

Libel And Slander

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A. Fundamentals of Defamation--Libel vs. Slander, Per Se vs. Per Quod

Defamation is defined in New Mexico, and in almost all states, as a wrongful and unprivileged injury to a person's reputation. Person includes not only individuals, but corporations and other business entities as well.

The law of defamation law revolves around two dominant historical facts. First, much of defamation law today remains a creature of state tort law, and much of that law descends from centuries of haphazard and often strange evolution. That process continues today, with each state constantly making adjustments to the basic rules.

The second historical fact relates to the 1964 decision in *New York Times Co. v. Sullivan*, in which the U.S. Supreme Court "constitutionalized" a substantial portion of defamation law. The Court held that the First Amendment places limitations on the defamation rules created by the states.

In the more than two decades since the Court decided *New York Times*, the First Amendment rules governing defamation have changed dramatically. Before *New York Times* defamation was a strict liability tort. In other words, a newspaper or other media defendant could be held liable simply for printing a defamatory statement. Following 1964, there is no such thing (or almost no such thing) as "no fault" defamation. In almost all cases, in order to be liable in a defamation suit, the defendant must have acted with the requisite degree of fault.

Defamation actually consists of the twin torts of libel and slander. Usually, libel is defamation by written or printed words, while slander is the communication of a defamatory statement by spoken words or by gestures. Courts distinguished between libel and slander in order to impose more severe punishment in libel cases. The rationale was that the written word would leave a more indelible blot on the plaintiff's reputation. Today, the significance of the distinction is fading, and in New Mexico it is largely immaterial whether the defamatory statement was in writing or not. Obviously, a defamatory statement verbally made on national television has greater capacity for harm than a written statement published in a small town newspaper.

The law also once distinguished between slander per se and slander per quod. Slander was per se if the defamatory impact was especially egregious, as when a publisher falsely

stated that a person had committed a serious crime involving moral turpitude, or that a woman was unchaste. Other, less outrageous kinds of slander were per quod. The claimant in a slander per quod case was required to prove special damages in order to prevail on liability. Special damages refer to actual pecuniary harm (such as lost wages), as opposed to general damages, which cover more nebulous concepts like damage to reputation. The claimant in a slander per se case was not required to prove special damages in order to establish liability.

In the early development of defamation law all libels were per se, and therefore were actionable without the claimant having to prove special damages. Over time, the rule developed that only libels in which the defamatory meaning was clear on the face of the words were actionable per se (i.e., without proof of special damages). Libels that required proof of additional facts to support their defamatory meaning were considered per quod, and required proof of special damages.

The distinction is useful now mainly for historical context, because many states, including New Mexico, have essentially abolished the distinctions between libel and slander, and the per se and per quod variations of each. Today, defamation is defamation.

B. The Constitutionalization of Defamation -- Public Figures, Public Officials, Private Figures, Matters of Public Interest, and Standards of Fault

As a result of the constitutionalization of defamation law it is critically important to classify the injured party, because a different fault standard will apply to each classification. In *New York Times* the Supreme Court held that defamation claims by public official plaintiffs can succeed only with a showing that the publisher of the defamatory statement acted with actual malice. Actual malice means publishing a statement with knowledge that it was false or with reckless disregard of whether not it was false. The Supreme Court determined that this requirement follows from the First Amendment. In a companion case in 1964, the Supreme Court extended the actual malice fault standard to plaintiffs who are "public figures."

In 1974 the Supreme Court decided *Gertz v. Robert Welch, Inc.*, and it provides much of the framework for modern defamation law. *Gertz* held that for private figures, or in other words people who are neither public officials nor public figures, states could establish their own standard of liability, so long as they did not impose liability without fault. Most states now merely require a private figure plaintiff in a defamation claim to prove that the publisher of the defamatory statement acted negligently. Negligence, of course, is one of the lowest standards of fault available in the law.

In *Gertz*, the Court also held that states could not permit recovery of either "presumed" or punitive damages without proof of actual malice. This holding was very helpful to media organization defendants, who previously could be held liable for very large judgments without evidence of any harm to the plaintiff. According to the Court in *Gertz*, proof of actual harm is required in cases where actual malice is not demonstrated. However, actual

harm was allowed to include general damage to reputation, and personal anguish, humiliation and suffering.

