COMMITTEE REPORT

Issue Checklist for Motions to Dismiss and Summary Judgment in a Defamation Action

Prepared by MLRC Pre-Trial Committee
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INTRODUCTION AND ISSUE CHECKLIST

This checklist poses a series of questions to take the defense attorney through the complaint just received from a media client. The goal is to pose the questions and cite the major procedural and substantive devices and decisions that will permit the attorney to dispose of the case at the earliest moment with the least expense to the client. The checklist is accompanied by an outline (revised as of August 31, 2004) highlighting general points of law pertinent to many of the issues identified here. However, the outline is not an exhaustive recitation or explanation of underlying media defamation law. Suggested resources to consult are: RESTATEMENT (SECOND) OF TORTS, §558 *et seq*.; Sack, R., SACK ON DEFAMATION (3d ed. 1999) (PLI); Sanford, B., LIBEL AND PRIVACY (2d ed. 1996 – 1 Supp.) (Aspen Law & Bus.); and Smolla, R., LAW OF DEFAMATION (2d ed. 1999) (West Group), and the three volumes of LDRC's 50 State Survey: MEDIA LIBEL LAW; MEDIA PRIVACY AND RELATED CLAIMS; and EMPLOYMENT LIBEL AND PRIVACY LAW. This checklist and the outline also are to be used in tandem with a Discovery Roadmap prepared by MLRC's Pre-Trial Committee in 2004. The checklist addresses the following questions:

1. Are there personal jurisdiction issues?

Before jumping in with an answer, be sure your client can be sued where the plaintiff filed the complaint. Also, consider whether venue is appropriate or strategically advantageous.

2. Can you (and should you) remove or remand the case? If you have a choice, consider the following:

   a. Do the courts' summary judgment standards differ?

   b. Do differences in discovery procedures potentially affect your motion?

   c. Do the courts differ in attitude about the news media or about dispositive motions?

   d. Are there different procedures or standards for interlocutory appeal?

3. Okay, you're properly served and in the right court. Are there potential choice of law issues affecting your motion?

   a. Do the plaintiff(s) and defendant(s) reside in different states?

   b. Is multi-state defamation alleged?

   c. Do the laws of the possible jurisdictions differ?

   d. Is non-forum law preferable to forum law?

4. Is there a requirement in your jurisdiction that the plaintiff first request a retraction? The proposed Uniform Act adopted by some states requires that certain plaintiffs first request a retraction as a condition of filing suit. In other jurisdictions the retraction statute may affect only the kinds of damages that may be recovered.

5. Does your state have an Anti-SLAPP statute? If so, you may not need to answer or respond to discovery – proceed to special motion to strike. If the suit is filed in federal court, consider a motion to remand to take advantage of the special motion to strike.

At this point check whether defenses appearing on the face of the complaint make the action vulnerable to a motion to dismiss or for judgment on the pleadings.

6. Is the claim stale or barred by the single publication rule?

a. Is there a choice of law issue with respect to the applicable statute of limitations?

b. Can you show that the cause of action accrued and the limitation period expired as a matter of law before the action was filed?

c. Has the plaintiff overlooked the single publication rule?

d. When was the alleged defamation published? The date of publication may be different from the date on the newspaper or magazine.

e. What are the rules applicable to republication?

7. Has the plaintiff alleged and can the plaintiff satisfy the proof requirements of a *prima facie* case sufficient to take the case to a jury? If you've gotten to this point in the checklist, you are going to have to address plaintiff's *prima facie* case to determine whether there is potential for a motion to dismiss or for summary judgment. From this point forward we review briefly the basics of dispositive motions and point out that federal law on summary judgment now clearly requires the plaintiff to negate the defendant's showing. State laws differ. If, for example, the defendant must negate every element of the plaintiff's claim, summary judgment may be much more elusive under state law.

Identifying first the elements of a *prima facie* case, the applicable burden of proof and the summary judgment standards, we then examine in detail challenges to a *prima facie* case and various privileges available to a defendant to defeat a defamation claim. Can you negate with admissible evidence one or more elements of the cause of action? Begin to design your discovery plan here.

8. What are the elements of a *prima facie* case?

9. Was the statement reasonably capable of a defamatory meaning?

10. Was the communication a provable statement of fact or, alternatively, was it:

a. Rhetorical hyperbole?

b. Fair comment?

c. Parody or fiction?

d. Opinion?

11. "Of and concerning" -- Is this a proper plaintiff?

a. Is the alleged defamation of and concerning the plaintiff?

b. Is this nonactionable group libel?

c. Is the allegedly defamed person dead? Watch out for special laws governing dead celebrities.

12. Was the statement published to a third person?

13. Can the plaintiff demonstrate that the statement was substantially false?

14. What are the standards for a motion to dismiss or summary judgment?

15. Who bears the burden of proof, and what is its measure?

16. What is the applicable fault standard: constitutional malice, negligence or some equivalent standard? What is the nature of the speech and the status of the plaintiff? The answers to these questions will affect the plaintiff's required showing and burden of proof as a matter of constitutional law.

(1) Is the plaintiff a public official?

(2) Is the plaintiff a public figure or limited purpose public figure?

(3) Is the speech of public concern or purely private?

(4) What must the plaintiff show to meet the fault standard of constitutional malice?

17. Is there an alleged element of damages not recoverable as a matter of law?

a. What are the categories of damages?

b. What standards apply to each?

c. Can the plaintiff show that the damages claimed were caused by the alleged defamation?

d. Is incremental harm an available defense?

e. Is the plaintiff libel proof?

18. Was the statement privileged?

a. Absolutely?

b. Qualifiedly? If so, can the plaintiff demonstrate facts to show possible abuse by the defendant?

ISSUES TO CONSIDER FOR MOTIONS TO DISMISS AND SUMMARY JUDGMENT IN A DEFAMATION ACTION

1. **Are there personal jurisdiction issues?**

A. Jurisdiction under a state long-arm statute: To determine whether the exercise of jurisdiction over a defendant would be appropriate, federal courts examine the law of the state in which the action was brought. Federal Rule of Civil Procedure 4(e) permits federal courts to exercise jurisdiction over a defendant where the law of the forum state permits state courts to exercise jurisdiction over a non-resident defendant. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

(1) Two-step inquiry: (i) Does the state long arm statute permit the court to exercise jurisdiction over this defendant? and (ii) Would the forum state's exercise of jurisdiction over this defendant comport with due process? *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

(2) One-step inquiry: Does the state long-arm statute permit state courts to exercise jurisdiction over non-resident defendants to the constitutional limits of the due process clause of the Fourteenth Amendment? If so, the only inquiry is whether the forum state's exercise of jurisdiction over this defendant comports with due process. *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 63 (3d Cir.1984).

B. General jurisdiction and specific jurisdiction over the person**:** Courts may exercise either general or specific jurisdiction over a non-resident defendant. The exercise of either general or specific jurisdiction over a non-resident defendant must satisfy two requirements: (1) The non-resident defendant must have sufficient minimum contacts with the forum so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice; and (2) the court's exercise of jurisdiction must be reasonable. *Int'l Shoe,* 326 U.S. at 316.

(1) General jurisdiction: A court may exercise general jurisdiction over the defendant when the defendant has engaged in continuous and systematic activity in the forum state, even if that activity is unrelated to the plaintiff's cause of action. *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, at 414-16 & n. 9; *Noonan v. Winston Co.*, 135 F.3d 85, 89 (1st Cir. 1998).

a. Did the defendant engage in *continuous* and *systematic* activity in the forum state? *See Int'l Shoe,* 326 U.S. at 318 (stating that defendant's contacts necessary for the exercise of general jurisdiction must be "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities").

b. Factors to consider:

(i) Has the defendant appointed an agent for service of process in the forum state?

(ii) Does the defendant engage in business activities in the forum state?

(iii) Does the defendant have any employees in the forum state?

(iv) Does the defendant regularly ship its product to purchasers in the forum state?

(v) Has the defendant entered into any contracts with persons in the forum state?

(vi) Does the defendant maintain an office in the forum state?

(vii) Does the defendant solicit business in the forum state?

(viii) If the defendant is a publisher, does it regularly circulate its publication in the forum? If yes, what percentage of the publication's total circulation was distributed in the forum state? *See e.g., Chaiken v. VV Pub. Corp.*, 119 F.3d 1018 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1169 (1998) (holding that defendant's circulation of 183 copies in the forum, out of a total distribution of 210,000, was insufficient to confer general jurisdiction over the defendant).

(2) Specific Jurisdiction: "Specific personal jurisdiction may be asserted where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts." These contacts need not be systematic or continuous. *United Elec., Radio & Mach. Workers of America v. 163 Pleasant St. Corp.,* 960 F.2d 1080, 1088-89 (1st Cir. 1992) (*"Pleasant I"*) citing *Helicopteros,* 466 U.S. at 414 & n. 8, (1984).

(3) Factors to consider:

a. Does the cause of action arise from the defendant's activities in the forum state?

b. Did the defendant purposefully avail itself of the privilege of conducting activities within the forum? E.g.:

(i) Is the defendant's connection with the forum such that he should reasonably anticipate being haled into court there? and

(ii) Did the defendant purposefully direct its activities toward the forum? *Int'l Shoe,* 326 U.S. at 316; *Helicopteros,* 466 U.S. at 414 n.8; *Wilson v. Belin,* 20 F.3d 644,647 *cert. denied*, 513 U.S. 930 (1994).

c. Would the exercise of jurisdiction over the defendant be reasonable? Courts will consider:

(i) the burden imposed on the defendant if compelled to defend a suit in the forum;

(ii) the interests of the forum state;

(iii) the plaintiff's interest in convenient and effective relief;

(iv) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies;" and

(v) "the shared interest of the several states in furthering fundamental substantive social policies." *See Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987)(describing the so-called "gestalt factors listed above in (i)-(v)).

C. Significant fact patterns for media defendants:

(1) Fact Pattern 1: Defendant's only "contact" with the forum state is *de minimis* circulation of the publication containing the allegedly defamatory material.

a. Contacts of each defendant must be assessed individually. For example, a newspaper's contacts with the forum are not necessarily imputed to an author or editor of an allegedly defamatory article for purposes of exercising personal jurisdiction over those individuals. *Calder v. Jones*, 465 U.S. 783, 790 (1984) *citing Rush v. Savchuk,* 100 S.Ct 571, 579 (1980).

b. What is the nature of the defamatory statement: does plaintiff seek nationwide damages? *See Keeton v. Hustler Magazine*, 465 U.S. 770, 781 (1984)(stating that since defendant may be charged with knowledge of the "single publication rule," defendant could anticipate that a suit will seek nationwide damages).

c. Does defendant distribute significant copies of its publication in the forum? *See Keeton* 465 U.S. 770 (holding that defendant's regular circulation of 10, 000 to 15, 000 copies of its magazine in the forum state was sufficient to exercise specific jurisdiction over defendant); *Gordy v. Daily News*, 95 F.3d 829 (9th Cir. 1996)

(holding that exercise of jurisdiction over newspaper in a defamation action was proper even though newspaper served substantially less than 1% of its subscribers in the forum state, where defendants knew plaintiff lived in forum state, had reason to believe article would have greatest impact there, and because defendants regularly covered news events in or concerning forum state activities); *Chaiken v. VV Pub. Corp.*, 119 F.3d 1018 (2d Cir. 1997) (holding that defendant's minimal circulation in the forum, which represented a tiny fraction of defendant's total circulation, was insufficient to confer personal jurisdiction over the defendant); *Noonan v. Winston*, 135 F.3d at 91 (holding that that the circulation in the forum of 305 magazines containing the allegedly defamatory advertisement was insufficient to confer jurisdiction over defendant where defendants did not target forum and did not know that magazines would enter the forum); and *Rodriguez Salgado v. Les Nouvelles Esthetiques*, 218 F.Supp.2d 203 (D.P.R 2002)(holding that video sales in Puerto Rico of only two copies out of 20,000 was not sufficient to confer jurisdiction).

d. Purposeful availment inquiry: Did the defendant target the forum? *See generally*, *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984).

(i) If the defendant is a publisher, did it send reporters or stringers to the forum in connection with the article?

(ii) Did the defendant know that the plaintiff resides in the forum?

(iii) Did plaintiff feel the brunt of his or her harm in the forum state?

(iv) Does plaintiff have a local or national reputation?

(v) Did the defendant conduct research in the forum?

(vi) Did defendant rely on sources in the forum?

(vii) Was the forum the focal point of story and of the harm suffered?

(viii) If defendant is the author of the allegedly libelous statement, did he or she play a role in the distribution of the statement?

(2) Fact Pattern 2: Defendant's only "contact" with the forum state is that defendant's website is accessed by users in the forum state. Query: What is the nature and quality of the defendant's contacts over the Internet? *See*

Young v. New Haven Advocate 315 F. 3d 256 (4th Cir. 2002) (discussing the standard for determining a court's authority to exercise personal jurisdiction in the context of websites).

a. Business activity: Personal jurisdiction exists when the non-resident defendant engages in business activity in the forum state.

(i) Did the defendant enter into on-line contracts (e.g., subscriptions) with residents of the forum state? *See e.g.*, *Zippo Mfg. Co. v. Zippo Dot Com., Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (holding that jurisdiction was proper where 3,000 residents of the forum subscribed to defendant's s Internet newsgroup service); *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996) (holding that on line contracts between plaintiff and defendant were sufficient to confer jurisdiction over the defendant); and *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (holding that exercise of jurisdiction was proper where defendant sought to establish a mailing list of Internet users so that the defendant could forward advertisements to those users).

(ii) Did the defendant sell or advertise its product via the website? *See Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (holding that the exercise of jurisdiction was appropriate where defendant advertised its product over Internet and provided a toll-free number for inquiries). *But see Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356, 1364-65 (W.D. Ark. 1997) (holding that defendant's advertisement in trade publication on the Internet did not confer jurisdiction over defendant).

b. Passive websites: The exercise of jurisdiction may not be proper when the defendant's website can be characterized as passive.

(i) Is defendant's website passive or interactive? *See e.g., Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F. Supp. 636, 638 (E.D. Pa. 1998) (discussing the appropriateness of exercising personal jurisdiction over a non-resident defendant where defendant host and user exchange information over the Internet). *See also, Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997) (holding that jurisdiction is inappropriate where forum users could not sign up for defendant's service and where " no money changed hands" between the parties); *Schnapp v. McBride*, 64 F.Supp.2d 608 (E.D.La.1998) (holding that newspaper defendant was not subject to

personal jurisdiction in libel action where only 19 copies of newspaper were sold in state and newspaper defendant maintained passive Internet website); *Bochan v. LaFontaine,* 68 F.Supp.2d 692, 701 (E.D. Va. 1999) (considering that libel defendant's maintenance of an "interactive" website "factor[ed] significantly in the jurisdictional analysis"); *Bailey v. Turbine Design, Inc*., 86 F.Supp.2d 790 (W.D. Tenn. 2000) (holding that defendant's maintenance of a passive web site, standing alone, was insufficient to confer personal jurisdiction, even where allegedly defamatory statements were posted on defendant's website).

(ii) Does the defendant's website merely provide information to those who seek such information? *See Bensusan Restaurant Corp.* 937 F. Supp. 295.

c. Combination of business activity and other non-Internet related contacts: Personal jurisdiction may be proper where the defendant engages in business activity and has non-Internet contacts with the forum. *See e.g., Blumenthal v. Drudge*, 992 F. Supp. 44, 54-56 (D.D.C. 1998) (holding that personal jurisdiction was appropriate where defendant operated an interactive website and traveled to the forum state to promote it).

(3) Fact Pattern 3: Defendant's only "contact" with the forum state is based on its subsidiary or parent corporation's contacts with the forum state. *See Gallagher v. Mazda Motor of America, Inc.*, 781 F. Supp. 1079 (E.D. Pa. 1992) (discussing the three lines of cases relating to imputing jurisdictional contacts).

a. Have the entities observed and respected the corporate form? *See Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773-74 (5th Cir. 1988) (holding that the contacts of a subsidiary will not be imputed to the parent corporation so long as both entities observe and respect the corporate form)

b. Can the subsidiary be characterized as the parent's alter ego or vice versa?

c. Would the parent have to undertake the subsidiary's activities were it not for the subsidiary's presence in the forum state? *See Gallagher*, 781 F. Supp. at 1083.

d. General factors to consider (*see Arch v. American Tobacco*, 984 F. Supp. 830 (E.D. Pa. 1997)):

(i) Does each entity have its own offices?

(ii) Does each entity have its own employees, directors and officers?

(iii) Does each entity maintain separate accounts, records and minutes?

2. **Can you (and should you) remove or remand the case?**

A. Removal and remand decisions should be evaluated on the basis of strategic considerations, some of which are set forth below. Defense counsel should be sensitive to the stringent and inflexible federal rules pertaining to removal which require, *inter alia*, complete diversity between the parties wherein none of the defendants is a citizen of the state in question; satisfaction of the jurisdictional amount for diversity cases; filing of the removal petition within thirty days of the first receipt of the complaint, by summons or otherwise, by *any* of the defendants; and joinder of *all* defendants in the petition for removal. *See* 28 U.S.C. §§ 1441 and 1446. Motions for remand for reasons other than lack of subject matter jurisdiction shall be filed within thirty days following the filing of the notice of removal. Remand for lack of subject matter jurisdiction can occur at any time before final judgment (or, indeed, thereafter). 28 U.S.C. § 1447 (c).

