Table of Contents

Volume 1

PART I. DEFAMATION

CHAPTER 1. OVERVIEW

§ 1:1 Introduction
§ 1:2 History
§ 1:3 —Origins of defamation law
§ 1:4 —Ambivalence toward defamation
§ 1:5 —Modern defamation explosion
§ 1:5.50 Case study—Litigation arising from the 2020 presidential election
§ 1:6 Cause of action prior to the *New York Times* decision
§ 1:7 —Strict liability tort
§ 1:8 —Basic elements
§ 1:9 —Modern British libel law
§ 1:9.50 Potential changes in Britain
§ 1:9.75 Defamation law in Canada
§ 1:9.80 Defamation law in Australia
§ 1:9.85 Defamation law in New Zealand
§ 1:9.90 Defamation law in South Africa
§ 1:10 Common-law libel/slander distinction
§ 1:11 —In general
§ 1:12 —Special problems in applying the distinction
§ 1:13 —Policies underlying the distinction
§ 1:14 —Special definitional problems
§ 1:15 —Special harm requirement
§ 1:16 Constitutionalization of modern defamation law
§ 1:17 —*New York Times Co. v. Sullivan*
§ 1:18 —*Walker* and *Butts*
§ 1:19 —*Gertz v. Robert Welch, Inc.*
§ 1:20 —*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*
§ 1:21 Protection of reputation—Purposes
§ 1:22 —Protection of relational interests
§ 1:23 —Compensation for economic injury
§ 1:24 —Compensation for emotional injury
§ 1:25 —Promotion of human dignity
§ 1:26 —Deterrent function
§ 1:27 —Check and balance function
§ 1:27.50 Protecting reputation in the internet and social media age

§ 1:28 Countervailing functions of free speech
§ 1:29 —Individual interests and social interests
§ 1:30 —Self-fulfillment function
§ 1:31 —Political self-governance function
§ 1:32 —Broader enlightenment function
§ 1:33 —First Amendment functions
§ 1:34 Elements of the modern cause of action

CHAPTER 2. PUBLIC FIGURE/PRIVATE FIGURE DICHOTOMY

§ 2:1 Starting point: *New York Times Co. v. Sullivan*
§ 2:2 —Background
§ 2:3 —Holding and rationale
§ 2:3.50 Judicial critiques of *New York Times v. Sullivan*
§ 2:4 Extension of *New York Times* to public figures
§ 2:5 —Harlan opinion
§ 2:6 —Warren opinion
§ 2:7 —Absolutists—Black and Douglas
§ 2:8 —"Box score"
§ 2:9 Short-lived "public interest" approach
§ 2:10 Modern approach
§ 2:11 —Background
§ 2:12 —Overview of *Gertz v. Robert Welch, Inc.*
§ 2:13 "Access to the media" rationale
§ 2:14 "Assumption of risk" rationale
§ 2:15 Subcategories of public figures
§ 2:16 "Vortex" or "limited purpose" concept
§ 2:17 —*Firestone* case
§ 2:18 —*Wolston* case
§ 2:19 —*Hutchinson* case
§ 2:20 Practical application of the limited public figure standard
§ 2:21 —Elusive classification problem
§ 2:22 —"Public controversy" and "plaintiff involvement"
§ 2:23 —Multifactor tests
§ 2:24 —Relevant factors
§ 2:25 Bootstrap problem
§ 2:26 Preexisting controversy requirement
§ 2:27 —Problems attending investigative reporting
§ 2:28 —Flexible solution
§ 2:29 Interests of nonparticipants
§ 2:30 Plaintiff's voluntary involvement
§ 2:31 —In general
§ 2:32 —"Voluntary" participation vs. voluntary acceptance of media attention
§ 2:33 Can "involuntary" vortex public figures exist?
§ 2:34 —Involuntary status
§ 2:35 — —*Dameron* decision

§ 2:35.50 — —Case study: *Lohrenz v. Donnelly*
§ 2:36 —"All purpose" classification
§ 2:37 Access to counterspeech
§ 2:37.50 Merely responding to attacks does not make one a public figure
§ 2:38 Public divisiveness
§ 2:39 —In general
§ 2:40 —*Wolston* dicta
§ 2:41 —Critique of *Wolston*
§ 2:42 Plaintiff's efforts to influence
§ 2:43 Plaintiff's prominence in the controversy
§ 2:44 Effect of passage of time on public figure status
§ 2:45 —In general
§ 2:46 —Historical reporting vs. contemporaneous reporting
§ 2:47 —Critique of the distinction
§ 2:48 —Lower court treatment of the time issue
§ 2:49 —Can public figure status fade away?
§ 2:50 Extent of publication
§ 2:51 —"Context public figure"
§ 2:52 —Local all purpose public figure
§ 2:53 —Local vortex public figure
§ 2:54 —Litigation strategy
§ 2:55 Examples of limited public figures
§ 2:56 —Cautionary note
§ 2:57 —Differentiating limited purpose and all purpose public figures
§ 2:58 —Candidates for public office
§ 2:58.50 —Political consultants
§ 2:59 —Entertainers and other "personalities"
§ 2:60 — —Famous entertainers
§ 2:61 — —Less famous entertainers
§ 2:62 —Sports figures
§ 2:63 — —In general
§ 2:64 — —Figures from the past
§ 2:65 — —Scope of comment
§ 2:66 —Writers, artists, critics
§ 2:67 —Religious figures and organizations
§ 2:67.50 — —Plaintiffs found not to be public figures
§ 2:68 —Corporate executives, business leaders, entrepreneurs, and inventors
§ 2:69 — —In general
§ 2:70 — —*Tavoulareas* holding
§ 2:71 — —Summary
§ 2:71.50 —Restaurateurs
§ 2:72 —Professionals
§ 2:73 — —Attorneys
§ 2:74 — —Ethical or disciplinary matters
§ 2:75 — —Going beyond mere legal representation
§ 2:76 — —Other professionals

§ 2:76.50 —Education officials
§ 2:77 Defining the "all purpose" public figure
§ 2:78 —Significance of the category
§ 2:79 —Rarity of the category
§ 2:80 Examples of all purpose public figures
§ 2:81 —In general
§ 2:82 —Political candidates
§ 2:83 —Entertainers and other "personalities"
§ 2:84 —Political, social, and consumer activists
§ 2:85 —Business and community leaders; major corporations
§ 2:86 —Political confidants and advisors
§ 2:87 —Writers, critics, and columnists
§ 2:88 —Religious figures and organizations
§ 2:89 —Attorneys
§ 2:90 —Persons associated with criminal activity
§ 2:91 —Publishers and major media outlets
§ 2:92 Corporate plaintiffs and the public figure/private figure dichotomy
§ 2:93 —In general
§ 2:94 —Diminished corporate interest in reputation
§ 2:95 —*Dun & Bradstreet* and commercial speech doctrines
§ 2:96 —Pervasive influence of corporations
§ 2:97 —Minority "public interest" approach
§ 2:98 —Majority "particularized" approach
§ 2:98.50 — —Restaurants and food reviews
§ 2:99 Definition of public official
§ 2:100 —Not all public employees covered
§ 2:101 —No one single test
§ 2:102 —After the official leaves office
§ 2:103 Examples of public officials
§ 2:104 —Law enforcement personnel
§ 2:105 —Elected officials
§ 2:106 —Judicial, administrative, and military personnel
§ 2:107 —School personnel
§ 2:108 —Policy-making authority and access to the press
§ 2:108.50 Public officials who are not government employees
§ 2:109 Scope of comment on public officials
§ 2:110 —Application of the actual malice standard
§ 2:111 —Framework for analysis
§ 2:112 Absolute immunity for criticism of a public official
§ 2:113 —*New York Times* holding revisited
§ 2:114 —Other interpretations of *New York Times*
§ 2:115 —Assertions of absolute immunity in the *Westmoreland* and *Sharon* cases
§ 2:116 Role of judge and jury in classifying plaintiffs
§ 2:117 —Public officials
§ 2:118 —Public figures and private figures
§ 2:119 Determining status on motions for summary judgment
§ 2:120 —In general

