

## **CHAPTER ELEVEN: DEFAMATION**

By Jon A. Duncan

The law of libel is arcane and not entirely logical. Describing it in any detail takes a book, and there is a good book: Robert Sack, "Libel, Slander and Related Problems" (Practicing Law Institute, 1980). Other useful references on defamation and invasion of privacy law are M. Polelle & B. Ottley, "Illinois Tort Law", Chapters 5 & 6 (Butterworth Legal Publishers, 1985) and J. Tidwell, "Media Law in Illinois", Chapters 1 and 2 (New Forums Press, Inc. 1992). But we offer no book here. What we have done, instead, is to describe a general approach that will help to identify whether a particular story presents a problem, and thus give guidance as to how carefully the material should be handled.

Even if you have been beyond reproach in your reporting, you may still find yourself one day as a defendant in a libel case, and incurring large legal bills for yourself and your news organization. First, we describe in general terms the problem areas in the law of libel. That somewhat academic discussion is followed by a hypothetical in which we apply the general principles to a concrete example.

The vast majority of libel problems can be avoided by making sure that your stories are both accurate and fair. When you finish reading this article, we hope you will conclude that the best advice is to ask yourself two tough questions: Is the story accurate? Is the story fair?

## **Libel Law Protects Innocent Reputations From Unfair Damages**

Before we undertake a reporter's evaluation of potential libel issues, however, it makes sense to review the legal basis of defamation law. The law of defamation is intended to protect an innocent person from damages to his or her reputation that result from the publication of false information.

Any student of libel law will quickly learn that Illinois courts classify defamation cases and the plaintiffs who file them in several ways, and that these classifications impact how a defamation case will proceed. For example, some types of false statements are considered to be so naturally harmful that the law will presume that the plaintiff's reputation was damaged, even without any proof of damages. These cases are known as libelous *per se*, and they include cases involving (1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession or business; and (5) words that make accusations of fornication and adultery. If the story fits into one of these categories as libelous *per se*, and if it is not reasonably capable of an innocent construction, then damages are presumed and the plaintiff need not prove any special damages.

However, if the story is not libelous *per se*, it may still be actionable as libelous *per quod*, but the plaintiff will have to prove special damages in order to recover. These classifications are really issues of damages, rather than issues of liability, however, and any extended discussion of

these distinctions is beyond the limited scope of this article. This article is more narrowly focused instead on how to avoid these problems in the first place.

## **Evaluating a Story for Libel Purposes**

### Is it derogatory?

Step one is to assume the worst about the harmful impact of what you are writing. The one test to determine what may be libelous that is the most useful to news reporters in their daily work is that if the words are derogatory, they are libelous. That is not a wholly accurate legal definition, particularly in Illinois, but for journalistic purposes, keeping the libel threshold that low avoids debate over nuances, so that one can focus on more important questions.

### Illinois' confusing "innocent construction" rule

Some courts went to extraordinary lengths to find words not libelous *per se* under a legal doctrine unique to Illinois known as the "innocent construction rule." This rule says that if there is more than one way to reasonably construe a statement, one libelous and the other non-libelous, then the non-libelous construction must be accepted by a court as the one intended by the publisher, and the article cannot be libelous *per se*. First announced by the Illinois Supreme Court in *John v. Tribune Co.* in 1962, the rule had been stretched so far as to innocently construe statements that an official "fixed" parking tickets on the ground that "fix" could mean mend or repair and therefore not imply dishonesty! Twenty years later, the court in *Chapski v. Copley Press* reminded everyone, however, that an innocent construction had to be a reasonable one, with the words read in context and given their ordinary meaning. This wasn't really earthshaking but did reconfirm sound advice - keep the threshold for deciding what is defamatory low.

Many libel cases were dismissed under the innocent construction rule because it was widely believed that the rule made immunized articles from litigation if the libelous material could be innocently construed. The rule has been strongly criticized and the Illinois Supreme Court noted in 1989 that the innocent construction rule "has spawned a morass of case law in which consistency and harmony have long ago disappeared."

More recent cases have made it clear that an available reasonable innocent construction only means that the lawsuit cannot be pursued as libelous *per se* (without proof of special damages), but that it can still be actionable as libelous *per quod*, that is, with proof of special damages. Under the modern cases, the innocent construction rule should not be viewed as a complete defense to libel cases in Illinois. Nor should it be regarded as a permanent weapon in the Illinois defamation defense arsenal.

