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Pre-Publication/Pre-Broadcast Review: A Primer

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I. Core Principles

A. Pre-publication/Pre-broadcast requires:

1. Grounding in substantive areas of law (libel, privacy, newsgathering)
2. Rapport with the client/author/producer
3. Good judgment

B. Understand the nature of the program or publication

1. Memoir
2. News
3. Parody/Satire
4. Celebrity Gossip and Tabloids
5. Documentary-Style Film or Television
6. Fictionalized “True Stories”

C. Understand your client’s approach toward risk

1. Key to successful pre-pub/pre-broadcast is taking the attitude of “how can I help get this published as safely as possible?” Be able to explain the legal risks involved – in a clear and non-legalese way – so that the editor/producer can make an informed decision about the story.
2. It is ultimately the organization’s call, although some will rely more on your recommendation than others.

D. Understand your client's process

1. Does your client rely on confidential sources? Does your client rely on “freelancers” who are really sources?
2. Has your client received the cooperation of the subject (e.g., victim or suspect in ride-along show; subject of biography or fictionalized “true story”)?
3. Has your client done primary research (book author)?
4. Is your client working with law enforcement? If so, has law enforcement provided anything of value?

E. Understand the nature of potential plaintiffs

1. These categories of people file a disproportionate number of libel suits:
 - a) Executives
 - b) Corporations
 - c) Judges
 - d) Law enforcement
 - e) Teachers
 - f) Doctors
 - g) Lawyers
 - h) Criminal suspects
 - i) Prisoners
 - j) Entertainers
 - k) Children
2. Particularly litigious subject matter?
3. Could the publication be sued abroad, and where? (E.g., be prepared to advise your client if they need to seek UK libel review)
4. What are the local politics (if a local story)?
5. It is often the person mentioned briefly in passing who sues.

F. Consider Issues of Privilege

1. For example, in book context, conversations with an author may not be covered by a joint defense privilege.
2. Can you avoid a problematic paper trail? Know what your client wants – some will want to communicate via writing, others are comfortable working entirely by phone. If you have to write something down, consider the wording.

G. Understand the potential causes of action

1. Defamation, false light (books, news, TV or film recreations)

- a) Libel – Statement of fact (vs. opinion), damaging to reputation, about a living identifiable person or entity, substantially false, made with fault, not protected by any privilege.
- b) Statement of Fact or Opinion? Assess content, language, and context.
 - (1) Are underlying facts set forth?
 - (2) Can they be substantiated?
 - (3) Hypothesis or speculation that is set forth is not actionable.
 - (4) BUT opinions which imply undisclosed false facts can be actionable.
- c) Defamatory meaning – The false statement or assertion is harmful to one's reputation; a statement that a person would not want said about him/herself. For example:
 - (1) Fired from work
 - (2) Bankruptcy
 - (3) Illegality
 - (4) Unethical behavior
 - (5) Conflict of interest
 - (6) Poverty
 - (7) Adultery
 - (8) Disease
 - (9) Teen pregnancy
- d) Libel by implication – A defamatory reference can be reasonably derived from a factually accurate report. Was the inference intended or adopted?
 - (1) Juxtaposition, accompanying graphics, headlines, choice of photos, choice of words, tone and omission of material facts may be evidence that a particular inference was intended or adopted.
 - (2) The absence of any language distinguishing or disclaiming an implication may be cited as evidence that the implication was intended.
 - (3) Carefully review headlines, photo captions, titles, chyrons,

etc. for unintended implications

- e) Of and Concerning a Living, Identifiable Person or Entity – Statements identifying not only individuals, but entities such as associations, unions, or corporations, may be actionable.
 - (1) Even if the person or entity is not named, if there are enough details given so that the person or entity is identifiable, the statement may be actionable.
 - (2) The identity does not have to be known to the average reader, but only to the subject's acquaintances.
 - (3) Large amorphous groups and government agencies cannot sue.
 - (4) Dead people cannot sue.
- f) Privileges and Republication – A fair and accurate report of judicial, legislative or administrative proceedings is not actionable.
 - (1) A report of judicial proceedings that are not open to the public (e.g., divorce, grand jury) may be actionable.
 - (2) A report of what the lawyer said about the case is not within the fair report privilege and may be actionable.
 - (3) A report of confidential, non-final official investigations (e.g., FBI preliminary report of investigation) may be actionable.
 - (4) A story that does not make attribution to the proceeding or report will not enjoy the protection of the fair report privilege.

2. Invasion of Privacy/Misappropriation, Right of publicity

(broadcast, entertainment programming, magazines)

- a) Intimate Private Facts – Publication of truthful intimate private facts. To establish liability, the facts must be private and not available to the public or taking place in a public place, plaintiff must be identifiable, and publication must be highly offensive to a reasonable person. But no liability will be established if publication of intimate private facts is newsworthy or the private facts are a matter of public record.
- b) Commercial Misappropriation/Right of Publicity – Use of a person's name or likeness for some commercial purpose without consent. Misappropriation claim applies only to advertising or trade; if use is reasonably related to editorial materials, use will not form the

basis for liability.

