Online and Off-Line Publisher Liability and the Independent Contractor Defense

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Media and entertainment companies—with the waves of buyouts, layoffs, and other measures to cut payroll in a challenging industry environment—are turning more and more to freelancers and other third-party providers to produce content.[1] The use of freelancers is, of course, not new to the industry. Many magazines and most book publishers traditionally have relied on independent contractors rather than employees in the production of new works. But the economic pressures on off-line media, the business models for much of the online world, and the emerging options for self-publication augur well for freelancer-supplied content.

An increased reliance on freelancers may provide new opportunities for media defense counsel and their corporate clients to shorten litigation and curtail exposure for tort claims. While employer-employee relationships bring with them *respondeat superior* liability for publishing torts such as defamation,[2] masters traditionally have not been held vicariously liable for the torts of their independent contractor servants.[3] Although a handful of reported decisions—most of them favorable to the defense—reflect some pursuit of the independent contractor defense, its use in the media and entertainment industries remains, from all outward appearances, confined to the field of book publishing.

Ethical and practical considerations may make it difficult to mount this type of defense in a given case. But the strength and continued vitality of the doctrine suggest that media defense lawyers ought to consider it seriously. And, in fact, counsel assisting in the engagement of a freelancer would benefit from considering this defense at the onset of the independent contractor's engagement. One need look no further than a recent federal court's application of the doctrine to an actual malice claim against an on-demand book publisher to see the power of the independent contractor arrangement.[4]

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Independent Contractor Defense

As a general rule, the common law holds that a principal (or master) is not liable for the torts of an independent contractor agent. The rule is a departure from that of the employer-employee relationship, where the employer directs the employee's work, provides the means of performance, and enjoys all rights to exploit the results.[5] Unlike the typical employment context, a principal in an independent contractor relationship gives up the right to control most of the details about the manner in which the work is produced, and the principal therefore ordinarily is not legally responsible for an independent contractor's torts.[6] Of course, the media industry has refamiliarized itself with the legal consequences of the independent contractor relationship through a number of recent high-profile copyright infringement claims brought by freelancers, arising out of digitized publications.[7]

The independent contractor doctrine has long been an absolute defense to tort liability claims brought against corporations in a number of industries. Construction companies, for example, routinely assert this defense in litigation arising out of alleged defects in the erection of a building[8] and injuries suffered on the job site.[9] Premises owners,[10] providers of services in homes,[11] and transporters of goods[12] are among the many other types of defendants who have made good use of their status as principals as a bar to their tort liability for the acts of independent contractor agents.

Of course, if a plaintiff is able to demonstrate a factual question on the bona fides of the independent contractor, the principal will not succeed on summary judgment. For example, in medical malpractice cases, the complex relationships between physicians and health care facilities often make it difficult for hospitals to obtain summary judgment.[13]

The following list identifies some of the factors that courts use to determine whether an agent is an independent contractor or an employee:

- the extent of control exercised over the contractor's work;
- whether the contractor is engaged in a distinct occupation or business;
- whether the work is supervised by the principal at that locale;
- the level of skill required in the occupation;
- whether the principal supplies the instrumentalities;
- the length of the contractor's engagement;
- whether payment is per job or salaried;
- whether the work is an integral part of the principal's regular business;
- the intent and belief of the parties;
- whether benefits are provided by the principal.

Liabilities of Principals

Despite this strong protection for principals, the law has developed several exceptions where the independent contractor's wrongdoing may be attributed to the principal, even where the contractor's status is not in question. For example, the law disfavors dismissal of the principal where a statute or regulation imposes particular responsibility on the principal, or where the duty is so

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integral to the principal's business that it is presumed to be "non-delegable." In a decision that hits very close to home for most law firms, the New York Court of Appeals has held that, notwithstanding the use of an independent contractor, a law firm can be held liable for negligently failing to make service. That duty is so integral to the legal practice that the courts will presume that it cannot be delegated as a matter of liability.[14]

Additionally, when the work carries with it an inherent risk of harm, the law holds that the principal should recognize the risk in advance of retaining a contractor. Because of the obviousness of the risk, the law will hold the principal vicariously responsible for the independent contractor's negligent performance.[15] But to warrant vicarious liability for the principal, the conduct must be so unreasonably dangerous that even reasonable care does not render it safe.[16]

The independent contractor doctrine has long been an absolute defense to tort liability claims.

Moreover, if the principal was on notice that the independent contractor was likely to create unsafe conditions, or had done so in the past, the principal will not be protected from liability under imputed theories of negligent hiring or negligent retention. Negligent hiring claims tend to yield anomalous results. Depending on the jurisdiction, ignorance of a contractor's incompetence or lack of qualifications is potentially exculpatory and knowledge of them is inculpatory.[17] Yet in others, ignorance can yield to liability if the principal failed to probe its putative contractor thoroughly enough.[18]

New York courts are the most reluctant to allow negligent hiring and negligent retention claims to subsume the doctrine that absolves principals for contractors' conduct. Courts there are "cautious in extending liability to defendants for their failure to control the conduct of others[.]"[19] A plaintiff seeking to impose liability on a principal for the torts of an independent contractor under the negligent hiring theory therefore "must establish that the party knew or should have known of the contractor's propensity for the conduct which caused the injury."[20]