B. Some of the strategic issues to be evaluated in determining whether to remove or remand include:

(1) whether the jurisdiction's state or federal court has demonstrated greater sensitivity to First Amendment issues generally, and to members of the media in particular (for example, in connection with shield law issues)?

(2) which court will specially assign a judge for the entire case, and whether such an assignment would be helpful under the circumstances?

(3) which court's docket is likely to proceed more expeditiously, and whether expedition is helpful under the circumstances?

(4) which court is more likely to grant summary judgment to media defendants, especially when First Amendment considerations are involved?

(5) does one court or the other have better standards or procedures for interlocutory appeal in a libel case? *See*, e.g., TEX. CIV. PRACT & REM. CODE § 51.014(6) (permitting members of the media and others whose remarks are included in media reports to appeal denials of motions for summary judgment when based on constitutional grounds or on statutory privileges and defenses); and *see* N.Y. C.P.L.R. 5701 (permitting interlocutory appeals in civil cases in which, *inter alia*, an order is entered which "involves some part of the merits"; this *does not* include evidentiary rulings).

(6) which court offers a better jury pool?

3. **Are there choice of law issues?**

Choice of law questions may be dispositive, as individual states apply the elements of defamation and related torts differently. Significant issues pertaining to choice of law are as follows:

A. Has plaintiff alleged multi-state defamation?

(1) If the plaintiff and defendant reside in different states or countries or if the injury occurred in a place or places other than where the plaintiff or defendant resides, a choice of law issue may arise (as well as jurisdictional issues discussed in Section 1.A, above).

(2) That two states are involved does not in itself indicate that there is a "conflict of laws" or "choice of law" *problem*. There is no problem where the laws of the two states are identical. *See, e.g., Hurtado v. Superior Court*, 11 Cal.3d 574 (1974).

B. If multi-state defamation is alleged, which state's choice of law provisions will apply?

(1) According to Judge Sack, if jurisdiction and venue are proper, the tendency of recent cases is to follow Section 150 of the RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS, applying the law of the state with the most significant relationship to the occurrence and parties. This will usually be the jurisdiction where an individual plaintiff is domiciled at the time of the occurrence, or where a corporate plaintiff has its principal place of business, if the defamatory statement was published there. *Id.* 1 SACK § 15.3.2.

(2) In federal diversity actions, a federal court must apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941); *Matter of Yagman*, 796 F.2d 1165, 1170 (9th Cir.1986).

C. What effect will the choice of law analysis have on the applicable statute of limitations and other substantive issues?

(1) Because statutes of limitation as well as the actionability of various torts related to defamation vary by state, resolution of the choice of law issue may be critical to a potential motion to dismiss or for summary judgment.

(2) For examples of the conflicts of law analysis and the differences, *e.g.*, between New York and California law, *see Gifford v. National Enquirer, Inc.*, 1993 WL 767192, 23 Media L. Rep. 1016 (C.D. Cal., Dec 07, 1993)

(NO. CV 93-3655 LGB (TX)) and *Page v. Something Weird Video*, 908 F. Supp. 714 (C.D. Cal. 1995).

4. **Is there a requirement that plaintiff seek a retraction before bringing suit?**

A. Numerous statutes may affect the recovery of damages in defamation actions if the plaintiff does not first demand a retraction of the claimed falsehood. These statutes are collected and analyzed at 84 A.L.R.3d 1249 as well as in MLRC's 50 State Survey. In addition, Bruce Sanford's excellent treatise, *Libel and Privacy,* Second Edition, includes a thorough discussion and accompanying appendix of these statutes. These include statutes that make a retraction demand a condition precedent to filing a defamation action, statutes that restrict recovery upon publication of a retraction, and statutes that provide that a retraction may be considered in mitigation. Some "retraction or correction" statutes provide that the retraction demand must be made, and the retraction not published, to enable the plaintiff to recover certain types of damages. *See, e.g.,* California Civ. Code § 48a. These provisions may be limited to publications in specified types of media. The argument that such statutes deny equal protection of the laws has been rejected in a number of jurisdictions. *See, e.g., Werner v Southern California Associated Newspapers*, 35 Cal. 2d 121(1950) .

B. Depending on the type and scope of the retraction statute, summary judgment may resolve an entire action or may restrict only the type of damages recoverable. *See, e.g., Fisher v. Larsen*, 138 Cal. App. 3d 627 (1982)(defamation action by a defeated candidate for reelection; affirming partial summary judgment denying plaintiff any entitlement, under California Civil Code, to special damages based on loss of earnings attendant upon failure to attain elective office, because these damages not recoverable absent demand for retraction, which plaintiff had failed to make).

5. **Is a special "anti-SLAPP" motion to strike available?**

A. Several states now have devices – under statutory or common law – that provide immediate relief to individuals or entities who can demonstrate that the plaintiff seeks to discourage or punish the speaker for exercising First Amendment rights in connection with an issue of public concern. California's statute, for example, permits a special motion to strike even before an answer is filed. California Code of Civ. Proc. § 425.16. Filing the motion stays discovery. If the defendant wins, attorneys' fees and costs shall be awarded. This special motion is available to news media in a defamation action. *Braun v. Chronicle Publishing Co*., 52 Cal. App. 4th 1036 (1997).

B. Presently, the following states have anti-SLAPP laws: California, Colorado, Delaware, Georgia, Indiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New York, Oklahoma, Pennsylvania (limited to citizen actions dealing with environmental issues), Rhode Island, Tennessee, Washington. States

with proposed anti-SLAPP statutes: Florida, Kansas, Maryland, Michigan, New Hampshire, New Jersey, Oregon, Texas, Utah.

C. The status of anti-SLAPP laws is monitored by the California Anti-SLAPP Project, which has an excellent web site: http://www.casp.net. Other resources include The First Amendment Project: www.thefirstamendment.org/antislappresourcecenter.html.

6. **Is the claim barred by limitations or the single publication rule?**

A. What is the applicable limitations period? Each state's law must be consulted on the limitations period applicable to a defamation claim. Separate inquiry must be made to determine whether a different limitations period applies to a cause of action for, *e.g.*, false light invasion of privacy, disparagement or injurious falsehood. In Maryland, for example, defamation claims are subject to a one-year limitations period, while invasion of privacy claims are subject to the general three-year period. *E.g., Allen v. Bethlehem Steel Corp.*, 547 A.2d 1105 (Md. App.), *cert. denied*, 550 A.2d 1168 (Md. 1988). The same appears to be true in Missouri. *Finnegan v. Squire Publishers, Inc.*, 765 S.W.2d 703 (Mo. App. W.D. 1989) (two-year limitations period for defamation); *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475 (Mo. 1986) (*dicta* stating that five year, general limitations period should apply to privacy claims).

B. When does the limitations period commence to run? Each state's law must be consulted as to the commencement of the running of the applicable limitations period. The *general rule* is that the cause of action accrues, and the limitations period commences to run, upon the date of first publication. *E.g.*, 50 AM. JUR. 2d *Libel and Slander* § 421; *Chevalier v. Animal Rehabilitation Center*, 839 F. Supp. 1224, 1231 (N.D. Tex. 1994); *Shepard v. Nabb*, 581 A.2d 839 (Md. App. 1990), *cert. denied,* 587 A.2d 247 (1991). A minority of states, however, follow the discovery rule, which tolls the running of the statute of limitations until the plaintiff "knew or reasonably should have known" of the allegedly defamatory statements. *Shepard*, 581 A.2d at 843-44; *Manguso v. Oceanside Unified School District*, 88 Cal. App. 3d 725, 152 Cal. Rptr. 27 (1979); *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 334 N.E.2d 160 (Ill. App. 1975). *But see Mikaelian v. Drug Abuse Unit*, 501 A.2d 721 (R.I. 1985) (discovery rule does not apply to defamation actions).

C. Republication liability and statutes of limitations:

(1) The single publication rule: Most jurisdictions have adopted this rule, which generally permits only one cause of action, subject to the appropriate statute of limitations, based upon the date of first publication and application of the discovery rule, in which *all* damages suffered from the allegedly defamatory publication must be claimed. Subsequent actions based upon that same publication are barred by a final judgment. *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984).

(2) The single publication rule does not bar subsequent actions based upon *new or subsequent editions* of the work. *E.g., id.; Rinaldi v. Viking Penguin*, 425 N.Y.S.2d 101 (1st Dept. 1980), *aff'd*, 420 N.E. 2d 377 (N.Y 1981). *See also* 1 SACK, §7.2; David A. Elder, Defamation: A Lawyer's Guide § 1.20 *et seq*. (1993).

(3) Under the common law, and regardless of the single publication rule, every republication by a *third party* gives rise to a new cause of action, pursuant to which both the re-publisher and, if re-publication were reasonably foreseeable, the original publisher, are potentially liable. *E.g.*, RESTATEMENT (SECOND) OF TORTS §§ 576, 577A and 578. Foreseeability should be judged by ordinary common law principles.

a. Due in part to the harshness of the republication rule, especially in the context of independent third party republications, a number of *privilege* defenses have been erected to bar republisher liability for defamation. Media defendants rely on these privileges extensively in seeking dismissal and summary judgment. *See*, Section 18, below.

7. **Has the plaintiff alleged and can plaintiff satisfy the proof requirements of a *prima facie* case sufficient to take the case to trial?**

A. If you have gotten this far, and the plaintiff's case is still moving forward, then you must assess the chances of prevailing via a motion to dismiss or for summary judgment. To evaluate the likelihood of success as to either motion, you must first review each element of a *prima facie* claim. If the plaintiff has failed to allege any element, then you should consider whether to file a motion to dismiss, weighing the benefits of forcing the plaintiff to allege the case properly (and potentially expose a weakness) versus the detriment of educating the plaintiff and thus allowing plaintiff to focus on an element of the tort plaintiff might otherwise overlook until it is too late to amend. Assuming the plaintiff's case is not dismissed with prejudice, you should at the outset identify issues for possible summary judgment. You should then develop a discovery plan accordingly.

B. Numerous grounds exist by which to challenge, on a dispositive motion, both the procedural and substantive elements of a plaintiff's *prima facie* case. The applicable burden of proof, the standards for summary judgment and certain fundamental grounds are described below. However, no outline can provide a complete set of grounds -- or a thorough review of authorities -- applicable to each case. The practitioner is encouraged to use this outline strictly as a checklist and primer, recognizing that the nature and elements of the tort and its defenses vary from jurisdiction to jurisdiction, requiring that state and federal law from the jurisdiction(s) concerned be consulted.

8. **What are the elements of a *prima facie* case?**

A. Nature of the Tort: Defamation (whether libel or slander) is a common law tort, arising from false and disparaging statements of fact about a person or entity. While generally based upon injury to reputation, damages are sometimes recoverable without proof of harm to reputation. The tort has been modified by both federal and state constitutional principles applied to protect First Amendment values. Some states have statutes that set forth, explain or will affect the elements of defamation. See California Civil Code §§ 44-47.

B. Elements: The elements a plaintiff must allege and prove to sustain a cause of action for defamation are defined by state law. The traditional elements are:

(1) **a defamatory statement of fact** (*see* Sections 9 and 10) (The concept of what is defamatory can change with the passage of time. Nowhere is this better illustrated than in *Albright v. Morton*, 32 Media Law Rptr. 1769 (May 28, 2004). In this case the court held that referring to someone as homosexual would no longer be considered defamatory because of the recent U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) holding that homosexual conduct could not be punished criminally.)

(2) **of and concerning** the plaintiff (*see* Section 11); and

(3) **published** to a third person (*see* Section 12) (In the mass media news reporting context this element will rarely be contested. Defamation lawsuits may also arise, however, in newsgathering activities. Under some circumstances, it is possible that publication of a defamatory statement to a third party in the course of newsgathering might be considered privileged.)

(4) that is **false** (*see* Section 13); and

(5) the requisite standard of **fault** (*see* Section 16*)*, consisting of either

a. negligence (unless the state has adopted a higher degree of fault, as in New York, where "gross irresponsibility" is the standard, Chapadeau v. Utica Observer-Dispatch, 88 N.Y.2d 196, 379 N.Y.S. 2d 61, 341 N.E. 2A 509 (1975)). or

b. actual malice (knowing falsehood or reckless disregard for the truth); and

(6) **damages**, whether actual or presumed (*see* Section 17). *See generally* RESTATEMENT (SECOND) OF TORTS § 558.

9. **Is the statement reasonably capable of defamatory meaning?**

A. Definition of "defamatory": "[M]erely unflattering, annoying, irksome, or embarrassing" statements, however hurtful to the plaintiff's feelings, are not defamatory. 1 Sack §2.4.1. A statement "is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT § 559. To be defamatory, a statement does not have to defame a person in the eyes of all or even a majority of the members of the community; it must injure a person's reputation in accordance with the standards of at least a substantial minority of the community. This requirement prevents small groups from defining what is defamatory. *Id.* (comment e). If the minority group whose standards are invoked has very anti-social views, then courts will not regard the statement as defamatory. *Id.* (comment e); s*ee also, e.g., Saunders v. Board of Directors, WHYY-TV,* 382 A.2d 257, 259 (Del. Sup. Ct. 1978) (prisoner is not liable for reputational damage among fellow prisoners because they have such antisocial standards that it is not proper for courts to recognize them as "right thinking").

B. Role of judge and jury: Whether a statement is *reasonably* capable of bearing the defamatory meaning alleged is initially a question of law for the court. If the court determines that the statement is not reasonably capable of being defamatory, then summary disposition is proper. *See* RESTATEMENT § 614. In addition to the language of the statement, the court examines the statement's context within the publication as a whole to determine if it is reasonably capable of a defamatory meaning. *Tucker v. Philadelphia Daily News*, 848 A.2d 113, 124 (Pa. 2004); *Deangelis v. Hill*, 847 A.2d 1261, 1269 (N.J. 2004); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000). If the communication is capable of the defamatory meaning suggested by plaintiff, then the jury must determine whether a defamatory meaning was understood by the recipient. *See, e.g.*, *Norse v. Henry Holt & Company,* 991 F.2d 563 (9th Cir. 1993); *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990); *Cianci v. New Times Publ'g Co.*, 639 F.2d 54 (2d Cir. 1980); *Buckely v. McGraw-Hill, Inc.*, 782 F. Supp. 1042 (W.D. Pa. 1991), *aff'd,* 968 F.2d 12 (3d Cir. 1992); *Granger v. Time, Inc.*, 568 P.2d 535, 537 (Mont. 1977).

C. The innocent construction rule: In a small number of jurisdictions, the courts recognize the "innocent construction" rule. Under this rule, if an article or statement is ambiguous and one of its meanings is "innocent" – that is, non-defamatory – the judge must find the article or statement non-actionable. *See, e.g.*, *John v. Tribune Co.*, 181 N.E.2d 105, 108, (Ill. App.) *cert. denied* 371 U.S. 877 (1962); *Wainman v. Bowler*, 576 P.2d 268 (Mont. 1978).

D. Is it libel or slander? While "libel" originally referred to written defamation and "slander" to oral communication, the terms have become blurred through the different interpretations of different jurisdictions. *See* DAN B. DOBBS, THE LAW OF TORTS, § 408 at 1143 (West 2000). The categorization of the challenged statement still makes a difference in many jurisdictions, however, both as to the

facts necessary to prove the defamatory content and the nature of the proof required to recover damages.

(1) At common law, slander *per se* involved defamation of four types: (1) allegations of criminal conduct; (2) allegations tending to injure the plaintiff in his or her trade, business, profession or office; (3) allegations of unchastity by a woman; and (4) allegations attributing to the plaintiff a loathsome disease. 1 SACK § 2.8.2; RESTATEMENT § 570. If the challenged statement, either directly or by reasonable implication, fell into any of these four categories, the plaintiff could recover for presumed harm to reputation, without proof of so-called "special damages" (proof of injury and loss). If not, special damages had to be alleged and proved. See 1 SACK § 2.8.2.

(2) At early common law, all libel (generally, written defamation) was considered actionable *per se* – that is, actionable without proof of special damages. *Id.* § 2.8.3.

(3) Today, these early common law distinctions are trumped by the damage rules limiting the recovery of presumed damages based upon the type of plaintiff and whether the challenged statement concerns a matter of public concern. *See infra,* Section 17.

