

# Table of Contents

---

## VOLUME 1

<b>About the Author</b> .....	ix
<b>Table of Chapters</b> .....	xi
<b>Preface</b> .....	xxxix
<b>Preface to the Fourth Edition</b> .....	xxxix
<b>Preface to the Third Edition</b> .....	xliv
<b>Preface to the Second Edition</b> .....	xliv
<b>Preface to the First Edition</b> .....	xlix
<b>Acknowledgments for the First Edition</b> .....	liii
<b>Note on Citations to Lexis and Westlaw</b> .....	lv
<b>Introduction</b> .....	lvii

### Chapter 1     **Constitutional Principles**

§ 1:1	Introduction .....	1-2
§ 1:2	Rule of <i>New York Times Co. v. Sullivan</i> .....	1-3
§ 1:2.1	Antecedents: Common-Law Fair Comment.....	1-3
§ 1:2.2	Public Officials: <i>New York Times Co. v. Sullivan</i> .....	1-4
§ 1:2.3	Invasion of Privacy: <i>Time, Inc. v. Hill</i> .....	1-10
§ 1:2.4	Public Figures: <i>Butts</i> and <i>Walker</i> .....	1-11
§ 1:2.5	Public Issues: The Short-Lived <i>Rosenbloom</i> Doctrine.....	1-13
§ 1:2.6	Private Plaintiffs: <i>Gertz v. Robert Welch, Inc.</i> .....	1-18
§ 1:2.7	<i>New York Times</i> Doctrine Under Siege: The Age of <i>Dun &amp; Bradstreet</i> .....	1-21
§ 1:2.8	Reaffirmation of <i>New York Times Co. v.</i> <i>Sullivan</i> : The <i>Hustler</i> Case .....	1-24
§ 1:2.9	More Recent Challenges to <i>New York Times v.</i> <i>Sullivan</i> .....	1-26
§ 1:3	“Actual Malice” .....	1-33
§ 1:3.1	“Actual Malice” Defined.....	1-33

§ 1:3.2	“Actual Malice” Confused .....	1-37
§ 1:3.3	“Actual Malice” Applied .....	1-38
§ 1:4	Public Officials .....	1-39
§ 1:4.1	Public Officials Identified.....	1-39
§ 1:4.2	Public Officials: Scope of Comment.....	1-40
§ 1:5	Public Figures .....	1-41
§ 1:6	Weight of the Burden of Proof: “Convincing Clarity” .....	1-44
§ 1:7	Burden of Proof As to Truth or Falsity .....	1-46
§ 1:8	Opinion .....	1-47
§ 1:9	Damages.....	1-50
§ 1:10	Jurisdiction .....	1-51
§ 1:11	Independent Review.....	1-54
§ 1:12	Invasion of Privacy .....	1-58

## **Chapter 2     The Cause of Action**

§ 2:1	Elements of the Torts.....	2-4
§ 2:1.1	Falsity .....	2-7
§ 2:1.2	Unprivileged Publication.....	2-8
§ 2:1.3	Fault .....	2-8
§ 2:1.4	Special Harm .....	2-8
§ 2:2	Malice.....	2-9
§ 2:3	Libel Versus Slander; Effect of Electronic Media.....	2-10
§ 2:4	Communications As Defamatory .....	2-14
§ 2:4.1	“Defamatory” Defined .....	2-14
§ 2:4.2	Principles of Construction; Context.....	2-21
	[A] Generally .....	2-21
	[B] Importance of Context.....	2-25
§ 2:4.3	Recipients of Communications: “Right-Thinking People” .....	2-28
§ 2:4.4	Liability for Implications, Innuendo, and the Meaning of the Statement “As a Whole” .....	2-33
§ 2:4.5	Headlines; “Clickbait” .....	2-43
§ 2:4.6	Epithets, Insults, Name-Calling, and Hyperbole.....	2-49
§ 2:4.7	Libel by Question.....	2-58
§ 2:4.8	Photographs and Other Pictures .....	2-60
§ 2:4.9	Gestures and Acts; Dismissal of Employees.....	2-64
§ 2:4.10	Humor and “Fictionalization” .....	2-66
§ 2:4.11	Inaccurate Quotation .....	2-68
§ 2:4.12	Defamatory Meaning: Differences in Time and Place .....	2-70
§ 2:4.13	Pleading Defamatory Language .....	2-74
§ 2:4.14	Innocent Construction Rule.....	2-81
§ 2:4.15	Single Instance Rule.....	2-84