3. Newsgathering Torts – intrusion, trespass, hidden cameras, illegal recording/surveillance (one or two party consent state?) – and §1983 (documentaries, documentary-style TV, crime and entertainment programming)
 - a) Even if the information is not published, it can be the basis of a lawsuit. The important question is: How was the information obtained? Was it by routine reporting techniques?
 - b) Crimes or torts committed in the course of newsgathering are generally not protected by the First Amendment.
 - c) Intrusion – If a reporter enters, uninvited by owner, an area not open to the public (i.e., a home, hotel room, employee non-public area), it may be actionable. Surveillance by means of visual or audio enhancement equipment (i.e., telephoto lens, sound boom), even if from the public street, may be actionable. Breaking into voicemail, e-mail.
 - d) Recording Phone Calls – At least one party must consent. In some states, all parties must consent. Best practice: Follow most restrictive state’s law when call is between states.
4. Copyright
 - a) Fair use of copyright materials: case-by-case analysis of fair use of copyrighted material. Factors:
 - (1) The purpose and character of the use (educational purposes, transformative use, etc.)
 - (2) Nature of the copyrighted work (published/unpublished, fact or data/fiction or creative)
 - (3) Amount or percentage of work taken for use
 - (4) The effect of the use on the potential market for the copyrighted work
 - b) Recipient of a letter is not the copyright holder – the author is.
 - c) Federal government documents are not protected by copyright.
 - d) Corporate memos are protected by copyright.
5. Trademark
 - a) Publications can use another’s trademark to illustrate a story about the company or in comparative advertising provided the use is not misleading or implies the company’s endorsement.

- b) False designation of the origin or source is actionable, e.g., falsely claiming an “exclusive interview” that was actually given to another publication.

H. Is the work fair and balanced? Make sure the reporter/editor/writer did his/her homework.

1. Sources:

- a) Are they fairly characterized?
- b) Factors to consider in weighing reliability of sources:

- (1) In a position to know
- (2) Personal agenda or motive
- (3) Other corroboration
- (4) Past reliability
- (5) Inherent credibility of claim
- (6) On or off the record

- c) If source is biased, is that bias made apparent?

- d) Difference between “off the record,” “on background,” and “confidential.”

- (1) Reliance on confidential sources – While you may not be compelled to reveal sources, you may not be able to rely on the unnamed source in your defense of a defamation claim
- (2) Avoid creating records, including electronic records and phone records, that contain information identifying source, particularly on company computers.
- (3) Avoid sharing your confidential sources and materials with outsiders – can constitute a waiver of privilege.

- 2. Are there privileges? Fair Report?
- 3. Review everything – remember to consider whether promotional materials such as social media, aired “outtakes,” blurbs or ads can be considered “for the purpose of trade” for misappropriation and whether such promotional materials may trigger other legal claims.
- 4. Is the work fair and balanced? Make sure the reporter/editor/writer did his/her homework.
- 5. Sources: Are they fairly characterized?

I. After reviewing any drafts of the article/report, be sure to review it after “final edit”

1. For broadcast, review: promos, teases, lookaheads, cut-downs, leads, tags, other web versions of the package, web extras, and social media posts/promos.
2. For print, review: table of contents, cover, book jacket, packaging, subscription offers (that sometimes contain images from back issues), web versions, and social media posts/promos.
3. Have underlying source documents available.

J. Privacy

1. Is the material of an “intimate” nature and “highly offensive”?
2. Does it address a matter of public interest? Is the subject and the individual’s role in it still newsworthy?
3. Is the subject telling his/her own story, in which the plaintiff is a part; courts are sympathetic to a person’s right to tell their own story.

K. Privacy: Private Fact/Misappropriation

1. Is the matter of public interest, the newsworthiness of which has not eroded?
2. Is there a sufficient nexus between the information disclosed and the topic of public interest?
3. Is the subject or potential plaintiff, if a private individual, in the “vortex” of a public newsworthy event?
4. Is the information otherwise available to the public?
5. Is the subject a sympathetic plaintiff? (child, disabled, crime victim).
6. Was the subject interviewed? Consent to the use of the information? Was the consent captured on audio/video?
7. If using photographs, was a release sought/received? Is the photograph’s subject an important/necessary part of the story?

L. News Organizations

1. What might be considered “defamatory” in the context of a particular public figure or celebrity’s life may differ than for a private individual.
2. Getting comment from the subject of the piece.
3. Lawyer’s letters – Public figures send legal letters, often to intimidate, in hopes of convincing not to publish: although it’s not a science, look at the letter to see if it says “this is defamatory” or “my client will sue if this is published.”
4. Discuss with editors the risk of suit vs. risk of losing suit: Are we relying solely on

an actual malice defense? If so, are the sources confidential? Did reporters seek corroboration?

