Top Tips For Effective Prepublication Review (Part II, Key Substantive Issues)[*]

Introduction: In Part I of this paper we discussed how an effective prepublication legal review ("vetting"), where needed, is one essential step in the publishing process. We noted that not every book or other publication (hard copy or online) requires vetting, but that identifying which publications do, and which do not, may be of great importance in avoiding litigation and potential legal liability.[1] Although not every book requires legal vetting, the cost of vetting those books that do warrant it will be far less than the cost of defending a legal claim that could have been avoided by a careful legal review.

In Part I we pointed out that, while non-fiction publications represent the lion's share of those works appropriately identified for vetting, even works of fiction – if they arguably have the potential to defame, invade the privacy or otherwise breach the rights of, an identifiable living person (e.g., potentially, "romans à clef"), can warrant a legal review. We observed that selecting publications for prepublication review, and effectively performing that review, is an art and not a science, but an art that can pay for itself many times over if done properly with respect to publications that are accurately identified as appropriate for legal review.

Finally, in Part I we addressed certain "preliminary matters" that we generally pursue in the vetting process: (i) understanding the nature and content of the publication; (ii) familiarizing oneself with the author(s) of the publication; (iii) and with any co-author or "ghost writer," including any extant or prior legal relationships between or among them; (iv) exploring any other special relationships between the author and her sources; (v) or between the author and her source material; (vi) evaluating who might be potential plaintiffs in relation to the publication; and finally (vii) understanding the role of vetting counsel in regard to the identification of legal risk(s) in the publication that can be eliminated, or at least minimized, in the legal review process.

In this Part II, we turn to key substantive issues related to the content of the publication being vetted. In Part III (forthcoming), we will address various other miscellaneous matters and issues that may arise in the course of a legal review

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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 presented are equally applicable to a pre-broadcast review and to other video presentations – on tape, film or online – that contain content about identifiable, living individuals.

II. Key Substantive Matters in the Vetting Process

Fundamentally, the substantive role of vetting counsel is to identify legal risk(s) that can be alleviated by substantiation, targeted revisions or, if necessary, deletion of risky and insufficiently substantiated material in the publication.

1. Overarching Legal Context: The Constitutionalization of the Law of Defamation and Related Legal Claims

Over the past half-century the law of defamation and related legal claims in this country has been constitutionalized – viz., the Courts have recognized that the First Amendment's protection of freedom of speech and freedom of the press necessitates limitations on legal claims that would attack (and thus potentially infringe) the freedom to express oneself in the publication of information and opinions about living individuals, be they public officials, public figures or (in most circumstances) even private figures. Previously, the law of defamation, and similar claims arising out of published materials, had been considered a matter of state or common law with far fewer constraints and limitations. Indeed, in the early history of these types of claims, "strict liability" was often imposed against defamatory or otherwise injurious material, regardless of whether that material was true or false, or published with any degree of fault. The constitutional narrowing of potential liability in the United States flowed from recognition of the need to provide "breathing space" for "robust and wide open" expression – notwithstanding that it might be controversial, hurtful or even false, so long as the falsity was unintentional (in some cases) or published without some degree of "fault" (in most others). It is in this libertarian context that modern prepublication vetting seeks, in broad strokes, to distinguish between material within the zone of constitutional or other legal protection and that which may cross the line into a zone where the risk of legal liability is presented, notwithstanding recognized limitations.

2. The Truth or Falsity of Factual Material

It may seem odd but, notwithstanding the protections of the First Amendment that would protect against potential liability in a breadth of circumstances, the primary standard that we apply as vetting counsel is whether any potentially defamatory factual material under review can be substantiated as true. At least in the United States, truth has long been recognized as a complete defense to defamation or related claims. Needless to say, if the integrity of the publication can be supported by its provable truth, there is no need to attempt to predict whether material that is, or despite initial findings turns out to be, false will nonetheless be protected in a judicial proceeding should any claim be forthcoming. Among other benefits, such vetting to the highest common denominator provides the broadest zone of protection – not only from successful legal claims, but also from the assertion of even baseless claims in the first place. Vetting to a standard of truth also protects the reputation for veracity of the publisher and/or the author of the work in question.