In 1985 the Supreme Court retreated somewhat from *Gertz*. The Court held that presumed and punitive damages are available even without a showing of actual malice, if the defamatory statement did not "involve matters of public concern." This underscores the importance of media organizations limiting the content of their reports to matters of public concern.

Much of the current uncertainty in defamation law arises from properly classifying the claimant. The usual definition of a public official is a government employee who has, or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs, such that the public has an independent interest in the qualifications and performance of the person who holds the position. One factor used in New Mexico is whether the public official was required by statute to take an official oath.

New Mexico has recognized that deputy sheriffs, deputy marshals, and police officers from the lowest to highest rank in municipalities, are public officials. However, not all public employees are public officials. People who have a peripheral connection to governmental activity or are extremely low in the organizational hierarchy may not be public officials.

The law recognizes two types of public figures. The first is universal (or unlimited or pervasive) public figures, and the second is limited (or "vortex") public figures. Limited public figures are only subject to the *New York Times* requirement that they prove actual malice, when they are defamed in connection with the issues in which they are a public figure. In other aspects of their lives they remain private figures, and would only need to prove negligence to win a defamation claim.

New Mexico has not provided a succinct definition of who is an all-purpose public figure. In other jurisdictions, in order for a person to be an all purpose public figure, there must be clear evidence of "general fame or notoriety in the community, and pervasive involvement in the affairs of society."

It is safe to say that most public figures are limited public figures. According to courts in other jurisdictions, these are people who have "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." Differentiating between limited public figures and private figures, it has been said, is a lot like trying to nail a jelly fish to the wall. However, many different factors and tests are given by the various courts; among the most influential are:

1. The extent to which the person's involvement in the controversy preexisted the defamatory speech. What this means is a media organization cannot validly say a person is a public figure when the person unwillingly achieved notoriety as part of a sudden media feeding frenzy;

2. The level of voluntariness in the plaintiff's involvement in the controversy;
3. The plaintiff's access to channels of communication for counter speech;
4. The degree of public divisiveness concerning the controversy. The more divisive the issue, the more likely the participants in the issue are public figures;
5. The extent of the plaintiff's prominence in the controversy;
6. The extent of the plaintiff's efforts to influence the resolution of the controversy;
7. The extent to which the plaintiff's public figure status continued to exist at the time of publication. In other words, limited public figure status can fade over time; and
8. The extent to which the allegedly defamatory speech is geographically or institutionally limited to the area in which the plaintiff had achieved public figure status. So, for example, a limited public figure in Deming may well be a private figure in Albuquerque.

People have been found to be public figures in an almost infinite variety of circumstances. Courts have found public figure status for a student class president, school officials, the head of an agricultural cooperative, a reputed mobster, law school deans, a Roman Catholic priest, a doctor, a lawyer, an author of pop psychology books, a football player, a basketball player, a woman who posed for a Playboy centerfold, the winner of a Nobel prize, candidates for public office, a chiropractor, the president of a major oil corporation, and many others.

But in an important New Mexico case, the court found that a lawyer who gave an interview to a newspaper and whose photograph was published below the headline "Organized Crime Showing Interest In New Mexico," was a private figure and not a limited purpose public figure. The court found that the attorney did not voluntarily inject himself into the public controversy surrounding organized crime.

In a more recent case, a plaintiff was neither a public official nor a public figure in a lawsuit he brought against the newspaper in Alamogordo for a false report of his arrest for paint sniffing and carrying a concealed gun. This was despite the fact that the plaintiff had volunteered to serve on the mayor's committee on alcoholism, the plaintiff was a prominent local tavern owner, and the plaintiff achieved extensive notoriety based on advertising of his liquor establishment. In that case, the plaintiff's wallet had been stolen, and apparently when the thief was arrested he passed himself off as the plaintiff. The plaintiff eventually proved negligence on the part of the newspaper and obtained a judgment of \$700,000 in compensatory damages, plus about \$5 million in punitive damages.

The classification of the claimant will determine the degree of fault he or she must prove and, in turn, produce arguments by the defendant that it did not act with the requisite

degree of fault. In cases involving public figures and public officials, because it is fairly difficult to prove actual malice, media organizations have quite a bit of latitude.

