# WRITING WITH LIBEL IN MIND
# A GUIDE FOR NON-PROFITS AND BLOGGERS

## BASIC LIBEL PRINCIPLES

### What Constitutes Libel

Precisely what, then, requires libel review? It is best to begin with a simplified definition of libel. A defamatory statement is a statement that is factual in character about an identifiable entity or living individual that, if believed, would influence the reader's or hearer's opinion of the entity or individual, either by reflecting badly on the person's character, or by harming the person's reputation or diminishing the esteem, respect, or good will that he, she or it enjoys in a relevant community. [1]

This definition is a good guide to what sorts of reports and blog posts, or portions of reports, will require libel review. If the report does no more than discuss policy – the desirability of proposed legislation, of an agency rule, or of a community approach to a particular issue – without making statements about particular people or companies involved in the debates no libel review will be required. And even if the report discusses individuals or entities, but only to express disagreement with their policy judgments, libel review is not

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[1]Defamation is a general term that includes both libel, which is a written defamatory statement, and slander, which is an oral defamatory statement. For simplicity's sake, this document uses the term libel generically to include all forms of defamation. Statements in interviews or press conferences can be the subject of libel litigation, and report authors who contemplate making statements in interviews that vary significantly from statements in the report itself, or who plan to use the publicity process without even issuing a report by making statements about particular persons that would, if written, implicate libel concerns, should share those statements with the libel reviewer. Some have argued that postings on Internet message boards are more like oral statements than like published writings. This distinction is significant because, in most states, a plaintiff has a higher burden to establish slander.

needed. On the other hand, if you make specific statements about particular people of companies involved in the debates, or to show reasons for or against the legislation, those statements might warrant libel review. For example, if you say, "this legislation [to crack down on deliberate cooking of the books] is needed because of Enron" implies that Enron deliberately cooked its books; or if you say, Pontiac opposes this legislation (to make cars safer) because it would force the company to take all its cars off the market, you are making an implied comment on the safety of Pontiac's cars.

Another important distinction flows from the general rule that, to be libelous, a statement must be about an individual person or entity, and not a undifferentiated group. For discussions about an entire industry – "all paid lobbyists are corrupt," for example – libel review is not required, because the statement does not mention any **particular** individuals or entities. On the other hand, a report need not name names to implicate libel concerns: "The husband of the junior Senator from the State of New York sleeps around" identifies a particular individual just as surely as if his name were used. But you can say all you want about the 37th President, because in most places, only living individuals can sue for libel.

A statement about a "small" group might well be different, however: "All three Bush brothers evaded military service" probably defames each of them individually (although of course truth is still a defense). How big that group must be to come within the rule against group libel depends to some extent on the state in which the suit is filed. Some recent decisions threaten to revive the concept of group libel.

To be libelous, a statement must be one of fact: For libel purposes, the Supreme Court

has said, “there is no such thing as a false idea.” For example, a statement that reflects an entirely subjective belief that cannot be proved true or false, and that does not imply false facts about the individual – for example, “With the economy the way it is, I see General Motors as headed for bankruptcy” – is nonactionable opinion. However, this does not mean that you can avoid exposure to a libel suit simply by characterizing a factual statement as an opinion. If you say, “**In my opinion**, Senator Tower is a notorious drunkard,” the three words at the beginning of the sentence that will not protect you from a successful libel suit. However, if you set forth the facts on which an adverse opinion is based, no libel claim can be based on the resulting opinion so long as the stated facts themselves are true. For example, you might write, “Senator Tower was spotted downing ten beers on Tuesday, Thursday and Friday before heading to the floor. Such a notorious drunkard should not be confirmed.” So long as the statements about beer consumption are correct, no libel action could succeed based on this passage.

Whether a statement is deemed fact or opinion depends in part on its context. Hyperbole and name calling, for example, are often treated as opinion, although they may also undermine the credibility of the entire report. A statement in an “opinion column,” or a posting on an Internet message board and on many kinds of blogs, comes in contexts in which readers may expect to find opinion rather than fact, so close cases may be resolved in light of their contexts. But the danger in using hyperbolic language is that, if the statement is deemed fact, it may be hard to defend its truth.

