Chapter 9
DEFAMATION, COMMERCIAL DISPARAGEMENT, AND FALSE ADVERTISING

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§ 9.1 INTRODUCTION ............................................................. 9–1
§ 9.1.1 Nature of Claims ..................................................... 9–1
§ 9.1.2 Context ................................................................. 9–2

§ 9.2 DEFAMATION AND COMMERCIAL DISPARAGEMENT ........................................... 9–2
§ 9.2.1 Elements of Defamation ............................................. 9–2
§ 9.2.2 Defamation Defined ................................................... 9–3
§ 9.2.3 Examples of Defamatory Statements .......................... 9–3
§ 9.2.4 Proving Fault ............................................................. 9–4
§ 9.2.5 Elements of Commercial Disparagement ...................... 9–6
§ 9.2.6 Damages and Remedies for Defamation and Commercial Disparagement .................. 9–8
  (a) Damages ................................................................. 9–8
  (b) Special Damages ....................................................... 9–8
  (c) Mitigation ............................................................... 9–9
  (d) Punitive Damages ..................................................... 9–9
  (e) Prior Restraint .......................................................... 9–9
§ 9.2.7 Defenses to Defamation and Commercial Disparagement
(a) Overview ................................................. 9–9
(b) Truth ......................................................... 9–10
(c) Opinion .................................................... 9–11
(d) Libel-Proof Plaintiff ................................. 9–12
(e) Privileges .................................................. 9–13

§ 9.3 FALSE ADVERTISING ................................. 9–16
§ 9.3.1 Nature of Claim .................................... 9–16
(a) Federal Law .............................................. 9–16
(b) State Law .................................................. 9–17

§ 9.3.2 Elements of Claim ................................. 9–17

§ 9.3.3 Significance of Consumer Reaction ....... 9–18
§ 9.3.4 Statements False or Misleading
by “Necessary Implication” ......................... 9–18

§ 9.3.5 “Commercial Advertising or Promotion” .. 9–19
§ 9.3.6 Injunctive Relief and Damages ............. 9–20
(a) Injunctive Relief ........................................ 9–20
(b) Damages .................................................... 9–20

§ 9.3.7 Defenses .................................................. 9–20
(a) Opinion .................................................... 9–20
(b) Puffery ....................................................... 9–21
(c) Negative Puffery ......................................... 9–21

§ 9.4 MINIMIZING THE RISK OF LIABILITY ...... 9–21
§ 9.4.1 The Risk Management Process ............... 9–21
§ 9.4.2 Procedures for Minimizing Risk .............. 9–22
§ 9.4.3 Compliance Training ............................. 9–22
§ 9.4.4 Checklists ............................................. 9–23

§ 9.5 REFERENCES ........................................... 9–23
EXHIBIT 9A—Complaint (Defamation, Commercial Disparagement, and False Advertising).................................................. 9–25

EXHIBIT 9B—Answer to Complaint (Defamation, Commercial Disparagement, and False Advertising)......................... 9–33

EXHIBIT 9C—Jury Instructions (Defamation, Commercial Disparagement, and False Advertising)............................... 9–39

EXHIBIT 9D—Burdens of Proof in Defamation Cases............. 9–47

EXHIBIT 9E—Checklist of Risk Management Procedures........ 9–49

EXHIBIT 9F—Defamation Checklist........................................ 9–51

EXHIBIT 9G—Commercial Disparagement Checklist............ 9–53

EXHIBIT 9H—False Advertising Checklist ............................ 9–55
Chapter 9
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Scope Note
This chapter summarizes a loosely related body of law—including defamation, commercial disparagement, and false advertising—that governs the conduct of business communications in Massachusetts. It sets forth elements, damages, and related defenses for each of these causes of action and suggests ways to advise clients on reducing the risk of liability in business communications, advertising, and marketing. Sample pleadings, jury instructions, and other useful resources are attached as exhibits.

§ 9.1 INTRODUCTION

The loosely related causes of action of defamation, commercial disparagement, and false advertising together have a significant impact on business communications in Massachusetts. Immediately following is a brief discussion of the nature of these claims and the contexts in which they tend to arise.

§ 9.1.1 Nature of Claims

Defamation encompasses the torts of libel (written defamation) and slander (spoken defamation). Draghetti v. Chmielewski, 416 Mass. 808, 812 n.4, 626 N.E.2d 862, 866 n.4 (1994). Commercial disparagement, which is closely related to defamation, concerns false statements made with the intent to call into question the quality of a competitor’s goods or services and to inflict pecuniary harm. Picker Int’l, Inc. v. Leavitt, 865 F. Supp. 951, 964 (D. Mass. 1994). False
advertising is advertising that is either literally false or is likely to mislead and confuse consumers. Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24, 33 (1st Cir. 2000).

A sample complaint and sample answer for these causes of action are attached as Exhibit 9A and Exhibit 9B. Sample jury instructions are attached as Exhibit 9C.

§ 9.1.2 Context

Defamation commonly arises in the context of journalism and publishing. It may also arise, however, in the context of correspondence, employment, and business relations.

Commercial disparagement and false advertising most frequently arise in the context of advertising, marketing, and sales activities. In all three kinds of cases, related claims may include

- intentional infliction of emotional distress,
- interference with contractual relations,
- breach of contract,
- trademark infringement,
- unfair competition, or
- unfair or deceptive practices in violation of G.L. c. 93A.


§ 9.2 DEFAMATION AND COMMERCIAL DISPARAGEMENT

§ 9.2.1 Elements of Defamation

Your client may have a claim for defamation if he or she can demonstrate that the defendant has made a defamatory statement of fact, of or concerning your client, that
• was made public,
• was false, and
• damaged your client as a result.


Showing a defamatory statement to just one person is sufficient to prove publication. _Shafir v. Steele_, 431 Mass. 365, 372, 727 N.E.2d 1140, 1145 (2000). Note that the plaintiff must also prove “fault,” as described § 9.2.4, Proving Fault, below.

**Practice Note**

Even where the plaintiff is not specifically mentioned by name, the statement is deemed to be “of or concerning” the plaintiff if it could reasonably be understood to refer to him or her. _Eyal v. Helen Broad. Corp._, 411 Mass. 426, 430–31, 583 N.E.2d 228, 230–31 (1991). In _Eyal_, the press reported that a Brookline deli owner was involved in an “Israeli mafia” cocaine operation out of his deli. The plaintiff stated a claim for defamation, even though he was not expressly named in the news reports, because the statements could reasonably be understood to refer to him.

The First Amendment defines the boundaries of defamation law. Therefore, the applicable law for a defamation claim filed in Massachusetts may include federal court decisions as well as Massachusetts state court decisions and statutes.

§ 9.2.2 Defamation Defined

It is well established that a statement is “defamatory” if it tends to injure a person’s reputation in the community and exposes that person to hatred, ridicule, or contempt. _Flotech, Inc. v. E.I. Du Pont de Nemours Co._, 627 F. Supp. 358, 367 (D. Mass. 1985), aff’d, 814 F.2d 775 (1st Cir. 1987) (collecting cases). The test is whether, under the circumstances, the statement discredits the plaintiff in the minds of any considerable, respectable class of the community. _Flotech, Inc. v. E.I. Du Pont de Nemours Co._, 627 F. Supp. at 367.

§ 9.2.3 Examples of Defamatory Statements

The following are examples of the types of statements that have been found actionable as defamation in Massachusetts:
§ 9.2 BUSINESS TORTS IN MASSACHUSETTS

- **Dishonesty or fraud.** See Ricciardi v. Latif, 3 Mass. App. Ct. 714, 714–15, 323 N.E.2d 913, 914 (1975) (letters sent by defendants to plaintiff’s customers falsely stating that plaintiff had refused to pay for defendant’s product were found defamatory).


- **Crime or immorality.** See Shafir v. Steele, 431 Mass. 365, 373, 727 N.E.2d 1140, 1146 (2000). Imputation of criminal behavior is defamatory per se (meaning that the plaintiff need not prove that he or she was injured by the publication of the statement). Draghetti v. Chmielewski, 416 Mass. 808, 812, 626 N.E.2d 862, 866 (1994) (false statement that police officer was “double-dipping”—teaching at the police academy for pay while out on paid sick leave from the department—was defamatory per se).

- **Injurious to business reputation.** See A.M.F. Corp. v. Corporate Aircraft Mgmt., 626 F. Supp. 1533, 1551 (D. Mass. 1985) (report prepared by consultant assessing an aircraft service company contained false and misleading statements that were deemed defamatory).