If It Looks like a Duck

Importantly, as the Ninth Circuit held in the landmark case of *Vizcaino v. Microsoft,* it is insufficient to merely label workers as "independent contractors." If the worker is, in fact, treated as an employee, the court will find no independent contract relationship existed and instead will accord the worker the legal status of an employee.[21] In *Vizcaino,* Microsoft routinely hired workers who were anomalously designated as "permatemps." Permatemps were required to sign written agreements acknowledging that they were independent contractors. Nevertheless, these workers were integrated into the workforce, participated on teams with regular employees, shared the same supervisors, performed identical functions, and worked the same hours.[22] The only difference was that the permatemps had to pay their own taxes and were not included in Microsoft's fringe benefits programs.[23] The permatemps sued Microsoft in class action and eventually won a judgment against the company allowing them to buy reduced stock.[24] Microsoft eventually settled for $75 million.[25]

The lesson learned from *Vizcaino* is that publishers entering into agreements with independently contracted authors should ensure that the contractual declaration of independent contractor status cannot be interpreted as a sham, as the Ninth Circuit deemed Microsoft's arrangement.

Actual Malice Claims

To the extent publishers have used the independent contractor defense in libel and related tort claims, they have met with the most success where the standard of care is actual malice.[26] This makes perfect sense in the context of actual malice claims, which require clear and convincing proof that a given defendant actually knew the information was false or proceeded to publish despite subjectively entertaining doubts in fact as to the truth.[27] Because of the rigorous burden plaintiffs face as to the subjective state of mind of each individual defendant,[28] courts have been receptive to arguments that, whatever the freelance writer's state of mind, an author's independent contractor status breaks the chain of imputation of actual malice on the part of the publisher.[29]

An excellent application of the doctrine is Judge Revercomb's opinion in *Secord v. Cockburn,*[30] a libel action by Gen. Richard Secord, arising out of the book *Out of Control: The Story of the Reagan Administration's Secret War in Nicaragua, the Illegal Pipeline, and the Contra Drug Connection.* Secord brought the action against the book's author, editors, publisher, and distributor. The author of the book, which reported on Secord's role in the Iran-Contra affair, was a freelancer.

In rendering summary judgment to the publisher, editors, and distributor on grounds of no actual malice, the court noted as an initial matter:

> Actual malice must be proved separately with respect to each defendant, and cannot be imputed from one defendant to another absent an employer-employee relationship giving rise to *respondeat superior.* . . . . . .
>
> Plaintiff cannot rely upon the theory of *respondeat superior* to impute evidence of actual malice from Leslie Cockburn to these defendants because the undisputed facts in the record before this Court provide that the author is an independent contractor. The plaintiff has failed to point to a single fact in the record on whether Entrekin, AMP, and Little Brown each had personal actual knowledge of falsity or serious doubts as to the truth of *Out of Control.*[31]

Judge Revercomb found the record lacking any evidence as to the states of mind of the book's principal editor, publisher, and distributor, and for that reason granted summary judgment for want of actual malice.

The court's analysis of another editor's potential liability was much more detailed. The editor had submitted an affidavit attesting that he had "worked with [the freelance author] editing and reorganizing the manuscript" and had assisted in "incorporat[ing] into the manuscript new material that was becoming available on an almost daily basis as a result of the ongoing investigation of the Iran-Contra Committees (which were then in the process of holding hearings)." The editor's

affidavit concluded that "all suggestions that I made were read by and/or discussed with [the author] to assure their accuracy."[32] Additionally, in his deposition, the editor had testified that rather than rewrite the manuscript himself, he had instead "suggested to [the author] that paragraphs be rewritten. Sometimes I submitted ideas."[33]

The court declined to equate this record of the editor's hands-on involvement in shaping the text with imputed knowledge from the author. In the words of the court, the testimony "establishes that he was not involved in substantively writing *Out of Control*." The court further rejected the argument favoring liability that the plaintiff had cast as "aiding and abetting."

> Simply alleging a "close working relationship" or "aiding and abetting" is begging the fundamental question at issue before this Court, namely, where are the record facts from which a reasonable jury could find actual malice pursuant to the clear and convincing standard? The plaintiff has come forward with none[.][34]

The court therefore granted summary judgment in favor of the editor as well.[35]

Book publishers have done well in numerous other cases governed by heightened levels of proof in which they have asserted no liability for the works authored by freelancers.[36]

Don't Try This at Home

There is a dearth of case law interpreting or applying vicarious liability of publishers to defamation-type cases that are not governed by the actual malice standard. However, in another type of publishing tort claim in which the negligence standard was applied, a book publisher was not held vicariously liable for freelancer content.

In *Winter v. G.P. Putnam's Sons,* plaintiffs alleged that they were poisoned when eating wild mushrooms they picked based on information contained in a book.[37] The Ninth Circuit affirmed summary judgment in favor of the book publisher because a publisher is not "a guarantor of the author's statements of fact," and "ha[s] no duty to investigate the accuracy of the contents of the books it publishes" unless it "assumes such a burden."[38] The court made clear that the First Amendment would not allow it to impose such a duty upon publishers.

