"Corrections or Clarifications of Media Publications,
in Lieu of Costly Defamation Litigation, in the 21st Century"

By Henry R Kaufman
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"The heart of every man lies open to the shafts of correction if the archer can take proper aim."
– Oliver Goldsmith

"To free a person from error is to give, and not to take away."
– Arthur Schopenhauer

CORRECTION (*The Lexington Dispatch*, *Lexington N.C.,* February 7, 2015):

"Boyd Thomas's letter Saturday contained an error in the headline [presumably due to the fault of the newspaper's editorial staff].

He does not believe President Obama is the Antichrist, who will come after seven kings, according to Revelation.

He thinks Obama could be the seventh king."

Introduction

Errors in the media are not always serious and may sometimes even be cause for levity. But at other times they raise grave issues of inaccurate, potentially damaging journalism – whether or not intended – that ought to be corrected, both in order to ensure the integrity of the publication and for the protection of its subject(s).

At Henry R. Kaufman PC, as media attorneys, we believe that the correction or clarification process offers demonstrable and tangible benefits to both complainants and publishers or other disseminators of published material in hard copy or online. Although we will not represent defamation plaintiffs in litigation against the media, we do recommend that individuals, companies or other organizations which may be aggrieved by erroneous publications, and therefore may be potential plaintiffs, seriously consider pursuing the possibility of a correction or clarification in lieu of defamation litigation.

Indeed, in our practice we have found that the benefits of a focus away from litigation – in terms of a quick and clear correction or clarification of the record, where available – far outweigh what are often the twin illusions that there will be both reputational rehabilitation and perhaps even a pot of gold at the end of the defamation litigation rainbow. Moreover, engaging a potential media defendant

in discussions over a correction or clarification is far easier and more productive when there is no shadow of potential litigation hanging over the parties' heads and when the potential defendant is aware that counsel does not intend to initiate litigation.

Background

The significant benefits of a published correction or clarification were recognized more than 20 years ago when the National Conference of Commissioners on Uniform State Laws gave its approval, in the summer of 1993, to a new Uniform Correction or Clarification of Defamation Act (the "UCCDA"). (A contemporaneous news article from The New York Times of August 9, 1993 about the UCCDA can be found here.) Thereafter, the House of Delegates of the American Bar Association approved the UCCDA in February 1994, after which the Uniform Act became subject to consideration by state legislatures.

To provide further perspective, it is well to remember that the UCCDA was adopted instead of a highly controversial "Uniform Defamation Act," which would have undertaken to rewrite and codify the law of defamation, including the attempt to codify constitutional protections of the First Amendment recognized under New York Times v. Sullivan and its progeny, in "uniform" legislation, state-by-state, inevitably complicating and potentially narrowing those protections.

The purpose of the UCCDA was to avoid the dangers of such far-reaching legislative tinkering with First Amendment protections, while at the same time giving the media new incentives for correcting or clarifying errors in their publications. On the other hand, the UCCDA gave potential libel plaintiffs meaningful incentives to avoid costly and rarely successful libel litigation, constrained by constitutional privileges, in favor of a speedy remedy that can be, in many cases, equally if not more effective in restoring reputation than years of libel litigation, whether or not successful.

In short, just as the Uniform Law Commissioners saw the wisdom of preserving rights of free speech in the context of potential defamation claims, they also saw the wisdom of providing incentives to publishers to correct or clarify the kinds of errors that are inevitable in the course of the newsgathering and publication process.

As the Uniform Commissioners aptly noted in their commentary to the UCCDA:

"Defamation actions were always complex and expensive and the overlay of first amendment issues has made them more so. On the other hand, unlike personal injuries, harm to reputation can often be cured by other than money damages. The correction or clarification of a published defamation may restore the person's reputation more quickly and more thoroughly than a victorious conclusion to a lawsuit. The salutary effect of a correction or clarification is enhanced if it is published reasonably soon after the defamation, but because of the complexity of defamation litigation, any ultimate vindication in the court comes long after the initial injury."

Along similar lines, the Commissioners also critiqued existing retraction statutes: "these statutes have been largely ineffective because … [t]hey do not create sufficient incentives on both parties … to come to an agreement regarding retraction. Even the term retraction carries with it an implication and

admission of wrongdoing, although in many instances the reputational harm arises from an interpretation not intended by the publisher or the publication of reasonably believable information that subsequently turns out to be false."

Unfortunately, despite this wise and cogent analysis, over the next two decades, as summarized here, only a handful of state legislatures have chosen to consider –and only two to adopt in full – the UCCDA (North Dakota and Washington State). Texas adopted a new retraction statute in 2013; however, the statute fails to track many of the provisions of the UCCDA. Finally, over the years, seven other states are reported to have considered – but failed to pass – statutes modeled after the Uniform Act.

