

JULY 2009



**California
Bar
Examination**

Performance Test B

INSTRUCTIONS AND FILE

WILLIAMS v. GOLUB

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WILLIAMS v. GOLUB

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains actual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Ryan, Evans & Blaire
605 Dana Way
Bodie, Columbia
www.ryanevansblaire.com

MEMORANDUM

To: Applicant
From: Lauren Evans
Date: July 30, 2009
Re: **Williams v. Golub**

We represent Adam Golub, a successful personal injury lawyer, who has been sued for defamation by Adrienne Williams. Ms. Williams was an associate in Mr. Golub's firm until she resigned to set up a solo law practice, taking one of the firm's clients with her. Mr. Golub was recently served with the complaint that alleges that a letter he sent to the client was defamatory.

As you will see when you read my notes from my interview with Mr. Golub, at least one of the assertions he made in the letter was untrue and is defamatory unless privileged. I need your help therefore in analyzing whether there are privileges that might apply.

An answer to the complaint is due next week. Please prepare an objective memorandum for me that analyzes whether any defenses to Ms. Williams' claim for defamation based on privilege are available.

Ryan, Evans & Blaire
605 Dana Way
Bodie, Columbia
www.ryanevansblaire.com

MEMORANDUM

To: File
From: Lauren Evans
Date: July 29, 2009
Re: **Interview with Client Adam Golub**

Adam Golub is the principal of a five attorney personal injury law firm. He has been sued for defamation by a former associate, Adrienne Williams, who left the firm “under unpleasant circumstances.” He said that her work was substandard and that he spoke to her about it “numerous times” and that ultimately she resigned on January 13, 2008 rather than be fired. Williams followed up with a resignation letter in which she announced that a client on whose case she had worked, Harvey Campbell, had decided to retain her as his lawyer and that she had taken portions of the client’s files. Golub called her and accused her of “poaching” his client and demanded that she return the files. She declined, and said that he would be getting a letter from Campbell (and maybe others) instructing him to transfer the case to her and to turn over the remainder of the file to her.

Golub says the case she took involved a client with paralysis resulting from the collapse of a roof. He said that liability among multiple defendants wasn’t clear and that the cause of the collapse was contested as well as the permanency of the injury. He said he “couldn’t imagine how a lawyer as inept as Williams could win the case, and at stake was a potential multimillion dollar verdict and the client’s capacity to pay for medical treatment over the long term.” Golub’s firm took the case on a contingency fee of 33% of the recovery plus costs, and he has already invested hundreds of hours on

the investigation and more than \$30,000 for expert witness fees. He composed and sent a letter to the client to “warn him about Williams” and to persuade him not to change lawyers.

After reading the letter I said to Golub, “You certainly used some strong language.” He responded, “Although it’s complicated, Campbell has a strong case. There was a lot of money involved for both Campbell and me. The more he gets, the more I get. Also, I just didn’t want a client of mine to make a decision to change counsel before considering what he was entitled to and to clearly understand the risk he was taking of losing his case.”

I asked if the letter worked. He said that no, it hadn’t. About a week after he sent the letter, he received a fax from Campbell, telling him that he had retained Williams as his lawyer and that Golub should transfer all files and evidence to Williams. I asked Golub if he’d assumed he was still Campbell’s attorney up until the time he got the fax. He said, “Yes. I sure wasn’t about to take Adrienne’s word for it.” Golub said over the course of the next month he had complied in transferring files, etc., and that he had formally withdrawn from the case. Even so, he continued to have disputes over the transfer of the firm’s claim for its share of legal fees and costs. He said that the atmosphere between them “was quite poisonous and that was, no doubt, the reason she filed the defamation lawsuit.”

I asked him to tell me about Adrienne Williams. He said that she went to law school after working for a decade as an emergency medical technician and that he had hired her after she had worked at the Robin, Thomas, David and Sweet law firm for two years. She started at the previous firm right after passing the bar exam. Even though “she barely kept her grades high enough to graduate” he was impressed with her experience in the medical field and thought her knowledge of and comfort with medical terminology and procedures would be useful in the practice. He said that, although clients liked her, “she seemed to resist learning what I tried to teach her, and her level of disorganization created some real problems for the firm.”

I asked him if everything he wrote in the letter was true. He said, "I thought so at the time I wrote it. I have since found out that even though I said that she had never handled a case like Campbell's and that she had never won a case, in fact, when she was with the Robin, Thomas, David and Sweet firm, she did work on another paralysis case in which she had gotten a million dollar verdict."