Another court similarly granted summary judgment in favor of a book publisher on claims of negligent misrepresentation and deceptive practices arising out of plaintiff's alleged reliance on factual information contained in a book to counsel adult victims of child abuse.[39] The court concluded that, unless the book publishers assume the duty to investigate, placing a burden on them "to check every fact in the books they publish is both impractical and outside the realm of their contemplated legal duties."[40] Thus, even if the authors could be held liable for negligent publication of erroneous information, the publishers were immune from liability for the independent contractor's alleged torts.[41]

Much as with the independent contractor defense in actual malice cases, the courts are unwilling to hold publishers, absent actual knowledge, to a high duty in these nondefamation negligence claims.[42]

Third–Party Content Online

In a related area of the law, Communications Decency Act § 230 has routinely been applied to limit liability for re-publication of third-party content on the Internet.[43] Courts generally have interpreted this provision broadly, finding that it encompasses not only claims such as defamation for which publication is an element, but any claim based on a service provider's alleged failure to "exercise . . . a publisher's traditional editorial functions," such as monitoring or screening other parties' transmissions or deciding whether to withdraw or delete content.[44] Recent cases have generally continued the provision's broad swath of publisher immunity, with the emerging issue that the immunity claim is weaker where the online service provider played a significant role in the creation or development of the information.[45] Notably, the protection of § 230 is expressly limited to publications occurring on an "interactive computer service" and would not be available to a publisher that reproduced the identical text off-line.

So You Want to Be a Writer?

Book publishing recently has taken a new path in the increasingly popular world of publish-on-demand. Through the power of the Internet, individuals now may circumvent traditional publishing houses to bring their works to publication. The common characteristic of publish-on-demand services is their singular role of printing whatever the customer requests. In the world of on-demand publishing, the editing and fact-checking services of traditional publishers are strictly at the author's option. And, unlike vanity publishing companies of the past, on-demand publishers typically do not require customers to buy a minimum quantity of their books upfront. Instead, the publisher prints copies only as purchased by the author for resale or as they are purchased online.

Publish-on-demand companies, however, are not simply copying services. They also offer a menu of à la carte services to help authors prepare, edit, and market their works. Some of the larger on-demand services include Lulu.com, the Amazon.com subsidiary BookSurge, and AuthorHouse.[46] For example, Lulu.com offers sophisticated design templates and comprehensive editing packages for purchase. BookSurge, utilizing its association with Amazon.com, offers comprehensive marketing services to authors, including printing and shipping the books directly to customers upon purchase. Some on-demand publishers contract out the fact-checking and editing services, but the extent of this practice is unknown.

Publish-on-demand has begun to prove fertile ground for the growth of the independent contractor defense for publishers. Recently, in *Sandler v. Calcagni,*[47] the federal court in Maine decided the first major publish-on-demand defamation lawsuit in which BookSurge was one of the defendants. The facts from *Sandler* are straight out of an after-school special gone bad. Two young women, Shana Sandler and Mia Calcagni, were classmates in high school and members of the cheerleading squad. Over time, their friendship soured, and Calcagni spread vicious rumors about Sandler. The fight eventually escalated to the point where Calcagni was found guilty of criminal mischief and agreed to a consent decree for a hate-crime charge.[48]

After Calcagni's criminal ordeal, her family wanted to tell their side of the story. They hired an author and independent fact-checker to help write and research their version of events for

a book, *Help Us Get Mia.* The Calcagnis purchased a package from BookSurge called "Author's Express PDF," which obligated BookSurge to print the book exactly as it was submitted without any additional fact-checking or editorial services.[49] The Calcagnis purchased 760 copies to give to friends and sell to local bookstores. The book was also available for purchase on Amazon.com, where approximately 80 copies were bought.

Plaintiff, Shana Sandler, filed a complaint for libel, false light, publication of private facts and punitive damages, naming as defendants Mia Calcagni and her parents, Peter Mars (the ghostwriter and fact-checker), and BookSurge. Before the court were cross motions for summary judgment pertaining to BookSurge's liability. The court granted BookSurge summary judgment, and the remaining parties later settled their claims.[50]

The district court first distinguished the meaning of the word "publication" in the context of defamation law, and concluded that merely because BookSurge participated in the publication of *Help Us Get Mia,* that alone did not "ipso facto establish liability."[51] It then turned to the view of the *Restatement (Second) of Torts,* and that of Prosser and Keeton, that the defendants' liability turns on their involvement in the defamation. Under Maine defamation law, fault must be proven at least to the negligence standard.[52] Thus, the court held that BookSurge would not be liable absent *scienter*—that it knew or should have known of the libel.[53]

Applying this negligence standard, the court granted summary judgment in favor of BookSurge, finding that it did not know or have reason to know of the defamation in printing *Help Us Get Mia.* The court held that because BookSurge did not "undertake to edit, review or fact-check any of its publications, it has no means or way of knowing whether defamatory material is contained within the works that it publishes."[54] The court highlighted the fact that, in this case, BookSurge had no involvement in the writing or production of the book and was merely paid by the authors to bind and print the manuscript. Interestingly, the court contrasted BookSurge to traditional book publishers (suggesting, without stating, that they *would* be liable for an author's negligence), noting that a traditional publisher "pays the author for the right to print a manuscript . . . review a manuscript when it is received to determine whether to accept the piece and pay the author . . . and edit and improve the manuscript in cooperation with the author."[55] By contrast, the court found that BookSurge would print, publish, and distribute anything submitted to it for publication, and engaged in no editing, fact-checking, or review of the manuscript. It also noted that any editing or fact-checking purchased through BookSurge was outsourced and performed by another, unaffiliated entity.[56]

