
A WRITER'S GUIDE TO DEFAMATION AND INVASION OF PRIVACY

Amy Cook | January 22, 2016
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A memoir is *your* story, but of course it will involve many other people. Most of us have not led completely charmed lives. Everyone has ups and downs, and those who write memoirs usually have had mountains and valleys—that's what makes them so interesting. Recent bestselling memoirs are replete with addiction, abuse, homelessness and triumph over these adversities. But do the other people in your story want *theirs* told? Are there elements that might be embarrassing to them? Will their memories be in sync with yours?

Writers don't get sued very often—and thanks to the First Amendment, even when they do, they usually prevail. But as an attorney specializing in these issues, I can tell you that you definitely don't want to put yourself in a position to endure any sort of lawsuit, even if the odds are you'd end up victorious. Many writers mistakenly assume their publishing company will protect them—after all, it's a large corporation with, presumably, a bunch of suits eagerly waiting to avenge you. But here's the truth: When you sign a publishing contract, you promise that your work will not defame anyone or invade anyone's privacy (along with a number of other assurances)—and you agree to indemnify the publisher in the event of a lawsuit against your work. In other words, the onus is on you to deal with any legal troubles that come your way. Most self-publishing companies have similar clauses.

So what can you do to protect yourself? Your best defense is to understand—before you publish your work—the legal issues that apply when you're writing about real people: namely, *defamation and invasion of privacy*.

Understanding Defamation

Defamation is when you injure a person's reputation; in legal speak, it's when you “lower them in the estimation of the community or deter third persons from dealing with them.” It's a false statement of fact. Only living people can sue for defamation; heirs cannot make a claim about a deceased relative's reputation.

The allegedly defamed person must prove that he is identifiable to readers by the setting, physical description or other factors. Changing someone's name and physical description is a good start, but it isn't necessarily enough to prevent a lawsuit. Truth, however, is always a defense to a defamation charge. As long as you can prove your ex cheated on his taxes, he cannot sustain a defamation claim.

What if you don't have proof? A defamation claim can be based only on something stated as fact—so, the good news is that your opinions are protected expression. That said, don't think simply couching your accusation as opinion—“It's my opinion that John Jones deals drugs,” or, “I believe Sara Smith embezzles from her employer”—is an easy out. Any such opinions need to be clearly relevant to your story, and should be supported with viable evidence or reasoning.

[Understanding Book Contracts: Learn what's negotiable and what's not.]

DISCLAIMING CONFLICTING MEMORIES

Sometimes truth and fact aren't always black and white. Memoirs are people's recollections about events in their lives, and we all know that people can remember situations and conversations differently without purposely intending to deceive anyone. This is where a good deal of legal wrangling in memoirs has originated.

In 2005, the Turcotte family filed a lawsuit against Augusten Burroughs and his publisher, St. Martin's Press, alleging defamation and invasion of privacy. The Turcottes said they were the basis for the Finch family Burroughs lived with and subsequently portrayed in his bestselling memoir *Running With Scissors*, and claimed the book contained fabricated or sensationalized descriptions of events.

Burroughs defended his work as accurate, but in the settlement, agreed to call it a “book” rather than a “memoir” in the author’s note (though it’s still referred to as a memoir on the cover, title page and elsewhere), and to recognize in his Acknowledgments in future editions the Turcotte family’s “conflicting memories” of events.

The Acknowledgments changed from: “I would like to thank each and every member of a certain Massachusetts family for taking me into their home and accepting me as one of their own,” to, “I would like to thank the real-life members of the family portrayed in this book for taking me into their home and accepting me as one of their own. I recognize that their memories of the events described in this book are different than my own. They are each fine, decent and hard-working people. The book was not intended to hurt the family. Both my publisher and I regret any unintentional harm resulting from the publishing and marketing of *Running With Scissors*.”

If you know you’re delving into disputed territory, consider addressing it in a similar way in an author’s note on your own volition. It could save you the expense and hassle of being forced to do so later.

[*\[Memoir or Novel? 8 Issues to Think About Before Writing Your Own Story\]*](#)

CHANGING IDENTIFYING DETAILS

Changing names and descriptions may not be enough if other details give away who the subject really is. And this doesn’t just apply to memoir, either. In a famous case where a novelist created a character based on a real person, she changed his name and physical description, but not much else. The author, Gwen Davis Mitchell, had attended a “Nude Marathon” therapy session in which participants shed their clothing in hopes that psychological inhibitions would go along with it. (Need I mention that this was 1970s California?) Prior to attending the session, Mitchell had signed a contract pledging she wouldn’t in any way disclose what had transpired. After the book, *Touching*, was released, Dr. Paul Bindrim sued the author and her publisher for defamation, saying that the character Dr. Simon Herford was clearly based on him, that colleagues identified him as Herford, and that his words and actions during the sessions had been inaccurately depicted.

Mitchell’s character was described as a “fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms,” whereas Bindrim was clean-shaven and had short hair. In ruling in favor of Bindrim, the court said the only differences between the character and the man were physical, and that otherwise they were very similar.

The author had tried to defend herself by citing another case in which a fictional character was based on a real person—but in that situation, there had been other differences, including age, profession, and time and place. That story had not significantly paralleled the real person’s life, so even though the plaintiff believed he’d been libeled, the court determined no one would be able to tell that the character was based on him. These are the types of changes you should employ any time you’re making embellished, disputable or *untrue* claims based on a real person, whether you’re writing a novel, a memoir or anything else.

Understanding Invasion of Privacy

Even if everything you write about someone is completely true, you still need to consider her privacy. Invasion of privacy occurs when you publicly disclose private facts *not related to public concern*. As with defamation, only living people can sue for invasion of privacy.

