

Top Tips For Effective Prepublication Review (Part I)*

Introduction: An effective prepublication legal review (or “vetting”), where needed, is one essential step in the publication process. Not every book requires vetting, but identifying those books that do can help to avoid the litigation – and potential liability – that may result from publication of legally-sensitive material. Common bases of litigation arising out of published content include defamation, invasion of privacy, breach of contract, and infringement of intellectual property (e.g., copyright, trademark rights, trade secrets), etc.¹

Although not every book requires legal vetting, the cost of vetting those books that do warrant it will almost certainly be far less than the cost of defending a legal claim that could have been avoided by a careful legal review.

Non-fiction books – because their subjects may be living individuals or existing corporate entities – represent the lion’s share of those works appropriately identified for vetting. But even works of fiction – if they arguably have the potential to defame an identifiable living person (e.g., “romans à clef”), or if they for some reason come too close to the line of infringing protected intellectual property – can warrant a legal review.

Selecting publications for prepublication review, and effectively performing that review, is an art and not a science – an art best acquired and practiced through long experience.

And because prepublication review is an art and not a science, the “top tips” below are presented for informational purposes only and represent but a small sampling of the issues, the expertise and the application of professional judgment that make for a successful legal vetting.

Part I – Preliminary Issues in the Vetting Process

1. Know Your Publication

It is essential to gain an understanding of the nature and content of the publication to be vetted. A preliminary Internet search – which we invariably undertake – may turn up prior publications – by others or by your author – on the same or similar subjects. These can raise issues for the new publication and must be carefully examined. The subject matter may have been addressed by other authors in other publications, with varying degrees of reliability and conflicting points of view. While such conflicts are normal, they must be taken into account. Where the author herself has written on the particular topic, it is important to ensure – at least as to legally-sensitive persons, topics and allegations

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¹ The issues and principles discussed in this paper are applicable not only to books but to other printed publications – e.g., newspaper or magazine articles, and also to digital publications – e.g., material published on websites, in blogs, etc. Most of the principles discussed in this paper are also applicable to a pre-broadcast review.

– that the related works will be consistent unless there is a good and credible reason for the author’s change of position. Similarly, in this online era, the author may already have expounded on the topic on a website or in a blog – perhaps even under the same title as the proposed book (see “Website Disclaimers” below). Finally, with other works by other authors on the same or similar subjects readily available online, there is always the potential for excessive quotation beyond the limits of “fair use” – if not outright plagiarism – that must, if possible, be identified and eliminated.

In one especially complicated instance, confronted quite some time ago, we became aware that the author of the book under review had previously addressed the same topic in both a major magazine piece and as a contributing consultant to a television news production. Indeed, the author’s primary purpose in publishing the book under review – in addition to reaching a new audience – was to expand upon the shorter, previously published and broadcast presentations. Those prior publications had themselves already been thoroughly vetted. Upon further examination, we became aware that in the course of the prior vetting, certain portions of the earlier works had been rewritten – and in some cases deleted – for legal reasons. It became apparent, however, that the author had not only expanded upon his prior work, but that he had also reintroduced into the book certain legally-sensitive allegations that had been deleted on the advice of prior vetting counsel. Our awareness of this history alerted us to the need for a very careful comparison of the previous and the proposed publication. Armed with this knowledge, we recommended and pursued a careful exploration of the new or expanded material that might otherwise have been overlooked.

2. Know Your Author

Also, before we begin to examine the text of the publication, we always do an Internet search of the author’s background to ensure that we know with whom we are dealing, to understand the extent of the author’s knowledge of and perspective on the subject matter, and to be sure there aren’t any other factors that make dealing with the author problematical in relation to the proposed publication.

In one extreme case, our preliminary Internet research quickly identified the unfortunate fact that the author of the book – which was on a professional topic – had not only been disciplined for, but had actually been barred by the applicable regulatory agency from practicing in her particular field. As it would clearly have been impossible to credibly publish or market a book written by an author who had been disabled by government regulators from doing business or giving advice in her field of expertise, we advised the publisher of this fact even before the substantive vetting had been commenced, which in short order led to cancellation of the publication.

3. Examine the Relationship Between Any Co-Author(s)/Ghostwriter(s) and Your Author

It is always important to make yourself aware of, and where necessary to examine, the relationship between your author and any ghostwriter or other co-author(s) that may be involved in the writing of the book under review. First of all, just as we familiarize ourselves with the author’s credentials, we also examine the ghost writer’s credentials, in terms of competency, knowledge of the subject matter and prior track record.