§ 2:121 —"Evidentiary hearing" alternative

CHAPTER 3. FAULT REQUIREMENTS FOR DEFAMATION

§ 3:1 Constitutional fault standards
§ 3:2 —Dichotomy between public official/public figures and private figures
§ 3:3 —Actual malice
§ 3:4 —Negligence
§ 3:5 —Strict liability
§ 3:6 —Government defendants and the actual malice standard
§ 3:7 Strict Liability in suits not involving matters of public concern
§ 3:8 —*Dun & Bradstreet*
§ 3:9 —Rejection of the media/nonmedia distinction
§ 3:10 —*Milkovich* revisits the media/nonmedia distinction
§ 3:11 The First Amendment principle disfavoring discrimination among different means of communication
§ 3:12 First Amendment doctrine eschews discrimination against media speakers
§ 3:13 The free speech rights of corporations
§ 3:14 The First Amendment and the dynamic nature of modern media
§ 3:15 The media/nonmedia distinction in light of the *Citizens United* decision
§ 3:16 The Supreme Court's refusal to treat distinctions between media and nonmedia corporate speakers as valid under the First Amendment
§ 3:17 Strict Liability in suits not involving matters of public concern—Does *Dun & Bradstreet* open the door to strict liability in private figure cases not involving issues of public concern?
§ 3:18 "Matters of public concern" standard
§ 3:19 —*Dun & Bradstreet*
§ 3:20 —*Dun & Bradstreet* standard vs. the *Gertz* standard
§ 3:21 —Refitting of *Rosenbloom*
§ 3:22 Does *Dun & Bradstreet* have any impact on public official and public figure cases?
§ 3:23 Chart summarizing fault standards after *Dun & Bradstreet*
§ 3:24 Burden of proof in establishing actual malice and negligence
§ 3:25 Special "convincing clarity" standard
§ 3:25.50 —Clear and convincing evidence on summary judgment
§ 3:26 Preponderance of the evidence standard
§ 3:27 States are free to set standards of fault
§ 3:28 —Private figure cases involving matters of public concern

§ 3:29 —Private figure cases not involving matters of public concern
§ 3:30 States that have adopted some form of negligence as the standard for private figure cases
§ 3:31 States that have adopted actual malice in private figure cases
§ 3:32 Intermediate "gross irresponsibility" standard
§ 3:33 —*Chapadeau* test
§ 3:34 —Meaning of "gross irresponsibility"
§ 3:35 —*Chapadeau's* "sphere of legitimate public concern" standard
§ 3:36 —No media-nonmedia distinction applies
§ 3:37 Supreme court's actual malice test
§ 3:38 —Early supreme court statements
§ 3:39 —*Butts* and *Walker* elaborations
§ 3:40 —*St. Amant v. Thompson*
§ 3:41 —*Masson* dicta: suggestions for a new terminology
§ 3:42 Actual malice is a subjective standard, though "objective" evidence may be probative
§ 3:42.50 Actual malice is a subjective standard, though "objective" evidence may be probative—Proving actual malice when the defendant is an institutional entity and multiple individuals within the entity participate in the publication
§ 3:43 Actual malice is a subjective standard, though "objective" evidence may be probative—Standard is subjective
§ 3:44 —Objective data as probative of subjective state of mind
§ 3:45 —Cumulative impact question
§ 3:45.50 Actual malice is a subjective standard, though "objective" evidence may be probative—Actual malice and fabricated "first—hand" allegations of wrongdoing
§ 3:46 Distinguishing constitutional actual malice from common-law "ill-will" malice
§ 3:47 Common-law malice as probative of constitutional actual malice
§ 3:48 Failure to investigate
§ 3:49 —Lack of journalistic initiative alone not actual malice
§ 3:50 —Mere failure to check story against information in internal files not actual malice
§ 3:51 Failure to check obvious sources as evidence of actual malice
§ 3:52 —In general
§ 3:53 —*Sharon v. Time, Inc.*
§ 3:54 —*Harte-Hanks Communications, Inc. v. Connaughton*
§ 3:55 —When verification is impractical
§ 3:56 —Fact-checking by publications known for reliability
§ 3:57 Actual malice and reliance on sources and tips
§ 3:58 —In general

§ 3:59 —Knowledge of a source's possible bias
§ 3:60 —Reliance on secondary sources
§ 3:61 —Reliance on information supplied by wire services, free-lance writers, and authors
§ 3:62 —Anonymous sources
§ 3:63 —Reckless reliance: the Carol Burnett litigation
§ 3:64 —Careful fact-checking as evidence to rebut actual malice
§ 3:65 —Fabricated interviews: the *Clint Eastwood* litigation
§ 3:65.50 Role of denials by the plaintiff
§ 3:66 Actual malice and the reporting and editing process
§ 3:66.50 Deviations from standard journalistic practices probative of actual malice
§ 3:67 Actual malice and the reporting and editing process—Editorial point of view
§ 3:68 —Lack of balance
§ 3:69 —Choice of facts and resolution of inferences or ambiguities may be probative of actual malice
§ 3:70 —Issues posed by *Westmoreland v. CBS*
§ 3:71 —Preconceived story lines
§ 3:72 —Doubt within the media organization
§ 3:73 —Cautionary note
§ 3:74 —Misleading sequencing of events in a story
§ 3:75 Effect of deadline pressures on actual malice
§ 3:76 —"Hot news" vs. time to investigate
§ 3:77 —Live broadcasts
§ 3:78 Bearing of a retraction on actual malice
§ 3:79 —Determination of actual malice made at time of publication
§ 3:80 —Failure to retract
§ 3:81 —Retraction as evidence to rebut actual malice
§ 3:82 Other issues bearing on actual malice
§ 3:83 —Faulty memory
§ 3:84 —Misuse of language or legal terminology
§ 3:85 —Republications and follow-up stories
§ 3:86 —Hostile investigation and questioning
§ 3:87 —Letters to the editor
§ 3:87.50 —"Ghostwriters" and "as told by" books
§ 3:88 Constitutional definition of negligence under *Gertz*
§ 3:89 "Professional malpractice" model of negligence
§ 3:90 —In general
§ 3:91 —*Restatement*'s adoption of the professional model
§ 3:92 —Role of custom and expert testimony
§ 3:93 "Ordinary reasonable person" model of negligence
§ 3:94 Application of res ipsa loquitur
§ 3:95 Determination of negligence
§ 3:96 —Cost/benefit approach
§ 3:97 —Contexts in which negligence may arise
§ 3:98 —Typical recurring negligence problems

