

## DEFAMATION

## Dershowitz's Attorney Comments on Reputational Damage

Commentary by Kendall Coffey

According to our philosophical and ethical traditions, reputation is sacrosanct.

An often-quoted passage from Proverbs proclaims that, "A good name is more desirable than great riches."

The signers of our Declaration of Independence pledged their lives, fortunes and "sacred honor" to the cause of liberty. While throughout history reputation has been recognized as a priceless treasure, it is fragile. Sensational accusations—even when baseless—often cause damage that is irreversible.

Reputation is all the more vulnerable today, especially with a public that can be fascinated by a case in a court of law. There is no presumption of innocence in the court of public opinion. The usual reaction to ugly accusations assumes that fire lies beneath the smoke rather than that the smoke lies.

Meanwhile, today's lawyers are increasingly media savvy. Some fashion pleadings to maximize self-serving publicity along with the damage that results.

Despite the immense importance of reputation and its extreme vulnerability, a vast license for character assassination has been judicially created by virtue of the litigation privilege. This doctrine provides that statements made in pleadings and court proceedings are generally exempt from accountability under the laws of defamation.

As a result, appalling falsities, whether



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calculated to satisfy spitefulness or generate newsworthiness, are sometimes injected into pleadings, with seeming impunity.

## NEED FOR LIMITATIONS

The critical exemption to this immunity from responsibility arises when the defamatory statements are "not relevant or pertinent to the subject of inquiry" in the litigation. In those instances, defamation claims are not made easy, but at least they are no longer made immune from consequences. Irrelevant statements are "conditionally or qualified privileged," so that if false and made in bad faith, they can be actionable.

The relevancy exemption to the usual litigation privilege protects lawyers and litigants acting within the boundaries of litigation, but not trespassers. The Supreme Court of Florida's declaration more than a century ago rings even truer in the age of bloggers.

"The ends of justice can be effectually accomplished by placing a limit upon the party or counsel who avails himself of his situation to gratify private malice by uttering slanderous expressions and making libelous statements which have no relation to or connection with the cause in hand or the subject matter of inquiry."

Because litigation immunity is an extreme form of protection that insulates even demonstrably false allegations made in bad faith, the need for principled limitations to circumscribe this immunity would seem evident.

Even so, a recent decision by Florida's

First District Court of Appeal rejected a "strict relevancy" test. In that case, the court ruled that even bad faith falsity is "entitled to immunity" so long as the statement "has some relation to the proceeding."

While eschewing "strict relevancy," the court provided no alternative framework for relevancy. Since a standardless concept of relevance promotes virtually limitless immunity, the relevancy analysis, to be meaningful, should be anchored upon justiciable criteria.

If "strict relevancy" is not to be applied, the other widely prevailing standard to consider is the relevancy framework governing civil discovery. That standard permits discovery if it is "reasonably calculated" to lead to admissible evidence.

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## INJURIOUS IRRELEVANCIES

For purposes of applying the litigation privilege, "some relation" to the proceeding could be established if the harmful allegations at issue are nonetheless reasonably calculated to advance the litigant's position in the proceeding. The determination of "reasonably calculated," as with discovery, is an objective standard based on existing legal principles rather than subjective conjecture.

Thus, for example, if a defendant's motion to dismiss a complaint is replete with personal attacks, those attacks could not be "reasonably calculated" to advance dismissal because such dismissal motions are determined upon legality rather than personality.

Similarly, if immunity were objectively limited, discovery motions might happily be relegated to addressing the merits of the discovery requests rather than the supposed demerits of opposing parties or counsel.

Without such a standard, litigants may feel free to devise pretextual and theoretical connections between scurrilous allegations and some facet of the litigation, irrespective of whether the allegations are "reasonably calculated" to advance the issues of the case.

While injurious irrelevancies can be stricken by the court, after-the-fact excision, even though it may reduce further damage, is far from a complete remedy. Without the right to sue for damages, there is neither compensation nor punishment nor effective deterrent.

Yesterday's newspapers may land in trash heaps, but even stricken allegations typically remain forever in the landing pages of today's Internet. Inevitably, the original vilification gets more coverage than subsequent vindication.

Only meaningful judicial standards can provide containment to the potentially limitless reputational assaults that all too frequently make one's good name disposable rather than its assailants accountable.

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