5. Did reporters confirm/fact-check the mundane parts of the source's story? Thus lending credibility to the source's primary story?
6. Review all headlines, coverlines, captions, etc. Often the potentially defamatory material is in these elements. Be aware that coverlines are also a business decision for the editors. Try to come up with alternatives that retain some of the "wow" factor, if seeking to tone down language.

M. Photos

1. Is a fact assumed/implied? (i.e., a photo with a glass assumed to be alcohol)
2. Are there background people to be concerned with? (photo of couple walking out of AA meeting, individuals in background)
3. Is timeline disclosed? (3-year-old photo of celebrity with cigarette used to illustrate story about current "addictions")
4. Beware stock photos and check license restrictions (i.e., photo of children in playground used to illustrate story about sexual abuse)
5. Beware of private individuals in photos, implication of illegal activity or allegedly defamatory action

N. Getting comment/denials

1. Where does the denial get placed?
2. When was the comment requested, how much time did subject have to respond? 24-48 hours is preferable, if possible. If not possible, be transparent about short time given to subject to respond, so that lack of response doesn't reflect negatively upon the subject.

O. Documentary-Style Film or Television

1. Criminal Subjects
 - a) Is a disclaimer necessary regarding what charges, if any, were filed; and as of when the information was accurate?
 - b) Should suspects be blurred?
 - c) How to handle when a suspect is identified but not charged?
 - d) Is it necessary to update program before re-airing if suspect is acquitted? Is appeal pending?
 - e) Accuracy in language (manslaughter v. murder; charged v. convicted; pled guilty v. found guilty)

2. Fourth Amendment Concerns

- a) Could your program's producers be considered to be acting in concert with law enforcement, or participating in the investigation?
- b) Be sure that the producers know to come to you as soon as possible to alert to any significant potential violations by police that they witnessed.
- c) Some arrested plaintiffs argue that producers are liable (civilly) for violations of Fourth Amendment rights, because they are acting "under color of law" in concert with the police.
 - (i) Perp walks: staged v. not staged
 - (ii) Illegal searches accompanied by cameras
 - (iii) Excessive force
- d) Is the producer's agreement with law enforcement sufficient to create the "color of law" relationship that would subject you to Fourth Amendment claims if, e.g., the police engaged in an illegal search?
 - (i) Review the agreement with the city or police department. Important elements include: ownership and control over footage; complete editorial control; and lack of payment.
 - (ii) Ensure that your producers are "fly on the wall" even if that means missing something.
- e) Do not influence the investigation, suggest leads, etc.

P. Privacy/misappropriation

1. Develop standard practices regarding releases – when they will be sought, how the program is willing to blur or distort voices of certain individuals
2. When considering whether to show an individual without a release, consider whether the subject's actions are a matter of public concern? E.g., in law enforcement programming, is the individual portrayed accused of serious, violent felony, or something far less serious such as traffic violations?
3. Be careful to blur any identifying information that appears in background (e.g., for law enforcement programming, SS#, arrest record if not relevant, weight, address, phone #).
4. In blurring: what was agreed to? Agree to particular process, rather than just to

“obscure identity.”

Q. Newsgathering issues

1. Hidden cameras/taping telephone calls
 - a) Check state law where filming
 - b) Are your producers on private property? Is there an expectation of privacy where filming (hidden or not)? Has the subject been told that they are not being filmed?
 - c) Are cameras adding real value?
 - d) Is the matter of public interest/concern?
 - e) Are the cameras yours or controlled by third parties?
2. Trespass - Did the producers secure consent to enter the private home, and a location release ultimately?

R. Outtakes

1. Develop a standard recycling policy – can be different for different programs within the same company – and stick to it.
2. Develop good/trusting relationship with producers: by the time the program is edited, you may not see some of the newsgathering problems (i.e., the footage where the producer enters a private home without consent will be edited out). You need to know these issues ahead of time, so you can discuss whether to air that particular incident and raise the risk of trespass/privacy suit from the homeowner.
3. Brady issues
 1. Does the state have a shield law? If so, review the particular law.
 2. Criminal defendants often seek outtakes, claiming they are the “best evidence” of law enforcement’s investigation of the crime.
 3. May argue that contract between producer and law enforcement renders the footage “Brady” material that must be turned over, at the expense of a mistrial/acquittal if it is not.
 4. Review the contract: do the police have a right to demand the footage?
 5. Is it clear in the contract and in practice that the footage is owned by the producer?
 - (1) Establish guidelines – e.g., if asked to review or turn over footage, producer will say “no” and immediately refer to executive producer/inside counsel/outside

counsel.

- (2) Do not turn over footage without a subpoena. When considering whether to fight a subpoena – from prosecutor or defense attorney – consider whether the requester is likely to meet the requirements of the applicable shield law.