§ 3:99 Negligence arising from general failure to pursue further investigation
§ 3:100 Unreasonable reliance on sources as negligence
§ 3:101 —In general
§ 3:102 —Official sources
§ 3:103 Negligence in the formulation of conclusions, inferences, and interpretations
§ 3:104 —In general
§ 3:105 —Contradictory information
§ 3:106 Negligence in note taking and quoting of sources
§ 3:107 Negligence through misuse of language or legal terminology
§ 3:108 Negligence arising from mechanical errors or lapses in internal procedures
§ 3:109 —Mechanical errors
§ 3:110 —Failure to follow established policies and practices
§ 3:110.50 Negligence in failing to establish adequate training or vetting procedures
§ 3:111 Time pressures and deadlines
§ 3:112 Vicarious liability (respondeat superior)
§ 3:113 —In general
§ 3:114 —Employee's fault is imputed to employer
§ 3:115 —Must the employee have editorial or policy-making responsibility?
§ 3:116 Independent contractors, agents, and partners
§ 3:117 Vicarious liability (respondeat superior)—Punitive damages
§ 3:118 —Application to computer databases

CHAPTER 4. DEFAMATORY MEANING

§ 4:1 Definition of defamatory
§ 4:2 Recipient approach
§ 4:2.50 Evidence of how actual recipients understood the statement is probative of how average or reasonable recipients could understand it
§ 4:3 Recipient approach—English approach
§ 4:4 —American approach
§ 4:5 —Limitations on the American position
§ 4:5.50 —The reasonable recipient may be less than perfect, and may not be in the "majority" of recipients exposed to the communication
§ 4:6 —Effect of the passage of time
§ 4:7 Name-calling, insults, epithets, and verbal abuse
§ 4:8 —Mere abuse
§ 4:9 —Abuse made actionable by context
§ 4:10 —Alternative statements
§ 4:11 Rhetorical hyperbole
§ 4:12 —Relation to the fact/opinion distinction
§ 4:13 —*Greenbelt v. Bresler*

§ 4:14 —*Hustler v. Falwell*
§ 4:15 —Jokes and parody
§ 4:16 Defamation through implication
§ 4:17 —Significance of context
§ 4:18 —Extrinsic facts—"Inducement" and "innuendo"
§ 4:19 —Examples
§ 4:19.50 —Denial of wrongdoing by implying one's accuser is a liar
§ 4:20 Rules of construction
§ 4:21 —Reasonable construction rule
§ 4:22 —Innocent construction rule
§ 4:23 —Single-instance rule
§ 4:24 Special contexts for defamatory meaning
§ 4:25 Defamatory headlines
§ 4:26 Defamatory headlines are independently actionable
§ 4:27 Defamatory headlines—"Fair index" truth defense
§ 4:28 —Ambiguity creates a jury issue
§ 4:29 Special contexts for defamatory meaning—Headlines, captions, "teases," and publicity efforts—Note on photograph captions
§ 4:30 —"Visual defamation"
§ 4:31 — —Photographs
§ 4:32 — —Broadcasts
§ 4:33 —Cartoons
§ 4:34 —Song lyrics
§ 4:35 —Misquotations
§ 4:36 —Future conduct
§ 4:37 —Use of social science evidence or linguistic experts
§ 4:38 Role of judge and jury
§ 4:39 Identity: the "of and concerning the plaintiff" requirement
§ 4:40 —Reference need not be by name—Colloquium
§ 4:40.20 — —Photographs and captions linking a plaintiff to defamation
§ 4:40.50 —The constitutional status of the "of and concerning" requirement
§ 4:41 —Strict liability
§ 4:42 —Accidental reference
§ 4:43 —Impact of *Dun & Bradstreet*
§ 4:44 —Not everyone must identify the plaintiff
§ 4:45 —Fictional works
§ 4:46 — —Problems in general
§ 4:47 — —Factors used to establish identity in fiction
§ 4:48 — —Cross-reference to fault requirements, and a proposed framework for handling the special problems posed by fiction
§ 4:49 — —Case study: *Polsby v. Spruill*
§ 4:50 Group defamation
§ 4:51 —Racial, ethnic, or religious disparagement

§ 4:52 —Criminal liability for racial, ethnic, or religious group defamation
§ 4:53 —Renewed interest in group defamation and criminal libel as a means of combatting hate speech
§ 4:54 — —First amendment doctrines that protect hate speech
§ 4:55 — — —Neutrality principle
§ 4:56 — — —Emotion principle
§ 4:57 — — —Symbolism principle
§ 4:58 — — —Causation principle
§ 4:59 — — —Precision principle
§ 4:60 — —Circumstances in which hate speech may arguably be punished
§ 4:61 — — —Two-class theory
§ 4:62 — — —Fighting-words doctrine
§ 4:63 — — —Protection of persons or property
§ 4:64 — — —Discriminatory conduct
§ 4:65 — — —Theory of hate speech as a relational harm
§ 4:66 — — —Public speech/private speech dichotomy
§ 4:67 — —Summary
§ 4:68 —Factors used to establish or deny civil liability for group defamation
§ 4:69 — —Size of the group
§ 4:70 — —Reference to all or only part of a group
§ 4:70.50 Attempting to criminalize mere "lies"—The Stolen Valor Act example
§ 4:71 Group defamation—Factors used to establish or deny civil liability for group defamation—Intensity of suspicion test
§ 4:72 Who may sue
§ 4:73 —No defamation of the dead
§ 4:74 —No vicarious defamation
§ 4:75 —Corporations
§ 4:76 —Governmental entities
§ 4:77 Publication
§ 4:78 —General principles
§ 4:79 —Publication must be intentional or negligent
§ 4:80 —Defamation by will
§ 4:81 —Repetition by the plaintiff
§ 4:82 —Publication through act of omission
§ 4:83 —Publication and online computer networks
§ 4:84 — —*Cubby v. Compuserve* decision
§ 4:85 — —*Prodigy* decision
§ 4:86 — —Federal immunity created by the Communications Decency Act
§ 4:86.50 Anonymity and the Internet
§ 4:87 Liability for republication
§ 4:88 —Expressions of disbelief
§ 4:89 —Fault still required

§ 4:90 —Wire service defense
§ 4:91 —Liability of originator
§ 4:92 —Distinction between primary and secondary publishers
§ 4:92.50 Vanity presses as media publishers
§ 4:93 Liability for republication—Single-publication rule
§ 4:93.50 — —Single-publication rule and Internet publication
§ 4:93.60 —Single publication rule—Hyperlinks to previously published defamatory material
§ 4:93.70 — —Liability for material and substantive alterations to an existing Internet article
§ 4:94 —When publication occurs
§ 4:94.50 The laches doctrine and time limits in cases seeking equitable relief
§ 4:95 Liability for republication—"Procured publication"
§ 4:96 Neutral reportage privilege
§ 4:97 —Commentary: Weakness of the policy arguments supporting adoption of the privilege
§ 4:98 —Origins of the privilege: *Edwards v. National Audubon Society*
§ 4:99 —Elements of the privilege
§ 4:100 —Judicial acceptance of the concept
§ 4:100.50 —Judicial rejection of the neutral reportage privilege
§ 4:101 —Privilege in the context of private figure suits
§ 4:102 Criminal liability for false electioneering and false political advertising

