



Defamation and Anti-SLAPP Statutes

When you are made aware of a negative online review, especially one that contains false and misleading information about your practice, your initial instinct may be to immediately post a detailed reply. TDIC analysts advise dentists to proceed with caution when considering response methods to potentially minimize the impact of a negative review.

Before taking any action, be aware of potential serious repercussions which can arise from replying to the reviewer, including the risks of breaching a patient's protected health information (PHI).

It can be tempting to consider filing a defamation claim against the patient in response to the negative online review. However, one of the defenses to a defamation claim that are afforded to a patient includes First Amendment rights protecting freedom of speech. Another potential response by the patient could be the filing of an anti-SLAPP lawsuit.

Anti-SLAPP laws provide defendants with a way to dismiss strategic lawsuits against public participation. These statutes vary state by state. This resource lists the governing anti-SLAPP statutes by state.

Defamation and Anti-SLAPP Statutes in California

Defamation comes in two forms: libel and slander.^[1] The basic difference between libel and slander is that the former is a written statement, while the latter is an oral statement.^[2] Since an online review is a written publication, libel is the form of defamation potentially at issue.

Libel is defined by California law as “a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, *or which has a tendency to injure him in his occupation.*”^[3] Stated plainly, a false statement on an online review that attacks a dentist’s reputation, which is made negligently, knowingly, or recklessly,^[4] is subject to a legal attack by the dentist via a claim for libel.

Importantly, because of freedom of speech principles enshrined by the First Amendment, the law distinguishes between statements of *fact* (which are provably false) and statements of *opinion* (which are not provably false).^[5] The United States Supreme Court held long ago: “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”^[6] Thus, “courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one [statements of opinion] as constitutionally protected and imposing on the other [statements of fact] civil liability for its abuse.”^[7] Indeed, “‘rhetorical hyperbole,’ ‘vigorous epithet[s],’ ‘lusty and imaginative expression[s] of [] contempt,’ and language used ‘in a loose, figurative sense’” are not actionable statements of fact.^[8] For example, calling an employee a “local loser,” or a teacher the “worst teacher” and a “babbler,” have all been deemed to be non-actionable *opinion*.^[9] On the other hand, posting on a website that a doctor is only a student who has no training in a particular area of medicine are provably false statements of fact, and therefore actionable when untrue.^[10] So too are blog posts falsely accusing a family court counselor of corruption, fraud, lying under oath, prescribing medicine illegally,

^[1] California Civil Code § 44.

^[2] California Civil Code §§ 45 and 46.

^[3] California Civil Code § 45 [italics added].

^[4] Different standards regarding the author’s mindset when publishing the false statement apply depending on whether (1) the person defamed is a “public” (i.e., someone in the public spotlight, such as a celebrity or politician) or “private” individual and (2) the statement concerns a matter of “public” or “private” concern. An issue of “public” concern is one that is being openly debated and has substantial ramifications for persons beyond those participating in the debate. *Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 376-378; *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1275. The more stringent state of mind standards (knowingly and recklessly) are required for “public” figures and matters of “public” concern, while the lower standard (negligence) is required for “private” figures and matters of “private” concern. For an overview of the specific elements of a defamation (libel or slander) claim, see Judicial Council of California Civil Jury Instructions (“CACI”) Nos. 1700, et al., available here: https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf.

^[5] *Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600.

^[6] *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340.

^[7] *Gregory*, 17 Cal.3d at 601.

^[8] *Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401.

^[9] *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 810-812; *Ferlauto*, 74 Cal.App.4th at 1397-1398 and 1403-1404; *Moyer v. Amador Valley Joint Union High School Dist.* (1990) 225 Cal.App.3d 720, 725-726.

^[10] *Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 797-799 [“Accusing a physician of being untrained and lacking the proper credentials are not statements of opinion. They are statements of fact.”]



and extorting money for services not performed.^[11] As the foregoing analysis demonstrates, there are certain trigger areas to be “on the lookout for” when determining whether a review is libelous:

1. Does the review claim you lack training or experience?
2. Does the review accuse you of engaging in criminal conduct?
3. Does the review assert you committed fraud?
4. Does the review state your treatment was substandard (negligent)?