(4) However, many jurisdictions still recognize distinctions between libel/slander *per se* and *per quod*.

a. In several jurisdictions, the early common law distinctions still apply concerning purely private defamations. *See* 1 SACK §§ 2.8—2.8.8.

b. In certain jurisdictions, to be defamatory *per se* (applying this term to both libel and slander), the defamatory meaning of the challenged statement must be *clear* on its face. That is, if the meaning of the statement is ambiguous, capable of a non-defamatory meaning, or requires proof of *extrinsic* facts to demonstrate its defamatory meaning (*e.g.,* when a newspaper reported plaintiff had checked into a hotel room with Bill Smith, when in fact plaintiff was married to John Jones, the challenged statement would be treated as defamatory *per quod*, requiring proof of the extrinsic fact that plaintiff was married to Jones, as well as proof of actual harm to reputation). 1 SACK § 2.8.6; *see also, e.g.*, PROSSER, THE LAW OF TORTS, § 112, at 763 (great majority of courts require proof of special damages if statement defamatory *per quod*); *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994), *cert. denied*, 513 U.S. 1127 (1995); *Sherrard v. Hull*, 456 A.2d 59 (Md.), *aff'd*, 460 A.2d 601 (1983), *overruled on other grounds by Miner v. Novotny*, 498 A.2d 269 (Md. 1985).

E. Defamation by implication

(1) Nature of the Cause of Action:

a. Defamation by implication claims may arise from otherwise non-actionable statements when a plaintiff claims that the statements create a false and defamatory implication, inference or innuendo.

b. Statements that are themselves substantially true, non-actionable opinion, or not defamatory, may be the basis of a claim when plaintiffs allege that implied meanings establish the missing elements of falsity, fact, and defamatory meaning.

c. The U.S. Supreme Court has provided authority for defamation by implication claims in *Milkovich*, 497 U.S. at 21 n. 7 (recognizing liability for a statement that "reasonably implies false and defamatory facts" and noting "that the issue of falsity relates to the defamatory facts implied by a statement").

d. *Milkovich* makes it clear that the U.S. Supreme Court does not recognize any constitutional barrier to such claims. Nevertheless, many courts have invoked constitutional principles in developing their approaches to claims of defamation by implication.

(2) Questions to Consider:

a. Is the alleged implication reasonably drawn from the stated facts?

b. Is it the only reasonable interpretation or is it one of several possible interpretations?

c. Is it a provable false fact or a subjective opinion not capable of being proved true or false?

d. Did the writer or speaker intend the implication?

e. Did the writer or speaker affirmatively endorse the implication?

(3) Treatment by Courts:

a. There is a wide disparity in treatment of defamation by implication claims by different courts. Accordingly, practitioners should consult the law in their own jurisdictions as well as favorable cases in other jurisdictions, especially those that draw on First Amendment principles.

b. Some courts do not distinguish defamation by implication cases from ordinary cases and treat an alleged implication the same as an

explicit statement. *See, e.g., Merriweather v. Philadelphia Newspapers, Inc.*, 684 A. 2d 137 (Pa. Super. 1996).

c. Some courts recognize that a publication may be defamatory if it "convey[s] a false and defamatory meaning by omitting or juxtaposing facts," *Turner v. KTRK Television, Inc.*, 38 S.W. 3d 103, 114 (Tex. 2000), and "so distorts the [recipients'] perception that they receive a substantially false impression of the event," *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 425 (Tex. 2000).

d. Many courts have imposed a stricter standard of proof on plaintiffs when a defamation by implication claim is based on factually accurate statements. Although the specific requirements vary across jurisdictions, the following approaches are representative:

(i) Public figure plaintiffs cannot recover for defamation by implication when the stated facts are true. *See Pietrafeso v. D.P.I., Inc.*, 757 P.2d 1113 (Col. App. 1988); *Strada v. Connecticut Newspapers*, 477 A.2d 1005 (Conn. 1984); *Schaefer v. Lynch*, 406 So. 2d 185 (La. 1981); *Diesen v. Hessburg*, 455 N.W. 2d 446 (Minn. 1990), *cert. denied*, 111 S.Ct. 1071 (1991); *DeFalco v. Anderson*, 506 A.2d 1280 (N.J. Super., App. Div. 1986); *Andrews v. Golden Aspen Rally, Inc.*, 892 P. 2d 611 (N.M. App. 1995).

Note: Some of these opinions suggest a qualification that the false implication could be actionable on a showing of undisclosed material facts.

(ii) Where the plaintiff is a public figure and the publication involves a matter of public concern, plaintiff must prove by clear and convincing evidence that defendant intended, or at least knew of, the alleged false implication. *See, e.g., Dodds v. Am. Broad. Co.,* 145 F.3d 1053 (9th Cir. 1998); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993); *Newton v. Nat'l Broad. Co.*, 930 F.2d 662 (9th Cir. 1990) *cert. denied*, 502 U.S. 866 (1991); *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309 (7th Cir. 1988); *Rapapport v. V.V. Publishing Corp.,* 618 N.Y.S. 2d 746 (1994).

(iii) On a matter of public concern, a private figure plaintiff suing a media defendant must, by clear and convincing evidence, prove actual malice, *i.e.*, knowledge of falsity or reckless disregard for the truth, to recover for alleged defamation by implication. *See Woods v. Evansville Press Company, Inc.*, 791 F.2d 480 (7th Cir. 1986); *James v. San*

Jose Mercury News, Inc., 20 Cal. Rptr. 2d 890 (Cal. Ct. App. 1993).

10. **Was the communication a provable statement of fact?**

A. Objective fact: To be actionable, a defamatory statement must either express or imply an assertion of objective fact, rather than hyperbole, fair comment, fiction or opinion. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). The distinction between fact and non-fact is critical.

B. Role for judge and jury: The federal courts and the majority of state courts hold that the determination of whether a challenged statement constitutes actionable fact is a question for the court, to be decided as a matter of law. *E.g.*, 1 SACK § 4.3.7 n.226. Certain courts leave the question to the jury if the challenged statement could be *reasonably* construed by the recipient either as fact or opinion. *E.g., Aldoupolis v. Globe Newspaper Co.*, 500 N.E.2d 794 (Mass. 1986); *Nevada Indep. Broad. Corp. v. Allen*, 664 P.2d 337, 341-42 (Nev. 1983); *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425, 428 (1976).

C. The decision in *Milkovich*: In 1990, the Supreme Court addressed the fact/opinion dichotomy, reversing a nearly twenty-year assumption that all statements of opinion are constitutionally immune. Instead, the Court declared that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). According to the Court, *whether or not labeled as opinion*, statements which either assert *or imply* verifiable facts -- *i.e.*, statements capable of being proved true or false -- are actionable. *Id.* at 21-22. Based on the holding in *Milkovich*, the Court specifically acknowledged four categories of "protected" (non-actionable) speech:

(1) "rhetorical hyperbole": *See Milkovich*, 497 U.S. at 17; *see also* RESTATEMENT § 566 cmts. d & e.

a. statements characterized by the sort of *loose*, *figurative* language signaling to the reader that the statement represents an exaggeration not intended to convey a verifiable statement of objective fact; *e.g.,* the defendant's characterization of plaintiff as a "scab" or "traitor," which, while literally charging plaintiff with a crime, nevertheless represented non-actionable hyperbole in the context of a heated labor dispute. *Id.* at 17, citing *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1993); *see also Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (holding that publisher's characterization of plaintiff's negotiating style with City Council as "blackmail" constituted non-actionable hyperbole). *But see Sprague v. Am. Bar Ass'n*, 276 F. Supp. 2d 365 (E.D. Pa. 2003) (finding a dual defamatory/non-defamatory meaning in the word "fixer" giving rise to a genuine

issue of material fact for consideration by the jury); *Condit v. Nat'l Enquirer, Inc.*, 248 F.Supp.2d 945 (E.D. Cal. 2002) (finding use of the word "attacks" in a headline to be "reasonably susceptible to one defamatory meaning" and therefore actionable); *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144 (2d Cir. 2000) (finding use of the term "ambulance chaser" is not a constitutionally protected opinion). Examples of rhetorical hyperbole include:

(i) The citizens of a voting district published a newsletter, which stated that Will Rogers said he "' . . . never met a person I did not like' . . .Will Rogers never met our supervisor!" This statement was published during an election for the Kern County Board of Supervisors. *Miller v. Bakersfield News-Bulletin, Inc.*, 44 Cal. App. 3d 899, 901 (Cal. Ct. App. 1975).

(ii) A letter construed to mean that "Joe Clark had a voting record with Communist tendencies and his record was approved by the A.D.A." was published. Plaintiff sued based on this statement. *Clark v. Allen*, 204 A.2d 42, 46 (Pa. 1964).

(iii) The alleged victim was a losing candidate in a re-election for the International Executive Board of United Mine Workers of America when a newspaper, the Evening Herald, reported that the candidate "had been ferried around the region to polling places on election day by a coal company helicopter." Other publications then called the losing candidate a "widow robber." *Savitsky v. Shenandoah Valley Publ'g Corp.*, 566 A.2d 901, 902 (Pa. Super. Ct. 1989).

(2) "fair comment": *See Milkovich*, 497 U.S. at 13-14; *see also*, RESTATEMENT § 566.

a. At common law, to be protected under the "fair comment" privilege:

(i) The statement must be based either on: facts *stated* with sufficient clarity that readers are able to judge for themselves the merit of the statement (*see, e.g., Leers v. Green*, 131 A.2d 781 (N.J. 1957)); or on facts *generally known by, or referenced and available to*, the audience. *E.g., Polanco v. Fager*, 886 F.2d 66, 69-70 (4th Cir. 1989). If the challenged statement is clearly based on underlying facts, and those underlying facts are themselves either true or privileged, then the challenged statement will not be

actionable, regardless of its reasonableness, because the audience members can judge for themselves the accuracy and fairness of the speaker's assessment of those underlying facts. *See, e.g.*, *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 731, *cert. denied* 504 U.S. 974 (1992) (relying on nature of information provided in the article and writing style to conclude that readers could not interpret the statements as factual assertions of dishonesty).

(ii) At early common law and continuing today in some jurisdictions, the statement must concern persons involved in, or matters of, public concern; for example, public officials, persons or institutions seeking public funds, creative and scientific works presented to the public, economic and social welfare events such as strikes and demonstrations, controversial public issues, criticism of commercial developments, and products that can affect the public health and safety (such as bottled water); *see, e.g., Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. 1965); *Dairy Stores v. Sentinel Publ'g*, 516 A.2d 220, 228-30 (N.J. 1986) (listing different subject matters to which courts have applied the fair comment privilege). *But see* RESTATEMENT § 566 cmt. c, illus. 1 & 2.

(iii) In certain states, the statement must itself be one of opinion. The majority and traditional view holds that statements of fact are not protected by the "fair comment" privilege, RESTATEMENT § 566 cmt. a (1977); 2 F. HARPER & F. JAMES, LAW OF TORTS (HARPER & JAMES), § 5.8 at 67-69 (2d ed. 1986); PROSSER & KEETON ON TORTS, § 115 at 831 (5th ed. 1984), although some states have begun to apply the privilege to statements of fact as well, as long as they are asserted as conclusions based on other stated or available facts. *See, e.g., Dairy Stores*, 516 A.2d at 231; *see also Coleman v. MacLennan*, 98 P. 281, 290-91 (Kan. 1908).

(iv) The statement must honestly express the writer's true opinion. *Cochran v. NYP Holdings, Inc.* 210 F.3d 1036 (9th Cir. 2000) (concluding that a reporter's expression of opinion did not imply "any false assertion of undisclosed facts serving as the basis of her views."); *Levin v. McPhee*, 119 F.3d 189 (2d Cir. 1997) (concluding that allegedly defamatory statements were opinions based on speculation and therefore not actionable); *Dairy Stores*, 516 A.2d at 232; *Leers*, 131 A.2d at 783.

b. Traditionally, the privilege is lost if the statement was made with common law malice. 2 HARPER & JAMES, § 5.8 at 67-69. Some jurisdictions have held that the privilege may only be overcome by a showing of "constitutional malice." *See, e.g., Dairy Stores*, 516 A.2d at 225.

c. Some states incorporate the "fair comment" privilege into statutory law. *See, e.g.,* TEXAS CIV. PRAC. & REM. CODE § 73.002(b)(2); California Civ. Code § 47(c) (West 2000).

(3) fiction or parody: *See Milkovich*, 497 U.S. at 17; *see also* RESTATEMENT § 566 cmt. d.

a. fictional depictions and parodies also enjoy immunity where *not reasonably capable* of being understood as conveying objective fact. *Id.; see also, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Indeed, the more obviously exaggerated, caustic or vituperative, the more likely the speech will be regarded as non-actionable. *Id.* at 53-54. *Cf., Milkovich*, 497 U.S. at 17 (non-actionable, rhetorical hyperbole characterized by loose, exaggerated language). Certain special liability issues are posed to the defendant depending on the particular class of parody or fiction involved.

b. Humor: this class of speech typically identifies a particular individual and intentionally portrays that person falsely. *E.g. Hustler, supra*; *Sagan v. Apple Computer Inc.*, 874 F. Supp. 1072 (C.D. Cal. 1994). Applying traditional analyses, in virtually every case a plaintiff will be able to demonstrate that the challenged statement was of and concerning that person, defamatory, and *intentionally* false. In such cases, a defendant has two defenses: (1) that the statement was not reasonably capable of conveying objective fact, *id.*; and (2) that, despite the understanding of the audience, the defendant did not intend the statement to be taken as an assertion of fact; hence, at least in a case involving a public official or figure, the defendant neither knew the statement was false nor was aware of its substantial falsity. The Supreme Court has not directly addressed the constitutional malice question in a case involving parody. 1 SACK § 5.5.2.7.1. Nevertheless, a similar argument has prevailed in dealing with defamation by implication, *e.g., Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 680-81 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991) and with unintended meanings generally. 1 SACK § 5.5.1.2 at 5-70 ("a person who believes and intends to say one thing is not lying, and is therefore not guilty of 'actual malice,' merely because . . . those who hear the statement believe it to mean something different.") (citations omitted).

c. Fiction: A similar problem (and solution) exists with respect to fiction. Here, however, the speaker does not intend the statement to apply to a particular person. Thus, the "of and concerning" defense is also available. Nevertheless, as most fictional characters are either based upon or, in hindsight, can be shown to share particular traits with, actual persons, a plaintiff may well satisfy the "of and concerning" element regardless of defendant's intent. *See Sims v. Kiro*, 580 P.2d 642, 645 (Wash. Ct. App. 1978) (it is "not who is meant but who is hit") (citation omitted).

d. Docudrama: This category of speech poses a different problem. Docudramas are intended to concern actual, identifiable persons, but provide fictionalized events and conversations to fill in historical gaps in a manner consistent with the known facts. The fact of fictionalization, without more, should not subject the speakers to liability as long as the gist of the characterization is accurate. *See Partington v. Bugliosi,* 56 F.3d 1147 (9th Cir. 1995); *Seale v. Grammercy Pictures*, 964 F. Supp. 918 (E.D. Pa. 1997); *Davis v. Costa-Gravas*, 654 F. Supp. 653 (S.D.N.Y. 1987). *But see Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840 (N.Y. 1967), *appeal dismissed*, 393 U.S. 1046 (1969) (applying a similar standard in a case involving a state's "right to publicity" statute and finding for the plaintiff based on the defendant's substantial falsification and knowledge of that falsification). *C.f., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (inaccurate quotes not actionable as long as substance accurate).

e. Examples of parody, fiction and docudrama include:

(i) *Hustler Magazine*, 485 U.S. at 57 (gross, mock portrayal of religious leader in sexually offensive manner and accusing him of incest with his mother, in imitation of "Campari" advertisement and bearing disclaimer – "ad parody – not to be taken seriously" – held not reasonably capable of conveying objective fact);

(ii) *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 441 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (despite defendant's claim to the contrary, fictionalized parody held to be of and concerning plaintiff; nevertheless, context made it clear that statements in article were fantasy, not to be taken seriously as actionable assertions of fact);

(iii) *Davis v. Costa-Gravas*, 654 F. Supp at 655-58 (docudrama portrays composite of several different individuals, not intended to represent any single individual person; moreover, although film fictionalizes certain matters,

because defendants based their portrayal on historical record which they believed to be true, defendants lacked constitutional malice).

