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Legally Speaking -- Trade Libel

by **Glen Secor** (Yankee Book Peddler, Inc.
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In a tough marketplace that becomes more and more competitive by the day, vendors scratch and claw for any possible advantage. Libraries benefit from much of this competition, as vendors seek to provide better service, better pricing and more innovative products. Unfortunately, some vendors, like most politicians, compete not by building themselves up, but rather by tearing the other fellow down. For the most part, these tactics can be characterized as hard-nosed, but clean. Others, though, flirt with ethical and legal boundaries which simply should not be crossed.

Ours is a relatively professional and collegial industry, but we are not without our rumor-mongers. Old-fashioned gossip can be hurtful enough, but rumor and innuendo, often with no foundation at all in the truth, simply should not be used as a business tool. This practice is not only unethical and unprofessional, but may also constitute an unfair trade practice or the tort of trade libel (a/k/a disparagement).

I speak not about product comparisons or other sales claims, even when such claims are grounded in opinion rather than fact. There is nothing legally wrong with the statements "Our service is better than theirs" or "We are a better company than they are," even if these assertions cannot be empirically proven. These are sales claims, to be accepted or rejected by the customer. As such, they differ dramatically from statements which, for example, call into question the financial health of a competing company, or insinuate that a competitor has engaged in unethical or illegal behavior. Such statements are designed not to promote the speaker's company or to encourage comparison by the customer, but instead are intended

solely to injure a competitor.

With all of the military analogies that are utilized in business, one might be tempted to apply the old maxim "All's fair in love and war" to these circumstances. But just as there are rules of war designed to protect civilians and combatants, so are there rules of business designed to protect consumers and companies. These rules, which are found in tort law and statutes dealing with unfair trade practices, seek to ensure fair and open competition.

The following definition of disparagement is instructive both as to the cause of action itself and as to why such conduct should be prohibited:

"[D]isparagement. . . may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, or even to some element of his personal affairs, *of a kind calculated to prevent others from dealing with him, or otherwise to interfere with his relations with others to his disadvantage.*" (emphasis added) W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts*, 5th ed., (St. Paul, West, 1984) 967.

Thus, individuals and companies should compete on their own merits, not by driving a wedge between the customer and the competitor. Legitimate distinctions can be drawn between one's products and those of another, but one cannot compete by simply casting aspersions on the competitor.

Most vendors, if not all, have been the subject of negative innuendo at one time or another, and I condemn the practice regardless

of the victim. We all work hard to establish our business reputations, and for the most part each company has the reputation it deserves. It is task enough these days to compete on price and service, without having to respond to unethical and perhaps illegal attacks on our reputations. And where many library vendors are small-to mid-sized, privately-owned companies, responding to rumors about financial instability can be quite difficult.

Many libraries place large deposits with their vendors without having much financial information on the vendors (this will be the topic of a future column), but will react with concern when one vendor's financial health is called into question by a competitor. I think that libraries should do more to ascertain the financial status of their vendors as a regular practice, particularly in deposit account and approval plan situations. But I also think that they should discount rumors started or passed along by competing vendors. Vendors who cast aspersions on the financial health or other critical elements of the reputations of their competitors should be scorned. Indeed, librarians should regard such vendors with heightened scrutiny, for such desperate actions may stem from desperate circumstances. If ever a business strategy deserved to backfire, it is one that relies on rumor and innuendo to disparage the competition.

Ours is not a litigious industry, especially compared to other industries in which participants will sue each other at the drop of a hat. We should not be surprised, though, if one day the subject of one of these rumors is not content to simply do the damage control, but seeks out the source and pursues a legal remedy. ☞