- **Potential for bad behavior.** See Smith v. Suburban Rests., Inc., 374 Mass. 528, 530, 373 N.E.2d 215, 217 (1978) (letter sent by defendant’s lawyer to plaintiff—and also to the police—advising plaintiff that she was no longer permitted to enter defendant’s restaurant was defamatory because the potential for bad behavior on the part of plaintiff could be inferred from the letter).

- **Careless omission of a significant fact or name in a publication.** See Sharratt v. Hous. Innovations, Inc., 365 Mass. 141, 145, 310 N.E.2d 343, 346 (1974) (omitting the name of the principal architect of a housing project and substituting the name of another could be defamatory).

§ 9.2.4 Proving Fault

Supreme Court jurisprudence defines the contours of defamation law within the protections of the First Amendment. To balance the right of free speech with the right to recover damages for defamation, the Supreme Court has held that a
plaintiff must prove “fault” on the part of the defendant in addition to proving each of the elements described above. The burden of proof varies depending on the status of the plaintiff. If the plaintiff is a public official or public figure, he or she must prove that the defendant acted with “actual malice.”


**Practice Note**

A statement is published with “actual malice” if it is published with knowledge that it is false or with “reckless disregard” as to whether it is false. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). A statement is made with “reckless disregard” if it is published with serious doubts as to its truth. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).


**Practice Note**
Practitioners representing clients in a defamation action should be acquainted with the following Supreme Court cases:

- New York Times Co. v. Sullivan, 376 U.S. 254, 267 (1964); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 133–34 (1967). The Court held that a plaintiff must prove “actual malice” to prevail in a defamation action against a public official or public figure.
  - private plaintiffs need not make the New York Times Co. v. Sullivan malice showing in actions involving media defendants;
  - states may not impose liability without requiring some showing of fault; and
  - a private plaintiff must prove malice to obtain presumed or punitive damages.
• *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985). The issue before the Court was whether the holding of *Gertz* applied to a private plaintiff with respect to a statement that is not a matter of public concern. The Court held that *Gertz* does not apply; thus, a private plaintiff does not have to prove malice with respect to such statements to obtain presumed and punitive damages.

• *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986). The Court held that a statement on a matter of public concern must be provable as false before there can be liability under state defamation law, at least where a media defendant is involved.


For a table showing how the burden of the plaintiff in a defamation case varies according to the plaintiff’s status, see Exhibit 9D.

**Judicial Commentary**

Corporate defamation claims are rarely seen in the superior court. Although businesses can be defamed, as can people when acting for or in business contexts, defamation counts are, like so many others, usually tagalongs to more serious contract or tort claims. In short, they may be significant, but there must be present a strong element of provable damages.

§ 9.2.5 **Elements of Commercial Disparagement**

Commercial disparagement is a common law tort closely related to defamation. It has been defined as a false statement intended to call into question the quality of a competitor’s goods or services in order to inflict pecuniary harm. *Picker Int’l, Inc. v. Leavitt*, 865 F. Supp. 951, 964 (D. Mass. 1994).
Practice Note
Be sure to distinguish corporate defamation from commercial (or product) disparagement. Defamation of a corporation injures the reputation of the corporation itself, while commercial disparagement injures the reputation of the corporation’s products or services. *Picker Int’l, Inc. v. Leavitt*, 865 F. Supp. at 964 n.3.

A commercial disparagement action shares the elements of defamation, including fault, as described above. Note, however, that the plaintiff must also prove special damages (economic loss) before being entitled to recover damages for commercial disparagement. *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. 358, 365 (D. Mass. 1985), aff’d, 814 F.2d 775 (1st Cir. 1987).

Practice Note

Corporations may be deemed public figures under certain circumstances. *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. at 365. Thus, if the plaintiff is deemed a public figure, it must establish actual malice on the part of the defendant to prevail in a commercial disparagement case. *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. at 365.

In *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, the defendant had issued a press release stating that, in its opinion, its chemical product was not effective as an oil additive. This statement was found not actionable as commercial disparagement vis-à-vis the plaintiff, who used the defendant’s chemical as an additive in its own product. *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. at 365; see also *Picker Int’l, Inc. v. Leavitt*, 865 F. Supp. 951, 964 (D. Mass. 1994) (noting in dicta that the defendant’s statements that rival plaintiff “wouldn’t do a good job” or lacked the “expertise to keep the equipment up and running” might be actionable as commercial disparagement).
§ 9.2.6 Damages and Remedies for Defamation and Commercial Disparagement

(a) Damages

In Massachusetts, a plaintiff prevailing at trial in a defamation or commercial disparagement case is entitled to actual or compensatory damages. According to one legal resource, in recent years the average damage award in a defamation case has exceeded $500,000. E. Gabriel Perle, John Taylor Williams & Mark A. Fischer, *Perle & Williams on Publishing Law* § 5.13, at 5-62 (3d ed. 1999 & Supp. 2001) (discussing damages) [hereinafter *Perle & Williams*].

Actual damages may include

- the value of the plaintiff’s reputation (as determined by the fact finder),
- lost business opportunities, and
- medical expenses and other costs related to remedying emotional injuries such as mental anguish, embarrassment, and humiliation.


(b) Special Damages

In cases involving slander (spoken defamation) or commercial disparagement, the plaintiff must prove special damages (economic loss) to recover a monetary award. *Alba v. Sampson*, 44 Mass. App. Ct. 311, 312, 690 N.E.2d 1240, 1242 (1998) (slander); *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. 358, 365 (D. Mass. 1985), aff’d, 814 F.2d 775 (1st Cir. 1987) (commercial disparagement). In cases involving libel (written defamation), proof of general damages is sufficient because damages are presumed.

Practice Note

If the statement relates to a matter of public concern, a private plaintiff may need to prove malice to obtain presumed damages. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).
(c) Mitigation

In Massachusetts, the defendant has the right to notify the plaintiff at any time before an answer is filed that the defendant will publish a retraction of the statement at issue. G.L. c. 231, § 93. Publication of such a retraction is a mitigating factor that the fact finder must consider when calculating damages. G.L. c. 231, § 93.

(d) Punitive Damages

Unlike some states, Massachusetts does not permit the award of punitive damages in defamation cases. G.L. c. 231, § 93.

(e) Prior Restraint

Due to constitutional protections of free speech, it is nearly impossible to obtain an injunction preventing the publication of potentially defamatory statements. See New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). A court will grant prior restraint only in extraordinary circumstances, such as where publication will implicate the issue of national security or the right to fair trial. Stone v. Essex County Newspapers, Inc., 365 Mass. 246, 264, 311 N.E.2d 52, 63 (1974); see Perle & Williams § 5.13(A), at 5-65.

§ 9.2.7 Defenses to Defamation and Commercial Disparagement

(a) Overview

With certain statutory limitations, truth is an absolute defense to a defamation or commercial disparagement action. Other common defenses include the following:

- the statement is an opinion and therefore not actionable,
- the plaintiff is “libel proof,” or
- the defendant has a conditional or absolute privilege.
§ 9.2 BUSINESS TORTS IN MASSACHUSETTS

(b) **Truth**

If the plaintiff states a claim for defamation, the defendant will likely argue that the statement at issue is true. In *Fitzgerald v. Town of Kingston*, for example, the defendant defeated a taxi driver’s defamation action by demonstrating the truth of statements made concerning the plaintiff’s abysmal driving record. *Fitzgerald v. Town of Kingston*, 13 F. Supp. 2d 119, 126–27 (D. Mass. 1998).

**Practice Note**

The plaintiff has the burden of proving falsity if he or she is a public official or public figure, or the defamatory statement involves a matter of public concern. *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 131–32, 691 N.E.2d 925, 927 (1998). The Supreme Court has not ruled on whether a private figure plaintiff suing on a matter of private concern also has the burden of proving falsity, or whether the defendant has the burden of proving the truth of the statement.

The defense of truth may be limited in Massachusetts by G.L. c. 231, § 92, which provides that “the truth shall be a justification unless actual malice is proved.” As used in the statute, the phrase “actual malice” does not have the meaning ascribed by the Supreme Court in *New York Times* (i.e., published with knowledge that a statement is false or with reckless disregard as to whether it is false). Rather, the phrase refers to the defendant’s “malevolent intent or motive.” *Gilbert v. Berhard*, 4 Mass. L. Rptr. 143 n.2 (Mass. Super. Ct. 1995) (citing *Fay v. Harrington*, 176 Mass. 270, 274, 57 N.E. 369, 371 (1900)). Thus, a private figure plaintiff who has sued for defamation on a matter of private concern may introduce evidence of the defendant’s malevolent intent (i.e., hatred or ill will) to negate the defense of truth. *Fay v. Harrington*, 176 Mass. at 274, 57 N.E. at 371; see also 17A Richard W. Bishop, *Prima Facie Case: Proof and Defense*, ch. 42 (Libel and Slander), in *Massachusetts Practice Series* (West 4th ed. 2001 & Supp. 2002). However, the Supreme Judicial Court has concluded that the statute does not apply if the plaintiff is a public figure or official, or if the statement relates to a matter of public concern. *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 134, 691 N.E.2d 925, 929 (1998).