3. Statements of Opinion as Opposed to Statements of Fact

The issue of truth or falsity presents itself only with respect to statements of "fact". Statements properly categorized as "opinion" are not actionable, even if they make what otherwise would be false and derogatory or defamatory assertions about a living individual or entity protected by the laws of defamation. For this reason, another central consideration in the vetting process is to distinguish between statements of fact and statements of opinion. Although there are some basic rules, the process of separating non-actionable expressions of opinion from potentially actionable statements of fact is as much art as science.

For example, statements that are incapable of being proven false, or that are merely name-calling filled with hyperbolic and overheated language, will generally fall on the opinion side of the divide, especially where it is clear that literal allegations are not being made (e.g., calling someone who crosses a picket line a "traitor" is not tantamount to the charge that she has criminally betrayed the country). Indeed, frequently it is not simply the actual language itself but the context in which it appears that is critical to the inquiry.

Many people believe that prefacing a potentially defamatory statement with "I think" or "in my opinion" will somehow immunize the publisher. By itself, however, the statement "I think that John is a drunkard" is no less actionable than the statement "John is a drunkard." Indeed, standing alone it suggests that the speaker is in possession of unstated defamatory facts that underlie her "opinion" regarding John's sobriety. An "opinion" that implies the existence of unstated defamatory facts is known as "mixed opinion" and is actionable. At the other extreme, however, had the speaker set forth the facts underlying her opinion (e.g., "John sits in his backyard every afternoon consuming an entire pitcher of liquid, the whole time singing loudly and out of tune, and after a couple of hours he stumbles back into the house"), the statement would be fully protected as "pure opinion" . . . unless, of course, John could prove the underlying facts were false and published with the appropriate degree of fault.

That said, distinguishing fact from opinion is an extraordinarily complex undertaking and the law of opinion may vary from jurisdiction to jurisdiction. Such fine points are well beyond the scope of this paper. Suffice to say, this is one of the many reasons that knowledgeable counsel is essential for an effective prepublication review.

4. Defamatory Meaning

In addition to factual falsity, to be actionable any false factual statements must have a "defamatory meaning." Basically, ignoring the complexities that are again the subject of indispensable legal expertise, a statement has defamatory meaning if, to the general public, it would be harmful to the reputation of a living individual, in particular in relation to his profession, his personal integrity or his sexual morality. To illustrate the two extremes, to falsely publish the factual statement that a living individual was guilty of fraud in a business transaction would have a defamatory meaning, but to falsely state that the individual wore a grey rather than a blue suit to the closing of that transaction, would not.

5. Defamation/Standards of Potential Liability

With regard to defamation (and related claims[2]) that may be pursued against a publication which contains negative/defamatory and allegedly false factual statements about living individuals potentially harmful to their reputation, there are several, varying standards of liability that may be applicable should litigation be commenced. In our practice, again, the primary focus of the vetting process is on the ability of the author to substantiate the truth of his claims no matter what standard of liability may ultimately be applied if a legal claim is asserted. Such substantiation can be found, *inter alia*, in documentary evidence available to the author, in information received by the author from credible sources or in eyewitness testimony of the author herself.[3] The goal is to try to ensure, to the extent possible, that the content of the book is true and therefore can be defended as such – no matter what the applicable legal standard may turn out to be should a legal claim be asserted.

Sometimes, of course, due to conflicting testimony or unavailable evidence, it is impossible to know for certain the truth of a particular matter or event. In that case, the varying standards of liability may come into play. Also pivotal is the general rule applicable to defamation litigation that it is the plaintiff's (complainant's) burden to prove the falsity of the statement – either by a preponderance of the evidence, if the plaintiff is a private figure, or by "clear and convincing" evidence if she is a public figure or public official.

