Online Defamation Cases

# Three State-Based Defenses to Consider

By Steven P. Aggergaard

**Recent decisions from several jurisdictions provide groundwork for litigating these cases in a new media world.**

Online media from blogs to bulletin boards have turned anyone with a computer into a publisher and also into a potential defamer. As a result, lawyers practicing in a wide range of areas increasingly receive requests for advice and sometimes requests to defend clients against online defamation allegations.

Practitioners have many pitfalls to navigate in these cases, particularly if they focus too much on the substance of the defamation claims or the nuances of federal constitutional law. These pitfalls can drive up fees quickly for the typical online defamation defendant who lacks insurance, significant financial resources, or both.

But attorneys can quickly mitigate if not achieve dismissals of claims alleging online defamation if they evaluate the following three state-law based defense tools the moment that clients contact them about online defamation lawsuits:

- **Anti-"SLAPP" statutes**, which authorize defamation defendants to move for early dismissals of lawsuits initiated to silence them from speaking out on matters of public concern;
- **Retraction or correction statutes**, which generally bar plaintiffs alleging defamation from recovering punitive damages, general damages, or both, unless the plaintiffs have requested and been denied retractions or corrections;
- **State constitutions**, some of which courts have interpreted as providing free speech protections independent of the federal constitution.

The law continues to evolve in this area on the degree to which these three defense tools apply in online defamation cases. However, attorneys should become involved in influencing that evolution by considering, affirmatively pleading, and litigating the defenses that these tools offer on behalf of bloggers, Facebook users, citizen journalists, and others who allegedly commit defamation on the internet.

## Anti-SLAPP Statutes—The Basics

"SLAPP" stands for "strategic lawsuits against public participation." According to the Harvard University Citizen Media Law Project, more than half of the states and one United States territory, Guam, have anti-SLAPP statutes. *See* Citizen Media Law Project, Responding to Strategic Law-

■ Steven P. Aggergaard is an associate attorney at Bassford Remele, PA in Minneapolis, where media law is part of his defense-oriented and appellate practice. Mr. Aggergaard was a newspaper journalist for 15 years, most recently with the *St. Paul Pioneer Press*, and holds a master's degree in journalism from Northwestern University. He is a member of the Minnesota Defense Lawyers Association as well as DRI.

suits Against Public Participation, http://www.citmedialaw.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps (last visited Feb. 29, 2011). Two more states, Colorado and West Virginia, have adopted defenses to SLAPPs as state common law. *See id.*

Anti-SLAPP statutes generally authorize trial courts to dismiss lawsuits early when the lawsuits effectively prevent citizens from speaking out on or otherwise participating in matters of public concern. Some anti-SLAPP statutes also permit courts to stay discovery immediately and to award prevailing party attorneys' fees.

However, as the Citizen Media Law Project explains, "anti-SLAPP laws vary in effectiveness, and some have not yet been tested in a legal case." *Id.* That particularly holds true in Internet defamation cases.

States from Arizona to Minnesota to New York have anti-SLAPP statutes. The California statute has generated the most litigation, and courts have interpreted it in the online realm. It states:

> 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 Constitution or the 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.

Cal. Civ. Proc. Code §425.16(b)(1).

As early as 2001, the U.S. District Court of the Central District of California invoked the California statute to dismiss defamation claims that a telecommunications company had asserted against two anonymous participants in a financial website chat room. *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001).

Explaining the dismissal basis, the court noted that a publicly traded company "is of public interest because its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole." *Id.* at 1265. For that reason, the court ordered the defamation claims dismissed under California's anti-SLAPP statute on the grounds that the defendants' Internet postings "were an exercise of their free speech in connection with a public issue." *Id.* at 1266.

More recently, in a defamation action that an insurance claims provider filed against a blogger who wrote critical posts about the provider's business practices, the U.S. District Court of the Northern District of California liberally construed the complaint as a SLAPP and ordered a dismissal. *Sedgwick Claims M'gmt Services, Inc. v. Delsman*, 2009 WL 2157573, No. 09-1468, (N.D. Cal. July 17, 2009).