**Example**

In *Shaari*, the defendant published a travel guide warning tourists to stay away from the plaintiff’s youth hostel because a woman had been sexually assaulted there. Although the defendant’s statements were true, the plaintiff argued that truth was not available as a defense as a result of G.L. c. 231, § 92. The Supreme Judicial Court concluded that the statute did not apply to statements related to a

(c) **Opinion**

An opinion is constitutionally protected speech and therefore not actionable as defamation. *Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. 358, 368 (D. Mass. 1985), aff’d, 814 F.2d 775 (1st Cir. 1987); *Cole v. Westinghouse Broad. Co.*, 386 Mass. 303, 308–13, 435 N.E.2d 1021, 1024–27 (1982). The form of the language used is not controlling, however, because writers and speakers often use the word “opinion” as a preface when asserting a factual untruth. Thus, a statement couched as an opinion—“in my opinion, John Jones is a liar”—may be defamatory if it implies false and defamatory facts. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990). The relevant question is not whether the statement is an opinion, but rather whether it would reasonably be understood to declare or imply provable assertions of fact. *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 727 (1st Cir. 1992).

The Constitution protects the following types of statements as opinion:


- Statements that cannot be reasonably interpreted as stating actual facts about an individual, such as “loose, figurative or hyperbolic language,” *Milkovich v. Lorain Journal Co.*, 497 U.S. at 21, using words like “traitor” or “blackmail.” For example, a theater critic who writes that “the producer who decided to charge admission for that show is committing highway robbery” would be immune from liability because no reasonable reader would understand the critic to be accusing the producer of an actual crime. *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 727 (1st Cir. 1992).

- Statements that, from their context, negate the impression that they are factual. Examples include statements published in formats known to include opinion—such as cartoons, satire, and theater review columns. *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 729 (1st Cir. 1992); *King v. Globe Newspaper Co.*, 400 Mass. 705, 710–11, 512 N.E.2d 241, 244–45 (1987) (cartoons).

In Massachusetts, the following factors must be considered when determining whether a statement is an opinion:
• whether the statement is provable as false;

• whether the statement can reasonably be interpreted as stating actual facts;

• whether the context in which the statement appears negates the impression that the statement is factual; and

• whether an independent examination of the entire record reveals that the determinations of the first three factors are made in such a manner as to not “constitute a forbidden intrusion on the field of free expression.”

Phantom Touring, Inc. v. Affiliated Publ’ns, 953 F.2d at 727.

Examples
In Phantom Touring, the Boston Globe’s highly critical review described a theater production as “a rip-off, a fraud, a scandal, a snake-oil job,” and accused the plaintiff of deliberately trying to deceive the public. The court concluded that many of these statements were “obviously protected hyperbole” or “not susceptible of being proved true or false” and were therefore protected as opinions. Phantom Touring, Inc. v. Affiliated Publ’ns, 953 F.2d 724, 727 (1st Cir. 1992).


(d) Libel-Proof Plaintiff

Even where the challenged statement is found to be false, a plaintiff may be deemed “libel proof” and therefore unable to prevail. Defendants frequently and successfully assert this defense against plaintiffs with criminal backgrounds whose reputations are already so tarnished that they cannot be defamed. For example, a mass murderer cannot be defamed by being falsely described as a tax evader. Defendants can also assert this defense in noncriminal contexts where the defamatory statement cannot harm the plaintiff’s reputation beyond the harm already caused by disclosure of the truth. Simmons Ford, Inc. v. Consumers Union of the United States, Inc., 516 F. Supp. 742, 750–51 (S.D. N.Y. 1981).
Example
The plaintiff, the manufacturer of an electric car, sued Consumer Reports for an article that truthfully reported the car’s abysmal performance ratings and poor safety record but also falsely claimed that the car failed to meet federal safety regulations. The court determined that the plaintiff was libel proof because of the car’s poor performance and safety record and concluded that the false statements about regulatory compliance were not actionable. Simmons Ford, Inc. v. Consumers Union of the United States, Inc., 516 F. Supp. 742, 750–51 (S.D. N.Y. 1981).

(e) Privileges
If certain circumstances apply, an “absolute” or “conditional” privilege may protect the maker of an otherwise defamatory statement from liability.

Absolute Privilege—Litigation
For example, attorneys have an absolute privilege—sometimes referred to as the “litigation privilege”—to publish statements that are preliminary to a judicial proceeding, so long as the proceeding is contemplated in good faith. Smith v. Suburban Rests., Inc., 374 Mass. 528, 531, 373 N.E.2d 215, 218 (1978); see also Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 140, 668 N.E.2d 1329, 1332–33 (1996) (emphasizing absolute nature of the privilege).

Practice Note
Keep in mind that the litigation privilege—although “absolute” and broad in scope—is not without limits, particularly with regard to pre-litigation activities. Practitioners with concerns in this area should review the April 2002 decision in Meltzer v. Grant, 193 F. Supp. 2d 373, 377–81 (D. Mass. 2002). In that case, the court refused to dismiss an action brought against a law firm that sent a presuit letter threatening civil and criminal action if the recipients did not take specified actions in favor of the firm’s client. The court found that it was unclear whether judicial proceedings were “contemplated in good faith and under serious consideration” and therefore premature to conclude that the litigation privilege applied to the firm’s actions. Meltzer v. Grant, 193 F. Supp. 2d at 381.
§ 9.2 BUSINESS TORTS IN MASSACHUSETTS

Conditional Privileges

General Principles

Massachusetts courts have recognized a number of conditional privileges, as described below. If one of these privileges applies, the defendant is generally permitted to make statements that would otherwise be defamatory so long as the defendant reasonably believed that the statements were true and acted in good faith. To overcome a defense involving such a privilege, the plaintiff must show an abuse of the privilege or that the statements were made with malice. Cignetti v. Healy, 89 F. Supp. 2d 106, 126 (D. Mass. 2000). Simple negligence, lack of sound judgment, or hasty action will not cause the loss of the privilege in these circumstances. Dexter’s Hearthside Rest., Inc. v. Whitehall Co., 24 Mass. App. Ct. 217, 223, 508 N.E.2d 113, 117 (1987).

Employer Privilege

Conditional privileges often arise in the employment context, because, as the courts have concluded, employers have a “legitimate need . . . to determine whether their employees are professionally, physically, and psychologically capable of performing their duties.” Bratt v. Int’l Bus. Machs. Corp., 392 Mass. 508, 516, 467 N.E.2d 126, 133 (1984). Thus, statements made by an employer within the context of an employment relationship by and to an employee’s supervisor or coworkers are conditionally privileged if the statements were reasonably necessary to serve the employer’s legitimate interest in the fitness of an employee to perform his or her job, and if the speaker reasonably believed that his or her statements were true and acted in good faith. Draghetti v. Chmielewski, 416 Mass. 808, 813–14, 626 N.E.2d 862, 867 (1994); Bratt v. Int’l Bus. Machs. Corp., 392 Mass. 508, 467 N.E.2d 126 (1984) (statements made by a supervisor about an employee’s mental condition were conditionally privileged); see also Cignetti v. Healy, 89 F. Supp. 2d 106, 126 (D. Mass. 2000); Foley v. Polaroid Corp., 400 Mass. 82, 95, 508 N.E.2d 72, 80 (1987). A conditional privilege may also apply to statements about an employee’s performance made by former employers to prospective employers (for example, an employment reference). See Bianchi v. Commonwealth Childcare Corp., 12 Mass. L. Rptr. 312 (Mass. Super. Ct. 2000). As a practical matter, however, employers often provide only basic factual information to prospective employers (such as hire and terminations dates) to reduce the risk of litigation.

Fair Reporting Privilege

Statements that contain minor inaccuracies but are substantially true are subject to the fair reporting privilege. Only the gist of the potentially libelous reference

**Legitimate Business Interest Privilege**


**Common Interest Privilege**

Statements made “where the publisher and the recipient have a common interest, and the communication is of a kind reasonably calculated to protect or further it” may be conditionally privileged. *Foley v. Polaroid Corp.*, 400 Mass. 82, 95, 508 N.E.2d 72, 80 (1987) (citing *Sheehan v. Tobin*, 326 Mass. 185, 190–91, 93 N.E.2d 524, 528–29 (1950)).