Ryan, Evans & Blaire
605 Dana Way
Bodie, Columbia
www.ryanevansblaire.com

MEMORANDUM

To: File
From: Lauren Evans
Date: July 29, 2009
Re: Telephone Conversation with Emily Sweet

After talking to Mr. Golub I called Emily Sweet. Emily is a partner in the law firm of Robin, Thomas, David and Sweet. She was Adrienne Williams' boss for 3 years. She said that Williams worked as a law clerk for the firm during her last year of law school and then they hired her as an associate after Williams passed the bar.

I asked whether Williams' work was satisfactory and she said, "Adrienne was quite good for her level of experience. During her time at the firm she tried two personal injury cases to completion and won one and lost one." She said that her research and writing "were adequate, not excellent."

I asked about the case she had won. Emily said, "It was her second trial and she had clearly learned some hard lessons from losing the first. In this one, she got a large verdict, \$1.2 million, for a client who had nerve damage with resulting paralysis. I was very proud of her, and the client was very pleased with her work."

I next asked why she had left the Robin, Thomas firm. The reply was "She went to work with Adam Golub because he lured her away with more money. He paid her more than I could afford. I was sad to see her go, but I didn't match his offer."

1 Conrad J. Gaskill
2 Panama, Whittier, Francisco & Alameda, LLP
3 5211 Bay Street
4 Santa Barbara, Columbia
5 (555)714-1937
6 Attorneys for Plaintiff

7
8 **SUPERIOR COURT OF COLUMBIA**
9 **COUNTY OF HERKIMER**

10
11 Adrienne Williams,
12 Plaintiff

Civ. # 27706

13
14 v.

COMPLAINT

15
16 Adam Golub,
17 Defendant

18 _____/

19
20 This is an action for defamation, in which plaintiff Adrienne Williams seeks general,
21 special, and exemplary damages proximately resulting from false and malicious
22 statements defendant Adam Golub made in a letter to a client of the plaintiff impugning
23 her competence and integrity as a lawyer.

- 24
25 1. Plaintiff is a lawyer, admitted to practice in the State of Columbia, and engaged
26 in the private practice of law.
27 2. Defendant is a lawyer, admitted to practice in the State of Columbia, and is the
28 principal in the law firm of Adam Golub and Associates (“law firm”).
29 3. From July 7, 2004 to January 13, 2008 plaintiff was employed as an associate
30 attorney in defendant’s law firm.

- 1 4. As part of her duties while employed at the law firm, plaintiff represented Harvey
2 Campbell (“the client”) in a suit based upon tort.
- 3 5. On January 13, 2008, plaintiff resigned from the law firm.
- 4 6. On January 18, 2008, defendant was terminated as counsel for Campbell and
5 was instructed to transfer Campbell’s case from the law firm to plaintiff for
6 continuing representation.
- 7 7. On January 20, 2008, defendant sent a letter to the client containing false and
8 unprivileged communications tending directly to injure plaintiff and damage her
9 business and professional relationships by mischaracterizing her competence as
10 a lawyer and specifically stating the falsehood that plaintiff had lost every case
11 she had taken to trial.
- 12 8. Plaintiff is informed and believes, and based thereon alleges, that the conduct of
13 defendant described above was done with malice.
- 14 9. Defendant’s conduct was defamatory under the law of the State of Columbia. As
15 a result of defendant’s defamation, plaintiff has suffered loss of earnings, injury to
16 her personal, business and professional reputation, harm to her business and
17 professional relationships and severe emotional distress, in an amount to be
18 established at trial.
- 19 10. Defendant’s conduct was such as to entitle plaintiff to punitive damages in an
20 amount to be established at trial.

21
22 Wherefore, plaintiff seeks damages as a result of defendant’s defamatory actions in an
23 amount to be established at trial.

24
25 Panama, Whittier, Francisco & Alameda

26
27 Dated: May 20, 2009 C J Gaskill

28 Conrad J. Gaskill, Esq.
29 Attorneys for Plaintiff Adrienne Williams

30

**Adam Golub and Associates
Attorneys at Law
11 Brocklebank Building
Bodie, Columbia
(555)538-2320**

January 20, 2008

Mr. Harvey Campbell
1873 West Shawna Lane
Shipley, Columbia

Dear Mr. Campbell:

Adrienne Williams has resigned from our law firm effective January 13, 2008 and set up a solo law practice run from her home. She informed me that you are considering withdrawing your case from our firm and hiring her to represent you in your ongoing lawsuit against those responsible for the roof collapse that injured you so severely. Because I do not think it is in your best interest to be represented by a lawyer with so little experience and such a weak record of success, I ask that you think long and hard before you make this change. If you do decide to transfer representation to her, I will, of course, honor your decision and turn over your file to Ms. Williams.