#### What standard of care applies?

A conclusion that the words are libelous is only the beginning of the analysis. A plaintiff must prove more in order to prevail.

In any libel case involving the media, the burden is on the plaintiff to prove two things. First, he must show that the article is false. This was declared the law in Illinois in 1969 in *Farnsworth v. Tribune Company*. In 1982, it was reaffirmed in *Colson v. Steig*, in which the Illinois Supreme Court predicted that the U.S. Supreme Court would take a similar position. In 1986, in *Philadelphia Newspapers Inc. v. Hepps*, the U. S. Supreme Court made this the law in the entire United States. The second thing a plaintiff must show is that the publisher was somehow at fault in publishing the story.

The kind of evidence required to prove fault depends on who the plaintiff is. If the plaintiff is a private person, he need only prove falsity and negligence. If he is a public official or public figure, he must prove falsity and “actual malice,” meaning that the publisher knew the material was false or that it published the material with a reckless disregard of whether it was true or not. The distinction based on the plaintiff’s status is based on the First Amendment and comes from *New York Times Co. v. Sullivan*, a 1964 United States Supreme Court decision that is the cornerstone of modern libel law. The general idea is that the First Amendment requires that there be sufficient “breathing room” for robust debate of matters of public importance without fear of libel litigation. Accordingly, when the allegedly libelous words involve a public official or matters of public concern, the interests of public debate requires that the rights of a libel plaintiff must be tempered to allow room for free speech on such issues.

However, where the plaintiff is a private person not involved in public issues, the need for robust public debate is not as important, and therefore, the standards of proof are less strict. A private plaintiff need only prove falsity and negligence, and the question of fault turns upon whether the reporter acted reasonably and professionally in checking the truth or falsity of the article prior to publication. If, on the other hand, the plaintiff is a public figure, it turns on a subjective standard of what the publisher knew at the time of publication.

It is not always easy to determine beforehand who is, and who is not, a public official or public figure. For example, not all public employees fall within the "public official" category. The Illinois Supreme Court has stated that the “public official” designation applies at the very least to those “among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” The

Court further stated that the “public official” designation applies “[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees.”

As a rule of thumb, only those who have, or are generally perceived to have, substantial responsibility for or control over the conduct of government affairs are deemed to be “public officials” for purposes of libel law. In Illinois, high ranking executive officials, the governor, mayors, state's attorneys and state agency heads, have all been held by courts to be public officials subject to the “actual malice” standard of proof in libel cases. It is not so clear, however, when you get down to agency employees, teachers, recipients of government grants or the like. The decision turns in large part on whether abuse of the office has great potential for social harm. If it does, the public has an independent interest in the qualifications and performance of the person who holds it. Consequently, situations involving lower level officials must be examined, on a case-by-case basis, to see what the official does and whether the article relates to those duties.

In discussing whether a police beat patrol officer should be classified as a “public official” for purposes of the “actual malice” standard in libel cases, the Illinois Supreme Court reasoned:

Although as a patrolman he is 'the lowest in rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly 'governmental' in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level

than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws.

It is fair to conclude that whether a particular public employee is required to prove "actual malice" in a defamation case will depend on his potential for social harm. So far, the cases say assistant states' attorneys, village attorneys and police officers are public officials, but school teachers are not. Cases are not always logical.

Classification of a defamation plaintiff as a "public figure" is even harder to predict. Generally speaking, there are two kinds of public figures. These include: (1) persons who achieve such a degree of general fame and notoriety in the community that they are considered public figures for all purposes and in all contexts; and (2) persons who either have voluntarily injected themselves into a public controversy in order to influence the resolution of the issues involved, or have been drawn into such a controversy, thus becoming public figures for a limited range of issues.

If you have a person who occupies a position of influence in society and therefore commands wide attention or generally has access to media coverage, it is pretty safe to assume the "pervasive public figure" classification will fit. (Ready examples are Dan Rather, David Letterman and Jesse Jackson).

To have "vortex public figure" you must first have a "genuine public controversy"; that is, one that existed before you decided to write about it! Then, you must have a person who by position or purposeful conduct is thrust into the forefront of that particular public controversy.