CHAPTER 5. TRUTH AS A CONSTITUTIONAL DEFENSE

§ 5:1 Overview
§ 5:2 —Early common law rules
§ 5:3 —American position
§ 5:4 Emergence of truth as a constitutional defense in public official and public figure cases
§ 5:5 Truth as a constitutional defense in private figure cases
§ 5:6 —*Gertz* and *Dun & Bradstreet* cases
§ 5:7 —*Cox Broadcasting* case
§ 5:8 —*Firestone* case
§ 5:9 —*Philadelphia Newspapers, Inc. v. Hepps*
§ 5:10 Truth issue in cases governed by *Dun & Bradstreet*
§ 5:11 Burden of proving the truth
§ 5:12 Burden of proof in public official and public figure cases
§ 5:13 Burden of proof in private figure cases
§ 5:14 Substantial truth test
§ 5:15 —Specific defamatory charges
§ 5:16 —Generalized defamatory charges
§ 5:17 —Minor inaccuracies
§ 5:17.50 —Falsity by omission of material facts
§ 5:18 —Repetition of another's defamatory communication

§ 5:19 Substantial truth test: specific defamatory charges
§ 5:20 —Overview
§ 5:21 —Relationship to fault requirements
§ 5:22 Substantial truth test: generalized defamatory charges
§ 5:23 Minor inaccuracies in detail
§ 5:24 —Errors in terminology
§ 5:25 —Minor "literary" embellishments
§ 5:26 —Decision in *Masson v. New Yorker Magazine, Inc.*
§ 5:27 —Interpretations of *Masson*
§ 5:28 —Is the statement actually defamatory?
§ 5:29 Substantial truth and accurate repetition of another's defamation
§ 5:30 Increasing use of truth as a defense
§ 5:31 —Traditional caution
§ 5:32 —New boldness in asserting the defense
§ 5:33 —Impact of modern fault rules
§ 5:34 —Modern examples
§ 5:35 —"Psychological cost" to the plaintiff
§ 5:36 —Risks

CHAPTER 6. OPINION AND FAIR COMMENT

§ 6:1 Introduction: elusive notions of "fact" and "opinion"
§ 6:2 New world after *Milkovich*
§ 6:3 Original common law position—fair comment
§ 6:4 —Evolution of fair comment
§ 6:5 —Persons and institutions subject to the privilege
§ 6:6 —Comment must be "fair"
§ 6:7 —Continued vitality of the privilege—Stuation prior to *Milkovich*
§ 6:8 —Situation after *Milkovich*
§ 6:9 Supreme court and the fact/opinion dichotomy
§ 6:10 —*Greenbelt v. Bresler*
§ 6:11 —*Gertz* pronouncement
§ 6:12 —*Letter Carriers* holding
§ 6:13 —Synthesis of *Bresler, Gertz*, and *Letter Carriers*
§ 6:14 —*Hustler v. Falwell* decision
§ 6:15 —*Milkovich v. Lorain Journal Co.* decision
§ 6:16 — —Facts
§ 6:17 — —Procedural posture of the case
§ 6:18 — —Alignment of the justices in *Milkovich*
§ 6:19 — —Court's treatment of the common law
§ 6:20 — —Court's treatment of *New York Times* and its progeny
§ 6:21 — —Court's treatment of opinion
§ 6:22 —Lower court interpretations of *Milkovich*
§ 6:23 — —*Immuno* decision
§ 6:24 — — —Court's First Amendment analysis
§ 6:25 — — —Court's state law analysis

§ 6:26 — — —Lessons of *Immuno*
§ 6:27 — —Other lower court decisions
§ 6:28 "Pure Opinion" vs. "Mixed Opinion": the *Restatement Second* approach
§ 6:29 —Pure opinion
§ 6:30 —Mixed opinion
§ 6:31 —Examples
§ 6:32 Elaborations on the *Restatement*
§ 6:33 —Deductive opinions
§ 6:34 —Evaluative opinions
§ 6:35 —Dishonestly maintained evaluative opinions
§ 6:36 — —Proof problem
§ 6:37 — —Compromise position
§ 6:38 —Informational opinions
§ 6:39 Judicial variations on the *Restatement*
§ 6:40 —Elaborations on "pure opinion"
§ 6:41 —"Hybrid" or "factually laden" opinions
§ 6:41.50 Factual statements embedded in opinions should be construed "as a whole"
§ 6:42 Judicial variations on the *Restatement*—Examples
§ 6:43 —Loss of the absolute privilege for hybrid opinions
§ 6:43.50 — —The underlying predicate facts must themselves be true
§ 6:44 Verifiability factor
§ 6:45 —In general
§ 6:46 —Relationship to the burden of proof on falsity issue
§ 6:47 Totality of circumstances approach
§ 6:48 —*Information Control* three part version
§ 6:49 —*Ollman v. Evans:* a case study
§ 6:50 — —Factual background
§ 6:51 — —Test set forth in *Ollman*
§ 6:52 — — —Common usage or meaning of the language
§ 6:53 — — —Verifiability
§ 6:54 — — —Context and cautionary language
§ 6:55 — — —Broader social context of the speech
§ 6:56 — —*Ollman* test applied
§ 6:57 —Political arena and public controversy factors
§ 6:58 — —Judge Robert Bork's "political arena" innovation
§ 6:59 — —Usefulness of the political arena approach
§ 6:60 Defamatory opinions
§ 6:61 Role of the judge and jury
§ 6:62 —Majority position
§ 6:63 —Minority position
§ 6:64 —Comparison of majority and minority views
§ 6:65 Private figures vs. public officials and public figures; the protection for opinion
§ 6:66 Fact/opinion distinction in specific situations
§ 6:67 —Lawyers and judges
§ 6:67.50 —Medical and psychological opinions

§ 6:67.60 Academic and scientific disputes
§ 6:68 Fact/opinion distinction in specific situations—Labor disputes
§ 6:69 —Political campaigns
§ 6:70 —Op-Ed articles, letters to the editor, and political cartoons
§ 6:70.50 —Defamation on Twitter, Facebook, and other social media
§ 6:71 —Internet message boards—General trend protecting such expression
§ 6:72 — —Exception to the trend: the *Hinerman* decision—A case study
§ 6:73 —Ideologically amorphous statements
§ 6:74 —Religious opinion and the intersection of the First Amendment Speech and Religion Clauses
§ 6:74.50 — —Lower court cases on religious opinion
§ 6:75 —Literary and artistic criticism
§ 6:76 — —Overview
§ 6:76.50 —Medical and psychological opinions
§ 6:77 —Literary and artistic criticism—*Moldea v. New York Times Co.*
§ 6:78 — — —Text of the review
§ 6:79 — — —Moldea's allegations
§ 6:80 — — —Court of appeals and the two *Moldeas*
§ 6:81 — — — —"Too much sloppy journalism"
§ 6:82 — — — —Joe Namath and the inside information sheet
§ 6:83 — — — —1958 Colts versus Giants Playoff
§ 6:84 — — — —Warmed over hot stuff
§ 6:85 — — — —Reviving the Carroll Rosenbloom story
§ 6:86 — — — —Joe Namath's "sinister meeting" with Lou Michaels
§ 6:87 — — —Conclusion
§ 6:88 —Restaurant and food critiques
§ 6:89 —Allegations of criminal activity
§ 6:89.50 —Allegations of criminal activity—Denial of wrongdoing by implying one's accuser is a liar
§ 6:90 —Abusive language, name-calling, ridicule, and jest
§ 6:91 —Commercial disputes
§ 6:92 —Talk show banter
§ 6:93 Unique liability issues surrounding talk shows
§ 6:94 —Public/private distinction
§ 6:95 —Intentional infliction of emotional distress: Rejection of the *Hustler* standard for private figures
§ 6:96 —Context
§ 6:97 —Religious broadcasts
§ 6:98 —"Shock jocks": *Roach v. Stern*
§ 6:99 Music Lyrics