In a case against *Girl, Interrupted* author Susanna Kaysen and her publisher, Random House, a court said that details revealed in a memoir fell under First Amendment protection as long as *they furthered the public interest*. Setting a sound precedent for other traditionally published memoirists, it also found that a publisher’s decision to release the book could alone be proof of public interest.

In the case, Kaysen was sued by an ex-boyfriend over her 2001 autobiographical book, *The Camera My Mother Gave Me*, which accused the man of offensive sexual behavior and (in the words of the judge) “culminated with the suggestion that he raped her.” The man, even though he’d been unnamed, said his reputation suffered because friends and business associates could identify him. But ultimately the court stressed the book was Kaysen’s story—saying she was “more than a disinterested party,” which gave her extra First Amendment protection.

There are two significant lessons here. One is the importance of a publisher's backing as part of the criteria for establishing public interest. The second is the fact that more leniency is given to those telling their own stories involving unsavory aspects, as opposed to a third party, such as a journalist, who might trigger stronger invasion of privacy allegations.

AVOIDING UNNECESSARY DISCLOSURES

Quirky people in your life—people who are different and unusual—are probably the ones you want to write about. Those may be the very people who don't want notoriety. Some people just don't want their lives made public. *The New Yorker* published an article about a once well-known child prodigy who'd renounced his life of fame to become an "insignificant clerk" who would not need to use his unusual math talents. His personal habits—his laugh, manner of speech, intense interest in minutia—were commented upon at length, and his apartment was described as "shabby." The court said the article was of great interest to the reader but it "may be fairly described as a ruthless exposure of a once-public character who has since sought and now been deprived of the seclusion of private life."

In this case, the court found that because this person had previously been a public figure, the "Where is he now?" angle of the story made the attention permissible. But the court cautioned that revelations that are so intimate and so unwarranted "as to outrage the community's notions of decency" should not be permitted.

When writing about such a person in your memoir, use the "sister" test: If you were to disclose this intimate and private fact about someone, would your sister/brother/neighbor find that fact offensive? If so, reconsider whether or not your story really requires those details, or could be just as effective without them.

DEPICTING CRIMINAL ACTS

Discussing a crime can be even trickier. The landmark case in which the court found that there was an invasion of privacy took place in 1971 in California. There, Marvin Briscoe sued Reader's Digest for including him in a 1966 article about truck hijackings. The article failed to note that Briscoe's crime had occurred 11 years earlier.

The court, in ruling for Briscoe, said articles about past crimes deserve less First Amendment protection than stories about current events. The court concluded there was a strong public interest in protecting the identities of rehabilitated felons.

In a more recent similar case, however, a man sued the Discovery Channel for a show recreating an event where he had been convicted of being an accessory to murder about 13 years earlier. The California justices hearing this case expressed sympathy for the man but observed that the U.S. Supreme Court had clarified the law to the benefit of the media since the Briscoe decision.

The case the justices cited took place in 1975. A Georgia court clerk had permitted a reporter to see an indictment in a rape-murder case. Violating a state law, the reporter then broadcast the victim's name. The victim's father brought an invasion of privacy suit (on his own behalf, not his daughter's), but the Supreme Court ruled that the media could not be liable for truthful publication of information obtained from public judicial records.

If your memoir features another's criminal escapades, the legal precedent isn't clear-cut. On one hand, criminal acts are public records. On the other, if the deed was a number of years in the past, and the person has rehabilitated himself, you'll want to consider whether the crime really needs to be discussed—and, if it does, whether there is a need to disclose the person's identity.

PROVING PUBLIC INTEREST WITHOUT A PUBLISHER

We've talked about how courts have found that "a legitimate public interest" exists by the mere fact that a traditional publisher selected that book or article to publish. It may be circular reasoning, but there it is. Your story has interest to the public because an established media company has decided it has interest to the public. But what if you go the self-publishing route? There is no independent third party that agrees that your story has legitimate public interest prior to publication, so be aware that public interest may be more difficult to prove if you find yourself facing an invasion of privacy lawsuit.

So how can you demonstrate public interest if you've self-published your memoir? If your book sells well, that could lend weight to your defense. A market for comparable titles also could demonstrate public interest in your subject matter in more general terms. If you're considering self-publishing and are worried about protecting yourself against invasion of privacy claims, peruse the shelves at the bookstore. If similar events have been written about and released by traditional publishers, you're probably in the clear.

At the other end of the spectrum, if you self-publish without sales goals in mind—if your book reaches only, say, a few dozen people—then the bright side is that you probably won't get sued.

The takeaways: Be truthful. If you're going to negatively embellish events involving a real person, be sure the person absolutely cannot be identified. Don't mention private or embarrassing facts about others unless you can honestly say they are of legitimate public concern and essential to telling your story. Ditto with bringing up a long-passed crime. Do include a disclaimer that this is your recollection of events, that you've related them to the best of your knowledge, and that some identities have been changed or are composites.

*This guest post is by **Amy Cook**. Cook is an attorney who has focused on intellectual property and publishing law issues for more than 20 years. She is on the board of directors of Lawyers for the Creative Arts and serves as the Managing Editor of the Chicago Bar Association's magazine, *The Record*. She is a frequent seminar leader, most often at Chicago's Newberry Library and also has been a presenter at the University of Chicago's Graham School of Continuing Education, University of Illinois at Chicago, and Depaul University, among others. Cook is proud to have a long association with *Writer's Digest* magazine, having written numerous feature articles on legal issues affecting writers. [Connect with Cook here.](#)*