Thus, a public university athletic director has been held such a public figure in the context of alleged sports gambling at the school, as was a retired army general who actively involved himself in a federally enforced integration program at a southern university. On the other hand, a wealthy socialite was deemed not to be a public figure in the context of her divorce proceedings, since there existed neither a public controversy nor an effort by her to voluntarily thrust herself into the limelight. Although several court cases have held that an athletic coach at a public school is not a "public figure," other cases have held that a coach is a "public figure" and the issue is far from resolved.

If you do have a public official or a public figure, then the *New York Times* First Amendment privilege applies and the libel plaintiff must prove by "clear and convincing evidence" that any defamatory falsehood was published with "actual malice," that is, with knowledge of its falsity or with a high degree of awareness of its probable falsity.

If the reporter entertained serious doubts in his mind as to the truth of the story, it may qualify as recklessness meeting the actual malice standard. "Actual malice" is a legal term of art, and it has little to do with malice. It is simply the label the Supreme Court applied to the public figure's burden of proof.

All this being said, however, the "actual malice" standard does not apply in cases involving private individual plaintiffs. The Supreme Court has held that were the plaintiff is not a public figure or public official, the private plaintiff need not prove "actual malice," but he still has the burden to prove that the article was false and that its publication was negligent.

Does the subject of the article give rise to a privilege?



While a plaintiff who is a public official or public figure carries the burden of proof on the issue of fault, there is a second group of questions on which the publisher carries the burden of proof. These defenses are called privileges, based on state common law rather than the First Amendment.

### Why are there privileges?

To look for the safe harbor of a privilege, you need an understanding of why the law creates privileges and the limits built into them. A privilege results from a balancing of the public's need for certain information against the damage that information can cause to personal reputations. That kind of judgment could be made in each case by a jury. In the area of free speech, however, the courts have held that the need for predictability requires consistent rules that can guide publishers. If one could not tell with some assurance that certain statements can be made without being subjected to the uncertain scrutiny of a jury years later, many articles would probably not be published. Without such an assurance, the risk of liability has the inevitable effect of making publishers leave a substantial margin of safety. The width of the margin represents information that should be published in the public interest but will not be published due to fear of liability. To avoid this "chilling effect," the legal system does not leave the balancing entirely to the case-by-case judgment of juries. Instead, it tells judges to dismiss suits once they are satisfied that the publication is about a kind of person or situation to which a privilege applies.

### What is a privilege?

State or common law privileges differ greatly from the *New York Times* federal constitutional privilege. While *New York Times* focuses on the nature of a person about whom a defamatory statement is made, the state law privileges derive from the nature of the event or subject being reported - not anything peculiar to any person.

State law privileges protect the reporting of even false and defamatory facts so long as certain conditions are met. First, the subject matter must fall within one of the recognized areas of protection. Next, the report about that subject matter must be fair and accurate. That is to say, the report must have the same "gist" as the original statement: it must be fair capsulization and carry no greater defamatory sting than the matter being reported upon. For example, if a matter to which such a privilege applies concerns charges of child neglect, reporting it in terms of child abuse would carry a greater sting and would not be privileged. If an article does not concern a privileged subject, false, libelous information in it may not be repeated without risk of liability.

#### What subjects are privileged?

Reports on acts of government: The broadest of the state law privileges protects reports on the acts of public agencies. If the state's attorney has begun an investigation, if the police have made an arrest, or if the school board has fired an employee, those facts are reportable, even though the individuals involved may be libeled. The rationale for this privilege is simple and basic; the public needs to know what its governmental agencies are doing. This privilege comes primarily from *Lulay v. Peoria Journal Star*, a 1966 Illinois Supreme Court decision. If the Illinois Department of Professional Regulation has begun an investigation of a physician who is alleged to sexually abuse patients under general anesthesia, that matter may be reported without

fear of liability for libel - even if the allegations are completely false - as long as the report is a fair and accurate report of the allegations.

However, unlike the *New York Times* privilege, which places the burden of proof on the plaintiff, the burden is on the defendant to establish that the report is a fair summary and consequently entitled to the privilege.

Reports of official records: A similar but narrower state law privilege covers reports on the contents of official records - executive, administrative, legislative and judicial. The same restraint applies: The report must be a fair summary of the contents of the official record.

