

NATIONAL NEWSPAPER ASSN. SEMINAR - 2014

Laura Lee Prather

512.867.8476

Laura.prather@haynesboone.com

haynesboone

Setting precedent.



PART ONE: CLAIMS ARISING OUT OF CONTENT OF STORY



Rule #1

**Re-publication of a
Libelous Statement is Libel**

Check Your Sources



Defamation

- **Defamation:** Publication of a false fact that hurts someone's reputation.
- **Elements:**
 - Publication of a false statement
 - That is defamatory
 - About the plaintiff
 - With requisite degree of fault (negligence or actual malice)
 - Resulting in damages
- **Slander is spoken libel.**
- **Republication Doctrine**
 - Media is liable when it re-publishes libelous statements
 - Each publication raises a separate cause of action
 - Each publication starts the limitation period running again.



Defamation Defenses

- **Truth or Substantially True**
- **Privileged**
 - Fair, true and impartial reporting on official proceeding.
 - Reasonable and fair comment on a matter of public concern.



Rule #2

Give Opportunity to Respond



Defamation

Two Types of Defamation:

Libel Per Se: (assumes damages) when one:

- (1) publishes falsehoods that injure one in office, business, profession, or occupation;**
- (2) unambiguously charge one with a crime, dishonesty or fraud**
- (3) publishes imputation of unchastity for a woman or**
- (4) publishes imputation of a loathsome disease**

Libel Per Quod: must prove damages.



Defamation

Different standards apply to publications about public and private figures:

Public Officials and Figures: Actual malice – liable if you had reason to think it was not true and published it any way.

Private Figures: Negligence – if fail to use reasonable care.
Key is do your own work and have reason to believe what you publish.



Rule #3

**Identify how person is public figure
and why it is of public concern**



Defamation

Privileges: A fair, true, and impartial account of:

- A Judicial Proceeding;
- Any Other Official Proceeding to Administer the Law;
- An Executive or Legislative Proceedings (including a proceeding of a legislative committee) or Proceedings of Governing Bodies such as City Counsel, County Commissioners Court, Public School Board (including statements made at the proceedings).
- The proceedings of any public meeting dealing with a public purpose, including statements and discussion at the meeting or other matters of public concern occurring at the meeting; and
- A reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information.



Rule #4

**Do the Legwork and
Attribute Official Source**



Defamation

Advice

- To obtain the privilege protection make sure you attribute official information to the source and that you have the most current information from the official source. Go to courthouse and get the latest pleadings, make sure it's a file stamped copy if you get it from others and check docket sheet.
 - Official Report – includes courtroom proceedings and allegations found in pleadings. (Be careful not to rely too much on attorneys). See *Scripps Texas Newspapers, L.P. v. Belalcazar*, 99 S.W.3d 829, 836 (Tex. App.—Corpus Christi 2003, pet. denied)
 - Law enforcement – if police tell you, not nearly as reliable, as if it is in an official document – then you can rely on the privilege.
- It is NOT enough just to rely on a press release or report, even if you publish it verbatim. Do an independent verification of the facts. *KMBT v. Toledo* Think about the implications of your facts and verify those too. Pick up the Phone!!! See *KBMT Operating Co., LLC v. Toledo*, 434 S.W.3d 276, 290 (Tex. App.—Beaumont 2014, pet. filed)



Defamation

Libel by Implication or Omission: Commit libel not in the exact words but in the general tenor of the publication.

- Libel by Omission — omission of facts may be actionable if it so distorts listeners' perception that they receive a substantially false impression of the event.
- Libel by Implication — can be created by omitting or juxtaposing facts in a misleading way (this also applies to business disparagement).
- **KEY:** What a reasonable person would draw from the juxtaposition of words or omission of material facts?