In opposing the pro se defendant's motion to dismiss, the company characterized the blog posts as "harassment, intimidation, defamation and trespass for the sake of pursuing a personal vendetta." *Id.* at *8. But the federal court disagreed, describing the blog posts as attempts to urge others to air their concerns to the company or law enforcement. "These statements," according to the court, "are precisely the type of speech that presents a matter of public interest." *Id.*

These California decisions are among a growing list of cases in which attorneys have invoked and courts have applied anti-SLAPP provisions as defenses in Internet defamation actions. And in the few years since the *Delsman* decision in 2009, social media use has exploded.

Facebook creates particular danger as exemplified by a $750,000 defamation lawsuit filed against a Michigan college student who used the social media site to criticize a towing company. *See* Robert D. Richards, *A SLAPP in the Facebook*, 21 DePaul J. Art, Tech. & Intell. Prop. L. 221, 222–23 (2011). The litigation is credited with prompting the Michigan legislature to consider enacting an anti-SLAPP statute. *See id.*

## Defenses to SLAPPs—The Constitutional Underpinning

As the law on how anti-SLAPP statutes apply to Facebook and other online media continues to evolve, defense attorneys should understand the constitutional underpinning for these statutes so that they can influence the evolution. As with many statutes establishing defenses, a defense to a SLAPP has roots in the common law, which offers counsel a way to defend clients even in states that lack anti-SLAPP statutes.

Two University of Denver professors, George Pring and Penelope Canan, coined the phrase "strategic lawsuits against public participation" and the acronym "SLAPP." In the early 1990s they studied 228 civil actions alleging defamation, business torts, or malicious prosecution against persons who spoke out against real estate developments, zoning, public officials, and neighborhood concerns. The professors characterized this as a trend of suing individuals or citizens groups "into silence." As Pring and Canan explained in a 1992 law review article, "Americans by the thousands are being sued, simply for exercising one of our most cherished constitutional rights—'speaking out' on political issues." George Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 938–39 (1992).

**Anti-SLAPP statutes** generally authorize trial courts to dismiss lawsuits early when the lawsuits effectively prevent citizens from speaking out on or otherwise participating in matters of public concern.

The professors found that most SLAPP defendants were not "extremists or professional activists" but rather "typical, middle-class, even middle-of-the-road Americans, and frequently first-time activists." *Id.* at 940. By and large, well-funded plaintiffs initiated the lawsuits not to recover damages but strategically to squelch citizen participation in matters of public concern. Pring and Canan identified a constitutional violation—that SLAPP lawsuits sought to deprive defendants of their First Amendment rights to "petition" the government on matters of public concern. They traced these lawsuits to the Colorado Supreme Court's "precedent-setting" deci-

sion in *Protect Our Mountain Environment v. District Court*, 677 P.2d 1361 (Colo. 1984).

According to Pring and Canan the case fit a "classic SLAPP pattern" because it involved a well-financed development corporation that sued a local environmental group that had spoken out against a large residential commercial development. The trial court refused to dismiss the case, but the Colorado Supreme Court ordered a reversal, explaining that "the First Amendment right to petition has been applied to immunize various forms of administrative and judicial petitioning activity from legal liability in subsequent litigation." *Id.* at 1365.

**If a plaintiff** files a defamation lawsuit without first demanding that a defendant retract or correct the allegedly defamatory publication, a statute might bar him or her from recovering punitive damages.

In this decision, the Colorado Supreme Court established a rule that when litigation risks hindering citizens' rights to participate in government, a "heightened standard" for constitutional defenses applies, and the courts will put the cases on fast-tracks to evaluate dismissing them. Today, nearly 30 years later, the anti-SLAPP statutes across the country reflect this rule.

Curiously, Colorado does not have such a statute. Yet the defense embodied in an anti-SLAPP statute exists, and the common law and the constitutional bases for it as articulated in *Protect Our Mountain Environment* provide a road map for defense counsel seeking to assert defenses to SLAPPs even in jurisdictions without anti-SLAPP statutes permitting courts to strike or dismiss these complaints.

