Top Tips for an Effective Prepublication Review (Part III, Miscellaneous Tips)*

Introduction: This is the third and final part of the presentation of our "Top Tips" for an effective prepublication review. In Part I, we discussed various preliminary matters of importance in pursuing an effective prepublication review. In Part II, we addressed some of the key substantive issues that can arise in performing a legal review prior to publication. In this Part III we provide other miscellaneous tips that are also essential to understand and keep in mind in the prepublication vetting process.

Part III. Other Miscellaneous Matters in the Vetting Process[1]

There are any number of other miscellaneous matters that must be kept in mind in the legal review process. Below are several, but by no means all, of them. A seasoned vetting attorney must be constantly aware of these kinds of miscellaneous considerations in order to perform a fully effective prepublication review. As has previously been noted, examining the "sourcing" of potentially defamatory material is one of the central features of the legal vetting process. There are many aspects to assessing and evaluating the "sourcing" of the materials under examination. Evaluating the strength or weakness of the author's sources is central and indispensable to an effective prepublication review.

1. Sourcing: Republication

Perhaps the major misconception many authors bring into the legal review process is that, if the potentially defamatory material has been previously published, it can be relied upon without further checking or examination. Quite the contrary, it is "black letter" law (i.e., a fundamental legal principle) that republication of a libel is equally actionable as against the re-publisher. It is worth repeating: just because something has been published before does not mean it can be relied upon or published without potential liability. The key consideration is the credibility and reliability of the secondary source. [2]

---

*By Henry R. Kaufman, with Michael K. Cantwell, attorneys with the law firm of Henry R. Kaufman, PC., New York City, October 31, 2015. This paper is the third of three on the subject of prepublication review. The first paper, "Top Tips For Effective Prepublication Review – Part I, Preliminary Issues in the Vetting Process", and the second, "Top Tips For Effective Prepublication Review – Part II, Key Substantive Issues", can be accessed by following the foregoing links or by visiting www.HRKaufman.com/Resources.

[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.

[2] One important exception to the republication rule is found in the "fair report" privilege. Under this privilege, if the source of the information to be published is reported based on a court proceeding (or on certain other official proceedings such as, depending on the law of the applicable jurisdiction, an adversarial administrative proceeding) or official documents, including allegations in a legal "complaint" (provided it has been filed with the court), then the author is free to republish allegations made in such official proceedings or documents, so long as the report is fair and balanced and does not take a position with regard to the truth or falsity of the allegations. (Footnote continued on following page)

In practice, the rule of “republication” thus requires further in-depth consideration before a potentially defamatory statement gleaned from a secondary source, which is no more than a mere republication, can be cleared in the review process.

On the two extremes:

If the matter has been previously published in *The New York Times* and/or other leading publications, and especially if there is no evidence that the allegation has been litigated or otherwise challenged, or that it has been retracted or otherwise corrected or clarified in such a way as to substantively undermine its support for the allegation(s) at issue,[3] then it should be safe to republish the statement – especially in the absence of any known change of circumstances.

On the other extreme, if the allegation was only found on an obscure blog, or in a comment appended to a news story by persons whose credibility is suspect and/or unknown, then the sourcing of a seriously derogatory factual statement must be considered to be inadequate without further substantiation.

Obviously, there are many fine gradations between these two extremes. And the decision whether to publish the particular allegation is ultimately a matter of risk assessment.

2. Sourcing: Interviews

An interview by the book’s (or other work’s) author, or by a third-party interviewer, of a person with direct knowledge of the issues or information under discussion can be an excellent source of confirmation and substantiation of sensitive material or allegations. But a claimed interview must also be assessed carefully and cannot be taken at face value. Here are some tips that we find helpful in evaluating and putting into perspective sourcing from interviews:

- If the interview was done by our author we find it important to confirm that the interviewee understood that the purpose of the interview was to elicit and/or substantiate material that would appear in the publication, and that the interviewee consented both to publication of the material she provided and to being identified as a source for the material she had substantiated.