**Legal Duty Privilege**

A legal duty imposed for the protection of a particular class of persons carries with it an absolute or conditional privilege to make statements of a kind that are reasonably necessary to the performance of the legal duty. *Dexter’s Hearthside Rest., Inc. v. Whitehall Co.*, 24 Mass. App. Ct. 217, 222, 508 N.E.2d 113, 117 (1987). For example, in *Dexter’s*, the defendant was under a legal duty to report delinquent accounts to the Alcoholic Beverages Control Commission, and its erroneous report regarding one of its customers was thus found to be conditionally privileged. *Dexter’s Hearthside Rest., Inc. v. Whitehall Co.*, 24 Mass. App. Ct. at 219–23, 508 N.E.2d at 115–17.

**Credit Report Privilege**


**Law Enforcement Privilege**

§ 9.2 BUSINESS TORTS IN MASSACHUSETTS

Competitive Privilege

Statements that would otherwise constitute commercial disparagement are often protected as conditionally privileged because courts acknowledge that “[m]any buyers . . . recognize disparagement [of a rival] as non-objective and highly biased.” Picker Int’l, Inc. v. Leavitt, 865 F. Supp. at 964 (quoting 3 Philip Areeda & Donald F. Turner, Antitrust Law § 738c, at 281 (Little, Brown 1978)); accord A.M.F. Corp. v. Corporate Aircraft Mgmt., 626 F. Supp. 1533, 1547 (D. Mass. 1985); see also Restatement (Second) of Torts §§ 623A, 649 (1979). “Generally, where the discussion involves a rival’s services or product, it is not considered libelous unless it ‘imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct . . . .’” Picker Int’l, Inc. v. Leavitt, 865 F. Supp. at 964 (quoting U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 924 (3rd Cir. 1990)).

§ 9.3 FALSE ADVERTISING

§ 9.3.1 Nature of Claim

(a) Federal Law

False advertising is prohibited by federal statute. The Lanham Act § 43(a), as amended in 1989, provides as follows:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.


9–16

(b) State Law

False advertising is not a cognizable tort under Massachusetts state law, except to the extent that it amounts to fraud or violation of G.L. c. 93A. Thornton v. Harvard Univ., 2 F. Supp. 2d 89, 95 (D. Mass. 1998). A Massachusetts statute and associated regulations prohibit untrue, deceptive, or misleading advertising; however, these provisions are enforced only by the Attorney General of Massachusetts and do not give rise to a private right of action for damages. G.L. c. 266, § 91; 940 C.M.R. §§ 6.01–.15. Violation of the attorney general’s regulations may, however, give rise to liability under G.L. c. 93A. Skinder-Strauss Assocs. v. Mass. Continuing Legal Educ., Inc., 914 F. Supp. 665, 681–82 (D. Mass. 1995).

§ 9.3.2 Elements of Claim

In order to prevail on a false advertising claim under the Lanham Act, the plaintiff must prove

- the defendant made a false or misleading statement in a commercial advertisement about its own or the plaintiff’s product;
- the statement actually deceives or has the tendency to deceive a substantial segment of its audience;
- the deception is material (i.e., it is likely to influence the purchasing decision);
- the defendant placed the statement into interstate commerce; and
- the plaintiff has been or is likely to be injured as a result of the statement, either by direct diversion of sales to the defendant or by a lessening of goodwill associated with the plaintiff’s products.

Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24, 33 n.6 (1st Cir. 2000).
§ 9.3 BUSINESS TORTS IN MASSACHUSETTS

Practice Note
In order to assert a false advertising claim under G.L. c. 93A, the plaintiff must prove—in addition to all of the elements of false advertising under Lanham Act § 43(a)—that the defendant knew or should have known that its statement was false or misleading. *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 120 n.3 (D. Mass. 1996).

§ 9.3.3 Significance of Consumer Reaction

The plaintiff may prove either that

- the statement is literally false or
- the statement, though literally true, is likely to mislead and confuse consumers.

If the statement is literally false, the court will grant relief without considering evidence of consumer reaction. Otherwise, the plaintiff must present evidence that consumers were actually misled or confused. *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d at 33. Most often, the plaintiff presents evidence of consumer reaction through consumer surveys. *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d at 36; *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 128 (D. Mass. 1996).

Practice Note
The plaintiff must show how consumers actually reacted, as opposed to how they could have reacted, in response to the statement. *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d at 33.

§ 9.3.4 Statements False or Misleading by “Necessary Implication”

Even if a statement in an advertisement does not appear to be literally false on its face, the statement may be found to be literally false or likely to mislead or confuse consumers based on “necessary implication.” A claim is conveyed by necessary implication when a consumer viewing the advertisement in its entirety would recognize the false claim as readily as if it had been explicitly stated. However, the greater the degree to which the consumer is required to integrate the components of the advertisement in order to draw the false conclusion, the less likely it is that the court will find literal falsity. *Clorox Co. Puerto Rico v.*
Proctor & Gamble Commercial Co., 228 F.3d at 34–35. Visual images, as well as words, can be false or likely to mislead within the meaning of Lanham Act § 43(a). Gillette Co. v. Norelco Consumer Prods. Co., 946 F. Supp. at 128.

Practice Note
An "establishment" claim is a statement claiming that tests or studies prove a certain fact. In order to prove that an establishment claim is false or likely to mislead, the plaintiff may show either (1) the defendant’s tests were not sufficiently reliable to support the claim, or (2) the defendant's tests, even if reliable, did not establish the proposition asserted by the defendant. Spalding Sports Worldwide, Inc. v. Wilson Sporting Goods Co., 198 F. Supp. 2d 59, 67 (D. Mass. 2002). If the plaintiff successfully challenges the reliability of the tests, the defendant may not rely on a defense that the tests were conducted in good faith. Gillette Co. v. Norelco Consumer Prods. Co., 946 F. Supp. at 121–22.

§ 9.3.5 “Commercial Advertising or Promotion”

By its express terms, Lanham Act § 43(a)(1)(B) applies only to “commercial advertising or promotion.” Courts in the District of Massachusetts apply a four-part test to determine whether a statement constitutes commercial advertising or promotion. The statement must be

(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant’s goods or services. While the representations need not be made in a “classic advertising campaign,” but may consist instead of more informal types of “promotion,” the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute “advertising” or “promotion” within that industry.


If the statement is not conveyed to the purchaser prior to the actual purchase, it will not constitute “advertising or promotion” within the meaning of the statute. Gillette Co. v. Norelco Consumer Prods. Co., 946 F. Supp. at 134–35 (statements contained in product package inserts were not advertising or promotion);
§ 9.3 BUSINESS TORTS IN MASSACHUSETTS

Brown v. Armstrong, 957 F. Supp. at 1302 (statements contained in videotape products were not advertising or promotion).

§ 9.3.6 Injunctive Relief and Damages

(a) Injunctive Relief

In order to obtain an injunction against false advertising in violation of Lanham Act § 43(a), the plaintiff must demonstrate a belief “that he or she is or is likely to be damaged by such [advertising].” 15 U.S.C. § 1125(a)(1). Thus, evidence of specific harm is not necessary to obtain an injunction.

(b) Damages

In order to recover damages, the plaintiff must show that the false advertising actually deceived customers and that the plaintiff was harmed as a result. Brown v. Armstrong, 957 F. Supp. 1293, 1302 n.8 (D. Mass. 1996), aff’d, 129 F.3d 1252 (1st Cir. 1997). Some courts presume harm where liability is based on false comparative advertising. J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:30 (4th ed. 1996 & Supp. 2001) (collecting cases).

§ 9.3.7 Defenses

In addition to any general defenses that may be applicable, the following specific defenses are available to a defendant in a false advertising case under Lanham Act § 43(a).

(a) Opinion

A statement in an advertisement cannot be false or misleading in violation of Lanham Act § 43(a)(1)(B) if it expresses an opinion rather than a fact. In distinguishing between opinion and fact, courts in false advertising cases turn to defamation jurisprudence. Generally speaking, a claim that is not capable of being verified is likely to be protected as a nonactionable opinion. Gillette Co. v. Norelco Consumer Prods. Co., 946 F. Supp. 115, 136–37 (D. Mass. 1996) (finding a razor blade manufacturer’s statement that “anything closer could be too close for comfort” constituted an opinion rather than a statement of fact).
(b) **Puffery**

A statement will not constitute false advertising if a court finds that it is mere “puffery.” Puffery is an exaggerated advertising statement, often made in a bluster- ing or boasting manner, on which no reasonable buyer would rely. Note, however, that a claim of product superiority that is specific and measurable is not puffery. *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 38–39 (1st Cir. 2000) (finding statement “[c]ompare with your detergent . . . [w]hiter is not possible” capable of measurement and therefore not puffery).