Ms. Williams has been an attorney for barely five years. In the three and a half years she was with my firm, she won only two cases. In each of those cases there was no defendant actively litigating against her allegations. In one, the doctor was in a mental institution and, in the other, she was suing a hospital for its emergency room practices, which they knew were deficient and were in the process of changing. They were anxious to settle once they had decided how to handle the changes. Both of those cases had been prepared for years by my office before Ms. Williams became involved. She has never before handled a case with an injury such as yours.

While with me, Ms. Williams lost four cases she took to trial. At her prior law firm, the first case she tried was a major case in which she represented a teacher who was dying of cancer that his urologist had failed to diagnose. The defendant's attorney told me that he had been present at a conference when the judge laughed at Ms. Williams for misrepresenting that her client was too sick to appear at a deposition when the defendant had surveillance photos showing him teaching a class and traveling to his vacation home in Montreal. The defendant's attorney also told me that Ms. Williams had not prepared her major witness. Her expert witness was unfamiliar with the medical records when questioned on cross-examination. Ms. Williams lost that case and every other one she took to trial.

It takes a lot of money to run a law office. I have heard that Ms. Williams hasn't enough money to hire a secretary. All of our attempts to reach her by telephone in the past two weeks have been unsuccessful because the answering machine says it is full. She will owe me tens of thousands of dollars in disbursements on the cases she hopes to take from my office.

If the defendant's attorneys know that the plaintiff's attorney has a record of losing cases, has limited experience in trying cases, and is not able to finance the great expenses of a complicated trial such as yours, which involves expert witnesses and depositions, they are likely to resist any legitimate settlement and force the case to trial. Also, Ms. Williams, in her need for money to pay her overhead and finance other cases, may attempt to settle your case for far less than its full value. Your case is worth millions of dollars. It would be criminal to settle the case for anything less. If she does so, she will have put her interests ahead of yours.

I tell you these things because, as your lawyer, I have an ethical obligation to give you candid advice. In addition, as I will receive a portion of the fee in your case, it is in both our interests that you receive the best possible result. As I have told you, I represented another client who has essentially the same injury as yours. I tried her case and obtained a verdict of \$3,500,000. The case was sent back for a new trial by the appellate court. The second time I obtained a verdict of \$3,400,000. I tried the case in Ness County, a jurisdiction that is much more hostile to plaintiffs than Herkimer. You, therefore, have a very valuable case. I am more than willing to continue to represent you in it. However, if you decide to entrust it to her, please, for both your sake and mine, take the following precautions:

1. Direct Ms. Williams in writing not to enter into settlement negotiations on your case without speaking first to you, discussing her settlement strategy, and obtaining your approval of the amounts she will demand and will be willing to settle for.
2. Before you accept any offer of settlement, you discuss the case with some other experienced personal injury attorney for the sake of having a second opinion and hearing other options. Your case is the first paralysis case that Ms. Williams will be handling. She does not have experience in evaluating or trying cases such as this and has very little rapport with the defense bar and the builders' insurance companies.

Judge Regina Mack, the judge handling your case, is very intelligent and experienced. After Ms. Williams was assigned to her for trial on a recent case, Ms. Williams called the court and stated that her father had been taken to the hospital. Ms. Williams had told me and an associate in my firm that she was afraid of going before this judge. The trial was continued. She then spent the day in the office rather than going to the hospital to see her father in the hospital, if he actually was in the hospital.

Please call me if you have any questions or wish to discuss these matters before making your decision.

Very truly yours,
Adam Golub and Associates
Adam Golub
Adam Golub

The Law Office of Adrienne Williams
560 Winston Street
Reginald, Columbia
555-331-0500

BY PERSONAL DELIVERY

Email: awlawyer@alo.com

January 18, 2008

Adam Golub, Esq.
Adam Golub & Associates
11 Brocklebank Building
Bodie, Columbia

Dear Adam:

This letter confirms our conversation in which I resigned as an associate with your firm, effective January 13, 2008. You know all of the ways that I was dissatisfied with the way I was treated by you and others at the firm, and I will not rehash them in this letter. My resignation gives me the opportunity to start my own firm, something I have always wanted to do.

Fortunately, I am working to ensure that the clients for whom I had primary responsibility are not harmed by my departure from your firm. They all have been quite happy with my work. That is particularly the case with Mr. Harvey Campbell, who has decided to come with me rather than stay with the Golub firm.

