

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1628

SPONSOR: Senator Bronson

SUBJECT: Civil Actions for Libel

DATE: April 24, 2001                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	Favorable/CS
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This bill creates the “Media Accuracy and Fairness Act” to revise common-law and statutory provisions relating to causes of action where there is an element of libel or slander as follows:

- Allows an action for defamation *only* if (1) the person makes a timely and adequate request for correction or clarification within the statute of limitations period for defamation actions, or (2) if the defendant has made a correction or clarification.
- Applies the act to all manner of publications, including writings, broadcast, oral communications, electronic transmissions, or any form of transmitting information.
- Applies equally to actions involving public figures or officials and private individuals.
- Limits damages to provable economic loss and reasonable compensation for injury to reputation if a timely and sufficient correction or clarification is made.
- Provides exception for cases involving libel or slander made with malice, in bad faith, or with gross negligence.
- Sets forth what constitutes a timely and sufficient correction or clarification.
- Provides an expedited time period for making a correction or clarification when a local, state, or federal public office candidate is involved.
- Provides a method for a defendant to challenge a request for correction or clarification.
- Prohibits the admission into evidence of a request for correction or clarification, the contents of the request, and its acceptance or refusal.
- Prohibits the admission into evidence of a correction or clarification and the contents of such except in mitigation of damages.

This bill creates s. 770.011, F.S., and repeals ss. 770.01 and 770.02, F.S.

## II. Present Situation:

Defamation includes libel and slander. Libel applies to the written publication while slander applies to publication by oral publication (such as a verbal statement, or a radio or television broadcast). Under common law, an action for defamation may be instituted if the plaintiff alleges that: (1) the defendant published a false statement (2) about the plaintiff (3) to a third party and (4) that the falsity of the statement caused injury (personal reputation) to the plaintiff. *See Valencia v. Citibank International*, 728 So. 2d 330 (Fla. 3d DCA 1998).

The burden is on the plaintiff to establish the falsity of the publication. If the incident involves a private individual, the plaintiff must prove he or she was defamed and the publisher acted negligently. If the incident involves a public official or public figure, such as a candidate for public office, the plaintiff has a higher burden. The plaintiff must not only prove that he or she was defamed, but that the publisher of the defamation acted with actual malice toward him or her. That would involve showing that the publisher acted with knowledge of its falsity or with reckless disregard of its truth or falsity. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Unlike the standard of proof in most civil actions, i.e., the greater weight of the evidence, the plaintiff must prove it under a clear and convincing standard. Generally, the tort of defamation imports some malicious intent or degree of negligence by the publisher depending on whether the person is a private individual or public figure. *See Thomas v. Jacksonville Television*, 669 So.2d 800 (Fla. 1<sup>st</sup> DCA 1997).

Recovery in a defamation action is generally limited to actual or compensatory damages commensurate with the harm suffered. Compensatory damages may include: (1) pecuniary loss, direct or indirect, or special damages; (2) damages for mental suffering; and (3) damages for injury to reputation. If there is a showing of actual malice or ill will, punitive damages may be recoverable.

If the defamation suit involves a media defendant, statutory law requires the plaintiff to give 5-day presuit notice to the media defendant, specifying that the article or broadcast is defamatory. *See s. 770.01, F.S.* Failure to comply with this statute is grounds for dismissal of the action. *See Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376 (Fla. 4<sup>th</sup> DCA 1997).

Under s. 770.02, F.S., a plaintiff is limited to recovering only actual damages at trial if a correction, apology, or retraction under specified circumstances by the media defendant is made as follows:

- The article or broadcast has to have been published in good faith,
- Its falsity made in honest mistake of the facts,
- There were reasonable grounds for believing the broadcasted or published statements were true, and,
- A full and fair correction, apology or retraction was made in the same editions or corresponding issues of the publication or broadcast at a comparable time (depending on whether libel or slander occurred through a publication or broadcast) within the statutory period of time.

The apology, correction, or retraction must be made:

- Within 10 days after service of notice in the case of a broadcast or daily or weekly broadcast or publication,
- Within 20 days after service of notice in the case of bimonthly publication,
- Within 45 days after service of notice in the case of monthly publication,
- By the next publication issue in the case of a longer than a month publication period, but notice must be served at least 45 days prior to the publication.

