DEFAMATION:
THE INSTITUTION AS DEFENDANT

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Defamation:
The Institution as Defendant

A brief checklist to help your client avoid trouble
and to minimize the risk of litigation after the mistake is made

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More often than many of us expect, colleges and universities are finding
themselves defending defamation actions. What’s worse, some institutions find that they
are unable to rid themselves of this litigation through motions to dismiss or summary
judgment and thus must face the prospect of discovery, trial and an adverse judgment.

If this scenario were not unpleasant enough, these cases almost invariably attract
attention from the news media, and the institution quickly finds it both frustrating — and
unavailing — either to decline comment or attempt in vain to somehow “win” the case in
the press.

The instances in which an institution can be said to have committed libel or
slander are limited only by a plaintiffs’ lawyer’s imagination, but I will deal with the two
most likely — an action based on a university publication and one grounded on
statements made during a disciplinary or employment decision process. Although the

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essential rules are the same in both instances, a university's strategy for preventing
defamation may differ significantly, depending on an institution's custom and practice.¹

From the outset, it is essential to keep in mind the great truisms of defamation:
first, that false statements invariably make their way into print or broadcast, often in
extremely defamatory fashion, and; second, that there are only two kinds of people in this
world — those who have uttered a false statement about another human being and those
who will.

Many of these suggestions are based as much on common sense as legal analysis.
However, it is likely that most organizations — including most universities — lack an
established strategy on preventing defamation, despite the rising incidence of litigation.
The suggestions in this paper should reduce the risk of litigation, but in the long run, they
also should enhance the quality of the institution's publications and its personnel review
process.

To impose some order upon this chaos, I have divided the suggestions between
pre-publication and post-publication, and where necessary, I have drawn distinctions
between strategies for university publications and for university personnel matters.

For example, a necessary element to establish a defamation is publication. Under
normal circumstances, a statement made or written to a plaintiff is not considered to be
published unless a third party is involved. Thus, institutions must decide whether, and to
what extent, some matters are reviewed during the disciplinary process before notice is
given to the student or employee.

¹ Carol LoCicero's outstanding paper both encapsulates the basic law of libel and reviews important cases
involving colleges and universities. To avoid unnecessary overlap — and my own embarrassment from the
comparison — I have chosen to concentrate on practical advice counsel can provide to an institution.
Pre-publication

1. Educate

Paradoxically, this simple first step is a common point of failure for most defamation defendants, including educational institutions. It is essential that anyone who publishes a statement in any form be aware that litigation can ensue from a single damaging inaccuracy.

In the area of university publications, each bulletin, newsletter and pamphlet should have a single editor or publisher whose job description includes reviewing the material for potential defamation.\(^2\) That person, in turn, must be made aware of the so-called “red flags” of defamation — assertions of criminal or immoral conduct, unprofessional behavior, etc.

Even more importantly, those with responsibility for university publications should be given periodic training, in-person training on libel issues.

For those with personnel responsibility, at minimum, libel issues should be addressed in the overall training material provided by the institution’s human services resources.

\(^2\)Although this paper does not focus on student publications, including student newspapers, it should be noted that student newspapers present substantial risk of defamation litigation and should be treated specially. Some universities provide libel seminars specially tailored for student journalists.
2. **Double-check**

When the reviewer sees a potential problem, he or she should first seek proof or corroboration that would show the assertion is probably accurate. Some of the best editors advise their writers to make at least one more call or one more research attempt than the writer thinks necessary.\(^3\) As in cases involving media defendants, libel plaintiffs will focus on the fact-finding process to determine whether the false publication was either intentional or a result of negligence.

If the offending passage is more in the nature of an opinion, the reviewer should ascertain the facts that the writer has to support the opinion.

3. **Review**

Once the material is checked again, the reviewer should seek at least a preliminary opinion from legal counsel about whether a suspected defamation problem may exist. Typically, a suspected passage may present little problem while a completely separate portion of the same publication may be problematic.

In any event, it is absolutely necessary for the publication's manager or editor to have authority to contact counsel, either in-house or outside the institution.

As with media clients, a counsel's objective is not to act as editor or censor. Rather, it is the counsel's role to provide legal advice with respect to potential liability arising out of specific statements. It is within the institution's

\(^3\) Blues artist B.B. King has immortalized the song, "My Mother Says She Loves Me, But She May Be Jivin' Too," probably on the news editor's time-honored admonition, "If your mother says she loves you, check it out."
rights to ask counsel for a written analysis of the proposed publication, and if litigation ensues, the very act of seeking legal advice before publishing may become an important part of the defense case.

To Review or Not To Review: A Disciplinarian’s Dilemma

As noted above, publication is an essential element of the tort of defamation. When a supervisor confronts an employee with an allegation without anyone else present, no publication can be said to have occurred. Thus, such a confrontation should not be actionable as defamation.

