



WRIGHT

SHAGLEY

LOWERY, P.C.

Attorneys at Law

500 Ohio Street • P.O. Box 9849 • Terre Haute, Indiana 47807-3517

812-232-3388 • Fax: 812-232-8817



# Legal Advisory

IDEAS AND STRATEGIES FOR YOU AND YOUR BUSINESS / FOURTH QUARTER 2014

## LOOKING INTO ONLINE DEFAMATION

**T**he Internet affects many aspects of everyday life. It may also have legal repercussions. **Prime example:** A potentially defamatory statement made online or through a social media site—such as Twitter, Facebook or LinkedIn—could result in a legal action. The opportunities to intentionally or accidentally defame someone are virtually endless.

**Basic premise:** Defamation is the wrongful hurting of one's reputation. A person who is being defamed can sue the person defaming him or her or, in some cases, an employer or other source of the defamation. There are two main types of defamation: (1) libel and (2) slander. Libel is written defamation, and slander is verbal. Due to its nature, an action based on slander is more difficult to pursue and prove.

This is a slippery slope because there is often a fine line between making innocent comments that may be misconstrued and actual defamation.

Although the exact law varies from state to state, the wronged party must show that the following elements exist for defamation to occur:

• A statement has been published. This does not necessarily mean "published" in the sense of a book or magazine. It means that a third party heard or saw the statement or depiction.

• The statement is false. Truth is a defense (but truthful demeaning remarks can still get you in hot water). Most opinions do not count as defamation because they cannot be proven to be false.

• The statement causes injury. Someone suing for defamation must demonstrate how his or her reputation was hurt by the false statement (e.g., lost wages). A person with an established bad reputation is not likely to recover much, if anything.

• The statement is not privileged. In some cases, a statement may not



*inside*

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## KEY LAW PINPOINTS FOREIGN ASSETS

**T**he U.S. government is ramping up efforts to improve compliance under the Foreign Account Tax Compliance Act of 2010 (FATCA). Pursuant to this goal, it has reached inter-governmental agreements (IGAs) with dozens of foreign countries, with more expected to follow.

**Background:** For years, U.S. taxpayers were able to hide assets in accounts of foreign entities and thereby evade taxes, often shielded by the privacy laws within “safe havens.” As a means to better enforce U.S. tax laws, FATCA was enacted. This law requires foreign financial institutions to report information about accounts held by U.S. taxpayers, even if they hold only non-U.S. assets, in addition to accounts held by foreign entities in which U.S. taxpayers have a substantial ownership interest.


If a foreign institution refuses to disclose the required information to the IRS, it may be assessed a 30% withholding tax on certain U.S. source payments, regardless of whether or not the recipient is a U.S. taxpayer. Specifically, there are three main requirements that apply to these institutions under FATCA:

- The foreign institution must obtain and verify information on the holder to identify U.S. accounts and meet procedures in identifying these accounts.
- The institution must report certain information on U.S. accounts on an annual basis, as well as comply with IRS requests for additional information.

- The institution must withhold 30% of the portion of any pass-through taxable U.S. source payment that is made to a noncomplying account holder or a non-participating institution.

In addition, certain individuals must file Form 8938 (Statement of Specified Foreign Financial Assets) with their annual tax return. This form is used to report ownership of specified foreign financial assets if the total value exceeds an applicable threshold amount. Failure to do so may result in a penalty of \$10,000. If the form isn't filed within 90 days of being notified by the IRS, an additional \$10,000 penalty for each 30-day period may be assessed, up to a maximum of \$50,000.

**New developments:** After final regulations on FATCA were issued in 2013, the U.S. government sought to increase compliance through the use of IGAs, initially setting a deadline of July 1, 2014. This deadline was extended and modified to include countries that have agreed in substance. This is so even if the IGA is not finalized until December 31, 2014.

If you have any questions regarding your personal situation, seek professional assistance. 


## LOOKING INTO ONLINE DEFAMATION

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be actionable even if it is false (e.g., testimony in a court proceeding).

It is easy to see how potential defamation may surface online. For example, if you blog that a local police officer is an ex-convict and that statement is false, the officer might sue you. Similarly, if someone accuses you of embezzlement in an online post, you might initiate a defamation suit against the accuser.

**Caution:** The law in this area is still evolving. To illustrate, in a new case in Oregon, a wedding guest gave a scathing online critique of the venue. When its business nose-dived, the venue's proprietors sued the wedding guest. Now the Oregon Court of Appeals, reversing a lower court's decision, has allowed the defamation case to proceed despite an Oregon law designed to safeguard speech in public forums.

Don't make any quick assumptions. Obtain expert legal assistance regarding online defamation from either a plaintiff's or defendant's perspective. 





### **When Employees Do Bad Things**

Suppose your employee causes an accident due to negligence. Is your business liable? It depends.

Generally, an employer is legally responsible for the actions of its employees, but only if the employee is acting within the scope of employment. Thus, the business may be liable if

the employee was doing his or her job, but this can be open to interpretation. Seek guidance for your situation.

## TEN TOP CASES FROM THE TOP COURT

As it wrapped up its recent term on June 30, 2014, the U.S. Supreme Court was busy. The nation's top court handed down several new decisions that caught the public's attention. Here's a summary of ten key cases.

**1. *Burwell v. Hobby Lobby*:** In a ruling involving the Patient Protection and Affordable Care Act (PPACA), the court said that requiring family-owned corporations to pay for coverage of contraception violated laws protecting religious freedom. The outcome could result in other challenges to the PPACA.

