This is your Release #1 (April 2018)

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:

- **Context of allegedly defamatory statement:** In *McKee v. Cosby*, the plaintiff accused the defendant of defaming her in a letter by using her published statements out of context. But the First Circuit, applying Massachusetts law, concluded to the contrary, noting that the quotations were "immediately followed by a hyperlink to the source article, allowing readers to put [the plaintiff's quoted] statements into proper context." See § 2:4.2[A], at note 66.
- **Defamation of groups and group members:** In *Elias v. Rolling Stone LLC*, the Second Circuit, applying New York law, held that it was error to dismiss a defamation cause of action brought by a group of fifty-three members of a college fraternity, based on a false published statement by the defendant that some nine of the fraternity's then members had committed or participated in a rape at their fraternity house. See § 2:9.4[A], at note 675.1.
- ***Hepps* doctrine—matters of public concern:** The Texas Supreme Court, in *Brady v. Klentzman*, has "recognized that even if the general subject matter of a publication may be a matter of legitimate public concern, some of the details may not be. But if a 'logical nexus' exists between these details 'and the general subject matter' of the article, then they are reasonably included as a matter of public concern." See § 3:3.2[A], at note 28.1.
- **Opinion—emojis and emoticons:** Digital media may well give rise to a new context in which to decide whether a statement is fact or opinion. One can guess that emojis and emoticons will, by their nature, ordinarily be treated as nonactionable opinion or commentary. See § 4:3.1[A], at note 121.1.
- **Public officials:** Persons held to be public officials include the director of budget and finance for a public school system; a former town clerk who, as such, "had the primary responsibility for organizing and issuing the

(continued on reverse)

Practising Law Institute
1177 Avenue of the Americas
New York, NY 10036
#239306

payroll for the town"; and the deputy manager of a U.S. shuttle projects office partially responsible for overseeing the development and operation of the propulsion systems for the ill-fated Challenger shuttle. See § 5:2.1, at notes 50.1, 99.1, and 101.1.

- **"Actual malice"—fictionalization:** In *Lovingood v. Discovery Communications, Inc.*, a federal district court in Alabama found no "actual malice" where a BBC docudrama broadcast under license by the defendant contained an invented scene defamatory of the public-figure plaintiff; "there is no evidence from which jurors could reasonably infer that the . . . defendants had reason to doubt the accuracy of the scenes in the . . . film or that the defendants' failure to do more to investigate the accuracy of the two scenes at issue evidences 'an intent to avoid the truth.'" See § 5:5.2[G][2], at note 705.
- **Absolute privilege—statements to federal authorities:** Statements to federal officials may also be entitled to absolute privilege. For example, in *Mangold v. Analytic Services, Inc.*, a divided panel of the Fourth Circuit held that statements made by a government contractor in the course of the investigation of an Air Force colonel's dealings with the contractor were absolutely privileged. The court saw the privilege as analogous to immunity for testimony in court, before a grand jury, and to public prosecutors. See new § 8:2.3[C].
- **Qualified privilege—charges of child sexual abuse:** In Connecticut, by statute, charges of child sexual abuse made to the Department of Children and Families are entitled to qualified immunity. See § 9:2.2, at note 57.
- **Damages:** Although the courts continue to monitor and sometimes limit damage awards, there are still large libel verdicts that survive appellate review, as a number of multi-million-dollar cases demonstrate. See § 10:5.2, at note 236.1.
- **Jurisdiction—New York long-arm statute:** New York's long-arm statute includes exceptions that limit its application in defamation cases; this favorable treatment of defendants in defamation cases has been held by the Second Circuit, in a thorough opinion by Judge Walker, to be constitutional, abridging neither the plaintiff's First Amendment right to petition nor his or her Fourteenth Amendment rights to equal protection (*Friedman v. Bloomberg L.P.*). See § 15:1.2[C], at note 25.1.
- **Texas Defamation Mitigation Act:** In addition to its anti-SLAPP statute, Texas has enacted the Defamation Mitigation Act, which requires a prospective plaintiff to make a request of the prospective defendant for a correction, clarification, or retraction of offending allegedly defamatory material before bringing a defamation action, unless the defendant has made such a correction, clarification, or retraction without such a request. See § 16:2.3[B], at note 84.1.
- **Anti-SLAPP laws—Massachusetts, Maine:** Recent cases interpret and apply the anti-SLAPP statutes of Massachusetts (*Blanchard v. Steward Carney Hospital, Inc.*) and Maine (*Gaudette v. Mainely Media, LLC*), which are both aimed at protecting the constitutional right to petition, rather than freedom of speech or of the press generally. See § 16:2.3[E], at notes 97 and 103.

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

FILING INSTRUCTIONS

Sack on Defamation

Libel, Slander, and Related Problems

Fifth Edition

Release #1
(April 2018)

Remove Old Pages Numbered:	Insert New Pages Numbered:
Volume 1	
❑ Title page to 12-106	❑ Title page to 12-106
Volume 2	
❑ Title page to I-50	❑ Title page to I-50

Practising Law Institute
1177 Avenue of the Americas
New York, NY 10036
#239306