Mr. Campbell has authorized me to enter an appearance in his pending case in the name of my new law firm. I will obtain a substitution of attorney from Mr. Campbell and send it to you for signature. In addition, please arrange to have Mr. Campbell's files available for pickup by me on or before January 25, 2008. My hope is that we will be able to amicably resolve any lingering financial issues regarding this case along with the money you still owe me for past services.

Sincerely,

A. Williams

Adrienne Williams

COPIES OF ADAM GOLUB AND ASSOCIATES E-MAIL CORRESPONDENCE

From: duarte@golublaw.com
To: golub@golublaw.com
Sent 12/19/2007 4:15 PM
Subject: RE: RE: Why are you excluding me?

Dear Adam,

I can no longer work productively with Adrienne. I realize that you have been counting on me as the senior associate to train her and bring her along but she has screwed up so many things that I don't feel I am being successful. She is disorganized and doesn't seem to be prepared. I sent her to court for a status conference a few weeks ago and she ended up going to the wrong courtroom and didn't straighten it out in time to be there when the case was called. This kind of thing happens too often, in my view.

I would appreciate it if you would assign me one of the other associates. Sorry to bother you with this. Here is the e-mail I got from her yesterday and my response to it.

Tony

From: duarte@golublaw.com
To: williams@golublaw.com
Sent 12/19/2007 3:45 PM
Subject: RE: Why are you excluding me?

Dear Adrienne:

I am not sure that carrying on this conversation by e-mail is the best idea. You asked why I exclude you, but the truth is that you have excluded yourself. How many client meetings have had to start without you because you came late or not at all? I can answer the question but perhaps you should reflect on it. It makes a very poor impression when we tell a client to expect you but you aren't there. Regarding expert witnesses, given your medical expertise I think you could potentially be a big help in talking with them but in the ones I have been part of with you it has seemed as if you were either unprepared or extremely disorganized. For these reasons I have stopped

scheduling you to be part of many meetings. If I can get a commitment from you to change your behavior, I will rethink my position.

Regarding the written work, I very often find your writing unpersuasive, your research incomplete, your analysis fuzzy, and your grasp of the facts marginal at best. I have offered repeatedly to work with you to help you improve but instead of accepting my constructive criticism you always walk away in a huff so I have just given up.

You aspire to be a trial lawyer but in the time you have been in this firm you haven't shown any of us that you have the drive or the ambition to develop the skills you need in order to be successful.

Tony

From: williams@golublaw.com

To: duarte@golublaw.com

Sent 12/18/2007 2:20 PM

Subject: Why are you excluding me?

Anthony:

I am getting increasingly angry by your repeated exclusion of me from meetings with clients and witnesses. I don't see how I can continue to be an effective member of our litigation team unless I have the kind of first-hand knowledge that comes from these meetings. You rewrite briefs and pleadings that I have drafted without consultation or discussion with me. I thought we were supposed to collaborate but instead you insult my work and act with condescension in ways that undermine me. In the Thornton case summary judgment brief, you ignored what I wrote about the medical diagnosis and substituted your language for mine. As you well know, my knowledge of medicine is far superior to yours and I think the way you botched the descriptions of the client's injuries will harm her case. I know there is much I can learn from you, but you have to treat me with respect.

Adrienne

From the Desk of Harvey Campbell

By Fax Transmission to 555-538-2321

TO: Adam Golub, Esq.
Adam Golub and Associates
11 Brocklebank Building
Bodie, Columbia

FROM: Harvey Campbell
1873 Shawna Lane
ShIPLEY, Columbia

DATE: January 27, 2008

NUMBER OF PAGES, INCLUDING COVER SHEET: One (1)

Dear Mr. Golub,

I have decided to switch attorneys, and I want to be represented by Adrienne Williams.

I appreciate the excellent work that has been done on my behalf by your law firm, and my decision to change law firms is based solely on my desire to stay with Ms. Williams. It does not reflect an adverse opinion toward you or your work.

Ms. Williams has informed me that she will shortly present you a Substitution of Attorney. Please transfer all my records and all of your files, documents, and work product to Ms. Williams.

Finally, now that Ms. Williams is my attorney, in the future please direct all communications to her.

Thank you for your past work and your cooperation in this matter.

Sincerely,

Harvey Campbell

Harvey Campbell

JULY 2009



**California
Bar
Examination**

Performance Test B

LIBRARY

WILLIAMS v. GOLUB

LIBRARY

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SELECTED PROVISIONS OF THE COLUMBIA CIVIL CODE

§ 44 Defamation. Defamation is effected by (a) libel, or (b) slander.