Courts are not entirely consistent, however, in judging on-demand publisher liability. In an unreported case from 2006, *Brandewyne v. Author Solutions,* a Kansas jury found AuthorHouse, another on-demand publisher, liable for defamation.[57] The process by which AuthorHouse publishes books is nearly identical to the process described above concerning BookSurge. In 2003, AuthorHouse published a book entitled *Paperback Poison: The Romance Writer and the Hit Man,* ghostwritten under the byline of Gary Brock, the ex-husband of best-selling romance novelist Rebecca Brandewyne. *Paperback Poison* made accusations that Brandewyne

DRAFTING THE CONTRACT

In structuring contracts with freelancer-authors, publishers should consider the following specific issues:[1]

Intention of independent contract: From the outset, all parties must understand that the author is entering into an independent contractor arrangement, which may vary from the author's previous experience. Generally, the contract should refer to the hired party as "contractor" or "agent." But do not abandon common sense when hiring an author as an independent contractor. Even an airtight independent contractual relationship can be overcome if the contracting author had no business producing the work on his own. The publisher does not, of course, vouch for the author. But a "no" answer in discovery to the question, "Did you feel that you could trust this author to do a good job?" will not help anyone.

Duties and responsibilities: The contract should contain a duties clause explaining the task and the independent contractor's responsibility in connection with that task. This is where the publisher should set forth length and general content requirements. Outline the legal and stylistic expectations, but clearly state that all final determinations will be left to the author's sole discretion.

Editing: The right to edit for style alone is unlikely to impose liability upon the publisher. However, editing for substance may raise the concern that the independent contractor relationship is a sham. Thus, the publisher's risk of liability increases the more the publisher edits an independent contractor's work for content.

Expenses and author's tools: Include the independent contractor's agreement to supply his or her own facilities and supplies used to perform the job. It is advisable to require third-party fact-checkers and editors for less-experienced authors and potentially for all authors, regardless of experience. Make clear that these services must be obtained at the author's own expense. Explain to authors the benefit of procuring their own services and why it is to their creative advantage to work with their own hired help. But be sure to not mandate any specific persons or firms to contract with for editing and fact-checking purposes—though putting together a suggested list of potential "trusted" firms may be helpful to steer the author in the right direction.

Intellectual property: Don't forget copyright law. Be sure to include that the work will be a work-for-hire and that the publisher retains all rights to re-publication and derivative works. At the same time, include in the agreement a clause limiting the author's ability to disclose proprietary information obtained during the independent contracting term.

Compensation: Specify the financial arrangement—whether flat fee or commission based. Use the word "fee" rather than "salary" or "wage." Of equal importance, emphasize what is not included (i.e., health benefits, workers' compensation, pension, 401k). Include an express statement that publisher will not withhold any federal, state, or local income taxes, Social Security taxes, and the author assumes sole responsibility for appropriately submitting them. If payment is conditioned upon the submission of the finished product, explicitly state that payment is contingent upon the author's certification that the work is complete and ready for publication, and that it has been thoroughly vetted, edited, and fact-checked.

Term and deadline: A term of contract should be set and a deadline for the completion of work. However, the contract should avoid descriptions of working hours, which would be inconsistent with independent contractors' ability to set their own hours.

Termination: Termination clauses should be drafted so that publisher's ability to terminate the agreement is based on the results accomplished or the freelancer's failure to assume the risks and expenses contemplated by the agreement. In contrast, an unconditional termination right suggests a relationship with an employer-employee rather than independent contractor.

Warranty: The publisher should ensure that authors warrant, among other things, that (1) they have the necessary equipment and ability to complete the project; (2) the work will be solely that of their own creation; (3) the work will be performed in a high-quality, professional, and timely manner; (4) authors will exercise reasonable care and diligence in performing their duties, including customary journalistic fact-checking and verification of sources and information; and (5) the work will not impair or violate anyone else's right to privacy, rights of publicity, libel, infringement of copyright, or any other rights.

Indemnification: An indemnification provision should allow publisher to defend and settle any claim made against the publisher where the freelancer breached his or her warranty. The provision should make the freelancer liable for all the publisher's costs, damages, and attorney fees resulting from any claim, whether the claim is eventually held valid. Although freelancers may balk at the potential liability of such a contract, help them understand its benefits, including increased editorial freedom and complete content control beyond the general subject matter of the work.

1. For an in-depth analysis of independent contract drafting issues in general, see Jacob Rabkin & Mark H. Johnson, Current Legal Forms with Tax Analysis, ch. 12, §§ 12.36, 12.61 & 12.62 (2007).

had adulterous affairs with men and women, abused her child, abused drugs, plagiarized other authors, and hired a hit man to kill her ex-husband. The book also contained accusations about Brandewyne's parents and current husband. Brandewyne and her family sued her ex-husband Gary Brock, his current wife, the ghostwriter, and AuthorHouse for libel, invasion of privacy, and outrage. Claims against Gary Brock were dismissed without prejudice after he filed for bankruptcy, and all other defendants later settled except AuthorHouse.[58]

At trial, Brandewyne put forth an internal AuthorHouse memo demonstrating its knowledge that the book had been rejected by another publish-on-demand company because of concerns with libel. The judge found Brandewyne to be a private figure, and under Kansas law, gave jurors a negligence instruction as to the defamation liability, and an actual malice instruction for punitive damages. The jury returned a verdict for plaintiff on all counts, awarding libel and privacy damages of $200,000 to Brandewyne and $10,000 each to her parents and husband.

