

HOUSE BILL REPORT

ESB 5236

As Passed House - Amended:
April 26, 2013

Title: An act relating to the uniform correction or clarification of defamation act.

Brief Description: Creating the uniform correction or clarification of defamation act.

Sponsors: Senators Kline and Padden.

Brief History:

Committee Activity:

Judiciary: 3/28/13, 4/2/13 [DPA].

Floor Activity:

Passed House - Amended: 4/26/13, 70-26.

**Brief Summary of Engrossed Bill
(As Amended by House)**

- Adopts the Uniform Correction or Clarification of Defamation Act setting up a process and rules for retractions of allegedly defamatory material.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 8 members: Representatives Pedersen, Chair; Hansen, Vice Chair; Goodman, Jinkins, Kirby, Klippert, Orwall and Roberts.

Minority Report: Do not pass. Signed by 3 members: Representatives O'Ban, Assistant Ranking Minority Member; Nealey and Shea.

Staff: Cece Clynch (786-7195).

Background:

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Defamation.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Defamation is the communication of damaging, false information about a person or entity to one or more persons. To prevail in a defamation action, the plaintiff must prove all of the following:

- a false *and* defamatory communication to one or more third persons;
- lack of privilege;
- fault; and
- damages.

A plaintiff in a defamation action is under no duty to request a retraction or correction of allegedly defamatory material. Furthermore, an offer by the defendant to publish any reasonable or truthful correction does not constitute a correction nor does it deprive the plaintiff of recovery if the plaintiff does not accept the offer. In the event that a defamation defendant does publish a correction, the defendant may plead and prove it for purposes of mitigating damages.

Defamation Statutes.

Although defamation is essentially a common law tort, there are some Washington statutes pertaining to defamation actions generally:

1. It is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application of the defamatory statement to the plaintiff, however, if the defendant denies that the statement was published or spoken concerning the plaintiff, it is up to the plaintiff to so prove. (RCW 4.36.120)
2. In an action for libel or slander, if the plaintiff recovers less than \$10, he or she is entitled to no more costs or disbursements than the damage recovered. (RCW 4.84.040)
3. The statute of limitations for a defamation action is two years. (RCW 4.16.100)
4. Election law provisions. (Title 29A and chapter 42.17A RCW)

Washington had criminal libel statutes until recently. In 2009 following a court decision finding these statutes unconstitutionally vague and overbroad, they were repealed by the Legislature.

Uniform Correction or Clarification of Defamation Act.

The Uniform Correction or Clarification of Defamation Act (UCCDA) pertains to the correction or clarification of defamation. The Uniform Law Commission completed drafting the UCCDA in 1993. To date, the State of North Dakota has enacted the UCCDA.

Summary of Amended Bill:

The UCCDA is adopted and applies to all claims for relief for damages arising out of harm caused by the false content of a publication, whether made orally, in writing, via broadcast, electronically, or any other form of transmission.

Intent.

Intent is expressed to provide strong incentives for individuals to promptly correct or clarify an alleged false statement as an alternative to costly litigation. This is done via providing plaintiffs an opportunity to secure quick and complete vindication of reputation while allowing publishers a means to correct or clarify and thereby avoid costly litigation.

Request for Correction.

A person may maintain an action for defamation or another claim covered by the UCCDA *only* if the person has made a timely and adequate request for correction or clarification (collectively referred to as "correction") *or* the publisher has made a correction. "Timely" means that the request is made within the statute of limitations for defamation, which is two years in this state. To be considered "adequate," the request must:

- be made in writing;
- reasonably identify the requester;
- specify, with particularity, the statement alleged to be false and defamatory and, to the extent known, the time and place of publication;
- allege the defamatory meaning of the statement;
- specify circumstances giving rise to any defamatory meaning which arise from other than the express language of the publication; and
- state that the defamatory meaning is false.

In the absence of a previous "adequate" request for correction, service of the summons and complaint stating a claim for relief and containing these elements satisfies this prong.

Correction.