However, if the records are not public, the privilege is not likely to apply and there could be liability for accurately reporting an untrue fact. The official report privilege also may not apply if the defamatory statement itself did not appear in the public record. For example, in *Berkos v. NBC*, a judge sued for libel after a grand jury handed down indictments in a court corruption investigation. The indictment itself did not name the judge, but it identified the courtroom in which a bribe had allegedly been paid. An NBC reporter checked the court records and found Judge Christy Berkos was in the courtroom on the day in question. The broadcast reported on the grand jury indictment and added the additional fact stating the name of the judge who presided on that day. This combination of facts from two separate public records was found not to be privileged because the defamatory information was not contained in the public record.

Reports of Official Statements: The *Lulay* privilege also covers reports of official statements: those of the governor, state's attorney, or the like. Here again, the same conditions apply. The report must be an accurate description or fair capsulization of the statement. Deciding who is a public official or whose statement may be reported under this privilege is not

quite the same as deciding who is a public official for purposes of the *New York Times* privilege.

First, the statement must deal with a matter of public concern, i.e., newsworthy. Second, it must be made by a public official and third, it must be related to matters committed in the official's responsibility.

If the matter is somehow related to the official's responsibility, its reporting will probably be privileged. There obviously is a limit, but as demonstrated by the case *Blair v. Walker*, for Illinois courts it has to be pretty far out. In that case, a press release issued by the governor that accused a real estate tax delinquency purchaser of being unscrupulous and preying on a helpless old woman was found to be within the governor's official duties and therefore absolutely privileged! The real risk with oral statements of officials lies in getting the quote accurately.

Reports of public meetings: Reports of meetings open to the public that deal with matters of public concern are also privileged as long as the usual *Lulay* conditions are satisfied. While there are no Illinois cases on this point, it would appear that the privilege applies not only to meetings of public bodies, but also to public meetings of private groups, such as a homeowners group or a gun control group, so long as they are open to the public and deal with matters of public concern.

Neutral Reportage: There is a final privilege worthy of note even though it is unclear whether it is now the law in Illinois. It has been accepted by one appellate district and rejected by another. It is the privilege of neutral reportage. This privilege is best described as an effort to broaden the *New York Times* privilege to include reports about any dispute between public figures. When public charges are made, especially when made by or about a public official,

reporting those charges should be privileged even though the media may have serious doubts about the truth of the charges. The fact that the public accusations were made by a serious source is itself newsworthy, whether they are true or false.

Importantly, the Appellate Court, First District, which hears appeals from the lower courts in Cook County, has rejected the neutral reportage doctrine. Accordingly, this privilege defense may be unavailable in Cook County. In the Fourth District, which hears appeals from the central portion of Illinois, including Sangamon County, has recognized this privilege. Unfortunately, the Illinois Supreme Court has not yet resolved these conflicting lower court rulings. Accordingly, courts in the Second, Third and Fifth appellate court districts remain free to choose which decision they regard as more persuasive. You should not place much reliance on this potential privilege until the Illinois Supreme Court has accepted it.

Common Law Malice: While the courts have established privileges to encourage certain kinds of reports, they recognized that there is a potential for abuse. As a result, most privileges come with strings attached in the form of a definition of a set of extreme circumstances in which the privilege will be lost. The oldest of those limitations is simply that statements should not be made because of personal hatred. That limitation has little practical relevance to the media, since news stories rarely involve that kind of personal animosity. But the definition of the limitation on most privileges has come to be phrased as "malice," and reporters can be guilty of some acts included in that definition. Evidence of malice, of one kind or another, tips the scales toward allowing a jury to decide the case.

In *Brown & Williamson Tobacco Co. v. Jacobson*, the destruction of reporters' files after they were requested by a libel plaintiff in pretrial discovery proceedings was regarded as proof of

"malice" by a reporter. Once a reporter's notes are subpoenaed or requested in litigation discovery, they must not be destroyed thereafter.

Opinion: Statements of pure opinion may enjoy a position somewhat more secure than that provided by any of the privileges discussed above. But it is no longer true that statements of opinion cannot be libelous.

In 1990, the U.S. Supreme Court ruled in *Milkovich v. Lorain Journal Co.* that statements of opinion can be libelous if the opinion can reasonably imply certain facts. This decision came as quite a shock to many journalists and media lawyers, who had previously relied on a statement in a 1974 Supreme Court case, *Gertz v. Robert Welch, Inc.*, which said that "there is no such thing as a false idea." Literally hundreds of lower court decisions, both before and after *Gertz*, had previously said that statements of opinion were absolutely protected and could not be libelous, on the theory that only facts could be false and defamatory, and that opinions cannot be false. *Milkovich* changed all that and said that certain statements of opinion can be libelous if there are combined with statements of fact.