Undertaking this analysis is critical before rushing to the courtroom. Bringing an unmeritorious libel claim against a reviewer can result in you being required to pay the reviewer’s often substantial attorney’s fees and costs. The reviewer can respond to the lawsuit by filing an anti-SLAPP motion to strike under California Code of Civil Procedure § 425.16, which, if successful (in part or in full), automatically entitles the reviewer to an award of attorney’s fees and costs.^[12]

The California Legislature developed the anti-SLAPP statutory scheme due to “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”^[13] An anti-SLAPP motion attacks a claim, such as one for libel, by asserting that (1) the challenged statement arises from Constitutionally-protected activity (i.e., free speech in connection with a public issue), and (2) the plaintiff (you, the dentist) does not have a probability of prevailing on the cause of action (i.e., the challenged statement was not defamatory).^[14] The pertinent language of the statute reads:

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.^[15]

As it relates to an Internet forum such as Yelp, an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution” is defined to include (1) any statement made in a public forum in connection with an issue of public interest or (2) any

^[11] *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 383-386 [disapproved on other grounds in *Baral v. Schnitt* (2016) 1 Cal.5th 376].

^[12] California Code of Civil Procedure § 425.16(c)(1).

^[13] California Code of Civil Procedure § 425.16(a).

^[14] *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 766 and 768; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.

^[15] California Code of Civil Procedure § 425.16(b)(1).



other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.^[16]

Significantly, the anti-SLAPP statute is construed broadly.^[17] “[T]he critical consideration is whether the cause of action is based on the defendant’s [the reviewer’s] protected free speech or petitioning activity.”^[18] Similarly, a “public issue” or an “issue of public interest” includes “not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity.”^[19] This definition extends to issues that are not necessarily of interest to the entire public, but rather to a limited, definable portion of the public, so long as the protected activity occurs “in the context of an ongoing controversy, dispute or discussion.”^[20]

^[16] California Code of Civil Procedure § 425.16(e)(3)-(4).

^[17] California Code of Civil Procedure § 425.16(a); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60, fn. 3.

^[18] *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.

^[19] *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.

^[20] *Du Charme v. International Broth. of Elec. Workers, Local 45* (2003) 110 Cal.App.4th 107, 118-119.



STATE	DEFAMATION GENERALLY SIMILAR TO CALIFORNIA?	ANTI-SLAPP LAW?
Alaska	Yes Requires (1) a false and defamatory statement; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) the existence of either “per se” actionability or special harm. <i>Odom v. Fairbanks Memorial Hospital</i>, 999 P.2d 123, 130 (Alaska 2000). A statement is actionable “per se” if the words used are so “unambiguous as to be reasonably susceptible of only one interpretation – that is, one which has a natural tendency to injure another’s reputation.” <i>Id.</i> A statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. <i>Briggs v. Newton</i>, 984 P.2d 1113, 1120-21 (Alaska 1999). The statute of limitations is 2 years (it is 1 year in California). Alaska Statutes § 09.10.070.	None
Arizona	Yes “One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a private matter, is subject to liability, if, but only if, he (a) knows that the statement is false and it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.” <i>Antwerp Diamond Exch. of Am., Inc. v. Better Bus. Bureau of Maricopa Cnty., Inc.</i>, 130 Ariz. 523, 528, 637 P.2d 733, 738 (1981). Like California, the statute of limitations is 1 year. Ariz. Rev. Stat. 12-541(1).	Yes Ariz. Rev. Stat. Ann. § 12-751 Arizona recently revised its anti- SLAPP statute (reflected in the link above) to somewhat expand its scope. https://www.ifs.org/blog/updates-to-the-anti-slapp-report-card/; https://www.swlaw.com/publications/legal-alerts/Arizona's-new-anti-slapp-law-now-covers-right-of-speech-freedom-of-the-press-free-association-and-peaceable-assembly



STATE	DEFAMATION GENERALLY SIMILAR TO CALIFORNIA?	ANTI-SLAPP LAW?
Hawaii	Yes "In order to sustain a claim for defamation, a plaintiff must establish the following four elements: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher [actual malice where the plaintiff is a public figure]; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." <i>Gold v. Harrison</i>, 962 P.2d 353 (1998). The statute of limitations is 2 years. Haw. Rev. Stat. § 657-4.	Yes Hawaii Public Expression Act Hawaii, like Arizona, recently revised its anti-SLAPP statute (reflected in the link above) to significantly expand its scope. The revised law has yet to assigned a statutory number. https://www.ifs.org/blog/updates-to-the-anti-slapp-report-card/
Idaho	Yes "In a defamation action, a plaintiff must prove that the defendant: (1) communicated information concerning the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication." <i>Irish v. Hall</i>, 416 P.3d 975, 979 (Idaho 2018). "A defamatory statement is one that 'tend[s] to harm a person's reputation, [usually] by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person's business.'" <i>Id.</i> The statute of limitations is 2 years. Idaho Statutes § 5-219(5). In addition, defamation can result in criminal penalties. Idaho Statutes §§ 18-4801 - 18-4802.	None