(4) other statements that do not assert or imply provably false statements of fact: *See Milkovich*, 497 U.S. at 21-22.

a. Unfortunately, the opinion in *Milkovich* was less than pellucid in defining a clear line of demarcation between those statements that do state or imply objectively verifiable and provable assertions of fact and those that, given the relevant circumstances, were intended and received as subjective assertions of the speaker's opinion. Prior to the decision in *Milkovich,* the most oft-cited test to distinguish between opinion and fact was that developed by the court in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). There the court identified a four-part test for distinguishing objective fact from subjective opinion, examining: (1) the common usage or meaning of the specific language used; (2) the objective "verifiability" of the challenged statement -- *i.e.*, was the statement literally provable as true or false; (3) the full context of the challenged statement within the article as a whole, because the context may indicate that statements which, out of context, might literally be provable as true or false, may, when read in context, merely reflect personal opinion, exaggeration or symbolic epithet; and (4) for the same reason, the larger social or political context in which the statement appears (*e.g.,* op-ed pages and critics' corners are traditionally viewed by the average reader as places for the assertion of the author's opinion, not fact). *See also, e.g.*, *Partington*, 56 F.3d at 1155 (9th Cir. 1995); *Moldea v. New York Times*, 22 F.3d 310, 314-15 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994); *Phantom Touring*, 953 F.2d at 727-28 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998).

b. The Court in *Milkovich* left unclear the status of the *Ollman* test. Compare *Milkovich*, 497 U.S. at 8-9 (majority opinion citing -- without expressly rejecting -- *Ollman* as an example of a decision based upon outdated view of opinion); and *id.* at 31-32 (Brennan, J., dissenting) (asserting that the majority had by its identification of relevant distinctions between fact and opinion affirmed the *Ollman* test). Since the *Milkovich* decision, however, while the courts have used a variety of formulations, it appears that most jurisdictions still apply an *Ollman*-like analysis of the language used and both the internal and external context to determine whether a particular statement, even if literally provable as true or false, nevertheless constitutes opinion. *See*, *e.g.*:

(i) Docudramas are opinions, even though they are verifiable, because they use more fiction than fact to maintain an audience. *See Partington*, 56 F.3d at 1154-55.

(ii) Statements of personal belief can be punished only if they do not incorporate "actual facts capable of being proved true or false." *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1438-39 (9th Cir. 1995).

(iii) Book reviews constitute opinions. *See Moldea*, 22 F.3d at 315.

(iv) While there is no doctrinal exemption for stock tip articles, such articles of a certain tenor and context would rarely be actionable. *See Biospherics*, 151 F.3d at 184.

11. **"Of and Concerning"** – is this a proper plaintiff? Is the plaintiff one who may bring a claim for defamation? Is the plaintiff sufficiently identified by the defamation or is the statement non-actionable group defamation? Are there different rules for corporate and individual plaintiffs?

A. Is the publication of and concerning the plaintiff?

(1) Requirement: Defamatory words are not actionable unless they refer to the plaintiff. *See New York Times v. Sullivan*, 376 U.S. 254, 288-91 (1964); *AIDS Counseling and Testing Center v. Group W Television, Inc*. 903 F.2d 1000, 1005 (4th Cir. 1990); *Blatty v. New York Times Co.*, 13 Med. L. Rep. (BNA) 1928 (Cal. App. 3d 1986), *cert. denied*, 485 U.S. 934 (1988). A defamatory statement need not refer to plaintiff by name as long as the person is identified sufficiently by the description or circumstance so that the trier of fact is certain the plaintiff is the person defamed. *AIDS Counseling*, 903 F.2d at 1005 (quoting *Arcand v. Evening Call Publ'g Co.*, 567 F.2d 1163, 1164 (1st Cir. 1977)); *Church of Scientology of California v. Flynn*, 744 F.2d 694, 697 (9th Cir. 1984); *Golden North Airways v. Tanana Pub. Co*., 218 F.2d 612, 621-22 (9th Cir. 1954); *Cusack v. 60 Minutes*, 209 Media L. Rep. 2076 (Sup. Ct. N.Y. Co. 2001). *See generally* Debra T. Landis, Annotation, *Sufficiency of Identification of Plaintiff by Matter Complained of as Defamatory*, 54 A.L.R.4th 746 (1987).

(2) Role of Judge and Jury: Whether particular statements reasonably can be construed as referring to the plaintiff generally is a question of law for the court; whether the statement actually refers to the plaintiff is a question for the jury. *Times v. Sullivan*, 376 U.S. at 288-91 (statements that do not name plaintiff and cannot reasonably be interpreted as referring to plaintiff are not actionable as a matter of law); *Davis v. Costa-Gravas*, 619 F.Supp. 1372, 1375-76 (S.D.N.Y. 1985). *But see Bee Publications v.*

Cheektowaga Times, 485 N.Y.S.2d 885 (4th Dpt 1985) (whether words are "of and concerning" plaintiff is a jury question).

(3) Statements Concerning Government Officials: The identification requirement is applied more strictly where the statements in question concern government action because those kinds of statements involve core First Amendment values. *See generally Rosenblatt v. Baer*, 383 U.S. 75, 82 (1966); *Times v. Sullivan*, 376 U.S. at 290-91; *College Savings Bank v. Florida Prepaid*, 919 F.Supp. 756 (D.N.J. 1996) (First Amendment designed to protect criticism of government; will not permit action for libel on government); *City of Philadelphia v. Washington Post Co*., 482 F.Supp. 897, 898 (E.D. Pa. 1979). Courts tend to circumscribe the circumstances narrowly pursuant to which government officials may claim defamation, not permitting them to proceed unless the plaintiff is named or identified directly and individually by some special reference (such as by position). *See, e.g., Rosenblatt*, 383 U.S. at 82 (impersonal discussion of governmental unit mismanagement not of and concerning governmental official who was among those responsible for unit); *Times v. Sullivan*, 376 U.S. at 288-92 (Court rejects as matter of law claim that advertisement, critical of police department, defamed Commissioner responsible for department); *Fornshill v. Ruddy*, 891 F.Supp. 1062, 1073 (D. Md. 1995), aff'd, 89 F.3d 828 (4th Cir. 1996) (summary judgment in park police officer's case claiming that report critical of government investigation of Vincent Foster's death was of and concerning plaintiff); *Edgartown Police Patrolmen's Ass'n v. Johnson*, 522 F.Supp. 1149 (D. Mass. 1981); *Cox Enters. v. Carroll City-County Hospital Auth*., 273 S.E.2d 841 (Ga. 1981).

B. Is this a non-actionable group defamation?

(1) The absence of an "of and concerning" requirement strictly applied to group defamations "could invite any number of vexatious lawsuits and seriously interfere with public discussion of issues, or groups, which are in the public eye. Statements about a religious, ethnic, or political group could invite thousands of lawsuits from disgruntled members of these groups claiming that the portrayal was inaccurate and thus libelous [of particular members]. Such suits would be especially damaging to the media, and could result in the public receiving less information about topics of general concern." *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981).

(2) An individual may not maintain an action for defamation directed against a group of persons to which the plaintiff belongs unless the persons to whom the communication was made understand that the communication was intended to apply to the plaintiff. *Blatty v. New York Times Co.*, 728 P.2d 1177, 1185 (Cal. Sup. Ct. 1986). To overcome the group defamation doctrine, the plaintiff must demonstrate that "the circumstances of the

publication reasonably give rise to the conclusion that there is a particular reference to the member." *Church of Scientology Int'l v. Time Warner, Inc.*, 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992) (quoting RESTATEMENT § 564A).

(3) If the communication refers to more than one person, the group generally must be small enough in number so that the defamation, reasonably construed, casts aspersions upon all members of the group. If not, the action should be dismissed. If the group is small and its members easily ascertainable, the plaintiff may succeed. But where the group is large -- in general, any group numbering over 25 members -- the courts generally have held that plaintiffs cannot show that the statements were "of and concerning" them. *See, e.g., Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316 (S.D.N.Y. 1952); *Blatty*, 728 P.2d at 1185; Noral v. Hearst Publications, Inc., 104 P.2d 860, 861-62 (Cal. App. 2d 1940). *But see Hudson v. Guy Gannett Broadcasting*, 521 A.2d 714 (Maine Sup. Ct. 1987), in which the court held that it was a jury question as to whether or not a broadcast reporting 12 persons had been fired for drug use was "of and concerning" plaintiff.

C. Does the action survive plaintiff's death? Most states follow the common law rule that the cause of action for defamation abates upon the death of the allegedly defamed person. *See, e.g., Anderson v. Romero*, 42 F.3d 1121 (7th Cir. 1994) (dicta); *Grusehus v. Curtis Publ'g Co.*, 342 F.2d 775 (10th Cir. 1965) (applying New Mexico law); *Soraghan v. Henlopen Acres, Inc.*, 236 F. Supp. 489 (D. Del. 1964). Certain states, including, *e.g.*, New Jersey, New York and Texas, have overridden the common law. *See Canino v. New York News, Inc.*, 475 A.2d 528 (N.J. 1984); N.Y. EST. POWERS & TRUSTS Law § 11-3.2(b) (McKinney 1999); and TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (West 1999).

D. Can corporations sue for defamation? As a general rule, corporations, partnerships and other entities may bring actions for defamation, although certain states hold that these entities lack personal reputations and, thus, may recover only for statements attacking their finances, business or credit practices. See 1 SACK § 2.10.1. *See also Continental Nut Co. v. Robert L. Berner Co.*, 345 F.2d 395, 397 (7th Cir. 1965); *Novick v. Hearst Corp.*, 278 F. Supp. 277, 279 (D. Md. 1968). Generally, defamation of individual owners, directors and officers does not defame their entities. *See, e.g., McBride v. Crowell-Collier Publ'g Co.*, 196 F.2d 187, 189 (5th Cir. 1952) (showing no special damages, stockholder could not recover for alleged libelous statements concerning his corporation); *Container Mfg., Inc. v. Ciba-Geigy Corp.*, 870 F. Supp. 1225, 1231 (D.N.J. 1994) (holding that the president had no claim against the corporation when the corporation published a study stating incorrect information about the manufacturer's product).

12. **Was the statement published to a third person?**

To be actionable, the challenged statement must have been published (communicated) to a third person – that is, to someone other than the originator and the target of the statement. RESTATEMENT § 577. This element has not been affected by the development of First Amendment principles applicable to defamation claims. Therefore, each jurisdiction's common law must be consulted. As a *general proposition*, however, the following considerations typically apply to the publication issue:

A. Purely accidental publication should not suffice. According to the Restatement, the defendant must have intentionally or negligently caused the publication to the third party. *Id.*

B. Jurisdictions vary as to whether intracorporate communications (that is, communications within the same organization) constitute communications to third persons, although most jurisdictions hold that they do. *Compare Halsell v. Kimberly-Clark, Corp.*, 683 F.2d 285, 289 (8th Cir. 1982) (agreeing with the Wisconsin Supreme Court that communications between officers of the same corporation do not constitute publications); *Johnson v. Delchamps, Inc.*, 715 F. Supp. 1345, 1347 (M.D. La. 1989) (negating a claim for defamation because there was no publication of the statement to anyone outside the corporation); *and Magnolia Petroleum Co. v. Davidson*, 148 P.2d 468, 471 (Okla. 1944) (holding that sending a communication from one corporate agent to another is not a publication), *with Quinn v. Limited Express, Inc.*, 715 F. Supp. 127, 128 (W.D. Pa. 1989) (explaining that publication occurred when the allegedly defamatory statements were communicated to non-supervisory employees); *Arsenault v. Allegheny Airlines, Inc.*, 485 F. Supp. 1373, 1380 (D. Mass. 1980) (holding that when an employee's employment termination letter was circulated to other employee, this act constituted a publication); and *Luttrell v. United Telephone Sys., Inc.*, 683 P.2d 1292, 1294 (Kan. Ct. App. 1984) (determining that statements from one employee to another regarding a third employee's job performance is a publication).

C. Jurisdictions generally hold that communications between a principal and his or her secretary or typist constitute publication to a third person. *E.g., Arsenault*, 485 F. Supp. at 1379 (explaining that where an employee's termination letter was dictated to and edited by two different secretaries and read by other agents of the corporation, this communication was a publication); 1 SACK § 2.5.1 n.319; RESTATEMENT § 557 cmt. h.

D. A relatively recent development in the law of publication is that of "compelled self publication." Under this doctrine, with slight variations among those jurisdictions recognizing it, a defendant is deemed to have "published" to a third person if he has communicated defamatory statements (such as a negative evaluation) under circumstances in which the defendant knew or reasonably should have known that the plaintiff would have to repeat the statement to third persons (*i.e.*, to prospective employers seeking the reason why plaintiff left prior

employment). This doctrine is highly controversial, and so far has been recognized only by a minority of jurisdictions. *See Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 912 (7th Cir. 1994), *cert. denied*, 514 U.S. 1111 (1995) (doctrine represents minority view). *See also* David P. Chapus, Annotation, *Publication of Allegedly Defamatory Matter By Plaintiff ("Self-Publication") As Sufficient To Support Defamation Action*, 62 A.L.R.4th 616 (1988).

(1) Accepting the doctrine: *e.g., Raymond v. Int'l Business Machines Corp.*, 954 F. Supp. 744, 755-56 (D. Vt. 1997) (applying Vermont law); *Downs v. Waremart, Inc.*, 903 P.2d 888, 894 n.8 (Or. Ct. App.), *rev'd on other grounds*, 926 P.2d 314 (Or. 1996) (citing *McKinney v. Santa Clara*, 110 Cal. App. 3d 787, 798 (Cal. Ct. App. 1980); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1343-45 (Colo. 1988); *Colonial Stores, Inc. v. Barrett*, 38 S.E.2d 306, 307-08 (Ga. Ct. App. 1946); *Belcher v. Little*, 315 N.W.2d 734, 737-38 (Iowa 1982); *Grist v. Upjohn Co.*, 168 N.W.2d 389, 405-06 (Mich. Ct. App. 1969); *Lewis v. Equitable Life Assur. Soc'y*, 389 N.W.2d 876, 886-88 (Minn. 1986); *Davis v. Askin's Retail Stores*, 191 S.E. 33, 35 (N.C. 1937); *Bretz v. Mayer*, 203 N.E.2d 665, 668-71 (Ohio 1963)).

(2) Rejecting the doctrine: *Rice*, *supra; Gore v. Health-Tex, Inc.*, 567 So. 2d 1307, 1309 (Ala. 1990); *Layne v. Builders Plumbing Supply Co.*, 569 N.E.2d 1104, 1111 (Ill. App. Ct. 1991); *Weintraub v. Phillips*, 568 N.Y.S.2d 84, 85 (N.Y. App. Div. 1991); *Yetter v. Ward Trucking Corp.*, 585 A.2d 1022 (Pa. Super. Ct. 1991); *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248, 259 (Tex. App. 1993); *Lunz v. Neuman*, 290 P.2d 697 (Wash. 1955).

13. **Is the statement substantially false?**

A. Whether falsity is an element of the plaintiff's *prima facie* case or truth is an affirmative defense, the statement need only be "substantially true" to avoid liability. The Supreme Court has defined "substantial truth" as follows:

> [t]he common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and focuses on the substantial truth. . . . Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting of the libelous charge can be justified.

Masson v. New Yorker Magazine, 501 U.S. 496, 516-17 (1991) (internal quotations omitted).

B. Under the substantial truth doctrine, a statement is not actionable merely because it misstates minor details or is technically inaccurate. *See* 1 SACK § 3.7. Even literary embellishments, such as altering a speaker's words, are permitted as long

as they do not effect a material change in meaning. *See Masson*, 501 U.S. at 516. In other words, "the statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* at 517.

C. Examples of challenged statements found to be *substantially true* on motion for summary judgment include:

(1) *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (inaccurate quote, as long as gist of statement accurate);

(2) *Riley v. Harr*, 292 F.3d 282 (3d Cir. 2002) (multiple statements implicitly invite readers to draw their own conclusions regarding the plaintiff's character);

(3) *Campbell v. Citizens for Honest Gov't*, 255 F.3d 560 (8th Cir. 2001) (vague terms used in a video narrating the theories behind an unsolved crime);

(4) *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92 (1st Cir. 2000) (report based on plaintiff's own statements and admissions);

(5) *Metabolife Intern'l, Inc. v. Wornick*, 72 F. Supp. 2d 1160 (S.D. Cal. 1999) (statements regarding the safety of diet pills were substantially true);

(6) *Piracci v. Hearst Corp.*, 263 F. Supp. 511 (D. Md. 1966), *aff'd*, 371 F.2d 1016 (4th Cir. 1967) (inaccurate statement that juvenile arrested for crime when actually charged with act of delinquency);

(7) *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000) (misstatement of dollar amount in a reported insurance swindle);

(8) *Texas Monthly, Inc., v. Transamerican Natural Gas, Corp*., 7 S.W.3d 801 (Tex. Ct. App. 1999) (article that stated a judge ordered parties to settle when judge only directed parties to talk);

(9) *Miller v. Journal News*, 620 N.Y.S. 2d 500 (N.Y. App. Div. 1995) (report that policemen suspended when actually placed on administrative leave);

(10) *Lemons v. Chronicle Publ'g. Co.*, 625 N.E.2d 789 (Ill. App. Ct. 1994) (article reporting plaintiff had stabbed, rather than slashed, another person and failing to report plaintiff's acquittal on one of four charges).