The Supreme Court in *Milkovich* rejected what it called "an artificial dichotomy between opinion and fact" and noted that expressions of opinion may often imply an assertion of objective fact and, in such cases, would be considered actionable. The Court explained that a wholesale first amendment protection of "opinion" was overly broad since "expressions of 'opinion' may often imply an assertion of objective fact." Instead, the Court held that a statement will receive first amendment protection only if it cannot be reasonably interpreted as stating actual facts about the plaintiff.

Subsequent cases that have interpreted the *Milkovich* ruling have said that it is clear that statements capable of being proven true or false are actionable, while pure opinions are not. Here is an example of how this works: simply couching the statement "Jones is a liar" in terms of opinion--"In my opinion Jones is a liar"--does not dispel the factual implications contained in the statement.

Thus, the test to determine whether a defamatory statement is constitutionally protected is a restrictive one. Under *Milkovich*, a statement is constitutionally protected under the First Amendment only if it cannot be "reasonably interpreted as stating actual facts." The more obviously absurd or hyperbolic the commentary, the more likely it will be protected from a lawsuit. But do not assume an opinion cannot be libelous.

### **Source Problems**

Another chapter of this guide is devoted to the Reporter's Privilege Act, which generally protects the confidentiality of news sources. But stories based on unnamed sources present special problems in libel cases. To show that the story was privileged, or to show that a story about a public official was not just fabricated, a reporter often needs to name a source.

Promising a source anonymity creates two problems. One is that you may lose a libel suit if you do not name your source. The other is that you may wind up being held in contempt, although that is less likely since the Reporter's Privilege Act was made applicable to libel actions in 1985. If a reporter refuses to reveal the source of information, a plaintiff may be prevented from determining whether the source was of such a character as to cause a reporter to seriously doubt the truth of the article or whether it was reasonable or professional to have relied on that

source. Accordingly, where the reporter refuses to reveal the source of allegedly defamatory statements, a court may enter a default judgment in favor of the plaintiff, or instruct the jury to assume that there was no source for the article.

In a case where a plaintiff can make an initial showing of falsity and actual harm or injury, a court may also find the reporter in contempt of court and impose criminal penalties, if the source is not revealed. Since all of these are unpleasant, pledges of confidentiality should be made sparingly, and if made, the article must be looked at on the assumption that it will have to be defended without reliance on the existence of that source.

### **Truth is a Complete Defense to a Defamation Claim**

Truth is the most important element in any libel case, just as it is the most important question about any story. Defamation is false by definition. Truth is always an absolute defense in every libel case, whether it involves a public official, a public figure, or a private person. But truth is often elusive, especially under deadline pressure, and sometimes no amount of digging can give one a sure sense of the accuracy of a story. That is when the matters discussed here become important, after one decides that the story is important enough to justify taking the risk of being wrong.

### **Applying Principles to Facts**

The hypothetical: Finneas Ferret is the chief investigative reporter for the Metropolis Chronicle, the leading daily in the populous midwestern state of Idyllia with a circulation of



550,000. In addition, he does a five-minute "spot" on local television station KROC TV's evening news based on the content of his daily column. To close out his long workday, Ferret does fifteen minutes of editorial commentary, again based on the subject of his daily Chronicle story, at 1 a.m. on KZAP, an independent, listener-sponsored FM station specializing in classical music and in-depth news analysis. Although the listening audience for Ferret's personal commentary is small, perhaps averaging 20,000, it is influential. As is true of all good investigative reporters, Ferret has numerous sources of information including government officials, private investigators, credit bureaus, banks and tipsters. His practice is to use them to the fullest and let the chips fall as they may. Ferret currently is covering the gubernatorial election campaign.

Because of a major schism in the state's dominant political party, there are three major candidates. The first is Anthony Aardvark, a young, aggressive third-term congressman from one of the Metropolis districts. The second is Babette Banal, a former prosecutor who is now a popular, syndicated TV news commentator and the first woman to run for the governorship in the state. She is one of the nation's leading right-to-life advocates, a position that is extremely popular in Idyllia because of its ethnic and religious composition. The third is Calvert Cretin, the incumbent Governor. A senior, conservative politician with two terms in the Governor's Mansion behind him, he is a master at dealing with the state legislature.