§ 45 Libel. Libel is a false and unprivileged publication by writing that exposes a person to hatred, contempt, ridicule, or obloquy, or causes the person to be shunned or avoided, or has a tendency to cause injury to reputation or occupation.

§ 46 Slander. Slander is a false and unprivileged publication, orally uttered, that charges a person with crime or tends directly to cause injury to a person's profession, trade or business.

§ 47 Privilege. A privileged publication is made:

- (a) In the proper discharge of an official duty;
- (b) In any
 - (1) legislative proceeding,
 - (2) judicial proceeding, or
 - (3) other official proceeding authorized by law;
- (c) In a communication, made without malice, to a person interested therein, by one
 - (1) who is also interested, or
 - (2) who is in a relationship to the interested person that affords a reasonable ground for supposing the motive for the communication to be innocent, or
 - (3) is requested by the interested person to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment.

§ 48 Malice. Malice is a state of mind arising from hatred or ill will toward the plaintiff; provided, however, that a communication made with a good faith belief in its truth at the time it is published shall not constitute malice.

**SELECTED PROVISIONS OF
THE COLUMBIA MODEL RULES OF PROFESSIONAL CONDUCT**

CLIENT-LAWYER RELATIONSHIP

RULE 1.4 COMMUNICATION

(A) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(B) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party.

* * * *

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the

client's best interests and the client's overall requirements as to the character of representation.

* * * *

COUNSELOR

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, which may be relevant to the client's situation.

Comment

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Auden v. Fox and Peters
Columbia Supreme Court (2002)

This appeal is a minor skirmish in a major litigation battle. The parent litigation is a case, *Pinkerton v. Duke Industries*, which after several years is still pending. While awaiting trial, Pinkerton's attorney Phillip Peters ("Peters") took the deposition of James Fox ("Fox"). At the deposition, Fox, in response to questions from Peters, said several unflattering things about Allan Auden ("Auden").¹ Two days after the deposition, Auden filed a defamation action against Peters and Fox. The Trial Court ruled in the defamation action that the statements were absolutely privileged and granted a motion to dismiss the complaint. Auden appeals.

The complaint alleges that Fox and Peters orally published defamatory matter about Auden at the deposition. The trial court held correctly that the plaintiff failed to state a cause of action for defamation because of the privilege recognized in connection with judicial proceedings.

Both sides recognize that the privilege of an attorney in judicial proceedings is absolute in that it cannot be defeated by a showing that the publication was made with malice. For the privilege to apply, however, the defamation published in a judicial proceeding must have "some relation" to the proceeding. (Restatement Torts, §585.)

Columbia Civil Code §47(b) provides that a privileged publication or broadcast is made in any (1) legislative proceeding, (2) judicial proceeding, or (3) other official proceeding authorized by law.

¹ We will discuss the statements made about Auden only to the extent that such discussion is absolutely necessary to our opinion. The entire record before us is replete with threats by everybody against everybody else to sue them on any theory which imaginative counsel can think of. There is no desire on the part of this court to act as an agent -- albeit immune -- who further publicizes a libel or slander and thereby adds grist to the parties' mills.

The purpose of §47(b) is to afford litigants freedom of access to the courts to secure and defend their rights without fear of being harassed by actions for defamation and to promote the unfettered administration of justice even though as an incidental result it may provide immunity to the evil-disposed and malignant slanderer. Thus, courts should not extend application of the absolute privilege unless the public policy upon which the privilege rests exists.

This statute protects attorneys as well as judges, jurors, witnesses and other court personnel from liability arising from publications made in the course of a judicial proceeding. The policy underlying the privilege is to afford our citizens utmost freedom of access to the courts. As a consequence, attorneys are given broad protection from the threat of litigation arising from the use of their best efforts on behalf of their clients. The privilege is absolute; it protects publications made with actual malice or with intent to do harm.

Although defamatory publications made in the course of a judicial proceeding are absolutely privileged, even if made with actual malice, the absolute privilege attaches only to a publication that has a reasonable relation to the action, is permitted by law, and if it is made to achieve the objects of the litigation. The absolute privilege in judicial proceedings is afforded only when the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law.

First, if the defamatory publication is made in furtherance of the litigation it is appropriate for the courts to define liberally the scope of the term "judicial proceeding" and the persons who should be regarded as litigants or other participants. If this requirement is met, the publication is absolutely privileged even though made outside the courtroom and no function of the court or its officers is invoked.

Second, although the defamatory matter need not be relevant, pertinent or material to any issue before the court, the publication must have some connection or logical relation to the judicial proceeding. Fox and Peters do not even have to claim that the allegedly defamatory deposition questions and answers were admissible, either directly or for the purpose of impeaching any witness or that they were calculated to lead to the discovery of admissible evidence. Doubts should be resolved in favor of relevancy and pertinency. For the privilege not to apply, the matter must be so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety.