Volume 2

CHAPTER 7. SPECIAL HARM—LIBEL AND SLANDER PER SE RULES

§ 7:1 Overview of Special Harm
§ 7:2 Special Harm, Actual Harm, and Presumed Harm
§ 7:3 —Actual harm
§ 7:4 —Presumed harm
§ 7:5 —Significance of the distinctions
§ 7:6 Constitutional minimums set by *Gertz* and *Dun & Bradstreet*
§ 7:7 —Constitution does not require special harm
§ 7:8 —Constitutional issues when state law does not require special harm
§ 7:9 Original common-law position
§ 7:10 Four common-law slander per se categories
§ 7:11 —Imputations of criminal conduct
§ 7:12 — —In general
§ 7:13 — —Moral turpitude
§ 7:14 —Allegations tending to injure another in his or her trade, business, profession, or office
§ 7:15 — —In general
§ 7:16 — —The nexus requirements
§ 7:17 —Imputations of loathsome disease
§ 7:18 —Imputations of unchastity
§ 7:19 Introduction of libel per quod
§ 7:20 —Use of "per se"
§ 7:21 —Emergence of libel per quod
§ 7:22 — —Libel per se
§ 7:23 — —Libel per quod
§ 7:24 — —Slander per se
§ 7:25 — —Slander per quod
§ 7:26 Hybrids of the per se/per quod distinction
§ 7:27 —Combining the approaches
§ 7:28 —Requirement of fault regarding extrinsic facts
§ 7:29 —Multiple lines of precedent
§ 7:30 Proposal for a simplified, fair reform
§ 7:31 —Abolish libel/slander distinction
§ 7:32 —Eliminate all special harm rules
§ 7:33 —Allow presumed damages if actual malice is shown
§ 7:34 —Permit jury to weigh all factors
§ 7:35 Judicial arguments favoring retention of traditional defamation per se rules

CHAPTER 8. COMMON-LAW PRIVILEGES

§ 8:1 Introduction: function of common-law privileges
§ 8:2 —Division between absolute and conditional privileges

§ 8:3 —"Fair report" privilege
§ 8:4 Absolute privilege of consent
§ 8:5 Absolute privilege for participants in judicial proceedings
§ 8:6 —Who is protected
§ 8:7 — —Judges
§ 8:8 — —Attorneys
§ 8:9 — —Parties and statements in documents
§ 8:10 — —Witnesses
§ 8:11 — —Judicial personnel
§ 8:12 — —Jurors
§ 8:13 —Defamatory statement must be relevant to the judicial proceeding
§ 8:14 —What qualifies as a "judicial proceeding"
§ 8:15 — —Any governmental body or proceeding engaging in judicial or quasi-judicial function
§ 8:16 — —Privilege extends to all aspects of the proceeding
§ 8:17 — —Does not extend to press conference or other extra-judicial activity
§ 8:18 —Questions of law
§ 8:19 Absolute immunity for participants in legislative proceedings
§ 8:20 —Federal rule
§ 8:21 — —Aides and assistants
§ 8:22 — —Committee reports and staff
§ 8:23 — —Holding in *Hutchinson v. Proxmire*
§ 8:24 —State legislators
§ 8:25 —Subordinate legislative bodies
§ 8:26 —Witnesses in legislative proceedings
§ 8:27 Absolute immunity for executive and administrative officials
§ 8:28 —Federal officials
§ 8:29 —Scope of immunity
§ 8:30 —State officials
§ 8:31 — —States that follow the federal model
§ 8:32 — —States that limit absolute immunity to superior state officials
§ 8:33 — —States that recognize no executive or administrative absolute immunity
§ 8:34 Miscellaneous absolute privileges
§ 8:35 —Spouses
§ 8:36 —Publication required by law
§ 8:36.50 Reports to government agencies
§ 8:37 —Sovereign immunity
§ 8:38 Conditional privileges: an overview
§ 8:39 —Conditional and absolute privileges compared
§ 8:40 —Relationship to modern constitutional fault rules
§ 8:41 — —Partial duplication of functions problem
§ 8:42 — —Renewed significance of conditional privileges after *Dun & Bradstreet*

§ 8:43 — —Solutions to the duplication problem in *Gertz* fault cases
§ 8:44 — —Solutions to the duplication problem in *Gertz* fault cases—Requiring fault greater than negligence to defeat the privilege
§ 8:45 — —Solutions to the duplication problem in *Gertz* fault cases—Alternative of discarding conditional privileges in *Gertz* fault cases
§ 8:46 "Interest-related" conditional privileges
§ 8:47 —Statements made to protect the publisher's interest
§ 8:48 —Statements made in furtherance of the interests of others
§ 8:49 —Requested vs. volunteered information
§ 8:50 — —Credit reports
§ 8:51 — — —Rules prior to *Dun & Bradstreet*
§ 8:52 — — —Potential influence of the *Dun & Bradstreet* decision
§ 8:53 — —Reports on employees
§ 8:54 — —Petitions clause
§ 8:55 —Statements made to protect a common interest
§ 8:56 — —In general
§ 8:57 — —Family relationships
§ 8:58 —Statements to those who act in the public interest
§ 8:59 —Cross-reference to the common law fair comment privilege
§ 8:60 Abuse of privilege
§ 8:61 —Excessive publication
§ 8:62 —Publishing for reasons other than protection of the interest giving rise to the privilege
§ 8:63 —Publication with common-law (ill-will) malice
§ 8:64 —Negligence
§ 8:65 —Actual malice, knowledge of falsity, recklessness
§ 8:66 "Fair report" privilege
§ 8:67 —Function and rationale
§ 8:67.50 —The attribution requirement
§ 8:68 —Proceedings covered
§ 8:69 — —Judicial proceedings
§ 8:70 — — —Official action
§ 8:70.50 — — —Defeasance of the privilege through actual or common-law malice
§ 8:71 — — —Secret proceedings
§ 8:72 — —Arrests and other law enforcement activity
§ 8:73 — —Legislative proceedings
§ 8:74 — —Executive, administrative, and other public proceedings
§ 8:75 —Requirement of accuracy and fairness
§ 8:76 — —Substantial accuracy test
§ 8:77 — —Role of judge and jury
§ 8:78 Reports published with actual malice

