**DEFAMATION FLOWCHART**

**Text-only version**

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*This text-only flowchart was created to mirror in substance a previously created image-based flowchart. Details regarding the translation are found in notes at the end of this document.*

**PART ONE: CONSTITUTIONAL LAW DEFAMATION FLOWCHART**

1. **FIRST AMENDMENT APPLICABILITY:** Is the plaintiff a public official or public figure, or does the statement involve a matter of public concern?
   1. If ***NO***, then the First Amendment does not come into play, just analyze under the common law. ***GO ON TO COMMON LAW ANALYSIS*** *[starting at 3, found under “Part Two: Common Law Defamation Flowchart”]*
   2. If ***YES***, then the First Amendment does come into play. ***GO ON to next [2]…***
2. Is the plaintiff a **public official or public figure**, or is the plaintiff a **private person**?
   1. If ***PUBLIC OFFICIAL OR PUBLIC FIGURE***, then the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, AND the plaintiff must prove the defendant’s **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement
      1. In which case, ***GO ON TO COMMON LAW ANALYSIS*** *[starting at 3]* ***(modifying elements and defenses as advised)***
   2. If ***PRIVATE PERSON RE MATTER OF PUBLIC CONCERN***, then the plaintiff must prove, as part of the prima facie case, that the statement is **false**, that is, that the statement is purported fact (as opposed to opinion) and is not true, AND the plaintiff must, either:
      1. prove the defendant’s **actual malice**, that is, that the defendant acted with knowledge that the statement was false or with reckless disregard as to the truth or falsity of the statement   
         OR
      2. prove **negligence** (not taking the care the reasonable person would in concerning the truth or falsity of the statement) plus **actual injury**, such as lost wages or sales
      3. In either case, ***GO ON TO COMMON LAW ANALYSIS*** *[starting at 3]* ***(modifying elements and defenses as advised)***

**PART TWO: COMMON LAW DEFAMATION FLOWCHART**

1. **PRIMA FACIE ELEMENTS:**
   1. Is there a defamatory statement? (this means tending to injure reputation, i.e., deter others from dealing with the person, from viewpoint of any substantial and morally respectable group; per se categorization is sufficient, but not necessary)
      1. If **NO**, then there is **no liability**.
      2. If **YES**, then go on to next [3.2] …
   2. Is the statement regarding a matter of fact? (statements of opinion don’t qualify)
      1. If **NO**, then there is **no liability**.
      2. If **YES**, then go on to next [3.3] …
   3. Is the statement of and concerning the plaintiff? (identification of person can be implicit; can be by group identification if group is small)
      1. If **NO**, then there is **no liability**.
      2. If **YES**, then go on to next [3.4] …
   4. Was the statement published by the defendant? (published means intentionally or negligently actually communicated to at least one third person)
      1. If **NO**, then there is **no liability**.
      2. If **YES**, then go on to next [3.5] …
   5. Is there an “extra condition”? (statement is libel per se, libel per quod, slander per se, or special damages are proven)
      1. Go on to the next set of questions [4] (involving slander per se / libel per se analysis) to determine if there is an “extra condition”
2. **[“EXTRA CONDITION” ANALYSIS]**
   1. Is it libel or slander?
      1. If SLANDER, then go on to slander per se analysis (same as libel per quod analysis) [4.2].
      2. If LIBEL, then choose whether it is libel per se or libel per quod …
         1. If it is LIBEL PER SE (i.e., no external information is needed to understand defamatory import), then a prima facie case has been established. ***GO ON TO DEFENSES [5]***.
         2. If it is LIBEL PER QUOD (i.e., innuendo, etc.; some external information is needed for defamatory import), then go on to libel per quod analysis (same as slander per se analysis).
   2. SLANDER PER SE / LIBEL PER QUOD ANALYSIS
      1. Does the statement’s defamatory information come from … ?

• adverse to one’s profession or business

• loathsome disease

• guilt of crime involving moral turpitude

• lack of chastity

* + - 1. If ***YES***, then a prima facie case has been established and no special damages need be proven. ***GO ON TO DEFENSES [5]****.*
      2. If ***NO***, then **special damages** must be proven.
         1. If PROVEN, then a prima facie case has been established. ***GO ON TO DEFENSES [5]***.
         2. If NOT PROVED, then there is **no liability**.

1. **DEFENSES:**
   1. Is the statement substantially true? (the statement is true, or at least it’s close enough to the truth that the false part doesn’t matter)
      1. If **YES**, then there is **no liability**.
      2. If **NO**, then go on to next …
   2. Is the statement protected by absolute privilege? (court proceedings, legislative proceedings, high-level government executive communications, spouse-to-spouse)
      1. If **YES**, then there is **no liability**.
      2. If **NO**, then go on to next …
   3. Is the defendant immune via the §230 safe harbor? (internet republication under 47 U.S.C. §230)
      1. If **YES**, then there is **no liability**.
      2. If **NO**, then go on to next …
   4. Is the statement protected by qualified privilege? (fair and accurate reporting, neutral reportage, employment reference, other)
      1. If **NO**, then there is **LIABILITY**.
      2. If **YES**, then go on to next …
         1. Is the qualified privilege exceeded? (lack of subjective belief in truth, lack of objectively reasonable belief in truth, excessive publication)
            1. If **EXCEEDED**, then there is **LIABILITY**.
            2. If **NOT** **EXCEEDED**, then there is **no liability**.

*[Notes about this document: This text-only flowchart differs from the image-based flowchart (at http://www.ericejohnson.com/m/Defamation\_Flowchart.pdf) in omitting colored arrows used to link blocks of text, omitting colored boxes surrounding some text, and omitting spatial arrangement of text as a means of orientation. Numbering has been added to provide a means for orientation. Some new text has been added as a replacement for the arrows, including words such as “If … then,” “Go on to next,” and similar. Also added are words “*then a prima facie case has been established” at places in section 4 and “‘EXTRA CONDITION’ ANALYSIS” as the header for section 4.*]*