To be defamatory, a statement must be false. This principle is often written as, “truth

is an absolute defense," although actually in libel litigation the burden is actually on the plaintiff, as a matter of First Amendment law, to prove falsity, not on the defendant to prove truth. (Purely private libel may be different.) A related doctrine is the principle of substantial truth: So long as the gist of an accusation is true, the fact that minor or irrelevant details were wrong does not allow the blog writer to be found liable. (Thus, "The President's secretary obstructed justice when she testified that her erasure of 20 minutes of tape was entirely inadvertent" is substantially true even though it was only 18-½ minutes.) On the other hand, even minor errors can undermine the reader's confidence in the entire report, and in a libel case that gets to trial, the judge or jury may well be influenced by an overall feeling that the report was sloppily written.

Three principles inform the level of detail that should be considered for the support of factual statements in a report. First, both as a matter of state law and under the First Amendment, libel law gives especially broad leeway to criticize public officials or "public figures" – persons who voluntarily put themselves in the public eye in connection with their activities or who are drawn involuntarily into public controversies. When a report focuses on an individual or entity that is **not** a public figure, especially strong support should be available for critical statements.

Liability cannot be imposed for statements about public officials or public figures unless "actual malice" is shown. (The term actual malice is discussed below.) A "public official" is just who it sounds like – someone who holds elective office, or non-elected government staff with substantial responsibility or control over public affairs; candidates for

public office also are often treated as public officials. "Public figure" is a more elusive term, and can apply to those who are public figures for all purposes – those who are famous (or notorious) to the whole community, such as cultural or sports celebrities, or major political figures, companies and organizations. Some cases in some states say that publicly traded corporations or their executives are public figures, but not every business would be. The term can also apply to those who are public figures for the purpose of particular controversies; those people or entities are treated as public figures only with respect to comments about them in connection with such controversies. These "limited purpose" public figures may have voluntarily injected themselves into a controversy of public concern, or may have become involuntarily dragged into the public spotlight (for example, by being indicted). However, a speaker cannot criticize someone not previously a public figure and then defend based on the controversy that the speaker has created.

Second, a rule that does not apply as a matter of constitutional law but is available in most states is the "fair report" privilege. The privilege provides extra protection, although not as much as the public figure rule, for an even-handed report about the findings of official bodies, or about a trial or other public, "official" proceeding that may lead to such findings. By and large, the "fair report" privilege applies to an official, public document, or a statement by a public official on a matter of public concern, so long as your report provides a fair and accurate account of the information in that source. To take advantage of this privilege, you must have clearly attributed your statement to the qualifying source. In other words, because the law places value on the public's interest in information about what occurs

in official proceedings (for example, briefs or opinions filed in litigation) and public meetings (for example, a legislative committee hearing), in these circumstances you can rely on the document even if it turns out that the document's contents were false.

Third, certain kinds of assertions are particularly prone to libel claims – for example, statements alleging criminal, dishonest, or immoral conduct, or alleging conduct that deliberately causes injury to others. When a report makes this sort of allegation, a good libel review will demand support for every fact stated about the person criticized. On the other hand, when other statements are made that are negative, but not so damning, a libel reviewer may decide to spot-check the sources for the statements in the report, and may assume that, if each of the spot-checked sources supports the statement, then no further review is required. There is a synergy between the relative prominence of the person criticized and the relative seriousness of the accusations, so that in a libel review closer scrutiny will be given the less prominent the target and the more serious the charges.

Another protection for the writer flows from the concept that, to be libelous, the statement must harm the target's reputation or diminish his or her respect in the community. Some subjects of criticism are "libel proof" because their reputation is so bad it cannot go any lower. If you accuse an admitted Cosa Nostra capo of jaywalking, or a Klan leader of using racist language, their reputations may be so low that it cannot get even worse even if your specific charge is false. But relying on such a defense is playing with fire.

