

Examination

'Bad Words'

**How CFEs can
Avoid Potential
Defamation
Pitfalls**

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Have you spoken or written these words lately in an investigation: fraud, criminal, theft, illegal, steal? The way you use these words can have potentially serious liability consequences. Here are guidelines governing the use of words describing criminal acts and ways to modify expressions to avoid defamation cases.

A Certified Fraud Examiner (we'll call him Ted) competently investigated an alleged theft by a former employee of a client (we'll call him Sam). However, during an informal conversation with representatives of the company (Ted's client), Ted told them that in his opinion, Sam was a "crook." Big mistake. Ted had found significant circumstantial evidence against Sam, but Sam was never prosecuted for the theft because of a lack of direct evidence. As is typical in this kind of case, Sam sued Ted's client for wrongful termination, among other things. However, when the complaint was filed, Ted was shocked to see that he was a *defendant* along with the employer. Sam had heard about Ted's offhand remark and sued him for defamation.

Ted's defense in court was frustrating, costly, and time-consuming, especially because it could have been avoided. Ted's insurance company funded his defense costs, but it ended up settling the case prior to trial. Unfortunately, Ted had to spend significant time tending to his defense - collecting documents, giving a deposition, and communicating with attorneys - when he could have been working. Ted's insurance premiums will likely increase, and the experience was extremely stressful.

In another actual examination, an internal auditor and CFE ("Bill") for a large company was investigating two employees for potential kickbacks. During an informal lunch, Bill allegedly told someone who knew the employees that they were "going to jail for what they had done." Unfortunately, a waitress, who knew one of the employees, heard the conversation and, of course, promptly told that employee.

The company fired both of the employees and prosecuted them. The court dismissed the criminal cases against them because of improper handling of evidence. The employees subsequently sued the company and Bill for several counts including defamation. The case is ongoing.

As CFEs, we're constantly presented with situations involving potential criminal conduct. Our work product provides a great deal of evidence against alleged criminals. So how do we investigate and examine potential criminal activity, interview possible suspects, report on alleged illegal acts, and provide opinions without subjecting ourselves to defamation claims?

DEFAMATION PRIMER

Black's Law Dictionary defines defamation as an "intentional, unprivileged, false communication, either published or publicly spoken, that injures another's reputation or good name."

By Jeff Windham, J.D., CFE

Defamation includes both libel (written defamation) and slander (spoken defamation). It's helpful to break down the elements of defamation:

1. A **false and defamatory statement** concerning another that a third party could reasonably understand to be naturally and probably injurious to the plaintiff's reputation.
2. The **unprivileged publication** of the statement to a third party (that is, someone other than the person defamed by the statement).
3. The statement must have **sufficient specificity** for the person to whom publication is made to know that it relates to the plaintiff.
4. The statement **damages** the plaintiff.

In the United States, defamation is a state-based, tort law cause of action – although it can also be criminal – so the elements of defamation might vary slightly from state to state.¹ (Defamation law and defenses vary in different states and countries. Thus, while the concepts discussed in this article generally are applicable in most areas, it's important to understand the specific laws in your state, country, or jurisdiction. Consult an attorney in your area if necessary.)

A *false and defamatory statement* about another is self-explanatory. Unprivileged publication requires that the statement be communicated, either verbally or in writing, to another person besides the person defamed. The statement must be specific enough to identify who it's defaming. For instance, the statement "teenagers are crooks" isn't specific enough to support a claim for defamation.

Finally, while damage to the plaintiff is required, damage is *presumed* when the communication is considered defamation *per se*. Defamation *per se* includes attacks on a person's professional character or standing and *allegations that a person has committed a crime of moral turpitude*. The latter causes the most concern for CFEs and investigators. The plaintiff is still typically required to show impairment of reputation or standing in the community, out-of-pocket expenses, and mental anguish and suffering. (In addition to these compensatory damages, a plaintiff might be able to recover punitive damages by showing that the statement was

made with malice – i.e., the intent to specifically injure the plaintiff, usually shown by previous ill will, hostility, threats, rivalry, and the like.)