Importantly, the Colorado Supreme Court did caution that a dismissal is not a sure thing. A court will weigh a defense against the allegedly defamed plaintiff's right to protect its reputation. As Lyrissa Barnett Lidsky reminds us, many plaintiffs "have legitimate claims against aggressively uncivil and vicious speakers whose only intent is to destroy the reputation of their targets." Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 945 (2000).

The recent decision in *Lynch v. Christie*, which involved false allegations of a chiropractor's sexual assault posted on a website and Facebook, underscores Lidky's admonition. ___ F. Supp. 2d ___, 2011 WL 3920154 (D. Me. 2011). When the chiropractor sued his patient over the postings, she removed the case to a United States District Court and sought a dismissal under Maine's anti-SLAPP statute. But the court denied the motion, concluding that the "statements on the website and Facebook were devoid of any reasonable factual support" and had caused the chiropractor injury. *Id.* at *6.

In plenty of cases such as *Lynch* defendants acted egregiously and had little if any basis for arguing that their online activity constituted participation in matters of public concern rather than defamation. In these cases courts understandably denied dismissal motions invoking defenses grounded in arguments that cases involve SLAPPs.

But *Lynch* does demonstrate an important characteristic of SLAPPs: many federal courts will apply state anti-SLAPP law in diversity actions. Therefore, an attorney should strongly consider removing an online defamation action to a United States District Court whenever possible to capitalize on the federal judiciary's expertise with constitution-based defenses.

Legislators notably have proposed but not yet enacted federal anti-SLAPP legislation. In 2009, Rep. Steve Cohen of Tennessee proposed the Citizen Participation Act of 2009, which would immunize from civil liability "any act of petitioning the government made without knowledge of falsity or reckless disregard of falsity." H.R. 4364, 111th Cong. (1st Sess. 2009). The legislation would permit a prevailing party to recover attorneys' fees and impose a "clear and convincing evidence" burden on a plaintiff to prove knowledge, reckless disregard of falsity, or both in a defamation action adjudicated in a federal court.

For now, as the federal as well as the state anti-SLAPP laws evolve, a defense counsel should consider pleading and litigating the defense—even when he or she can base a defense solely in constitutional common law principles—whenever a defendant makes an allegedly defamatory online communication as part of the alleged defamer's effort to air views about real estate developments, public officials' job performance, or other matters of public concern.

As Pring and Canan warned 20 years ago, "defense attorneys can fail their clients by not recognizing a SLAPP" and instead fixating on the substantive claims and missing the "underlying political issue." The professors' admonition strongly resonates today in an era increasingly defined by Facebook, Twitter, and blogs.

## Retraction Statutes—The Basics

If a plaintiff files a defamation lawsuit without first demanding that a defendant retract or correct the allegedly defamatory publication, a statute might bar him or her from recovering punitive damages or the "general" damages that the law sometimes presumes emanate from defamatory statements. This is true in about two-thirds of the states that have enacted statutes imposing a retraction-request prerequisite.

As with their anti-SLAPP cousins, retraction statutes have roots in the constitutional principle that states cannot use defamation law to limit freedom of expression unduly. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). But unlike anti-SLAPP statutes that can lead courts to dismiss defamation lawsuits, retraction statutes generally permit defendants to *mitigate* damages when defamers effectively communicate to their readers, listeners, or viewers that "what I said before was wrong."

So retraction statutes rarely obliterate liability when an online communicator publishes a mistake. A plaintiff might still recover special damages, for instance, for loss of business, even when a retraction statute applies. *See Annotation*, Libel and Slander: Who Is Protected by Statute Restricting Recovery Unless Retraction Is Demanded, 84 A.L.R.3d 1249 §2[a].

It is vitally important to remember that legislatures enacted many of these retraction statutes a century ago or more and wrote them with newspapers in mind. But because retraction statutes have roots in common law mitigation principles and defenses, an attorney should consider presenting a retraction defense even in a state with an outdated retraction statute or without any statute at all.