This is unfortunate because, over the same period of time, there has been a revolution in the media landscape – not only with regard to the costs and risks of defamation litigation but also in terms of the ease of correcting the record, often in a fashion that will be permanently preserved and readily accessible. Indeed, many publications now print solely online, and even those that still maintain traditional print publications also maintain an online presence that frequently serves as a historical archive, extending the shelf-life of the initial print publication. This change in media practices has a significant upside for aggrieved defamation claimants because it also gives media publications far more flexibility to be open to the notion of online corrections or clarifications. In the right circumstances, online corrections or clarifications can be permanently attached to the archived online version of the publication in question. This, in turn, may well provide all of the benefits – if not more – that the Uniform Commissioners had in mind when they approved the UCCDA more than a generation ago.

Inspired by the UCCDA, and the significant benefits that corrections or clarifications offer to the subjects of erroneous publications as well as their publishers, it is the purpose of this article is to urge both sides, when confronting a potential defamation dispute, to first carefully consider the salutary benefits of a prompt correction or clarification – one that, if issued, can remain attached, in a meaningful and rehabilitative fashion, not only to whatever correction may subsequently be published in hard copy, but also appended indefinitely to the original article, as digitally archived, no matter how long the corrected or clarified information remains online.

General Purpose of the UCCDA

As summarized by the Uniform Law Commissioners in a prefatory note, the general purpose of the UCCDA is to provide a prompt and direct remedy for allegedly false and defamatory information, and to do so as a prerequisite for pursuing a defamation action. As the commissioners noted:

"Under this Act, a person must make a timely request for a correction or clarification from the publisher of a defamation in order to maintain an action for defamation. If the publisher of the defamation subsequently publishes a timely correction or clarification in a manner to reach the same public that the defamation reached, the defamed person can only receive economic losses if he or she prevails in a defamation action ….

"The options created by the Act provide an opportunity for the plaintiff who believes he or she is defamed to secure quick and complete vindication of his or her reputation. The act provides publishers with a quick and cost-effective means of correcting or clarifying alleged mistakes and avoiding costly litigation. In this way, both reputational interests and rights of free expression are advanced."

(A copy of the full UCCDA, as enacted by the Uniform Law Commissioners, with commentary, is available here. A brief summary of the thirty or so existing state "retraction" statutes is also provided for reference purposes and can be found here. No such statute, whatever its precise terms, however, precludes pursuing the alternative track of corrections or clarifications of demonstrable errors in hard copy or online publications.)

Beneficial Provisions of the UCCDA

There are three key provisions of the Uniform Act that makes its operation more useful than many of the existing state retraction statutes.

First, under Section 1 of the Act ("Definitions"), the key provision that makes the UCCDA so significant for publishers, as a strong incentive to seriously consider issuing corrections or retractions, lies in its restrictive definition of recoverable damages. Thus, under Section 1 (2), if a satisfactory correction is made, recoverable "economic loss" may extend only to "special, pecuniary loss" that is caused by a false and defamatory publication. Moreover, the commentary to Section 1 makes clear that recoverable economic loss is intended to be defined narrowly and to reach solely "those forms of provable loss described, variously, as "and pecuniary, special, or out-of-pocket" and that the Act "[e]xcludes all other forms of damage, including presumed, general, reputational, and punitive damages." (Also notable is that, under a later section of the Act [8 (c) (2)], a plaintiff who declines an adequate offer of a correction or clarification, may also not recover attorneys' fees and expenses in any subsequent litigation.)

Under Section 2 of the Act ("Scope"), the most significant factor – especially in light of the explosion in the pervasiveness of electronic communications since 1993 – is the foresight of the Commissioners in establishing broad coverage of the Act to include not only "writings, broadcasts [and] oral communications," but also to extend the act to "electronic transmissions, or other forms of transmitting information." Clearly, therefore, the Act was prescient in reaching all online communications in addition to traditional books, newspapers, magazines and like print publications. Again, this section represents a substantial advance over most state retraction statutes that on their face appear to be limited to print publications such as newspapers or magazines; and even those that also include broadcasters but that do not do so with language that clearly applies to online publications. In this Internet age, failure to cover online publications is a pivotal – at times critical – defect and oversight in the current statutory scheme.