If the individual under discussion is clearly a "private" figure, the vetting attorney must also keep in mind that in most states proof of no more than mere negligence in falsely defaming a living individual will be the applicable standard – at least so long as the publication involves an issue of public concern. In some jurisdictions, "negligence" may be defined broadly based on the common sense of the judge or jury. In other jurisdictions a standard of "professional negligence" may be applied as judged against accepted journalistic standards. The latter rule opens the door for expert testimony regarding the standards of professional journalism.

In New York State, a unique standard of "gross irresponsibility" is applied to defamation claims, expressly in order to provide *broader* protection to freedom of speech or of the press. The New York rule is defined as *grossly* departing from the standards of information gathering and publication normally followed by responsible parties – a standard of liability substantially more protective of the

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[2] Because the cause of action for defamation has been narrowly constricted by constitutional principles, plaintiffs who choose to litigate claims based on an allegedly injurious publication often assert multiple, alternative theories of liability in the hope of avoiding or circumventing the constitutional limitations. In many instances, however, Courts have held that the law prevents such attempted "end runs" around constitutional protections. Some of those kinds of alternative claims are addressed later in this paper.

[3] In an arms-length publishing scenario, an initial judgment has already been made as to the credibility of the author who has typically made a formal, contractual representation that the information to be included in her publication is not defamatory and does not breach any other legal rights or obligations. Vetting counsel is thus entitled to presume that the author is reliable unless questions about the credibility of the author arise during the course of the vetting process. In a self-publishing scenario, however, vetting counsel must be ever more sensitive to issues of credibility or reliability.

author or publisher than mere negligence. But even under the standard of gross irresponsibility, the author must at least have one credible source for the statement(s) at issue – even if the source turns out to be in error – in order to be protected under the New York rule.

Finally, under the landmark case of New York Times v. Sullivan, publications about a public official or public figure require proof of the highest, constitutionally-mandated standard of "actual malice." Actual malice is defined by the U.S. Supreme Court as requiring "clear and convincing" proof that the publisher of a false and defamatory factual statement must either have had *actual* knowledge of its falsity at the time of publication or must have *recklessly disregarded* the author's substantial, *subjective* doubt regarding the truth of the particular matter.

Other liability standards may also come into play depending on the situation. As just one example, if the reporting is about a court proceeding or certain kinds of official documents, a so-called "fair report" (a fair and objective report or summary of the proceeding or document, presented in a reasonably neutral fashion) would be enough to protect the author, regardless even of knowledge of falsity or at least serious doubts as to the truth of the particular proceeding or document. The theory is that the public is entitled to know what is happening in a public courtroom, regardless of whether allegations made in the court proceeding or official documents are true or false.

6. Invasion of Privacy/Breach of the Right of Publicity

The laws protecting individuals from alleged invasions of privacy are traditionally broken down into four subcategories. Each represents essentially a different kind of potential claim and the risk of infringing each such type of claim should be kept clearly in mind during the vetting process.

(i) False light. Similar to defamation, but involving injury to feelings rather than reputation, false light consists of a publicly made false statement of fact that would be highly offensive or embarrassing to a reasonable person. Similar to the closely related tort of defamation, if the publication involves a matter of public concern, public official or public figure plaintiffs must also establish that the publication was made with "actual malice" and private figure plaintiffs must establish at least a negligent publication.

(ii) Public Disclosure of Private Facts. As the title suggests, this tort involves the publication of a matter concerning the private life of another that would be highly offensive to a reasonable person and that is not of legitimate concern to the public. Unlike with defamation or false light, truth is not a defense to a private facts claim. But the ambit of a private facts claim has generally been held to be exceptionally narrow.