(Footnote continued from previous page) The fair report privilege is applicable even if the author herself harbors serious doubts as to the truth of the official allegations. In daily reporting, this additional proviso makes sense in order to vouchsafe the author’s and/or publisher’s ability to provide a full recounting of such proceedings or documents as they occur or are officially filed and released. One final note: it is arguable that the author of a historical treatment of the same official allegations, who has had access to far more background and/or subsequent information, may at some point distant from the original proceeding be precluded from full reliance on the fair report privilege.

[3] *The New York Times*, as an example, always appends significant corrections at the very beginning of the affected article in its online archive. This is an excellent policy that, unfortunately, not all publications adhere to. Eschewing this policy is self-defeating. Confidence in sourcing is enhanced by transparency in the correction process. Hidden corrections help neither those affected by the original error(s), nor authors, publishers – and, yes, prepublication reviewers – for whom clear and visible corrections provide needed assurance that reliance on previously published material is not misplaced.

- If the interview was conducted by a third party, we would also want to evaluate the circumstances of that interview – to the extent known – to assure its credibility as well as our author's ability to safely report the information gleaned from the interview.

- Even though an interview can be a highly effective means of gathering reliable information, an interview must nonetheless be assessed for its credibility and relevance. If the interviewee clearly has direct knowledge of the topic on which she is speaking, then the interview can generally be considered reliable. An example of a generally highly reliable piece of information on which the author would be entitled to rely would be the interviewee's admission or confirmation of details about her own personal activities. On the other hand, if the interviewee is really only passing along rumors, or other information as to which it is clear she has or can have no direct knowledge, then the interview is no more inherently reliable as a source of sensitive information than any other form of information gathering.

- As to any interview(s) conducted by our author – especially if the publication is built around numerous interviews with various sources – we always want to explore our author's interview methodology. In addition to making clear to the interviewee that the interview (or information gleaned from the interview) is intended for publication, we also want to know whether our author has taken notes of the interview or – even better – whether she has recorded the interview, on tape or video. Although this has been a matter of some debate, as to both extant notes and recordings, we prefer that our authors have retained – and that they confirm their intention to continue to retain – their notes and recordings should the sourcing or substantiation of sensitive matters ever be challenged.

- **S**ometimes it becomes apparent that the interview was done for a different purpose than the publication under review – e.g., an interview for a magazine piece that is later repurposed for a book. Alternatively, it is possible that a significant amount of time may have passed since the interview was conducted. To the extent there is some sensitivity to the information to be published, it is important to evaluate whether the interviewee's consent is still effective and whether the information is still current and credible.

3. Sourcing: Eyewitness Information

If the source for potentially damaging or defamatory information or statements about a living individual is based on the "eyewitness" account of the author, then on its face that would certainly seem to be the most definitive possible substantiation of otherwise potentially defamatory allegations.

Although at first blush this might seem to be an odd example, probably the most common form of an "eyewitness" account – at least in book form – is an autobiography, or some other form of nonfiction, first-person account of events in which the author directly participated. In other words, such publications become extended accounts based on eyewitness information.

However, simply because an author was, or claims to have been, an eyewitness to the events being reported, does not relieve the vetting attorney of the responsibility to assure, to the extent possible, that the information to be published about third parties with whom the author has lived, worked or otherwise interacted, is accurate. This can potentially be checked or cross-checked based on third-party or other relevant information beyond the author's naked eyewitness account.

Suppose, for example, that there is already contradictory information in the public record – despite the author's claims of eyewitness knowledge? Or suppose that the living individual who is the subject of the supposedly eyewitness allegations is contacted and denies the information? Without extending the discussion of such possibilities, it is thus evident that under certain circumstances even an "eyewitness" account may require checking/cross-checking in order to be safely published.

In a traditional book publishing context, should there be questions about an author's eyewitness claims, with an independent contractor author and an independently owned and operated publisher, we proceed on the assumption that the publisher has already made a preliminary assessment that it considers the author to be a reliable source in relation to the subject matter and information contracted to be contained in the book – even if the information may be contradicted by others with whom the publisher does not have such a relationship. In addition, the author typically contractually "warrants" the accuracy of the material to be included in the publication and agrees to "indemnify" the publisher should there be a breach of that warranty. Therefore, in most instances, any doubts that cannot be completely dispelled through objective, documentary evidence should normally be resolved in favor of the author.