*Table of Contents*

§ 2:4.16	Judge and Jury.....	2-86
§ 2:4.17	Proof of Injury to Reputation .....	2-90
§ 2:4.18	Inconsequential Fault, Falsity, or Harm: The Libel-Proof Plaintiff and the Incremental Harm Doctrine .....	2-94
§ 2:4.19	Constitutional Dimension.....	2-101
§ 2:4.20	Speech in a Religious Context.....	2-102
§ 2:5	Publication .....	2-102
§ 2:5.1	Publication Generally .....	2-102
§ 2:5.2	Pleading Publication .....	2-108
§ 2:5.3	“Compelled Self-Publication” .....	2-109
§ 2:5.4	Intracompany Publication.....	2-116
[A]	Division of Authority.....	2-116
[B]	Relationship to Qualified Privilege.....	2-119
§ 2:6	Statute of Limitations.....	2-120
§ 2:6.1	Beginning of Statutory Period.....	2-120
§ 2:6.2	The Discovery Rule and Fraudulent Concealment .....	2-122
§ 2:6.3	Equitable Estoppel.....	2-125
§ 2:6.4	Single Publication Rule .....	2-126
§ 2:6.5	End of Statutory Period.....	2-127
§ 2:6.6	Relation Back.....	2-127
§ 2:7	Republication.....	2-128
§ 2:7.1	Liability for Republication by Defendant of Statement by Another.....	2-128
§ 2:7.2	Liability for Republication by Another of Statement by the Defendant .....	2-129
§ 2:8	Pleading and Proof of Special Damages: Libel and Slander Per Se.....	2-131
§ 2:8.1	General Principles.....	2-132
§ 2:8.2	Slander.....	2-135
§ 2:8.3	Libel Per Se and Per Quod.....	2-142
[A]	“Inducement” and “Innuendo” .....	2-147
[B]	Libel Per Se and Slander Per Se Compared .....	2-147
[C]	“Defamatory Per Se”?.....	2-149
[D]	“Colloquium” Compared .....	2-152
§ 2:8.4	Judge and Jury.....	2-152
§ 2:8.5	Pleading.....	2-153
§ 2:8.6	Special Rules in Other Jurisdictions .....	2-153
[A]	New Mexico.....	2-153
[B]	Georgia, Virginia, Kansas, Maryland, Nebraska, New Hampshire, Ohio, Illinois, Indiana, Wisconsin, North Carolina, Utah, South Carolina, Minnesota, Iowa, Louisiana, Pennsylvania, Texas and Connecticut .....	2-154

[C]	Ambiguous Publications .....	2-164
[D]	New York .....	2-164
§ 2:8.7	Impact of <i>New York Times</i> and <i>Gertz</i> .....	2-171
[A]	<i>Gertz</i> .....	2-171
[B]	<i>New York Times Co. v. Sullivan</i> .....	2-173
§ 2:8.8	Conclusion .....	2-173
§ 2:9	“Of and Concerning” the Plaintiff.....	2-174
§ 2:9.1	Generally .....	2-174
§ 2:9.2	Proof .....	2-181
§ 2:9.3	Judge and Jury.....	2-182
§ 2:9.4	Groups and Group Members .....	2-183
[A]	General Principles.....	2-183
[B]	Constitutional Aspects .....	2-190
§ 2:9.5	Vicarious Defamation .....	2-191
§ 2:9.6	Accidental and Fictional Reference.....	2-194
§ 2:9.7	Impact of <i>New York Times</i> and <i>Gertz</i> .....	2-197
§ 2:10	Parties.....	2-198
§ 2:10.1	Plaintiff.....	2-198
§ 2:10.2	Defendant.....	2-202

### Chapter 3 Truth and Criminal Libel

§ 3:1	Introduction .....	3-2
§ 3:2	Criminal Libel .....	3-3
§ 3:3	Actionability of Truth and the Burden of Proof.....	3-7
§ 3:3.1	Public-Official and Public-Figure Plaintiffs.....	3-7
§ 3:3.2	Private Plaintiffs .....	3-8
[A]	Sanctions Against “True” Speech .....	3-8
[B]	Burden of Proof.....	3-13
[B][1]	Public Issues and Media Defendants .....	3-13
[B][2]	Burden of Proof in Other Private-Plaintiff Cases.....	3-14
§ 3:4	Weight of the Burden of Proof.....	3-17
§ 3:5	Independent Appellate Review .....	3-19
§ 3:6	Post-Publication Discovery of Truth .....	3-20
§ 3:7	Substantial Truth.....	3-20
§ 3:8	Implications, Innuendo, Statement “As a Whole,” and “Tone”.....	3-28
§ 3:9	Breadth of Proof.....	3-31
§ 3:10	“Own Words” and “Known Truth” Defenses.....	3-32
§ 3:11	Aggravation of Damages .....	3-33
§ 3:12	Problems with Truth-Finding.....	3-35