CHAPTER 9. DAMAGES AND OTHER REMEDIES

§ 9:1 Overview
§ 9:2 —Linkage to substantive rules
§ 9:3 —Interest in reform
§ 9:4 —Terminology
§ 9:5 Nominal damages
§ 9:6 —Plaintiff's preference
§ 9:7 —Jury's judgment
§ 9:8 — —Award of significant damages not appropriate
§ 9:9 — —As a "peg" for punitive damages
§ 9:10 —Constitutional questions
§ 9:11 Compensatory damages
§ 9:12 —Types
§ 9:13 General damages
§ 9:14 —Types
§ 9:15 —Constitutional rules
§ 9:16 Presumed damages
§ 9:17 —Function and rationale
§ 9:18 —When constitutionally permissible
§ 9:19 — —When actual malice is established
§ 9:20 — —Cases governed by *Dun & Bradstreet*
§ 9:21 — —Not permitted in *Gertz* negligence cases
§ 9:22 Actual damages
§ 9:23 —When constitutionally required
§ 9:24 —Two subdivisions
§ 9:25 —Decisions restricting the award
§ 9:26 — —Consistency with the common law tradition
§ 9:27 —Emotional distress as a free-standing component of actual damages
§ 9:28 — —*Firestone* case
§ 9:29 — —Practical result: presumed harm through the back door
§ 9:30 —Proving actual harm to reputation
§ 9:31 — —Interference with existing relations
§ 9:32 — —Interference with future relations
§ 9:33 — —destruction of favorable public image
§ 9:34 — —Negative public image
§ 9:34.50 —Damages arising from defamation in social media
§ 9:35 Special damages
§ 9:36 Punitive damages
§ 9:37 —When constitutionally permitted: under *Gertz*
§ 9:38 —Under *Dun & Bradstreet*
§ 9:39 —First Amendment considerations
§ 9:40 —Eighth Amendment does not apply
§ 9:41 —When permitted under state law
§ 9:42 — —General tort principles
§ 9:43 — —Defamation rules

§ 9:44 — — —Common law malice
§ 9:45 — — —Evidentiary standard
§ 9:46 — —Other factors considered in assessing punitive damages
§ 9:47 — — —Financial condition of defendant
§ 9:48 — — —Actual harm
§ 9:49 — — —Reasonable proportionality to actual damages
§ 9:50 — — —Defendant's failure to retract
§ 9:51 —Jurisdictions that do not permit punitive damages
§ 9:52 Chart of constitutional damages rules
§ 9:52.50 Damages recoverable when the plaintiff is a corporation or organization
§ 9:53 Factors in mitigation and aggravation
§ 9:53.50 Attorneys' fees and public relations expenses spent to mitigate
§ 9:54 Factors in mitigation and aggravation—Nature of the defamation
§ 9:55 —Form and extent of publication
§ 9:56 —Extent to which defamation believed by recipients
§ 9:57 —Plaintiff's prior reputation
§ 9:58 — —Plaintiff's good reputation
§ 9:59 — —Plaintiff's bad reputation
§ 9:60 — —Prior bad acts
§ 9:61 — —"Libel-proof" plaintiff
§ 9:62 —Prior publication
§ 9:63 —Prior recoveries or settlements
§ 9:64 —Defendant's good faith or bad faith
§ 9:65 —Evidence of provocation by the plaintiff
§ 9:66 —Retraction
§ 9:67 Judicial review of damages awards
§ 9:68 —Modern approach
§ 9:69 Judicial review of damages—Use of comparators in reviewing jury verdicts
§ 9:70 Retraction
§ 9:71 —At common law
§ 9:72 —Proliferation of statutes
§ 9:73 —Variations in statutory approaches
§ 9:74 — —Media vs. nonmedia
§ 9:75 — —Notice provisions
§ 9:76 — — —Timing
§ 9:77 — — —Prerequisite to suit
§ 9:78 — — —Prerequisite to certain types of damages
§ 9:79 — —Effect of retraction
§ 9:80 — —Aspects of a retraction
§ 9:81 — — —Content
§ 9:82 — — —Form and placement
§ 9:83 — — —Timing
§ 9:84 —Failure to retract as justification for punitive damages
§ 9:85 Equitable relief

§ 9:86 —The role of First Amendment prior restraint doctrine
§ 9:87 —Rationales supporting the granting of injunctive relief
§ 9:88 —Injunctions are permissible to enjoin future repetition of defamatory statements after an adjudication of liability
§ 9:89 —Injunctive relief: equity will not enjoin a libel—Recharacterizing the harm
§ 9:90 —Right of reply and compulsory retraction
§ 9:91 — —Right of reply
§ 9:92 — —Compulsory retraction
§ 9:93 —Declaratory judgments
§ 9:94 —Annenberg libel reform proposal
§ 9:95 — —Summary of Annenberg proposals
§ 9:96 — —Text of Annenberg Libel Reform Act
§ 9:97 — —Conclusion
§ 9:98 —Iowa project
§ 9:99 — —How the program works
§ 9:100 — —Summary of libel dispute resolution procedures
§ 9:101 — —Neutrals
§ 9:102 — —Cost
§ 9:103 — —Iowa libel research project
§ 9:104 — —American Arbitration Association
§ 9:105 —Uniform law commissioners proposal
§ 9:106 Recent trends in damages awards—a statistical summary
§ 9:107 SLAPP suits and anti-SLAPP legislation
§ 9:108 SLAPP suits and media defendants
§ 9:109 Variations among SLAPP statutes
§ 9:110 SLAPP statutes and potential conflicts with the Federal Rules of Civil Procedure
§ 9:111 SLAPP statutes and choice of law conundrums
§ 9:112 Monetary settlements in defamation and related cases
§ 9:113 Liability of corporate officers or directors in shareholders derivative actions

PART II. INVASION OF PRIVACY AND RELATED TORTS

CHAPTER 10. INVASION OF PRIVACY

§ 10:1 Overview
§ 10:2 —Prosser's four part subdivision of the law of privacy
§ 10:3 —Vicarious invasion of privacy
§ 10:4 —Special note on the right of publicity
§ 10:4.50 — —Appropriation and trade names
§ 10:5 — —First Amendment tensions with the right
§ 10:6 — —Commercial vs. noncommercial uses
§ 10:6.25 Relationship to copyright law

§ 10:6.30 Fantasy sports leagues
§ 10:6.40 Right of publicity claims arising from video games based on real people
§ 10:6.50 Assignability and descendability
§ 10:6.75 Prior restraints in appropriation and right of publicity cases
§ 10:7 False light invasion of privacy
§ 10:8 —Overview
§ 10:9 —Relationship to defamation
§ 10:10 — —Problem of distinguishing the torts
§ 10:11 — —False light claim need not involve defamatory speech
§ 10:12 — —Statement must be highly offensive to a reasonable person
§ 10:13 — —How can a nondefamatory statement be offensive?
§ 10:14 —First Amendment fault standards
§ 10:15 — —Ambiguities
§ 10:16 — —Division among lower court decisions
§ 10:17 —Types of false light claims
§ 10:18 — —False association
§ 10:19 — —Distortion or exaggeration
§ 10:20 — — —Photographs
§ 10:21 — — —Film and broadcast footage
§ 10:22 — — —Printed matter
§ 10:23 —Minor and insubstantial errors
§ 10:24 —Fiction and the false light tort
§ 10:25 — —Identity issues
§ 10:26 — —Special First Amendment considerations
§ 10:27 — —Survival
§ 10:28 —*Renwick* case as an assault on the false light tort
§ 10:28.50 Other rejections of the false light tort
§ 10:29 Intrusion
§ 10:30 —Activities covered
§ 10:30.50 —Unconsented recording
§ 10:31 —Activities covered—Essence of intrusion
§ 10:32 — —Paparazzi and the aftermath of the death of Princess Diana
§ 10:33 —Intrusion and trespass in news gathering
§ 10:34 — —Defining seclusion; public vs. private matters
§ 10:34.50 — — —Intrusion into business and commercial settings
§ 10:35 — —Consent
§ 10:36 — — —"Ambush" interview techniques
§ 10:36.50 — —Media "ride-alongs"
§ 10:36.60 — —Intrusion caused by improper inducement by a third party to persuade another to reveal private information
§ 10:36.70 — —Media and government partnerships in surreptitious surveillance
§ 10:37 Publication of private facts