(c) **Negative Puffery**

In recent years, the concept of puffery has been extended to negative comments made about the products of a competitor. Such negative puffery is not actionable where no reasonable consumer would rely on the exaggerated claims. For example, visual images that exaggerated the pain and danger of shaving with a regular razor blade—including a swarm of bees stinging a face and animated razors spitting out flames and turning into sharp-toothed animals—were found to be nonactionable puffery. *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 131 (D. Mass. 1996).

§ 9.4 **MINIMIZING THE RISK OF LIABILITY**

§ 9.4.1 **The Risk Management Process**

Advising clients on how to minimize risks associated with business communications, advertising, and public relations involves teaching yourself and your client the elements of each cause of action and implementing procedures to minimize the risk of unanticipated claims.

This risk management process may be especially important if your client is of a type that is susceptible to liability for defamation—publishers, news organizations or other media clients, advertising or public relations firms, or Internet service providers—or engages in extensive advertising activities. However, even “low risk” clients have business groups that engage in activities that could expose their company to liability. Such groups may include

- human resources;
- sales and marketing;
§ 9.4 BUSINESS TORTS IN MASSACHUSETTS

• public communications (including groups involved with advertising, press releases, or newsletters); and

• Web site hosting.

Practice Note
You may want to advise your clients that business groups engaging in such high-risk activities be provided basic risk management procedures and compliance training.

§ 9.4.2 Procedures for Minimizing Risk

Training high-risk clients is the single most important procedure for minimizing risk. Basic training should include teaching your clients the elements of the business communications and advertising torts described in this chapter. Other procedures for minimizing risk are suggested below. Obviously, each client should develop its own procedures that take into account its business philosophy, budget, and tolerance for risk.

For a checklist of risk management procedures, see Exhibit 9E.

§ 9.4.3 Compliance Training

Basic compliance training should include teaching your clients the elements of the business communications torts described in this chapter. The following concepts should also be part of a training program:

• Clients should be informed that false or misleading communications—whether spoken, printed in correspondence, posted on the Internet, or published in advertising or editorial content—may result in liability.

• Clients should be informed that, in Massachusetts, under certain circumstances even truthful statements can result in liability if made with the malicious intent of injuring another party.

• Your client’s Web site administrator should be trained to identify suspect statements before publishing them on the Internet. (You may want to suggest an audit if you suspect that a client’s Web site contains false advertising or potentially defamatory or disparaging content.)
• Clients should remind their human resources departments that even internal dissemination of potentially defamatory information about an employee may result in liability. Confidentiality is crucial to minimizing risk.

• Clients should scrutinize statements they plan to make about competitors that could injure their competitors’ contractual relations with existing customers or otherwise cause financial loss. Sales and marketing groups in particular should be trained to identify such statements and to request a legal evaluation if there is any question about whether the statements could constitute defamation, commercial disparagement, or false advertising.

• With respect to recognizing actionable statements made by third parties about your clients, you should remind your clients that the U.S. Constitution protects “free expression.” Therefore, opinions, hyperbole, and name-calling—for example, that your client is a “silly, stupid, senile bum”—may be upsetting, but are generally not actionable. Further, unflattering statements about your client’s products or services will likely not be actionable unless the statements are likely to cause direct economic loss and
  – are literally false,
  – are likely to mislead or confuse consumers, or
  – allege “fraud, deceit, dishonesty, or reprehensible conduct” on the part of your client.

§ 9.4.4  Checklists

As part of training, you may want to provide checklists to your clients to assist them in identifying actionable communications. Sample checklists for defamation, commercial disparagement, and false advertising are attached as Exhibits 9F–9H.

§ 9.5  REFERENCES

This chapter provides only a brief summary of Massachusetts law relating to the claims of defamation, commercial disparagement, and false advertising. The following authorities provide further information and resources that may be useful in particular cases:
§ 9.5 BUSINESS TORTS IN MASSACHUSETTS


- Restatement (Second) of Torts §§ 558–623 (1979) (concerning defamation) and Restatement (Second) of Torts §§ 623A, 694 (1979) (concerning commercial disparagement).

EXHIBIT 9A—Complaint (Defamation, Commercial Disparagement, and False Advertising)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT

ZEPHYR SECURITY SOFTWARE, INC.,
and JOHN ANDERSON,

Plaintiffs,

v.

SECUR-SPACE, INC.,
and DOUGLAS BALMY

Defendants.

VERIFIED COMPLAINT AND JURY DEMAND

PARTIES

1. Plaintiff Zephyr Security Software, Inc. ("Zephyr") is a Delaware corporation with a principal place of business at 123 Dove Street, Boston, Massachusetts.

2. Plaintiff John Anderson is the founder and president of Zephyr, residing at 17 Reindeer Way, Brookline, Massachusetts.

3. Defendant Douglas Balmy is an individual residing at 89 Hedgehog Lane, Providence, Rhode Island. On information and belief, Balmy has also used the alias “Code__Kid” when publishing information concerning Zephyr and Anderson.

4. Defendant Secur-Space, Inc. (“Secur-Space”), is a Delaware corporation owned by Balmy with a principal place of business at 2000 Birds Nest Street, Boston, Massachusetts.
JURISDICTION AND VENUE

5. The Massachusetts Superior Court has jurisdiction over this action pursuant to G.L. c. 223A, § 3 and G.L. c. 214, § 1. The amount in controversy exceeds twenty-five thousand dollars ($25,000), exclusive of interest and costs. Venue in this forum is proper pursuant to G.L. c. 223, § 1.

6. [If filed in federal court: The United States District Court for the District of Massachusetts has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity) or 28 U.S.C. § 1338 (patents, copyrights, trademarks, and unfair competition)], and has jurisdiction over state law and common law claims pursuant to the doctrine of pendant jurisdiction. [If diversity: The amount in controversy exceeds seventy-five thousand dollars ($75,000), exclusive of interest and costs.] Venue in the United States District Court for the District of Massachusetts is proper under 28 U.S.C. § 1391.

FACTS

7. Zephyr is a local company that has been developing software for corporate security applications for over fifteen years. Its premier software application is ZephyrSoft. Zephyr has developed a blue chip clientele over the years, and has won industry awards for innovation in the security services sector. Zephyr has also advised the city of Boston on matters relating to security of government offices and other public properties. Zephyr has established itself as a well-respected corporate citizen of Boston.


9. When Anderson advised Balmy that his employment was being terminated, Balmy was visibly angry.

10. Balmy founded his own company, Secur-Space, on or about August 1, 2001.

11. On information and belief, Secur-Space develops custom security software for corporate clients. Accordingly, Secur-Space competes for the same clients as Zephyr.

12. An Internet site called Yippee! operates and maintains “message boards” concerning various topics. Users can post messages for the public to view on the Internet.

13. One Yippee! message board concerns Technology.
14. On or about September 20, 2001, a person using the alias Code_Kid published the following message on the Technology message board: “I know that John Anderson, the president of Zephyr Security Software, has a criminal past.”

15. On information and belief, Balmy is the person who used the alias Code__Kid to publish said message on the Yippee! message board.

16. The statement that Anderson has a criminal past is wholly untrue.

17. On or about October 20, 2001, Balmy and Secur-Space published a full-page advertisement in the Boston Business Bee. The advertisement featured a photograph of Anderson and a headline that read: “Can You Entrust Your Building’s Security to This Man?” The text below the headline read: “Zephyr’s president has a criminal past. No wonder he considers himself an expert on security.” The advertisement went on to compare the Secur-Space software product with Zephyr’s: “Independent tests show that Secur-Space’s software is three times more effective than ZephyrSoft in preventing security breaches. Doesn’t your business deserve the security and peace of mind that only Secur-Space provides?”

18. The statement that Anderson, and by affiliation Zephyr, cannot be trusted to provide security products or services is wholly untrue.

19. The statement that Secur-Space’s security software is three times more effective than Zephyr’s software in preventing security breaches is also wholly untrue.

20. On or about November 20, 2001, Balmy, as a representative of Secur-Space, called one of Zephyr’s long-term clients, Gizmo, Inc. (“Gizmo”), and informed Megan Charles, Gizmo’s security advisor, that “ZephyrSoft has secret files embedded in it that make it possible for Zephyr to spy on your company.”