In addition, there is some case law recognizing that the author of an autobiography (or briefer, autobiographical material) should be accorded some reasonable leeway to record her own subjective views of personal events in which she participated – and her views of third parties, with whom she has lived or worked, for example, even if they are negative – so long as they do not present, or are not based on, what can be determined to be objectively inaccurate information. An autobiography is, after all, well understood by the reader to be the personal story of the author's life as viewed and recounted through her own subjective lens. Thus, in this context, in a "he said, she said" clash of view, it is fairly arguable that the author of an autobiography should be entitled to recount the story of her life – or of certain events in her life – even if that involves resolving such doubts in the author's favor or revealing sensitive information that might be derogatory about family members, friends, or other third parties.

4. Sourcing: Secondary Sources

There are any number of other, secondary sources of information that can be consulted in the process of vetting and attempting to substantiate potentially defamatory allegations about a living individual in the publication under examination. In the Internet age, many of these secondary sources can be called up in an instant by a Google or other computer search. This abundance – if not overabundance – of information on the Internet is not always dispositive on the issue of truth or falsity. Nonetheless, multiple sources confirming the author's claim(s) can greatly narrow if not always entirely

eliminate the margin of doubt in the vetting process. The quality of the secondary sources must still be evaluated and any conflicting information must still be taken into account.

5. Sourcing: Confidential Sources

This is not the place to attempt to write a treatise on the complex and ever-changing law of confidential sources (also often referred to as the "reporter's privilege"), which may vary markedly from jurisdiction to jurisdiction. Suffice it to say that the reliance on confidential sources in the vetting process can lead to various pitfalls – especially if the information provided by those sources is of such sensitivity that it might be challenged in a court of law.[4]

As has been noted in this and our other Top Tips on Prepublication Review, one of the central purposes of vetting a manuscript is to assure that potentially defamatory statements about living individuals are properly substantiated. The first issue, therefore, with regard to confidential sources, who may have provided the basis for such potentially defamatory statements, is for the vetting attorney to evaluate whether a valid and enforceable confidential source relationship has actually been established. If it has not, source substantiation would follow the typical pattern because there would be no concern that confidentiality is required**.**

It is also important to keep in mind that the assurance of confidentiality to a source may have any number of different meanings, primarily based on the understandings (or lack thereof) between the author and the confidential source. If the promise of confidentiality is no more than an agreement not to reveal the source's name in the initial publication, then this kind of agreement has far fewer consequences than the most far-reaching agreement to protect the source's identity under any and all circumstances – up to and including the threat of jailing for contempt or of the risk of default in any ensuing defamation action that is dependent for its successful defense on the information provided by the confidential source.[5] There are numerous gradations of confidentiality in between those two

---

[4] The ability of an author to offer – or to agree to a request for – confidentiality is more and more today a matter of state statutory privilege. Such statutes vary widely from state to state and cannot be comprehensively reviewed here. However, it is important to note that the application of the statutes to particular authors or journalists also may vary depending on the status of the reporter as well as the medium in which the publication has been or will be made. For example, there have even been situations where a journalist has been held protected by the privilege when she is writing for a newspaper, yet has been found to be not protected when she may be publishing the very same material from the same confidential source in a book. Similar complications may arise as between journalists working for accredited publications, as opposed to freelancers such as bloggers or unaffiliated researchers. Some state statutes have been revised and modernized to avoid such questionable distinctions; others have not.

