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INSIGHTS | MAY 2018

#MeToo and the Media

In the past year, allegations of sexual misconduct have regularly made headlines in top news outlets across the United States. The #MeToo movement has encouraged many individuals to make public the details of sometimes decades-old incidents of sexual harassment or sexual assault. Disclosures have often begun on social media before making their way to mainstream news channels. This reporting has helped shed light on wrongdoing and injustice — both specific and systemic — and has helped fuel a national conversation that likely will lead to lasting social change.

As important as these disclosures may be, however, publicizing allegations of sexual misconduct is not without substantial risk. After all, such allegations can have a devastating impact on the reputations of the accused and could result in claims for defamation and invasion of privacy. It is important for media organizations to understand these risks and keep in mind several fundamental legal principles in evaluating and preparing such stories for publication.

Republication Rule

Under the common law republication rule, a reporter who relays (or "republishes") an accusation that one person made about another person can be just as liable as the accuser.[1] Put differently, simply saying "*I* didn't accuse the famous newscaster of sexual misconduct; I was just reporting that *his assistant* accused him of sexual misconduct" would not be a defense against a defamation action.

Counterintuitive as it may be to many reporters, the author of a story that accurately quotes allegations of sexual harassment or sexual assault is not automatically immune from liability — even if those allegations have already been widely discussed on social media and even if those allegations involve public officials or public figures.

This common law rule has two key exceptions: the fair report privilege and the neutral reportage privilege. Both of these may protect reporting of #MeToo accounts only in limited situations, depending on the jurisdiction.

The fair report privilege can negate the republication rule when the press reports accusations that are made to the government or by the government.[2] For example, this privilege may protect a story about accusations of sexual misconduct made against

1 *See, e.g., Medico v. Time, Inc.*, 643 F.2d 134, 137 (3d Cir. 1981).

2 *See, e.g., id. at 137-47; Salzano v. N. Jersey Media Group Inc.*, 993 A.2d 778, 785-98 (N.J. 2010).

a famous newscaster by his assistant if those accusations were made in a police report or in a lawsuit. But it is unlikely to protect reporting on accusations that surface outside the context of a government proceeding.

The neutral reportage privilege, unlike the fair report privilege, is the law in few jurisdictions. It generally negates the republication rule when a publisher accurately reports accusations made by one public official or public figure about another public official or public figure.[3] For example, it may protect reporting about one legislator's accusations of sexual misconduct against another legislator.

Yet neither the fair report privilege nor the neutral reportage privilege should be relied on without careful consideration of the facts at issue and the law of the governing jurisdiction. Even determining which jurisdiction's law applies can be difficult when the allegations at issue are being circulated on the internet and are available around the country.

Fault

In a defamation suit based on an article reporting on sexual misconduct allegations, the standard of fault could turn on what type of person the accused is — specifically, whether the accused is a public official or a public figure, on the one hand, or a private figure, on the other hand.

In general, public officials are those individuals in government "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[4] Public figures generally fall into two categories:

- Individuals who are so famous that they are public figures for purposes of any reporting about any subject.
- Individuals who have injected themselves into particular public controversies, thus making themselves public figures for purposes of reporting about those controversies.[5]

Private figures are everyone else.

If the accused in an article about sexual misconduct allegations is a public official or a public figure, the First Amendment, as interpreted by the US Supreme Court, would require him or her to prove actual malice to prevail in a defamation suit.[6] In other words, the accused would have to prove that the reporter (or editor) knew that the accuser's allegations were false or probably false but published them anyway. But if the accused is a private figure, he or she might have to prove only that the reporter (or editor) was negligent in determining whether the accusations were false.[7]

These differing standards can make reporting on sexual misconduct allegations against private figures riskier than reporting on the same allegations against public officials or public figures. Further complicating matters, assessing whether the accused is a public official or a public figure can be a gray area and vary by jurisdiction.

Fairness and Accuracy

Whatever the application of the republication rule and no matter the governing fault standard, striving for fairness and accuracy — two basic pillars of responsible reporting — can go a long way toward mitigating the risk involved in publishing a story about sexual misconduct allegations.

In this context, fairness means, among other things, giving the accused a meaningful opportunity to respond to the allegations and exploring any facts that might cast doubt on the credibility of the accuser. Accuracy means making clear to the audience that what is being reported are allegations. It also means making clear exactly what those allegations are, so as not to imply anything unintended.

Insurance Coverage Considerations

Media liability insurance policies enable news organizations and other media businesses to transfer some of the risk associated with a claim of defamation. Such policies cover reasonable defense costs as well as the expense of a settlement or judgment resulting from a complaint of libel or slander. Coverages can also include certain related torts, such as intrusion upon seclusion, publication of private facts, or portrayal in a false light.

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3 *See, e.g., Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d. Cir. 1977).

4 *Roseblatt v. Baer,* 383 U.S. 75, 85 (1965).

5 *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

6 *See id.* at 334-35.

7 *See id.* at 347.

Some of the litigation against media organizations involves claims of trespass or wrongful entry or illegal procurement of information through eavesdropping or other surreptitious methods. Where criminal or deliberately fraudulent conduct is alleged, most policies will still cover the cost of defense up to the point of a final adjudication adverse to the insured (after which point the insurer may seek to recoup those costs). Although beyond the scope of this article, media liability policies may also cover claims for the infringement of intellectual property, such as copyright, trademark, and the misappropriation of someone's image.

Coverage can be offered on either a "claims-made" or "occurrence" basis. The difference between these two forms stems from the event that triggers coverage:

- A claims-made policy is triggered when a claim is "made" (most commonly, this is the receipt of a lawsuit or demand, although other events can also fall within the definition of "claim").
- An occurrence form is triggered by the date of the alleged wrongful act, regardless of when the claim is ultimately made.

In some cases, an occurrence giving rise to a lawsuit or demand today could have taken place a number of years ago, so an older policy may be implicated rather than the one currently "in force." One coverage form is not necessarily "better" than the other, but moving from one type of coverage to another can create gaps in coverage (if going from claims made to occurrence) or, conversely, overlapping coverage (if moving from occurrence to claims made). A qualified insurance broker can help determine which type of coverage is best for a given client's exposures and can identify the insurers willing to write media liability coverage on each type of form.

Underwriters will evaluate a number of factors to determine whether a media organization presents a good risk and how to price the coverage being offered. The base rating factor for media liability is a company's revenue, but additional "step" factors exist that could make a risk more or less attractive. The exact underwriting criteria for these step factors will vary based upon the type of media enterprise in question. For example, broadcasters may be asked about their content mix, the types of on-air personalities they employ, the extent of their investigative reporting, and their use of delay devices for call-in shows. Newspaper or magazine publishers can expect to field questions regarding the scope of reporting (national, regional, or local), the use of freelance writers and warranties associated with their engagement, the extent of prepublication review, and, of course, circulation. Digital media companies, meanwhile, must be concerned with policing of user-generated content and the use of embedded social media content and images obtained from other content sources.

Recent high-profile judgments and settlements involving media companies have put the spotlight on this area of insurance coverage. Underwriters are responding by increasing their focus on the procedures their insureds use to review and clear content, including the circumstances under which a company may seek an opinion from outside counsel before proceeding with the publication or broadcast of controversial content. To reduce the risk of liability in this environment, media organizations — even those with the best possible controls in place — should consider insurance as a backstop against any claims that may be made against them.

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