Third, since the deposition questions and answers concerned Auden's credibility, which would affect the outcome of the litigation, they were not pretextually calculated merely to defame and therefore they are made to achieve the objects of the litigation.

Fourth, the privilege stated in §47(b) is confined to statements made by an attorney while performing his function as such. This approach does not protect attorneys, witnesses and litigants who use the mere fact that they are talking in the course of judicial proceedings as a pretext to defame persons with respect to matters that have nothing to do with the question under consideration, yet it does shield counsel, clients and witnesses from having their motives questioned and being subjected to litigation if some connection between the utterance and the judicial inquiry can be established. Likewise, this approach does not shield attorneys, witnesses, or litigants who are no longer involved in the litigation, such as by way of dismissal as an attorney, witness, or litigant.

As long as Peters was actually retained as a lawyer in this litigation, he is protected by this privilege, and, so long as Fox was answering his questions, he, too, is protected.

AFFIRMED.

Kashian v. Harriman
Columbia Supreme Court (1966)

Edward Kashian (“Kashian”), a prominent businessman and civic leader in Paradise Valley, Columbia, brought this action for defamation against Richard Harriman (“Harriman”). The dispute arises from remarks published by Harriman regarding Kashian, who was at the time serving as Chair of the Board of Trustees of Paradise Valley Hospital (PVH), a nonprofit, tax-exempt corporation.

In 1964, PVH announced plans to build and operate a for-profit heart hospital. Local non-profit medical providers, St. Anne Elizabeth Medical Center (“St. Anne”) and MediPrime, became concerned that PVH’s hospital would compete unfavorably with them. St. Anne wrote a letter to the Columbia Attorney General expressing its concern that PVH’s involvement in a for-profit hospital would conflict with its non-profit status and called for an investigation. Harriman, who was counsel for MediPrime, wrote a letter to the Attorney General joining in this request for an investigation.

In 1962, Harriman had been retained as special counsel in the bankruptcy of another provider whose assets PVH had purchased from the bankrupt estate. In his current letter to the Attorney General, Harriman wrote that, in the course of his duties as special counsel, “I conducted an investigation that led me to believe that PVH has engaged in unfair business practices since at least 1959 by pursuing a course on intentional conduct that interfered with the practices of private practitioners. Moreover, my investigation led me to believe that Mr. Kashian has unlawfully used his position as Chair of the PVH Board of Trustees to accrue substantial economic advantages for himself to the disadvantage of PVH.” Harriman’s letter indicated that he had sent copies to “Clients, and St. Anne.”

On June 1, 1964, *The Paradise Valley Bee* published a news article reporting on Harriman's letter, under the headline "Hospital Official Assailed." The article focused

primarily on the accusations about Kashian, and quoted parts of the letter, including the excerpt cited above. Kashian was quoted in the article as saying the accusations were “completely false.”

On June 19, 1964, Kashian filed a lawsuit against Harriman asserting that Harriman's letter was false and defamatory. He also alleged Harriman acted with malice.

Harriman filed a motion for summary judgment on all Kashian's claims. Harriman acknowledged sending his letter to the Attorney General with copies to his client and St. Anne, with which he was joining to request an investigation of PVH. He argued that his letter to the Attorney General was absolutely privileged under Columbia Civil Code §47(b), qualifiedly privileged under section 47(c), and not defamatory.

The trial court granted Harriman's motion. The court concluded Harriman's statements were privileged under section 47(b) of the Civil Code. The court declined to decide whether the privilege was a qualified one, in which case it could be defeated by a showing the statements were made with actual malice, because the evidence failed to show Harriman had acted with malice. It also ruled Harriman's delivery of the letter to third persons (his client and St. Anne) was privileged under Civil Code section 47(c). The trial court also declined to reach the question of whether the publication in *The Paradise Valley Bee* was defamatory because Kashian failed to make a sufficient prima facie showing that Harriman was the person responsible for sending the letter to the newspaper. Kashian appealed.

Columbia law recognizes two types of privileged communications: (1) communications that are absolutely privileged, for which there is no liability even if the defamatory communication is made with actual malice; and (2) communications that are qualifiedly privileged, for which a finding of malice will prevent the communication from being found privileged.