[5] There are numerous procedural complications that can arise in a defamation action where one or more of the central allegedly defamatory allegations is supported by – if not solely by – a confidential source. Again, the entire range of procedural consequences is beyond the scope of this paper. Suffice to say that if the source insists upon remaining confidential, despite the potentially grievous adverse impact on the author and publisher in a defamation action, then it falls to litigation defense counsel to attempt to work around the absence of the confidential source and also at times to attempt to avoid sanctions for failing to reveal the identity of the confidential source. Such sanctions can range from the threat of judicial sanction such as (civil) contempt, to an instruction that the jury should consider the information at issue to have no source, to entry of an outright default judgment, which may be the same thing in a single source case.

extremes. Certainly, it is best practice for the author and source to discuss and clarify the scope of the confidentiality being requested and promised *prior to* provision of the confidential information. For better or worse, however, this ideal is only infrequently attained. Where confidentiality involves only a promise not to identify the source in the book, we ask authors for confirmation that the source would be willing to testify in the event that a defamation claim is filed.

Finally, it is also essential – if confronted with information originating from confidential sources – that the vetting attorney take this factor into account in evaluating whether one or more other confirming, non-confidential sources will be required in order to warrant vetting counsel's clearance, in this context, of the particular information proposed to be published.

6. Sourcing: Footnotes, Endnotes and Other References

Depending on the type and style of the publication being vetted, the legal reviewer may encounter footnotes, endnotes or other forms of formal references. This can often ease the process of seeking substantiation for problematical assertions about living individuals in the manuscript. It can also obviate the need for concern to the extent it can readily be determined whether the object of the sensitive information is alive or dead, as the dead cannot be defamed. And often, in this day and age, such references in the manuscript are accompanied by links to assertedly supporting, previously published material.

Obviously, these references should be checked in the vetting process, at the very least when they are related to sensitive material. Depending on the quality and reliability of the reference, such checking can alleviate many of the concerns of the legal reviewer. When the allegations being checked are of a highly-serious nature, it may be appropriate to go beyond the footnote or endnote references and to check for further substantiation from the author and/or online.

Such secondary sourcing is not always a panacea. In one extreme case that we encountered, and unbeknownst to us, the subject of the potentially defamatory comments had already hired an aggressive attorney to assist in defending her reputation from precisely the allegations being made in the publication in question. Our attempt to substantiate the allegations involved reviewing the linked sources; however, that process turned out to be largely inadequate. The reason: the potential claimant's attorney had pursued a scorched-earth crusade systematically demanding that the cited publications not only retract the allegations in question but that they take down the previously examined and supporting publications. This successful attempt to cleanse the record had occurred between the time of vetting and the time of publication. By the time the inevitable threat of a lawsuit was received from this hyper-aggressive claimant and her attorney, post-publication, the linked to sources that had been relied upon during the vetting process were no longer available through normal means online.

One lesson we learned from this is to preserve at least the most critical supportive reference materials by either assuring that the author has kept a copy of them, or alternatively by undertaking to copy and retain them in the vetting attorney's files. Of course, in normal circumstances it would be overkill to preserve all copies of supporting materials referenced in oftentimes hundreds of footnotes or endnotes. Inevitably, such extreme measures must of necessity be limited to those relatively rare

instances deemed highly likely to generate defamation claims, where the object of the sensitive information is known to have the resources to pursue them in such an aggressive fashion.[6]

7. Primary Versus Incidental Characters

The preceding sections have shown that a great deal of time and attention is appropriately paid during the vetting process to substantiating potentially defamatory statements about the key (living) characters in the story. However, it is often the case that incidental characters are those that can potentially cause the greatest problems – if only because they are less the focus of attention, therefore their potential claim may be unexpected and there may also be limited information available about them. So it is important not to gloss over the need to also substantiate sensitive statements about incidental characters in the vetting process.

One classic example of this phenomenon can be encountered in "true crime" manuscripts, where the central character(s) are perpetrator(s) who may have already been found guilty – especially if no appeals are pending – and are thus of no great concern from a reputational point of view even though statements about them in the publication that would be defamatory – if not true – are likely to be the central focus of the work.

