

# Defamation: A Sales Force Liability

By Steven Mitchell Sack

Sales representatives frequently compare the qualities and characteristics of their product or service with a competitor's during the sales presentation. Such comparisons are often inaccurate or misleading, and sometimes tend to slander a company's business reputation and distort or disparage its products.

Such conduct is illegal. Hundreds of companies and manufacturers' representatives have been sued by competitors for making slanderous statements while selling. Economic injuries, including proof of lost contracts, employment and sales have been redressed by legal actions for product disparagement, unfair competition and trade defamation. In addition to private lawsuits, the Federal Trade Commission (FTC) is empowered to impose a cease-and-desist order or injunction on companies that engage in unfair or deceptive practices through their salespeople.

That is not all. When a statement disparages the quality of a person's product and at the same time *implies* that the person is dishonest, fraudulent or incompetent (thus affecting the individual's personal reputation), a private lawsuit for personal defamation may also be brought.

What constitutes business defamation? The following forms of wrongs fall under the larger heading of business defamation:

**1. Business slander.** This arises when an unfair and untrue oral statement is made about a competitor. The statement becomes actionable when it is communicated to a third party and can be interpreted as damaging the competitor's business reputation or personal reputation of an individual in that business.

**2. Business libel.** This may be incurred when an unfair and untrue

statement is made about a competitor in writing. The statement becomes actionable when it is communicated to a third party and can be interpreted as damaging the competitor's business reputation or personal reputation of an individual in that business. Such comments can be contained in a letter, sales literature, advertisement or company brochure.

**3. Product disparagement.** This occurs when false or deceptive comparisons or distorted claims are made concerning a competitor's product, services or property.

**4. Unfair competition.** Injury to a business may also result from statements made by a salesperson that reflect upon *his own* product or service rather than a competitor's. This frequently arises from the false advertising of one's product, misrepresenting the qualities or characteristics of the product, or engaging in a related unfair or deceptive trade practice.

False advertising, misrepresentation, and unfair and deceptive trade practices are extensively regulated under the Federal Trade Commission Act. They arise in a variety of forms, including unlawful statements contained in printed advertisements, radio or television commercials, direct-mail pieces, brochures, catalogs, price lists and "sales talk."

This last item, statements made by salespeople during or after the sales representation, can be especially troublesome. The following checklist illustrates the kinds of statements that are personally defamatory:

- Untrue remarks saying that a competitor engages in illegal or unfair business practices.
- Untrue remarks that a competitor fails to live up to his contractual obligations and responsibilities. For example, saying the competitor ships defective goods or is always being sued.
- Untrue statements regarding a competitor's financial condition. Examples: The competitor has discontinued its operations, is financially unstable, or is going bankrupt.
- Untrue statements that a principal

in the competitor's business is incompetent, of poor moral character, unreliable or dishonest.

Both sales managers and salespeople should be instructed to avoid saying these kinds of things about competitors at all times. The reason is that the law treats these statements as defamatory *per se*. This means that a company or defamed individual does not have to prove actual damages to successfully recover a verdict. Money can be recovered against both your company and your independent reps merely if the statement is untrue. You often hear unconfirmed trade talk, which is often inaccurate, especially with respect to a competitor's financial condition — just avoid making these types of comments.

The following recommendations may prove valuable in protecting your company in this area:

**1. Review your correspondence and promotional material before distribution.** This will reduce the chance that defamatory material is inadvertently distributed by your sales force. Companies often commit trade libel through their sales force by disseminating false information that their salespeople then pass along, intentionally or not, to their customers.

In one court case, a company was sued for \$1 million after it bought a competitor's product, analyzed it, and distributed a printed pamphlet through its sales force that was unfairly critical of the competing product. Another company was ordered to pay \$105,000 as a result of a letter that had been circulated to potential customers in the industry. At the trial, a salesperson for the plaintiff, a competing company that brought the suit, testified that when he called on 41 customers from whom he had taken orders the previous year, more than half of them mentioned receiving the letter, and many refused to renew their orders.

In still another case, a company offered a free roll of film with each roll developed. The defendant (the company being sued) had distributed sales literature asserting that such practices were

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inflationary and made possible by the use of inferior developing practices.

The court found that the assertions were *personally defamatory* because they implied that the competitor's president was deceptive and dishonest in his business. The court further found that the statements disparaged the quality of the competitor's product and imposed a verdict for \$394,400.

Cases such as these demonstrate that it is a good idea for the sales manager to review all sales material before distribution to the sales force. If he has any questions regarding its accuracy, he should speak with the appropriate department (advertising, legal, etc.) immediately.

2. Instruct the sales staff to **avoid repeating unconfirmed trade gossip**, particularly about the financial condition of a competitor.

3. Tell salespeople to **avoid statements that may be interpreted as impairing the reputation of a business or individual**.

4. Ensure that the staff **avoids making unfair or inaccurate comparisons about a competitor's product**. The law generally states that the mere "puffing" (sales talk), or the offering of an opinion about your product or service which claims superiority over a competitor's product is not a disparagement as long as the comparison attempts primarily to enhance the quality of your product without being unfairly critical of the competitor's. But when you make a statement or pass along untrue or misleading information which tends to influence a person to not buy, that is unlawful.

Thus, salespeople should avoid sending customers written comparisons of competing products, particularly when asked, unless they have conferred with management and are sure that the comparisons are totally accurate. A good way to make sure would be to include scientific facts or statistical evidence that has been documented or prepared by an independent research firm proving, for example, that your product is safer, more cost-efficient, etc. Using scientific evidence to support factual claims will reduce claims of product disparagement and unfair competition.

Honesty is always the safest approach in any sales discussion — salespeople should feel free to say anything that is true in order to be better able to sell their company's products or services. But they must remember that every word can have legal significance.

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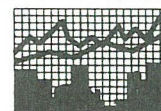
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