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What To Do When You Are Attacked Online:

"You're A No-Good, Lying, Cheating, Crook"

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While social media offers a valuable way for businesses to engage with customers, recruit brand advocates, promote products and services, and obtain valuable feedback, it also exposes businesses like never before to immediate, caustic, pervasive and relentless attacks on a business's most valuable asset, its reputation. This is especially true when comments move from legitimate critique to defamation. Imagine the following scenario:

You arrive at your office, open your e-mailbox, and discover Google Alerts filled with web content about your company. When you click the links to various "comment sites" and other social media, you find anonymous posts of negative comments about your company, including that your colleagues are "thieves," that your business provides "shoddy service," that your technicians "purposely broke a customer's equipment so they could charge to fix it," and that you are a "dishonest crook."

After briefly pondering whether being called an "honest crook" might have been slightly more palatable, you quickly think about damage control—how to get these posts removed—as well as possible legal action against the purveyors of these false, derogatory statements.

While you can't believe your misfortune, you are but the latest victim of an increasingly common cyber-attack by disgruntled customers, competitors posing as customers, and other antagonists. The number of websites allowing for spontaneous venting—in some cases, while still on the subject's premises, coupled with the ease of sharing one's displeasure with the rest of the world, has created a dangerous environment for individuals and businesses trying to protect and foster their reputation.

This negative commentary can have a substantial impact on a business. According to Nielsen's 2011 Global Trust in Advertising Survey, "Online consumer reviews are the second most trusted form of advertising with 70 percent of global consumers surveyed online indicating they trust this platform, an increase of 15 percent in four years." (Word-of-mouth and recommen-

dations from friends are the most trusted source at 92 percent.) Thus, a poisonous attack on your business can make it appear toxic in the eyes of prospective or even current customers, especially if it has the air of believability, regardless of whether it is actually true. Consider that Yelp was created when its founder caught the flu and was trying to find a doctor. People rely on these sites not only for shopping, but also for choosing doctors, lawyers, plumbers, and other service providers; if people see a bad review for one provider, they may go elsewhere. Moreover, once the bad information is on the Internet, it is difficult to eradicate. Thus, timely detecting, addressing, and minimizing these attacks is critical.

Early Detection

Having an "early warning system" (like Google Alerts), staff members or outside public relations professionals responsible for media monitoring, and a comprehensive crisis communications plan allows for early detection and proactive response. What action to take will be determined by where the negative rants appear, the willingness of websites to remove them, what is driving the poster's criticism, and your ability to identify him / her.

Prompt and Effective Response

While it never hurts to ask for the removal of the offending posts, many large comment websites are reluctant to limit content, preferring to provide a forum where both sides can share views. This is to be expected in a society that values freedom of expression.

In cases of legitimate gripes, swift action to address the issue may not only sooth the unhappy customer, but also allow for positive recognition for your attentiveness. If handled well, this can turn an initial negative into a significant positive. A good example is Domino's Pizza's handling in 2009 of a viral YouTube video of employees doing disgusting things to customer pizzas. Domino's quickly responded with its own video, noting that the

employees in question had been fired, warrants had been issued for their arrest, and the store in question had been closed until it was completely sanitized. Domino's is now a common case study for best practices in responding to social media crises.

Who Wrote This?

In some situations, the ugly commentary crosses into defamation. Even if you want to hold the culprits legally responsible, a large hurdle often involves identifying whom to sue since postings are typically anonymous. To protect confidentiality and encourage participation, website operators in response to requests for the name and contact information of the poster generally will not provide any identifying information absent a subpoena, creating a dilemma because, typically, there needs to be an active lawsuit before a subpoena can be issued.

Thus, many courts allow for "John Doe lawsuits"—that is, cases against unnamed defendants. After filing a John Doe case, you can then subpoena the website, which may know only the poster's IP address and internet service provider. Armed with that information, you must then subpoena the ISP, and hope that the data leads to a customer and not a library, Starbucks, or other public place. Some states require a showing of a legally sound defamation claim before you can get the information. Golfer Phil Mickelson pursued such a lawsuit to uncover the identity of a poster on a Yahoo website of what he described as "vicious statements about" his wife and him. After satisfying the court that the case had merit and then months of litigation in multiple jurisdictions, Mickelson found the culprit in Canada.

Rather than wasting time and resources chasing an unknown poster who could be anywhere, you may think, why not sue the website, particularly if it refuses to identify the bad actor or remove the defamatory content? Federal law, however, shields online forums from liability when the operators are not actively engaged in content creation or editing. As a result, many cautious operators will not remove objectionable content for fear that they will be considered content creators and will be exposed to liability, even though the law provides a "safe harbor" from liability for removal of certain offensive content in certain circumstances.

A federal judge in Kansas City earlier this year dismissed a case by a woman against the website *thedirty.com*, which displayed the woman's picture alongside anonymous critical comments about a recent romantic relationship in which she was involved. The court held that federal law shielded the website and its operator from liability, while noting that the woman could still pursue a claim against the anonymous poster of the comment.

Is it Defamation?

That brings you back to the anonymous poster. Assuming you

can identify him/her, you will need to prove defamation. Internet defamation law is the same as for other forms of speech: there must be a false and defamatory statement that injured your reputation. Generally, that means a statement that would cause people to think less of you, and/or one that would injure you in your trade, business, or profession. In addition, the falsity must be substantial—that is, more than just a technicality. For example, a report that someone tested positive for cocaine when, in fact, it was marijuana would likely be found by a court to be substantially true, and not actionable defamation, because the gist or sting, that someone had tested positive for drugs, was correct. The same outcome would likely occur for a post that a man had beaten his wife thirty to fifty times, even though he had actually beaten her eight times.

