

Big Mouths, Big Deal, Big Money

There has been a a lot of loose talk about libel and slander in the high and low desert these days. Quite simply, **free speech** in America is defined by the **U.S. Constitution**, not by attorneys or talk show hosts. California has one of the most liberal interpretations of free speech in the nation, and our desert communities are not barren of threats against our liberty. Behind the threat is big money.

Up in the high desert, **Cora Heiser** found herself on the receiving end of a letter requesting a retraction along with a threat of legal action from **Gary Daigneault**, a small radio talk show host, offended by a remark Heiser wrote in **Cactus Thorns** (www.cactusthorns.com), a popular blog run by businessman **Dan O'Brien**. Daigneault was insulted that Heiser was critical of his proposal to spend millions in city funds to build a massive theatre in **29 Palms**.

Down **Palm Springs** way, **KNEWS (94.3 FM)** talk show host **Lee Rayburn** and his employer, **Morris Desert Radio**, were served a lawsuit by a high-powered and well-connected attorney, **David Baron**. He was seeking millions for the words broadcast on air, referring to **Pete Chryss**, the convicted felon and unlicensed contractor. Chryss had been exposed for taking part in a questionable relationship with former DHS councilman **Karl Baker**, with whom he then resided, and whose signature appears to have endorsed checks from the city made payable to Chryss.



Both O'Brien and the *Desert Star Weekly* are also winners of Daigneault letters threatening litigation, letters now framed and hanging on the wall amongst other awards. Daigneault has failed to shove a sock in the mouth of critics with whom he disagrees. **Cactus Thorns**, with a readership measuring ten times that of Daigneault's listeners, revels in Daigneault's complaint. The last time Daigneault attacked the *Desert Star Weekly*, telling his readers not to read our newspaper, circulation skyrocketed. Therefore we are grateful for Daigneault in spite of his objections and his difficult to pronounce name.

After the popular Rayburn show informed the public that Chryss was not licensed to sell, service, install or monitor security alarm systems, the contracts Chryss had with the cities of **Indio** and **Desert Hot Springs** were canceled. One reason Baron is suing Rayburn and company is because they allege Chryss "lost 90% of his business" as a result of Rayburn's big mouth. Rayburn's ratings have soared ever since, as he has continued exposing criminal acts, political corruption, and funky business practices.

In light of the fact the **U.S. Supreme Court** long ago protected the free speech rights of Hustler Magazine's Larry Flynt to publish an illustration of Jerry Falwell's mother engaging in a sex act, these local objections to free speech raise questions of what free speech is and who public figures are.

In cases where the media defendant is addressing an issue of public concern, the **First Amendment** also requires proof of actual malice or a reckless disregard for the truth, even if the plaintiff is not a public figure. So, who exactly qualifies as a **Public Official** or **Public Figure**? And, what are some of the rules used by the media in doing their job reporting the news?

Governmental policy-makers are public officials, while public employees generally are not public officials. There are three criteria used in determining public figure status. Does the person named

1. **Perform governmental duties** directly related to the public interest;
2. **Hold a position** to significantly influence the resolution of public issues; and
3. **Have, or appears to the public to have**, substantial responsibility for, or control over, the conduct of government affairs.

A "**public figure**" is a person who is publicly prominent, so much so that discussion or commentary about that person amounts to a public concern. However, such persons are not necessarily public figures for any

purpose: Status as a public figure may only extend to the particular area in which they are publicly prominent. There are several types.

(1) **Involuntary Public Figure**: became a public figure through no purposeful action of their own, including those who have become especially prominent in the affairs of society;

(2) **Ongoing Public Figures**: those who occupy a position of such persuasive power and influence that they are deemed public figures for all purposes;

(3) **Public Figures on Specific Issues**: those who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

The media is required to perform due diligence to investigate the facts. Even basic investigations can go a long way towards reducing defamation liability. Publishing material as fact without doing any investigation by itself might amount to a reckless disregard for the truth. To avoid liability, you don't have to establish the truth of the statement for all time; rather, you should do enough to satisfy yourself that the facts alleged are probably true in your reasonable judgment.

It is also necessary to establish **Neutral Criteria** for publication. The guidelines you use must be reasonable and should reflect the appropriate professional standards of journalism. Failure to follow the criteria established might be viewed as recklessness.

Use reliable sources and common sense. Be aware when people have obvious axes to grind. If an unreliable or uncertain source presents you with a good story, take special care to verify or corroborate the story before publication.

Retain records of investigation. In order to defeat a claim of recklessness, it is extremely helpful to document the facts and procedures of the investigation. The main way of doing that is to preserve the notes, records, and other material related to an investigation. Establish a general policy of records retention. Keep the records until the statute of limitations on defamation runs out.

Confirm the identity of the subject of your article. Many defamation problems may be headed off by calling the subject of the article for confirmation or denial. If the subject chooses to talk to you, you will get their side of the story. Getting this information may cause you to modify the article you are about to run. Certainly you can claim a good faith effort to determine the truth if you contact the subject. If the subject refuses to speak with you, at the very minimum you've made a good faith effort.

Attempting to contact the subject helps avoid any identification problems about the subject. Many names are quite common, and contacting the subject will confirm that you're dealing with the right person. At a minimum, you might try to get the subject to confirm the exact spelling of their name, which also acts as a check on identity.

Be skeptical of public records. Many public records also reflect the confusion of common names, and the only real guarantee of accuracy in public records is the skill of the typist who entered the data in the computer.

Use quoted material whenever possible. Often more controversial material should be presented in the form of a quotation. The person being quoted takes the risk of a defamation claim. You should not use a quote if you believe that that quote is false, and you can't knowingly or recklessly print false information simply by putting the words in someone's mouth.

Avoid conclusory language. Report facts, not conclusions. If there are any conclusions to be drawn from the facts, the reader will draw them. Cite the person giving you the quotation. Often the identity of a person making a statement is more newsworthy than the quote itself.

Do not take sides in evaluating disputed facts. You can compare and contrast differing versions of events with each other in a news story, but do not state unequivocally that one side or the other is lying, or that one side or the other is factually incorrect. That is an opinion, and should be qualified as such. As an opinion, it should not appear in a news story where a reader may confuse it with a factual report.

Instead of "Mrs. Smith is lying because the videotape at the scene shows the officer was courteous" you might say: "Mrs. Smith's account is contradicted by the videotape from the officer's car. The videotape appears to show that the officer acted courteously. Mrs. Smith denied assaulting the officer even after she was confronted with the videotape and hospital records showing medical treatment of slap marks on the officer's right cheek."

We listen to “**The Lee Rayburn Show**” and trust that he and the radio station will be victorious against this assault on free speech. We at the *Desert Star Weekly* believe our news colleagues have done their homework. And **Cora Heiser** up in the high desert, in speaking out, has won our admiration for her courage in facing the elephant in the room. **Gary Daigneault**, on the other hand, well deserves a lesson in hypocrisy and polite consideration for the benefits of free speech that generates income for our media businesses.

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Publisher and one of the writers for the Desert Star Weekly, the California desert's #1 and only alternative independent weekly newspaper. Dean started in the newspaper business at age nine, delivering the weekly Shopping News in Long Beach, California. He wrote, published and sold ads for his first independent newspapers in 1969 while in high school and has been writing ever since. Art Kunkin, then publisher of the LA Free Press and now of Joshua Tree, was then and remains now his inspiration and a weekly columnist in the Star. While Dean's "cactus thorns" can be sharp and pointed, he has a passion for art, music, good food and healthy living. See www.desertstarweekly.com/who-we-are for more.



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