

*Houston Construction News*  
**Legal Column**

*“Business Disparagement Today”*

In today’s business climate, whether it be in the construction industry or otherwise, statements made by employees, agents, or other representatives of your company may subject you to claims of business disparagement. Statements made by you or your representatives, which are claimed to falsely disparage or defame a person or corporation, may form the basis of a cause of action against the person responsible for making such statements, as well as his or her business. Such causes of action include, among others, claims for business disparagement, defamation, libel and slander. While many times such statements are not taken seriously by the person making them, or they are made in what are believed to be “confidential conversations,” a number of causes of action and claims for significant amounts of damages can result. Any claim of business disparagement must be taken seriously, due to the potential for an award of high monetary damages which may not be covered by insurance.

For example, in one case, a jury awarded only one dollar for a business disparagement claim, but awarded 3 Million Dollars in punitive damages as well as \$75,000 in damages for libel and \$25,000 for damages for tortious interference with the claimant’s contracts with its customers. In another cause of action arising out of alleged disparaging statements, a jury awarded in excess of 366 Million Dollars to the plaintiff. Damages can be awarded not only for the loss of existing contracts by the disparaged party, but damages for the loss of future contracts.

Some types of statements will constitute defamation “per se.” The attribution of criminal activity to another party is one such type of statement, which can lead to a business defamation claim. More specifically, statements may constitute defamation per se if a charge of criminal

conduct is apparent by reasonable implication or insinuation, if the statement in question sets out facts that presumably would be understood by those who hear it as charging someone with a crime, or if the language or statement in question was calculated to induce those who hear it to understand that the claimant is guilty of a crime.

The false attribution of immoral conduct or dishonesty such as a statement that the party complaining committed an act that is generally regarded by the public as involving moral turpitude may also be considered to be defamatory per se. Specifically, statements that cause injury to the claimant's business or profession or occupation such as attributions of professional or business impropriety may be found to be defamatory per se, as well as attributions made of another person of racism, bankruptcy or financial insolvency. For example, a communication falsely stating that a person is not credit-worthy or that he or she is bankrupt or "broke" has been found to be defamatory per se.

The elements of business disparagement generally include the publication of disparaging words, which were false and which were published with malice. With respect to whether the words were made with malice, the courts have held that evidence of ill will between the parties is relevant. There must also be a lack of privilege to publish the alleged disparaging words, and the claimant must have incurred special damages such as lost income. When determining the disparaging nature of a statement, the judge will generally construe the publication based upon how ". . . a person of ordinary intelligence . . ." would perceive it. Therefore, it is obvious that even a statement made casually could develop into a claim of business disparagement against you.

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