Table of Contents

**Chapter 4 Opinion**

§ 4:1	Overview .....	4-2
§ 4:2	Historical Review.....	4-5
§ 4:2.1	Introduction.....	4-5
§ 4:2.2	Common-Law Roots .....	4-5
§ 4:2.3	Opinion in the Wake of <i>Gertz</i> .....	4-7
[A]	<i>Gertz</i> and Its Aftermath .....	4-7
[B]	Differentiating Fact from Opinion After <i>Gertz</i> .....	4-12
§ 4:2.4	<i>Milkovich</i> and After .....	4-13
[A]	<i>Milkovich</i> Decision.....	4-13
[B]	Protection for Opinion Post- <i>Milkovich</i> .....	4-16
[C]	Open Issues .....	4-25
[D]	Connecticut, Illinois, Massachusetts, New Jersey, New York, Ohio, Oklahoma, Utah, and Washington .....	4-27
§ 4:3	Analysis.....	4-33
§ 4:3.1	Custom and Context .....	4-33
[A]	Generally .....	4-33
[B]	Political Expression.....	4-46
[C]	Criticism .....	4-48
[D]	The Internet .....	4-49
[E]	Academic Debate .....	4-50
§ 4:3.2	Relationship Between Opinion and Underlying Facts .....	4-52
§ 4:3.3	Epithet and Rhetorical Hyperbole As Nonactionable .....	4-58
§ 4:3.4	Expression of Opinion Not Genuinely Held.....	4-60
§ 4:3.5	Statements Held to Be Nonactionable .....	4-62
§ 4:3.6	Statements Held to Contain Allegations of Fact .....	4-69
§ 4:3.7	Judge and Jury.....	4-72
§ 4:3.8	Advertising and Commercial Speech.....	4-75
§ 4:3.9	Appellate Review.....	4-75
§ 4:4	Common-Law Fair-Comment Privilege .....	4-75
§ 4:4.1	Generally .....	4-75
§ 4:4.2	Underlying Facts, Stated and Unstated .....	4-76
§ 4:4.3	Protection for Misstatement of Underlying Facts .....	4-78
§ 4:4.4	Persons Subject to Fair Comment .....	4-79
§ 4:4.5	Scope of Privilege .....	4-82
§ 4:4.6	Defeasance of Privilege.....	4-83
§ 4:5	Opinion and Other Speech Respecting Religion.....	4-85

**Chapter 5 Standard of Conduct: Public Plaintiffs**

§ 5:1	Introduction; Pleading “Actual Malice” .....	5-2
§ 5:2	Public Officials .....	5-6
§ 5:2.1	Identified .....	5-6
§ 5:2.2	Scope of Statements Protected .....	5-19
§ 5:3	Public Figures .....	5-22
§ 5:3.1	<i>Gertz’s</i> Criteria .....	5-22
§ 5:3.2	“Pervasive” or “All-Purpose” Public Figures .....	5-24
§ 5:3.3	“Vortex” or “Limited Purpose” Public Figures .....	5-26
§ 5:3.4	“Pervasive” Public Figures: Examples .....	5-32
§ 5:3.5	“Vortex” Public Figures: Examples .....	5-33
§ 5:3.6	Nonpublic Figures: Examples .....	5-46
§ 5:3.7	Corporations As Public Figures .....	5-51
§ 5:3.8	Former and “Fading” Public Figures .....	5-55
§ 5:3.9	Identity, Nature, and Location of the Audience .....	5-57
§ 5:3.10	Applicability of the <i>New York Times</i> Standard to Nonmedia Defendants .....	5-58
§ 5:3.11	Beyond <i>Gertz</i> .....	5-62
[A]	Celebrities .....	5-62
[B]	Public Controversy Versus Public Issue .....	5-64
[C]	“Voluntariness” and “Involuntary” Public Figures .....	5-68
[D]	<i>Gertz</i> As a Prescription of Minimum Standards .....	5-78
§ 5:4	Judicial Identification of Public Officials and Public Figures .....	5-79
§ 5:4.1	Role of Judge and Jury .....	5-79
§ 5:4.2	Timing of the Decision .....	5-81
§ 5:5	Application of the <i>New York Times</i> Standard .....	5-82
§ 5:5.1	The Test .....	5-82
[A]	“Actual Malice” and Common-Law “Malice” Compared .....	5-85
[B]	Focus of Test on Subjective Factors .....	5-87
§ 5:5.2	Application of the Test .....	5-90
[A]	Evidence Employed to Establish “Actual Malice” .....	5-94
[B]	Evidence Insufficient to Establish “Actual Malice” .....	5-105
[C]	Reliance on Third Parties .....	5-117
[D]	Use of Expert Witnesses .....	5-121
[E]	Application of the Doctrine of Respondeat Superior .....	5-123
[F]	Correction, Retraction, and Republication .....	5-124
[G]	Constitutional Protection for Known “Falsehoods”: Humor and Fiction .....	5-127
[G][1]	Humor .....	5-127

## Table of Contents

	[G][2]	Fictionalization .....	5-133
	[G][3]	Fictionalization and Humor Compared .....	5-136
	[G][4]	Defenses .....	5-137
§ 5:5.3		Burden of Proof .....	5-141
	[A]	“Convincing Clarity” at Trial .....	5-141
	[B]	“Convincing Clarity” at the Summary Judgment and Directed Verdict Stages .....	5-143
§ 5:6		Commercial Speech .....	5-144
§ 5:7		Labor Law .....	5-149

