*This is your Release #3 (April 2020)*

# Sack on Defamation

## Libel, Slander, and Related Problems

### *Fifth Edition*

**By Robert D. Sack**

***(Judge, U.S. Court of Appeals, Second Circuit)***

To keep you informed about the latest developments in the law, the author has added new discussion and analysis throughout the treatise. Topics discussed in this Release include:

**"Clickbait" headlines:** In assessing alleged defamatory content, courts generally decline to consider headlines separately from the articles which they introduce. But in the arguably different context of online publications, where the "clickbait" may be all that is read, might courts recognize causes of action for "clickbait defamation" in some circumstances—even where the linked online communication is substantially accurate or nondefamatory? See § 2:4.6, at note 179.1.

**Hyperbole:** According to a federal district court in South Carolina, when directed at a businessman, terms like "crony capitalist," "crook," and "crooked owner" were "rhetorical hyperbole . . . not capable of being proven false or even properly defined," and therefore not actionable (*McGlothlin v. Hennelly*). See § 2:4.7, at note 197.1.

**Defamation by physical objects:** In *Lewis v. M7 Productions, LLC*, a federal district court in Louisiana appeared to conclude that the display of mannequins arranged to convey the image of the plaintiff involved in a "criminal and grossly offensive" sexual act with a child might have been defamatory but was not actionable in any event because it had not been "published" under applicable law. See § 2:4.9, at note 252.

**Proof of injury to reputation:** The Pennsylvania Supreme Court has clarified that "for purposes of a Pennsylvania defamation case, proof of actual injury to a private plaintiff's reputation is a prerequisite to the recovery of damages for other actual injuries, including mental and emotional injuries" (*Joseph v. Scranton Times, L.P.*). See § 2:4.17, at note 344.

**Opinion—reports of opinions of others:** As indicated in the Sixth Circuit's *Croce v. New York Times Co.*, correctly reported opinions of others may be protected opinion even though the defendant doing the reporting does not agree with the opinions, else the protection could become useless in reporting of conflicting opinions, hardly an unusual phenomenon. See § 4:3.4, at note 222.1.

*(continued on reverse)*

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**Opinion—accusation of patent trolling:** According to the New Hampshire Supreme Court in *Automated Transactions, LLC v. American Bankers Association,* the statement that the plaintiff "is a well-known patent troll" is one of opinion rather than fact. See § 4:3.5, at note 268.3.

**Public officials:** Courts have reached differing conclusions as to whether a high school football coach is a public official. Recently, a South Carolina court said yes (*Garrard v. Charleston County School District*), while a Minnesota court said no (*McGuire v. Bowlin*). See § 5:2.1, at note 47.

**Fair report privilege:** In *Butcher v. University of Massachusetts*, the Supreme Judicial Court of Massachusetts observed that republication of what is contained in a "police blotter," that is, the record of what occurred at a particular police station, may or may not be protected depending on, for example, whether it reflects complaints of criminal activity and police responses to them or may be allegations filed for the purpose of injuring personal reputation. See § 7:3.5[B][4], at note 121.1.

**Preemption by federal regulatory scheme:** Actions based on statements made by private regulatory agencies empowered to resolve disputes by federal law, such as the Financial Industry Regulatory Authority and the National Futures Association, are generally immune from suit: The state law of defamation is said to be preempted by the federal regulatory scheme. See § 8:2.7, at note 273.1.

**False light tort:** In a case where the plaintiff alleged a false light violation, but without the usual accompanying claim for defamation, the Tenth Circuit engaged in a meticulous examination of "false light" law as recognized under Oklahoma law, ultimately deciding that the claim had failed under the circumstances presented (*Talley v. Time, Inc.*). See § 12:3, at note 58.1.

**Intentional infliction of emotional distress:** According to the Second Circuit in *Rich v. Fox News Network, LLC*, knowledge of a plaintiff's susceptibility to emotional distress can, under New York law, transform nonactionable acts into outrageous conduct. See § 13:6.1, at note 243.

**Anti-SLAPP laws—California:** A California court of appeal, in *Issa v. Applegate*, emphasized the importance of speech in behalf of one candidate about another in granting broad effect to the anti-SLAPP law, commenting, "we must bear in mind the political context in which the advertisements at issue were published and the extraordinary degree of protection accorded to political speech, including political advertising, in our free society." See § 16:2.3[A][1], at note 41.2.

In addition, the **Table of Cases**, the **Defendant-Plaintiff Table**, and the **Index** have been updated.

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