14. **What are the standards for summary judgment?**

A. In a trilogy of cases issued in 1986 -- *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) -- the Supreme Court

breathed new life into summary judgment, encouraging broader use of the procedure to dispose of cases prior to trial. In *Celotex*, the Supreme Court defined summary judgment as "an integral part" of the rules as a whole, designed "to secure the just, speedy and inexpensive determination of every action." 477 U.S. at 327. In *Anderson*, the Court explained the summary judgment standard as follows:

> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented. . . . [T]here must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252. Summary judgment is absolutely mandated where "the evidence is so one-sided that one party must prevail as a matter of law. . . ." *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 545 (4th Cir. 1995), *rev'd in part*, 517 U.S. 308 (1996) (citation omitted). Indeed, the Court has an affirmative obligation to prevent factually unsupported claims from proceeding to trial. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

B. To overcome a properly supported summary judgment motion, the opposing party must respond with evidence which both is detailed and demonstrates a ground of opposition to the motion of a substantial character; summary judgment will not be denied if the opponent's evidence is "merely colorable" or anything short of "significantly probative" on a material issue. *Anderson*, 477 U.S. 249-50. Mere disagreement about material facts is not enough: "A dispute is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1413 (5th Cir. 1993) (quoting *Anderson*, 477 U.S. at 248). Accordingly, "the judge must view the evidence presented through the prism of the substantive evidentiary burden" applicable at trial. *Anderson*, 477 U.S. at 254.

C. Many courts have held that they have an additional obligation on summary judgment where the issues concern matters of paramount First Amendment concern. In these circumstances, the courts have a duty to be especially vigilant in considering a motion for summary judgment, to ensure that the continued pursuit of flawed complaints does not dull the unfettered exercise of freedom of speech. *E.g. Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969); *Fornshill v. Ruddy*, 891 F. Supp. 1062, 1074 (D. Md. 1995), *aff'd*, 89 F.3d 828 (4th Cir. 1996) ("where the cost of defending a protracted lawsuit threatens to chill First Amendment rights, courts must carefully scrutinize the pleadings and grant summary judgment . . . where appropriate"). It is well established that

> [i]n the First Amendment area summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. . . . Unless persons . . . desiring to exercise their First

> Amendment rights are assured freedom from the harassment of lawsuits, they will tend to be self-censors. And to this extent, debate on public issues . . . will become less uninhibited, less robust, and less wide-open . . . .

Washington Post v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966). In cases driven by constitutional considerations, courts are compelled "to carefully review . . . motions for summary judgment in libel cases involving the exercise of First Amendment guarantees and, at that stage, to determine whether there is substantial evidence presented which, if believed, could persuade a jury with convincing clarity that the defendant was guilty of maliciously making a libelous statement." *Tait v. KING Broad. Co.*, 460 P.2d 307, 311 (Wash. Ct. App. 1969). *See also* Section 9.C. (3), *supra*.

15. **Who bears the burden of proof, and what is its measure?**

A. What is the importance of the burden of proof? Both the allocation and measure of the burden of proof are among the most important procedural elements in the examination of a defamation claim. Ever since the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), First Amendment principles have guided the outcome of these questions.

B. Who bears the burden of proof?

(1) Generally: The general rule, followed by most states as a matter of common law, is that *the plaintiff* bears the burden of proof as to each element of a *prima facie* case. *See* RESTATEMENT § 613 (stating that plaintiff bears burden on all elements, with proviso that Restatement expresses no opinion on who bears the burden as to falsity); 1 SACK §§ 3.3.1-3.3.2.

(2) When plaintiff bears the burden: As a constitutional matter, however, the status of the plaintiff as a public or private figure and the status of the defendant as a member of the media serve to shift the burden of proof. For example, public-official or public-figure plaintiffs must bear the burden of proof as to falsity. *New York Times*, *supra*. *See also Howard v. Antilla*, 294 F.3d 244 (1st Cir. 2002) (treating a false light invasion of privacy claim involving a public figure plaintiff and a media defendant as analogous to a claim for defamation). The Supreme Court has also held that when the defendant is a member of the media and the publication involves a matter of public concern, the First Amendment requires a private plaintiff to bear the burden of proving falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

(3) When defendant bears the burden: The Supreme Court has not decided whether the burden also must shift to the plaintiff when the plaintiff is a private figure and the matter is of public concern, but the defendant is *not*

a member of the media. *But see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 742 U.S. 749 (1985) (resulting in six Justices disclaiming a press/non-press distinction in defamation cases). Similarly, with respect to cases *involving purely private parties and matters*, the Supreme Court has yet to decide whether placing the burden of proving truth on the defendant violates constitutional principles. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1 n.6 (refusing to decide the question); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. at 779 n.4 (same). In such cases, the common law rule that "truth is an absolute defense" to be pleaded and proved by a preponderance of the evidence by the defendant may well survive. 1 SACK § 3.3.2.2.2.

C. What is the measure and significance of the burden of proof for summary judgment?

(1) Preponderance of the evidence: Most states apply this traditional standard to private plaintiff, private matter cases. There is no constitutional impediment to that standard in such cases. *See Milkovich*, 497 U.S. at 21. However, the Supreme Court has mandated a higher standard of proof as to certain elements of a plaintiff's *prima facie* case in *all* public figure cases, and certain courts have so mandated in private figure, public matter cases involving media defendants. The requirement is constitutionally driven. *See Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974); *New York Times*, 376 U.S. at 285. This higher standard is that of *clear and convincing evidence.*

(2) The clear and convincing standard defined: Clear and convincing evidence (also known as convincing clarity) -- compare *Ayala v. Washington*, 679 A.2d 1057, 1063-64 (D.C. 1996) (stating clear and convincing standard) with *Firestone v. Time, Inc.*, 460 F.2d 712, 721-22 (5th Cir. 1972) (explaining convincing clarity) -- is more than a preponderance of the evidence, but something less than beyond a reasonable doubt. *Bose Corp. v. Consumers Union of U.S., Inc.*, 692 F.2d 189, 195 (1st Cir. 1982), *aff'd*, 466 U.S. 485, 517 (1984). It is the highest burden a plaintiff must bear in a civil action. *E.g.*, *United States v. Kaluna*, 192 F. 3d 1188, 1204 (9th Cir. 1999) (Thomas, J., dissenting) (clear and convincing standard one of the highest burdens of proof). This standard "reflects the value society places on individual liberty." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (non-libel case).

(3) Application to summary judgment: In federal cases, as well as in state cases where the standards are analogous to those set forth in the Federal Rules of Civil Procedure, the convincing clarity standard, where applicable, must be applied at the summary judgment stage. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Placement of the burden on the plaintiff can be dispositive, especially when considered in connection with a motion for summary judgment. *See Anderson*, 477 U.S.

at 254 (1986) (court must take substantive burden into account in considering summary judgment); *Sunshine Sportswear & Electronics v. WSOC Tele.*, 738 F. Supp. 1499, 1506 (D.S.C. 1989) (in dealing with issues requiring proof by convincing clarity, summary judgment "prevents all but the strongest libel cases from proceeding to trial," quoting *Martin Marietta Corp. v. Evening Star Newspaper Corp.*, 417 F. Supp. 947, 954 (D.D.C. 1976).

In addition, some courts have held, at least with respect to the element of falsity, that if the case is a close one on the facts, the convincing clarity standard tips the balance in defendant's favor at summary judgment. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 825 (1988). "There will always be instances when the fact-finding process will be unable to resolve [truth or falsity]; it is in those cases that the burden of proof is dispositive." *Hepps*, 475 U.S. at 776-77; *see also Auvil v. CBS 60 Minutes*, 836 F. Supp. 740, 742 (E.D. Wash. 1993), *aff'd*, 67 F.3d 816 (9th Cir. 1995) *cert. denied*, 517 U.S. 1167 (1996) (where question of truth or falsity evenly divided, public figure plaintiff loses); *Foretich v. Chung*, 1995 WL 224558 (D.D.C.) (same).

D. How is the burden as to each element of a *prima facie* case affected by public/private distinctions? The placement and measure of the burden are directly affected by constitutional and common law principles arising in three contexts: (i) cases involving *public officials* and *figures,* complaining about *statements of public concern*, regardless of the defendant's identity; (ii) cases involving *private plaintiffs*, *matters of public concern* and *media defendants*; and (iii) cases involving *private figures and private matters*, regardless of the defendant's identity. (The definitions of public officials/figures and matters of public concern are discussed in Sections 16.E(1)-(3), below).

(1) Public Officials/Figures and Matters of Public Concern: Where the plaintiff is a public official or public figure and the allegedly defamatory statement concerns a matter of public concern, then:

a. As to falsity:

(i) Who bears the burden: The *plaintiff* bears the burden of proving *falsity*. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) (public figure bears burden to prove falsity); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (same re public official).

(ii) Measure of the burden: The law is unsettled. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 661 n.2 (1989) ("some debate . . . whether . . . falsity must be established by clear and convincing evidence"). Some

courts that have addressed the issue have required proof by clear and convincing evidence. *See, e.g.*, *Chesapeake Publ'g Co. v. Williams*, 661 A.2d 1169, 1174 (Md. 1995). *See also Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d. Cir. 1977) *cert. denied*, 434 U.S. 1002 (1977) (finding "mere denials, however vehement," cannot support a finding of liability under the clear and convincing standard); *Buckley v. Littell*, 539 F.2d 882, 889-90 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (public figure must prove falsity by clear and convincing evidence); *Firestone v. Time, Inc.*, 460 F.2d 712, 722 (5th Cir. 1972), *cert. denied*, 409 U.S. 875 (1972) (same); *Sharon v. Time*, 599 F. Supp. 538 (S.D.N.Y. 1984) (same); *Deutsch v. Birmingham Post Co.*, 603 So. 2d 910 (Ala. 1992) (same); *Deaver v. Hinell,* 391 N.W.2d 128 (Neb. 1986) (same); *Nevada Broad. v. Allen*, 664 P.2d 337, 343 n.5 (Nev. 1983) (same); *Whitmore v. Kansas City Star*, 499 S.W.2d 45 (Mo. Ct. App. 1973) (same). *Contra, e.g.*, *Rattray v. City of Nat'l City*, 36 F.3d 1480 (9th Cir. 1994), *mod.*, 51 F.3d 79 (9th Cir. 1994) (requiring only a preponderance of the evidence); *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (same). *But see Celle v. Fillipino v. Reporter Enters., Inc.*, 209 F.3d 163, 181 (2d Cir. 2000) (remarking on the current, supposedly unclear state of this issue).

b. As to fault:

(i) Who bears the burden: The *plaintiff* bears the burden of proving *fault*.

(ii) Measure of the burden: *by clear and convincing evidence*. *Gertz*, 418 U.S. at 342 (public figures); *New York Times Co.*, 376 U.S. at 285-86 (1964) (public officials).

c. As to other elements: The placement and measure of the burden as to each of the remaining elements vary from jurisdiction to jurisdiction. For example, in Idaho, a public figure plaintiff must prove the entire case by clear and convincing evidence. *Bandelin v. Pietsch*, 563 P. 2d 395 (Idaho 1977). In Louisiana, the standard applies to falsity and fault. *Spears v. McCormick & Co., Inc.*, 520 So. 2d 805 (La. Ct. App. 1987), *writ denied*, 522 So. 2d 563 (La. 1988). In Maryland, a public official complaining about statements of public concern must prove defamatory meaning, falsity, fault *and* punitive damages by clear and convincing evidence. *LeMarc's Management Corp. v. Valentin*, 709 A.2d 1222, 1226 (Md. 1998) (punitive damages); *Aron v. Brock*, 703

A.2d 208 (Md. Ct. Spec. App. 1997), *cert. denied*, 697 A.2d 913 (1997) (meaning, falsity and fault). *See also* 1 SACK §5.5.2.1. Most states limit application of the clear and convincing evidence standard to the issue of fault only. *See* LDRC, LDRC 50-STATE SURVEY 1999-2000 MEDIA LIBEL LAW (1999).

(2) Private plaintiffs, matters of public concern and media defendants

a. As to falsity:

(i) Who bears the burden: the *plaintiff* bears the burden of proving *falsity*, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); s*ee also Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (questioning, but not deciding, whether the defendant's identity should create a distinction as to who bears the burden); *see also, e.g.,* 1 SACK § 3.3.2.2.2 (citing cases for proposition that most courts apply the *Hepps* rule to non-media defendants).

(ii) Measure of the burden: there is no constitutional requirement raising the burden to convincing clarity. 1 SACK § 3.4. Thus, this is a question of state law. Certain courts have held that the burden is that of convincing clarity – *e.g., Williams v. Continental Airlines, Inc.*, 943 P.2d 10 (Colo. Ct. App. 1996) (applying standard where matter is of public concern); *Wright v. Dollar General Corp.*, 602 So. 2d 772 (La. Ct. App. 1992) (applying standard to all elements of a claim); *Mark v. Seattle Times*, 635 P.2d 1081 (Wash. 1981), *cert. denied*, 457 U.S. 1124 (1982) (applying standard except where defendant is not a media member and matter is not of public concern). Other states have applied the preponderance standard – *e.g., Shapiro v. Massengill*, 661 A.2d 202 (Md. Ct. Spec. App. 1995), *cert. denied*, 668 A.2d 36 (1995); *Gazette, Inc. v. Harris*, 325 S.E.2d 713 (Va. 1985).

b. All Other Elements: Strictly a matter of state law as to both who bears the burden and what measure applies, as long as there is no strict liability for defamation.

(3) Private plaintiffs/private defendants/private matters:

a. All Elements: As long as there is no strict liability for defamation, in cases of purely private defamation the Supreme Court has left it to the states to determine both *who bears* the burden and *the measure* of the burden to be satisfied. *Gertz*, 418 U.S. at 345-47.

But see Greenmoss Builders, *supra* (in decision without a majority opinion, several concurrences suggest that the *Gertz* "no liability without fault" holding does not apply to purely private defamation actions).

b. Where Negligence is the Standard of Conduct: In most jurisdictions, and assuming no privilege applies (*see* Section 18, *infra*) plaintiff's burden is to prove negligence by a preponderance of the evidence. 1 Sack § 6.2.4. The State of Ohio, however, has found the standard for burden of proof to be one of clear and convincing evidence. *Lansdowne v. Beacon Journal Publ'g. Co.*, 512 N.E.2d 979 (Ohio 1987).

16. **What is the applicable standard of fault?**

A. Fault standard determined by public/private distinction: There are two fault standards applicable to defamation cases: the higher standard known as actual or constitutional malice (*see infra* Section 16.G); or some lower, non-strict liability standard, such as negligence or lack of good faith. The applicable fault standard is determined by both the plaintiff's status and the nature of the communication at issue.

B. Fault standard governed by constitutional principles: Beginning with the decision in *New York Times Co.*, *supra*, 376 U.S. at 279-80, the relevant fault standard a plaintiff must meet has been governed by constitutional principles. The critical distinction is between those cases involving public official/figure plaintiffs complaining about statements of public concern, those involving private figure plaintiffs, regardless of the subject matter, and those involving matters of private concern, regardless of the plaintiff's status.

C. Role of judge and jury: Whether a plaintiff is a public official/figure, and whether the statement is of public concern, are generally questions decided by the court. *See, e.g.*, *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966); RESTATEMENT § 580A cmt. b.; s*ee also Bowman v. Heller*, 651 N.E.2d 369, 373 (Mass. 1995) (holding that whether a plaintiff is a public or private figure is a question of law); *Jee v. New York Post Co., Inc.,* 176 Misc.2d 253, 257, 671 N.Y.S.2d 920, 923 (Sup. Ct., New York Co., 1998), *aff'd,* 260 A.D.2d 215, 688 N.Y.S.2d 49 (N.Y. App. Div., 1st Dep't 1999), *leave to appeal denied*, 93 N.Y. 2d 817, 697 N.Y.S. 2d 565 (1999) (ruling that whether plaintiff is a public official is a question of law for the court); *Trotter v. Jack Anderson Enterprises, Inc.,* 818 F.2d 431, 433 (5th Cir. 1987) (holding that a defamation plaintiff's status is a question of law for the court).

D. Standard of fault:

(1) Public Officials and Figures. The plaintiff must prove constitutional malice to prevail. *See Gertz*, 418 U.S. at 334-35 (extending actual malice

test to public figures); *New York Times*, 376 U.S. at 286-88 (holding that actual malice must be shown regarding public officials).

(2) All other cases: The Court has left it to each state to define the standard of liability, as long as some level of fault (*e.g.*, negligence or lack of good faith) is required. *See Gertz*, 418 U.S. at 347; *see also, e.g., Chapadeau v. Utica – Observer Dispatch,* 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975) (New York's highest court, the Court of Appeals, defines the standard of liability for private figures involved in matters of public concern as "gross irresponsibility.")

