).

C. Libel vs. Slander. Libel is a defamatory statement made in writing. Slander is a defamatory statement made orally.

D. Defamation per se. Virginia recognizes that certain statements constitute defamation “per se”. Damages are presumed in instances of defamation “per se”. An instance of libel or slander is considered “per se” defamatory if it: (1) states or implies



that the person committed a crime involving moral turpitude, (2) states or implies that the person is unfit to perform his job; (3) states or implies that the person lacks integrity in the performance of her job; or (4) prejudices the person in his or her profession or trade.

E. Criminal Sanctions. Section 18.2-417 of the Virginia Code provides criminal sanctions for slander and libel and, in relevant part, states as follows:

Any person who shall falsely utter and speak, or falsely write and publish, of and concerning any female of chaste character, any words derogatory of such female's character for virtue and chastity, or imputing to such female acts not virtuous and chaste, or who shall falsely utter and speak, or falsely write and publish, of and concerning another person, any words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace or shall use grossly insulting language to any female of good character or reputation, shall be guilty of a Class 3 misdemeanor.

II. Defenses to Defamation

A. Truth. One of the critical elements to a claim of defamation is that the statement is false. As a result, truth is an absolute defense to defamation.

B. Opinion. Matters of belief or ideas that cannot be proven true or untrue do not qualify as false statements and are not actionable as defamation. Establishing that a statement made by a party was merely his opinion is a valid defense to defamation.

C. Privilege. In some situations, the person making the statement, even if it is defamatory, is immune from liability for defamation. Two types:

1. **Absolute Privilege**. The person making what would normally be considered a defamatory statement has the absolute right to make the statement. May apply: during judicial proceedings; by high government officials; by legislators during legislative debates; during political broadcasts or speeches; and between spouses.

2. **Qualified Privilege**. The person making what would normally be considered a defamatory statement has a qualified right to make the statement. In such situations the plaintiff must establish that the person with a qualified privilege



acted intentionally, recklessly or with malice, hatred, spite, ill will or resentment when making the defamatory statement. Qualified privilege may apply with: statements made in governmental reports of official proceedings; statements made by lower government officials; citizen testimony during legislative proceedings; statements made in self-defense or to warn others; and certain types of statements made by a former employer to a potential employer regarding an employee.

D. Private, Public and Limited Public Figures. There are three types of figures in regards to defamation cases: Private Figures, Public Figures and Limited Public Figures. Public Figures are those who have played a prominent role in public affairs or achieved pervasive fame. Limited Public Figures are those who have put themselves at the forefront of a particular controversy. Private Figures are everyone else (those who do not qualify as Public or Limited Public Figures). In regards to *Private Figures*, liability for defamation is established by proving the defendant acted negligently in making the defamatory statement. In regards to *Public and Limited Public Figures*, a plaintiff must establish that the defendant acted with actual malice when making the defamatory statement.

1. *Is a Board member a Limited Public Figure?* In some cases, likely yes!
2. In New Jersey, a candidate for an association's board was deemed a limited public figure because "plaintiff thrust himself into a spotlight which justified viewing him as a public figure for the limited purpose of his candidacy." Verna v. The Links at Valleybrook Neighborhood Association, Inc., 371 N.J. Super. 77, 97, 852 A.2d 202 (App.Div.2004).
3. In Wyoming, a board member alleged that contained within flyers prepared and distributed by residents which criticized the firing of a manager were defamatory statements. The Court held that the dispute was a public controversy because "Plaintiff voluntarily and vigorously inserted himself into the controversy making him a public figure."

E. Retraction. In some situations, a Court may deem an apology and retraction suitable punishment or sufficient damages for a defamatory statement.



III. How to Respond to Defamation?

A. Litigation is always an option but should be utilized sparingly (for the reasons discussed below). Additionally, before initiating a lawsuit the defamatory statements and surrounding circumstances should be reviewed with the association's legal counsel and Board provided options on how to proceed and recommendations on the best course of action. Ultimately, if the association, board or management has suffered quantifiable monetary damages resulting from an instance of defamation then litigation may be warranted, but often the damages suffered are nebulous and hard to quantify, which can make it difficult for a Court to award appropriate damages.

B. Oftentimes, a letter from the association's legal counsel to the owner which demands that the owner cease and desist from making defamatory remarks in the future, apologize for the past defamation and publish a retraction can be an effective response.

C. Additionally, working to improve communication with the individual engaging in defamation can be helpful. Adopting rules which encourage proper decorum and respectful communications during association meetings can help dissuade future defamation. As well as directors and management being open and honest with members inquiring about proper association issues. Please note, when questions or comments aren't appropriate, offer to discuss them after the meeting or at another time. The key is to remain calm and try not to antagonize the member or escalate the situation by getting angry.