Rule #5

Watch Your Headlines

Watch
your
headlines:



STOP DRINKING OR GO TO PRISON

ELECTRONIC TAGS TO MAKE LAGER LOUTS STAY SOBER

Joseph Watts Political Correspondent

LONDON'S worst lager louts will be forced from today to wear ankle tags that will send them to jail if they drink.

The pioneering electronic "sobriety tags" will make drunken louts become effectively trespassers for up to four months at a time.

Mayor Boris Johnson announced a trial scheme that will see up to 150 offenders at a time fitted with the tags and ordered to abstain from alcohol or be sent to prison. The first order was passed within hours of the launch this morning.

The aim is to change the behaviour of a substantial minority blamed for alcohol-related crime in the capital. But as well as cutting crime, the scheme's supporters believe it could dramatically save some people from the health risks of binge drinking and drunken hoedgannism.

The gadgets contain sensors in electronic anklets that detect alcohol in perspiration and send an alarm via the internet to probation officers. Authorities hope the scheme will reduce the £60 million cost of binge drinking and alcohol abuse in the capital.

London Ambulance Service received almost 72,000 drink-related call-outs last year, almost 200 a day.

Visiting Croydon to launch the scheme, Mr Johnson said: "Alcohol-fueled criminal behaviour is a real scourge on our high streets. It denies law-abiding citizens from enjoying our great city, especially at night, placing a massive strain on frontline services, whilst costing businesses and the taxpayer billions of pounds."

Hollywood star Lindsay Lohan was famously ordered to wear one of the ankle tags as a punishment during her trial for a drink-driving offence. The tags will be handed to thugs in Croydon, Lambeth, Southwark and Sutton as part of a

Continued on Page 2



Passionate prince: Harry today vowed to make his Invictus Games a regular feature as he spoke to BBC Radio 2's Chris Evans about next month's event for wounded military personnel at Queen Elizabeth Olympic Park. FULL STORY: Page 3

GAME'S ON FOR HARRY AND CHRIS

Poison
spy
probe
will stay
secret

PAGE 2



Look who
Justin's
out with
now

PAGE 9

Hunt for
mugger
wearing
rasta wig

PAGE 5



Business Disparagement

- Harm to commercial interests (rather than personal harm to reputation)
- Two year statute of limitations (Defamation has one year statute of limitations)
- Mistaking an affiliate company with a parent company or other similar company in a negative story:
- Golden Bear v. Chase Revel (*Entrepreneur Magazine*) 708 F.2d 944, 948 (5th Cir. 1983)- story about fraud case against Golden Bear of California, mentioned Golden Bear of Texas, didn't distinguish properly between the two. GB Texas lost business and went bankrupt, and won a libel lawsuit. "The basis of the libel lies in the juxtaposition of truthful statements about one company with truthful statements about the illegal operations of an independent company of the same name located in a different state."



Rule #6

Confirm Company Names



Invasion of Privacy

4 categories of Invasion of Privacy -

- Intrusion into Seclusion
- Misappropriation
- Public disclosure of private facts
- False light



Invasion of Privacy

Intrusion into Seclusion

- Intrusion into private place, conversation or matter.
- In a manner highly offensive to a reasonable person.
 - Encompasses a physical intrusion (without consent) into a home, hospital room, or other place privacy is expected.
 - Encompasses unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying
- Basically, one intrudes by going into a place where a person has an expectation of privacy.



Rule #7

**Don't Use Someone's Image
To Promote Your Work Without
Permission**



Invasion of Privacy

Misappropriation

- Using someone's name and likeness for commercial purposes without their permission;
- This arises in the advertising area primarily;
- Promotions can be used to promote a story, but not for advertising.
- Cases in this area are on the rise.