### Chapter 6 Standard of Conduct: Private Plaintiffs

§ 6:1		Generally .....	6-2
§ 6:2		Negligence .....	6-3
	§ 6:2.1	Negligence Test: Description and Rationale .....	6-7
	§ 6:2.2	Industry Standard or “Reasonable Person”? .....	6-7
	§ 6:2.3	Contributory Negligence .....	6-11
	§ 6:2.4	Burden of Proof .....	6-11
§ 6:3		“Actual Malice” .....	6-11
	§ 6:3.1	Colorado .....	6-12
	§ 6:3.2	Indiana .....	6-13
	§ 6:3.3	New Jersey .....	6-14
	§ 6:3.4	Alaska .....	6-16
	§ 6:3.5	Kansas .....	6-16
§ 6:4		New York and Other State Standards .....	6-16
§ 6:5		Is <i>Gertz</i> Applicable to Nonmedia Defendants? .....	6-23
	§ 6:5.1	<i>Gertz</i> Applied to Nonmedia Defendants .....	6-24
	§ 6:5.2	<i>Gertz</i> Not Applied to Nonmedia Defendants .....	6-27
§ 6:6		Matters of Purely Private Interest: Impact of <i>Dun</i> <i>e) Bradstreet</i> .....	6-30

### Chapter 7 Republication, Rumor, Fair Report, and Neutral Reportage

§ 7:1		Liability for Republication .....	7-2
§ 7:2		Statutes of Limitation and the Single Publication Rule .....	7-4
	§ 7:2.1	Generally .....	7-4
	§ 7:2.2	Single Publication Rule and the Internet .....	7-9
§ 7:3		Limitations on and Exceptions to Liability .....	7-12
	§ 7:3.1	Mere Circulation or Distribution .....	7-12
	[A]	Vendors, Telephones, Telegraphs .....	7-12
	[B]	Hyperlinks or Other References to Internet-Borne Material .....	7-13

§ 7:3.2	The Internet: Section 230 of the Communications Decency Act .....	7-14
§ 7:3.3	Wire Service Defense .....	7-22
§ 7:3.4	Printers, Sellers, Etc. ....	7-24
§ 7:3.5	Protections for Reporting False Statements .....	7-25
[A]	<i>New York Times</i> and <i>Gertz</i> .....	7-26
[A][1]	Generally.....	7-26
[A][2]	Live Republication by Broadcaster .....	7-27
[B]	“Fair Report,” “Record,” or “Reporter’s” Privilege .....	7-28
[B][1]	Generally; Defeasance .....	7-28
[B][2]	Rationale .....	7-33
[B][3]	State Statutes .....	7-35
[B][4]	Scope of Privilege: Reports Covered .....	7-36
[B][5]	“Malice” .....	7-50
[B][6]	Fairness and Accuracy .....	7-50
[B][7]	Portions of Record and Sources of Information .....	7-56
[B][8]	Constitutional Ramifications .....	7-58
[C]	Reports of Investigations.....	7-59
[D]	Neutral Reportage .....	7-61
[D][1]	The Problem .....	7-61
[D][2]	The Problem Illustrated .....	7-61
[D][3]	Protection for Neutral Reportage .....	7-63
[D][4]	Application of and Limitations on the Doctrine .....	7-64
[D][4][a]	Neutral Reportage Privilege Denied.....	7-64
[D][4][b]	Neutral Reportage Privilege Applied .....	7-67
[D][4][c]	Neutral Reportage Extended .....	7-70
[D][5]	The Hypothetical Solved .....	7-72
[D][6]	Other Aspects of the Neutral Reportage Doctrine.....	7-73
[D][6][a]	Neutral Reportage and the Fair Report Privilege .....	7-73
[D][6][b]	Neutral Reportage Under <i>Chapadeau</i> and <i>Gertz</i> .....	7-75
[D][6][c]	Rumors .....	7-76

## Chapter 8      **Absolute Privilege, Immunity, and Preemption**

§ 8:1	Privilege—An Overview .....	8-2
§ 8:2	Absolute Privilege .....	8-3
§ 8:2.1	Judicial Proceedings .....	8-5
[A]	Requirement of Pertinence.....	8-5
[B]	The Judiciary .....	8-9



Table of Contents

[C]	The Bar.....	8-10
[D]	Parties, Complainants, Witnesses, and Investigators .....	8-21
[E]	Jurors .....	8-27
[F]	Officers of the Court.....	8-28
§ 8:2.2	Legislators.....	8-28
[A]	The Speech or Debate Clause .....	8-28
[B]	Protection for Federal Employees Under the Federal Tort Claims and Westfall Acts .....	8-31
[C]	State Legislators.....	8-34
[D]	Petitions to and Testimony Before Legislatures .....	8-36
§ 8:2.3	Federal Executive and Administrative Officers .....	8-37
[A]	<i>Barr v. Matteo</i> .....	8-37
[B]	The Federal Tort Claims and Westfall Acts .....	8-39
[C]	Statements to Federal Authorities.....	8-40
§ 8:2.4	State Agencies and Proceedings.....	8-40
[A]	Generally .....	8-40
[B]	Immunity for Quasi-Judicial Agencies and Persons .....	8-44
[C]	Subordinate Legislative Bodies .....	8-50
§ 8:2.5	State Executive Officers .....	8-51
[A]	Particular State Officers .....	8-53
[B]	State Variations.....	8-54
§ 8:2.6	Husband and Wife .....	8-60
§ 8:2.7	Labor Law, Federal Regulatory Agencies, and Other Miscellaneous Absolute Privileges and Preemptions.....	8-61
§ 8:2.8	Consent; “Invited Defamation” .....	8-69
§ 8:2.9	Sovereign Immunity and Act of State Doctrine.....	8-72
§ 8:2.10	“Political Question” Immunity .....	8-76
§ 8:2.11	Interlocutory Appeal .....	8-76

