

PART 5 OF 7

# Why can you write about some people and not others?

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PART 5 OF 7 | WHAT YOU CAN AND CAN'T SAY

# Why can you write about some people and not others?

**Why can you write about some people and not others?** Publishers treat people differently because the law does. The working factors: public figure status, the passage's newsworthiness, how well you can prove your claims, whether the person is living, how realistically litigious they are, and whether the portrayal is one nobody would ever release. The same sentence can be safe about one person and dangerous about another.

Your publisher cleared the senator chapter without a comment. The chapter about your old business partner came back covered in flags, and he's never held office in his life. From where you sit, it looks backwards, or political, or personal.

The review followed a list. Six questions, run on every name in your manuscript. I know the list because I ran it. I was general counsel of a US book publishing company with global reach and read the flagged passages every week.

The law does the first sorting, on purpose. American defamation law gives writing about public people more room than writing about private ones, wide enough that one sentence can be fine in chapter four and expensive in chapter five. The publisher owns the rest of the list. The full map of publishing exposure is in **What You Can and Can't Say**. Defamation and privacy law vary by state, so this page is general information rather than advice about your manuscript. Where the law splits, I'll say so.

## Why does the law protect writing about public people more?

The Supreme Court built room for error into debate about public life by raising the bar public plaintiffs must clear. A public official suing over your account of his official conduct must prove actual malice. Your neighbor, in most states, proves something closer to carelessness.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), held that a public official cannot recover for a defamatory falsehood about his official conduct unless he proves the statement was made with actual malice: knowledge that it was false, or reckless disregard of whether it was false.

**actual malice.** A term of art for the fault standard public officials and public figures must prove: the writer published knowing the statement was false, or while entertaining serious doubts about whether it was true. Set out in New York Times Co. v. Sullivan and sharpened in St. Amant v. Thompson.

The word malice misleads almost everyone who meets it. The test asks about your knowledge, and the Supreme Court made it subjective in St. Amant v. Thompson, 390 U.S. 727 (1968): reckless disregard requires evidence the publisher “in fact entertained serious doubts as to the truth of his publication.” The same opinion holds that failure to investigate does not by itself establish bad faith. The half I rarely heard quoted back: the standard protects a careless writer more than a worried one, because the careless writer never formed the doubt.

Three years after Sullivan, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), carried constitutional limits past government officials to public figures. The Justices divided on the formulation, and a majority favored the same actual-malice standard, which is the version that governs now. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), then set the floor for everyone else: states may define their own standard of liability for defamatory falsehoods that injure a private individual, so long as they do

not impose liability without fault. States answered, negligence being the common choice.

Gertz explained the line: public people usually have better access to the channels that answer a false statement, and they accepted scrutiny when they stepped forward. A private person did neither. **The gap between actual malice and negligence is the gap between the senator's chapter and your neighbor's.**

## What makes someone a public figure?

Two routes, and Gertz named both. Fame so pervasive the person is a public figure for all purposes. Or, in the Court's words, having "thrust themselves to the forefront of particular public controversies" to influence the outcome, public for a limited range of issues only. Gertz calls the second route the more common one.

**limited-purpose public figure.** A person treated as a public figure only inside one public controversy they stepped into to influence, and treated as a private figure everywhere else. Most classification disputes over the people in a book are about this category.

The cleanest articulation comes from *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), which asks three things in order. Was there a genuine public controversy, a real dispute whose outcome affects people beyond the participants? Did this person play a prominent role, seeking to influence the outcome? And was the statement germane to that role? Formulations differ by state, and classification is decided by the court hearing the claim, but those three questions run underneath most versions.

Waldbaum ran a large supermarket cooperative and lost on classification: he had publicly championed policies reshaping his industry, so the court held him a limited-

purpose public figure for that fight. The same opinion carries the warning for business memoirs: an executive title at a prominent company does not, by itself, make someone a public figure. Your former CEO can be famous inside the industry and private in the eyes of the law.

## **Can a private person become fair game by entering a controversy?**

Rarely, and almost never by accident. The Supreme Court spent the late 1970s refusing the conversion, three times, in ways that map onto your manuscript.

In *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), a man who ignored a grand jury subpoena and drew press coverage for it was still a private figure: involvement in a newsworthy matter does not automatically transform anyone, and a defendant must show “more than mere newsworthiness” before the actual-malice burden applies. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), a heavily covered society divorce was not a public controversy, going to court was compelled rather than voluntary, and a few press conferences changed nothing.

*Hutchinson v. Proxmire*, 443 U.S. 111 (1979), answers the move authors reach for first. A senator ridiculed a scientist's federally funded work, then argued the resulting attention made the scientist a public figure. The Court refused: those charged with defamation “cannot, by their own conduct, create their own defense,” and media access that exists only to answer the attack does not count. Applied to your manuscript: **your book cannot promote its own subject into a public figure. The status has to exist before you publish.**

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## **WHAT COURTS HAVE SAID**

Classification is decided by the court hearing the claim, under that state's formulation. The constitutional floor below is national; its application varies.