STATE	DEFAMATION GENERALLY SIMILAR TO CALIFORNIA?	ANTI-SLAPP LAW?
Illinois	Yes "A statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with him or her." <i>Brennan v. Kadner</i>, 814 N.E.2d 951, 956 (App. Ct. Ill. 2004). "To prove defamation, a plaintiff must show: (1) the defendant made a false statement concerning the plaintiff; (2) there was an unprivileged publication of the defamatory statement to a third party by defendant; and (3) publication of the defamatory statement damaged the plaintiff." <i>Id.</i> at 956-957. Like California, the statute of limitations is 1 year. 735 Ill. Comp. Stat. 5/13-201.	Yes 735 Ill. Comp. Stat. 110/1 - 110/99 An analysis of Illinois' anti-SLAPP statute and how it has been interpreted by the Courts is found here: https://jenner.com/system/assets/publications/12789/original/BermanWadeThomsonWilliams_Com_Lawyer.pdf?1395059301
Minnesota	Yes "To establish the elements of a defamation claim in Minnesota, a plaintiff must prove that: (1) the defamatory statement was 'communicated to someone other than the plaintiff'; (2) the statement is false; (3) the statement tends to 'harm the plaintiff's reputation and to lower [the plaintiff] in the estimation of the community,' . . . and (4) 'the recipient of the false statement reasonably understands it to refer to a specific individual.'" <i>McKee v. Laurion</i>, 825 N.W.2d 725, 729-730 (Minn. 2013). The statute of limitations is 2 years. Minn. Stat. § 541.07(1).	None Law found unconstitutional by the Minnesota Supreme Court in 2017. https://www.minnpost.com/community-voices/2017/06/minnesotas-slapp-law-slapped-down-and-impact-likely-be-profound/



STATE	DEFAMATION GENERALLY SIMILAR TO CALIFORNIA?	ANTI-SLAPP LAW?
Montana	Yes Libel (written defamatory statement) is defined by statute as “a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injure a person in the person's occupation.” MCA § 27-1-802. Slander (oral defamatory statement) is defined by statute as “a false and unprivileged publication other than libel that: (1) charges any person with crime or with having been indicted, convicted, or punished for crime; (2) imputes in a person the present existence of an infectious, contagious, or loathsome disease; (3) tends directly to injure a person in respect to the person's office, profession, trade, or business, either by imputing to the person general disqualification in those respects that the office or other occupation peculiarly requires or by imputing something with reference to the person's office, profession, trade, or business that has a natural tendency to lessen its profit; (4) imputes to a person impotence or want of chastity; or (5) by natural consequence causes actual damage.” MCA § 27-1-803. The statute of limitations is 2 years. MCA § 27-2-204. In addition, defamation can result in criminal penalties (MCA § 45-8-212), although it appears to have struck down as unconstitutional. See https://reason.com/volokh/2019/03/18/montana-criminal-libel-statute-struck-down/	None



STATE	DEFAMATION GENERALLY SIMILAR TO CALIFORNIA?	ANTI-SLAPP LAW?
Nevada	Yes "To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication. <i>" PETA v. Bobby Berosini, Ltd., 895 P.2d 1269, 1272 (Nev. 1995).</i> The statute of limitations is 2 years. Nev. Rev. Stat. § 11.190(4)(c). In addition, defamation can result in criminal penalties. Nev. Rev. Stat. §§ 200.510 - 200-560.	Yes Nev. Rev. Stat. §§ 41.635 - 41.670
New Jersey	Yes "[T]he elements of a defamation claim are: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher." <i>DeAngelis v. Hill</i>, 847 A.2d 1261, 1267-1268 (N.J. 2004). Like California, the statute of limitations is 1 year. N.J.R.A. § 2A:14-3.	None However, anti-SLAPP legislation has been recently introduced. https://www.law.com/njlawjournal/2022/09/11/time-to-slapp-back/?slret urn=20220931110521