In contrast, incidental characters in true crime stories – such as the investigators, witnesses, victims and the perpetrators' family or friends – may be subjected to harsh, and at times even scathing, critiques in the proposed publication's treatment of how they comported themselves before or during the crime, the criminal investigation, the trial or afterwards. Examples of this phenomenon include manuscripts where the author portrays one of the investigators as the hero of the case while others may be presented as simply getting in the hero's way – or worse. Another troublesome scenario arises when the manuscript expressly or implicitly portrays the perpetrator's family as being more or less responsible for the perpetrator's wrong turn into a life of crime. Finally, there are cases in which characters who were never charged are portrayed as being, in one fashion or another, complicit in the crime.

8. Vetting of Self-Published Works

When the work being vetted is being self-published by the author, a number of different considerations may be presented.

First of all, in performing a legal review for a third-party publisher, the publisher and not the author is the client. It is important to alert the author to this fact. For the most part, the publisher's and the author's interests coincide: they both want to avoid or minimize risk by assuring that all potentially

[6] It is possible that materials taken down by a publisher of previously-relied-upon source material may still be found in archives such as the Internet archive (or "wayback machine"), available at https://archive.org. But even if the supportive materials can be located in this fashion, the author and/or publisher must still account for the likely contentions that the third-party publisher had concluded – albeit under duress – that the publication previously relied upon contained insupportable allegations that warranted the decision to take them down and that, therefore, reliance upon such sources was not reasonable.

defamatory allegations about living individuals in the publication have been sufficiently examined and substantiated, or modified or removed.

For its part, the third-party publisher may or may not be willing to assume the same degree of risk as the author. If the third-party publisher has deep pockets – and/or if it maintains sufficient errors and omissions insurance – it may often be in a stronger position than the self-published author to assume more risk and it may also be more willing to assume that risk if in its business judgment the book or other material has a high value, either in terms of potential sales or in terms of the enhanced credibility of the publisher as a source of important and/or controversial but newsworthy information.

On the other hand, the self-published author may or may not be willing to assume the same degree of financial risk as the third-party publisher in their evaluation of risk may focus on the short rather than the long-term. Many self-published authors tend to have limited resources, and that will surely affect their potential risk aversion. However, some self-published authors are persons of means who can be financially less risk-averse. Also, it is possible for a self-published author to acquire insurance – even for a one-off publication – although such a policy may be relatively costly compared to a third-party publisher's insurance program that is spread over many books or other publications.[7]

Also, a self-published author may well be more powerfully devoted or incented, on a personal level, to see to it that her individual book or other publication sees the light of day without unwelcome cutting. A commercial publisher, in contrast, with an extensive publishing program, may not necessarily have the same degree of devotion to any one or a few sensitive assertions in one high-risk publication, as opposed to the host of other publications that do not present that same degree of risk.

As far as the actual vetting process for a self-published work, in general it follows the same pattern as any careful legal review. However, because the client is the author and not the publisher there are some different factors that may come into play. Most obviously, there does not exist the same distancing element that enables the vetting attorney – if he or she disagrees with the author about a particular item or allegation – to seek support from the third-party editor or publisher who can assert leverage over the author as to that particular item or as to the project as a whole. The vetting attorney's leverage over the self-published author rests solely on his or her persuasive abilities in relation to the author and any contested item(s). It is not unheard of, in our experience, for a self-publishing author to refuse to follow her vetting attorney's best advice. In the extreme case, this can lead to a parting of the ways between attorney and client. There is no point in the author spending her money on legal fees if she is consistently unprepared to accept the recommendations of her attorney.

[7] The self-publishing author's ability to obtain libel insurance may be substantially enhanced if the insurance carrier is made aware that the book has been vetted and cleared by knowledgeable legal counsel. The utility of that information may be further enhanced where the insurance carrier knows – or knows of the favorable the reputation of – vetting counsel.

9. Group Libel

In vetting books, we always remain alert for situations where a seemingly defamatory statement will nonetheless be protected from a successful lawsuit if directed at a sufficiently large group of individuals. For example, if a publication reporting on the recent "Black Lives Matter" movement were to generally state, as far as the author was concerned, or were to report, as far as the author's sources were concerned, that members of the Ferguson, Missouri Police Department are all racists and liars – the case law of "group libel" would nonetheless protect the author and publisher because it recognizes that no one Ferguson policeman would have a claim (and neither would the group as a whole) against the publication because no one person is identifiably singled out from a large group (in that case apparently numbering around 50).