**Sources That Support Defamatory Statements**

The general rule for public officials and public figures who sue for libel is that the

plaintiff has to show both that a libelous statement about them was false, and that the statement was made with "actual malice" – a technical term that does not connote ill will, which may or may not be present, but either "knowledge" of falsity, or "reckless disregard" of the likelihood that the statements were probably false. The fact that the speaker made foolish judgments about the reliability of sources or made merely careless errors about the facts should nevertheless prevail in litigation on the issue of actual malice. But that is only a standard for avoiding liability. However, as important as that protection is, it only makes it harder for a public official or public figure to win a libel lawsuit. A speaker or organization that issues reports or makes blog postings, but that does not have either good libel insurance or very substantial assets with which to finance a libel defense, and that only prevails after enduring both full discovery and trial, will end up with a victory that will feel in many ways like a loss. Libel defendants who have to endure the entirety of a suit will both experience both dissipation of assets because of the legal expense, and lose all the time and energy that has to be spent on the defense. As a result, when libel litigation is a realistic possibility, it is wise to set a higher standard – the libel reviewer should be satisfied that the allegations are true and that sound judgments have been made about possibly disputed issues of fact.

Applying this higher, constitutionally-not-required standard, you need to have a good and defensible reason for relying on a particular source for the statements in a report. For example, just because someone has accused OJ Simpson of murdering his ex-wife does not mean that everyone else in the world gets a free pass to repeat the accusation simply because

it is “true” that the accusation was made. The “republication” of libelous accusations can be just as serious – and just as much the basis for a libel suit – as the original publication. In fact, some accused persons may be more inclined to proceed against the republisher than against the original accuser, for a variety of reasons such as the second speaker having deeper pockets than some lone critic, the concern that endorsement by the speaker gives the accusation greater credibility, reasons of harassment, or the belief that the second speaker can more easily be intimidated. This is not to say that you should shy away from repeating strong accusations when you have good reason to rely on the sources who make them.

Original sources, such as financial reports filed by a person when used as a basis for statements about that person, or “respected” media sources, will generally be accepted in a libel review without question. If, however, you rely on a supermarket tabloid for a statement about Senator Jones’ latest escapade in the red-light district, or on some obscure left-wing publication for statements about a capitalist’s abuse of his employees, it may be foolish to accept the citation at face value without some better showing of reliability. Again, the nature of the allegation and the susceptibility of the statement to a serious threat of libel litigation may bear on how such sources will be treated in the course of the review.

If, in the course of your research, you find reason to question the accuracy of a particular statement or the reliability of a particular source, you should take that information into consideration in deciding whether to rely on the source; and, you should share that information with the libel reviewer. You cannot turn a blind eye to serious questions about the sources for your assertions. Such questions may, for example, be raised by the denial of

an accusation by its subject, by known biases and accuracy problems on the part of a source, and by conflicting accounts from different sources. For example, you may learn that the authors of certain accusations of criminal misconduct had been sued for libel and lost. Even if that judgment was on appeal, it could be disastrous to include these accusations without a strong explanation of the circumstances. The report need not necessarily discuss the reasons for relying on a possibly questionable source – although disclosing the problem in the report and explaining the reasons for your conclusions is helpful as a form of "opinion based on disclosed facts," discussed above. At the very least, you need to disclose those issues to the libel reviewer so that the reviewer can make the necessary judgments.

The foregoing discussion was largely based on the assumption that the sources are written and could simply be copied for inspection by the libel reviewer. Reliance on oral sources poses special questions, in part because the interviewer may not be available by the time the report is challenged. If a report contains factual statements based on conversations (or attempted conversations), the gold standard is to make **contemporaneous** notes of those conversations, which can then be provided for review along with written sources. Because contemporaneous notes – made during or immediately after the interview – are given more credence in court than notes made weeks after the fact when the author is preparing for a libel review – a libel review might refuse to accept after-the-fact reconstructions of conversations, depending on the nature of the statements for which the notes are provided. If an organization uses the same libel reviewer on several reviews, the reviewer is likely to develop a good sense of which staff members can be trusted, and to what extent, with respect

to the reliability of their reports. [2]