Further, the rationale for limiting a retraction defense to benefit "newspapers," "broadcasters," and other professional media has now decreased if not become obsolete. In the past only professionals could retract libelous statements in ways that would meaningfully mitigate a defamed plaintiff's damages. But this is not true anymore.

As with traditional print media, online publishers today can publish retractions, but they can also go a step further and actually attempt to rewrite history by taking down a web entry or blog post. Because many online publishers do not have bureaucratic editing structures, they often can correct errors much faster than the mainstream media can. Further, plaintiffs might want a "takedown" more than monetary damages. As Jennifer Liebman wrote, "retracting speech via a takedown ensures that the harmful speech will not be readily accessible to a blog's readers." *See* Liebman, *Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. Ill. J. L. Tech & Pol'y 343, 367–68 (2006). Today, it makes little sense to limit retraction statutes so that they only benefit newspapers and other traditional media.

Also, the proliferation of "citizen journalism" has blurred the line between the professional and the nonprofessional journalist because both types now have the means to publish regularly and often instantaneously. Therefore, both types of journalists can retract their mistakes in a timely fashion.

Some defense attorneys may not understand "citizen journalism" and might miss opportunities to characterize clients as the sorts of communicators entitled to benefit from retraction statutes and other heightened protections generally available only to the news media.

Amateurs do citizen journalism largely by using affordable technology that people use every day—smart-phone cameras instead of satellite trucks, and blogs and YouTube instead of printing presses and television transmitters—and citizen journalism often relies on virtually untrained amateurs to gather and publish the news.

Many citizen journalists intentionally defy the mainstream media's bureaucratic structure, often foregoing libel insurance. Some citizen journalists also avoid if not actively criticize the mainstream media's pursuit of objectivity and balance, producing news that spans the ideological spectrum from the Tea Party to Occupy Wall Street movements.

The Minnesota-based The UpTake is but one example of a citizen journalism website. *See* http://www.theuptake.org. The nonprofit organization would not deny taking a left of center stance, and it has a self-descriptive slogan: "Will journalism be done by you or to you?" The UpTake gained national attention in 2008 as the only news organization to provide live coverage of an election recount that sent former Saturday Night Live comic Al Franken to the United States Senate, and this year The UpTake has broadcasted live from Occupy Wall Street-type protests in and outside of Minnesota using little more than iPhones.

## Retraction Statutes—An Evolution

The fact that The UpTake and similar citizen journalism websites can "go live" from practically anywhere in the world has effectively eradicated the reason for applying retraction statutes only to the professional news media. And the law's recognition that the rationale no longer applies is evolving—albeit slowly—in both statutory amendments to retraction statutes and in judicial opinions that liberally construe the existing statutory language.

North Dakota has led the way. The Citizen Media Law Project identifies North Dakota as the only state to offer protection explicitly to electronic publications. *See* N.D. Cent. Code §32-43. Other states, such as Georgia, have statutes that have singled out the traditional printed media but have amended them to apply to "other publications," too. Ga. Code Ann. §51-5-11.

Even in states with narrowly drawn and unamended statutes, all is not lost. For example, Minnesota's retraction statute applies only to "newspapers." Minn. Stat. §548.06. But in applying the statute nearly a half-century ago, the Minnesota Supreme Court interpreted the term "newspaper" to include even a mimeographed circular. *Soderberg v. Halver*, 150 N.W.2d 27 (Minn. 1967). This was because the circular was viewed as the mid-1960s equivalent of citizen journalism. As the Minnesota Supreme Court explained, the mimeographed circular "discussed newsworthy and topical events" and "was published and distributed not less regularly than every election and sometimes more frequently." *Id.* at 29–30.

When comparing a mimeographed circular with The UpTake for publication regularity, The UpTake wins hands down, and it appears that a plaintiff would have little room to argue that Minnesota's retraction statute should not apply to regularly published online media, especially given the common law basis of the Minnesota retraction statute.

