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Think Before Speaking: Defamation Pitfalls for the Unwary Lawyer

Introduction: Lawyers and Defamation Claims

Defamation exposure is an overlooked but important vulnerability for lawyers, especially for those who advance their client's interests in the so-called court of public opinion. Whether a defamation suit is filed by a disgruntled opponent over an attorney's press release that he believes depicts him unfairly, or by a *pro se* litigant for statements an opposing lawyer made in court, lawyers are one of the most common targets, followed closely by news organizations, regarding communication-related torts. Understanding why these suits are typically filed, as well as the unpredictable law that governs them, will help you avoid unwanted exposure.

What Claims Are Lawyers Likely to See?

The defamation claims the authors see most frequently against attorneys involve efforts to publicize the filing or resolution of a lawsuit. Plaintiff press releases that accompany the filing of lawsuits have given rise to numerous claims, as well as the public responses of defendants to those complaints. Recent noteworthy examples include the flood of defamation claims against Bill Cosby and his lawyer for claims both made denouncing the civil suits filed by his victims.[1]

The authors also have seen attorneys sued for post-resolution statements, such as post settlement press releases, comments to the press on the proverbial courthouse steps after winning a trial, and even for descriptions of litigation in "notable results" sections of their websites. If a client is joined as a co-defendant in these lawsuits, the attorney may face the unpleasant prospect of also defending his client's malpractice suit in addition to the opponent's defamation claim.

As this article explains, the legal standard for defamation requires significantly more than the plaintiff's mere dissatisfaction with a statement. Often, such dissatisfaction seems to become the basis for claims filed against attorneys, sometimes related to anger or frustration, rather than a measured legal analysis of the pros and cons of instituting litigation.

Many defamation claims against attorneys thus arise from statements that would probably not be considered actionable on a law school exam, but nonetheless frequently survive dispositive motions in front of cautious judges who would prefer to let the jury decide these matters. The authors also have represented multiple attorneys who evaluated and determined accurately that statements were not defamatory as a matter of law before releasing them, but nonetheless found themselves named in protracted defamation litigation.

In order to avoid defamation liability, a simple psychological understanding of your opponent may be instructive. If you are dealing with a volatile individual, one who is especially averse to losing, or who seems to be the type who must have the last word irrespective of the circumstance, the best strategy to avoid a potential claim may be to simply save your press efforts for the next case. But when that is not practical the following information should help you understand exactly what you are getting into when you take your advocacy outside the boundaries of the courtroom.

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1 *See Green v. Cosby*, 138 F.Supp.3d 114, 2015 WL 5923553 (D.Mass., 2015); *Hill v. Cosby*, 665 Fed. Appx. 169 (3d Cir. 2016); *Dickinson v. Cosby*, 225 Cal. Rptr. 3d 430 (Ct. App. 2017), review denied (Mar. 14, 2018).

The Law of Defamation: An Overview

Defamation is an umbrella term that refers to the twin "dignitary" torts of libel and slander. Libel and slander were historically distinct causes of action used to describe written and oral disparagement, but have tended to merge.[2] The law of defamation is marked by tension between the interests of the states in providing remedies for injury to reputations of their residents,[3] and our nation's robust Constitutional tradition of freedom of expression.[4]

The body of Supreme Court caselaw that limits the reach of state defamation law affords the most protection to statements by the press about public officials and/or matters of public concern. On the other hand, a diminished level of protection is afforded to speech by the "non-press" involving private citizens on matters of no public concern. Most claims against attorneys seem to involve the least protected category, in which the defendant bears the burden of *disproving* the plaintiff's claims. As a result, they may be subjected to presumed and punitive damages with no evidence of actual damages, based on a negligence standard, rather than a standard of "actual malice."[5]

Defamation Elements and Application

American Jurisprudence has distilled the following minimum standards from Supreme Court jurisprudence:

> [T]o prevail on a cause of action for defamation, the complainant must establish the following basic elements: (a) that a statement was published; (b) which was of or concerning the complainant; (c) which was false; (d) was made in violation of the applicable duty of care; (e) was not privileged; and (e) caused damage.[6]

Surprisingly, it does not include the element "defamatory," which addresses whether the statement is the type of communication that should be expected to harm the subject's reputation or lower his standing in the community.[7] While the U.S. Supreme Court has made few significant pronouncements on this issue (and perhaps this is why *American Jurisprudence* omitted it), it is an element of the cause of action in most if not all states.[8] Even a superficial discussion of the variables and factors that pertain to these elements would be extensive, and, therefore, this article focuses on issues the authors frequently encounter in lawsuits against attorneys.