(iii) Intrusion upon solitude. The elements of this tort are (1) intentional intrusion (physically or otherwise) upon the solitude or seclusion of another or his private affairs or concerns that (2) would be highly offensive to a reasonable person and (3) causes distress, humiliation, or anguish. Generally, this is not a publication, but rather a newsgathering, tort. Still, if the vetting attorney suspects that information proposed to be published could only have been obtained by means of some kind of improper trespass, it is essential that this suspicion be explored lest the publication being vetted serve

as the linchpin for an intrusion claim against the author and publisher. Proof of an intrusion claim against a publisher would be possible only in certain very limited circumstances, such as if the publisher is in a position to order – and actually did order – the author to make the intrusion, or if the publisher can be said to be responsible for any wrongdoing by its employee-journalist on a theory of "respondeat superior." Specifically in the book publishing context, where the author is an independent contractor who is contractually bound to refrain from – or at least to reveal – any breach of legal requirements in the writing or researching of the book in question, it is highly unlikely that such an arm's-length publication could result in a successful intrusion claim against a book publisher.

(iv) Misappropriation/Right of Publicity. Although the elements of these claims vary widely among jurisdictions, the basic elements are (1) the use of a person's name or likeness (some jurisdictions protect voice and even other "indicia of identity" as well), (2) without consent (3) for advertising or purposes of trade. Use of the plaintiff's name or likeness in connection with publication of newsworthy reports (the "editorial use" exception) do not give rise to a claim, however. An influential "Restatement" of the law in this field has recognized that the misappropriation/right of publicity tort is "fundamentally constrained" by the First Amendment.

7. "Ancillary" Claims: Intentional Infliction of Emotional Distress or "Outrage," Negligent Infliction of Emotional Distress, *Prima Facie* Tort, Breach of Contract

Also to be kept in mind are so-called "ancillary" claims which may seek to circumvent the heavy legal burdens imposed on potential claimants by the constitutionalized law of defamation. Such attempted "end runs" around First Amendment concerns are not favored. As a result, when such claims are asserted they generally fail – especially if a closely-related defamation claim has also been pled but not proven. Nonetheless, it is important to keep in mind even such extreme claims if only to be sensitive to them in those rare instances when the proposed publication borders on such extremes. For example, a leading case from California imposed intentional infliction of emotional distress liability, based on the taking of photographs at the scene of an accident. The case arose in circumstances where the photographer had breached police lines, the accident victims were seen graphically in various states of distress or injury, and where those victims had certainly not consented to the photographs or their publication.

8. Infringement of Copyright/Fair Use

The prepublication reviewer should be constantly alert for copyright infringement issues. Most often, the question is whether the author has quoted too much material from any one or more sources that are not in the "public domain." For the most part, separating a so-called "fair use" from an infringement is an art rather than a science as to which there is no precise rule of thumb. We have not infrequently heard from authors who have been led to believe that as long as less than some hard and fast number – e.g., 25 words, or less than 50 words, has been used (or some other arbitrary number or percentage) – then that is a permissible fair use. This is incorrect. For example, 25 or 50 words could comprise the entirety of the lyrics of a copyrighted song or brief poem. On the other hand, that same

amount of usage from a book-length work containing tens of thousands of words would be considered "de minimis" and thus would not even rise to the level of an actionable infringement.

In addition to sheer volume, the type of use of copyrighted material in a book may also have a determinative effect on whether a use of copyrighted material is permitted or forbidden. For example, quotations in an epigraph to a chapter or book are unlikely to be considered a fair use and are generally permissible only when the quotation constitutes such a small taking as to be considered de minimis. We have already mentioned that uses involving short works such as song lyrics and also short poems may also be extremely limited. As another example, use of a song lyric merely to set the mood for a discussion of other events, may be very problematical. In such a case, it would be difficult to argue that this kind of use is "transformative." On the other hand, a scholarly examination of the meaning of a song or a poem may represent a fair use even if a substantially greater proportion of the work has been quoted in the analysis than would be permissible in other circumstances.