Invasion of Privacy

Public Disclosure of Private Facts

- Publication of highly embarrassing private facts that are not newsworthy.
- **The key is think about whether there is any reason the public needs to know this information.**

Elements:

- Publicity given to matters concerning one's personal life;
- Publication would be highly offensive to a reasonable person of ordinary sensibilities; and
- The matter is not of legitimate public concern.
 - **Truth IS NOT a defense.**
 - Facts must be private, embarrassing and none of the public's business.
 - **Facts in public court records are not "private."**




Invasion of Privacy

False Light:

Publication that presents the plaintiff in a “false light”

- Recognized in 32 states and the District of Columbia
- Some states have explicitly rejected it for its similarity to defamation
- Elements:
 - Widespread publicity of the information
 - Publicity that places the person in a false light that would be highly offensive to a reasonable person;
 - Actual malice, or reckless disregard for the truth.



Invasion of Privacy False Light

“Pregnancy forces granny to quit work at age 101.”

- *People’s Bank and Trust Co. v. Globe International Publishing*
- Tabloid used file photograph of an elderly woman, Nellie Mitchell, and – incorrectly assuming that she was dead – ran the picture with a story under the headline “Pregnancy forces granny to quit work at age 101.”
- Fictitious name used but woman was easily recognizable in her community, and story claimed she had an extramarital affair with a client.
- Although the name was false, and the publication argued that the story that the woman was pregnant at 101 could not reasonably be believed as true, an appeals court held that the other allegations in the story such as the sexual impropriety were subject to reasonable belief and the publisher intended for its readers to believe its stories in general. The centenarian was awarded a \$1 million in damages.



PART TWO: NEWSGATHERING



Fraud/Misrepresentation

- Convincing someone to do something they might not have otherwise done but for your misrepresentation.
- Telling people you are there for one purpose when, in fact, you are there for another. You cannot lie and deceive someone to get a story.



Breach of Contract

- Can get attorneys' fees
- Broken Promises — *i.e.*, this story will be run at a specific time, you will not be identified in the story, etc. — Remember, identification can be accomplished by more than just writing someone's name.
- 4-year statute of limitations



Rule #8

**Avoid Vague Terms In Making Promises
And Never Promise a Result**



Breach of Contract

- **Never promise results.** Promise the process but not the result. If you are particularly concerned about a person, then tape or memorialize the promise. Avoid vague terms like “fair” or “unidentifiable.”
- Be careful that consent covers everything you are dealing with and in all mediums you are using.
- Get your own agreements. Don’t rely on others to get them for you.



Trespass

- Unauthorized Entry to Private Property
- Photographers:
 - Going on private property without permission
 - Watch out for “super telephoto” lenses — has to do with expectation of privacy.
 - Use caution with drones/ UAVs
 - In Texas, civil and criminal penalties for photographing with UAV without permission of landowner-regardless of whether or not you are trespassing.
- Hidden Cameras-
 - Hidden cameras can violate state wiretap laws as well as privacy laws
 - Some states control hidden camera use in Nursing Homes and State Hospitals.



Wiretap laws

- Federal law requires one-party consent
- State law varies
- 2-party consent is required in twelve states: CA, CT, FL, IL, MD, MASS, MI, MO, NE, NH, PA & WA
- All states have criminal penalties
- Most states provide for civil suits for violation of wiretapping laws
- Almost half the states have laws directed at hidden camera use.



PART THREE: ON-LINE CONTENT PITFALLS



Rule #9

**Treat Online Content And
Social Media Posts With
The Same Care As You Would
Treat Print Publication**



Blogging/ Social Media

- **Problem**: blogging and social media posts typically are treated with less care. Don't be fooled into thinking they don't matter!
- Copyright infringement and defamation are common claims that arise in social media, as are “tag-along” torts such as tortious interference, negligence and intentional infliction of emotional distress.
- For example: Courtney Love was in a dispute with a fashion designer and posted a series of allegedly defamatory posts on Twitter. The designer sued, and Love settled for a reported \$430,000.