**Chapter 9 Qualified Privilege**

§ 9:1	Rationale and General Principles.....	9-2
§ 9:2	Occasions for Conditional Privilege.....	9-8
§ 9:2.1	Interest of the Speaker .....	9-9
§ 9:2.2	Interest of Recipient or Third Person .....	9-14
[A]	Reports on Employees and Prospective Employees.....	9-16
[B]	Student Evaluations .....	9-23
[C]	Credit Reports.....	9-23
[C][1]	Common Law .....	9-23
[C][2]	Fair Credit Reporting Act.....	9-25
[D]	Reports to Consumers .....	9-26

§ 9:2.3	Common Interest .....	9-27
§ 9:2.4	Family Relationships.....	9-35
§ 9:2.5	Public Interest.....	9-36
§ 9:2.6	“Fair Report,” “Record,” or “Reporter’s” Privilege .....	9-39
§ 9:2.7	Fair Comment .....	9-40
§ 9:2.8	Constitutional Privilege .....	9-40
§ 9:2.9	Right to Petition .....	9-40
§ 9:3	Defeatance of Conditional Privilege.....	9-41
§ 9:3.1	“Malice” .....	9-44
§ 9:3.2	“Actual Malice” .....	9-48
§ 9:3.3	Reckless Falsehood.....	9-55
§ 9:3.4	Negligence .....	9-56
	[A] Generally .....	9-56
	[B] Interrelationship with <i>Gertz</i> .....	9-57
§ 9:3.5	Other “Abuse” of Privileged Occasions .....	9-58
	[A] Excessive Publication .....	9-58
	[B] Excesses of Language .....	9-60
	[C] Improper Purpose .....	9-60
§ 9:4	Severability .....	9-61
§ 9:5	Judge and Jury .....	9-61
§ 9:6	Burden of Pleading.....	9-62

## Chapter 10 Damages and Other Remedies

§ 10:1	Overview .....	10-2
§ 10:2	Principles of <i>Gertz v. Robert Welch, Inc.</i> .....	10-4
§ 10:3	Types of Damages .....	10-6
§ 10:3.1	Nominal Damages.....	10-6
§ 10:3.2	Special Damages .....	10-8
§ 10:3.3	General Damages: Presumed and Actual Injury.....	10-10
§ 10:3.4	Compensation for Actual Harm; Damage Awards to Corporate Plaintiffs .....	10-14
§ 10:3.5	Punitive or Exemplary Damages .....	10-16
	[A] Punitive Awards Generally.....	10-26
	[B] Punitive Damages Limited to Protect Expression .....	10-33
	[C] Tendency Toward Punitive Damages in <i>New York Times</i> Cases .....	10-35
	[D] Vicarious Liability; Respondeat Superior.....	10-36
§ 10:4	Nonmedia Defendants.....	10-38
§ 10:5	Amount of Damages and Causation.....	10-40
§ 10:5.1	Criteria and Proof .....	10-40
§ 10:5.2	Judicial Review of Award.....	10-45

*Table of Contents*

§ 10:5.3	Causation .....	10-55
§ 10:5.4	Constitutional Basis for Reversal .....	10-58
§ 10:5.5	Mitigation and Aggravation .....	10-61
[A]	Similar Bad Acts .....	10-61
[B]	Plaintiff's Bad Reputation or Character .....	10-62
[C]	Previous Settlement or Recovery .....	10-64
[D]	Charges Already in Circulation.....	10-64
[E]	Plaintiff's Ability to Rebut Charges .....	10-65
[F]	Defendant's Motivation.....	10-65
[G]	Retraction .....	10-66
[H]	Statutory Damage Caps .....	10-66
[I]	Sanctions for Frivolous Litigation .....	10-66
[J]	Plaintiff's Duty to Mitigate.....	10-67
§ 10:6	Other Remedies .....	10-67
§ 10:6.1	Injunctions .....	10-67
§ 10:6.2	Compulsory Retraction.....	10-75
§ 10:6.3	Declaratory Judgment .....	10-77
§ 10:6.4	Disgorgement .....	10-79
§ 10:7	Discharge in Bankruptcy .....	10-79
§ 10:8	Workers' Compensation .....	10-79
§ 10:9	Tax Treatment of Awards.....	10-80
§ 10:10	Arbitration.....	10-81
§ 10:11	Countersuits and "SLAPP" Statutes.....	10-82
§ 10:11.1	Anti-SLAPP Statutes .....	10-83
§ 10:11.2	Suits Under 42 U.S.C. § 1983 .....	10-85