A correction satisfies the "timely" and "sufficient" criteria if the parties so agree in writing. Otherwise, a correction is "timely" if published before, or within 30 days after, receipt of a request for correction or receipt of information disclosed by the person to the publisher in response to a publisher's request, whichever is later.

A correction is "sufficient" if it:

- is published with a prominence and in a manner and medium "reasonably likely to reach substantially the same audience" as the original publication;
- refers to the statement being corrected and
 - corrects the statement;
 - in the case of a defamatory meaning arising from other than the express language of the publication, disclaims an intent to communicate that meaning or assert its truth; *or*
 - in the case of a statement attributed to someone else, identifies that person and disclaims an intent to assert the truth of the statement;
- in advance of the publication, is communicated to the person requesting the correction; and
- accompanies and is an equally prominent part of any electronic publication of the allegedly defamatory statement by the publisher.

If a timely correction is no longer possible, the publisher may make a written offer, at any time before trial, to make a correction. The offer must include a copy of the proposed correction together with an offer to pay the person's reasonable expenses of litigation, including attorneys' fees, incurred before publication of the correction. If the person accepts such an offer, the person is barred from commencing an action based on the alleged defamatory statement. In the event of acceptance after a suit has already been commenced, the court must dismiss the action after compliance with the terms of the offer.

Challenges to Timeliness/Adequacy/Sufficiency.

A publisher intending to challenge the adequacy or timeliness of a request for correction must do so within 60 days after service of the complaint and the court is to rule on the motion at the earliest appropriate time before trial. A publisher must also notify the person of its intent to rely upon a timely and sufficient correction within the later of 60 days after service of the complaint or 10 days after the correction is made.

Damages.

Certain occurrences operate to limit a person's recovery as follows:

1. If, after a request for correction is made, the publisher asks the person to disclose additional, reasonably available information material to falsity and the person unreasonably fails to so disclose, damages for injury to reputation or presumed damages may not be recovered; however, the person may recover all other damages permitted by law.
2. If a timely and sufficient correction is made, damages for injury to reputation or presumed damages may not be recovered; however, the person may recover all other damages permitted by law.
3. If a person does not accept a publisher's offer, made after timely correction was no longer possible, to publish a correction and pay reasonable expenses of litigation, the person may not recover damages for injury to reputation or presumed damages. However, the person may recover all other damages permitted by law, as well as reasonable expenses of litigation, including attorneys' fees, incurred before the offer, unless the person failed to make a good faith attempt to request a correction or failed to disclose reasonably available information material to falsity after being requested to do so.

Uniformity.

The UCCDA is to be applied and construed to effectuate its general purpose to make uniform the law on this subject among the states enacting it.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) With the striking amendment that is being drafted, a person will be allowed to recover damages for emotional distress. A few unnecessary definitions are also being removed. In 2009 the Legislature repealed the unconstitutional criminal libel statutes on the anniversary of the *Garrison* case. This bill includes needed reforms. The state lacks a retraction statute and this causes uncertainty and makes publishers wary of publishing a correction. Based on the UCCDA, which was approved by the American Bar Association in 1984, the bill: encourages correction; is technology neutral; and limits some of the damages that a person may recover. This is a voluntary process, at least from the point of view of the publisher. The amendment made in the Senate plays to the strengths of search engines,

linking the defamatory statement to the retraction. Washington will lead the nation. Although these actions are rare, responsible publishers carry insurance which is not cheap. The price of the premium can be less if the publisher provides access to a legal hotline and if the state has a retraction statute. The bill includes a thorough list of steps that must be taken. Thirty states have some sort of retraction statute. Only North Dakota has adopted the UCCDA. California's law is dated, applying only to daily newspapers and radio.

(Opposed) None.

Persons Testifying: Senator Kline, prime sponsor; Rowland Thompson, Allied Daily Newspapers; Bruce Johnson, Davis Wright Tremaine; and Bill Will, Washington Newspaper Publishing Association.

Persons Signed In To Testify But Not Testifying: None.