Kansas law calls for a bifurcated hearing on punitive damages, in which the jury determines whether the defamation was wanton conduct, and the judge determines the amount.[59] The jury found AuthorHouse's conduct met that standard, and the judge awarded $240,000 in punitive damages. In his written decision on punitive damages, Judge Jeff Goering ruled that AuthorHouse ignored clear warnings of potential libel, finding that "[e]very employee involved in the decision making process . . . had to have made a conscious decision to ignore a clear warning that the book was defamatory, or to pass the buck on to someone else."[60] Given AuthorHouse's knowledge of the content of the book, Judge Goering wrote that a "responsible publisher would make some effort to screen the content of the book at issue in this case before accepting it for publication" and that "AuthorHouse's failure to act when it had information that would have placed a prudent publisher on notice that the content of [the] book was harmful to the Plaintiffs."[61]

Although the conclusions of *Sandler* and *Brandewyne* are contradictory, they can be reconciled by looking to the application of the *scienter* element to the specific facts in each case. In *Sandler,* the court found BookSurge had no reason to know of the alleged defamation by virtue of its attenuated involvement in the publishing of the book. In contrast, the court in *Brandewyne* found much greater involvement by AuthorHouse, as demonstrated by an internal memo acknowledging that another publisher-on-demand previously rejected the manuscript because of its concerns with libel exposure. The lesson to be drawn from these two cases is that in negligence cases, the publisher's specific knowledge of the content of the book is critical.

General Lessons from the Case Law

The brick-and-mortar, online, and on-demand publishing case law discussed in this article may provide a road map for publishers to maximize their use of the independent contractor defense. All of the cases indicate that courts will look most favorably upon publishers that appear to be as far removed as possible from the creation and editing of the written work. Thus, the closer a work is to immediate publication when the publisher first touches it, or the more a publisher relies on outside fact-checking and editing services, the less likely it is

for the publisher to be held liable. While this may sound risky, especially with unknown and unproven authors—and may not be acceptable under certain publishers' standards and practices—the law rewards the publisher for detachment and distance.

In fact, it may be best to leave the retention of third-party editing and fact-checking services entirely to the author, to comport with the standard that the independent contractor will supply his or her own tools in the production of the work. The tools of an author go beyond the act of writing to include research, fact-checking, and editing for style and substance and to ensure that the final product complies with the law of defamation. Similarly, communication between the publisher and author during the production of the manuscript should be limited to questions of timing and delivery. Any additional communication as to content should be restricted to preserve the independence of the author and curtail any potentially adverse inference that the publisher participated in and supervised the creation of the work.

See the sidebar on page 8 for specific suggestions on drafting contracts with freelancers.

Ethical Issues for Lawyers

Lawyers retained by publishers in these circumstances need to be especially mindful of the ethical rules in dealing with or additionally representing the freelancer. Like many media joint-representation arrangements, independent contracting raises potential ethical problems for the lawyer.[62]

For media lawyers, joint representation typically is guided by *respondeat superior* principles, where the employee reporter, editor, and publisher share common interests and goals and in turn share in the liability.[63] More issues arise, however, when creating an arrangement that purposefully severs liability for the publisher, but not the author. These include identification of the client, joint responsibilities, confidentiality, potentially divergent objectives, and potentially adverse litigation positions. Except for the possibility of directly adverse litigation positions, the other potential traps for the lawyer typically may be overcome through careful client counseling and obtaining certain waivers.

Identifying who is the client in the independent contractor author arrangement is difficult in that only upon legal action against the publisher do the interests of freelancer and publisher substantially diverge. The *Restatement (Third) of the Law Governing Lawyers* states that when a lawyer attempts to represent an organization, along with one or more persons associated with the organization, determining who is the lawyer's client "is a question of fact to be determined based on reasonable expectations in the circumstances."[64] Thus, the lawyer's resulting "failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer relationships not intended by the lawyer."[65]

As a result, if lawyers want to represent both freelancer and publisher, they must obtain informed consent from both clients. When undertaking a joint representation, they must endeavor in a two-part duty of disclosure to the clients.[66] First, lawyers must investigate the "essential facts" and determine in their "professional opinion that interests are, in fact, common and not adverse."[67] Second, they must "explain fully to each client the implications of the common representation."[68] These conversations about conflict should be more than cursory. Candidly confront the possibility of conflicts and explain in depth the consequences of dual representation and conflicts of interest.[69] Failure to properly counsel and obtain informed consent may result in possible disqualification of the attorney and possible mandatory withdrawal. Other potential consequences include preclusion of cross-examination or taking any adverse position against a former client, thereby limiting representation to your primary client.[70] Most obviously, joint representation limits the ability to safeguard the attorney-client privilege and can increase exposure to malpractice claims.[71]

A potential conflict may be mitigated by signing an advance waiver under Rule 1.7(b) of the Model Rules of Professional Conduct when (1) the lawyer believes he will be able to provide competent and diligent representation, (2) the representation is not prohibited by law, (3) representation does not involve a direct claim of one client against the other, and (4) each affected gives informed consent in writing.[72] Informed consent means the lawyer has made adequate disclosure of the risks and alternatives and the client has agreed to the course of conduct.[73]