In such circumstances, neither the author nor the publisher would be required to meet a burden of establishing the truth of the statement as to all 50 members of the Ferguson Police Department. The law of defamation assumes that such a "group libel" cannot be said to reflect specifically on any one person, or on just a small number of identifiable individuals. There is no magic formula for the exact number required to invoke the group libel defense, but certainly a group of 25 or more individuals would come within the group libel protection, and quite likely a group of perhaps a half dozen or less, would not.

10. Written Permissions/Consents

One possible solution to any concern regarding the accuracy of – or the possibility, whether or not accurate, of litigation arising out of – potentially defamatory statements about living individuals in a publication is to seek and secure written permissions or consents from those individuals to the publication. One danger of such a process is that the request for consent may be interpreted as a concession that the author lacks substantiation for, or confidence in, the validity of the information and that, implicitly, if consent is not granted the author will remove the matter in question. Even if seeking consent does not lead to such an extreme result, it must be expected that the individual in question may condition any consent granted upon revisions or excisions that could cause damage to the completeness or integrity of the publication. (For a discussion of such potential adverse impacts in particular cases *see* "International Vetting," *infra*.)

It is for these reasons that our general practice – as has been noted throughout these papers – is to seek substantiation for the truth of any sensitive information rather than permission to use it. Other publishers may have a different approach. For one notable example, motion picture producers often seek permissions as a matter of course, with respect to individuals who are identified as having a potential legal claim with respect to the presentation – perhaps because of the often huge financial investment involved in motion picture productions.

11. “Disclaimers”

So-called “disclaimers” are another mechanism to attempt to minimize the risk of (successful) legal action against the publication. Disclaimers also seek to clarify for the reader the nature of the content of the work or to warn the reader against specific actions or consequences which may arise from the reader’s misunderstanding of the nature and intent of the subject matter of the work.

Probably everyone has been exposed to the standard global disclaimer often used by motion picture producers in the closing credits – e.g., “any resemblance to actual persons, living or dead, is purely coincidental….” Considering their persistent and often rote utilization, whether such blanket disclaimers are truly effective – either for clarification to the viewer or the avoidance of legal liability – is a question that only has an answer when evaluated with respect to specific cases.

In our practice, disclaimers (we frequently refer to them as “Author’s Notes”) are only used when the circumstances truly warrant them and are always tailored to the specific needs and circumstances of the publication. Here are a few examples of typical disclaimers that we recommend, where appropriate:

- Notes alerting the reader to the fact that certain names or details have been changed in the presentation. This disclaimer not only represents full disclosure in alerting readers to the nature of what they are reading, but also provides potential legal protection from characters as to whom derogatory statements may have been made but who are not identifiable to the general public because of the changes made.

- In publications containing health or health care information we often recommend a medical disclaimer, the gist of which is that the publication of such general information should not be treated as personal medical advice, which can only be obtained from the reader’s own physician, and specifically stating the neither the author nor the publisher accept responsibility for any adverse effects any reader may claim resulted from acting upon such information without consulting their own physician.

- The same kind of disclaimer may also be recommended with respect to legal, financial or other professional information/guidance.

- In publications discussing dangerous or risky activities we often recommend a disclaimer warning the reader that the author and publisher do not recommend that readers undertake such activities.

- At times, we suggest a disclaimer which clarifies the meaning of certain terms used in the book. Among other things, this can be one means of seeking to avoid legal claims arising out of a potential claimant’s misunderstanding or misinterpretation of statements in the book.

- See also “Book-Related Websites,” *infra*, discussing the need for disclaimers as to the relative responsibilities of the publisher or the author for new, post-publication materials that may not have been vetted and that may go beyond the information previously approved for publication by counsel.

12. International Vetting

In general, we vet to satisfy the standards and requirements of U.S. law. It would be extremely difficult to try to satisfy the varying requirements reflected in the defamation and related laws of the multitude of other nations. This is one among many reasons why we attempt to vet toward a standard of truth, which is a common denominator in many other countries. However, even truth may not be a defense in some jurisdictions if the true statement is nonetheless damaging to the claimant’s reputation.