§ 10:38 —There must be a public disclosure
§ 10:39 —Facts must be private
§ 10:39.50 — —Distinction between revelation of a private "fact" and revelation of video, audio, or images with graphic depictions of private facts
§ 10:39.75 — —Protest activity involving surveillance and video or photographs
§ 10:40 — —Breach of confidential relationship
§ 10:40.10 — —Revenge porn
§ 10:41 — —Breach of promise by reporter
§ 10:42 —Disclosure offensive to a reasonable person
§ 10:43 —Constitutional law restrictions
§ 10:43.50 Is there a constitutional right to informational privacy?
§ 10:44 Publication of private facts—Constitutional law restrictions—Public records
§ 10:45 — — —*Cox Broadcasting Corp. v. Cohn*
§ 10:46 — — —After *Cox*—The access cases
§ 10:47 — — —Definition of public record
§ 10:48 — — —*Butterworth* decision and evolving First Amendment standards
§ 10:48.50 Prior restraints and privacy for inadvertently released material in sexual abuse cases—The *Kobe Bryant* case
§ 10:49 Publication of private facts—Constitutional law restrictions—Newsworthiness privilege
§ 10:50 — — —Privilege is broadly defined
§ 10:51 — — —Nexus requirement
§ 10:52 — — —Balancing newsworthiness against intrusiveness
§ 10:53 — — —Effect of the passage of time
§ 10:54 — — —Public disclosure in the 1990s—A comment on AIDS and outing
§ 10:54.50 Privacy and autopsy photographs: the *Favish* Vince Foster case
§ 10:54.60 Privacy and funerals
§ 10:55 Liability for surreptitious newsgathering
§ 10:56 —Undercover reporting
§ 10:56.50 Illegally intercepted electronic material—The *Barnticki v. Vopper* decision
§ 10:56.70 — —Elaborations on *Bartnicki*: subsequent interpretations on when the First Amendment does and does not bar trafficking in truthful information, and what is meant by information "lawfully obtained"
§ 10:57 —Emergency rescue shows
§ 10:58 —Antipaparazzi legislation

CHAPTER 11. EMOTIONAL DISTRESS, INJURIOUS FALSEHOOD, AND NEGLIGENT PUBLICATION

§ 11:1 Emotional distress

§ 11:2 —Intentional infliction of emotional distress, or "outrage"
§ 11:3 — —Elements
§ 11:4 — — —Intentional or reckless conduct
§ 11:5 — — —Extreme and outrageous conduct
§ 11:6 — — —Severe emotional distress
§ 11:7 — — —Causation
§ 11:8 — —Application to media cases
§ 11:9 — —*Hustler v. Falwell* litigation
§ 11:10 — —*Hustler v. Falwell* litigation—Lower court decisions
§ 11:11 — — —Analysis of the fourth circuit holding
§ 11:12 — — —Supreme court's decision
§ 11:13 — —Private figure cases
§ 11:13.50 Military funeral protests and emotional distress—*Snyder v. Phelps*
§ 11:14 Emotional distress—Future of the intentional infliction of emotional distress tort
§ 11:15 — —Nonspeech cases
§ 11:16 — — —Problems of a simplistic division
§ 11:17 — — —Nonspeech masquerading as speech
§ 11:18 — —Emotional distress for the content of speech
§ 11:19 — — —Modern examples
§ 11:20 — — —Use of other torts
§ 11:21 — — —Sexual harassment
§ 11:22 — — —*Firestone* case example
§ 11:23 — —Multitiered solution for the future
§ 11:24 — — —Scale of liability factors
§ 11:25 — — —Logic of the scale
§ 11:26 — — —Applying the scale
§ 11:27 — — —Lax standard for private figure/private speech cases
§ 11:28 — — —Conclusion
§ 11:29 —Negligent infliction of emotional distress
§ 11:30 — —Recovery for mental disturbance
§ 11:31 — —Physical manifestation position
§ 11:32 — —Emergence of "pure" emotional distress recovery
§ 11:33 — —Applicability to media
§ 11:34 Injurious falsehood
§ 11:35 —Elements of the cause of action
§ 11:36 — —Falsity
§ 11:37 — —Injury to pecuniary interests
§ 11:38 — —Publication
§ 11:39 — —Special harm
§ 11:40 — —Intent, malice, or fault
§ 11:40.50 Case study: the *Suzuki v. Consumers Union* litigation
§ 11:41 —Common law privileges
§ 11:42 —Constitutional privileges
§ 11:43 —Relationship between defamation and injurious falsehood

§ 11:44 —Remedies
§ 11:45 — —Damages for pecuniary loss
§ 11:46 — —Punitive damages
§ 11:47 — —Availability of injunctive relief
§ 11:48 Negligent publication
§ 11:49 —Faulty instructions and misinformation
§ 11:50 —Inducement of self-destructive behavior
§ 11:50.50 —Violent material and children
§ 11:51 —Liability for publication of criminal solicitations
§ 11:52 Aiding and abetting criminal activity
§ 11:53 —Case study: The *Hit Man* litigation
§ 11:54 — —Legal arguments
§ 11:55 — —Court of appeals decision in *Rice v. Paladin Press*
§ 11:56 —Liability for violent films—the *Natural Born Killers* litigation
§ 11:57 —"Surprise television" and the Jenny Jones case
§ 11:58 —Liability for violent Internet postings

PART III. LITIGATION, COUNSELING, AND STRATEGY

CHAPTER 12. LITIGATION

§ 12:1 Subject matter jurisdiction
§ 12:2 —State courts
§ 12:3 —Federal court limitations
§ 12:4 —Federal court subject matter jurisdiction over defamation and privacy cases
§ 12:5 — —Diversity of citizenship—Nonmedia cases
§ 12:6 — — —Media cases
§ 12:7 — —Rule of complete diversity
§ 12:8 —Attempts to manufacture diversity
§ 12:9 In personam jurisdiction
§ 12:10 —Lack of jurisdiction
§ 12:11 —Due process limitations
§ 12:12 — —Minimum contacts requirement: physical presence
§ 12:13 — — —*International Shoe* and its progeny
§ 12:14 — — —*World-Wide Volkswagen* formulation
§ 12:15 — —Relevance of the First Amendment: the pre-1984 split of authority
§ 12:16 — — —Supreme Court's resolution in *Calder v. Jones* and *Keeton v. Hustler Magazine, Inc.*
§ 12:17 — —Factors that influence in personam jurisdiction determinations
§ 12:18 — — —Circulation level
§ 12:19 — — —Nexus between the story and the forum state
§ 12:20 — — —Plaintiff's residence and contacts in forum
§ 12:20.50 — — —Treating authors separately from publishers