In 2005, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 05–436, approving the use of advanced waivers under Rule 1.7, giving lawyers far greater latitude in obtaining advanced conflict waivers from clients.[74] It stresses that the waiver's effectiveness is "generally determined by the extent to which the client reasonably understands the material risks that the waiver entails."[75] The committee notes that the more comprehensive and detailed the explanation to the client is concerning the actual and reasonably foreseeable consequences, the more likely the client has the requisite understanding.[76] General and open-ended waivers are typically only sufficient where the client is an experienced user of legal services and has a genuine understanding of the material risks involved.[77] The *Restatement* echoes the concern that open-ended advanced waivers require a certain level of client sophistication for them to retain their effectiveness over time.[78] A number of jurisdictions have adopted their own advanced waiver rules,[79] while many jurisdictions have adopted the amendments to the Model Rules in their entirety.[80]

Rule 1.7(b) specifically prohibits the representation of both clients in adverse litigation claims against the other. To the extent freelancers and publishers will be directly adverse is likely only where both parties have lost a lawsuit and the publisher must sue the freelancer for indemnification. It is then that the publisher will assert its contractual limitation of liability and place sole responsibility on the freelancer. By placing this specific instance in the language of the waiver, it will provide the requisite notice to the clients of this exact scenario.

In sum, the independent contractor and publisher relationship requires careful counseling of all parties involved. Both freelancer and publisher should be fully briefed so that they understand the potential conflicts of interest and their impact on continued representation. The moment any claim arises, the lawyer should analyze it for any potential conflict and again counsel the client.

Conclusion

While there are many advantages of structuring the relationship between publisher and author as an independent contractor agreement, perhaps here more than most areas of publishing law, facts

will rule the day. Simply drafting a tight agreement will not alone ensure success if the performance does not comport with the contract. Thus, not only is careful planning needed in the drafting but also in publisher follow-through to ensure that the relationship maintains an independent character and does not appear to be a sham. Independent contracting law can be a friend to both author and publisher in these difficult times for the industry, allowing for increasingly independent expression by encouraging publishers to relinquish control in order to lower legal risk.

Endnotes

1. *See* Joe Strupp, *Cuts like a Knife,* Editor & Publisher, Sept. 3, 2008.

2. Restatement (Third) of Agency § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

3. *See id.* § 7.07 cmt. f ("For purposes of *respondeat superior,* an agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs the work.").

4. *See* Sandler v. Calcagni, 565 F. Supp. 2d 184 (D. Me. 2008) (holding that without proof of *scienter,* on-demand book publisher was not liable for defamatory statements made by author where publisher did not participate in the substantive editing and writing of the book).

5. *See* Restatement (Third) of Agency § 7.07 (2006).

6. *Id.*

7. *See, e.g.,* Tasini v. New York Times Co., 533 U.S. 483 (2001); Faulkner v. Nat'l Geographic Enters., 409 F.3d 26 (2d Cir. 2005); Greenberg v. Nat'l Geographic Soc'y, 533 F.3d 1244 (11th Cir. 2008) (en banc) *cert. denied,* 2008 WL 4451872 (U.S. Dec. 8, 2008).

8. *See, e.g.,* East Point Condominium Owners Ass'n v. Cedar House Ass'n, 663 N.E. 2d 343 (8th Dist. Cuyahoga County 1995) (finding contractor liable for the faulty work of its subcontractors).

9. *See, e.g.,* Pershing v. United States, 736 F. Supp. 132 (W.D. Tex. 1990) (finding no liability for United States because liability for job site injuries generally determined on the basis of control, and United States did not exercise the means and methods in performing the construction work).

10. *See, e.g.,* Adams v. Hilton Hotels, Inc., 787 N.Y.S.2d 238, 240 (N.Y. App. Div. 2004) (affirming summary judgment for television station whose independent contractor's negligence assembling stage led to decedent's death).

11. *See, e.g.,* Carrasquillo v. Holiday Carpet Serv., Inc., 615 So. 2d 862, 863 (Fla. Dist. Ct. App. 1993) (affirming summary judgment for carpet cleaning company whose contractor's negligence injured plaintiff).

12. Hill Bros. Chem. Co. v. Superior Court, 20 Cal. Rptr. 3d 530, 536 (Cal. Ct. App. 2004) (holding that summary judgment had been improperly granted for plaintiff who was injured in negligent car crash by for-hire carrier hired as independent contractor).

13. *See, e.g.,* Tesillo v. Emergency Phys. Assocs., Inc., 376 F. Supp. 2d 327 (W.D.N.Y. 2005) (disputed issues of fact about extent of control hospital exerted over doctor precluded summary judgment for hospital).

14. Kleeman v. Rheingold, 614 N.E.2d 712, 715 (N.Y. 1993).

15. *See* Restatement (Third) of Agency § 7.06 (2006).

16. *See* Atl. Container Line AB v. Aref Hassan Abul, Inc., 281 F. Supp. 2d 457, 465 (N.D.N.Y. 2003) (seller of used tires was not liable for the torts of its agent against common carrier contracted by agent to transport the tires).

17. *See, e.g.,* Mireles v. Ashley, 201 S.W.3d 779, 784 (Tex. App. 2006) (reversing summary judgment and remanding due to existence of material issue of fact as to whether company inquired into its independent contractor's competency to drive—in fact, company was shown to have knowledge that the independent contractor driver had received eight citations over a five-and-a-half-year period).