IV. Concerns with Litigation

A. Proving defamation is difficult due to the many defenses available and difficulty of quantifying the economic damages associated therewith.



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B. The difficulty in proving defamation and fact specific nature of such claims can also make litigating such cases very costly.

C. *Beware of the Streisand Effect!* Litigating the matter tends to keep the dispute going longer and court proceedings are public, so litigation may end up damaging the plaintiff's reputation more than the original defamatory statements. The association may also need to disclose the ongoing status of litigation upon request from a potential seller (which may discourage buyers or lenders from wanting to buy in to community).

D. Boards should additionally be aware that attorneys' fees are typically not recoverable in actions for defamation.



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2020 LEGAL WEBINAR SERIES

TODAY'S TOPIC

Defamation and Common Interest Community Associations

Presented by Bruce Easmunt

Disclaimer: The information presented in this Webinar is not intended to be legal advice. Legal advice must be tailored to the specific facts and circumstances of each case and each association's governing documents. Every effort has been made to ensure this information is up-to-date. However, it is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the individualized advice of your legal counsel.

What is “defamation”

A false assertion to another regarding a person that causes damage to that person.

It is important to note that not all cases involving defamation are necessarily matters to be litigated by an association.





What about Free Speech?

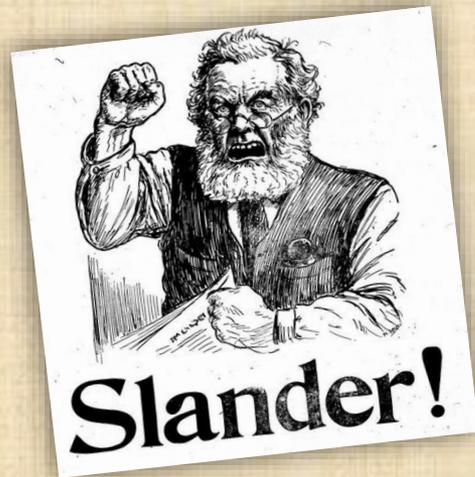
First Amendment to the U.S. Constitution provides for freedom of speech.

BUT: Protection from government, not Virginia community associations

Even if it did, it does not protect defamatory speech, or the consequences such speech.

Types of Defamation

Libel = written defamatory statement



= verbal defamatory statement

Virginia Elements to Prove Defamation

- Factual assertion about plaintiff, made to a third party (not an opinion)
- Assertion is false – truth is an absolute defense
- Defamatory in nature
- In a non-privileged context
- With a requisite degree of fault
- That causes damages.

Defamation “*per se*”

Damages are presumed if the defamatory statement states or implies:

- crime of “moral turpitude”;
- Person unfit to perform job;
- Person lacks integrity in performance of job;
- Prejudices person in profession or trade.

Defamation Defenses



- Truth- absolute defense.
- Privilege – status or setting grants immunity
 - applies to gov. officials, legislators, spouses, self defense situations, certain former employer situations
- Retraction

Defamation Defenses, cont.

- Private, Public and Limited Public Figures
 - Public or Limited Public Figure – liability conditioned on actual malice = high standard
 - Private Figure- liability conditioned on negligent defamatory statement =low standard

Are Directors “Limited Public Figures”?

In some cases, yes!

- NJ Court - director running for Board “thrust himself into a spotlight” as a candidate.
- WY Court – director “voluntarily and vigorously inserted himself into the controversy.”

Litigation?

- Defamation can be difficult to prove.
 - Multitude of defenses, damages
- Costly due to fact specific nature
- Attorney's fees not likely recoverable like other association legal actions
- *Not all cases involving defamation are necessarily matters to be litigated by an association.*
 - Individual directors may need to seek independent legal counsel
- One-year statute of limitations
 - *Va. Code 8.01-247.1*



Beware:



- Litigation promotes the visibility of statements
- Protracted litigation is unpopular with owners
- Litigation may need to be disclosed to potential purchasers. Could discourage.

How to Respond?

- Work to improve communication and transparency;
- Remain calm, do not stoop to their level;
- Cease and desist from legal counsel;
- Litigate when necessary.



Questions?

If you enjoyed this brief Webinar and have a few questions regarding this topic, we can schedule a **live** Zoom session to take questions.

If interested, please email Cathleen Watkins at cwatkins@chadwickwashington.com. Once enough parties indicate an interest, the Zoom session will be scheduled, and you will be notified.