§ 12:21 — — —News gathering
§ 12:22 — — —Advertising and solicitation efforts
§ 12:23 — — —Freelance writers
§ 12:24 —Long arm statutes
§ 12:24.50 —Jurisdiction in Internet cases
§ 12:24.60 Identifying defendants' identities in anonymous Internet defamation cases
§ 12:25 Conflicts of laws
§ 12:26 —Relationship to in personam jurisdiction
§ 12:27 —Forum shopping
§ 12:28 —Vulnerability to abusive forum shopping
§ 12:29 — —Double counting the first amendment
§ 12:30 —Approaches to conflicts problems
§ 12:31 —Territorialist approaches
§ 12:32 — —Place of the wrong
§ 12:33 — —Relation to single publication rule
§ 12:34 — —Practical result of territorialist approach
§ 12:35 —Most significant relationship approach
§ 12:36 —Better rule approach
§ 12:37 —Governmental interests analysis
§ 12:38 —Forum law approach
§ 12:39 —Constitutional limitations on choice of law decisions
§ 12:40 — —Impact of *Keeton*
§ 12:41 — —Enforcement of foreign judgments
§ 12:41.30 Foreign judgments and the American SPEECH Act
§ 12:41.50 Foreign judgments and the Internet; the Australian *Gutnick* litigation
§ 12:42 Removal, transfer, and Forum non conveniens
§ 12:43 —Removal from state court to federal court
§ 12:44 —Transfer
§ 12:45 —Forum non conveniens
§ 12:46 —First amendment considerations
§ 12:47 Pleading considerations
§ 12:48 —Defamatory meaning and the "of and concerning" requirement
§ 12:49 —Required fault level
§ 12:50 —Special damages
§ 12:51 —Other considerations
§ 12:51.50 —Issues generated by anti-SLAPP legislation
§ 12:52 Special discovery issues
§ 12:53 —Inquiry into editorial process
§ 12:54 — —Scope of the inquiry
§ 12:55 — —Relationship to confidential source privilege
§ 12:56 —Confidential sources
§ 12:56.50 Motion to compel discovery when confidential source privilege invoked
§ 12:57 Special discovery issues—Confidential sources—Qualified First Amendment privilege
§ 12:58 — — —Lower court interpretations of *Branzburg*

§ 12:59 — — —Balancing test
§ 12:59.50 — —Portents of demise of the privilege: The *Judith Miller* litigation
§ 12:60 — —State shield laws
§ 12:61 — — —Absolute immunity
§ 12:62 — — —Qualified immunity
§ 12:62.50 — —Determining who may invoke a reporter's privilege
§ 12:62.60 Diminished protection for non-confidential journalistic material
§ 12:63 Special discovery issues—Confidential sources—Sanctions for failure to reveal sources
§ 12:64 — — —Contempt
§ 12:65 — — —Striking of pleadings and entry of default judgment
§ 12:66 — — —Preclusion of reliance on source or presumption that no source existed
§ 12:66.50 —Protective orders and third-party discovery
§ 12:67 —Breach of contract for revealing sources
§ 12:68 —Confidential sources and tortious interference with contract
§ 12:68.50 —Discovery in SLAPP motions
§ 12:69 Summary judgment practice
§ 12:70 —Competing First Amendment tensions
§ 12:71 —Burger footnote in *Hutchinson v. Proxmire*
§ 12:72 —Post-*Hutchinson* split and the neutrality principle
§ 12:73 — —Analogy to *Calder* and *Keeton*
§ 12:74 — —Summary judgment should not be especially "favored" or "disfavored"
§ 12:75 —Defeating a summary judgment motion in public figure cases: actual malice obstacle
§ 12:75.50 Summary judgment and SLAPP motions
§ 12:76 —Negligence standard cases
§ 12:77 — —Impact of *Dun & Bradstreet*
§ 12:78 Directed verdicts and J.N.O.V.'s
§ 12:79 —As devices for jury control
§ 12:80 —General standards
§ 12:81 —First amendment concerns applied to summary judgment motions
§ 12:82 —Relationship to independent review doctrine
§ 12:83 Appeals and the doctrine of independent judicial review
§ 12:84 —Reaffirmation of the doctrine in *Bose v. Consumers Union*
§ 12:85 —Does *Bose* swing "both ways"?
§ 12:86 —"Preliminary" facts vs. "ultimate" facts
§ 12:87 Trials and evidence
§ 12:88 Non-disclosure and non-disparagement agreements
§ 12:89 Default judgments in defamation and related cases

CHAPTER 13. COUNSELING AND STRATEGY

§ 13:1 Counseling clients—To sue or not to sue, that is the question

§ 13:2 —Consider whether the action is time-barred
§ 13:3 —Traps for the unwary: retraction, correction, or notice statutes and the like
§ 13:4 —Consider whether the offending statements are actionable
§ 13:5 —Evaluating substantial truth
§ 13:6 —Consider whether there are affirmative defenses in play
§ 13:7 —Evaluating the public figure v. private figure question
§ 13:8 —Evaluating fault
§ 13:9 —Assessing damages and other remedies
§ 13:10 —Choosing a forum
§ 13:11 —Choice of law considerations
§ 13:12 —Consider whether anti-SLAPP laws may apply
§ 13:13 Explaining to clients what to expect

CHAPTER 14. *[Reserved]* *Insurance*

CHAPTER 15. DEFAMATION IN THE WORKPLACE

§ 15:1 Growing significance of employee/employer defamation suits
§ 15:2 —Increasing prevalence
§ 15:3 — —Reference letters and other communications to third parties
§ 15:4 — —Communications within the company
§ 15:5 —Overview of special problems for workplace defamation
§ 15:6 Publication
§ 15:7 —Internal communications
§ 15:8 — —Minority no-publication position
§ 15:9 — —Majority publication position
§ 15:9.50 Publication by one corporate employee to another when the employee is sued in an individual capacity
§ 15:10 Publication—Compelled self-publication
§ 15:11 — —Overview
§ 15:11.50 The clear and convincing evidence question
§ 15:12 Publication—Compelled self-publication—Authority supporting the doctrine
§ 15:13 — — —*Lewis v. Equitable Life* decision
§ 15:14 — —Competing interests
§ 15:14.50 —No compelled self-publication when no repetition to a third party has occurred
§ 15:14.60 —Compelled self-publication—Authority rejecting the compelled self-publication doctrine
§ 15:15 Defamatory meaning and opinion
§ 15:16 —Defamatory meaning
§ 15:17 —Fact/opinion distinction

§ 15:18 Per se and per quod special harm rules
§ 15:19 Truth
§ 15:20 —Substantial truth
§ 15:21 —Burden of proof
§ 15:22 Vicarious liability
§ 15:23 —Respondeat superior
§ 15:24 — —Libel/slander distinction
§ 15:25 — —Punitive damages
§ 15:26 Fault considerations
§ 15:27 —Constitutional requirements
§ 15:28 —Common-law requirements
§ 15:29 — —Absolute privileges
§ 15:30 — —Conditional privileges
§ 15:30.50 — —Privileges arising from legal reporting duties
§ 15:31 —Argument for actual malice as the governing privilege standard
§ 15:32 —Damages and causation
§ 15:33 Government defamation as a violation of civil rights
§ 15:34 Relation to workers' compensation statutes

CHAPTER 16. FOOD DISPARAGEMENT LAWS

§ 16:1 Proliferation of food disparagement laws
§ 16:2 Compendium of food disparagement laws
§ 16:3 Case study: Oprah Winfrey litigation
§ 16:4 Commentary: the case against food disparagement laws

Table of Laws and Rules

Table of Cases

Index