**Chapter 11 Retraction**

§ 11:1	Common Law; "Actual Malice" .....	11-2
§ 11:2	Retraction Statutes .....	11-3
§ 11:2.1	Good Faith.....	11-4
§ 11:2.2	Notice.....	11-4
§ 11:2.3	Timing of Demand .....	11-6
§ 11:2.4	Content .....	11-8
§ 11:2.5	Timing of Retraction.....	11-9
§ 11:2.6	Defendants Covered.....	11-10
§ 11:2.7	Effect of Retraction .....	11-12
§ 11:2.8	Torts Covered.....	11-13
§ 11:2.9	Conflicts of Laws .....	11-13
§ 11:2.10	Validity of Statutes .....	11-14
§ 11:2.11	Evaluation.....	11-15

## VOLUME 2

<b>Table of Chapters</b> .....	v
--------------------------------	---

### **Chapter 12    Related Tort Causes of Action: Invasion of Privacy**

§ 12:1	Defamation-Related Tort Causes of Action	
	Generally .....	12-3
§ 12:1.1	The Causes of Action .....	12-3
§ 12:1.2	Constitutional Principles Applicable to Defamation-Related Causes of Action.....	12-4
§ 12:2	Invasion of Privacy: History.....	12-6
§ 12:2.1	Warren, Brandeis, and the <i>Harvard Law Review</i> .....	12-6
§ 12:2.2	Acceptance in the States .....	12-8
§ 12:3	False Light .....	12-13
§ 12:3.1	Elements .....	12-18
[A]	Generally .....	12-18
[B]	Offensiveness.....	12-24
§ 12:3.2	Survival of Action .....	12-28
§ 12:3.3	Vicarious Rights.....	12-28
§ 12:3.4	Distinctions Between Defamation and False-Light Invasion of Privacy.....	12-29
[A]	Oral and Written Invasion .....	12-30
[B]	Extrinsic Facts, Privilege, Single Publication, Statutes of Limitations, and Retraction.....	12-30
[C]	Judge and Jury.....	12-33
§ 12:3.5	Corporate Plaintiffs.....	12-33
§ 12:3.6	Constitutional Treatment .....	12-34
[A]	<i>Time, Inc. v. Hill</i> .....	12-34
[B]	Application of <i>Time, Inc. v. Hill</i> to Private Plaintiffs .....	12-35
§ 12:3.7	Prevalence of the Tort .....	12-38
§ 12:4	Public Disclosure of Private Facts .....	12-39
§ 12:4.1	Private Facts Invasion of Privacy Compared with Defamation and False Light .....	12-41
§ 12:4.2	Elements: Publicity .....	12-42
§ 12:4.3	Elements: Identification of Plaintiff .....	12-46
§ 12:4.4	Elements: Facts Disclosed Are Private.....	12-47
[A]	Material in Fact Public.....	12-48
[B]	Public Places .....	12-48
[C]	Public Record.....	12-51

## Table of Contents

§ 12:4.5	“General Interest” or “Newsworthiness” .....	12-51
[A]	Public Officials and Public Figures .....	12-54
[B]	Private Persons .....	12-54
[B][1]	Relationship Between Newsworthy Event and the Plaintiff .....	12-55
[B][2]	Private Facts Held Actionable or Protected .....	12-59
[C]	“General Interest”: Matters of Public Record .....	12-65
[D]	“General Interest”: Specific Protection for Republication of Court Records .....	12-66
[E]	Constitutional Protection for Matters of Public Record .....	12-67
[F]	Passage of Time; Rehabilitation of Criminals.....	12-70
[G]	Perpetual “General Interest” .....	12-72
§ 12:4.6	Elements: Offensiveness .....	12-73
[A]	Generally .....	12-73
[B]	Relationship Between “General Interest” and Offensiveness: The <i>Sidis</i> Principle .....	12-76
§ 12:4.7	Negligent Invasion of Privacy.....	12-79
§ 12:4.8	Waiver.....	12-79
§ 12:4.9	Other Defenses and Privileges.....	12-80
§ 12:4.10	Breach of Contract and Promissory Estoppel .....	12-81
§ 12:4.11	Damages.....	12-81
§ 12:4.12	Injunctive Relief.....	12-82
§ 12:4.13	Choice of Law .....	12-83
§ 12:4.14	Other Constitutional Considerations .....	12-83
[A]	<i>Cox Broadcasting Corp. v. Cohn</i> and Its Progeny.....	12-84
[B]	<i>New York Times Co. v. Sullivan</i> .....	12-85
[C]	Judge and Jury.....	12-86
§ 12:4.15	Effect of the Internet on the Tort.....	12-86
§ 12:5	Appropriation; “Right of Publicity” .....	12-89
§ 12:5.1	In General.....	12-89
§ 12:5.2	Descendability, Statute of Limitations, Etc. ....	12-96
§ 12:5.3	Video Games.....	12-98
§ 12:6	Intrusion and Trespass .....	12-99
§ 12:7	Right to Privacy in New York and Virginia.....	12-108