The remaining provisions of the UCCDA can be briefly summarized:

Section 3 deals with the timing of a request for correction or clarification, for the issuance of same, and an assessment of their adequacy. Although the act would permit a correction request at any time during the period of limitations, unless the request is made within 90 days of knowledge of the publication, thereafter the plaintiff can only recover damages for economic loss. (Service of the summons and complaint that contains all of the information required for an adequate correction request may serve as the request.) Significantly, in the commentary to Section 3, the Uniform Commissioners recognize that a potential defamation defendant may issue a correction or clarification at any time, including before formal service of a demand for same.

Section 4 provides that a potential defamation plaintiff must upon request disclose sufficient, reasonably available, evidence of falsity. If a correction or clarification is not made due to the unreasonable withholding of evidence of falsity, the potential defamation plaintiff may only recover provable economic loss. The potential defendant must publish a correction or clarification within 25 days of receipt of sufficient evidence of falsity, or within 45 days of receipt of the request for a correction or clarification, whichever is later.

Section 5 provides that publication of a sufficient correction or clarification limits the defamation plaintiff to recover only provable economic loss, "as mitigated by the correction or clarification."

Section 6 provides the definitions of a timely (45 days) correction or clarification and its efficacy. This section may not be ideal in the Internet age because it appears to envision publication in the identical medium and place as the original, allegedly false, article. On the other hand, given the power and permanence of a correction or clarification prominently attached to an archive, an online version of the original article might be agreed by mutual consent of the parties to be sufficiently prominent, notwithstanding the precise and cumbersome statutory language that attempts to define sufficient corrections or clarifications.

Section 7 defines the timing and assessment of the sufficiency of corrections or clarifications.

Section 8 provides for the possibility of a late correction or clarification so long as offered prior to the commencement of any trial. Once again, if the correction or clarification is sufficient but is rejected by the defamation claimant, the claimant is limited to provable economic loss plus, because of the delay, her attorney's fees up to the time of the correction or clarification offer.

Section 9 provides that a correction or clarification offered by a representative of the publication covers all persons responsible for the corrected publication. The only exception is if the correction or clarification is premised on the republication of the allegedly false material by another identified person. That person would not be covered by the protective effect of the correction or clarification, unless that third party also issued her own correction or clarification.

Post—Adoption Action on the UCCDA

Unfortunately, as noted above, the Uniform Law Commissioners have made only very modest headway in enacting the UCCDA. According to the Commissioners' legislative fact sheet, since 1993 the UCCDA has been enacted in only three states: North Dakota, Texas and Washington State, and all of these three were enacted only very recently. According to a leading commentator, the act was also introduced in seven other states but failed to be passed.

It is apparent that the time is right for taking another hard look at the UCCDA, and the possibility of pursuing its enactment more broadly, in the age of online media.

It is also well worth considering the enhanced utility, for both plaintiffs and defendants, of seriously considering the option of corrections or clarifications, not just as part of formal litigation, but also as a practical and inexpensive remedy with the potential to cure reputations while at the same time enabling media – especially online media – to permanently correct the historical record in their archived online news coverage or commentary.

According to the Media Law Resource Center 50-State Survey 2013-14, the Washington statute was passed in 2013. As summarized in the Survey, the law requires plaintiffs to request a correction or clarification before filing a lawsuit. If they do not, they cannot recover reputational or presumed damages at trial. The statute applies not just to defamation lawsuits, but to any claim targeted at an allegedly false statement. Notably, according to the Survey, unlike most state retraction laws, but following the Uniform Act, the Washington UCCDA applies expressly to all electronic publications.

Also according to the MLRC Survey, North Dakota's UCCDA has been held to be constitutional notwithstanding that it limits certain damages otherwise available in defamation cases. It appears that the North Dakota statute has changed some of the time periods recommended by the Uniform Law Commissioners. A potential plaintiff has up to 90 days within which to make her request for a correction or clarification. The publisher will benefit from the act only if the correction is published within 45 days of the request.

Finally, in Texas, the "Defamation Mitigation Act" was recently passed and became effective on June 14, 2013. The new act does not follow the UCCDA in certain respects and only limits punitive damages if the correction procedures are followed under the Texas Act.

Comparing the UCCDA to Existing State Retraction Statutes

According to the MLRC 50 State Survey, there are some 30 existing state retraction statutes, apart from the three listed above that follow the UCCDA in whole or in part. An analysis of these suggests a wide array of seemingly small – but in practice potentially significant – differences in most instances between older retraction statutes and the UCCDA. In order to appreciate some of the differences, a brief 50 State summary of correction, clarification and/or retraction process can be found here.

Conclusion: Toward an Enhanced Role for Media Attorneys in Requesting or Facilitating the Publication of Curative Corrections or Clarifications in Lieu of Defamation Litigation

Just a brief sampling of this firm's practice representing potential libel plaintiffs, solely for purposes of the correction or clarification of erroneous media publications, will demonstrate just how effective such an approach can be in contrast to the massive complications, delays and costs that are almost inevitably the hallmarks of defamation litigation.