As stated above, actual malice means that a statement was made with knowledge that it was false, or with a reckless disregard of whether it was true or false. Reckless disregard means a high degree of awareness of probable falsity, or that the publisher entertained serious doubts as to the truth of the statements. Obviously, the actual malice standard is subjective and goes to the state of mind of the publisher. However, it can be proved with circumstantial evidence concerning a number of factors, many of which overlap. Important factors are:

1. Motive of the publisher;
2. Intent;
3. Reliability of the information forming the basis of the report;
4. Plausibility of the source or story. When there are obvious objective reasons to doubt the integrity and credibility of a source, this may be used to show that subjective doubt existed;
5. Selective verification, i.e., checking only those additional sources which could confirm a story;
6. A preconceived story line. Evidence that a paper conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story, is usually very powerful evidence of actual malice;
7. Reliance on a biased source. When a source harbors biases or hostilities against a plaintiff, and the defendant publisher is aware of those biases or hostilities, that awareness is evidence of actual malice;
8. Reliance on an anonymous, unverified source; and
9. The internal decision making process and prepublication review of the paper. Internal doubt at the paper about the truth or fairness of a story may well be a factor supporting actual malice.

The failure of a publisher to further investigate a story before publishing it cannot, standing alone, constitute actual malice. The simple failure to investigate may establish negligence, but it does not establish the publisher's subjective knowledge of the falsity of a story or serious doubts about the truth of the story.

Similarly, failure to check obvious sources is not, standing alone, actual malice. However, it can be used to suggest or create an inference that the defendant in fact entertained serious doubts about the truth of a story, or that the defendant intentionally

avoided verification for fear that it would contradict the story the defendant was about to publish.

It is also not recklessness or actual malice merely for a publication to have an editorial point of view or a distinctive political slant. A conservative public figure, for example, cannot validly say that actual malice is established merely because the defendant is a known "liberal" magazine.

A corollary to this point is that actual malice is not synonymous with a lack of balance or neutrality in the gathering, reporting or editing of news. It is not reckless disregard for the truth, as such, to selectively report the facts, if the defendant subjectively believes that the selection represents the truth.

A factor undercutting actual malice is a media organization's reliance on information supplied by professional third party sources, such as wire services, freelance writers, or authors. However, reliance on tips and third party sources will not immunize a publisher from a finding of actual malice. In Carol Burnett's case against the *National Enquirer*, a paid informant heavily embellished a story about Burnett having dinner at a Washington restaurant. The story indicated that Burnett argued with Henry Kissinger, was drunk, and offered everyone in the restaurant a bite of her dessert. Very little of this was true, and the *Enquirer* was held liable under the actual malice standard.

Courts also frequently take into account the presence or absence of time pressure in assessing actual malice. They give media organizations much greater leeway in a "hot news" situation.

The mere failure of a media organization to retract or correct a story does not constitute actual malice. At the same time, however, issuing a prompt retraction may be used by a media organization as a factor to disprove actual malice and to minimize damages.

The negligence standard applies when the subject of the communication is a private figure, or a limited public figure who is defamed on a subject unrelated to the issue on which he has obtained notoriety. Negligence occurs where "the defendant negligently failed to check on the truth or falsity of the communication prior to publication," and of course is much easier to prove than actual malice.

Negligence may occur through acts or omissions. A negligent act is one which a reasonably prudent person would foresee involves an unreasonable risk of injury to another's reputation, and which a reasonably prudent person in the exercise of ordinary care would not do. A negligent omission is the failure to do an act which one is under a duty to do, and which a reasonably prudent person would do to prevent injury to another's reputation.

Defamation cases against the media involving the negligence standard of fault tend to turn on compliance with the custom and practice of the profession in the particular locality. In other words, these cases are much like journalistic malpractice suits. It is

obviously often tricky business to establish the prevailing journalistic standard. Still, journalistic negligence typically arises in the following situations:

1. Failure to pursue further investigation;
2. Unreasonable reliance on sources;
3. Unreasonable formulation of conclusions, inferences, or interpretations;
4. Errors in note taking and quotation of sources;
5. Misuse of legal terminology;
6. Mechanical or typographical errors;
7. Unreasonable screening or checking procedures; and
8. The failure to follow established internal practices and policies.