Falsity/Fair Report/Substantial Truth/Opinion

Defamation claims against attorneys are often based upon statements about their client's adversaries and disputes. As a result, the truth/falsity analysis for lawyer defendants frequently turns on the accuracy of the attorney's description of his client's lawsuit or opponent. Many states still follow the common law on falsity, which requires attorney defendants (the press is treated differently) to prove falsity unless a public figure or issue is involved. Since public figures and issues are rare, most attorney defendants will bear the burden of proving the truth of their claims. This burden may become a significant obstacle to the attorney defendant especially inasmuch as the Supreme Court has observed that in cases with conflicting evidence, the burden will be case dispositive.[9]

Plaintiff attorneys frequently file these lawsuits after prevailing over the party that issued a press release, asserting that their victory proves that their opponent's description of the dispute was false. They also may contend that *res judicata* or collateral estoppel prevents the court from evaluating the truth or falsity of the subject statements, as it is bound by the underlying court's findings and judgments. In most states, this argument should fail, since *res judicata* requires precise identification of parties, and attorneys acting as advocates are not considered one and the same with their clients.[10]

These attempts also should fail on the identity of issues prong, because an inconsistency will arise between issues or burdens. For example, many courts have held that the outcome of a lawsuit is totally irrelevant to a defamation claim based upon that lawsuit. Understanding the rationale for these decisions may be one of the most important lessons the practitioner can apply in seeking to limit her own defamation exposure.

2 *See* 53 C.J.S. Libel and Slander; Injurious Falsehood § 5 ("Distinction between libel and slander").
3 "Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).
4 "[T]he United States is generally considered to have the strongest legal regime for the protection of free speech in the world." Jamie Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 Am. J. Int'l L. 628, 644 (1997).
5 *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).
6 104 Am. Jur. Proof of Facts 3d 221.
7 *See* Restatement (Second) of Torts § 559 (1977).
8 50 Am. Jur. 2d Libel and Slander § 195.
9 *See Hepps* at 776 "There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive."
10 *Massey v. David*, 831 So. 2d 226, 234 (Fla. 1st DCA 2002), *Keramati v. Schackow*, 553 So. 2d 741 (Fla. 5th DCA 1989).

To illustrate: the fair report privilege, substantial truth doctrine, and opinion defenses may all be supported by the following minor modification:

ACTIONABLE: "Mark Sullivan stole my money."

DEFENSIBLE: "I sued Mark Sullivan for stealing my money."

The distinction between these functionally similar phrases may seem semantical, but semantics are often the metrics by which defamation suits are measured.[11] Moreover courts have consistently drawn significant legal distinctions between these types of comments based upon the following overlapping[12] doctrines.

Fair Report Privilege

The first is the fair report privilege, which emanates from policy concerns involving the transparency of courts and judicial proceedings. It applies to one who gives an accurate summary of the events of official proceedings,[13] and is *not* limited to the media.[14] To qualify for the privilege a summary must be fair and complete. Since the application of the privilege turns on the accuracy of the *description*, not the underlying events,[15] a press release which accurately summarizes a pleading is privileged even if the pleading is false.[16]

It is not unusual for plaintiffs to assert that the privilege is defeated by paraphrasing or lack of detail. In one case the authors defended, the plaintiff, who previously defended a civil theft claim based on stealing corporate funds, contended that a press release which stated he was sued for embezzlement was inaccurate since the underlying complaint did not contain a count for embezzlement. Such hyper-technical nitpicking is generally rejected by defamation law. These types of arguments should fail pursuant to authority that clarifies the privilege does not require an exhaustive or comprehensive report, but merely a "rough and ready" summary[17] that should produce a similar gist or "sting" as the precise truth. In *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1112-13 (6th Cir. 1978) the 6th Circuit held that "fraud" fairly represented the gist of a developer's prosecution for securities violations although he was not technically charged with fraud.