In 1993, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Correction or Clarification of Defamation Act. According to the NCCUSL, only the state of North Dakota has adopted the Act to date although the Act has been endorsed by the American Bar Association

### III. Effect of Proposed Changes:

The bill creates the “Media Accuracy and Fairness Act<sup>1</sup>” to replace the common law and existing statutory provisions for actions of libel and slander. This act applies to all claims (regardless of how they are characterized) for defamation regardless of whether the person is a private individual or a public official. It also applies to all manner of publications, including writings, broadcasts, oral communications, electronic transmissions, and other forms of transmitting information which means that the Act applies to media and nonmedia defendants.

The apparent intent of the bill is to place the burden on the plaintiff to make a timely and formal request for a correction or clarification and to provide sufficient information to the defendant to determine whether the publication is false and defamatory. Otherwise, the plaintiff (public or private individual) is limited in his or her recovery of damages based on the assumption that the plaintiff is more interested in restoring his or her reputation than receiving monetary damages. In turn, the defendant’s (media or nonmedia) liability for damages is limited if he or she makes a timely correction or clarification in a time, place and manner likely to correct the record and restore the plaintiff’s reputation.

A person may maintain an action for defamation only if:

- (1) the person has made a timely and adequate request for correction or clarification or
- (2) the defendant has made a correction or clarification.

A person, for purposes of the bill, includes an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or other legal or commercial entity. It also provides that public figures (e.g., legislator) and public figures for limited purposes (e.g., daughter of a notorious murder defendant) must be afforded the same protections from defamation as private individuals.

A request for correction or clarification is *timely and adequate* if made within the period of limitation for commencement of an action for defamation. A plaintiff’s recovery of damages is limited to economic loss if the plaintiff fails to make a good-faith attempt to request a correction

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<sup>1</sup> It is modeled after the NCCUSL’s Uniform Correction or Clarification of Defamation Act.

or clarification within 90 days after knowledge of the publication.<sup>2</sup> A request for correction or clarification is *adequate* if it:

- is made in writing and reasonably identifies the person making the request;
- specifies with particularity the statement alleged to be false and defamatory and, to the extent known, the time and place of publication;
- alleges the defamatory meaning of the statement;
- specifies the circumstances giving rise to any defamatory meaning of the statement which arises from other than the express language of the publication; and
- states that the alleged defamatory meaning of the statement is false.

This represents a change from current law, which does not require a formal request for correction or clarification but does require a 5-day pre-suit notice. Under the bill, the statutory requirement for a formal request may be satisfied by the very act of serving the complaint to include the information discussed. If a timely and sufficient correction or clarification is made, a person is only entitled to recover provable economic loss as further mitigated by the correction or clarification.

A defendant who has been requested to make a correction or clarification may request that the plaintiff provide reasonably available information material to the determination of the falsity of the allegedly defamatory statement. The statute of limitations for such action is tolled up to 45 days after the receipt of such request or 25 days after receipt of specified information by the person to allow a person to respond to a request for correction or clarification.

If a timely and sufficient correction or clarification is not made and a plaintiff unreasonably fails to disclose requested information as to the falsity of the alleged defamatory statement, the plaintiff is only entitled to recover provable economic loss.

A correction or clarification is *timely and sufficient* if it is mutually agreed upon in writing by the parties. A correction or clarification is *timely* if it is published before or within 45 days after a request for such has been made or if published within 25 days after a response to a request to the plaintiff for information material to the falsity of the allegedly defamatory statement.

A request for correction or clarification about a candidate for a local, state, or federal office made for purposes of influencing the outcome of an election must be made within 96 hours of knowledge of the publication of the statement. The correction or clarification must be designed to reach substantially the same audience in a timely manner before the election day. The plaintiff is then limited to recovery of economic loss.

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<sup>2</sup> The bill defines “economic loss” as “special, pecuniary loss caused by a false and defamatory publication.”

A correction or clarification is *sufficient* if it is published with a prominence and in a manner and medium reasonably likely to reach substantially the same audience as the publication complained of, refers to the statement being corrected or clarified and:

- corrects the statement;
- in the case of defamatory meaning arising from other than the express language of the publication, disclaims an intent to communicate that meaning or to assert its truth; or
- in the case of a statement attributed to another person, identifies the person and disclaims an intent to assert the truth of the statement; and
- is communicated to the person who has made a request for correction or clarification.

“Publication in a medium . . .” is defined as a correction or clarification published in a later issue, edition, or broadcast of the original publication. If publication is not made by the expiration of the time for a timely correction or clarification, a correction or clarification may still be published accordingly if: 1) it is timely published in a reasonably prominent manner in another medium likely to reach an audience reasonably equivalent to that of the original publication, in the newspaper with the largest general circulation regionally (if the parties can not agree on another medium, 2) reasonable steps are taken to correct undistributed copies of the original publication, and 3) it is published in the next practicable issue, edition, or broadcast of the original publication or broadcast.