E. Who is a public official/figure?

(1) Public Official: Although not every government person is a public official, the category is intentionally broad, because debate about public affairs and those who serve the public are at the core of First Amendment concern. The category "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." *Rosenblatt*, 383 U.S. at 85. For a collection of cases detailing public official determinations, *see* Danny R. Veilleux, Annotation, *Who is "Public Official" for Purposes of Defamation Action,* 44 A.L.R.5th 193 (1996, Supp. 2004).

a. Examples of public officials:

(i) Current elected office holders (at any level), *see, e.g.*, *Garrison v. Louisiana*, 379 U.S. at 67; *Lane v. MPG Newspapers,* 438 Mass. 776, 781 N.E.2d 800 (2003);

(ii) State university administration, *see, e.g.*, *Baxter v. Doe,* 868 So.2d 958 (La. Ct. App. 2d Cir. 2004) (university vice president); *Grossman v. Smart*, 807 F.Supp. 1404, 1408 (C.D. Ill. 1992) (vice chancellor);

(iii) State university professors, *see, e.g., id.* at 1408;

(iv) State university coaches, *see, e.g., Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182, 186 (Tex. Ct. App. 1993);

(v) School superintendent, *see, e.g., Purvis v. Ballantine*, 487 S.E.2d 14 (Ga. Ct. App. 1997);

(vi) High school principal, *see, e.g., Johnson v. Robbinsdale Indep. Sch. Dist. No 281,* 827 F.Supp. 1439 (D.C. Minn. 1993); *Kapiloff v. Dunn*, 343 A.2d 251(Md. Ct. Spec. App. 1975); *but see East Canton Education Association v.*

McIntosh, 709 N.E.2d 468 (Ohio), *cert. denied, Slick v. McIntosh*, 120 S.Ct. 614 (1999);

(vii) High school teachers, *see, e.g., Kelley v. Bonney*, 606 A.2d 693 (Conn. 1992);

(viii) Law enforcement officials and correctional officers at all levels, *see, e.g.*, *Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977); *Kiser v. Lowe,* 236 F.Supp.2d 872 (S.D. Ohio 2002); *Beaton v. District of Columbia,* 779 A.2d 918 (D.C. 2001);

(ix) Numerous federal, state and local government administrative personnel, *see, e.g.*, *Henry v. Collins*, 380 U.S. 356 (1965);

(x) Village building inspector, *see, e.g., Dattner v. Pokoik,* 81 A.D.2d 572, 437 N.Y.S.2d 425 (N.Y. App. Div., 2d Dep't 1981);

(xi) Court officials, *see, e.g.*, *Ross v. News-Journal Co*., 228 A.2d 531 (Del. 1967);

(xii) City attorneys, *see, e.g., Rogers v. Cassidy,* 946 S.W.2d 439 (Tex. App. Corpus Christi 1997);

(xiii) Former public officials: ordinarily those no longer publicly employed will nevertheless be treated as public officials if alleged statements concern the performance of their duties while so employed. *See* 1 SACK § 5.2.1 at 5-6; *see also Rosenblatt*, 383 U.S. at 87 n.14 (unless "person is so removed from a former position of authority that comment . . . no longer has the interest necessary to justify first amendment concern about public debate"); *Zerangue v. TSP Newspapers, Inc.,* 814 F.2d 1066 (C.A.5 La. 1987).

(2) Voluntary public figures: There are three categories of public figures – the "all purpose" or "pervasive" public figure; the "limited purpose" public figure; and the "involuntary" public figure. The Supreme Court has never set out definitive tests for each. Nevertheless, while the tests for each vary from jurisdiction to jurisdiction, there is a general consistency of analysis in the cases as to the meaning of each category. As stated in *Gertz,* 418 U.S. at 345, 351, public figures "have assumed roles of special prominence in the affairs of society" and assumed "special prominence in the resolution of public questions." Also, they are assumed to have greater access than the ordinary citizen to the media to state their position and to rebut charges against them. *Id.* In other words, (voluntary) public figures

are those who, by dint of their own actions, are sought out by the public generally as to political and social questions and the way in which we as a society conduct our lives. For a collection of cases detailing public figure determinations, *see* Tracy A. Bateman, Annotation, *Who is "Public Figure" for Purposes of Defamation Action,* 19 A.L.R. 5th 1 (1994, Supp. 2004).

a. All-purpose voluntary public figures: those who, by their own voluntary conduct, "occupy positions of such pervasive power and influence that they are deemed public figures for all purposes." *Gertz*, 418 U.S. at 345. This category includes, for example, national celebrities, such as Johnny Carson, *see Carson v. Allied News Co*., 529 F.2d 206, 210 (7th Cir. 1976) and Clint Eastwood, *see Eastwood v. National Enquirer, Inc*., 123 F.3d 1249, 1251 (9th Cir. 1997); actors such as Christianne Caratano (*aka* Chase Masterson), *see Caratano v. Metrosplash.com, Inc.,* 207 F.Supp.2d 1055 (D.C. Cal. 2002); national religious figures such as Jerry Falwell, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988); well-known professional athletes such as Orlando Cepeda, *see Cepeda v. Cowles Magazine & Broadcasting, Inc.,* 392 F.2d 417 (9th Cir. 1968); candidates for national and/or prominent electoral office such as Barry Goldwater, *see Goldwater v. Ginzburg*, 414 F.2d 324, 335 (2d Cir. 1969); and prominent citizens of other countries such as the former Israeli defense minister, Ariel Sharon, *see Sharon v. Time, Inc*., 599 F. Supp. 538, 563 (S.D.N.Y. 1984).

b. Limited-purpose voluntary public figures:

(i) This category is reserved for those who, while they may not have national or pervasive fame or prominence, have nevertheless "thrust themselves to the forefront of particular public controversies [intending to] influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345; *see also Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991), *cert. denied*, 501 U.S. 1212 (1991) (five part test: (1) plaintiff had access to effective channels of communication; (2) plaintiff voluntarily assumed role of special prominence in controversy; (3) plaintiff sought to influence outcome of controversy; (4) controversy pre-existed publication of defamatory statement; and (5) plaintiff retained public figure status at time of publication); *Clark v. American Broad. Cos.*, 684 F.2d 1208, 1218 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983). Perhaps the best known test for determining limited purpose public figure status is that stated in

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296-98 (D.C. Cir. 1980):

– is there a public controversy?

– has the plaintiff played a sufficiently central role in the controversy?

– is the alleged defamatory statement germane to the plaintiff's participation in that controversy?

See also, Dameron v. Washington Magazine, 779 F.2d 736 (U.S.App. D.C. 1985), *cert. denied,* 476 U.S. 1141, 106 S. Ct. 2247 (1986); *Daniel Goldreyer, Ltd v. Dow Jones Co.,* 259 A.D. 2d 353, 687 N.Y.S.2d 64 (N.Y. App. Div., 1st Dep't 1999).

For definition of public controversy, *see* Section 16.F, *infra*.

(ii) Examples of limited purpose public figures:

Cera v. Gannett Co., Inc., 47 A.D.2d 797, 365 N.Y.S.2d 99 (N.Y. App. Div., 4th Dep't 1975), chiropractors who appeared on local television broadcast on one occasion;

James v. Gannett Co., Inc., 40 N.Y.2d 415, 386 N.Y.S.2d 871 (1976), professional belly dancer who gave newspaper interview;

Street v. National Broad. Co., 645 F.2d 1227, 1235 (6th Cir.), *cert. dismissed,* 454 U.S. 1095 (1981), plaintiff who voluntarily gave press interviews outside courtroom;

Fitzgerald v. Penthouse Int'l, Ltd., 525 F. Supp. 585, 594 (D. Md. 1981), *aff'd in part, rev'd in part*, 691 F.2d 666 (4th Cir. 1982); *cert. denied*, 460 U.S. 1024 (1983), plaintiff who had single appearance on *60 Minutes*;

Martin v. Wilson Publishing Co., 497 A.2d 322 (R.I. 1985), successful businessman and long-time resident who appeared before local regulatory agencies to secure permits for renovation projects;

Contemporary Mission, Inc. v. New York Times Co., 665 F.Supp. 248 (S.D.N.Y. 1987), *aff'd*, 842 F.2d 612 (2d Cir. 1988), *cert. denied*, *O'Reilly v. New York Times Co.*, 488

U.S. 856 (1988), not-for-profit organization of Catholic priests who formed musical group and were involved in controversy regarding ordination by issuing press releases and giving interviews;

Brueggemeyer v. American Broadcasting Co., 684 F.Supp. 452 (N.D. Tex. 1988), prominent businessman engaged in the sale of bulk meat whose business along with the industry were subject to media attention;

Wilsey v. Saratoga Harness Racing, Inc., 140 A.D.2d 857, 528 N.Y.S.2d 688 (N.Y. App. Div., 3d Dep't 1988), jockey, found akin to a professional athlete or entertainer, who participated in media interviews following his termination;

Park v. Capital Cities Communications, 181 A.D.2d 192, 585 N.Y.S. 2d 902 (N.Y. App. Div., 4th Dep't), *appeal dismissed*, 80 N.Y. 2d 1022, 592 N.Y.S. 2d 668 (1992), doctor who described himself as "pioneer" of new eye surgery techniques and appeared on local television stations to promote techniques;

Curry v. Roman, 217 A.D.2d 314, 635 N.Y.S.2d 391 (N.Y. App. Div., 4th Dep't 1995), *appeal dismissed*, 88 N.Y. 2d 804, 646 N.Y.S. 2d 984 (1996), auctioneer hired to liquidate publicized art collection who advertised and gave media interviews regarding auction;

Partington v. Bugliosi, 825 F. Supp. 906, *aff'd*, 56 F.3d 1147 (9th Cir. 1995), plaintiff who was lead defense counsel in heavily publicized murder trial and gave numerous press interviews regarding the trial;

Freyd v. Whitfield, 972 F. Supp. 940 (D. Md. 1997); plaintiffs, leaders of private, non-profit False Memory Syndrome Foundation, who promoted organization on television, radio, in person and via the internet;

Waicker v. Scranton Times Limited Partnerhip; 113 Md. App. 621, 688 A.2d 535 (Md. App. 1997), prominent real estate developer whose activities, which were compared to "blockbusting," were publicized locally;

Carr v. Forbes, Inc., 259 F.3d 273, 279, 281 (4th Cir. 2001) (corporate executive was a limited-purpose public figure based in part on the fact that the controversy

discussed by Forbes "stirred public debate" and on executive's own actions in voluntarily assuming a "prominent public presence.")

Kassouf v. Cleveland Magazine, 142 Ohio App.3d 413, 755 N.E.2d 976 (Ct. App. Ohio, 11th District 2001), locally prominent businessman whose personal and professional activities were publicized for 12 years before the article at issue;

Chafoulias v. Peterson, 642 N.W.2d 764 (Minn. Ct. App. 2002), *aff'd in part, rev'd in part*, 668 N.W. 2d 642 (Minn. 2003), prominent local businessman and hotelier who defended allegations of sexual harassment by guests at his hotel;

Medure v. Vindicator Publishing Co., 273 F.Supp.2d 588 (W.D. Pa. 2002), casino operator involved in high-profile, highly regulated industry;

Playboy Enterprises v. Wells, 30 Fed. Appx. 734 (9th Cir. 2002), model deemed "Playmate of the Year" who voluntarily injected herself into trademark dispute by publicly commenting on controversy;

Lohrenz v. Donnelly, 350 F.3d 1272, 1281 (D.C.Cir. 2003), a female pilot serving in the U.S. Navy was "a voluntary public figure for the limited purpose of the debate about whether and how women should be integrated into combat aviation roles."

Gill v. Delaware Park, LLC, 294 F.Supp.2d 638 (D. Del. 2003), owner of thoroughbred racehorses;

*White v. Berkshire-Hathaway, Inc.,*195 Misc.2d 605 (Sup. Ct., Erie Co. 2003), *aff'd,* 5 A.D.3d 1083, 773 N.Y.S.2d 664 (N.Y. App. Div., 4th Dep't 2004), controversial real estate developer whose publicly funded projects were publicized locally.

See also, examples listed in 1 SACK § 5.3.5.

(3) Involuntary public figures: The Supreme Court has acknowledged the possibility that certain individuals can be deemed public figures *regardless* of whether they voluntarily participate in a public controversy. *See Gertz*, 418 U.S. at 351 ("an individual voluntarily injects himself or *is*

drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues")(emphasis added).

a. The Supreme Court has never actually held a plaintiff to be an involuntary public figure. *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

b. A number of courts, however, have applied the *Waldbaum* test to find that a particular plaintiff is an involuntary public figure.

c. Examples of involuntary public figures:

Byers v. Southeastern Newspaper Corp., 161 Ga. App. 717, 288 S.E.2d 698 (Ct. App. Georgia 1982) (college Dean held to be a limited purpose public figure: "[w]hile appellant may not have voluntarily injected himself in the controversy over whether or not the office of the Dean…should be abolished, it is clear that appellant was drawn into this controversy by the announcement that the position would be abolished");

Dameron v. Washington Magazine, Inc., 779 F.2d 736, 741 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986) (air traffic controller on duty at time of crash was involuntary public figure for limited purpose of discussions of controversy surrounding crash);

Daniel Goldreyer, Ltd. V. Dow Jones & Co., 259 A.D.2d 353, 687 N.Y.S.2d 64 (N.Y. App. Div., 1st Dep't 1999) (well-known and controversial art restorer whose questionable restoration of valuable painting made him a public figure);

Erdmann v. SF Broadcasting, 229 Wis.2d 156, 599 N.W.2d 1 (Ct. App. Wisconsin 1999) (falsely accused suspect in shooting was a limited purpose public figure as he had been "thrust" into publicized controversy);

Marcone v. Penthouse Int'l. Magazine for Men, 754 F.2d 1072, 1082-86 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) (criminal defense attorney representing notorious motorcycle gangs allegedly involved in drug trafficking may be classified as a public figure where "the plaintiff's action . . . itself invite[s] comment and attention");

McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985) (individual who "undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired," is a public figure when his actions place him at the center

of a public controversy; holding architect involved in controversial public construction projects to be involuntary public figure);

Rosanova v. Playboy Enterprises., Inc., 580 F.2d 859, 861 (5th Cir. 1978) (prior media reports about plaintiff's activities and alleged associations with organized crime made him a public figure).

Wiegel v. Capital Times Co., 426 N.W.2d 43 (Ct. App. Wisconsin 1988) ("It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient…that [the plaintiff] voluntarily engaged in a course that was bound to invite attention and comments"; holding landowner whose farming practices allegedly damage Yellowstone Lake a public figure);

But see Wells v. Liddy, 186 F.3d 505, 534 (4th Cir. 1999) (former office secretary at Watergate office of Democratic National Committee not a public figure despite substantial public speculation concerning her role in allegedly improper committee activities).

(4) Corporations as public figures: Corporations may be, but are not necessarily, public figures. *See, e. g., Steaks Unlimited v. Deaner,* 623 F. 2d 264, 273-74 (3d Cir. 1980) (holding plaintiff a limited purpose public figure as a result of a heavy advertising campaign that invited public attention, comment and criticism); *Northwest Airlines, Inc. v. Astraea Aviation Services, Inc.,* 111 F.3d 1386, 1393 – 94 (8th Cir. 1997) (holding highly regulated corporation a public figure); *Reliance Insurance Co. v. Barron's*, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (holding plaintiff a public figure because it "voluntarily thrust itself" into the public arena with respect to issues surrounding a public stock offering). *But see Computer Aid, Inc. v. Hewlett-Packard Co*., Nos. 96-CV-4150, 97-CV-0284 (E.D. Pa. June 15,1999) (holding that Hewlett-Packard was not a public figure for purposes of defamation counterclaim because it did not have "such pervasive fame or notoriety" to be a general purpose public figure, and its press releases about its business activities did not create a public controversy); *Franklin Prescriptions, Inc. v. The New York Times Co.,* 267 F.Supp.2d 425 (E.D. Pa. 2003) (ruling on summary judgment that while pharmacy advertised online, it did not thrust itself into controversy concerning illegal online pharmacies).

F. What constitutes a public controversy? The Supreme Court has not set forth a definition of a "public controversy," leaving that task to lower courts. The most commonly cited definition is that set forth in *Waldbaum*, 627 F.2d at 1296-97: public controversies are those with "forseeable and substantial ramifications for non-participants." *See also Blue Ridge Bank v. Veribanc*, 866 F.2d 681, 688 n.12 (4th Cir. 1989) (stating that public controversy is "a real dispute, the outcome of which affects the general public or some segment of it"); *White v. Berkshire-*

Hathaway, *supra*, 195 Misc.2d at 607 (stating that public controversy is a dispute, the outcome of which affects the "general public" or some segment thereof in a meaningful way); *Norris v. Bangor Publ'g Co.*, 53 F. Supp. 2d 495, 504 (D. Me. 1999) (defining a public controversy as something that invites attention and comment); *Gray v. St. Martin's Press, Inc.*, 1999 WL 813909, *3 (D.N.H. 1999) (giving an example of a public controversy as a situation that relates to "often discussed public issues."). Examples of public controversies include drug trafficking (*Marcone v. Penthouse International Magazine,* 754 F.2d 1072,1083 (3d Cir.), *cert. denied,* 474 U.S. 864 (1985) and corruption in the jai alai industry (*Silvester v. American Broadcasting Co., Inc.,* 839 F.2d 1491, 1494-95 (11th Cir. 1988).

G. Constitutional malice standard ("actual malice"):

(1) Public Figure Plaintiff's Burden of Proof: In *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964), the Supreme Court held that the First Amendment requires a public figure plaintiff to prove, by clear and convincing evidence, that defendant published the challenged publication with "actual malice," also called constitutional malice to distinguish it from common law malice. *See Masson v. New Yorker Magazine, Inc.,* 960 F.2d 896, 900 (1992). Actual malice means subjective knowledge of falsity or reckless disregard for the truth.