C. Other Defense Alternatives

Besides lack of fault, the defendant typically will advance some sort of defense arising from the claimant's inability to prove one or more elements of his case. It is difficult to set forth a precise laundry list of the elements of the defamation action, since they will often change depending upon the type of person suing and the subject matter of the statement, but certain elements are fairly constant. The plaintiff generally has the burden of proving each of the following contentions in a defamation lawsuit:

1. The defendant published the communication;
2. The communication contains a statement of fact;
3. The communication was concerning the plaintiff;
4. The statement of fact was false;
5. The communication was defamatory;
6. The persons receiving the communications understood it to be defamatory;
7. The defendant knew the communication was false or negligently failed to recognize that it was false, or in the case of public officials and figures, acted with malice toward the plaintiff;
8. The communication proximately caused actual injury to the plaintiff's reputation; and

9. If applicable, the defendant abused its privilege to publish the communication.

Notice that the plaintiff bears the burden of proving falsity. This is obviously helpful to defendants, because they will not usually have the burden of proving the truth of the matter. An exception may occur where a private figure plaintiff alleges defamation by a statement that was not of public concern. In that situation the defendant may well have the burden of proving the truthfulness of the statement.

Lack of falsity will protect the defendant from liability even if the precise literal truth of the defamatory statement cannot be established. Insignificant or slight inaccuracies of expression are not sufficient. The test is whether the "gist" or sting of the defamatory statement is substantially true.

The Supreme Court addressed the issue of misquotations in the famous *Masson v. New Yorker* magazine case. In that case, a writer conducted extensive interviews with a psychoanalyst who was closely involved with archives of Sigmund Freud's work. The psychoanalyst did not state many of the quotations attributed to him in the stories. The Court held that the magazine and the reporter were not automatically liable for failing to reproduce the speaker's words verbatim. Altered quotations which accurately convey the gist of the interviewee's actual statement, and therefore do not materially alter the meaning, are essentially truthful and therefore not libelous. However, fabricated quotes that convey a meaning different from that which the interviewee intended and which could injure the interviewee's reputation, may well be libelous.

Note also that the plaintiff must prove that the defamatory communication proximately caused actual injury to his reputation. Again, under the old common law, a claimant could win and recover presumed damages. Today, the only case that might support an award of presumed damages would involve a private figure and a matter not of public concern.

There must be a publication of the defamatory statement in order to support a claim. Publication is an intentional or negligent communication to a person other than the one defamed. Special problems may exist with respect to the republication doctrine. The general principle is that each repetition of a defamatory statement by a new person constitutes a new publication, leaving the repeater liable for the new publication. The law deems the repeater to have adopted the defamatory statement as his own. Liability for republication can exist when a media organization publishes a defamatory political advertisement, or any kind of ad for that matter. Liability for republishing a defamatory statement is not excused by the fact that the repeater states that he disbelieves the story. At the same time, merely using the word "alleged," or naming the source, or identifying the information as mere rumor, does not necessarily relieve the repeater of independent liability for the new publication, unless the publisher can establish some sort of exception to the republication doctrine. The most common exceptions are the neutral reportage privilege, the wire service defense, and the fair and accurate report of public record or proceeding defense.

While the neutral reportage doctrine has never been expressly embraced by New Mexico courts, and has been expressly rejected by some courts in other jurisdictions, the four usual elements of the privilege are:

1. Charges of a serious nature must be made in a context in which the very leveling of the charges is newsworthy in and of itself;
2. The charges must be made by a public official or public figure or by a prominent organization;
3. The charges must be about a public figure or a public official; and
4. The reportage of the charges must be neutral, that is, accurately and disinterestedly republished.

Under the wire service defense, a media organization's liability for republishing a defamatory statement may be excused when there was a reliance on statements received from a news gathering agency. The four elements of this defense are:

1. The defendant received a wire release from a reputable news gathering agency;
2. The defendant did not actually know the story was false;
3. Nothing on the face of the story itself would reasonably have alerted the defendant that the story may be incorrect; and
4. The defendant reprinted the wire release without substantial change.

