

1 **13-1004. Statement of fact: Fact defined; opinion contrasted.**

2 To support a claim for defamation, the communication by defendant must contain a
3 statement of fact.

4 In contrast, statements of opinion alone cannot give rise to a finding of defamation.

5 [However, an opinion which implies that it is based upon the existence of undisclosed facts
6 is the same as a statement of fact.]

7 In deciding whether the communication is or contains a statement of fact, you should
8 consider the following:

9 (A) The entirety of the communication and the context in which the
10 communication was made; and

11 (B) Whether reasonable persons would be likely to understand the
12 communication to be a statement of the defendant[']s opinion or a statement of fact.

13 USE NOTES

14 In *Marchiondo v. Brown*, 1982-NMSC-076, ¶¶ 55-58, 98 N.M. 394, ~~404~~, 649 P.2d 462, [
15 472 (1982)], the supreme court described the proper role of judge and jury in determining whether
16 the alleged defamatory statement was or contained a statement of fact:

17 Where the statements are unambiguously fact or opinion, . . . the court determines as a
18 matter of law whether the statements are fact or opinion. However, where the alleged defamatory
19 remarks could be determined either as fact or opinion and the court cannot say as a matter of law
20 that the statements were not understood as fact, there is a triable issue of fact for the jury.

21 If the trial judge determines that, as a matter of law, the alleged defamatory statement is
22 wholly opinion, then the court should direct a verdict for the defendant. If the judge determines

1 that, as a matter of law, the statement is factual, there is no need to give this instruction; instead,
2 the judge normally should omit any instruction or discussion of this issue.

3 Where the alleged defamation is made up of many statements, it is possible that some of
4 the statements will be opinion as a matter of law, some will be factual as a matter of law and some
5 will raise a jury issue as to whether they constitute facts or opinion. In such cases, the trial judge
6 should make clear to the jury which portions of the statements the judge has ruled upon and which
7 statements raise a jury issue as to their factual or nonfactual nature.

8 The bracketed instruction contained in the third paragraph should be given only when the
9 judge determines that the alleged defamatory statement is or may be a statement of opinion, but
10 further determines that the statement, if opinion, nonetheless may imply the existence of
11 undisclosed facts:

12 It is the function of the court to determine whether an expression of opinion is capable of
13 bearing a defamatory meaning because it may reasonably be understood to imply the assertion of
14 undisclosed facts that justify the expressed opinion about the plaintiff or ~~[his]~~plaintiff's conduct,
15 and the function of the jury to determine whether that meaning was attributed to it by the recipient
16 of the communication.

17 Restatement (Second) of Torts § 566 comment c (1977). In such cases, if the jury concludes
18 that the statement is an opinion but that it implies the existence of undisclosed facts, the
19 requirement of a factual statement, described in this instruction, is satisfied.

20 [As amended by Supreme Court Order No. S-1-RCR-2025-00126, effective for all cases pending
21 or filed on or after December 31, 2025.]

22 **Committee commentary.** — Statements of opinion alone cannot be the basis of an action for
23 defamation:

1 Under the First Amendment, there is no such thing as a false idea. However, pernicious an opinion
2 may seem, we depend for its correction not on the conscience of judges and juries, but on the
3 competition of other ideas. But there is no constitutional value to false statements of fact.
4 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40[~~94 S. Ct. 2997, 41 L. Ed. 2d 789~~] (1974). New
5 Mexico acknowledges this fundamental premise of defamation law: [“]“Ideas and opinions,
6 although incorrect or faulty in their premise, are protected by the United States constitution. False
7 statements of fact, whether intentionally or negligently published, are unprotected[”].
8 *Marchiondo v. [New Mexico]N.M. State [Tribune]Trib. Co.*, 1981-NMCA-156, ¶ 38, 98 N.M.
9 282,[~~291,~~] 648 P.2d 321[~~, 330 (Ct. App. 1981)~~], cert. quashed, 98 N.M. 336, 648 P.2d 794(1982);
10 *see also Marchiondo[v. Brown]*, 1982-NMSC-076, ¶ 55[~~98 N.M. 394, 404, 649 P.2d 462, 472~~
11 ~~(1982)~~] ([“]“Opinions are protected but defamatory falsehood is not[”]).
12 In *Marchiondo[v. Brown]*, 1982-NMSC-076, ¶ 55[~~98 N.M. 394, 404, 649 P.2d 462, 472 (1982)~~],
13 the supreme court noted that [“]“[t]he problem which arises under the new standard is
14 distinguishing between an opinion and a mere statement of fact[”]. The criteria for determining
15 whether a statement constitutes a fact or opinion are derived from that decision.
16 The third paragraph addresses the special problem which arises when the communication may be
17 classified as opinion, but may imply the existence of underlying facts. Two decisions of the court
18 of appeals hold that the constitutional requirement that defamation actions be limited to factual
19 statements is satisfied under these circumstances. *Kutz v. [Independent Publishing]Indep. Publ’g*
20 *Co.*, 1981-NMCA-147, 97 N.M. 243, 638 P.2d 1088 [(~~Ct. App. 1981~~)]; [*Marchiondo v. New*
21 *Mexico]N.M. State [Tribune]Trib. Co.*, 1981-NMCA-156[~~98 N.M. 282, 648 P.2d 321 (Ct. App.~~
22 ~~1981)~~], cert. quashed, 98 N.M. 336, 648 P.2d 321(1982)]. The Supreme Court of New Mexico

- 1 accepted this view in *Marchiondo*~~[v. *Brown*]~~, 1982-NMSC-076, ¶ 55~~[98 N.M. 394, 404, 649 P.2d~~
- 2 ~~462, 472 (1982)]~~.
- 3 [As amended by Supreme Court Order No. S-1-RCR-2025-00126.]