But the legal relationship between the author and the ghostwriter may also require exploration. If the relationship raises questions, and if there is a written collaboration or similar agreement between the author and the writer, it may even become appropriate to review the agreement – especially if vetting counsel has a question about compliance with its terms. Conflicts may arise between the author and writer over credit or the size and placement of the author’s versus the writer’s name, which may be avoided by becoming aware of these considerations during the vetting process. There may also be potential contractual conflicts over the relative responsibilities of author and writer. Ideally, such issues will have been addressed by the editor and/or in-house counsel prior to sending the book out for legal review. However, this ideal is not always achieved and there are more extreme situations which can also arise that may draw the vetting attorney into any conflict between author and writer – either unknown to the publisher or which develops during the subsequent writing and/or vetting process.

For example, we have confronted situations – previously unknown to the publisher – in which an early conflict between the author and a prior ghostwriter had led to a parting of the ways before the book was sold to the publisher. In at least one case in which we were involved, a previously-unknown, initial ghostwriter had been discharged and a new writer brought onto the project. Then, on the eve of publication, the original ghostwriter reappeared, demanding her share of royalties and insisting upon compliance with the previously-negotiated co-authorship credit. It is evident that such prior history – especially if only discovered late in the publishing process – can cause significant problems, at best, and in the worst-case scenario can jeopardize the viability of the publication altogether.

4. Explore Any Other Special Relationships Between the Author and Her Sources

It is always also essential to explore and understand any other special relationships between the author and her sources. This could affect any essentially single source work, such as an authorized biography – where the author is essentially the primary source – but can also affect multiple sources who may have been interviewed, or otherwise communicated with, during the course of information gathering for the book. This is especially true where promises of one kind or another had been made to the source(s) – including promises of confidentiality, agreements to exclude particularly sensitive information or topics, or to change the name of the source, offers to accord the source the right to review what has been written about her prior to publication, etc. The ultimate dilemma in such situations could arise if such promises were made but then not complied with.

In one of the most notorious cases – one happily not involving this firm – after the book was published the cooperating subject of and source for an authorized biography disowned the content of the book in its entirety! As can be imagined, this created huge problems – both practical and legal – for the publisher. In that case, litigation ensued between the author and the publisher. Moreover, when the author as primary source for the book disowned the book’s integrity and credibility, any potentially defamatory material about third parties in the book was likewise undermined and could have subjected the publisher to any number of other difficult-to-defend lawsuits.

Even in less extreme cases, a substantive conflict between the ghostwriter and her author or her sources may arise regarding one or a finite number of statements in the publication, thus again

potentially undermining legal support for particular assertions in the publication. Such a conflict must be identified and resolved prior to publication. It is for this reason that – even if our primary vetting contact is with the ghostwriter – we make it a practice to always contact the author during or at the end of the vetting process in order to obtain the author’s signoff (ideally memorialized in writing) regarding the content of the book, *including* the author’s express approval of any legal changes made during the vetting process.

5. Make Yourself Aware of Any Special Limitations on Use of Substantive Material in the Publication

Potential breaches of contract, including any express requirement of confidentiality regarding materials the author wishes to include in the book, or of other applicable limitations – e.g., based on alleged breach of trade secrets – are preliminary matters that should require exploration during the pre-contract period. Ideally, potential problems of this kind will become evident before the publishing contract is signed, based on the subject matter of the book to be vetted or the legal status of the book’s author. For example, a book written in the business context could arguably contain material that violates nondisclosure agreements or other restrictions that may have been agreed to by the author as a condition of her employment. These agreements are typically drafted very broadly, so that the employee-author is limited not only from revealing trade secrets but from any information that might be related to the employer’s business operation. Restrictions on disclosure of information must also be carefully and early on explored in the context of books written by former government employees who may be subject to strict confidentiality restrictions – especially former government employees who have had access to classified information, many of whom may well have contracted not only to not reveal such information but also to submit any book or article they write for *prior* review by the involved government agency.

Ideally, such obligations will have been disclosed or detected while contracting for the book and compliance with any such prepublication obligations will have been completed, or at least be well underway, *before* the manuscript would normally be given in due course to outside vetting counsel. Indeed, disclosure to outside counsel, *before* allegedly classified or restricted information has been officially reviewed and removed, could itself arguably represent a breach of the author’s obligation to protect classified information from disclosure to a person not authorized to possess such information. As a practical matter, this is also likely to compromise the existing publishing schedule, since the book will be delayed for some unpredictable period during any agency vetting process.