*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). A public official cannot recover for a defamatory falsehood about official conduct without proving actual malice: knowledge of falsity or reckless disregard.

*Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Constitutional limits reach public figures outside government. The Justices split on the standard; a majority favored the actual-malice test later cases apply.

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Public figure status arises through pervasive fame or voluntary injection into a particular public controversy. States set private-figure fault standards, short of liability without fault, and presumed and punitive damages are restricted absent actual malice.

*Time, Inc. v. Firestone*, 424 U.S. 448 (1976). A heavily publicized divorce was not a public controversy; resort to the courts is not voluntary injection.

*Hutchinson v. Proxmire*, 443 U.S. 111 (1979). A defendant cannot create its own defense by making the claimant a public figure; access limited to answering the attack is not public-figure access.

*Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979). Involvement in a newsworthy matter does not automatically make a private person public.

*Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980). The limited-purpose inquiry: genuine public controversy, prominent role, germane statement. An executive title alone does not confer the status.

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## **Why do publishers ask questions the law never asks?**

A publisher is pricing a claim rather than predicting a verdict, so the review runs on four more factors no fault standard mentions.

Newsworthiness of the passage. Defamation needs falsity; the privacy claims mostly run on truth. In the states that recognize a claim for public disclosure of private facts, the question is whether a truthful intimate disclosure served a legitimate public concern, and states weigh that concern differently. In my own review practice, the tether decided it: a disclosure tied to the book's public point survived far more often than one that read as score-settling.

Provability. Courts test fault after a claim arrives. A publisher tests evidence before the book ships, because the house may one day need to stand behind every word of the passage, on a schedule it does not control. In my review years, the file decided more flags than the passage: contemporaneous documents, corroborating witnesses, your own records.

Living or dead. Defamation generally requires a living subject, and in most states a claim over statements about the dead fails. One exposure shrinks. Others stand. Living relatives can be identifiable in the same passage, some states protect a deceased person's name and likeness by statute, and a false claim about the dead still costs the book its credibility.

Litigiousness. Publishers ask whether your subject is the suing kind. The question embarrasses people, and it belongs in the analysis: a weak claim from a litigious subject costs real money before any court reads a word, and a strong claim from someone who will never sue may cost nothing. Prior lawsuits, wealth, counsel on retainer, public threats: counsel weighs all four, and the cost math is the subject of **“I don't care if I get sued.” Your publisher does.**

The sixth factor explains the strangest pattern in review. Some portrayals end the release conversation before it starts, because nobody signs a release for the chapter that calls them a thief. When no release would ever cover the portrayal, the publisher moves from permission to proof, which is why two authors can get opposite

instructions about the same kind of person. What to do when the answer is no is in What to do when they refuse to sign a release.

## How do the five kinds of subjects compare?

Fault standards are the law; the practice column is what I watched houses do with them.

| Subject type                  | Fault standard the law applies                                                              | What changes in practice                                                                                                                                |
|-------------------------------|---------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| Public official               | Actual malice, for statements about official conduct (New York Times Co. v. Sullivan)       | Review asks whether the passage concerns the office or the private life, and what your sourcing shows about belief                                      |
| All-purpose public figure     | Actual malice (Curtis Publishing Co. v. Butts; Gertz v. Robert Welch, Inc.)                 | A narrow category: pervasive fame, household names. Counsel spends little time here when sourcing is documented                                         |
| Limited-purpose public figure | Actual malice, within the controversy that made them public (Gertz; the Waldbaum framework) | The fight is over classification and germaneness: does your passage sit inside their controversy or outside it                                          |
| Private figure                | Whatever standard their state sets, at least fault, commonly negligence (Gertz)             | Flags concentrate here. Evidence does the work, and privacy claims stay available in the states that recognize them, even where every word is true      |
| Deceased subject              | In most states, no defamation claim for statements about the dead                           | Review shifts to living people identifiable in the passage, statutory postmortem rights where a state grants them, and accuracy for the book's own sake |

Each row states a tendency. Classification and fault are decided case by case, under the law of the state where a claim is brought.

One habit to break: renaming a person does not move them between rows. A renamed neighbor is still a private figure when her circle can recognize her, because identification runs on job, place, timeline, and relationships rather than the name.

Does changing the name actually protect you? walks that test in full.

## How does a publisher's counsel sort your cast?

In about an hour, into four rough bins, and the last bin drives the flags.

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### HOW A PUBLISHER READS THIS

When I ran manuscript review, a first sort of every named person in a book took about an hour: public and provable, private and documented, private and undocumented, and undocumented and litigious. The last bin generated most of the flags. The coordinates are status, proof, and who picks up the phone angry. A senator criticized on documented facts barely slows the read. A private business partner accused from memory, with a history of suing people, is the flag that reaches the editorial meeting. Authors who arrive with the cast already sorted, and the evidence mapped to each claim, walk into review with most of the argument made. The sort is one pass inside the larger framework, which How publishers decide whether your book is safe to publish walks end to end.