Section 47(b) defines what is commonly known as the litigation privilege. The privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) that have some connection or logical relation to the action; (3) made to achieve the objects of the litigation; and (4) by litigants or other participants authorized by law. The privilege is absolute. If it applies, it does not matter whether the communication was made with malice or the intent to harm. Put another way, application of the privilege does not depend on motives, morals, ethics or intent. The litigation privilege is not limited to the courtroom, but encompasses actions by administrative bodies and quasi-judicial proceedings. The privilege extends beyond statements made in the proceedings and includes statements made to initiate official action. The absolute privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing. The privilege is based on the importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity. *Wise v. Thrifty Payless, Inc., supra* (husband's report to the Department of Motor Vehicles regarding wife's drug use and its possible impact on her ability to drive).

Section 47(c) codifies the common law privilege of common interest which protects communications made in good faith on a subject in which the speaker and hearer share an interest or duty. This privilege applies to a narrow range of private interests and does not create a broad public interest privilege. The interest protected must be private or pecuniary. It must be a common interest in an outcome, which can exist in the absence of a formal relationship (for example, shareholders who bought corporate shares independently of one another). It can also be in a contractual, business, or similar relationship, such as between partners, corporate officers or members of incorporated associations, or between union members and union officers. The communication must have been in the course of the relationship.

This definition is not exclusive, however, and the cases have taken an eclectic approach toward interpreting the statute. The scope of the privilege is not capable of precise definition and its application depends upon an evaluation of the competing interests that defamation law and the privilege are designed to serve.

The common interest privilege as defined in §47(c) only arises in the absence of malice. Malice for purposes of the statute means a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person. Malice is not inferred from the communication itself, but from surrounding circumstances.

We now consider whether the privileges apply to Kashian's complaint. Kashian's claim for defamation is based on the letter Harriman wrote to the Attorney General and delivered to his client and involved in the complaint to the Attorney General. We assume the letter was defamatory and consider whether delivery of the letter was privileged.

Kashian argues Harriman's delivery of the letter to the Attorney General's office was subject only to the qualified common interest privilege because there was no official proceeding. We disagree. Section 47(b) provides for an absolute privilege with regard to statements made in "any . . . official proceeding authorized by law." A communication concerning possible wrongdoing made to an official government agency such as a local police department and designed to prompt action by that entity is as much a part of an official proceeding as a communication made after an official investigation has commenced. The policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing. A qualified privilege is inadequate under the circumstances. Since the privilege is absolute, it cannot be defeated by a showing of malice.

In *Dove Audio, Inc. v. Stark, Vernon & Ruxton*, Dove Audio produced a recording featuring the voices of several celebrities whose royalties were to be paid to their designated charities. When few royalty payments were actually made, one of the celebrities contacted the law firm of Stark, Vernon & Ruxton (SV&R) to request that it look into the matter and contact the appropriate government agency to conduct an investigation. SV&R wrote to the celebrities explaining the situation and soliciting their

support for a complaint to the Attorney General's office. Dove Audio sued SV&R alleging the letter was defamatory and interfered with their economic relationships with other celebrities. The court granted SV&R's motion to dismiss the claims on the ground that the communication was absolutely privileged under Civil Code section 47(b). This court held that a petition to the Attorney General constitutes an official proceeding within the meaning of section 47(b) since the Attorney General has the statutory responsibility to protect the assets of charitable trusts and public benefits corporations. In addition, the court held that the privilege extends to communications with private parties who share with the defendant an interest in the investigation preliminary to the institution of the official proceeding.

We conclude, then, that Harriman's delivery of his letter to the Attorney General and the other entities requesting an investigation into PVH's business practices was absolutely privileged under section 47(b). Consequently, we need not reach the questions of the applicability of the qualified privilege as it applies to the delivery of the letter to the Attorney General.

On appeal, Kashian also argues that neither the litigation privilege nor the common interest privilege attaches to publication of the letter to *The Paradise Valley Bee* or to St. Anne. We address these contentions in turn.

As for the publication of the letter to *The Paradise Valley Bee*, we do not reach the question of privilege because we agree with the trial court that there is insufficient evidence to suggest that Harriman was responsible for sending the letter to the newspaper.

We turn finally to Harriman's publication of the letter to St. Anne. In this case, St. Anne was a party to the request to the Attorney General for an investigation into PVH's tax-

exempt status. It follows that their communications with one another in that connection were protected by the litigation privilege.

Kashian maintains, however, that the same privilege does not extend to their communications in regard to Harriman's request for an investigation into Kashian's alleged conflict of interest, a request in which St. Anne had not joined until after Harriman's letter. We need not decide whether the litigation privilege under section 47(b) reaches these communications because we conclude that St. Anne shared a common business or professional interest under §47(c) in investigation of both PVH's business practices and Kashian's potential conflict of interest.