Another critical ingredient to proving defamation is that the poster made the statement, at a minimum, negligently or carelessly. If you are in the public eye, or involved in a public controversy the standard is significantly higher: you must prove that the poster knew that the offending statement was false. Thus, proof that the poster was negligent will not be enough for a "public figure" to succeed on a defamation claim.

In addition, the statement in question must be of a factual nature, that is, something that is capable of being proved false ("the cooks at Charlie's lace their crab cakes with imitation crab"). Otherwise, the court may find the statement to be one of opinion or hyperbole, both protected by the First Amendment and not subject to redress in a defamation lawsuit.

Thus, the statements above about your colleagues being "thieves" and your providing "shoddy service" may be opinion and/or hyperbole, while the statement that your people broke something so they could charge to fix it may be actionable. Sometimes it can be difficult, even for judges, to determine whether a statement is defamatory or opinion. Aside from the actual words, courts consider the context and surrounding language in which the words appears ("in my opinion, the service was the worst of any restaurant on Main Street," although saying "in my opinion" does not automatically make it opinion) as well as the overall context in which the content appears (a hotel review on Trip Advisor) in determining whether the statement would be reasonably understood as opinion or factual. The court will also consider whether the statements were not meant to be taken literally, but involved rhetorical hyperbole to illustrate an opinion ("the appetizer tasted worse than dog food").

Courts often struggle with determining whether a statement is opinion or one on which a defamation lawsuit can be based. One recent example is a case by a neurologist in Minnesota against a patient's son who posted critical remarks on various websites about the doctor's bedside manner. Among other things, the patient's son said that after his father, a World War II veteran, had been transferred from intensive care to a regular hospital

room, the doctor was upset that he "had to spend time finding out if you transferred or died." The son also quoted a nurse as allegedly referring to the doctor as "a real tool." Although the trial court found the statements to be protected opinion, the appellate court disagreed. In September, the case was argued before the Minnesota Supreme Court and is awaiting a decision as to whether the doctor may proceed with his claim or if the statements are protected opinion.

Numerous court cases have ultimately failed because courts have found the inflammatory statements to be opinion. Yet, in the process, the critic often is reluctant to post further commentary until the case is over and may incur significant legal expense in defending the lawsuit. In response to increasing fears about questionable lawsuits aimed at speech on matters of public concern that might nevertheless chill speech, many states have enacted laws allowing for prompt dismissal and, in some cases, recovery of attorneys' fees by defendants who can prove that the claims are baseless. Known as "Anti-SLAPP," which stands for Strategic Lawsuit Against Public Participation, these laws create financial exposure for the subjects of critical commentary if their lawsuit lacks legal merit. Thus, a plastic surgeon in California was ordered to pay nearly \$20,000 in attorney's fees after unsuccessfully suing a patient who posted negative comments about her on Yelp.

Is a Lawsuit Worth It?

Ultimately, you must decide whether the cost of litigation makes it worthwhile. According to the Media Resource Center, around \$50 million in defamation judgments have been awarded against bloggers. However, numerous cases have been dismissed on legal and factual grounds well before trial. In reaching a decision, it is important that you consult a lawyer experienced in this complicated area of the law to assess the strength of a possible legal challenge. Regardless of whether a good case exists, often there are less drastic and proactive alternatives to counter the criticism and minimize its impact. In addition, you must consider the public relations impact of pursuing a lawsuit. A company can win in the courtroom, and lose in the court of public opinion. A variation on this is what has become known as the "Streisand Effect," which Wikipedia defines as the "phenomenon whereby an attempt to hide or remove a piece of information has the unintended consequence of publicizing the information more widely, usually facilitated by the Internet."

In many cases, it may be most effective to simply respond constructively to assuage the public anger. This will show that you are responsive to and care about your customers' opinions, and could actually improve your reputation and bottom line. Thus, Food Network star Guy Fieri may have ultimately benefitted from the skewering his new Times Square restaurant received recently from a New York Times restaurant critic and the widespread media aftermath. The attention and Fieri's calibrated

response may actually drive diners to the eatery.

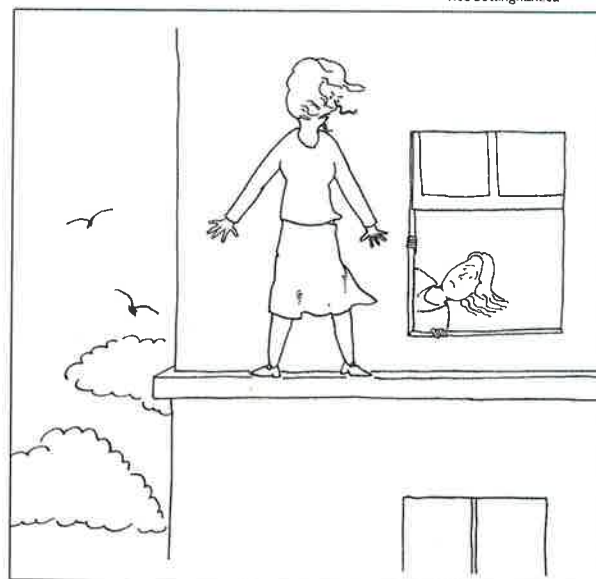
Minimizing and Learning from Attacks

In many cases, there is at least a kernel of truth to the critical commentary. Thus, before reacting, it is worth pausing to consider whether, beneath the vitriol, the poster has identified some service flaw or weak spot that should be addressed to improve the customer experience.

Because of the risks associated with Internet attacks on your business, delivering high customer service to ensure satisfaction should be an even higher priority in today's world of instant communications to avoid the poisonous commentary altogether.

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I have a hundred and seventy-three thousand, six hundred and eighty-two unread emails. You tell me what I have to live for.