One way to get around the difficulty of attempting to vet to the standards of dozens or hundreds of jurisdictions – as we try to do in relation to the variety of practice and legal standards that to some extent exists even among U.S. states – is to remain attuned to those living persons portrayed in the publication who are deemed to be the most likely to complain about their treatment, including those who have a proven predisposition and/or the means to pursue costly claims or litigation.

In the international setting, a similar methodology is employed in attempting to identify those most likely to be aggrieved – and to vigorously evaluate the possibility of any such grievance – by focusing on potentially defamatory material as to those characters in the publication. If the assessment is that one or another major character, domiciled in a foreign jurisdiction, is highly likely to challenge or attack her portrayal, and if it is known that the publication will be distributed in that foreign jurisdiction, then it is possible to consider bringing in counsel from that character’s home nation to review the publication in question, or at least to consult with U.S. counsel on the legal standards that may be applicable.

Another case where a conflict between U.S. and a foreign jurisdiction (or jurisdictions) may arise is where publication rights have already been sold to another major market and especially where simultaneous publication is envisioned. For English-language publications, one typical scenario is a U.S.-British publication. Although defamation law in Britain has in recent years been reformed to some extent, it is still far more favorable to plaintiffs than the constitutionally-protective standards encountered in the U.S.[8]

If in such circumstances it is the intention to have *both* a U.S. and a British vetting, ideally it is best to coordinate such dual legal reviews from the outset. Unfortunately, such coordination is often not achieved. In one case, we vetted the book in question to our U.S. standards. This included identifying those major characters as to whom critical information or commentary had been located in the pending

---

[8] In fact, in the heyday of the UK's nearly strict liability defamation law regime, a phenomenon of so-called "libel tourism" had arisen where wealthy claimants from other jurisdictions (think especially the Middle East) had for good reason chosen to pursue their libel claims in England!

manuscript. As to those characters, we had followed a dual track. We sought to achieve the most thorough substantiation and, where full substantiation was not possible, we recommended changes that could to some extent lessen the risk of a claim – which as has been discussed included some softening of harshly critical language and also certain changes, again where possible without undue fictionalization, of those characters' names or incidental details in order to disguise their identity.

We had completed the vetting process and had submitted the manuscript with such recommended changes. It was only then that we were advised of a parallel vetting process ongoing in another key jurisdiction. We had followed our normal practice of avoiding contact with sensitive characters, and of eschewing a process of seeking written consents or releases (see "Written Permissions/Consents", *supra*). Unfortunately, it turned out that foreign counsel had followed an entirely different course, having already made contact with many of the key characters in the book, in an effort to seek written releases. Not only was this inconsistent with our standard vetting strategy, but it was then revealed to us that some of the characters contacted had refused to provide releases and others had demanded significant changes in the manuscript! So much for our careful strategy to avoid such problems and complications. The book was eventually published, although the legal review process had by then turned into something of a salvage operation.

13. Is the Vetting Attorney Responsible for Fact-Checking?

It might seem that the vetting attorney's potentially extensive participation in checking and substantiating sources would in essence be the equivalent of a "fact-checking" process. This is not correct. The substantiation being sought in the course of a legal review is only for purposes of eliminating potentially defamatory – or other legally actionable – statements about living individuals. The credibility of a book is certainly a worthy goal, and if obvious factual errors are identified – even though they don't threaten legal liability – it would make no sense to ignore them when they can be simply corrected. Nonetheless, legal vetting is not fact checking and the two should be clearly distinguished. For example, if three quarters of a nonfiction book recounts historical matters in which all participants are long dead, there would be no need for the vetting attorney to bother him or herself with such matters. On the other hand, fact checking for accuracy and credibility may be just as important in relation to the historical record than it is in relation to current events. Some publishers or authors employ fact checkers in addition to legal reviewers. Once again, the two should not be confused. The legal reviewer's central responsibility is to identify and to avoid the risk of legal action. The fact checkers role is to avoid factual errors, whether or not they are legally sensitive.