(2) Burden of Proof for Summary Judgment: A public figure plaintiff must prove actual malice by clear and convincing evidence to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254-56 (1986). Whether the evidence in the record is sufficient to support a finding of actual malice is a question of law for the court. *Bose Corp. v. Consumer's Union,* 466 U.S. 485, 510-11 (1984).

(3) Definition of Actual Malice or Reckless Disregard: To establish actual malice or reckless disregard for the truth, a plaintiff must prove that "the defendant in fact entertained serious doubts as to the truth of the publication." *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968). The test has been fashioned as a deliberately subjective one. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *Freeman v. Johnson,* 84 N.Y.2d 52, 58, 614 N.Y.S.2d 377, 380 (1994), *cert. denied*, 513 U.S. 1016 (1994). The plaintiff must demonstrate, at least, that the publisher had a "high degree of awareness of probable falsity" at the time of publication. *Id.* (quoting *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964)). *See also, Bose Corp.*, 466 U.S. at 511 n.30. Actual malice is not established by suggesting, without more, that sources were inadequate, or that their reputation for veracity had not been established, *St. Amant*, 390 U.S. at 730-32, or by asserting that the challenged publications were one-sided, s*ee Westmoreland v. CBS, Inc.,* 601 F. Supp. 66, 68 (S.D.N.Y. 1984). Neither negligence nor a failure to investigate, without more, is sufficient. *St. Amant*, 390 U.S. at 730. Even an extreme departure from

accepted professional standards of journalism is not sufficient to establish actual malice. *Harte-Hanks,* 491 U.S. at 664. Believing one source over another is not sufficient, even where the subject of the publication denies its truth. *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1510-11 (D.C. Cir. 1996); *Edwards v. Nat'l Audobon Society, Inc.*, 556 F.2d 113, 121 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) (clear and convincing proof of malice "cannot be predicated on mere denials, however vehement"); *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984) (reporter not required to prefer denials over apparently creditable accusations).

(4) Evidence Constituting Actual Malice or Recklessness. Actual malice is not measured by objective standards of reasonableness but "rests *entirely* on an evaluation of [the author's] state of mind when he wrote his initial report." *Bose Corp.,* 466 U.S. 485, 494 (1984). Recklessness may be found where "a story is fabricated by the defendant, is the product of his imagination, was based wholly on an unverified anonymous telephone call," consists of allegations "so inherently improbable that only a reckless man would have put them in circulation," *St. Amant,* 390 U.S. at 732, or "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Harte-Hanks Communications,* 491 U.S. at 688. The plaintiff presented sufficient evidence of actual malice in *Anderson v. Augusta Chronicle,* 31 Media L.Rep. 1393 (S.C.App. 2003), wherein the court found that the defendant had obvious reason to doubt the veracity of the source, which was a previous newspaper article by defendant. Plaintiff denied allegations in the previous article and presented evidence supporting the denial. Because the court found that defendant engaged in more than just "sloppy journalism," it was held that a reasonable jury could find for the plaintiff on the malice issue.

H. Effect of lapse of publicity on public figure status:

(1) Case law indicates that individuals who achieve limited purpose public figure status retain such status for later comment on the same controversy. *See*, *e.g.*, *Milsap v. Journal/Sentinel, Inc.,* 100 F.3d 1265 (7th Cir. 1996); *Thompson v. National Catholic Reporter Pub. Co.,* 4 F.Supp.2d 833, 838 (E.D.Wis. 1998); *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981); *Brewer v. Memphis Publishing Co., Inc.,* 626 F.2d 1238 *(*5th Cir. 1980*), cert. denied,* 452 U.S. 962 (1981)*; Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971); *Medure v. Vindicator Printing Co.*, 273 F.Supp.2d 588 (W.D. Pa. 2002); *Contemporary Mission,Inc. v. New York Times Co.,* 665 F.Supp. 248 (S.D.N.Y. 1987)*, aff'd*, 842 F.2d 612 (2d Cir. 1988), *cert denied*, *O'Reilly v. New York Times Co.,* 488 U.S. 856 (1988); *White v. Berkshire-Hathaway, Inc.*, 195 Misc.2d 605 (Sup. Ct., Erie Co. 2003), *aff'd*, 5 A.D.3d 1083, 773 N.Y.S.2d 664 (N.Y. App. Div., 4th Dep't 2004);

(2) However, *dicta* in the decision of one court indicates that the result may be different in certain circumstances, *i.e.* cases involving general purpose public figures. *See*, *Huggins v. Moore,* 253 A.D.2d 297, 689 N.Y.S. 2d 21 (N.Y. App. Div., 1st Dep't 1999), *leave to appeal granted,* 262 A.D.2d 1087, 693 N.Y.S 2d 436 (N.Y. App. Div., 1st Dep't), *rev'd by,* 94 N.Y.2d 296, 704 N.Y.S.2d 904 (1999) ("person who had been a general purpose public figure does not retain that status unless he or she maintain[s] regular and continued access to the media").

(3) Examples of limited purpose public figures who retained such status for further commentary on the subject, despite a lapse of time during which the person received no publicity:

White v. Berkshire-Hathaway, Inc., 195 Misc.2d 605 (12 year lapse in publicity coupled with plaintiff's relocation from New York, the focus of prior publicity, to Florida did not diminish his status as a limited purpose public figure);

Medure v. Vindicator Printing Co., *supra* (plaintiff's argument that his company was no longer involved in the controversial management of casinos was unavailing; holding "once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of *that controversy*");

Contemporary Mission, Inc. v. New York Times, Co., 665 F.Supp. 248 ("[a]n individual who becomes a limited purpose public figure with respect to a particular controversy retains that status for the purpose of later commentary on *that* controversy"; ruling that not-for-profit group of Catholic priests was public figure for a period when artistic career and involvement in controversy was at peak);

Street v. National Broadcasting Co., supra (40 year lapse did not diminish Scottsboro Boys rape victim's limited purpose public figure status for a historical news report on earlier trial);

Brewer v. Memphis Pub. Co., Inc., 626 F.2d 1238 (former entertainer and ex-girlfriend of Elvis Presley retained public figure status 8 years after ceasing entertainment career);

Time, Inc. v. Johnston, supra (former professional basketball player's limited purpose public figure status endured 9 years after his retirement as a player and 12 years after incident discussed in publication at issue).

17. **Is there an alleged element of damages not supportable as a matter of law?**

A. Categories of damages:

(1) Compensatory:

a. Nominal damages;

b. Presumed harm to reputation;

c. Actual harm to reputation;

d. Economic harm;

e. Emotional distress.

(2) Punitive.

B. What *compensatory* damages are recoverable? Defamation is primarily a reputation-based tort. *See Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); 1 SACK §10.5.1. The reputational aspect of the tort is supported by the requirement that the words be defamatory—that is, that they expose the plaintiff to public scorn, hatred, or ill-will. *See* Section 13.A, *supra*. Proof of harm to reputation, however, is not a constitutional prerequisite for recovery of compensatory damages in a defamation action, and states may choose to award compensatory damages for proof of pecuniary losses, emotional distress, anxiety, or humiliation even where the plaintiff cannot show damage to reputation. *Time, Inc. v. Firestone,* 424 U.S. 448, 460 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *see also Hearst Corp. v. Hughes*, 466 A.2d 486, 492 (Md. 1983) (framing the *Firestone* rule as: "Where P is a private citizen and D is engaged in media expression, then defamatory publication + falsity + fault by negligence standard + harm by way of emotional distress without proof of harm to reputation = constitutionally permissible cause of action for compensatory damages …."); 1 SACK § 10.5.1; Earl L. Kellett, Annotation, *Proof of Injury to Reputation as Prerequisite to Recovery of Damages in Defamation Action*, 36 A.L.R.4th 807 (2004). For example, in *Hearst,* the Maryland Court of Appeals (that state's highest court) held that emotional injury alone is sufficient to trigger compensatory damages in a defamation action:

> Victims of defamation can reasonably become genuinely upset as a result of the publication. If such persons can convince a trier of fact that their emotional distress is genuine and can prove the other common law and constitutionally required elements of a negligent defamation case, we see no social purpose to be served by requiring the plaintiff additionally to prove actual impairment of reputation.

466 A.2d at 495; *see also Rockwell v. Allegheny Health, Educ. & Research Found.*, 19 F. Supp. 2d 401 (E.D. Pa. 1998) (although Pennsylvania law requires

plaintiff alleging defamation to show actual harm resulting from defamatory remarks, plaintiff need not prove actual harm to his reputation in order to recover). Other jurisdictions hold that compensatory damages for the tort of defamation are tied, if not limited to, reputational injury. For example, in *Gobin v. Globe Publishing Co.*, the Kansas Supreme Court held:

> We conclude that in this state, damage to one's reputation is the essence and gravamen of an action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander, under our law. It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander.

649 P.2d 1239, 1243 (Kan. 1982); *see also Garziano v. E.I. DuPont De Nemours & Co.*, 818 F.2d 380, 395 (5th Cir. 1987) (imposing a reputational harm prerequisite in defamation actions); *Jenkins v. Star Bulletin,* 971 P.2d 1089 (Haw. 1999) (recovery without proof of reputational injury, based solely on claims of emotional distress, not permitted in a defamation action); *Little Rock Newspapers v. Fitzhugh*, 954 S.W.2d 914, 936–37 (Ark. 1997) (*Firestone* approach incorrect; injury to reputation a prerequisite to making out a case of defamation); *Cox v. Hatch*, 761 P.2d 556 (Utah 1988) (defamation protects only reputation); *Maressa v. New Jersey Monthly*, 445 A.2d 376 (N.J. 1982) (law of defamation imposes liability for publication of false matters injuring reputation of others); *France v. St. Clare's Hosp.,* 441 N.Y.S.2d 79, 82 (N.Y. App. Div. 1981) (absent proof of harm to his reputation a plaintiff may not recover on a claim of defamation unless he can prove malice); *Salamone v. MacMillan Publ'g Co.,* 429 N.Y.S.2d 441, 443 (N.Y.App. Div. 1980) (claim for mental anguish not compensable unless concomitant with loss of reputation)..

In jurisdictions that still recognize defamation *per se*, absence of evidence that defamatory statements harmed plaintiff's reputation is irrelevant. *See, e.g., Starr v. Pearle Vision*, 54 F.3d 1548 (10th Cir. 1995). Other jurisdictions no longer recognize defamation *per se* and do not award compensatory damages based on presumed harm to reputation. *See, e.g., McCauley v. Raytheon Travel Air Co.*, 152 F. Supp. 2d 1267 (D. Kan. 2001); *Edelstein v. WFTV, Inc.*, 798 So. 2d 797 (Fla. Dist. Ct. App. 2001).

C. Does the allegedly defamatory statement add any incremental harm?

(1) "[T]he incremental harm doctrine measures the harm 'inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If that harm is determined to be nominal or nonexistent, the statements are dismissed as not actionable.' " *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 898 (9th Cir. 1992) (quoting *Herbert v. Lando*, 781 F.2d 298, 311 (2d Cir. 1986)); *see also J.H. Desnick, M.D., Eye Servs., Ltd. v. ABC, Inc.*, 44 F.3d 1345, 1350 (7th Cir. 1995) ("If a false accusation cannot do any incremental harm to the plaintiff's deserved

reputation because the truth if known would have demolished his reputation already, he has not been harmed *by the false accusation* and therefore has no remedy.") (emphasis in original). *See generally* Kevin L. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. REV. 529 (1998). The closer in substance the challenged statement is to the unchallenged statement, especially where the unchallenged statement appears to carry the greater sting, the more likely the case will be dismissed for lack of incremental harm to reputation.

(2) The incremental harm doctrine is closely related to that of substantial truth, which holds that "[m]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (internal quotation omitted); *accord Liberty Lobby v. Dow Jones*, 838 F.2d 1287 (D.C. Cir. 1988) ("Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."); *see also* Section 12, *supra*. Although the doctrines have been confused by several courts, they are conceptually distinct. The substantial truth doctrine dismisses a libel claim where "a statement is not false and, therefore, an element of the cause of action has not been met." *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 393 (S.D.N.Y. 1998). The incremental harm doctrine, by contrast, rejects a claim even though the underlying statement may be false if "a court determines that the incremental benefit to plaintiff from continuing a suit outweighs the harm to the defendant and society." *Id.* at 394. In sum, "the substantial truth doctrine is concerned with truth (regardless of harm) and the incremental harm analysis is concerned with harm (regardless of truth)." *Id.*

(3) The U.S. Supreme Court has explicitly rejected "any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech." *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 523 (1991). In *Jewell v. NYP Holdings, Inc.,* 23 F. Supp. 2d 348, 387–96 (S.D.N.Y. 1998), the court concluded that the defense was available under New York law but declined to apply it to the facts of the case. Some courts have rejected the incremental harm doctrine. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896 (9th Cir. 1992) (incremental harm doctrine not recognized under California libel law); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986) ("The law … proceeds upon the optimistic premise that there is a little bit of good in all of us …. Even if some of the [statements] lawfully … attribute[d] to the [plaintiffs] … are in fact much more derogatory than the statements under challenge, the latter cannot be said to be harmless.").

D. Is the plaintiff defamation-proof?

(1) If the plaintiff's reputation was already so bad with respect to the trait attacked by the defamatory statement that it could not have been harmed by the statement as a matter of law, then the defamation claim will fail. *See, e.g., James v. DeGrandis*, 138 F. Supp. 2d 402, 417 (W.D.N.Y. 2001) ("The libel-proof plaintiff doctrine 'reasons that when a particular plaintiff's reputation for a particular trait is sufficiently bad, further statements regarding that trait, even if false and made with malice, are not actionable because, as a matter of law, the plaintiff cannot be damaged in his reputation as to that trait.' ") (quoting *Church of Scientology Int'l v. Time Warner, Inc.*, 932 F. Supp. 589, 593 (S.D.N.Y. 1996)).

(2) Certain persons are so notorious that they are considered to have no positive reputation on which to base a defamation claim, regardless of the trait attacked by the allegedly defamatory statements. They are "defamation-proof" as a matter of law. *See, e.g., Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976), *aff'd without opinion*, 582 F.2d 1280 (6th Cir. 1978) (King assassin James Earl Ray incapable of being defamed). Criminal convictions are the well-worn path to achieving libel-proof status. *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986). In addition to the above, cases which have applied the doctrine include: *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1975) (explaining that habitual criminal is libel-proof); *Jones v. Trump*, 971 F. Supp. 783 (S.D.N.Y. 1997) (highly publicized convicted thief is libel-proof); *Wynberg v. Nat'l Enquirer, Inc.*, 564 F. Supp. 924 (C.D. Calif. 1982) (holding that plaintiff's past conduct and convictions make him libel-proof); *Logan v. District of Columbia*, 447 F. Supp. 1328 (D.D.C. 1978) (criminal with numerous narcotics convictions); *Cofield v. Advertiser Co.*, 486 So. 2d 434 (Ala. 1986) (well publicized convict); *Jackson v. Longcope*, 476 N.E.2d 617 (Mass. 1985); *Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512 (Tex. App. 1987). The Third, Fifth and Eighth Circuits have suggested they would apply the doctrine under appropriate circumstances. *See Marcone v. Penthouse Int'l Magazine*, 754 F.2d 1072 (3d Cir. 1985); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066 (5th Cir. 1987); *Ray v. United States Dep't of Justice*, 658 F.2d 608 (8th Cir. 1981); *see also* Note, *The Libel Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909 (1985); *but see Liberty Lobby, Inc. v. Anderson*, 746 F. 2d 1563, 1568 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986) ("We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth."). The Second Circuit has counseled that "[t]he libel-proof plaintiff doctrine is to be applied with caution, since few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements." *Guccione*, 800 F.2d at 303.

E. How do First Amendment considerations affect a plaintiff's damages?

(1) Matters of Public Concern: As a constitutional matter, in cases involving statements of "public or general concern," both *presumed* and *punitive* damages are *unavailable unless the plaintiff first proves constitutional malice*. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974); *see also Brock v. Counter Landmarks Harlem, Inc.*, No. 98–7984, 1999 WL 752959 (2d Cir. Sept. 9, 1999) (plaintiff not entitled to presumptive damages where defamatory newspaper article involved issues of public interest). In addition, some states further limit the circumstances in which presumed or punitive damages are recoverable. *See, e.g.*, *Prozeralik v. Capital Cities Communications*, 626 N.E.2d 34, 42 (N.Y. 1993) (punitive damages recoverable only if plaintiff proves both constitutional malice and common law malice, such as ill will); *Le Marc's Mgmt. Corp. v. Valentin*, 709 A.2d 1222, 1226–27 (Md. 1998) (actual knowledge of falsity required for punitive damages; reckless disregard for truth not enough); *see also* Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 860–61 (1985) (dual constitutional-common law malice standard "would permit punitive damages [only where] such damages advance the state's interests in optimal deterrence and morally justifiable retribution").

