

Defamation vs. Disparagement Explained

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, my colleague Russell Berger, both attorneys at Offit Kurman. And today we are talking about non-disparagement and defamation. So this comes up in a lot of different contexts with businesses but comes up when you're working on an agreement, whether it be with an employee or some type of business contact or relationship.

And you might see a non-disparagement clause in the agreement or an agreement to not disparage one another. I think this is a concept that people often think non-disparagement and defamation are the same thing. They sound kind of similar, and they do cover similar things, which is, how businesses and individuals talk about each other or what they might communicate regarding a business or an individual.

Kind of high level, Russell, [00:01:00] what is the difference and why might you see this in a contract?

Russell Berger: Yeah. So defamation is actionable on its own. You don't need a contract to sue someone for defamation, but defamation is, in short, a false statement made to a third party that may cause damage to the target of that statement.

Disparagement does not have to be false. It just has to be negative. Negative connotation not inherently actionable as a result. So, when people talk about, as you mentioned, a contract term, you don't really need to add, "You will not defame me" into a contract because it's already actionable.

If it's a contract term and they defame you, you'd sue them breach of contract for defaming me. Or you could just sue them for defaming you 'cause it's already actionable as a matter of law. Disparagement is not actionable unless you make it a contractual provision. So for example, if I had a bunch of [00:02:00] negative opinions about you, Sarah, I could go around and I could share them.

There are some limits on it, and again, if I were, using false statements, then I'd be defaming you, and that would be actionable. But if I just said, this isn't factual, I just have an opinion, "I don't like Sarah because..." Then that would be disparaging. Not necessarily actionable, but if we had a contract where we agreed not to disparage each other, and then I went and said something like that, then you'd have a cause of action, you could sue me.

Sarah Sawyer: Yeah, and so it's definitely something that a lot of folks will include if there is a situation where something has gone wrong in a business relationship or an employee-employer relationship. Because you have an interest in not just people being truthful about what they put out there, but also in not going around and talking poorly about the company or going out of their way to try to interfere with the reputation.

So a lot of it has to do with reputation as opposed to just, like [00:03:00] truth versus is it correct or incorrect. And so that's where we see it come up a lot is when there's that friction that happens. 'Cause sometimes that happens, right? That people get frustrated, emotions get involved, and there's some concern that, hey, someone's gonna go and talk about me out there and they might have an impact because of who they are and how closely we are situated in an

industry or in a region or in a particular space. And it's really to guard against that damage that might do if they, start saying things even if they're truthful about you and start just meddling with things.

Russell Berger: Yeah, it's really a tool you see in contracts a lot to help bring finality. So whether it's partners having the dispute, employer-employee, two different businesses, a business and a customer, whatever it is, you have a dispute and you reach an agreement and you've agreed on the financials, the release of claims, that sort of thing.

And really, there's this common sense that we just wanna be done with each other. We never wanna talk about each other. We just wanna be out of each other's lives for [00:04:00] good. And the non-disparagement, often paired with confidentiality, is we're not gonna talk about these things that are confidential.

And obviously opinions are not confidential, but we're also not gonna talk about each other in a negative way. And instead, if it comes up, we're just gonna say, "Hey, we've resolved our dispute to the mutual satisfaction of all parties," and we're not gonna say- we got a resolve, but that other guy, ugh, don't get me started.

We're not gonna get into that because we just wanna be done with each other. So it helps bring finality and conclusion to disputes as well.

Sarah Sawyer: Yeah, and because it's involving this speech and these different ways that people might talk about each other, it's definitely important to tailor it and make sure the language is tight to bring that finality.

But good Points, and that's a wrap on that one. We'll see you next time, Russell.

Russell Berger: All right. Thanks, Sarah. Don't disparage me in the meantime.

Sarah Sawyer: Back at you.

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