

# Defamation: Some Finer Points

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Konomark - Most rights sharable.

## Republication

- Repeating a defamatory communication (“republishing”) ordinarily constitutes publication for defamation purposes.
- But, the fair reporting privilege is a defense for republishers.
- Also, keep in mind §230 (covered separately).

## **Fair reporting privilege**

- Common-law based.
- The media is privileged to provide a fair and accurate report of defamatory statements made in the course of legislative, judicial, administrative and other official proceedings/records, if:
  - The proceedings or records are open to the public
  - Relate to a matter of public concern

## **Limitations on the fair reporting privilege**

- Common-law malice may defeat the privilege
- Must be “fair,” i.e., not distort the facts or omit important relevant facts that would change the reader/viewer’s perception
  - Media report should not carry a “greater sting” than the government-generated content.

- A report based on FBI documents was found to be privileged, even where the documents were not generally available to the public.
- A newspaper reporter's accurate account of police statements to the press expressing doubt about the plaintiff's rape allegations was held absolutely privileged.

## **Privilege of neutral reportage**

- First Amendment based.
- Absolute privilege to fairly and accurately report newsworthy charges made by one public figure against another.
- Does not apply if reporter espouses the charge or distorts the statements in order to make a personal attack.
- Generally moot where reporter lacks malice (since regular First Amendment doctrine requires malice).

## **What Causes Juries to Find Requisite Fault**

- Relying on a single source known to be biased or not believable
- Failing to contact an obvious and available source for corroboration.
- Publishing a story that is inherently improbable
- Publishing despite subjectively held doubts

## **Discovery in Defamation Suits**

- The First Amendment does not prohibit plaintiffs from making direct inquiries into the editorial process of a defamation defendant.
- Reporter's shield laws generally will not work for defendants against defamation plaintiffs.

## Acquiring “Publicness”

- The defamation itself generally cannot make a private person a public person.
- I.e., stories published after an initial defamatory story will not convert a private person into a public figure.
- The benchmark for analysis is when the initial defamatory story is published.

## Acquiring “Publicness”

- Plaintiffs can be “general purpose” or “limited purpose” public figures.
  - General-purpose public figures always face the additional constitutional hurdles.
  - Limited-purpose public figures face constitutional hurdles only when the topic is the one for which they are public.
- Plaintiffs can acquire publicness involuntarily

## **Fact vs. opinion**

- Only statements of purported fact can be defamatory.
- Opinion is protected.
- What counts as non-actionable opinion can be a close issue.

## **Fact vs. opinion**

- In considering whether a statement is a factual/actionable one, courts will consider:
  - The context
  - Whether the statement is provably false
  - Precision and specificity of language
  - Words of apparencey, cautionary language
  - The medium
  - The intended audience

## **Snively v. Record Publishing Co.**

(Cal. 1921)

Political cartoon suggested the chief of the LAPD was secretly receiving money for illegal purposes. The cartoon was protected as fair comment. Political cartoons get “running room” from courts, as the it is intrinsic to the genre that facts are stretched and exaggerated for the purpose of advancing a pointed commentary.

## **Obsidian Finance Group v. Cox**

(D. Or. 2011)

Because of the “looser, more relaxed communication style” of blogs, it was not defamatory for blogger Crystal Cox of [obsidianfinancesucks.com](http://obsidianfinancesucks.com) to accuse bankruptcy trustee Kevin Padrick of various forms of perfidy.

Cox’s blogged allegations against Padrick included money laundering, perpetrating “fraud on the courts,” and engaging in various “illegal activity.”

Cox blogged that Padrick was a “Thief,” a “CRIMINAL,” and a “Corrupt Attorney.”

## Obsidian Finance Group v. Cox (D. Or. 2011)

Finally, the statements are not sufficiently factual to be susceptible of being proved true or false. Cox repeatedly poses her statements as questions or asserts that she will prove her accusations. For example, she asserts that “a Whole Lot” of the “Truth” is “Coming Soon,” that she “intend[s] to Expose every Dirty Deed,” that Padrick “WILL BE EXPOSED,” that “YOU [meaning Padrick] will BE Indicted SOME TIME, someday,” and that she “WILL PROVE IT ALL.” Padrick Decl. at pp. 1-13. She tells the reader to “STAY TUNED,” and she asks “Kevin Padrick, Guilty of Tax Fraud?” Id. She also states that Padrick is a “cold hearted evil asshole” and is a “Cruel, Evil Discriminating Liar.” ...

Defendant’s use of question marks and her references to proof that will allegedly occur in the future negate any tendency for her statements to be understood as provable assertions of fact. Her statements contain so little actual content that they do not assert, or imply, verifiable assertions of fact. They are, instead, statements of exaggerated subjective belief such that they cannot be proven true or false.

Considering all of the statements in the record under the totality of circumstances, the statements at issue are not actionable assertions of fact, but are constitutionally protected expressions of opinion. Plaintiffs’ motion for summary judgment on the liability of the defamation claim is denied.

## Procedural hurdles

- **Demand for retraction**
  - Some state statutes require a timely retraction be demanded and refused as a prerequisite to suit or certain remedies against a publisher or broadcaster.
- **Section 230 (*discussed separately*)**
- **SLAPP (*discussed separately*)**