

13-1003. Publication: Defined.

To support a claim for defamation, there must be a publication. Publication is an intentional or negligent communication to one other than the person defamed. [If, however, the communication is only to a person who knows that the communication is false, then there has been no publication.]

USE NOTES

There can be no defamation if the communication was not published. See *Bookout v. Griffin*, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982). Often, the fact of publication will be apparent, and the defendant will not deny that a publication occurred. In such cases, this instruction need not be given. Indeed, in some cases, publication will be presumed from the facts. See, e.g., *Hornby v. Hunter*, 385 S.W.2d 473, 476 (Tex Civ. App. 1964) (paper with circulation of 4100: "It is not necessary that the article was read, as that can be presumed".), cited with approval in *Martinez v. Sears, Roebuck & Co.* 81 N.M. 371, 467 P.2d 37 (Ct. App.), cert. denied, 81 N.M. 425, 467 P.2d 997 (1970).

Where appropriate, the judge may supplement this instruction with a definition of the word "negligent" used in the instruction. If the negligence standard is used in UJI 13-1009 NMRA, the judge might choose to incorporate the definition of negligence given there. If the malice standard is used in UJI 13-1009 NMRA, however, the judge should provide a definition of negligence in the instruction.

The bracketed matter informs the jury that if the communication was received only by persons who knew that the communication was false, there is not, in law, a publication; the defamation action must fail. *Id.* at 375, 467 P.2d at 41. Because publication is an element of defamation upon which the plaintiff bears the burden of proof, presumably the plaintiff must establish that at least one person to whom the alleged defamation was communicated was unaware that the communication was false. The bracketed portion of the instruction should be given when the defendant has not admitted the fact of publication and an issue of fact has arisen concerning whether any recipient of the communication believed it to be true.

Former UJI Civ. 10.26 (Repl. 1980) stated that no instruction on the issue of "republication" had been formulated because "[t]here is no New Mexico case law in point on the matter and the rulings from other states are in conflict". This observation is still true and, once again, the committee has not promulgated an instruction.