ACFE CODE OF ETHICS

Another facet of the defamation quandary, especially for CFEs, is found in the ACFE Code of Ethics:

A Certified Fraud Examiner, in conducting examinations, will obtain evidence or other documentation to establish a reasonable basis for any opinion rendered. *No opinion shall be expressed regarding the guilt or innocence of any person or party.* (emphasis added)

The prohibition on guilt or innocence opinions applies throughout an engagement (and even thereafter) and not just at trial. Often, in the course of investigations and examinations, we get busy, preoccupied, or excited so that we could unintentionally violate this standard. For example, have you ever said to a colleague "Ms. Y is guilty" or "Mr. X was stealing"? Are these statements defamatory – probably. Do they violate the ACFE Code of Ethics – yes. As a practical matter, comments among colleagues rarely result in a defamation case even though they might be defamatory.

In many jurisdictions, statements among co-workers are usually conditionally privileged because they're made among persons who have a duty toward or interest in the subject matter, and the statements are made to others with similar duties or interests.

MINIMIZING RISK AND AVOIDING LIABILITY

By this point, you're probably wondering how to express your opinions or conclusions or communicate with your clients without being defamatory. Or perhaps, you're recalling past examinations and wondering if you inadvertently made defamatory remarks. There are some simple ways to make sure you don't accidentally invoke a potential defamation case or violate professional standards. The following considerations significantly minimize

CHECK THE WEB FOR FURTHER INFORMATION ON DEFAMATION

Defamation law in other countries (some of this information is available for a fee):

- Summary of numerous countries: www.worldlawdirect.com/forum/law-wiki/12227-defamation-slander-libel.html
- Canada: "Halsbury's Laws of Canada – Defamation" by Peter A. Downard, LexisNexis Canada, 2009 www.lexisnexis.ca/bookstore/bookinfo.php?pid=1848
- England: www.opsi.gov.uk/Acts/acts1996/ukpga_19960031_en_1
- India: www.indlawnews.com/display.aspx?3529

Be sure to check with counsel in your jurisdiction on defamation laws and issues.

Additional tips on avoiding defamation in the course of business:

- "Think Before You Speak: Avoid Becoming a Defendant in a Defamation Lawsuit," www.muchshelist.com/avoid-becoming-a-defendant-in-a-defamation-lawsuit-blq.htm
- "Avoiding Defamation in the Workplace, Giving References and Disciplining Employees While Avoiding Liability," <http://library.findlaw.com/1999/Sep/1/127684.html>
- "Conduct Unbecoming: How to Avoid 'Defamatory Conduct,'" HR Advisor, March/April 2005, www.mhtl.com/assets/PDF/HowToAvoidDefamatoryConduct.pdf

the risk of defamatory statements.

The “F” Word – Fraud

Keep in mind that while we deal with fraud on a daily basis, it’s a negative and serious word to most people. Fraud involves dishonesty and is a criminal allegation in the same ballpark with theft and robbery. Be mindful of this before throwing the “F” word around as you might with a colleague.

Refer to fraud *generally* and *globally*. For example:

- “There is evidence of fraud.”
- “The company might be a victim of fraud.”
- “I believe a fraud has occurred.”

Avoid specific, pointed statements such as:

- “John has committed fraud.”
- “Jane was somehow involved in this fraud.”
- “These people are crooks.”

Well-Placed Modifiers

Memorize these words – tattoo them on your arm if necessary – because they are that important:

- Alleged
- Likely
- Possibly
- Probably
- May or might
- Could

Proper use of these modifiers, or qualifiers, can be the difference between acceptable statements and defamatory statements.

If you must speak directly about fraud or other potential criminal acts, use phrases such as:

- “The alleged fraud began in the accounting department.”
- “It has been alleged that John committed fraud.”
- “Jane could have played a role in the theft.”
- “Stan possibly embezzled money.”

Use the Evidence

Base your opinions on the evidence. This is an express and underlying theme in the ACFE Code of Ethics. So not only are you minimizing potential defamation risk but you’re complying with ACFE standards.

For example, say (or write):

- “The evidence indicates that Sue might be involved in a fraudulent scheme.”
- “The allegations of theft against Carl are supported by the evidence that I’ve reviewed in this case.”

Avoid Editorial Comments

A CFE or investigator commonly makes editorial comments when he or she unintentionally dispenses with formalities. In conversation they’re often preceded by phrases such as: “To be honest with you,” “My personal thought is,” and “Frankly.” Editorial comments have no place in a formal report.

Avoid Conclusory Statements

The reason that the ACFE Code of Ethics prohibits a CFE from

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opining as to guilt or innocence is simple: we're charged with evaluating and presenting the evidence. A jury, not the CFE or investigator, is the entity responsible for assigning guilt or innocence. (Note: If the alleged perpetrator has already been convicted of the crime, has confessed, or has pleaded guilty, many of the defamation concerns might be moot. However, there most likely are additional individuals who will have information on the acts or might even be involved, so be very cautious when investigating, discussing, and reporting on other individuals who haven't been charged with a crime.)