If possible, it may be best to provide recorded interviews, but it is not always possible to make a recording of interviews. Some sources may be more reluctant to be candid if they know that a tape recorder is running, and in many states (such as Maryland) it is unlawful to make a tape recording without informing all parties to the conversation of the recording. If an organization relies on oral statements made to a non-staffer, such as a stringer who is reporting from some far-flung location, it may be wise to insist upon a recording depending, again, on the nature of the statement. At the least, it is a good idea to have information about the track record of non-staff reporters, and an explanation of why he or she made the judgment to rely on their reporting.

Sometimes sources are reluctant to speak to an investigator or report writer unless they are confident that their identities will be kept confidential. Some people believe that reliance on unidentified, confidential sources is inconsistent with sound practice, while others believe that significant reporting is impossible without such sources. It is, to a certain extent, a choice of the report writer (or an organization employing the writer) whether to rely on confidential sources, and whether and to what extent to extend assurances of confidentiality. Most jurisdictions recognize a **qualified** privilege to withhold confidential sources in

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[2]If a libel case goes to trial, however, notes of interviews can hurt the defense case as well as helping it, if the plaintiff uses them to argue about what was left out of the report, or what facts were "known" to the writer but not used in the blog past, in making an argument about actual malice. Some libel lawyers recommend that their clients adopt a strict policy about retaining notes, because if the notes are lost instead of being discarded after the report is published pursuant to organizational policy, the plaintiff may ask the jury to infer that the notes were deliberately destroyed to hide evidence.

response to a legal subpoena in civil litigation. The privilege may be based on the First Amendment or the common law, and many states have "shield laws" that either codify this privilege or even, in some states, provide a more ironclad privilege that cannot be overcome by the particular circumstances of the case. Whether a non-profit organization or blogger can invoke the source privilege may depend on the court precedents in particular locations, or on the wording of a state's shield law. Although there are strong arguments for extending the source privilege to journalistic bloggers, this area of the law is new and still developing.

As a "qualified" privilege, the source privilege can be overcome depending on the circumstances of a particular case. Moreover, even if you are able to succeed in asserting the source privilege in a particular case, the court will not be obligated to accept as gospel the facts that you derived from the source. To the contrary, you may find that you are unable to put forward any other factual basis for a very important part of your story. What is more, you need to be careful about promising confidentiality, because such a promise, if broken, can become a basis for a lawsuit against you by the source for breach of contract. Further complicating this picture is the fact that, in some places, a promise of confidentiality increases the strength of the argument for application of the source privilege.

**Dealing with the Subject of a Report or Investigation**

It is often wise to conduct an interview with people or companies who are themselves the target of criticism in a report or on a blog. Sometimes you will want to do this early in your investigation to frame your research or, indeed, to decide whether a subject for a potential report is as promising as might initially appear based on a tip or a previous

published report. If your investigation has developed facts about someone, particularly about someone who is likely to be unhappy about the publication of those facts or about your criticisms based on those facts, it can be a good idea to confront the subject with the facts or criticism to obtain his or her reaction. If the subject of a report is unwilling to grant an interview or to respond to the facts, that can itself be significant. You may, indeed, want to mention the refusal to respond, although it is important to be completely accurate about the circumstances of the refusal. On the other hand, the person's response may reveal innocent explanations for the facts that you have developed, and denial of the facts may lead you to question the soundness of your sources. Of course, you do not have to accept the denials, but it may be wise to mention the denials (or explanations) in the course of your report. You need not provide the subject with a draft of your report in the course of seeking comment, and it is usually not a good idea to do so. There are choices to be made about how specifically to describe the facts in the process of seeking comment from the subject.

WHY A LIBEL REVIEW

PROTOCOLS FOR LIBEL REVIEWS

CONCLUSION AND APPENDIX OF RESOURCES

Guide for Bloggers and Non-Profit Organizations About Writing With Libel in Mind