Expedited Correction on the Eve of an Election

Publication of erroneous information shortly before an election is recognized as a classic case requiring immediate action in order to dispel such false information before it has an impact on the election and the particular candidate. Indeed, at least a number of the state retraction statutes have special rules providing for far shorter deadlines for responding to requests for corrections or clarifications in such circumstances.

In one such situation, I was called two days before an election by a candidate who had been stung by provably false information in a leading newspaper. When the client called, it was obvious that by far best route to repair of reputation was to be represented in such a fashion that the particular publication – and the client – could focus all attention on correcting the record before Election Day. Knowing in-house counsel at the publication was a tremendous advantage because our credibility did not have to be established. Similarly, the fact that the publisher knew me as someone who could be relied upon to play it straight in such compelling circumstances, and not to be building a case for subsequent litigation, removed that issue from the equation and ultimately led to a correction published by the newspaper – literally overnight.

Correcting a Book Prior to Publication

It is often more difficult to secure an expeditious correction of false and defamatory material in a book, especially after it has already gone to press or been shipped to bookstores. Nonetheless, hard copies of books can, in theory, be corrected in second or later printings. Moreover, now that so many books are (also) published online, corrections of digital copies are not only easier to effectuate, but can also be more timely. Clearly, it is not always easy to discover correctable errors in a book prior to publication. Nonetheless, even authors of books must do research, and they often contact confirmatory sources, so that it can become known to outsiders that a book author is at risk of crediting erroneous or unsubstantiated allegations.

For example, some years ago a client came to the firm with information that a friend was about to be identified in a book in connection with an unproven rumor of a sexual dalliance. When contacted, the author had to acknowledge that the alleged episode amounted to no more than gossip, as to which the author had no solid proof, only adamant denials. The woman in question was a private figure who

had never before been publicly linked to the male protagonist, who was a public figure. After discussions back-and-forth, and with the publisher left on the sidelines as a last resort, the author agreed to delete all identifiable features of the woman in relation to the story prior to publication.

Correction of the Erroneous Characterization of a Civil Regulatory Settlement

More recently, the firm was contacted by a client that had been the subject of a regulatory investigation that ultimately led to a voluntary settlement with the investigating agency. There was a civil fine involved in the resolution of that particular matter, but the record was also quite clear that there had been no "fraud" by our client, which paid a fine but was not required to admit any wrongdoing other than an inadvertent bookkeeping error. The settlement documents also clearly stated that there had been no finding of fraud. Despite this, the term fraud was included in the headline of the offending news article as well as in the body of the text.

In that case, the client could have chosen to make the case that being falsely labeled a fraud was severely damaging to the client's reputation and to approach the matter as a potential high-stakes litigation with the possibility of a substantial damage award. Again, we urged the client to look at the situation from the perspective of an immediate correction of the record which would enable the client to move on with its business operations unfettered by the demonstrably false representation. In that way, the client's damages would be reduced, the value of any litigation would be similarly reduced, but the reputation of the client would be quickly repaired. The course of seeking a correction was pursued, and instead of years of costly litigation the matter was successfully resolved in mere weeks, at a small fraction of the cost of litigation.

Correcting Recurring Repetition of a False Claim in the Media

Just a few months ago, the firm was contacted by a potential client who had been the subject of a series of articles, in two different newspapers, each of which were publishing and then repeating a recurringly false claim. The false information was only one piece of a complex story but the false claim was significantly damaging, and the repetition of the falsity was a source of great frustration to the client. Each time the story was republished, the same core error was repeated. In the particular situation, it was not so much a matter of the financial impact of the erroneous material, but its psychological impact on the client who knew the true situation and did not wish to see the false material republished time and again, thus taking on a life of its own in a growing archive of online stories by the two publishers (and other lesser publications) about the client's case.

Again, arguably a successful defamation litigation could have been crafted out of such repeated errors in both newspapers. But again our recommended course was to establish, based on certain indisputable documentary evidence, that a mistake had been made and was being repeated and that the repeated error was in immediate need of correction. Once again, it was helpful that the firm had a good contact in-house at one of the publishers and it was made clear from the outset that what we sought was a correction based on the record and nothing more. Within days, corrections were published in both newspapers' online archives. The corrections were located at the very beginning of the two offending articles, thus completely alleviating the false impression that had previously been created. If litigation had been the choice, that false impression would have lingered for months if not years while our clients were dragged through the painful and costly throes of litigation.