21. The statement that ZephyrSoft has secret files embedded in it is wholly untrue.

22. The statement that Zephyr spies on Gizmo, or on any company, is also wholly untrue.

23. Three days later, Gizmo sent a registered letter informing Zephyr that it was terminating its security services contract and destroying Zephyr’s software. The contract was for the use of Zephyr’s software and support services, for which Gizmo paid Zephyr in excess of $100,000 annually.
COUNT I

(Defamation of John Anderson by Balmy and Secur-Space)

24. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 23, above.

25. Defendants’ statements that the president of Zephyr, John Anderson, has a criminal past and cannot be trusted are false and untrue, and defamed Anderson.

26. By publishing the statements on the Technology message board of Yippee! and in the advertisement placed in the *Boston Business Bee*, Defendants published defamatory statements to a wide range of persons in the public.

27. Defendants negligently published the false and defamatory statements about Anderson, causing him to suffer damages, including emotional distress and injury to his reputation.

28. Defendants published the false and defamatory statements with the knowledge that the statements were false, or with reckless disregard as to the falsity of the statements.

29. Defendants’ defamatory statements injured the reputation of Anderson.

COUNT II

(Defamation of Zephyr by Balmy and Secur-Space)

30. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 29, above.

31. Defendants’ statements that the president of Zephyr, John Anderson, has a criminal past and cannot be trusted are false and untrue, and defamed Zephyr.

32. By publishing the statements on the message board of Yippee! and in the *Boston Business Bee*, Defendants published defamatory statements to a wide range of persons in the public via the Internet.

33. Defendants’ statements that Zephyr’s software has secret files embedded in it, and that Zephyr uses the files to spy on its clients, are false and untrue and defamed Zephyr.

34. By telling the statement to the security advisor at Gizmo, Megan Charles, Defendants published the defamatory statement to at least one other person.
35. Defendants negligently published the false and defamatory statements about Zephyr, causing Zephyr to suffer damages, including the monetary loss of an important and valuable client, Gizmo, and injury to Zephyr’s reputation.

36. Defendants published the false and defamatory statements with the knowledge that the statements were false, or with reckless disregard as to the falsity of the statements.

37. Defendants’ defamatory statements injured the reputation of Zephyr.

**COUNT III**

*(Commercial Disparagement)*

38. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 37, above.

39. Defendants’ statement that Zephyr’s software has secret files imbedded in it is false and untrue, and disparaged Zephyr’s software product, ZephyrSoft.

40. By telling the statement to the security advisor at Gizmo, Megan Charles, Defendants published the disparaging statement to one or more people.

41. Defendants negligently published the false and disparaging statement concerning ZephyrSoft, causing a customer to regard ZephyrSoft as dangerous, and imputing deceit, dishonesty and reprehensible conduct to Zephyr.

42. Defendants’ statement that Zephyr’s president has a criminal past is false and untrue, and disparaged Zephyr’s software product, ZephyrSoft.

43. By publishing the false and disparaging statement in the *Boston Business Bee*, Defendants published the disparaging statements to a wide range of persons in the public.

44. Defendants published the false and disparaging statements about ZephyrSoft, causing Zephyr to suffer special and general damages, including the monetary loss of an important and valuable client, Gizmo, and injury to the reputation of ZephyrSoft and Zephyr.

45. Defendants published the false and disparaging statement with the knowledge that the statement was false, or with reckless disregard as to the falsity of the statements.
COUNT IV

(False Advertising—Section 43(a) of the Lanham Act)

46. Zephyr incorporates by reference the allegations set forth in paragraphs 1 through 45, above.

47. The statement in Defendants’ advertisement that “Independent tests show that Secur-Space’s software is three times more effective than Zephyr's software, ZephyrSoft, in preventing security breaches” is false and misleading, and misrepresented the characteristics and qualities of both Secur-Space’s and Zephyr’s products.

48. The false and misleading statement in the advertisement deceived, and has a tendency to continue to deceive, a substantial segment of its intended audience.

49. The deception of the advertisement is material, and has influenced, and will continue to influence, the purchasing decisions of potential customers of Zephyr, specifically companies that plan to purchase security products and services.

50. The deceptive advertisement was published in the Boston Business Bee, a business newspaper distributed in Massachusetts and other states, and was thereby placed into interstate commerce.

51. The deceptive advertisement injured, and is likely to continue to injure, Zephyr.

52. The deceptive advertisement violates Section 43(a) of the Lanham Act, codified at 15 U.S.C. § 1125(a), which prohibits Defendants from using false, misleading, or disparaging representations of fact that misrepresent the nature, characteristics, or qualities of its own or Zephyr’s products.

53. Zephyr has no adequate remedy at law.

COUNT V

54. [Other counts may include Chapter 93A, intentional interference with contractual relations, breach of noncompete agreement, etc.]

THEREFORE, Plaintiffs respectfully requests that this Court:

A. Preliminarily and permanently enjoin Defendants from publishing further defamatory statements about Zephyr, Anderson, and ZephyrSoft;
B. Enter judgment against Defendants on all counts of the Complaint;

C. Award Plaintiffs damages in an amount to be determined at trial;

D. Award Plaintiffs enhanced damages as permitted by law, plus its reasonable attorney fees and the costs of this action; and

E. Grant such other relief as the Court deems just and proper.

JURY DEMAND

Zephyr demands a jury trial on all triable issues.

Dated: __________, 2002

ZEPHYR SECURITY SOFTWARE, INC.,
JOHN ANDERSON
By their attorney,

Josephina Kermit, BBO #000001
KERMIT & KIBBLESTONE LLP
1 Winter Street
Boston, MA 02110
Tel. (617) 555-2222
VERIFICATION

I, John Anderson, President of Zephyr Security Software, Inc., declare that I have read this Complaint and know its contents. The contents are true to my knowledge except as to those matters that are alleged on information and belief; as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this _____ day of ________________, 2002 in Suffolk County, Massachusetts.

__________________________
John Anderson, President
Zephyr Security Software, Inc.
EXHIBIT 9B—Answer to Complaint (Defamation, Commercial Disparagement, and False Advertising)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

ZEPHYR SECURITY SOFTWARE, INC.,
and JOHN ANDERSON,

Plaintiffs,

v.

SECUR-SPACE, INC.,
and DOUGLAS BALMY

Defendants.

Civil Action No. 02-0000

ANSWER OF DOUGLAS BALMY

Defendant Douglas Balmy (“Balmy”) in the above-captioned action answers the Complaint as follows:

PARTIES

1. Balmy is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Balmy is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint.

3. Denied to the extent that the allegation in paragraph 3 of the Complaint alleges that Balmy uses an “alias.” Otherwise, admitted.

4. Balmy admits the allegations contained in paragraph 4 of the Complaint.
JURISDICTION AND VENUE

5. Balmy admits the allegations contained in paragraph 5 of the Complaint.

6. [If filed in federal court: Balmy admits the allegations contained in paragraph 6 of the Complaint.]

FACTS

7. Balmy is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint and therefore denies the same.

8. Balmy admits that he was hired by Zephyr Security Software, Inc. ("Zephyr") as a computer engineer in June 1989. Otherwise denied.

9. Balmy denies the allegations contained in paragraph 9 of the Complaint.

10. Balmy admits the allegations contained in paragraph 10 of the Complaint.

11. Balmy admits that he develops custom security software for clients. Balmy denies that he competes for the same clients as Zephyr.

12. Balmy admits the allegations contained in paragraph 12 of the Complaint.

13. Balmy admits the allegations contained in paragraph 13 of the Complaint.

14. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 14 of the Complaint and therefore denies the same.

15. Balmy denies the allegations contained in paragraph 15 of the Complaint.

16. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 16 of the Complaint and therefore denies the same.

17. Balmy admits the allegations contained in paragraph 17 of the Complaint.

18. Balmy denies the allegations contained in paragraph 18 of the Complaint.


20. Balmy denies the allegations contained in paragraph 20 of the Complaint.
21. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 21 of the Complaint and therefore denies the same.

22. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 22 of the Complaint and therefore denies the same.

23. Balmy is without information or knowledge sufficient to admit or deny the allegations contained in paragraph 23 of the Complaint and therefore denies the same.