The more neutral the summary, the more likely it is to pass muster. As the Florida Supreme Court has observed, "[The] report *should not be mingled with comment*, either in the body of it or in the heading…."[18] In short, objective and "clean" statements are more likely to be considered privileged, while statements that appear to "take a side", or imply the author's belief in the allegations, are less likely to be deemed as privileged.

Malice may or may not be relevant to the privilege depending upon the jurisdiction. While fair report was previously described as a conditional privilege that would be defeated by malice, this element has been abandoned in many states.[19]

Substantial Truth

Courts have reached similar results based upon a simple application of the truth defense. The "substantial truth doctrine" in defamation law mirrors the "gist" analysis described above, by protecting statements that may be technically false in some sense. Nevertheless, and similar to fair report, they convey an accurate impression or "gist."[20]

Courts have relied on this authority to dismiss defamation claims based upon descriptions of litigation provided that appropriate "cautionary terms" signal the reader that he is reading allegations rather than conclusive statements of fact. An example can be seen in *Thompson v. Lee*, 888 So. 2d 300 (La. App. 2 Cir. 2004), in which a Louisiana Court of Appeals held that an attorney did not defame a party by issuing a press release about a lawsuit *even if the suit's allegations were incorrect*: "[T]he statements in the press release are true. The first sentence of the first paragraph merely indicates that Cutler filed a civil rights suit and accurately describes the allegations of the complaint."[21]

As in the context of fair report, the minimal alteration of text to clarify that a statement describes litigation, rather than an opinion about the merits of that the litigation, may be the difference between a defensible and indefensible claim.

11 *See e.g. Seaton v. TripAdvisor*, LLC, 3:11-CV-549, 2012 WL 3637394 (E.D. Tenn. 2012) ("[W]hen considering a motion to dismiss in a defamation case, the analysis necessarily turns on semantics").

12 *See Nat Stern, Defamation, Epistemology, and the Erosion (but Not Destruction) of the Opinion Privilege*, 57 Tenn. L. Rev. 595, 604 (1990) ("That these three standards have been far from mutually exclusive is attested by the eclectic manner in which courts have invoked more than one within a single judicial opinion.").

13 *See* 50 Am. Jur. 2d Libel and Slander § 294.

14 *See* Restatement (Second) of Torts § 611 (1977).

15 *Eubanks v. Nw. Herald Newspapers*, 397 Ill. App. 3d 746, 750, 922 N.E.2d 1196, 1200 (Ill. App. Ct. 2010)(emphasis added).

16 *See Aoki v. Benihana, Inc.*, 58 F. Supp. 3d 439, 445 (D. Del. 2014) ("Despite plaintiffs' protestations to the contrary, the veracity of the Florida Complaint is irrelevant to whether the press release accurately reflects the Florida Complaint.").

17 *Id.*

18 *Shiell v. Metropolis Co.*, 136 So. 537, 540-41 (Fla. 1931)

19 *See To Be or Not to Be, Malice Is the Question: An Analysis of Nebraska's Fair Report Privilege from A Press Perspective*, 36 Creighton L. Rev. 21, 38 (2002) (containing comprehensive multijurisdictional discussion of the issue).

20 As the court explained in *Masson v. New Yorker Magazine, Inc.* 501 U.S. 496, 517 (1991) using language that should look familiar from the fair report authority, "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'"

21 *See also Aoki v. Benihana, Inc.* 58 F. Supp. 3d 439, 445 (D. Del. 2014) (dismissing suit pursuant to observation that "Despite plaintiffs' protestations to the contrary, the veracity of the Florida Complaint is irrelevant to whether the press release accurately reflects the Florida Complaint.")

Opinion

Verbiage expressing an opinion also increases the chances the statement will be considered an opinion. Based upon unique authority that has evolved in the context of attorney and party statements about litigation and legal disputes, a statement representing the merits of litigation may be characterized as an opinion.