## Chapter 13 Other Related Causes of Action

§ 13:1	Injurious Falsehood .....	13-2
§ 13:1.1	Introduction: Disparagement (Trade Libel) and Slander of Title .....	13-2
§ 13:1.2	Slander of Title .....	13-4
[A]	Interests Protected .....	13-4
[B]	Form of Publication .....	13-5

[C]	Damages.....	13-6
[D]	Constitutional and Anti-SLAPP Protection.....	13-6
§ 13:1.3	Disparagement (Trade Libel) .....	13-7
§ 13:1.4	Elements of Injurious Falsehood .....	13-10
[A]	Generally .....	13-10
[B]	Comparison with Defamation .....	13-13
[C]	“Of and Concerning” the Product or Service .....	13-15
[D]	Falsity .....	13-17
[E]	Malice.....	13-18
[F]	Special Damages .....	13-23
§ 13:1.5	Privilege .....	13-27
[A]	Absolute Privilege .....	13-27
[B]	Conditional Privilege .....	13-28
[C]	Special Injurious Falsehood Privileges .....	13-29
§ 13:1.6	Injunctions .....	13-30
§ 13:1.7	Statutes of Limitations; Survival of Action.....	13-31
§ 13:1.8	Impact of the Constitutional Cases .....	13-31
§ 13:2	The Lanham Act.....	13-33
§ 13:3	Securities Exchange Act .....	13-40
§ 13:4	Interference with Contract and Interference with Prospective Advantage .....	13-41
§ 13:5	Prima Facie Tort .....	13-48
§ 13:6	Intentional Infliction of Emotional Distress .....	13-51
§ 13:6.1	The Tort.....	13-51
§ 13:6.2	Interrelationship with Defamation .....	13-67
§ 13:6.3	“Cyberstalking” .....	13-68
§ 13:7	Negligent Infliction of Emotional Distress.....	13-69
§ 13:8	Negligent Misstatement .....	13-73
§ 13:9	Conspiracy.....	13-77
§ 13:10	Deprivation of Civil Rights.....	13-78
§ 13:11	Misrepresentation, Breach of Contract, Promissory Estoppel, and Yet Other Causes of Action.....	13-82

**Chapter 14   Discovery; Sources, Confidentiality,  
and Anonymity**

§ 14:1	Introduction .....	14-2
§ 14:1.1	Generally .....	14-2
§ 14:1.2	The “Press”; Motions to Dismiss.....	14-4
§ 14:2	Tactics .....	14-5
§ 14:2.1	Plaintiff’s and Defendant’s Discovery Compared .....	14-5
§ 14:2.2	Defendant’s Use of Interrogatories.....	14-7

*Table of Contents*

§ 14:3 Confidential News Sources..... 14-7

    § 14:3.1 The Problem..... 14-7

        [A] Plaintiff’s Interest..... 14-8

        [B] Defendant’s Interest ..... 14-9

        [C] Nonconfidential News-Gathering Information .... 14-11

    § 14:3.2 The Problem’s Resolution..... 14-12

        [A] The Extremes ..... 14-12

        [B] Toward Accommodation of Interests..... 14-13

        [C] Summary Judgment..... 14-19

        [C][1] Discovery Compelled ..... 14-22

    § 14:3.3 Statutory Protection..... 14-23

    § 14:3.4 Application of Statutory Privilege to  
        Defamation Cases in State Courts..... 14-29

        [A] Qualified Protection..... 14-30

        [B] Absolute Protection ..... 14-30

    § 14:3.5 Application of Statutory Privilege to  
        Defamation Cases in Federal Courts..... 14-32

    § 14:3.6 Conduct of the Case ..... 14-33

§ 14:4 Anonymous Internet and Other Authors..... 14-37

§ 14:5 Journalists As Plaintiffs ..... 14-49

§ 14:6 Confidentiality Orders Covering Material  
    Disclosed by Plaintiff..... 14-50