If a defendant intends to rely on a timely and sufficient correction or clarification, the defendant must serve notice of such intent with a copy of the correction or clarification, to the plaintiff within 60 days (or 2 months) after service of the complaint, or 10 days after the correction or clarification is made, whichever is later. The burden shifts to the plaintiff to challenge the timeliness and sufficiency of the correction or clarification within 20 days after the notice is served. If a defendant intends to challenge the adequacy or timeliness of a request for correction or clarification, the defendant must file a motion to declare the request inadequate or untimely within 60 days after service of the summons and complaint. The court must rule on the motion at the earliest appropriate time before trial.

If the period for making a timely correction or clarification expires, the defendant can still offer in writing, at any time before trial, to correct or clarify the alleged defamatory statement. The written offer must be made to the person allegedly defamed by the publication and must contain the publisher's offer to publish, at the person's request, a sufficient correction or clarification and pay the person's reasonable expenses of litigation, including attorney's fees, incurred before publication of the correction or clarification. The offer must be accompanied by a copy of the proposed correction or clarification and the plan for its publication.

If the plaintiff accepts the offer in writing and an action has not yet been instituted, the action is duly barred. If the suit has been filed, then suit must be dismissed with prejudice. If the plaintiff does not accept an offer, the plaintiff is only entitled to recover provable economic loss, reasonable compensation for injury to reputation and reasonable expenses of litigation, including attorney's fees, incurred before the offer, unless the person failed to make a good-faith attempt to request a correction or clarification or failed to disclose information material to the falsity of the statement. Cases involving publication made with malice, in bad faith or with gross negligence are excepted. The court shall determine the amount of reasonable expenses of

litigation, including attorney's fees. This is the only situation under the bill that expressly provides for recovery of attorney's fees and litigation expenses.

A timely and sufficient correction or clarification made by a person responsible for a publication constitutes a correction or clarification made by all persons responsible for that publication other than a republisher. The fact of a request for correction or clarification, the contents of the request and its acceptance or refusal are not admissible in evidence at trial. The fact that a correction or clarification was made and the contents of the correction or clarification are not admissible in evidence at trial except in mitigation of damages.

The bill also contains a provision requiring that the act be applied and construed uniformly to effectuate its purpose to the law uniform among the states that have adopted this act. To date, only one other state has adopted this act.

The bill contains a severability provision and takes effect upon becoming law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. Constitutional Issues:**

This bill raises constitutional concerns. For example, the bill places public figures on par with private individuals regarding the protections against defamation actions. Libel and slander are not absolutely immune from constitutional limitations. In recognition of free speech and freedom of the press as protected under the First and Fourteen Amendment of the *United States Constitution*, defamation actions involving public figures require an additional showing that the publisher acted with actual malice even presuming factual error or misrepresentation. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). That would involve showing that the publisher acted with knowledge of its falsity or with reckless disregard of its truth or falsity.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The bill imposes more requirements and restrictions governing retractions to expedite demands for clarification or correction in return for limited recovery of damages and to provide incentives to publishers of allegedly defamatory statements to correct or clarify such statements in order to restore the plaintiff's reputation.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

A statute in derogation of common law will be strictly construed by the courts. This bill may be interpreted to abrogate all common law actions for defamation with the creation of this statutory cause of action for defamation as the scope of the bill goes beyond attempting to establish a comprehensive framework for retractions. Since the bill does not set forth the elements per se of a cause of action for defamation, it may impact not only cases of defamation involving public and private individuals but any other case involving an element of defamation such as false light and right of privacy actions. The bill sets forth a new definition for "defamation" as "tending to harm reputation" which may be construed to abrogate the common law definition and elements of defamation. The bill essentially changes the basis for what constitutes publication as established by common law. It does not address the corresponding affirmative defenses which may or may not still be available to a defendant under common law. The bill is also silent as to the scope of recoverable damages although it does appear to limit recovery of non-economic damages and punitive damages if certain steps are or are not followed.

The CS/SB 1628 is misnomered as the Media Fairness and Accuracy Act. The bill is not limited to media defendants; it could apply to public and private defamation actions and nonmedia defendants as well. For example, the bill could potentially cover actions arising out of an employee evaluation containing an inaccurate and damaging statement made by a supervisor or out of a business memorandum intended for limited distribution that slanders a rival business which reaches an unintended audience.

**VIII. Amendments:**

None.