Blogging/ Social Media

- All social media in company name should go through a limited number of gatekeepers/editors who are well informed on journalism standards, copyright law and defamation
- The gatekeepers should be tasked with ensuring that all posts conform to the same standards that print publications would meet
- Nobody should be permitted to have a social media account associated with the newspaper unless they are trained
- Establish a newsroom policy on copyright and make sure that everyone knows that photos on social media are subject to copyright protection



Anonymous Posters

- Protecting the anonymity of online commenters against subpoenas
 - If you allow anonymous comments on your website, be careful about not making promises you can't keep about protecting the anonymity of commenters.
 - Be prepared to fight efforts to subpoena the IP address of anonymous online commenters.



Liability For On-Line Comments

- Regarding defamation in comments posted to your website, the same generally rules apply but there is a defense to the republication rule because of the Communications Decency Act,
- Section 230 immunizes ISPs and internet users from liability from torts committed by others using their website or online forum.



Copyright

- The biggest concern with many digital media outlets is copyright. With the ease of downloading, cutting and pasting, the temptation to appropriate the work of others is strong. But doing so can result in huge legal liability for you and your company.



Copyright

- Copyright covers “original works of authorship fixed in any tangible medium of expression.”
- The term “works of authorship” includes literature, including news articles, music, drama, pictures (and photographs), movies and other audiovisual work, and architecture.



Rule #10

**Get Permission From Copyright Holders
To Re-Publish Works**



Copyright

- Copyright is the exclusive right that the author has to publish or reproduce the work or authorize others to do so.
- If you don't have permission from the author, you may not legally publish the work, in most circumstances.
- This includes Music and Photos (think Facebook — can't use photos without photographer's permission)



Copyright

Who is the author?

- If there is no employer-employee relationship, the person who created the work is typically the author.
- If the artist is an employee acting in the scope of employment, or under a work-for-hire contract, the company is the author.
- A work-for-hire agreement must be in writing and signed- otherwise it is not valid.
- A copyright transfer agreement must be in writing and signed- otherwise it is not valid.



Copyright

Important — there is no copyright to facts, only the expression of those facts.

- So while you cannot re-use an article that discusses a city council meeting without permission, you can write your own article, in your own words, about what happened in the city council meeting and it does not violate copyright to say “X publication reported....” If you did not attend, of course, you will want to provide the source of your information (this is a journalism standard, not a legal standard).



Copyright- Exceptions

- **Public Domain** — Work that is in the public domain is not subject to copyright — you don't need permission. Work is in the public domain if it is:
 - **Past the term of copyright** (copyright currently lasts 70 years past the death of the author)
 - **A Federal government work** — work that is created by the federal government is not subject to copyright protection. This includes, for example, photos taken by the White House photographer, documents created by federal agencies or federal employees, federal court opinions.
 - **Put in the public domain by the author**- many authors want their work to be freely shared — a common way of doing this is with a “creative commons” license. Some software has also been placed in the public domain by its creators. This is commonly called “freeware.”
 - **Be careful**- some people offer free work that they don't actually own the rights to. Try to verify. Avoid suspicious looking websites offering “free” works.



Copyright- Exceptions

IMPORTANT — NOT in the Public Domain

- Articles and images are NOT in the public domain just because they are on the internet or posted on Social Media. Work published on the internet is subject to the same copyright protections as work published in print.
- AFP v. Morel: \$1.2 million jury verdict against photo agency that took photos from Twitter without permission and licensed the work to various magazines, newspapers, websites, television stations.



Copyright- Exceptions

Fair Use- where copyright and free speech meet

The court considers four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.



Copyright- Exceptions

Things that, by themselves, do not qualify a use as “fair use”:

- You are not making money on the publication
- You provide a credit to the author
- The events depicted in the work are newsworthy
- It was on the internet
- You put a disclaimer on it saying that it is fair use.