§ 14:7 Court Control of Discovery in Defamation Cases ..... 14-52

**Chapter 15 Jurisdiction and Choice of Law**

§ 15:1 Personal Jurisdiction over the Defendant..... 15-2

    § 15:1.1 Introduction..... 15-2

    § 15:1.2 State Long-Arm Statutes ..... 15-3

        [A] Generally ..... 15-3

        [B] Print and Broadcast Defendants..... 15-4

        [C] Special Rules for Defamation in Certain States..... 15-7

        [D] Nonmedia Defendants..... 15-11

        [E] Digital Media..... 15-12

    § 15:1.3 The Due Process Analysis..... 15-14

        [A] Introduction ..... 15-14

        [B] General Jurisdiction..... 15-17

        [C] Specific Jurisdiction ..... 15-18

        [C][1] Generally..... 15-18

            [C][1][a] Circulation..... 15-20

            [C][1][b] Foreseeability and Effects in the Forum..... 15-27

            [C][1][c] News Gathering ..... 15-29

            [C][1][d] Solicitation of Advertising ..... 15-30

        [C][2] Authors, Anchors, Editors, Etc. .... 15-31

[C][3]	Sources.....	15-31
[C][4]	Internet Defendants .....	15-35
[C][5]	Other Defendants.....	15-45
§ 15:1.4	Discovery.....	15-46
§ 15:1.5	Forum Non Conveniens and Motions for Change of Venue.....	15-47
§ 15:1.6	Actions Against United States and Foreign Governments and Their Instrumentalities .....	15-49
§ 15:2	Federal Removal Jurisdiction .....	15-49
§ 15:3	Choice of Law.....	15-54
§ 15:3.1	Historical Overview .....	15-56
§ 15:3.2	The Second <i>Restatement</i> View.....	15-58
§ 15:3.3	Statutes of Limitations.....	15-69
§ 15:3.4	Pleading Foreign Law .....	15-70
§ 15:4	Enforcement of Foreign Judgments; “Libel Tourism” .....	15-70
§ 15:4.1	Legislative Response .....	15-73
§ 15:4.2	Judicial Response .....	15-75
§ 15:4.3	Congressional Response—The SPEECH Act.....	15-76
§ 15:4.4	U.K. Response.....	15-78

## Chapter 16 Motion Practice and Appeal

§ 16:1	Introduction .....	16-2
§ 16:2	Motion to Dismiss and Anti-SLAPP Laws .....	16-3
§ 16:2.1	Generally .....	16-3
§ 16:2.2	<i>Twombly</i> and <i>Iqbal</i> .....	16-7
§ 16:2.3	Special Motion to Strike Under Anti-SLAPP Statutes.....	16-11
[A]	California .....	16-11
[A][1]	“In Furtherance of [the Defendant’s] Right of Petition or Free Speech”.....	16-14
[A][2]	Procedure .....	16-23
[A][3]	Appeal.....	16-26
[B]	Texas.....	16-27
[C]	Illinois .....	16-31
[D]	New York.....	16-33
[E]	Other States.....	16-35
[F]	Availability of Anti-SLAPP Procedures in Federal Courts .....	16-45
[G]	Other Remedies .....	16-50
§ 16:3	Summary Judgment.....	16-50
§ 16:3.1	Public-Official and Public-Figure Cases .....	16-50
[A]	Summary Judgment Preferred in Theory .....	16-54



Table of Contents

[B]	Summary Judgment Preferred in Fact .....	16-64
[C]	Summary Judgment Disfavored .....	16-68
[D]	“Convincing Clarity” .....	16-70
§ 16:3.2	Private-Figure Cases.....	16-72
[A]	Interest in Freedom to Communicate .....	16-72
[B]	Impact of a Negligence Standard.....	16-74
[C]	Summary Judgment Where Remedy Is Theoretically Preferred.....	16-74
[D]	Summary Judgment Where Remedy Is Not Theoretically Preferred.....	16-76
[E]	Summary Judgment in Non-Negligence Jurisdictions.....	16-77
§ 16:3.3	Summary Judgment Postponed .....	16-78
§ 16:3.4	Multiple or Successive Motions for Summary Judgment .....	16-79
§ 16:4	Directed Verdict and Judgment N.O.V. ....	16-79
§ 16:4.1	Generally .....	16-79
§ 16:4.2	Court’s Role in Evaluating Weight of Evidence ....	16-80
§ 16:5	Appeal .....	16-82
§ 16:5.1	Introduction.....	16-82
§ 16:5.2	Public-Official and Public-Figure Cases .....	16-83
§ 16:5.3	Other Cases .....	16-91
§ 16:5.4	Application of <i>Bose</i> to Verdicts for Defendant.....	16-93
§ 16:5.5	Analysis of Independent Review: Appellate Review and the Institution of the Jury .....	16-93
[A]	Rationale for Independent Review.....	16-93
[B]	Role of the Jury .....	16-95
[C]	Independent Review: Towards a Resolution .....	16-98
§ 16:6	Interlocutory Appeal.....	16-99
§ 16:6.1	Constitutional Law .....	16-99
§ 16:6.2	State Law .....	16-101

**Chapter 17 Insurance Policies**

§ 17:1	Introduction .....	17-1
§ 17:2	Insurance Available.....	17-2
§ 17:3	The Insurance Agreement .....	17-5
§ 17:3.1	Policy Triggers.....	17-5
§ 17:3.2	Torts Covered.....	17-5
§ 17:3.3	Giving Notice of Claims .....	17-6
§ 17:3.4	Persons Covered.....	17-7
§ 17:3.5	Types of Media Covered .....	17-8

SACK ON DEFAMATION

§ 17:3.6 Other Factors ..... 17-10  
§ 17:3.7 Communications Between Insurer and Insured ..... 17-10  
§ 17:4 Errors and Omissions Coverage..... 17-10  
§ 17:5 Policy Comparisons ..... 17-11

**Table of Cases**..... TOC-1

**Defendant-Plaintiff Table**.....DP-1

**Index**..... I-1