In addition to being false, a defamatory statement also must be based on a statement of fact, rather than opinion. Courts have relied on this authority to hold that readers will probably interpret interested commentary about legal disputes as statements of opinion. The evolution of this line of authority is complex and beyond the scope of this article, but its recent application can be seen in *Hill v. Cosby*, 665 Fed. Appx. 169 (3d Cir. 2016). The Third Circuit Court of Appeals determined, among many other findings, that an attorney's press comments suggesting that the plaintiff was a liar and extortionist were nonactionable opinions, although they superficially appeared to be statements of fact. However, a different court reached a different result on similar facts in *Green v. Cosby*, 138 F. Supp. 3d 114 (D. Mass. 2015).

Merely labeling a statement as an opinion is ineffective, since the test looks beyond labels to evaluate whether the substance of the purported opinion suggests a basis in undisclosed defamatory facts,[22] and/or "implies the assertion of an objective fact."[23] The latter appears to be the more current test, and was applied to protect statements about litigation in the influential case *Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980). *Info Control's* multi-part test, which examines factors such as the publication medium, the context (including speaker and subject), and the use of cautionary words, has been consistently applied by courts to support findings that the public is unlikely to view statements about legal disputes by adversaries (and their lawyers) as objective statements of fact rather than predictable advocacy.[24]

Litigation Privilege

Many attorneys believe that their press statements regarding client lawsuits will be protected by the litigation privilege, which protects parties and counsel from liability for actions connected to pending litigation.[25] But numerous courts have excluded press statements from the privilege's protection. Most have reached this conclusion by finding that attorney communications to the media do not serve the attorney/client privilege policy justifications of ensuring that parties are not discouraged from testifying candidly in official proceedings.[26] This line of authority has primarily distinguished between "core" litigation activities, such as hearings and depositions, and ancillary activities, such as talking to the media or interviewing witnesses.

In *DelMonico v. Traynor*, 116 So. 3d 1205 (Fla. 2013), the Florida Supreme Court held that an attorney's statements to a potential deposition witness were not protected by the absolute privilege, but by a lesser qualified privilege that required the defendant to demonstrate the absence of express malice. While litigation privilege is not always helpful to media-related claims, it remains an indispensable tool to quickly eliminate frivolous suits based on in-court statements, that are typically filed only by *pro se* litigants or inexperienced attorneys.

Attorneys and clients should understand the various risks posed by the non-disparagement clauses . . . . These agreements are typically not subject to First Amendment concerns since parties are considered to have waived their First Amendment protections by voluntarily entering into the agreement.

22 *Kotlikoff v. The Community News*, [89 N.J. 62] 444 A.2d 1086 (N.J.1982).
23 *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995).
24 *See also Dreamstone Entm't Ltd. v. Maysalward Inc.*, 2:14-CV-02063-CAS, 2014 WL 4181026, at *4 (C.D. Cal. Aug. 18, 2014).
25 T. Leigh Anenson, J.D., LL.M., *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 Pepp. L. Rev. 915, 916 (2004).
26 *See* Douglas R. Richmond, *The Lawyer's Litigation Privilege*, 31 Am. J. Trial Advoc. 281, 324 (2007) (citing numerous decisions in support of the observation "Courts are reluctant to extend the litigation privilege to lawyers' communications with the media because they seldom serve the purposes on which the privilege is founded.").

Damages

Injury to reputation represents the quintessential element of a defamation claim.[27] Recoverable damages are divided into general, special, and punitive damages. Special damages are concrete monetary damages that must be established by evidence.[28] General damages include the traditional and amorphous defamation harms such as loss of reputation, shame mortification, and hurt feelings that are presumed to arise from defamatory statements.