COUNT I

24. Balmy incorporates by reference the answers set forth in paragraphs 1 through 23 of this Answer.

25. Balmy denies the allegations contained in paragraph 25 of the Complaint.

26. Balmy denies the allegations contained in paragraph 26 of the Complaint.

27. Balmy denies the allegations contained in paragraph 27 of the Complaint.

28. Balmy denies the allegations contained in paragraph 28 of the Complaint.

29. Balmy denies the allegations contained in paragraph 29 of the Complaint.

COUNT II

30. Balmy incorporates by reference the answers set forth in paragraphs 1 through 29 of this Answer.

31. Balmy denies the allegations contained in paragraph 31 of the Complaint.

32. Balmy denies the allegations contained in paragraph 32 of the Complaint.

33. Balmy denies the allegations contained in paragraph 33 of the Complaint.

34. Balmy denies the allegations contained in paragraph 34 of the Complaint.

35. Balmy denies the allegations contained in paragraph 35 of the Complaint.

36. Balmy denies the allegations contained in paragraph 36 of the Complaint.

37. Balmy denies the allegations contained in paragraph 37 of the Complaint.
COUNT III

38. Balmy incorporates by reference the answers set forth in paragraphs 1 through 37 of this Answer.

39. Balmy denies the allegations contained in paragraph 39 of the Complaint.

40. Balmy denies the allegations contained in paragraph 40 of the Complaint.

41. Balmy denies the allegations contained in paragraph 41 of the Complaint.

42. Balmy denies the allegations contained in paragraph 42 of the Complaint.

43. Balmy denies the allegations contained in paragraph 43 of the Complaint.

44. Balmy denies the allegations contained in paragraph 44 of the Complaint.

45. Balmy denies the allegations contained in paragraph 45 of the Complaint.

COUNT IV

46. Balmy incorporates by reference the answers set forth in paragraphs 1 through 45 of this Answer.

47. Balmy denies the allegations contained in paragraph 47 of the Complaint.

48. Balmy denies the allegations contained in paragraph 48 of the Complaint.

49. Balmy denies the allegations contained in paragraph 49 of the Complaint.

50. Balmy denies the allegations contained in paragraph 50 of the Complaint.

51. Balmy denies the allegations contained in paragraph 51 of the Complaint.

52. Paragraph 52 contains a legal conclusion to which no response is required. To the extent a response is deemed required, Balmy denies the allegations contained in paragraph 52 of the Complaint.

53. Paragraph 53 contains a legal conclusion to which no response is required. To the extent a response is deemed required, Balmy denies the allegations contained in paragraph 53 of the Complaint.

COUNT V

54. [Responses to other counts, as listed in Complaint.]
DEFAMATION AND FALSE ADVERTISING

FIRST AFFIRMATIVE DEFENSE
The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE
Plaintiff’s claims are barred because the allegedly defamatory or disparaging statement or statements set forth in the Complaint are statements of opinion.

THIRD AFFIRMATIVE DEFENSE
Plaintiff’s claims are barred because the allegedly defamatory or disparaging statement or statements are true.

FOURTH AFFIRMATIVE DEFENSE
Plaintiff’s claims are barred because the allegedly defamatory or disparaging statement or statements are statements of opinion, which Balmy believed, as a matter of Balmy’s opinion, to be true.

FIFTH AFFIRMATIVE DEFENSE
Plaintiff’s claims are barred because the allegedly defamatory or disparaging statement or statements set forth in the Complaint are rhetorical hyperbole or puffery.

SIXTH AFFIRMATIVE DEFENSE
Some or all of Plaintiff’s claims are barred by the First Amendment and the state and federal constitutional protection afforded free speech.

SEVENTH AFFIRMATIVE DEFENSE
Plaintiff’s claims are barred because Plaintiff has suffered no harm, to its reputation, its business or otherwise, as a result of the alleged defamatory or disparaging statement or statements set forth in the Complaint or as a result of any other conduct set forth in the Complaint.

EIGHTH AFFIRMATIVE DEFENSE
[Other defenses may be based on laches, estoppel, acquiescence, statute of limitations, jurisdiction, etc.]

Wherefore, with respect to the Complaint, Balmy respectfully requests that this Court:

9–37
a. Enter an Order dismissing the Complaint;
b. Enter judgment on behalf of Balmy on each count of the Complaint;
c. Grant Balmy his reasonable attorney fees and costs; and
d. Grant such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Balmy demands a jury trial on all triable issues.

Dated: __________, 2002

DOUGLAS BALMY

By his attorney,

Francis X. Wigglesworth, BBO#000002
WIGGLESWORTH & WIGGLESWORTH
2 Winter Street
Boston, MA 02110
(617) 555-5555

CERTIFICATE OF SERVICE

The undersigned certifies that he served the foregoing document on all counsel of record by first class mail on this ______ day of ______________, 2002.

Francis X. Wigglesworth
DEFAMATION AND FALSE ADVERTISING

EXHIBIT 9C—Jury Instructions (Defamation, Commercial Disparagement, and False Advertising)

DEFAMATION

Elements of Claim

In a claim for defamation, the plaintiff must prove by a preponderance of the evidence that the defendant has made a defamatory statement of or concerning the plaintiff. The statement must be one that was false and made publicly. It must also be a statement that damaged the plaintiff.¹ Making a defamatory statement to even one person is sufficient to prove publication.²

A statement is considered defamatory if it tends to injure the plaintiff’s reputation in the community and exposes him or her to hatred, ridicule, or contempt.³ You must determine if the statements alleged in this case, and the circumstances under which they were made, discredit the plaintiff in the minds of any considerable, respectable class of the community.⁴

Our judicial system works to balance the right of free speech with the right to recover damages for defamation. For that reason, the plaintiff must also prove “fault” on the part of the defendant by a preponderance of the evidence.

If a private plaintiff: Private individuals, such as the plaintiff, are afforded greater protection than public figures under the First Amendment. In Massachusetts, a plaintiff who is a private figure need only prove that the defendant acted with negligence in making the defamatory statement.\(^5\)

If the plaintiff might be a public official or public figure: The burden of proof for proving fault varies depending on the status of the plaintiff. If you find that the plaintiff is a public official or a public figure, the plaintiff must prove that the defendant acted with “actual malice.” A statement was published with “actual malice” if it was published with knowledge that it was false or with “reckless disregard” as to whether it was false.\(^6\)

Choose the applicable instruction:

1. The status of “public official” generally applies to government employees who have substantial responsibility or control over the conduct of government affairs;\(^7\) or

2. the status of “public figure” applies to individuals who have assumed roles of prominence in the affairs of society.\(^8\) A corporation may be a public figure under certain circumstances.\(^9\)


Defenses

You may find that the defendant has one or more defenses to the claim of defamation [or commercial disparagement]. Truth is an absolute defense to a defamation [or commercial disparagement] action. If you find by a preponderance of the evidence that the statement is true, you must find for the defendant.

There are also other common defenses, including

1. the statement is an opinion,
2. the plaintiff is “libel-proof,” or
3. the defendant has a privilege.

An opinion is constitutionally protected speech, and therefore not actionable as defamation.\(^\text{10}\) A defendant, however, cannot escape potential liability just by using the word “opinion” while asserting a factual untruth. For example, a statement couched as an opinion—"in my opinion, John Jones is a liar"—may be defamatory if it implies false and defamatory facts.\(^\text{11}\) The relevant question for you to determine is not whether the statement is couched as an opinion, but rather whether the statement presents or implies the existence of facts that are capable of being proven true or false.\(^\text{12}\)

In making this determination, you must consider whether the context in which the statement is published negates the im-

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\(^{12}\) Note that whether a statement is a fact or an opinion is a question of law to be decided by the court. However, if the statement could be understood by the average reader to be either, the issue of whether it is a fact or an opinion must be decided by the jury. *Myers v. Boston Magazine Co.*, 380 Mass. 336, 339–40 (1980).
pression that it is factual. You should consider all the words used, not merely a particular phrase. You should also consider any cautionary terms used by the defendant, the publication in which the statement was published, and the intended readers.\(^\text{13}\)

If the statement presents or implies actual facts, it is actionable. On the other hand, if it is plain from the context of the statement that the defendant is merely expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, or that the statement is merely hyperbole or fiery rhetoric, the statement is not actionable.\(^\text{14}\)

Even where the challenged statement is found to be false and not an opinion, a plaintiff may be deemed “libel-proof” and therefore unable to prevail. If the plaintiff’s reputation is already so tarnished by prior acts, it is possible that he or she cannot be defamed or disparaged. For example, in a criminal context, a mass murderer cannot be defamed by being falsely described as a tax evader.

Under certain circumstances, a privilege may apply. In such cases, the defendant is generally permitted to make statements that would otherwise be defamatory so long as the defendant reasonably believed the statement was true and acted in good faith. [Describe any privileges that are applicable to the specific facts of the case.]


However, the defendant is not entitled to the benefit of the privilege if the plaintiff proves that the defendant abused the privilege or made the statement with malicious intent.

If you find that the defendant had a privilege in making [his or her] statement and did not abuse this privilege, you must find for the defendant.

The defendant has the burden of proof of establishing, by a preponderance of the evidence, any claimed defenses and privileges. If a qualified privilege is established by the defendant, the plaintiff must in turn prove, by a preponderance of the evidence, that the privilege was abused.