The election is five days away. As a windup to his month-long coverage, Ferret plans an in-depth profile of each of the three candidates, publishing one a day. There is reason to assume that the other major daily in the state is about to publish its own major series on the election and has assigned its up-and-coming reporter Ned Nosey to the story. Last night, an unmarked

envelope was delivered to Ferret. There was no indication as to its source. In it were copies of numerous documents that appeared to be from the files of the State Police Intelligence Unit. The material pertained to Aardvark and Banal. There was nothing in the papers about Cretin. Ferret, who has some familiarity with material of this type from his days as a police reporter, had reason to believe it was genuine; he also knew that, if genuine, its release to him either was an intentional leak by the state police or it was stolen from them. Several telephone calls to friends and information sources revealed nothing conclusive about the documents. The material on Aardvark included a full financial report, which showed Aardvark's net worth, outstanding debts, and contained several unexplained "slow-pay" and "no-pay" entries. In addition, there was a three-year-old investigative report on Aardvark, containing notes of an interview with one of Aardvark's neighbors. These suggested that Aardvark conducted frequent, loud parties attended by numerous bearded "hippie" types and that a distinctive, sweet aroma frequently emanated from his apartment. Perhaps the most interesting item pertaining to Aardvark was a transcription of notes allegedly made by Dr. Eric Enuresis, a prominent psychiatrist, in the course of treating Aardvark. These notes suggested the possibility of a potentially disabling mental illness. A phone call to Dr. Enuresis yielded nothing other than an invocation of the doctor-patient privilege and an off-hand remark, "This is very strange; I have never had any dealings with the press during my 30 years as a psychiatrist, but you are the second reporter to call today." Ferret's wrap-up column on Aardvark contained comments suggesting that the candidate lacked financial responsibility and emotional stability, and led a kind of life that might not be appropriate for the governor of Idyllia. He repeated this material on the evening news. On his late night FM

broadcast, however, Ferret went much further in his attack on Aardvark's personal life, calling, at the end, for a return to the "old-style morality."

Ferret's investigation of Babette Banal revealed nothing of an unsavory character. However, the documents appearing to be from the state police's files contained three interesting items. First, a field agent's report, in connection with a security clearance, of an interview with one of her law professors, Dagby Dolt, indicating that Banal had gotten through school by the "skin of her teeth" and either had "little aptitude for law and hard work" or "had spent too much time with men." Second, a 25-year-old medical record indicating that at age 15 Babette had an abortion. And, third that Banal's husband had been convicted of manslaughter for slaying his first wife in a fit of passion, had served five years in prison, 14 years ago had changed his name and moved to Metropolis to escape his past after being released, and that since his arrival in Metropolis he not only had lived a blameless life, but had become a pillar of Metropolis society and a patron of numerous charitable endeavors. Ferret reported these facts as part of his column and news broadcast on Banal without editorial comment.

In preparing the profile of Governor Cretin, Ferret had another of his contacts, Sheriff Brutus Lascivious Clodde, who is up for re-election next year and has been supported by the Chronicle in the past, search the Metropolis police records and, using a local computer terminal, make an inquiry of the FBI's National Crime Information Center. This produced rap sheet entries showing that, as a teenager, Cretin had been arrested for a hit-and-run vehicular homicide, but was never prosecuted. This disclosure by the sheriff to Ferret violated both state law and U.S. Department of Justice regulations. Two nights before the Cretin story was due, Ferret stopped at an out-of-the-way watering hole for a nightcap after his KZAP-FM broadcast. When he went to

the rear of the bar to make a telephone call, he noticed Cretin in a hidden booth with a strikingly attractive woman 30 years his junior. Cretin appeared intoxicated, but not sufficiently so to prevent the pair from engaging in amorous activity. Searching his memory, Ferret recalled that the woman, Wanda Werewolf, had once been arrested but not prosecuted for soliciting. The scene also was consistent with other reports Ferret had received about Cretin's excessive drinking. The following morning, Ferret prepared a column reporting these items to his readers under the proposed headlines "Governor Cretin Involved in Car Death and Linked With Prostitute." Considerable attention was paid to Wanda Werewolf, and Ferret speculated on her relationship with Cretin. Shortly after the preparation of the Cretin story, but a day before its scheduled publication, the contents of the story were revealed to both Cretin and Werewolf. The former immediately asked the Chronicle's managing editor to kill the story or to allow Cretin equal space to explain both the vehicular homicide and the bar incidents. When Governor Cretin and Werewolf appeared at the newspaper to complain about Ferret's story, they presented a statement containing facts showing that the vehicular homicide charge was dismissed when it was discovered that Cretin was not driving at the time of the accident, and that he did not know that Werewolf, whom he had met in the bar after a long day of campaigning, might have been a prostitute. Both requests were refused.