Depending upon the circumstances and an institution’s practices, it is conceivable that such a procedure in the nature of a preliminary conference with an employee could be useful. However, as a means of avoiding defamation litigation, its value would be minimal. Inevitably, some form of publication would occur and supply the plaintiff’s missing element.

At the same time, such a conference with the employee could be extremely valuable in the fact-finding process. An admission, obviously, closes the circle. On the other hand, a denial also can be helpful. Normally, an employee who disputes the wrongful conduct and may provides an explanation or supply additional facts that can be checked.

4. Inform

For editors of university publications, the single most important preventive measure is to personally confirm that the subject of the allegation or assertion has
been informed of the intended publication and has been given an opportunity to respond. Normally, this step is part of double-checking the material, but it is remarkable that even major national news organizations sometimes fail to contact the subject of adverse statements.

When the contact is made, the subject should be presented with the full allegation, along with the context. In jurisdictions that observe the neutral reportage privilege, the success of the defense may depend not only on how fully the publication quotes the subject but also on how fully the subject was informed of the intended publication.

**After Publication**

Although it’s true that anyone with a filing fee can sue, it’s also true that only a fraction of potential defamation plaintiffs actually do bring suit. In all likelihood the sheer weight of defamation law, replete with thorny First Amendment issues, is daunting to some lawyers, and the discovery necessary to bring a defamation case to trial also can be time and resource consuming.

In addition, there are some subtle, and not-so-subtle, factors that often influence a prospective plaintiff’s decision to sue. In large part, a person who knows he or she has been the subject of an inaccurate publication is looking primarily for vindication, not for money. Accordingly, many news organizations have instituted formal mechanisms for

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4 As the name implies, the privilege exists in a minority of jurisdictions for reports that present a response or a denial of a negative assertion. Typically, the privilege is asserted by media defendants who have reported on public figures or public officials. The applicability of the privilege is seldom tested in cases involving private figures, and may not be available.
handling complaints about news coverage that are equally applicable to college publications and broadcasts.

1. **Listen**

Within each publication or at the end of each broadcast, there can be an address for comments and suggestions. Each publication manager or editor should designate a person on staff to field complaints. In some university publications where this is not possible every staff member must understand the importance of hearing out a complaint. Often, a would-be plaintiff can blow off considerable steam simply by giving his full story to a willing listener.

It’s important that the person fielding the complaint do little more than listen and report to the editor. It would be inappropriate for the person receiving the complaint to offer his or her opinion about the publication. Likewise, it would be inappropriate for this person, at this point, to offer an apology — no matter how compelling the facts might seem.

The publication’s editor or manager should promptly see all complaints and determine whether there is any risk of a lawsuit in the material complained of. Whenever the answer is yes, counsel should be contacted at once.

In the employer-employee situation, this step is just as important, although normally it is institutionalized in the personnel system. As a practical matter, the “publication” is never final until an adverse action is taken, so the employee has a continuing opportunity to challenge or supplement the record.
Also, in many institutions, employees have an absolute right to have their response included in the permanent personnel file.

2. **Respond**

Treating the complaint as a priority, a publication can occasionally dissuade a potential plaintiff with a quick response. Even if the outcome is not entirely favorable for the complainant, he or she will have some satisfaction from being taken seriously and knowing that the publication was based on some facts, albeit disputed ones.

Obviously, if the complaint involves a matter of anticipated litigation — and particularly if the complaint is made by an attorney — the university’s counsel should be involved in the response and any printed or broadcast correction.

3. **Correct**

If the publication is determined to have been inaccurate, correct it. It’s remarkable how many publications still hesitate to publish corrections.

The correction should be in a place of prominence, but not necessarily in the same position or prominence as the offending article. Of course, the mistake should not be repeated in the correction, if even to explain what erroneous statement was published.

4. **Negotiate**

If, after all these reasonable steps have been taken, the potential plaintiff still wants to go to court, the institution’s counsel should persuade him — or more appropriately, plaintiff’s counsel — otherwise.
Although most of the various First Amendment protections, state statutes and common-law privileges were erected to protect the news media, many of those considerable protections are available for other defendants as well. In addition, many defamation cases against a media defendant that might get to a jury could be more easily dismissed as to a non-media defendant. It might be relatively simple to show, for example, that a university publication owed a lower standard of care regarding fact-checking and reporting that did a national news organizations.

Others issues, such as incremental harm, self-publication and damage, could favor the defendant as well.

**Conclusion**

The most important factors in avoiding libel are knowing that the potential liability exists and ensuring that, with respect to the subject of the adverse statements, there are no surprises. For an institution with a significant number of publications, it is highly advisable to implement a defamation-avoidance plan with the assistance of experienced counsel.