14. Book-Related Websites/Author Promotional Tours

The vetting attorney must also be concerned that all the care taken in the legal review process not be undone after the book is published should the author reintroduce deleted and/or unsupported materials – consciously or unconsciously – in other forms or forums. More and more we find that the author – and sometimes the publisher as well – has in mind to expand upon the content of the book in a book-related website, often under the same title as the book. In those cases, if the publisher will have control over the content, it should be vetted in the same fashion and to the same extent as the original

publication. In our experience, knowledgeable in-house counsel is often acutely aware of such risks and is careful to ensure that any such follow-on usages are carefully vetted.

On the other hand, if the publisher will have no control over the future content of the website, this can present serious problems that can undo or at least undermine the original vetting process. For example, carefully vetted passages that artfully avoid a particular legal problem, can be for naught if the author – unguided by the publisher or its counsel – later expounds upon the same topic and effectively adds back legally-sensitive material that had been eliminated or reworked in the vetting process. Although the publisher would not be liable for any defamatory statements over which it has no control, it is certainly prudent that a clear disclaimer of relationship to the author's website or its content be prominently presented in the book. In addition, pursuant to agreement between the author and the publisher, some kind of parallel disclaimer, memorializing the publisher's lack of control or responsibility for the website's content, should also be prominently displayed on the website.

Similar post-publication problems can occur in the course of author promotional tours. For example, in interviews or in other comments to the media, or at conferences and in panel discussions, the author may be called upon to comment on matters that have been carefully framed in, or excised from, the original publication in the course of the initial vetting process. In at least one case, happily not involving a book with which we were involved, the author was sued for defamation – not with respect to any statement made in the book, but for statements made about the particular character that went beyond the book in widely disseminated interviews. The good news, if one can call it such, is that to our understanding the publisher in that case was not named as a defendant in the litigation.

15. Changes of Names and Other Details

Changes of names and other details (see also discussion of Disclaimers, *supra*) are often used as a means of deflecting lawsuits from living individuals who are presented in a derogatory fashion, especially when the identity of the actual person is not central to the purpose of the book. In general, making such changes and alerting the reader to them, seeks to avoid questions that might otherwise be raised regarding the credibility of the book or particular portions thereof and also alerts both reader and subject that no harmful identification was intended. Unfortunately, such changes – although they are intended to – cannot always prevent an allegedly aggrieved party from coming forward to complain that the changed character or event is really about them. Nonetheless, changes made in good faith should in most cases deter a person whose identity has been protected – if only because the person will wish to avoid a self-inflicted wound – that would be caused by coming forward to identify him or herself in relation to potentially damaging and/or derogatory allegations.

16. Classified Information/Contractual Limitations

Difficult issues can be presented where the author is subject to some kind of contractual or similar limitation on her ability to discuss matters subject to such limitations. The first thing for the vetting attorney to do is to inquire into the existence of such agreements. Armed with knowledge of the potential limitations, efforts can be made to assure that the publication is not in violation of those legal

requirements or to carefully work around them so that the integrity of the publication can be preserved while still avoiding any alleged legal violations.

Key among and such limiting obligations include authors who are bound by some form of confidentiality agreement. These can arise in the context of government employment where the author has agreed, for example, not to reveal classified information and/or to submit any book regarding the author's public employment, or information obtained therefrom, for prior review.

Similar limitations may exist in the private employment context where the author may have entered into a confidentiality agreement. In certain instances, compliance with such agreements may have a severe impact on the author's ability to fully discuss the subject matter of the publication. In such instances, the role of the vetting attorney may be to advise the author and/or publisher regarding the sufficiency of compliance, or of ways and means to minimize the impact of such limitations.

Conclusion

The foregoing are just a sampling of the many miscellaneous issues and complications that may be encountered in the prepublication vetting process. Experienced legal counsel can be essential in identifying and addressing all such issues, in resolving such complications and in avoiding the legal problems or potential liabilities that could otherwise result.

October 31, 2015