Still, there is only sparse case law addressing retraction statutes' applicability to web publishing, particularly case law on online citizen journalism. Several of the court decisions that do exist have not involved online journalism or blogs but rather Internet bulletin boards filled with Internet users' opinions. And even then, the court decisions have not reflected anything approaching consensus on the degree to which retraction statutes should apply to mitigate online defamation damages attributable to these bulletin boards.

For example, in 2002, a divided Georgia Supreme Court held that the state retraction statute's reference to "other publication" should broadly include "a communication made to any person other than the party libeled," which would include communication on an Internet bulletin board. *Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002).

The case involved a citizen's inflammatory posts about the majority owner of a solid-waste facility who then sued alleging defamation but failed to request a retraction before filing the lawsuit. Even though the citizen had called the business owner a "thief" and a "crook," the Georgia Supreme Court held that his failure to demand a retraction precluded him from recovering punitive damages.

The court's reasoning was that because the legislature had amended the statute by substituting the words "other publication"

for "magazine or periodical," Georgia lawmakers intended that the statute apply broadly, including to published media other than published paper media.

But the court went beyond a straightforward legislative-history analysis, foreshadowing the proliferation of online citizen journalism. As the court explained, differentiating between professionals and non-professionals "makes little sense when the speech is about matters of public concern," and applying the statute narrowly "fails to accommodate changes in communications and the publishing industry due to the computer and the Internet." *Id.* at 384–85.

**There is only** sparse case law addressing retraction statutes' applicability to web publishing, particularly case law on online citizen journalism.

Another court issued an opposite decision in Florida, which has a retraction statute similar to the Georgia statute in that it applies to defamation "in a newspaper, periodical, or other medium." *Zelinka Inc. v. Healthscan Americare*, 763 So. 2d 1173 (Fla. Ct. App. 2000) (citing Fla. Stat. §770.01–.02). The Florida case, similar to the Georgia case, involved allegedly defamatory postings on an Internet bulletin board.

The Florida court's reasoning for not applying the retraction statute to online media was based primarily in legislative deference—to date the courts had only applied the statute to "media defendants," and broadening it to apply to others was something for the legislature rather than the courts to consider.

Significantly, though, the Florida court practically telegraphed the sort of online defamation case to which its state's retraction statute *would* apply, explaining that "it may well be that someone who maintains a website and regularly publishes internet 'magazines' on that site might be considered a 'media defendant.'" *Id.* at 1175. The Florida court penned this language just a few years before citizen journalism began to proliferate, and the dicta fits this new breed of journalism perfectly.

## Retraction Statutes—Unconstitutional?

Lurking in the background is the argument that if a court deprives an amateur journalist, and perhaps an uninsured journalist, of a retraction defense while providing it to a mainstream medium, and probably an insured medium at that, it would violate constitutional equal protection.

The U.S. Constitution Equal Protection Clause, and many of its state constitutional cousins, generally require a rational basis for laws that distinguish between classes of persons. *See., e.g., Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). Although the United States Supreme Court has noted the existence of retraction statutes, the Supreme Court has not had opportunity to address equal protection concern as it applies to retraction statutes. *See Time v. Firestone Inc.*, 424 U.S. 448, 452 n.1 (1976).

State court precedents do not offer much encouragement to a defense attorney seeking to succeed with an equal protection argument over a retraction statute's applicability. More than 60 years ago, in *Werner v. Southern California Associated Newspapers*, 216 P.2d 825, 835 (Cal. 1950), the California Supreme Court rejected that very idea.

But under the right set of facts, perhaps involving citizen journalists, *Werner* seems ripe for overruling. As the California Supreme Court explained, the reason retraction statutes exist is because "a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages." *Id.* at 833 (quoting *Allen v. Pioneer Press Co.*, 41 N.W. 936, 938 (Minn. 1889)). The rationale applies with substantial force to a broad range of today's online communication, citizen journalism in particular.

