Sack on Defamation
Libel, Slander, and Related Problems

Fourth Edition
By Robert D. Sack
(Judge, U.S. Court of Appeals, Second Circuit)

To keep you informed about the latest developments in the law, the author has added new discussion and analysis throughout the treatise. Topics discussed in this release include:

- **Statute of limitations—discovery rule:** Is material that is publicly available on the Internet “publicly available” for purposes of the discovery rule? The Texas Court of Appeals ruled in the affirmative in a case involving technical matters available on a U.S. government website (Velocity Databank, Inc. v. Shell Offshore, Inc.). See § 2:6.2, at note 433.1.

- **Material truth or falsity:** In *Air Wisconsin Airlines Corp. v. Hoeper*, the U.S. Supreme Court concluded that “materiality” should be judged in light of the nature of the recipient of the speech in question. “[T]he identity of the relevant reader or listener varies according to the context. In determining whether a falsehood is material to a defamation claim, we care whether it affects the subject’s reputation in the community.” See § 3:7, at note 65.1.

- **Opinion—communications held not actionable:** The Ninth Circuit found that nonactionable opinions were being expressed when a blogger wrote that plaintiffs, acting with respect to a corporate bankruptcy, were engaged in “illegal activity,” including “corruption,” “fraud,” “deceit on the government,” “money laundering,” “defamation,” “harassment,” “tax crimes,” and “fraud against the government” (*Obsidian Financial Group, LLC v. Cox*). See § 4:3.5, at note 252.6.

- **“Vortex” public figures:** In a Sixth Circuit case, Thomas M. Cooley Law School, the largest accredited law school in the country, which was involved in a public controversy over certain aspects of the value of its educational programs, was held to be a public figure with respect to allegedly defamatory statements made about those programs. See § 5:3.5, at note 214.3.

- **Neutral reportage:** The U.S. District Court for the District of Maine commented favorably on the doctrine of neutral reportage, but declined
to accept or reject it, ruling for the defendant on other grounds (Pan Am Systems Inc. v. Hardenbergh). See § 7:3.5[D][4][b], at note 206.1.

- **Absolute privilege—judicial proceedings:** According to the D.C. Circuit in Telschik v. Williams & Jensen, PLLC: “Under the judicial privilege recognized by D.C. law, an attorney ‘is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.’” See § 8:2.1[C], at note 30.

- **Damages—appellate review:** The Texas Supreme Court “ha[s] recognized an imperative that appellate courts determine whether any evidence supports the amount of jury damages.” The court declined to allow compensatory damages based on an estimate or speculation or “meager circumstantial evidence” (Burbage v. Burbage). See § 10:5.2, at note 231.1.

- **Retraction:** Under Florida’s retraction statute, does the requirement that the plaintiff make a retraction demand (“presuit notice”) apply to statements made by those who are not members of the “institutional press”? In Comins v. VanVoorhis, the Florida District Court of Appeal reviewed the law and held that the author of a comment posted on a blog was entitled to presuit notice. See § 11:2.6, at note 37.

- **Privacy torts—intrusion:** In Lawlor v. North American Corp., the Illinois Supreme Court announced that Illinois was joining “the vast majority of other jurisdictions that recognize the tort of intrusion upon seclusion.” See § 12:6, at note 472.

- **Intentional infliction of emotional distress:** The Texas Court of Appeals held that section 230 of the Communications Decency Act protects Internet service providers from claims for intentional infliction of emotional harm based on material published on their sites (GoDaddy.com v. Toups). See § 13:6.2, at note 254.2.

- **Discovery—anonymous Internet authors:** Virginia has adopted by statute a detailed procedure that a plaintiff must follow to require disclosure of an anonymous poster; the statute appears to establish a standard somewhat easier to meet than the standards set out in Doe v. Cahill and Dendrite International, Inc. v. Doe. See § 14:4, at note 163.1.

- **Jurisdiction:** New York’s long-arm statute makes exceptions limiting the statute’s applicability to defamation actions. The courts have emphasized that those limitations cannot be avoided by denominated a defamation claim as something else—such as intentional infliction of emotional distress or false light invasion of privacy—even if the tort is recognized under the applicable state substantive law. See § 15:1.2[C], at note 33.2.

- **Pleading actual malice:** Whether a plaintiff must plausibly allege actual malice at the pleading stage appears to be an open question, according to a federal district court in New York (Kerik v. Tacopina). See § 16:2.2, at note 22.2.

In addition, the **Table of Cases** and the **Defendant-Plaintiff Table** have been updated.
FILING INSTRUCTIONS

Sack on Defamation

Release #5
(April 2015)

Remove Old Pages Numbered:

Insert New Pages Numbered:

Volume 1

☐ Title page to 12-105

☐ Title page to 12-105

Volume 2

☐ Title page to I-50

☐ Title page to I-50