

The Clock is Ticking:
Navigating the Texas Defamation Mitigation Act
By Nick Brown & Ethan Gibson

An oft-overlooked case killer lurks in the recently passed Texas Defamation Mitigation Act (TDMA). Passed in 2013, the legislature hoped the TDMA would encourage victims of defamation to seek out-of-court redress before rushing to file a lawsuit. And though overshadowed by the sweeping procedural changes ushered in from the Texas Citizens Participation Act,¹ the TDMA imposes a distinct set of rules and deadlines in defamation cases. Failure to comply with the TDMA's strict deadlines can destroy a plaintiff's damages model even in the most egregious defamation cases.

Broadly speaking, the TDMA requires plaintiffs to make a "timely and sufficient request for correction, clarification, or retraction from the defendant" and imposes penalties for failing to do so.² To be timely, the request must be made before the one-year statute of limitations period expires. To be sufficient, the request must comply with a variety of detailed statutory provisions. A defendant who does not receive this request is entitled to have the suit automatically abated for sixty days.³

But the TDMA contains a far more dangerous deadline than the one-year "timeliness" requirement. A ninety-day clock starts ticking the moment the plaintiff obtains "knowledge of the publication." The plaintiff must send a request for correction, clarification, or retraction within that ninety-day window. If the clock runs out and no request has been sent, the TDMA totally bars the recovery of exemplary damages.

Loss of exemplary damages can serve as a death knell in many defamation cases. Successful pursuit of a defamation claim necessitates a significant investment of time to overcome the numerous legal hurdles and opportunities for dismissal.⁴ Lost profits (and other forms of so-called special damages) and general reputational damages are sometimes difficult to prove in significant amounts.⁵ Without the threat of exemplary damages, many plaintiffs may find it economically impractical to pursue otherwise strong claims for defamation.

As early as the initial consultation, each side must lock down whether the ninety-day deadline has passed. The plaintiff should send the TDMA request as soon as possible to ensure compliance with the statute. The defendant should check if the plaintiff missed the deadline. Pointing out that the deadline has passed could help value and settle the case.

The ninety-day clock starts ticking on the day the client obtains "knowledge of the publication." Establishing this date can be more difficult than it sounds. For example, what if the client knew the defendant sent letters to third parties, but did not know those letters were defamatory until six months later? Must the plaintiff have knowledge just of the communication or of the actual defamatory statement?

¹ Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.*

² Tex. Civ. Prac. & Rem. Code § 73.055.

³ Tex. Civ. Prac. & Rem. Code § 73.062.

⁴ The Texas Citizens Participation Act, for example, gives defendants the opportunity to obtain early dismissal and an interlocutory appeal.

⁵ See, e.g., *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142 (Tex. 2014).

In the only opinion to have interpreted this section of the TDMA, Fulkerson Lotz's own Ethan Gibson successfully argued in the Western District of Texas that the 90-day clock starts running when the plaintiff obtains knowledge of the specific words that were used.⁶ In that case, the defendant sent allegedly defamatory letters to the plaintiff's business partners. The plaintiff soon discovered the letters had been sent when one of those partners suspended its relationship with the plaintiff, but the plaintiff did not know the contents of the letters until months later. The court found that the plaintiff only received "knowledge of the publication" at the time it learned the specific contents of the letters. Fulkerson Lotz sent a retraction request on behalf of the client within 90 days of that time, and therefore preserved the claims for exemplary damages.

This is the first known case to interpret any part of the TDMA and other questions certainly remain. But one thing is certain: the 90-day deadline can fundamentally alter the value of a defamation case. Whether bringing a defamation claim or defending against one, the clock will be ticking. Both sides must know exactly when time runs out.

⁶ *Bancpass, Inc. v. Highway Toll Admin., LLC*, No. A-14-CA-1062-SS, 2016 WL 4491736, at *8 (W.D. Tex. Aug. 25, 2016).