**Damages**

A plaintiff is entitled to damages if he or she prevails at trial in a defamation case. Actual damages may include the damage to the value of the plaintiff’s reputation as determined by you and costs, such as medical expenses, related to remedying emotional injuries such as mental anguish, embarrassment and humiliation.\(^15\)

In cases involving slander, which is spoken defamation, the plaintiff must prove “special damages,” rather than mere damage to reputation, to recover a monetary award. Special damages require economic loss.\(^16\)

In a case of defamation, the plaintiff’s recovery is limited to compensatory damages for actual injury resulting from the wrong done by the defendant. The plaintiff has the burden of

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proving the actual harm inflicted by the defamatory state-
ment, which includes impairment of reputation and standing
in the community, personal humiliation, and mental anguish
and suffering. The plaintiff may also recover specific eco-
nomic harm caused by the defamation. However, punitive
damages are prohibited. That means you must not award
damages based on an intent to punish defendant’s conduct
or attempt to deter future conduct.

COMMERCIAL DISPARAGEMENT

Elements of Claim

The plaintiff has charged the defendant with commercial dis-
paragement. Commercial disparagement consists of a false
statement made with the intent to call into question the qual-
ity of a competitor’s goods or services in order to inflict eco-
nomic harm on that competitor.

[The elements the plaintiff must prove in a commercial dis-
paragement action are the same as the elements of defama-
tion.] The plaintiff must also prove, by a preponderance of
the evidence, “special damages.” Special damages require
economic loss. Thus, the plaintiff must establish that the dis-
paraging statement caused economic loss before being enti-
tled to recover damages for commercial disparagement.

Defenses

[Same defenses as for defamation.]

17 G.L. c. 231, § 93.
1985), aff’d, 814 F.2d 775 (1st Cir. 1987).
Damages

The plaintiff is entitled to actual or compensatory damages if you find that the defendant made a disparaging statement that caused economic loss. Actual damages may include the value of lost business opportunities.

FALSE ADVERTISING

Elements of Claim

The plaintiff has charged the defendant with false advertising under Lanham Act § 43(a). In order to prevail on a false advertising claim under the Lanham Act, the plaintiff must prove, by a preponderance of the evidence:

1. the defendant made a false or misleading statement in a commercial advertisement about its own or the plaintiff’s product;
2. the statement actually deceives or has the tendency to deceive a substantial segment of its audience;
3. the deception is material (i.e., it is likely to influence the purchasing decision);
4. the defendant placed the statement into interstate commerce; and
5. the plaintiff has been or is likely to be injured as a result of the statement, either by direct diversion of sales to defendant or by a lessening of goodwill associated with the plaintiff’s products.

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22 Clorox Co. P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 33 n.6 (1st Cir. 2000).
Defenses

A statement in an advertisement cannot be false or misleading in violation of the Lanham Act if you find that it expresses an opinion rather than a fact. Additionally, a statement will not constitute false advertising if you find that it is mere “puffery.” Puffery is an exaggerated statement contained in an advertisement, often made in a blustering or boasting manner, on which no reasonable buyer would rely. You should keep in mind, however, that a claim of product superiority that you determine to be specific and measurable is not puffery. On the other hand, exaggerated negative comments made about the products of a competitor may also be considered puffery, but only if you find that no reasonable consumer would rely on the exaggerated claims.

Damages

In order to recover damages, the plaintiff must show that customers were actually deceived by the false advertising and that the plaintiff was harmed as a result. In that event, the plaintiff is entitled to compensation for the harm that it suffered.

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### EXHIBIT 9D—Burden of Proof in Defamation Cases

<table>
<thead>
<tr>
<th>STATUS OF PLAINTIFF</th>
<th>BURDEN OF PROOF</th>
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<tbody>
<tr>
<td>Private figure</td>
<td>Negligence</td>
</tr>
<tr>
<td>Pervasive public figure (such as a nationally known celebrity)</td>
<td>Clear and convincing evidence of actual malice for almost all statements concerning the plaintiff, including statements relating to his or her personal life (such as comments on sex life or drug use)</td>
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<td>A negligence standard may apply in very limited circumstances, such as when the defendant falsely fictionalizes the plaintiff’s life and presents it as the truth</td>
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<tr>
<td>Limited purpose public figure (one who has thrust himself or herself into the forefront of a public controversy to influence the outcome of the issues involved)</td>
<td>Clear and convincing evidence of actual malice for statements concerning the plaintiff’s public activities</td>
</tr>
<tr>
<td></td>
<td>For other defamatory statements, negligence</td>
</tr>
<tr>
<td>Public official (note that not all government employees are considered “public officials” for purposes of defamation law)</td>
<td>Clear and convincing evidence of actual malice for statements relating to the plaintiff’s status as a public official, including the plaintiff’s fitness for public office</td>
</tr>
<tr>
<td></td>
<td>For other defamatory statements, negligence</td>
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EXHIBIT 9E—Checklist of Risk Management Procedures

❑ Develop and implement a training program to train management and high-risk departments to identify and prevent the disclosure of potentially defamatory statements.

❑ Assign one person to review all public communications that contain statements about competitors.

❑ Limit the number of people who are authorized as spokespeople for the client. Make sure they are all well trained.

❑ Send questionable material to outside counsel for review before release.

❑ Include a corporate communications policy in the employee handbook.

❑ Develop a policy regarding communications on the company’s web site, particularly if employees, customers, or the public are able to post messages on the web site. (The policy should include requirements for posting content and a notice that the company does not review content posted on the site by third parties and reserves the right to remove any content for any reason at its sole discretion. The policy should also disclaim all liability for posting.)

❑ Maintain corroborating information for statements made about third parties or competitors that may result in legal action.

❑ If an action for defamation, commercial disparagement, or false advertising is filed, consider publishing a retraction of the statement at issue.

❑ Require all employees to sign a nondisclosure agreement prohibiting the improper disclosure of confidential information. A nondisclosure agreement safeguards a client’s proprietary information generally. In addition, a nondisclosure agreement that expressly prohibits employees from improperly disclosing personnel and other sensitive information could reduce the risk of a defamation suit.

❑ Obtain appropriate insurance coverage for business communications and advertising liability. Report any claims to the insurer promptly.
EXHIBIT 9F—Defamation Checklist

❑ Does the statement imply or contain any fact concerning a living individual or an existing company that is substantially false? Will the statement be “published” to one or more people, either orally or in writing?

❑ Would a reasonable member of the community form a lower opinion of the individual or company as a direct result of the statement? Will the statement cause the public to avoid the individual or company? If an individual, will the statement injure his or her professional status?

❑ Does the statement accuse an individual or company of dishonesty or fraud, mental disease, crime or immorality, or potential for bad behavior? Or does a statement delete important facts about an individual or company in such a way as to injure them?

❑ If the statement is true but potentially damaging, what is the client’s reason for publishing the statement?

❑ Does the statement concern a public official or figure? Is it about a matter of public concern?

❑ Is the statement an opinion? One way to tell the difference between an opinion and a fact is that an opinion cannot be proven false.

❑ Does the statement accurately and fairly portray the facts of the matter? Are corroborating sources available?
EXHIBIT 9G—Commercial Disparagement Checklist

❑ In addition to the questions set forth in Exhibit 9F, Defamation Checklist, could the publication of a statement regarding a competitor’s product or service interfere with a contractual relationship with an existing customer?

❑ Could the statement directly cause financial damages to a competitor?

❑ Does the statement impute any of the following to a rival company: fraud, deceit, dishonesty, or reprehensible conduct?
EXHIBIT 9H—False Advertising Checklist

❑ Is the statement literally false?

❑ If the statement is literally true, is it nonetheless likely to mislead and confuse a substantial number of consumers? If so, is there evidence that consumers were actually misled or confused? What would a consumer survey be likely to show?

❑ Is the statement material, in that it is likely to influence purchasing decisions?

❑ Will the statement be placed in interstate commerce?

❑ Will the statement be sufficiently disseminated to the purchasing public for the purpose of influencing purchasing decisions (as opposed to, for example, a statement in a product insert that would only be discovered after the purchase was complete)?

❑ Could a party in commercial competition with the client be injured by the statement?

❑ Is the statement “puffery” (i.e., an exaggeration or boast about the client’s products upon which no reasonable consumer would rely, rather than a measurable claim of product superiority)?

❑ Is the statement “reverse puffery” (i.e., an exaggeration of the qualities of the products of the client’s competitor, which is so unrealistic or playful that no reasonable consumer would take it seriously)?

❑ Is the statement one of opinion rather than fact?