If pressured to make an opinion on a case, try the following:

- "There is evidence that suggests Bill might have been involved in the alleged fraud."
- "Based on the evidence, it is my opinion that a jury could conclude that Jim might have committed theft."

Know Your Jurisdiction

Jurisdictions have varying rules and regulations on investigations. In fact, many American states have investigator licensing bodies. CPAs, CFEs, and others investigating financial or accounting matters often are exempt from licensing, but be sure to check in your state/jurisdiction as to whether certain privileges might apply. (See the Defamation Defenses section below.)

Obtain Professional Liability Insurance

Most forms of professional liability insurance cover acts done in the course of one's profession. They are subject, of course, to numerous exceptions. Also, many professional liability policies will provide a defense attorney and pay defense costs if the insured gets sued.

DEFAMATION DEFENSES

It almost seems counterproductive to discuss defenses to defamation cases because the purpose of this article is to help minimize or avoid them. Nonetheless, it might be useful for the CFE or investigator to know some of the commonly accepted defenses:

Truth

Truth is an absolute defense to defamation. However, consider that no matter how concrete the case against an alleged fraudster might be, the jury may not agree (assuming he or she is tried for the claims). Thus, even if it seems a sure thing, truth might not be on your side when the dust settles.

Privilege

Statements made by witnesses in court, arguments made by lawyers in court, statements by legislators on the legislature floor, and statements of judges while on the bench are generally privileged and don't constitute defamation no matter how outrageous.

- **Accountant-Client Privilege** A few jurisdictions recognize an accountant-client privilege, which might protect certain communications made by an accountant to his or her client. However, be aware that this privilege wouldn't likely apply to a non-accountant performing an investigation.
- **Attorney-Client Privilege/Work Product Doctrine** This might apply when an attorney hires an investigator as an agent to perform

an investigation for the attorney. However, be aware that this privilege typically *won't* protect the investigator from statements made to third parties (i.e., persons other than the lawyer or client).

- **There's generally NO investigator's privilege!**¹ A very few American states provide exceptions for accountants performing investigations as part of a broader crime investigation or at the direction of law enforcement.
- **Corporations and other entities** Statements made among managers or executives of the same corporation or other business entity generally aren't considered "published" (or communicated) to support defamation claims. In other words, the statements are being made within the corporation itself and not "published" or communicated to a third party. This is generally why human resources departments enjoy significant leeway in investigating or discussing employee behavior.


Public Figures

Public figures, such as well-known actors/actresses, coaches, politicians, etc., have a much higher threshold to prove a case of defamation. Typically, they must prove malice (a very high standard) to have a defamation case.

Opinion vs. Fact

Some jurisdictions, *but not all*, recognize a distinction between comments that are simply opinion versus fact. For example, the statement that "John isn't very smart" is one of opinion, whereas if I wrote and published a white paper analyzing John's grades, abilities, and comments of teachers, etc., then I'm likely going well beyond mere opinion.

TIGHT LIPS

Defamation can be a confusing and difficult subject for CFEs and investigators to fully master. Carefully crafted answers and responses can be the difference between a highly successful engagement and one that's subject to a defamation lawsuit. Use caution when addressing the "bad words" surrounding an investigation. Also, the high probability of some type of litigation surrounding alleged criminal acts means that attention to detail throughout an examination is critical. Finally, although it's not extremely practical, sometimes it might be worthwhile to remember the old adage, "If you can't say anything nice, don't say anything at all!" 

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¹ *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir.1961) (Friendly, J.). See also *United States v. Haynes*, 216 F.3d 789, 793-94, 798 (9th Cir.2000); *United States v. Alfonso*, 552 F.2d 605, 617 (5th Cir.1977); *Parkman v. Arkansas*, 294 Ark. 339, 742 S.W.2d 927, 928-29 (1988); *Flynn v. Superior Court*, 57 Cal.App.4th 990, 992-96, 67 Cal.Rptr.2d 491 (1997); and cf. *United States v. Nobles*, 422 U.S. 225, 237-39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (work product).

² *U.S. Dept. of Educ. v. Nat'l Collegiate Athletic Assoc.*, 481 F.3d 936 (7th Cir., 2007).