Under the privilege for reporting fair and accurate accounts of public records or proceedings, the elements are:

1. A fair and accurate report;
2. Of a public meeting or record;
3. On a matter of public concern; and
4. The report is not slanted or garbled, and does not draw defamatory conclusions, comments, or insinuations.

The fair report privilege only extends to information found in the report. In the Alamogordo newspaper case, the paper argued that it was merely reporting what the police report said. The court ruled that the privilege did not apply because the paper added information that was not in the police report, including that plaintiff was a "prominent local bar owner." The court also ruled that the privilege did not apply to oral statements by the police officer.

The defendant's communication must contain a statement of fact in order to be actionable. The usual rule was that statements of opinion alone cannot give rise to a finding of defamation. The opinion defense was often called the fair comment defense or privilege. Typically, the fair comment privilege only applied to public figures or officials in matters of public interests.

It has proved too difficult to distinguish between fact and opinion, so the distinction is fading somewhat. Today, the emphasis is on whether the statement may be understood as a statement of fact, or as implying false defamatory facts. In other words, an opinion which implies that it is based upon the existence of undisclosed facts is the same as a statement of fact, and is actionable.

There are certain examples of statements which may be "non-facts":

1. Ideas. Statements that cannot reasonably be interpreted as stating actual facts about an individual are not actionable;
2. Rhetorical hyperbole is usually a "non-fact. This might include calling a union "scab" a "traitor", or calling a real estate developer's dealings with a municipality "blackmail";
3. Epithets may well be non-facts, such as calling a person a jerk, blockhead, slime ball, or more colorful language;
4. Parody and comedy that cannot reasonably be interpreted as implying facts, usually is non-fact.

The defendant also typically advances a privilege to defeat liability. Common law privileges grew out of a recognition that in certain circumstances, the social interest in the free flow of information is so important that mistakes must be allowed to be made, even if it leaves a victim of defamation without a claim. Sometimes the informational interest is so important that the privilege is absolute. In a true absolute privilege situation, liability is totally foreclosed without regard to fault or mental state of the defendant.

Conditional or qualified privileges involves speech deserving of some enhanced protection, but not the complete immunity that accompanies absolute privileges. Discussed above are two conditional privileges: the neutral reportage privilege, and the wire service defense. In New Mexico, it appears that the fair report doctrine has been called an absolute privilege, but in many states it is only a conditional privilege. And even in New Mexico the privilege can be abused; therefore, it is more accurate to classify it as a conditional privilege. The only true absolute privilege in New Mexico is consent.

Conditional privileges often have little to do with the media business. Some of the most prevalent conditional privileges are for:

1. Statements made to protect the publisher's own legitimate interests;

2. Statements made to further the interests of another;
3. Statements made to protect a common interest; and
4. Statements to persons who act in the public interest.

Once the defendant invokes a conditional privilege the plaintiff has the burden to show the defendant abused the privilege by acting with actual malice. If malice is proved, the privilege is lost. In other words, an abuse of qualified privilege occurs when the publisher lacks belief or reasonable grounds for belief in the truth of the alleged defamation, when he publishes material for an improper purpose, when he publishes a statement to a person who does not need to hear the statement for the accomplishment of the purpose, or when the publication is not reasonably necessary to accomplish the purpose. It is not clear whether a publisher can abuse a privilege by acting negligently.

Prior to litigating the defendant should consider printing a retraction or clarification. A retraction or clarification will not necessarily defeat liability, but can be used to argue lack of fault and damages. New Mexico has not adopted the Uniform Correction Act. Under this act a person may not sue a media defendant for defamation unless he has first sought a correction or retraction from the paper. If the media defendant promptly prints a correction or retraction of a problematic story, the plaintiff -- if he still chooses to sue -- would not be able to recover punitive damages, or damages to reputation. He would only be limited to damages for actual economic loss.

ETHICAL CONSIDERATIONS

A. Identifying and Avoiding Conflicts of Interest

1. Insured defendant

The attorney representing the person alleged to have committed defamation or invasion of privacy should first determine whether the client maintains any insurance policies that could provide coverage for the claim. More and more malpractice claims arise from the attorney's failure to notify the client's insurer of the claim. Many news media organizations are "self-insured" for this kind of risk, while others maintain coverage from a specialty insurer such as Media Professional Ins. Co. The media defendant typically prefers an occurrence-based policy, rather than a claims made policy, because it applies to any publication or broadcast made during the policy period regardless of when the claim is made or suit is brought.