Therefore, when faced with the appropriate set of facts, defense attorneys representing alleged online defamers should remember to plead not only the retraction statute as an affirmative defense, but also that a court's refusal to apply it possibly would deprive the alleged defamer of constitutional equal protection.

## State Constitutions—Independent Protections

In many ways, the law of defamation has become federalized, even in the state courts. The credit, or perhaps the blame, belongs to *New York Times Co. v. Sullivan* and its progeny, which command that if states and their courts apply defamation law in ways that unduly restrict the free flow of ideas, state actions will violate the First and Fourteenth Amendments to the United States Constitution.

But state constitutions have free speech and freedom-of-the-press provisions, too. Many of them were litigated around the time of World War I as the courts struggled with the degree to which war opponents had a right to speak out. But after the war, as First Amendment protections became "incorporated" to state and local governments by and through the Fourteenth Amendment, most state constitutional free speech provisions began languishing in obscurity, waiting to be tested in a world where the reach of the federal constitution's Bill of Rights often is constrained.

All state constitutions have freedom-of-expression protections independent of the First Amendment. Some even single out the "press." The provisions frequently are found in state Bills of Rights that were ratified around the time of statehood. In the nation's oldest states and commonwealths, the clauses were drafted before the First Amendment was ratified and even served as a model for it. And nearly all the state provisions predate the United States Supreme Court's incorporation of First Amendment principles.

Notably, many of the state constitutional provisions are distinguishable from the First Amendment because they have plain language that affirmatively protects free speech rights without regard to whether there is state action. For example, although article I, section 2 of the California Constitution parallels the First Amendment stating that no law may "restrain or abridge liberty of speech or press," it also affirmatively states, "Every person may freely speak, write and publish his or her senti-

ments on all subjects, being responsible for the abuse of this right."

The California Supreme Court is among the minority of state courts of last resort that have given this language life apart from the First Amendment. In *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979), the court held that even though United States Supreme Court precedent permitted private property owners to exclude protesters from a shopping mall, the California Constitution applied independently to afford high school students access so that they could collect signatures for a petition.

And in affirming the decision, Justice William Rehnquist wrote that federal law does not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

High courts in New Jersey, Colorado, Massachusetts, and Washington have followed Justice Rehnquist's and California's leads to invoke state constitutional provisions to ensure access to private shopping malls, at least when the expression involved matters of political concern. *See N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994); *Bock v. Westminster Mall*, 819 P.2d 55 (Colo. 1991); *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 595 (Mass. 1983); *Alderwood Assocs. v. Wash. Envt'l Council*, 635 P.2d 108 (Wash. 1981).

However, as the Minnesota Supreme Court observed when denying protesters access to the Mall of America, *Pruneyard* and its progeny represent a "small minority." *State v. Wicklund*, 589 N.W.2d 793, 800–01 (Minn. 1999).

To be sure, given the nature of online communication, state constitutions may offer little if any protection to an alleged online defamer whose expression has crossed not only state lines but also international borders. Still, given the ever-changing nature of online communication, a wise attorney would at least consider and affirmatively plead state-based constitutional defenses.

This may prove particularly true in a case involving intrastate politicking online—perhaps a local blogger's effort to seek signatures opposing a private real estate development. Federal constitutional law might offer little defense in such an instance. But with the right set of facts, a state court might conclude that the time is right to apply the state constitution to the benefit of internet free speech within the state's borders.

## Conclusion

Pleading and litigating SLAPP and retraction laws are two ways lawyers can leash the benefit of constitutional defenses without subjecting their clients to the costly burdens of extensive constitutional litigation. Invoking the independent language of state constitutions is another tactic worth considering, perhaps at the prediscovery stage to try to compel early settlements.

Court decisions from states including Colorado, Minnesota, California, and Georgia provide groundwork for litigating these state law-based defenses in a new media world. But those decisions do more. They serve as reminders that these sorts of defenses exist only because defense attorneys refused to accept settled law and in the past thought creatively about that law and the underlying constitutional right to free expression.