**2. *Harris v. Quinn*:** The Court ruled that certain government employees do not have to pay any fees to the unions representing them. The home-care aides who typically work for an ill or disabled person and are paid by Medicaid should be classified as partial public employees.

**3. *McCullen v. Coakley*:** A Massachusetts law barring protests, counseling and speeches near abortion clinics was unanimously struck down by the court. The 2007 law, which created 35-foot buffer zones around entrances to abortion clinics, was challenged on First Amendment grounds.

**4. *NLRB v. Canning*:** In a case with constitutional ramifications, the Court said President Obama overstepped his bounds by appointing officials to the National Labor Relations Board (NLRB) during short breaks in the Senate session. But the Court did not eliminate presidential recess appointment powers.

**5. *Riley v. California*:** A sweeping decision by the Supreme Court requires police to obtain warrants to search cellphones of arrested people. This ruling protecting privacy rights is expected to apply to other electronic devices, such as laptops and tablets, and could affect searches of homes and businesses.


**6. *Hall v. Florida*:** The Court ruled that Florida's IQ score cutoff was too rigid to decide when mentally disabled individuals must be spared the death penalty. This decision could affect eight other states with comparable provisions.

**7. *Utility Air v. EPA*:** This case addressed the authority of the Environmental Protection Agency (EPA) to regulate greenhouse gas emissions from power plants and other sources under the Clean Air Act. Essentially, the Court found the EPA went too far in interpreting the Act in a way that could eventually require small businesses to acquire permits based solely on their greenhouse gas emissions.

**8. *Town of Greece v. Gallo-way*:** In a case involving religion in government, the Court said a town board could begin its sessions with sectarian prayers. The town in upstate New York did not violate the Constitution by starting with a ceremonial prayer from a "chaplain of the month."

**9. *Schuette v. By Any Means Necessary*:** The Court upheld a Michigan constitutional amendment banning affirmative action in admissions to the state's public universities. In addition to affecting seven other states, the ruling may encourage other states to enact similar measures.

**10. *McCutcheon v. Federal Election Commission*:** The Court struck down a long-standing cap on the total amount any individual can contribute to federal candidates in a two-year election cycle. This could have a major impact on political campaigns.

This is just an overview of the last Supreme Court term. We will keep you up to date on other significant rulings. 



## WOULD YOU BENEFIT FROM A PRENUP?

It was once thought that prenuptial agreements (“prenups”) were reserved for the rich and famous such as Donald Trump and Beyoncé. However, prenups are increasingly being used by average people from all walks of life. In fact, a prenup—sometimes called a premarital or antenuptial agreement—may be especially beneficial for someone who is getting married for the second or third time.

**Background:** Basically, a prenuptial agreement is a legally binding contract between an intended bride and groom. The contract lists each person’s personal and real property and outlines a plan for distribution of that property in the event that the marriage doesn’t work out.


It may seem unromantic or miserly for a fiancé, fiancée or engaged couple to take steps that will provide for an orderly divorce. But it is a fact that more than half of all marriages entered into today end in divorce. A pre-

nuptial agreement actually may lessen pain and suffering in the long haul. It can also offer financial protection to children of a prior marriage. For these reasons, prenups no longer have the same stigma attached to them as they did in the past.

Usually, a prenuptial agreement can be prepared in about the same time it takes to prepare a will. As with a will, the agreement ensures that your property will be distributed in the manner you desire. In effect, this is a form of “marriage insurance.”

The foundation of a successful prenuptial agreement is full disclosure of all assets. Both parties must be meticulous in listing everything of value that they own or in which they have an interest. Once that is done, the parties must agree on a fair distribution of these items after divorce. In many cases, particularly second and third marriages, the prevailing philosophy is “what’s mine is mine and what’s yours is yours.”

However, where the respective wealth of the parties is substantially unequal, some compromise may be necessary. **Reason:** In some states, the assets of both parties are put into the same “pot” upon divorce. The couple then splits the assets equally. Thus, one spouse could walk away with substantially more than he or she had when the marriage was entered into.

**Caution:** This is not a do-it-yourself proposition. Consult an experienced legal adviser to create a carefully drafted document that reflects your personal needs and desires. 

## BRIEFS

◆◆**Follow-Up Examination**—A worker in a district attorney’s (DA) office experienced mood swings and bouts of depression. She took a leave under the Family and Medical Leave Act (FMLA) and was reinstated. But then the DA’s office ordered her to undergo a fitness-for-duty examination following her return. The worker refused and said the medical examination violated her FMLA rights, but a California Court of Appeals disagreed.

◆◆**Listening to Reason**—In a new case in New York, a longtime employee with a new boss complained about being held to an unreasonably high standard. But the company concluded the supervisor was being reasonable. After the employee was disciplined, she claimed the supervisor had created a hostile work environment. But she did not produce any concrete examples of discrimination, so the case against the company was dismissed.

◆◆**Virtual Reality**—Although using Bitcoin and other virtual currency may seem futuristic, it is gradually becoming more prevalent both online and at brick-and-mortar outlets. Now the IRS says that Bitcoin and similar currencies constitute property for U.S. tax purposes. This could cause complications for individuals and businesses that must account for the tax consequences. Stay tuned for further developments.

◆◆**Year-End Review**—The end of the year is a good time to review your estate plan. Here are some questions you might ask: Have you finalized the beneficiaries of all your assets? Who will handle your financial affairs if you are ever incapacitated? And who will make medical decisions if you are unable to make them for yourself? Tie up any loose ends before the New Year.