### **How to Find the Problems**

A good way to review a story for possible libel problems is to make a list of the potential plaintiffs: anyone who might sue because of it. Next, note each of the facts stated in the story

about that person. Then assess whether there is doubt about the accuracy of each. If there is doubt, decide whether each plaintiff is a private person or a public official or figure. If the potential plaintiff is a private person, examine the source of the fact about that person to see if it falls within an area protected by privilege. You might also consider here whether you could prove you acted reasonably in publishing the story or had no serious doubts as to its truth. Would such proof depend on a source to whom you have promised confidentiality and consequently would refuse to disclose? Do you believe your source; is your source reliable?

Now, let's have some practice. Are there problems? Yes and no. Perhaps yes from a journalistic viewpoint, probably no from a libel viewpoint. The former is beyond the scope of this discussion; the latter is worked through below.

Aardvark, Banal, Cretin, Werewolf and Banal's husband are all potential plaintiffs. We do not know enough about them to know if each would sue. It's most likely Banal would, and possibly that the candidates would do likewise, especially if suit could be filed before the election. The pivotal question in the potential Aardvark and Banal claims is whether the documents received by Ferret in the envelope were genuine, could be proven to be genuine, or if not, whether he was safe in relying on them. Both potential plaintiffs are clearly public figures for purposes of comment on the election and anything that might touch on their qualifications for office. Congressman Aardvark is a "public official" and Banal, as a candidate for public office, is a public figure. Since all the statements about Banal are related to the election controversy, the public figure classification is sufficient to bring the stories within *New York Times*. Thus, to recover in a libel suit, Aardvark and Banal would have to prove that Ferret knew the information was false or acted in reckless disregard of its truth or falsity. Since he had reason to believe the

documents were genuine, it doesn't appear that they'd be able to prove that. It is however, a claim that might have to go to trial. Even if Ferret stated the facts that constituted the basis for his conclusions about Aardvark's lifestyle, the mere fact that they could be considered to be his opinion is not sufficient to claim a privilege for opinion, since even opinions now may be the subject of a libel claim.

Cretin also is a public official. His potential claims appear to be somewhat different, however. Ferret had the purportedly official report showing the vehicular homicide arrest but also had some facts to alert him that the arrest was in error. Even though he got the report from an improper source, Cretin's statement admits the report was correct. Thus, reporting it accurately is protected. Whether it should be is another question. Consider what happens if Cretin sues and asks for the source of the report. Presumably, Ferret might name his source. But if Cretin admits that he was arrested - that is, that the story was true - the source becomes irrelevant, and Ferret need not face the possibility of being prevented from introducing evidence of the source or facing a contempt charge.

The bar incident may well turn out differently for Werewolf than Cretin. As long as Ferret had no awareness of the probable falsity of his reports, Cretin loses. On the other hand, Werewolf is neither a public figure nor a public official. Consequently, if Werewolf can show that she isn't a prostitute, she need only show that Ferret was negligent, that is, did not act with reasonable care. Since all he had was an arrest for soliciting, she might well be right. Mr. Banal's best complaint is for invasion of privacy. Although privacy is treated elsewhere, it bears note here because it poses a potential danger in dealing with old official records. Where the

newsworthiness of a person's criminality has been substantially diminished by the passage of time, and he or she has become a rehabilitated member of society, there must be some independent justification for identifying the individual - even though the reported facts are true. It may be that being the potential "husband of the governor" is sufficient justification to identify him with the old wife-slaying conviction, but it's a close call.

Consider the invasion of privacy claim that Werewolf might bring in this context. Even if she had been a prostitute many years ago, if she has rehabilitated the publication of a story discussing her former profession may invade her privacy. Importantly, the law in this area is not fully developed and a story's truth may not necessarily be a defense to an invasion of privacy claim.

## **NOTES**

Adopted from a hypothetical used by the Ford Foundation Law Media seminars, where this hypothetical was used to illustrate that editors often face hard choices.

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