Other persons or organizations may have coverage for defamation or invasion of privacy under other kinds of policies. More and more employers have employers' liability policies. Commercial general liability policies may provide coverage, although typically they exclude coverage for intentional acts.

If the defendant or potential defendant is or may be insured, the attorney must carefully consider the questions "who is my client?", and "do I owe any duties to anyone else?" If the attorney is representing the insured only and has not been appointed by the insurer to defend the insured, then the lawyer owes his allegiance only to the insured.

The attorney appointed by the insurer to provide a defense is in a more ambiguous situation. He clearly enjoys an attorney-client relationship with the insured who is the defendant or potential defendant. The defense lawyer, therefore, must consult with the insured concerning the goals of the representation and how they will be pursued, plus he must also obtain the insured's consent to settle the case.

The defense lawyer appointed by the insurer will also owe duties to the insurer, either as a client or as an interested third party. Usually the lawyer is permitted to undertake this kind of dual representation, because the interests of the insurer and the person alleged to have committed defamation or invasion of privacy generally align. Both parties will want to defeat liability and minimize damages.

However, the interests of the insurer and insured can, and often do, diverge. For example, suppose the attorney learns facts creating an issue as to whether insurance coverage exists. If the insurer is not a client, the attorney probably has no duty to disclose those facts to the insurer, particularly where the attorney learns of the facts from the insured. But if the attorney learns the facts from his own investigation, then it is a closer question whether the attorney must disclose the facts to the insurer. The attorney may feel he should not disclose the information to the insurer, since disclosure would run counter to the interests of his client, the insured, but then he leaves himself vulnerable to a claim by the insurer for breach of fiduciary duty. The attorney in this situation may want to advise both insurer and insured at the outset that adverse information will not be provided to the insurer.

A conflict of interest situation may also exist where the insurer provides a defense under a reservation of rights. Usually defense counsel can shade a case to either favor or disfavor the existence of coverage. Counsel typically cannot represent both insurer and insured in that situation, and may have to withdraw from representing the insured.

Another conflict situation may arise where the suit seeks an amount in excess of coverage limits. The attorney should discuss the potential for an excess judgment with the insured.

2. Representing other multiple parties

Multiple representation problems most often arise when a case names both a news organization as a defendant and one of its employees--namely, the reporter who wrote the allegedly libelous story--as a co-defendant. Often the organization's attorney is asked to represent the employee in order to save on defense costs. The potential for conflict between the organization and the employee exists, however, if the employee exceeded the scope of his authority or violated company policies, or if the company may be liable for punitive damages due to facts showing malice by the editorial staff. The situation gets

even more difficult if the organization wants the employee to sign a "waiver", providing that the attorney will continue to represent the organization and not the employee if an "actual conflict" arises.

Counsel in this situation should conduct an initial investigation, and assess the likelihood that the interests of the organization and the employee will diverge. If the chances are great, the lawyer should decline to represent the employee. If the chances are more manageable, the lawyer should obtain an appropriate advance consent from the employee.

3. Adverse party as current or former client

The attorney may face the question whether a potentially adverse party is either a current or former client. This is important because the attorney cannot be adverse to a current client without client consent (and some conflict situations are non-consentable), while the attorney can be adverse to a former client if the old and new matters are not substantially related.

Sorting out when a current client becomes a former client can be difficult, especially where no "end of representation" letter has been sent. Courts tend to focus on whether the client could have reasonably believed that it was a current client. If so, the client usually is deemed to be a current client, even if the lawyer has not done any work for the client for a long period of time.

4. Obtaining confidential information from potential client

Sometimes an attorney can unintentionally conflict himself out of representation. Suppose the lawyer conducts an initial consultation with a prospective client about a potential libel or invasion of privacy claim against the person's employer. If the prospective client conveys confidential information to the attorney during the interview, the attorney generally will be precluded from representing the employer, even if the attorney had a pre-existing relationship with the employer, and even if the attorney declines to represent the claimant.

Attorneys should be careful not to hear anything substantive about potential representation until all of the potential parties have been run through the attorney's conflict of interest database.