Attorney defamation defendants frequently contend that their opponent has no "actual" damages, but this is not necessarily relevant to their exposure. As the U.S. Supreme Court has explained, defamation is an oddity of tort law because it permits the recovery of presumed compensatory damages without actual loss,[29] since reputational damage is inherently difficult to prove.[30]

The fact that most defamation cases against attorneys will involve private individuals and private matters is as relevant to damages as it is to the liability standard. Dun & Bradstreet *Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) permits the states to fashion whatever remedy they wish in this context without offending Constitutional norms. In the absence of binding guidance, some states have completely abolished presumed damages,[31] while others continue to permit them.[32] Some states split the difference by limiting "no evidence" presumed damage awards to a nominal value.[33] This limitation is not required by the Constitution, however, and the 7th Circuit Court of Appeals held that a million dollar "no evidence" presumed damage award did not violate the First Amendment.[34] If your case is being litigated in a state that still permits assessment of significant presumed damage awards with no evidence, a lack of provable reputational injury will not necessarily lead to a victorious result.

Liability for Breach of Non-disparagement Agreements

Attorneys and clients should understand the various risks posed by the non-disparagement clauses that are commonly incorporated in settlement agreements. These agreements are typically not subject to First Amendment concerns since parties are considered to have waived their First Amendment protections by voluntarily entering into the agreement.[35]

It is significant that in contract litigation over these claims, courts look to dictionaries to define the parties' understanding of the term "disparage." [36] In doing so, they are likely to define the term more broadly than "defame." Defamation must be false, *and* substantially impair the subject's reputation, while "disparage" appears to be satisfied by virtually any remotely negative statement, including true statement and opinion.[37]

Non-disparagement clauses also increase the risk that your client will be sued for your activity. While questions about scope and authority may protect your client from claims that he is vicariously liable in tort for your press releases about his litigation, the majority of settlement agreements render the settling client vicariously liable for any agent's breach of the terms. If there is one thing more unsettling than being sued by your client's opponent for defamation, it is being sued beside your client, who is then forced to contemplate whether he has a viable breach of fiduciary duty claim against you for exposing him to contract liability to promote your own interests.

27 See *Kiesau v. Bantz*, 686 N.W.2d 164 (Iowa 2004) ("The gravamen or gist of an action for defamation is damage to the plaintiff's reputation.").
28 50 Am. Jur. 2d Libel and Slander § 353 (Compensatory Damages; general and special damages).
29 *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("[T]he common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss.").
30 *Id.* at 373 (citing The (Restatement) Second of Torts for the proposition that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed.").
31 NMRA 13-1010.
32 Mike Steenson, *Presumed Damages in Defamation Law*, 40 Wm. Mitchell L. Rev. 1492, 1534 (2014)
33 *NuWave Inv. Corp. v. Hyman Beck & Co., Inc.*, 432 N.J. Super. 539, 75 A.3d 1241 (App. Div. 2013), aff'd, 221 N.J. 495, 114 A.3d 738 (2015) ("While an adequately instructed jury may make an award of presumed damages in libel action absent proof of actual harm to a plaintiff's reputation, the award must be nominal.").
34 *See Republic Tobacco Co. v. N. Atl. Trading Co., Inc.*, 381 F.3d 717, 734 (7th Cir. 2004). See also (generally) 36 A.L.R.4th 807 Proof of injury to reputation as prerequisite to recovery of damages in defamation action—post-*Gertz* cases (Originally published in 1985).
35 USA Technologies v. Tirpak, 2012 WL 1889157 (E.D. Penn 2012).
36 *Sohal v. Michigan State Univ. Bd. of Trustees*, 295557, 2011 WL 1879728, at *4 (Mich. Ct. App. May 17, 2011).
37 Id.

Conclusion

Defamation liability cannot be eliminated, but it can be mitigated. The recommended strategy avoids any public discussion of legal matters, and pursuant to cases such as Florida's *Delmonico v. Traynor*, perhaps even private discussions. But such absolute measures will not be possible, or desirable for every attorney. For those practitioners, understanding the limits of litigation privilege, the doctrine of presumed damages, and the assignment of falsity burdens will, at a minimum, permit a more informed decision about the risk/benefit balance of a decision to publicize a case. And for those who find the risk acceptable, understanding the factors that will make a court more likely to interpret commentary as nonactionable truth, opinion, or fair report may be the difference between a claim that is dismissed in the first two months, or persists for years.

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