

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?
 - 1.1. 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"]**
 - 1.2. 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**?
 - 2.1. 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
 - 2.1.1. In which case, **GO ON TO COMMON LAW ANALYSIS [starting at 3] (modifying elements and defenses as advised)**
 - 2.2. 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:
 - 2.2.1. 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**
 - 2.2.2. 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
 - 2.2.3. In either case, **GO ON TO COMMON LAW ANALYSIS [starting at 3] (modifying elements and defenses as advised)**

PART TWO: COMMON LAW DEFAMATION FLOWCHART

3. PRIMA FACIE ELEMENTS:

- 3.1. 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)
 - 3.1.1. If **NO**, then there is **no liability**.
 - 3.1.2. If **YES**, then go on to next [3.2] ...
- 3.2. Is the statement regarding a matter of fact? (statements of opinion don't qualify)
 - 3.2.1. If **NO**, then there is **no liability**.
 - 3.2.2. If **YES**, then go on to next [3.3] ...
- 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)
 - 3.3.1. If **NO**, then there is **no liability**.
 - 3.3.2. If **YES**, then go on to next [3.4] ...
- 3.4. Was the statement published by the defendant? (published means intentionally or negligently actually communicated to at least one third person)
 - 3.4.1. If **NO**, then there is **no liability**.
 - 3.4.2. If **YES**, then go on to next [3.5] ...
- 3.5. Is there an "extra condition"? (statement is libel per se, libel per quod, slander per se, or special damages are proven)
 - 3.5.1. 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"

4. ["EXTRA CONDITION" ANALYSIS]

- 4.1. Is it libel or slander?
 - 4.1.1. If **SLANDER**, then go on to slander per se analysis (same as libel per quod analysis) [4.2].
 - 4.1.2. If **LIBEL**, then choose whether it is libel per se or libel per quod ...
 - 4.1.2.1. 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]**.
 - 4.1.2.2. 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).
- 4.2. **SLANDER PER SE / LIBEL PER QUOD ANALYSIS**
 - 4.2.1. 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
 - 4.2.1.1. If **YES**, then a prima facie case has been established and no special damages need be proven. **GO ON TO DEFENSES [5]**.
 - 4.2.1.2. If **NO**, then **special damages** must be proven.
 - 4.2.1.2.1. If **PROVEN**, then a prima facie case has been established. **GO ON TO DEFENSES [5]**.
 - 4.2.1.2.2. If **NOT PROVED**, then there is **no liability**.

5. DEFENSES:

- 5.1. 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)
 - 5.1.1. If **YES**, then there is **no liability**.
 - 5.1.2. If **NO**, then go on to next ...
- 5.2. Is the statement protected by absolute privilege? (court proceedings, legislative proceedings, high-level government executive communications, spouse-to-spouse)
 - 5.2.1. If **YES**, then there is **no liability**.
 - 5.2.2. If **NO**, then go on to next ...
- 5.3. Is the defendant immune via the §230 safe harbor? (internet republication under 47 U.S.C. §230)
 - 5.3.1. If **YES**, then there is **no liability**.
 - 5.3.2. If **NO**, then go on to next ...
- 5.4. Is the statement protected by qualified privilege? (fair and accurate reporting, neutral reportage, employment reference, other)
 - 5.4.1. If **NO**, then there is **LIABILITY**.
 - 5.4.2. If **YES**, then go on to next ...
 - 5.4.2.1. Is the qualified privilege exceeded? (lack of subjective belief in truth, lack of objectively reasonable belief in truth, excessive publication)
 - 5.4.2.1.1. If **EXCEEDED**, then there is **LIABILITY**.
 - 5.4.2.1.2. 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.]