
Judiciary Committee

HB 1406

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: Representatives Goodman, Pedersen, Rodne and Nealey; by request of Uniform Laws Commission.

<p style="text-align: center;">Brief Summary of Bill</p> <ul style="list-style-type: none">• Adopts the Uniform Correction or Clarification of Defamation Act
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Hearing Date: 2/5/13

Staff: Cece Clynch (786-7195).

Background:

Defamation.

Defamation is the communication of damaging, false information about a person (or entity such as a corporation or partnership) to one or more persons. Libel and slander are each subparts of the tort of defamation. If the defamatory communication is written or printed or embodied in physical form, it is libel. Slander, on the other hand, is a communication in oral form.

To prevail in a defamation action, the plaintiff must prove all of the following:

1. A false *and* defamatory communication to one or more third persons.
2. Lack of privilege. In some situations, an otherwise defamatory communication may be absolutely or qualifiedly privileged. For instance, statements made by an attorney, witness, or party during a judicial proceeding are absolutely privileged. Communications made in good faith by a variety of ombudspersons, if reasonably related to their responsibilities, enjoy a statutory privilege.
3. Fault. Negligence is generally the standard of fault for proving defamation of a private person, and the standard of proof is a preponderance of evidence. Where the plaintiff is a

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public figure or public official, the plaintiff must show that the defendant acted with "actual malice" which, in this context, means knowledge of falsity or reckless disregard for the truth. The standard of proof for this "actual malice" element is clear and convincing evidence.

4. Damages.

Pursuant to case law in Washington, 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, in addition to statutes recognizing various privileges, there are some Washington statutes pertaining to defamation actions generally:

- 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)
- 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)
- The statute of limitations for a defamation action is two years. (RCW 4.16.100)

There are also specific provisions in Title 29A RCW Elections and Title 42.17A RCW Campaign Disclosure and Contribution pertaining to defamation in the context of elections:

- A person believing himself or herself to be defamed by an argument or statement offered for inclusion in the voter's pamphlet may petition for a judicial determination that it be rejected for publication or edited to delete the defamatory statement.
- It is a violation for a person to sponsor, with actual malice, a statement constituting libel or defamation per se under a variety of enumerated circumstances. "Libel or defamation per se" is defined as statements that tend to expose a living person to hatred, contempt or ridicule, or to deprive him or her of the benefit of public confidence, or injure him or her in business or occupation. Such violations must be proven by clear and convincing evidence; if so proven, damages are presumed.

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

Uniform Correction or Clarification of Defamation Act (UCCDA).

The 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 Bill:

The Uniform Correction or Clarification of Defamation Act (UCCDA) is adopted as a new chapter in Title 7 RCW. It applies to all claims for relief for damages arising out of harm to personal reputation caused by the false content of a publication made on or after the effective date of the act. Publications include writings, broadcasts, oral communications, electronic transmissions, or other forms of transmitting information. Under the UCCDA, certain terms are defined:

- "Defamatory" means tending to harm reputation.
- "Economic loss" means special, pecuniary loss caused by a false and defamatory publication. ("Pecuniary" is not defined. Per its ordinary dictionary definition, the word means consisting of or measured in money or relating to money.)
- "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or other legal or commercial entity. This term does not include a government or governmental subdivision. (Under the UCCDA, "person" can refer to either the person allegedly defamed or the person alleged to have defamed. For clarity's sake, this bill analysis refers to the person allegedly defamed as "person" and the person alleged to have defamed as "publisher".)

Request for Correction.

A person may maintain an action for defamation *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 for defamation and containing these elements satisfies this prong.

Correction.

The publisher may request the person seeking a correction to disclose additional, reasonably available information material to falsity.

A correction is "timely" if published within the later of:

- 25 days after receipt of information disclosed by the person in response to a request by the publisher; or
- before or within 45 days after receipt of a request for correction from the person.

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 of;

- 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; *and*
- is communicated to the person requesting the correction.

Ordinarily, a correction is "reasonably likely to reach substantially the same audience" if it is published in a later issue, edition, or broadcast of the original. Provision is made for situations in which a later issue or edition will not be published soon enough to be considered "timely." In that case, a correction may nonetheless be considered "reasonably likely to reach substantially the same audience" if:

- it is timely published in a reasonably prominent manner:
 - in another medium likely to reach the same audience; or
 - if the parties cannot agree on another medium, in the newspaper with the largest general circulation in the region in which the original publication was distributed;
- reasonable steps are taken to correct undistributed issues of the original publication; and
- it is published in the next practicable issue of the original publication.

Additionally, a correction is both timely and sufficient if the parties so agree in writing.

If a timely correction is no longer possible, the publisher may make a written offer, at any time before trial, to make a correction. Such a writing must include:

- an offer to publish, at the person's request, a sufficient correction;
- an offer to pay the person's reasonable expenses of litigation, including attorneys' fees, incurred before publication of the correction; and
- a copy of the proposed correction and the plan for publication.

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, with prejudice, after compliance with the terms of the offer.

A timely and sufficient correction made by a person responsible for a publication constitutes a correction made by all persons responsible for that publication except for:

- a republisher; and
- in the case of a statement that the publisher attributes to someone else, the person to whom the statement was attributed.

Challenges to Timeliness/Adequacy/Sufficiency.

A publisher intending to challenge the adequacy or timeliness of a request for correction must make such challenge in the form of a motion within 60 days after service of the summons and complaint. A court must rule on the motion at the earliest appropriate time before trial.

A publisher must notify the person of its intent to rely upon a timely and sufficient correction. A notice to this effect must be served within the later of:

- 60 days after service of the summons and complaint; or
- 10 days after the correction is made.

A correction is deemed to be timely and sufficient unless, within 20 days after the publisher's notice is served, the person asserts a challenge on these grounds.

Damages.

Under the UCCDA, certain occurrences operate to limit a person's recovery as follows:

1. If a person, within 90 days after knowledge of the publication, fails to request a correction or clarification, damages are limited to "provable economic loss."
2. 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 are limited to "provable economic loss."
3. If a timely and sufficient correction is made, damages are limited to "provable economic loss" as mitigated by the correction.
4. 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, damages are limited to "provable economic loss" and reasonable expenses of litigation incurred before the publisher's 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.

Admissibility of Evidence.

The fact of a request for correction, the contents of the request, and its acceptance or refusal are not admissible at trial. The following are also not admissible: the fact of an offer of correction; the contents of the offer; the fact of an offer's refusal.

In the event a correction was made, that fact and the content of the correction are only admissible with respect to the mitigation required under the second occurrence set forth above with respect to damages. If the fact that the correction, or its contents, are received in evidence, then the fact of the request may also be received.

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