18. *See* Puckrein v. ATI Transport, Inc., 897 A.2d 1034, 1044 (N.J. 2006) (reversing summary judgment and remanding on issue of negligent hiring where waste disposal company failed to inquire into whether its independent contractor haulers had proper insurance and registration).

19. *Atl. Container Line,* 281 F. Supp. 2d at 466 (defendant tire seller had no duty to inquire into the entities independent contractor intended to ship tires to, and therefore plaintiff carriers who were harmed by independent contractor's deceptive trade practices could not create issue of fact under negligent selection sufficient to survive summary judgment—any other result would force the principal to act as a guarantor of the independent contractor's conduct).

20. *Id. See also* Sandra M. v. St. Luke's Roosevelt Hosp. Ctr., 823 N.Y.S.2d 463, 467 (N.Y. App. Div. 2006) (affirming summary judgment in favor of hospital whose nurse sexually assaulted a patient—negligent hiring exception inapplicable because hospital, which used an independent contractor temporary staffing service for the selection of nurses, had no reason to foresee misconduct by the nurse).

21. 120 F.3d 1006 (9th Cir. 1997).

22. *Id.* at 1008.

23. *Id.* at 1011–12.

24. Vizcaino v. U.S. District Court for the Western District of Washington, 173 F.3d 713 (9th Cir. 1999).

25. *See* Steven Greenhouse, *Technology: Temp Workers at Microsoft Win Lawsuit,* N.Y. Times, Dec. 13, 2000.

26. New York Times v. Sullivan, 376 U.S. 254 (1964).

27. Anderson v. Liberty Lobby, 477 U.S. 242 (1986); *Sullivan,* 376 U.S. at 287.

28. Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989) (summary judgment for book publisher affirmed; "reckless disregard must be proved with respect to each defendant" and cannot be imputed if the author is an independent contractor).

29. *See, e.g.,* Nelson v. Globe Int'l, 626 F. Supp. 969, 978–79 (S.D.N.Y. 1986) (granting summary judgment in favor of magazine publisher, considering author's total control over the manner in which articles were written, notwithstanding editorial rewrites made by publisher); D.A.R.E. Am. v. Rolling Stone Mag., 101 F. Supp. 2d 1270, 1278 (C.D. Cal. 2000) (affirming summary judgment in favor of magazine, despite author's admissions as to falsehoods in article, because the author was an independent contractor; magazine exerted limited control over "the result of the work and not the means by which it is accomplished," the author was paid per article and not salary, and author retained staff position at another magazine during this independent contractor relationship); Chaiken v. Village Voice Publ'g Corp., 119 F.3d 1018, 1033–34 (2nd Cir. 1997) (affirming summary judgment for newspaper in libel action because reporter independently selected topics and conducted research, wrote articles without guidance, was subjected only to edits by the newspaper, received payment per article, and did not receive benefits); Falls v. Sporting News Publ'g Co., 899 F.2d 1221 (6th Cir. 1990) (applying Michigan law and concluding that weekly sports columnist was an independent contractor, notwithstanding the fact that his work was integral to the success of the paper; newspaper had the right only to edit the columnist's work, the columnist was paid per column, did not receive benefits, and did not list the newspaper on his tax return as an employer).

30. 747 F. Supp. 779, 787 (D.D.C. 1990).

31. *Id.* (citations omitted).

32. *Id.* at 788 n.7.

33. *Id.*

34. *Id.* at 788.

35. After careful analysis of her work, the

court also awarded summary judgment to the author on grounds that plaintiff had failed to demonstrate clear and convincing evidence of actual malice. *Id*. at 797.

36. *See e.g.,* Naantaanbuu v. Abernathy, 816 F. Supp. 218, 226–27 (S.D.N.Y. 1993) (publisher found not liable under "gross irresponsibility" standard, it adhered to established editorial procedure to ensure thorough review); Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989) (affirming summary judgment for book publisher: "[R]eckless disregard must be proved with respect to each defendant" and cannot be imputed if the author is an independent contractor); Chalpin v. Amordian Press, 14 Media L. Rep. 1206 (N.Y. Sup. Ct. App. Div. 1987) (magazine publisher's unrebutted showing that it relied upon integrity of reputable author and had no substantial reason to question accuracy of information provided by author warrants summary judgment for publisher under "gross irresponsibility"); Geiger v. Dell Publ'g Co., 719 F.2d 515, 518 (1st Cir. 1983) (affirming summary judgment in libel action in favor of book publisher, noting that publishers can only be held liable, under New York's "gross irresponsibility" standard, if it had reason to believe that the author's statements were likely to be untrue); Adams v. Maas, 7 Media L. Rep. 1188 (S.D. Tex. 1981) (granting summary judgment to publisher Bantam Books, finding its reliance on authors did not amount to a reckless disregard).

37. 938 F.2d 1033, 1036–37 (9th Cir. 1991).

38. *Id.* at 1037.