Copyright- Advice

- If you are planning to post about an article that you did not write, the best thing to do is to write a summary- in your own words, and then link to the article.
- Photographs are trickier because you cannot just describe a photo or use a portion of a photo — however, the use of a thumbnail may be okay (there has not been a court ruling on this in the Fifth Circuit, or by the Supreme Court of the United States). Use of a photo when discussing the photo is probably ok.



PART FOUR: SUBPOENAS



Reporter's Privilege

One of the most important defenses available to journalists in libel litigation, protecting your sources and your work product. 49 states have expressly recognized the privilege.

- 40 states and D.C. have statutory protection
- 9 states have case law recognizing the privilege
- 1 state, Hawaii, has neither.
 - A statute passed in 2008 expired in 2013.




Reporter's Privilege

- Level of protection varies
 - Identity of sources
 - Notes, outtakes or work product
 - Personal observations
- Some differences exist as to absolute vs. qualified privilege or coverage of work product vs. confidential sources.
 - Absolute privilege protects source information under all circumstances (i.e., Arizona)
 - Qualified privilege protects sources unless the information is
 - Relevant or material
 - Unavailable by other means
 - A compelling need is shown for the information



Reporter's Privilege

- Type of proceeding that privilege applies to varies
 - Criminal
 - Civil
 - Both
- In some states the reporter's state of mind is relevant and the privilege can be defeated if actual or common law malice is shown.



PART FIVE:
NEW TOOLS FOR
LITIGATION
AND HOW TO AVOID
BEING SUED

New Tools for Litigation

Anti-SLAPP – a law designed to reduce and provide for early dismissal of meritless lawsuits filed against someone for exercising their First Amendment rights (“**SLAPP**” = “**S**trategic **L**awsuit **A**gainst **P**ublic **P**articipation”).


- 27 states, D.C. and Guam have some form of anti-SLAPP statute
- 19 of those jurisdictions have mandatory attorney’s fee shifting
- The broadest scope of protection to date has been provided by statutes in states such as California which protect not only traditional petitioning activity but speech made in connection with issues of public concern (Texas, Indiana, Louisiana, Oregon, Washington, and most recently Oklahoma have followed California’s model).
- May help to deter potential litigants from even filing suit



New Tools for Litigation

Anti-SLAPP - the scope of these anti-SLAPP statutes varies greatly:

- Some statutes are narrowly written to apply only to actions brought by public applicants against people who have challenged or opposed such applications to government bodies.
- Other statutes are written to apply to speech seeking to influence decisions by the legislature or executive branch – and can be narrowly or broadly construed by the courts based on legislative histories and doctrines of statutory interpretation.



Damage Control – How To Handle The Angry Phone Call

- Listen to the irate caller who complains about a story
- Don't admit any mistakes, but be sympathetic to the way they feel
- Try to find out any factual errors they think have been made
- Make no promises but appreciate them for their call
- Publish a correction or clarification if facts are wrong.



Damage Control- Should I Run A Retraction

- Run a retraction, correction or apology if you are wrong. (Limits damages if they decide to sue).
- A retraction may serve to lessen the amount of damages rather than to deflect all liability.
- A retraction may provide evidence of a publisher's lack of malice if there also is evidence of good will and accidental publication.
- Retraction of a defamatory statement is generally regarded as a matter to be considered in mitigation of damages.



Top 10 Rules

1. Re-publication of a libelous statement is libel – check your sources
2. Give opportunity to respond
3. Identify how person is public figure and why it is of public concern
4. Do the legwork and attribute official source
5. Watch your headlines
6. Confirm company names
7. Don't use someone's image to promote your work without permission
8. Avoid vague terms in making promises and never promise a result
9. Treat online content and social media posts with the same care as you would treat print publication
10. Get permission from copyright holders to re-publish works

Thank You

Laura Lee Prather

Laura.Prather@haynesboone.com

Haynes and Boone, LLP

600 Congress Avenue
Suite 1300

Austin, TX 78701-3285

(t) 512.867.8476

(f) 512.867.8609

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www.haynesandboone.com