One of the most extreme examples, and a cautionary tale, is the case of ex-CIA agent Frank Snepp. Concerned about excessive government censorship and delay, in the post-Vietnam era, Snepp (with the knowledge of his publisher) consciously elected to breach his contractual obligation to submit his book for prior review by the CIA. Ultimately, the government brought legal action against Snepp. The case went to the U.S. Supreme Court where the Court – in a highly unusual summary opinion – held that Mr. Snepp had clearly breached his obligations of confidentiality. As a sanction, the Court unanimously granted the government’s application for a “constructive trust” over *all* of the author’s proceeds of any kind from the sale – or even the promotion – of his book.

Many situations in this area are not so dramatic, but still require careful attention in terms of the author's pre-existing contractual obligations – including her compliance with any prepublication submission requirements – so as to keep publication of the book on track. Another type of breach of contract situation – not nearly so dramatic, but still of potential concern – arises out of promises that may have been made to sources, confidential or otherwise. Case law [Cohen v. Cowles Media] holds that such promises may be enforceable on a theory of promissory estoppel, notwithstanding the arguable impact on the publisher's or the author's First Amendment rights to publish newsworthy information in their possession.

6. Litigious Plaintiffs versus Plaintiffs Unlikely to Sue

So far as I am aware – at least in the modern era – a sitting United States President has never pursued a libel suit against a publisher or an author while in office. On the other hand, so far as we are aware, over the past two decades – at least until most recently – the Church of Scientology may never have passed up an opportunity to pursue a libel suit against a publication or broadcast critical of the Church or its leaders. Donald Trump has also been known to litigate at the drop of a hat and his current run for President does not seem like it has in any way changed his tenacious style. Most potential libel plaintiffs fall somewhere in between, in terms of the possibility or probability of a libel lawsuit.

We generally vet most books agnostically on the theory that, in general, it is impossible to predict for certain whether any living person or entity will or will not pursue a libel suit. Even statements in the manuscript about those considered unlikely to sue are given treatment and care similar to any other statement about any other potential plaintiff. Of course, in extreme cases, where there is a conflict of views as between vetting counsel and the author or editor, likelihood of suit certainly becomes one factor in the assessment of ultimate risk.

7. The Role of Vetting Counsel

The role of vetting counsel will vary depending on the nature of the assignment and the client. When we work as outside counsel to a publisher, our client is the publisher and not the author. However, because the interests of the publisher and author are closely aligned – as both are equally desirous of eliminating legal risk to the extent possible – it is rare that a serious conflict arises between the publisher's and the author's views regarding any particular recommended revision(s) to the manuscript.

When we serve as outside counsel to the publisher, our role is to identify topics or statements or situations that are legally risky and to work with the author(s) in order to reach agreement on the sufficiency of available substantiation or on recommended revisions to bring the manuscript in line with available support. The skill and authority of outside counsel, and his or her persuasiveness, generally leads to agreement on most recommended revisions. Indeed, we find that our authors are in general greatly appreciative of the efforts of vetting counsel and that they defer to our recommendations in the vast majority of situations. However, as outside counsel we are only recommending and not in a position to insist upon any particular revision. In the rare instance when there is a dispute between author and counsel we generally report back to the editor – or the publisher's in-house counsel – to

discuss the dispute and attempt to resolve it. In the ultimate case of a continuing disagreement, vetting counsel's role is to identify the *degree* of risk should the recommended revision(s) not be made and at that point it becomes a business decision as to whether to accept that risk or to insist that the author either make the recommended revision(s) or suffer whatever consequences are provided in the publishing contract in regard to a book that has not been legally approved by counsel as safe for publication – a circumstance that often gives the publisher the right – ultimately – to decline to publish the book and to terminate the contract.

In those situations where the client is the author, the substantive role of vetting counsel still remains to identify risk that can be alleviated by targeted revisions or further substantiation. In that case the author is generally still motivated to accept the judgment of vetting counsel – either if she is planning to self-publish or if she is planning to attempt to sell the manuscript to a publisher after having been pre-cleared by counsel. Finally, preclearance by counsel may not only be of assistance in reassuring potential publishers that any legal risk has been minimized if not eliminated but it also can be of assistance to the author in obtaining libel insurance where vetting counsel is known to – and trusted by – the insurance carrier.

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*See also “Tips for Effective Prepublication Review, Part II, ‘Substantive Matters’” – forthcoming.