Another way to identify and evaluate excessive quotation is to be constantly on the alert for material not identified with quotation marks but that nonetheless may amount to copying – and potentially excessive copying – from third-party sources. When sources are footnoted, a quick scan of material surrounding the particular quotation in the vetting process may give a sense of how the author is potentially using or paraphrasing material from the third-party source without placing that material in quotation marks. Even if the manuscript is not footnoted, the vetting process may uncover sources identified by the author that can be double checked for excessive usage not identified by quotation marks.

Of course, whenever a use cannot be judged to be "de minimis", or at least a "fair use," there remains the possibility of seeking permission from the owner of the copyright. If such permission is granted, care must be taken to assure that the author (and the publisher) have complied with all requirements of the permission (including payment, if any, and credit, for example) and all limitations of the permission such as use solely in the first edition of the hardcover book version or other limited formats, domestically rather than internationally, and possibly for a limited duration. As such limitations inhibit use of the material in subsequent editions and other formats (e.g., e-books), we encourage authors to use, to the extent possible, permission request forms that are unrestricted.

9. Trademark Issues

Trademarks and service marks (together "marks") comprise words, names, logos and/or symbols that serve to identify the origin of a product or service, respectively. Trademark infringement occurs when a party uses another's mark in a manner that causes confusion as to its origin or falsely suggests that the party is licensed, sponsored or otherwise associated with the owner of the mark. Even when confusion does not occur, liability may result if the use either "tarnishes" a mark or "dilutes" its distinctive nature.

Trademark claims against published books are relatively rare, and certainly are far less common than defamation or copyright claims. For one, it is very unlikely that the mere use of a "word mark" (i.e., a mark consisting of words alone, neither combined with a design or logo nor presented in a distinctive

typeface) in the text of a book will confuse purchasers into believing that the mark's owner is the source of the book or has sponsored or is otherwise affiliated with the book. For example, the use of Nike® to identify a particular brand of sneakers or Windows® to identify a particular operating system in a book is unlikely to lead potential purchasers to conclude that the book was published or sponsored by Nike, Inc. or the Microsoft Corporation. Moreover, there is no other way to identify the particular product or service and, therefore, there is in such cases no need to present even a registered mark with an ® or, in the case of an unregistered mark a designation such as superscript ™.

An area of potentially greater risk involves marks consisting of words combined with a logo or design ("composite marks") or that are presented in a distinctive manner or typeface ("stylized marks"). Here the likelihood that potential purchasers will be confused is increased and the justification for use of more than the word portion of the mark is greatly reduced (if not eliminated).

In short, use of more than the word portion of composite or stylized marks should always be avoided, especially on book covers or jackets.

Book titles are another sensitive and complicated area. Although the Patent and Trademark Office will refuse to register the title of a single work (be it a book, a movie, a song, a record album, etc.), it *will* register titles that are part of a series (e.g., "Harry Potter and . . ." or "The Hardy Boys"), and use of a confusingly similar title would almost certainly constitute trademark infringement. Moreover, individual titles that are well known and associated with a particular author (think of "Gone with the Wind" and Margaret Mitchell) may still be protected under the related body of the law of "unfair competition."

10. Assessment of Risk versus Reward

At the end of the day, every substantive prepublication review comes down to an assessment of the degree of risk identified – versus the value of the reward in publishing the work, or a particular portion thereof. As long as the work deals with living individuals it is always possible – even if every single factual statement has been researched and appears to be confirmed by one or more sources – that a subject of the work will nonetheless complain and/or in the extreme situation commence legal action. Too often such hopeless lawsuits are commenced simply in order to emphasize the subject's vigorous public denial of unfavorable statements or characterizations.

Ultimately, it is for the publisher (or the self-published author) to assess, ideally with the assistance of experienced vetting counsel, whether the unavoidable risks identified in the work are or are not tolerable, economically or otherwise. This then requires a careful assessment of whether to publish the particular contested item or items, or in extreme cases, however rare, whether to abandon the work in its entirety rather than to publish a work that cannot be legally defended.

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(See also "Tips for Effective Prepublication Review, Part III, Miscellaneous Tips" – forthcoming.)