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If one person in your manuscript is the reason you're on this page, and you can't tell which bin they land in, that is the conversation I have most often. Happy to have it with you.

## What should you build before you turn it in?

A cast list, in five columns: the person, public or private, what the manuscript claims about them, what evidence supports each claim, and their realistic response. Build it in an afternoon, attach it at delivery, and you have answered the six questions before anyone asks them.

The middle columns do the real work. Writing the claims out makes you read your chapter the way a legal reader will, one assertion at a time. The evidence column shows you, before anyone else, which passages rest on documents and which on memory. The last column is the underwriting question, and you know the answer better than any lawyer: what will this person actually do?

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### WHAT THIS MEANS FOR YOUR MANUSCRIPT

List every living person in your draft this week, named or recognizable. Mark each one public or private, using the tests above and honest judgment. For every private person, write what you claim about them and what you could hand a stranger to support it. Where a claim rests on memory alone, that passage is where review will land, so decide now: document it, narrow it, seek a release, or accept the flag with your eyes open. Delivery is the deadline, because your contract warranties attach when you hand the book in.

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**"Every author thinks the review is inconsistent, and from outside it looks that way. Inside, the same six questions ran on every name in the manuscript. Answer them yourself, in advance, and the review stops feeling like weather."**

## QUESTIONS TO ASK BEFORE YOU TURN IT IN

- For each person you criticize: did a genuine public dispute exist before your book, or does your book create the attention? Hutchinson answers the second case, against you.
- For each public figure: is the passage about the fight that made them public, or their private life? Germaneness is a real limit.
- For each private person: what could you hand a stranger tomorrow to support the claim? A document, a witness, a record.
- Which subjects are dead, and which living people are identifiable in those passages?
- Which one person is most likely to sue, whatever the merits, and does their chapter rest on evidence or memory?
- Would the portrayal survive the subject reading it aloud in front of people you both know? If that changes your breathing, move the chapter to the top of your documentation list.

The Manuscript Risk Checklist. Twelve questions to answer before you turn in a manuscript, drawn from the review standards I wrote for a publishing house. The cast list above feeds three of them.

### **Run the Risk Scorecard**

If you want the sorting done properly on your own cast, that is what a clearance review is for. I run flat-fee manuscript clearance reviews: a passage-level read of your draft, every named person sorted and scored, the exposure each flag

carries, and the smallest fix that keeps your point intact. Quoted up front, based on length, no hourly meter.

**See Manuscript Clearance pricing**

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## Common questions

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### **Why can I criticize a politician more freely than my neighbor?**

Because the Supreme Court set different fault standards. A public official suing over coverage of official conduct must prove actual malice, knowledge of falsity or reckless disregard of the truth, under *New York Times Co. v. Sullivan*. A private person proves whatever their state requires, commonly negligence, a lower bar. The protection follows the public role, and your neighbor does not have one.

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### **What makes someone a public figure?**

Pervasive fame that makes them public for all purposes, or a voluntary step into a particular public controversy to influence its outcome, public for that controversy only. *Gertz v. Robert Welch, Inc.* names both routes, and the widely cited *Waldbaum v. Fairchild Publications* framework asks three questions: was there a real public controversy, did the person play a prominent role in it, and is the statement germane to that role.

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### **Does writing about a dead person remove the risk?**

It removes one risk and leaves others. In most states, no defamation claim exists for statements about the dead. Living relatives identifiable in the same passage can still sue, some states protect a deceased person's name and likeness by statute, and false statements about the dead still damage the book's credibility.

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### **Why does my publisher ask about some people's tempers?**

Because a claim costs money before any court weighs its merits. Demand letters, delayed publication dates, and early motions cost real money even when the claim is weak, so counsel treats litigiousness as an underwriting fact. A litigious subject with a weak claim can cost more than a calm subject with a stronger one.

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## **Can a private person become fair game by entering a controversy?**

Only by genuinely thrusting themselves into a public dispute to influence its outcome, and courts read that narrowly. Newsworthy involvement was not enough in *Wolston v. Reader's Digest*, a famous divorce was not a public controversy in *Time, Inc. v. Firestone*, and a defendant's own attention could not create the status in *Hutchinson v. Proxmire*.

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## **Related guides**

### **PART 2**

#### **Does changing the name actually protect you?**

Changing a name removes the label and leaves the person. Identifiability is the legal test, and this is what real de-identification takes.

### **PART 6**

#### **What to do when they refuse to sign a release**

A refused release closes a shortcut without closing the book. What remains: narrow to what you can prove, attribute, de-identify, or price the risk.

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