39. Barden v. HarperCollins Publishers, Inc*.,* 863 F. Supp. 41, 45 (D. Mass. 1994).

40. *Id.*

41. Numerous other courts have echoed the refusal to create a duty on traditional publishers based on a reader's misplaced reliance. *See, e.g.,* First Equity Corp. v. Standard & Poor's Corp*.,* 869 F.2d 175, 179–80 (2nd Cir. 1989) (investors who relied on inaccurate financial publications to their detriment were unable to recover their losses); Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1216–17 (D. Md. 1988) (finding no liability for publisher of nursing textbook when nursing student alleged that she injured herself with a home remedy described in nursing textbook); Lewin v. McCreight, 655 F. Supp. 282, 283 (E.D. Mich. 1987) (publisher found not liable to plaintiffs injured in explosion after mixing chemicals in reliance on metalsmithing book); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1267 (Ill. Ct. App. 1985) (publisher not liable to plaintiff whose injuries stemmed from reliance on a book's instructions on how to make tools); Gutter v. Dow Jones, Inc., 490 N.E. 2d 898, 902 (Ohio 1986) (finding no liability for *Wall Street Journal*'s inaccurate description of corporate bonds).

42. A notable outlier reliance case is Rice v. Paladin Enterprises Inc., 128 F.3d 233 (4th Cir. 1997).The Fourth Circuit held that a publisher was potentially liable as an aider and abettor when a murderer followed instructions in a technical "how-to" for hit men. The parties had stipulated to the publisher's knowledge and specific intent to target the book to would-be murderers. The court concluded that the case was "unique in the law" due to "astonishing stipulations . . . the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder. . . ." *Id.* at 267.

43. 47 U.S.C. § 230(c).

44. *See* Zeran v. AOL, 129 F.3d 327, 330 (4th Cir. 1997).

45. *See* Chicago Lawyers Comm. v. Craigslist, 519 F.3d 666 (7th Cir. 2008) (housing website publisher not required to filter or screen for discriminatory content; imposing such a duty would make the service impractical or substantially increase its costs); Fair Housing Council v. Roommate.com, 521 F.3d 1157 (9th Cir. 2008) (housing website could not avail itself of the immunity provided to operators in § 230 because it played a part in developing the allegedly illegal content when it solicited answers to discriminatory questions and allowed its members to search based on those answers).

46. *See* www.booksurge.com/info/About_Us; http://www.authorhouse.com/AboutUs/index.asp; and http://www.lulu.com/en/products/?cid = en_tab_publish.

47. 565 F. Supp. 2d 184 (D. Me. 2008).

48. *Id.* at 188–89.

49. *Id.* at 189.

50. *See* Notice of Settlement of All Parties, Sandler v. Calcagni, Docket No. 07-cv-29, Doc. #170 (D. Me. filed Sept. 4, 2008).

51. *Sandler,* 565 F. Supp. 2d at 193–94.

52. Maine generally follows *Restatement* view that "one who only transmits defamatory matter published by a third person is subject to liability, if, but only if, he knows or has reason to know of its defamatory character." *Sandler,* 565 F. Supp. 2d at 193 (quoting Restatement (Second) of Torts § 581). *See also* Levinsky's Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 128 (1st Cir. 1997); Lester v. Powers, 596 A.2d 65, 69 (Me. 1991).

53. *See Sandler,* 565 F. Supp. 2d at 194 (quoting Maynard v. Port Publ'ns, 297 N.W. 2d 500, 506 (Wis. 1980); Lewis v. Time, Inc., 83 F.R.D. 455, 463 (E.D. Cal. 1979)).

54. *Id.* at 195.

55. *Id.* at 194.

56. Calcagnis hired their own independent fact-checker and editor, co-defendant Peter Mars. *Id.*

57. Brandewyne et al. v. AuthorHouse, No. 04-cv-4363 (Dist. Ct. Sedgewick County, Kan. Aug. 2, 2006). *See also* MLRC MediaLawLetter at 17–18 (Aug. 2006).

58. Claims against Debbie Brock and the ghostwriter were settled for a combined $9,000. *Id.*

59. Kan. Stat. § 60-3702(b).

60. MLRC MediaLawLetter, *supra* note 57, at 17.

61. *Id.*

62. For an excellent and indispensable treatment of joint representation of media clients, *see generally* Richard M. Goehler, Bruce E.H. Johnson & Thomas S. Leatherbury, *Representing Media Clients and Their Employees in Newsgathering Cases: Traps for the Unwary,* ABA Comm. Lawyer, Summer 2002, at 10.

63. *Id.*

64. Restatement (Third) of the Law Governing Lawyers § 14 cmt. f (2001).

65. *Id.*

66. *See* Felix v. Balkin, 49 F. Supp. 2d 260 (S.D.N.Y. 1999).

67. *Id.*

68. *Id.*

69. *See id.*

70. *See* United States v. Henke, 222 F.3d 633 (9th Cir. 2000).

71. *See* Goehler et al., *supra* note 62.

72. Model Rules of Prof'l Conduct, R. 1.7(b).

73. *See* Model Rules of Prof'l Conduct. R. 1.0(e).

74. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05–436 (2005). *See also* Alice E. Brown, *Advance Waivers of Conflicts of Interest: Are the ABA Formal Ethics Opinions Advanced Enough Themselves?,* 19 Geo. J. Legal Ethics 567 (2006).

75. ABA Formal Op. 05–436, *supra* note 74.

76. *Id.*

77. *Id.*

78. Restatement (Third) of the Law Governing Lawyers § 122 cmt. d (2000).

79. *See* D.C. Bar Legal Ethics Comm., Op. 309 (2001) (holding that advanced waivers are generally not prohibited); N.Y.C.L.A. Comm. on Ethics, Op. 724 (1998) (holding that as an ethical matter there is no bar to seeking a waiver of future conflicts).

80. Brown, *supra* note 74, at 574.