B. Attorneys' Fees and Other Costs Issues

1. Fee agreements

The attorney must communicate the basis for his fee, preferably in writing, prior to undertaking the representation. It is best to memorialize the fee agreement in an engagement letter which spells out how the fee will be determined, when payment will be expected, and the like.

Counsel representing a claimant may enter a contingency fee agreement with the client. Contingency fee agreements are required to be in writing. At the conclusion of the matter, the attorney must provide the client with a written report stating the outcome of the case, the amount due to the client (if any), and the method of determining the amount due to the client.

2. Advancing costs

A lawyer may advance court costs and litigation expenses on behalf of the client, so long as the client remains ultimately responsible for the costs and expenses.

3. Other

It is generally improper to retain an expert witness under a contingency fee arrangement.

It is also improper to pay a fact witness for his testimony, although it is proper to pay a fact witness for his expenses so long as the payment is not conditioned on the content of the testimony. "Expenses" may include compensating the witness for time spent in pretrial interviews, otherwise preparing for the testimony, and giving the testimony. The amount of the "expenses" must be reasonable, taking into account relevant circumstances such as the witness's normal rate of pay in his field of employment and the amount of time spent with the lawyer.

C. Confidentiality Issues

1. Client secrets

The attorney must presume that information he obtains from a client is confidential. She must also presume the confidentiality of information obtained from other sources about the client that the client wants to keep secret or might harm or embarrass the client. The scope of information covered by the confidentiality rule is much broader than information protected by the attorney-client privilege, which is an evidentiary rule and not an ethics rule. Sometimes the lawyer's ethical obligations require disclosure of the confidential information, however, as where the disclosure is necessary to prevent the client from committing a criminal act that is likely to result in serious bodily or financial harm to another person.

2. Confidentiality issues and modern means of communication

The existence of modern technology presents issues as to preserving the confidentiality of communications with clients. The law is in flux as to many of the modern means of communication, but the present trend appears to be as follows:

cellular and cordless phones: the lawyer probably does not violate her duty of confidentiality by discussing client confidences on cell or cordless phones;

Internet communications (e-mail): the most recent ethics opinions conclude that using the Internet without encryption is not a violation of ethics rules on confidentiality and should not trigger a waiver of confidentiality.

However, lawyers should exercise judgment when discussing highly sensitive confidences via cell and cordless phones and Internet e-mail, not only because of the danger of eavesdropping, but also because some courts have concluded that waiver can occur when communications are somehow misdirected.

D. The Scope of Privilege

1. Attorney-client privilege

Communications between the client and the attorney representing either side in a defamation or invasion of privacy dispute are privileged.

There is no longer any question that attorney-client privilege is not restricted to individuals, and may extend to organizations. However, the attorney representing an organization--whether it be a media outlet or an employer--must remember that not all communications with all employees of the organization will be privileged. In general, communications about the dispute with high-level employees of the organization will be privileged. Communications with mid- and low-level employees of the organization will only be privileged if the employee's superiors instruct the employee to talk with the attorney in order to secure legal advice for the organization, and the subject matter of the communication is within the employee's organizational duties.

2. News media confidential source or information privilege

Counsel defending a news organization in a defamation or privacy suit must ascertain whether the source of information for the disputed report is confidential. If so, the attorney may wish to assert the news media confidential information privilege.

As part of his duty of zealous representation, counsel representing a claimant has a duty to seek disclosure of the confidential source, if the identity of the source is material or may lead to discovery of useful information.

E. Other Issues

The lawyer should be careful about holding informal discussions with current and former employees of organizational opponents without the consent of the organization's attorney. Most but not all current employees of the organizational opponent are "off limits" while most but not all former employees are "fair game." The attorney representing the organizational client may want to discuss with key current and former employees what to do if opposing counsel contact them *ex parte*.

A lawyer may not ethically tape record conversations (by phone or otherwise) unless the lawyer has the consent of all parties to the conversation.

The media client's use of hidden cameras and audio recording devices may constitute violation of federal wiretapping laws if the reporter is not a party to the filmed or taped communication. A purely local broadcast may escape the reach of federal legislation. Use of such news gathering techniques raises issues of journalistic ethics.