(2) Private Issues: In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Supreme Court held that *Gertz* did not apply to a defamation action where the statement constituted private speech: "We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of '[constitutional] malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." *Id.* at 763.

F. "Excessive" punitive damages: In the event of an otherwise constitutional punitive damage award, it may be worth making the argument post-trial that the award is out of line, not reasonable under the circumstances and a violation of the Due Process Clause. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (punitive damages award of $145 million based on $1 million compensatory damages violated Due Process Clause because it was neither reasonable nor proportionate to the wrong committed); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (due process analysis of punitive damages awards is guided by "general concerns of reasonableness").

G. Other damage issues: Some courts hold that nominal damages, intended to substitute for general damages where none have been shown, can become the platform for an award of punitive damages. *See, e.g., Paul v. Hearst Corp.*, 261 F. Supp. 2d 303 (M.D. Pa. 2002) (jury's decision to grant no actual damages did not prevent award of punitive damages); *see also* 1 SACK § 10.3.1 (citing other examples); *but see Schiavone Constr. Co. v. Time, Inc.*, 646 F. Supp. 1511, 1520 (D.N.J. 1986) ("[A]s a matter of federal constitutional law … a public figure

cannot maintain a libel suit over statements of public concern against a media defendant absent a showing of compensable injury to reputation. Thus, [the plaintiff] cannot maintain this action purely for nominal and punitive damages.").

H. Must the damages be "caused" by the defamatory statement? One of the most often overlooked defenses in a defamation action is that of *lack of causation*. As stated by a leading commentator, "courts have increasingly insisted that the link of causation between publication and injury be clearly established." 1 SACK §10.5.3, and cases cited therein. Thus, before proceeding with a claim for particular damages (with the exception of damages for presumed harm to reputation) the plaintiff must adduce evidence of causation in response to a motion for summary judgment. *Id.*

The Hawaii Supreme Court held that a man whose name was confused with his brother's in a story about an insurance investigation could not simply speculate about the loss of future income: "[Plaintiff] admitted during discovery that he could not think of a single client or matter that he had lost as the result of the alleged defamation. He offers only his 'feeling' that he would have derived greater net earned income had the story not appeared. Such 'evidence' of business losses is not competent under general libel law. A libel plaintiff claiming loss of earnings must adduce admissible evidence that the defamation was a 'material element or substantial cause' of actual economic damage." *Jenkins v. Liberty Newspapers,* 971 P.2d 1089, 1104 (Haw. 1989) (internal citation omitted); *see also Arthaud v. Mut. of Omaha Ins. Co.*, 170 F.3d 860 (8th Cir. 1999) (plaintiff must show that prospective employer actually relied on false statement in refusing him employment); *Simons v. Shearson Lehman Bros.,* 895 F.2d 1304 (11th Cir. 1990) (no special damages for plaintiff's termination because plaintiff failed to introduce evidence that termination was based on defamatory statements); David A. Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 764–73 (1984). Also, a plaintiff must distinguish in proof between the harm caused by truthful statements, which is not compensable, and that separately caused by any false and defamatory statement. *See, e.g., Foretich v. CBS, Inc.*, 619 A.2d 48, 60 (D.C. 1993) ("[I]t is clear that a plaintiff may not 'combine the damaging nature of true statements with the falsity of other, immaterial statements in order to provide the basis for a defamation claim.' ") (quoting *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990)); *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981) (no defamation where challenged statement in article could not harm the plaintiff's reputation beyond the harm already caused by the unchallenged remainder of the article). Where a jury verdict is based on more than one defamatory statement and an appellate court finds that one or more of those statements are not defamatory as a matter of law, the case will usually be remanded for a determination of damages based on the defamatory statement(s) alone. *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725 (9th Cir. 1999); *but see Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 191 (2d Cir. 2000) (After a jury verdict of $1 nominal and $15,000 punitive damages based on the defendants' publication of three

defamatory newspaper articles, the Second Circuit found that only two of the three articles had been proven false. Instead of remanding for determination of damages based on the two proven charges, a divided panel reduced the punitive damages award to $10,000 "in the interest of justice, and the avoidance of unnecessary expensive and repetitive litigation.").

18. Can the defendant assert a defense of absolute or qualified privilege?

A. Categories of privileges: There are a variety of constitutionally based, statutory and common law privileges which can be asserted as defenses to defamation claims. Within each of these three classes, certain privileges are absolute and others are qualified. To the extent a privilege is founded upon constitutional doctrine, federal law applies, unless a particular state's constitution provides *broader* protection. The elements and scope of common law privileges vary widely from state to state, although certain common law privileges are almost universally recognized, with broad agreement as to their general meaning.

B. Question for court or jury? As a general principle, *whether* a statement is made on an absolutely or qualifiedly privileged occasion is a question of law to be determined by the court. Whether the privilege has been abused, such that any protection afforded by the privilege has been lost, is a question of fact for the jury. *E.g.,* RESTATEMENT § 619; *Rabinowitz v. Oates*, 955 F. Supp. 485, 488 (D. Md. 1996); *Marks v. Estate of Hartgerink*, 528 N.W.2d 539, 546 (Iowa 1995); *Shapiro v. Massengill*, 661 A.2d 202, 219 (Md. Ct. Spec. App.1995), *cert. denied*, 668 A.2d 36 (Md. 1995).

With respect to each category of privilege set forth herein, state and federal law *must be consulted* for the jurisdiction in question to determine whether the privilege is recognized and what constitute its precise contours.

C. Statutory privileges: Both absolute and qualified statutory privileges exist from state to state, and, although less plentiful, may also be found under federal law. For example, Section 230(c)(1)of the Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1), grants absolute immunity to the internet service provider and user from defamation claims for Internet material supplied by another information content provider.

D. Constitutionally based privileges:

(1) Absolute:

a. Speech and Debate: Pursuant to Article 1, Section 6 of the Constitution, all sitting members of Congress and their staff members are protected from liability for statements made in the House and Senate, as well as in the course of committee hearings, wherever held. The privilege does not apply to the so-called "informative" function, *i.e.*, in the course of constituent reports,

statements to the press, and campaign speeches. Most state constitutions provide similar immunity.

Major authorities: *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. U.S.*, 408 U.S. 606 (1972).

b. Neutral Reportage: "[W]hen a responsible, prominent organization [or person] . . . makes serious charges against a public figure . . . the First Amendment [absolutely] protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity." *Edwards*, 556 F.2d at 120. The privilege is based upon the notion that the mere making of statements by and/or about prominent persons and organizations is a newsworthy event, without regard to the statement's underlying truth. As long as the media does not itself endorse the charge, it performs a valuable public service by reporting that such statements have been made, without vouching for the truth or falsity of those statements. The existence of this privilege is highly controversial, and, even among those jurisdictions that recognize the privilege, the elements necessary to establish its application vary widely. For example, favorable jurisdictions differ as to whether it is necessary to report a response to the public charge. *Compare, Edwards, supra*, with *Suchomel v. Suburban Life Newspapers, Inc.*, 240 N.E.2d 1 (Ill. 1968). Thus, the law of the relevant jurisdiction *must be checked* to determine whether the privilege has been recognized and, if so, to identify the pertinent elements, such as whether there must be a pre-existing controversy; whether the target of the statement must be a public figure; whether the speaker must be trustworthy; and whether the reporter must seek and/or publish any response to the charge being reported.

(i) Major Authorities:

(a) Recognizing: *Cianci v. New Times Publ'g. Co.*, 639 F.2d 54 (2d Cir. 1980); *Edwards*, supra; *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 494 U.S. 1013 (1990); *Medina v. Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971); *Coliniatis v. Dimas*, 965 F. Supp. 511 (S.D.N.Y. 1997); *Barry Sunshine Sportswear & Electronics, Inc. v. WSOC Television*, 738 F. Supp. 1499 (D.S.C. 1989);

(b) Rejecting: *Dickey v. CBS*, 583 F.2d 1221 (3d Cir. 1978) (dicta); *Weiner v. Doubleday & Co.*, 549 N.E.2d 453 (N.Y. 1989), *cert. denied*, 495 U.S. 930

(1990); *Janklow v. Viking Press*, 378 N.W.2d 875 (S.D. 1985); *Young v. Morning Journal*, 669 N.E.2d 1136 (Ohio Ct. App. 1996); *Hogan v. Herald Co.*, 446 N.Y.S.2d 836 (N.Y. App. Div. 1982).

c. Federal Employees Acting Within Scope of Duty: In *Barr v. Mateo*, 360 U.S. 564 (1959), the Supreme Court held that the statements of federal executive officials given in the course of their duties enjoy absolute immunity. *See also Gorst v. Ferguson*, 431 F. Supp. 125 (W.D. Okla. 1977) (privilege applied to employee evaluation letter written by government official to superior). *But see Butz v. Economou*, 438 U.S. 478 (1978) (immunity denied if actions outside scope of official's duty).

d. Ecclesiastical Privilege: Under the religion clauses of the First Amendment, federal and state courts lack subject matter jurisdiction over hierarchical religious organizations and their members concerning matters of theological controversy, institutional discipline, governance, and the conformity of members to ethical and moral standards required of them. This exclusion includes actions for defamation brought by institutional members against religious organizations and officials concerning theological matters.

Major authorities: *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986) (minister's defamation complaint against bishop and others dismissed for lack of jurisdiction); *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286 (D. Minn. 1993); *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808 (Md. Ct. Spec. App. 1996).

(2) Qualified -- Petitions for Redress of Grievances:

a. Definition: Qualified privilege exists under the petitioning clause of First Amendment for petitions seeking redress addressed to the legislative, judicial or executive branch of government. Comparable privilege exists under many state constitutions. As a constitutionally-based privilege based upon First Amendment principles, federal petitioning privilege is defeated by existence of constitutional malice -- knowledge of falsity or reckless disregard for the truth. Privilege has been applied to immunize complaints about public officials directed to their government supervisors and to complaints and petitions for action submitted to the executive and legislative branches of government.

b. Major authorities: *McDonald v. Smith*, 472 U.S. 479 (1985); *Bradley v. Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir. 1981), *cert. denied*, 454 U.S. 940 (1981); *Miner v. Novotny*, 498 A.2d 269 (Md.1985); *Pickering v. Fink*, 461 A.2d 117 (N.H. 1983).

E. Common law privileges

(1) Absolute

a. Judicial Proceedings Privilege

(i) Definition: Depending on the jurisdiction, absolute privilege exists for statements made during civil and criminal proceedings. The privilege generally applies to statements of judges, attorneys, witnesses, jurors and parties to the proceedings. The statements to which the privilege applies includes those made in anticipation of, initiating, or outside of but relating to such proceedings, although the scope of this privilege varies from state to state. The general requirement is that the statement be pertinent to the proceeding -- *i.e.*, that it appears relevant in the broadest sense (not necessarily admissible) to a reasonable person. Most states hold that extra-judicial commentary neither directly related to nor part of the judicial process (*i.e.*, statements to the media) are not protected by the privilege.

(ii) Major Authorities: RESTATEMENT § 587; *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Hinton v. Shaw Pittman Potts & Trowbridge*, 257 F.Supp.2d 96 (D.D.C. 2003); *Woodruff v. Trepel*, 725 A.2d 612 (Md. Ct. Spec. App. 1999); *Hawkins v. Harris*, 661 A.2d 284 (N.J. 1995). *But see Cardtoons v. Major League Baseball Players Ass'n*, 208 F.3d 885 (10th Cir. 2000) (noting that pre-litigation threats communicated solely between the parties are not afforded immunity).

b. Consent

(i) A target's actual consent, by word or conduct, to a defamatory statement about that person provides an absolute privilege to publish. Generally, fraud, misrepresentation and duress inducing consent defeat application of the privilege. While it is not necessary that the target know the exact content of the statement, the target must at least know that the content will be

defamatory. The scope of the consent governs the protection afforded as to both the substance and nature of the publication.

(ii) Major authorities: RESTATEMENT § 583; *Johnson v. Baptist Medical Center*, 97 F.3d 1070, 1071 (8th Cir. 1996); *Cox v. Nasche*, 70 F.3d 1030 (9th Cir. 1995); *Farrington v. Bureau of Nat'l Affairs*, 596 A.2d 58 (D.C. App. 1991). *But see Tacka v. Georgetown Univ.*, 193 F.Supp.2d 43 (D.D.C. 2001) (finding only a qualified immunity based on genuine issues of material fact as to whether the privilege was lost through publication that was outside normal channels or made with malicious intent). *Compare Bagwell v. Peninsula Regional Medical Center*, 665 A.2d 297, *cert. denied*, 669 A.2d 1360 (1995) (consent found as a matter of law), *with McDermott v. Hughley*, 561 A.2d 1038 (Md. 1989) (whether consent given was question for jury).

(2) Qualified

a. Fair Report Privilege (Reports of official proceedings or documents): Under the Restatement and the law of most jurisdictions, reports of official proceedings and the content of public records are qualifiedly privileged. RESTATEMENT § 611. The report must be a fair and accurate summary of the proceeding or statement, but is privileged even if the speaker's underlying statement is incorrect. *See e.g., Steer v. Lexleon, Inc.*, 472 A.2d 1021 (Md. Ct. Spec. App. 1984) (accurate republication of erroneous arrest report privileged). The law of each jurisdiction *must be consulted* to determine the level of fault or other conduct necessary to defeat the privilege. Under the Restatement, the privilege is absolute. However, many jurisdictions hold that the presence of constitutional malice, or publication purely out of spite, hatred or ill will, defeats the privilege. *Compare, e.g.*, RESTATEMENT § 611 cmt. b *with* 1 SACK § 7.3.2.2.1. While the privilege is invoked most often by the media, it is generally held to apply to anyone issuing an oral or written report of an official proceeding. *Id.* The following are included within the official proceedings privilege:

(i) Reports of judicial, legislative and executive proceedings: privilege applies to reports covering statements made during judicial, administrative, legislative and other governmental proceedings. Jurisdictions are divided as to whether the privilege applies to all stages of judicial proceedings. 1 SACK § 7.3.2.2.4. According to the

Restatement, if a report republishes defamatory testimony at one stage of the proceeding, the reporter is under a duty to report exculpatory material disclosed at a later stage. RESTATEMENT § 611 cmt. f. *But see* 1 SACK § 7.3.2.2.7.

(ii) Reports of official statements: privilege generally held to apply to official statements of government officials and agencies, content of official documents, and public records. Jurisdictions vary as to whether the statement or activity reported must be "official," *i.e.,* for public release, and/or whether the statement must be within the scope of the speaker's official duty. *See, e.g., Kenney v. Scripps Howard Broadcasting Co.*, 259 F.3d 922 (8th Cir. 2001) (statement in official police report privileged); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) (statement of congressman at press conference privileged); *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978) (unofficial report issued by FBI privileged). *But see Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003) (finding that fair report privilege did not apply to on-air statements made by defendant that went beyond simple reporting of allegations contained in a legal complaint).

(iii) Reports of arrest: reports of arrests, the underlying charges and the contents of arrest warrants are qualifiedly privileged. RESTATEMENT § 611; *Yohe v. Nugent*, 321 F.3d 35 (1st Cir. 2003); *Mathis, supra*.

(iv) Administrative proceedings lacking due process safeguards comparable to civil or criminal trials: As previously stated, most jurisdictions confer an absolute privilege upon statements made preliminary to, in the initiation of, and during the course of judicial proceedings. To the extent an administrative proceeding does not provide the full measure of due process safeguards found in judicial proceedings, statements made in that context should enjoy a qualified privilege as statements made in the public interest. *E.g., Gersh v. Ambrose*, 434 A.2d 547 (Md. 1981).

b. Statements among those having an interest in the subject matter: Most jurisdictions also recognize a qualified privilege for statements made to those who have a recognizable social, moral or economic interest in the subject matter. 1 SACK §§ 9.2.2-9.2.3; RESTATEMENT §§ 593-598. This privilege is commonly invoked in connection with reports to law enforcement officials regarding

suspected criminal activities; references to prospective employers; and intra-enterprise reports regarding employee conduct. *Id.* The privilege is generally held to be abused by a showing of constitutional malice, proof that the speaker's principal motivation was ill will, or that either the speaker or recipient had no legitimate interest in the communication. *Id. See, e.g.*, *Garziano v. E.I. du Pont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (finding a qualified privilege in the publication and internal distribution of a bulletin recounting the plaintiff's allegedly sexually harassing conduct and generally describing sexual harassment).

c. Wire service defense privilege: The majority of jurisdictions recognize a qualified privilege for the republication (by the media or otherwise) of reports taken from recognized, reputable publishers, such as a recognized wire service, nationally regarded newspaper or magazine. *E.g., Gray v. Williams*, 486 F. Supp. 12 (D. Ark. 1979) (summary judgment for publisher who republished wire service story without independent verification). Application of the privilege is defeated by showing of republisher's constitutional malice. *Id. O'Brien v. Williamson Daily News*, 735 F. Supp. 218 (E.D. Ky. 1990), *aff'd.,* 931 F.2d 893 (6th Cir. 1991); *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468 (S.D. Fla. 1987).