STATE	DEFAMATION GENERALLY SIMILAR TO CALIFORNIA?	ANTI-SLAPP LAW?
North Dakota	Yes Libel is defined by statute as “a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes the person to be shunned or avoided, or which has a tendency to injure the person in the person’s occupation.” N.D.C.C. § 14-02-03. Slander is defined by statute as “a false and unprivileged publication other than libel, which: 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; 2. Imputes to the person the present existence of an infectious, contagious, or loathsome disease; 3. Tends directly to injure the person in respect to the person's office, profession, trade, or business, either by imputing to the person general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to the person's office, profession, trade, or business that has a natural tendency to lessen its profits; 4. Imputes to the person impotence or want of chastity; or 5. By natural consequence causes actual damage.” N.D.C.C. § 14-02-04. An important additional requirement under North Dakota law is that the injured person must make “a timely and adequate request for correction or clarification from the defendant or the defendant has made a correction or clarification.” N.D.C.C. §§ 32-43-01 - 32-43-10. The statute of limitations is 2 years. N.D.C.C. § 28-01-18. In addition, defamation can result in criminal penalties. N.D.C.C. § 12.1-15-01.	None



STATE	DEFAMATION GENERALLY SIMILAR TO CALIFORNIA?	ANTI-SLAPP LAW?
Oregon	Yes “The conduct necessary for a defamation claim is: 1) the making of a defamatory statement; 2) the ‘publication’ of the defamatory material; and 3) a resulting special harm (unless the defamatory statement gives rise to presumptive special harm).” <i>L&D of Oregon v. American States Ins.</i>, 14 P.3d 617, 620. Like California, the statute of limitations is 1 year. Or. Rev. Stat. § 12.120(2). Oregon appears to also a criminal form of defamation. Or. Rev. Stat. § 135.733.	Yes Or. Rev. Stat. §§ 31.150 - 31.155
Pennsylvania	Yes In a defamation, action, “[t]he burden is on the plaintiff to prove: (1) The defamatory character of the communication. (2) Its publication by the defendant. (3) Its application to the plaintiff. (4) The understanding by the recipient of its defamatory meaning. (5) The understanding by the recipient of it as intended to be applied to the plaintiff. (6) Special harm resulting to the plaintiff from its publication. (7) Abuse of a conditionally privileged occasion.” <i>Weaver v. Lancaster Newspapers, Inc.</i>, 926 A.2d 899, 903 (Pa. 2007) [citing 42 Pa. Consol. Stat. § 8343(a)]. “In assessing whether a publication is defamatory, we must determine if the communication ‘tends so to harm the reputation of [the complaining party] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.’” <i>MacElree v. Philadelphia Newspapers</i>, 544 Pa. 117, 124-125 (1996). Like California, the statute of limitations is 1 year. 42 Pa. Consol. Stat. § 5523(1).	Yes However, the anti-SLAPP provisions are limited to protected statements or conduct pertaining to environmental law or environment regulation. 27 Pa. Consol. Stat. §§ 7707 and 8301 - 8305



STATE	DEFAMATION GENERALLY SIMILAR TO CALIFORNIA?	ANTI-SLAPP LAW?
Tennessee	Yes "To establish a prima facie case of defamation in Tennessee, the plaintiff must establish that: 1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." <i>Sullivan v. Baptist Memorial Hosp.</i>, 995 SW 2d. 569, 571 (Tenn. 1999). Unlike California and other states, Tennessee law requires a plaintiff to prove actual damages in all defamation cases. <i>Myers v. Pickering Firm, Inc.</i>, 959 SW 2d. 152, 164. "Presumed damages" are unavailable. There are 2 separate statutes of limitations for defamation: 6 months for slander; 1-year for libel. Tenn. Code Ann. §§ 28-3-103 and 28-3-104.	Yes Tenn. Code Ann. §§ 20-17-101 - 20-17-110 and §§ 4-21-1001 - 4-21-1004
Washington	Yes "A prima facie defamation claim requires a plaintiff to prove falsity, an unprivileged communication, fault, and damages." <i>Sequist v. Caldier</i>, 438 P.3d 606, 612 (Wash. 2019). Like North Dakota, an important additional requirement under Washington law is that the injured person must make "a timely and adequate request for correction or clarification from the defendant" or "[t]he defendant has made a correction or clarification." RCW §§ 7.96.010 - 7.96.901. The statute of limitations is 2 years. RCW § 4.16.100(1).	Yes RCW §§ 4.105.010 - 4.105.903 Washington recently revised its anti-SLAPP statute (reflected in the link above) after its Supreme Court held a prior version was invalid. See https://www.dwt.com/insights/2021/07/Washington-state-new-anti-slapp-law

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