Kashian argues that he presented evidence that, if believed, was sufficient to support a finding of actual malice, which would prevent the defense of a qualified privilege under section 47(c) from arising. On the premise that Harriman's statements about him in the letter are defamatory, Kashian contends a jury might reasonably infer Harriman acted with malice because he failed to conduct an adequate investigation before making the statements.

Malice, which is statutorily defined as state of mind arising from hatred or ill will, may be proved by showing the publisher of a defamatory statement lacked reasonable grounds to believe the statement was true, and therefore acted with a reckless disregard for the rights of the person defamed. However, negligence is not malice. It is not sufficient to show that the statements were inaccurate or even unreasonable; only willful falsity or recklessness suffice. Only reckless or wanton disregard for the truth will imply a willful disregard for or avoidance of accuracy sufficient to establish malice.

Kashian's bare assertion that many of the statements in Harriman's letter are false does not make it so, much less establish that Harriman made the statements maliciously. For example, Harriman urged the Attorney General to investigate certain of Kashian's business dealings using the following language: "Your investigators will need to obtain property profiles on certain properties, such as the proposed Heart Hospital and

Women's Center, in order to trace the ownership and development of the properties by entities in which Mr. Kashian has been involved, either directly or indirectly."

In his declaration Kashian asserts that "even a cursory review of the facts would have put anyone on notice that many of these factual allegations are false. For example, it is a matter of public record that the property purchased by the Heart Hospital--which Harriman accused me of profiting from--was sold by River Park Properties approximately 10 years prior to the Heart Hospital's purchase." This evidence tends to show at most that Harriman's letter was inaccurate insofar as it suggested Kashian may have had a direct financial interest at a certain moment in PVH's purchase of land for a heart hospital. The evidence is insufficient to support an inference Harriman acted with a reckless or wanton disregard for the truth when he wrote the letter. Consequently, the trial court was correct in rejecting Kashian's claim under section 47(c) because there was no prima facie showing of malice.

AFFIRMED.

Scott Rogers v. Associated Aviation Underwriters

Supreme Court of Columbia (1953)

This defamation action was brought by Scott Rogers (“Rogers”) against Associated Aviation Underwriters (AAU) and various insurance companies that were members of that association. His action was based upon a report made by AAU that he claimed injured his reputation and deprived him of his profession as a pilot. At the conclusion of plaintiff's evidence, the trial court directed a verdict for the defendants on the ground that the communication from AAU to Rogers' employer, Olympic Oil Company (“Olympic”), was privileged.

AAU is the name of an organization of the aviation insurance departments of the defendant insurance companies. It inspects risks and makes periodic inspections of the aviation facilities insured by the insurance companies.

Olympic employed Rogers as an aircraft pilot from February 1948 until he was discharged about November 22, 1948. He alleged that his discharge resulted from a report of an investigation of all of the aviation facilities and pilot personnel of Olympic by AAU. Two sections of the report are at issue here. First, the report states that, “None of the crew members currently employed by Olympic Oil Company has qualified for Airline Transport Rating (ATR). We advise that all Olympic Oil pilots obtain an ATR rating from one of the recognized competent schools. This training should be given to weed out the weaker pilots.” Second, the report stated that, “In checking with a previous employer we were unable to substantiate that Rogers was anything other than an average pilot with questionable flying ability, and this employer lacked confidence in him as a pilot. In addition, we were informed he had a poor personality and there was much better pilot material available. In checking with another source, who has flown with Rogers and has known him personally for seven or eight years, we could not develop any information concerning Rogers' qualifications to operate aircraft in accordance with the high standards desired by the Olympic Oil Company.”

Rogers claims that the report does not fall within the qualified common interest privilege. Under the common interest privilege, communication made in good faith in which the person reporting has an interest and in reference to which he has a duty is conditionally or qualifiedly privileged if made to a person having a corresponding interest or duty. By definition the privilege arises only in the absence of malice. Malice is not inferred from the communication itself, but from surrounding circumstances.

Rogers does not contend that AAU did not believe the communications to be true or that they were actuated by hatred or ill will. He does contend that the communications were made with such gross indifference to his rights as to amount to a willful or wanton act. The evidence showed that Rogers actually had an ATR at the time of the report. The evidence further showed that the derogatory statements concerning Rogers were based upon only two telephone calls to persons who had known or been associated with him. A jury might very well have found that there was no sufficient investigation to support the statements against the appellant. We do not think, however, that the evidence was sufficient to submit to the jury the issue of such gross indifference to the rights of Rogers as would amount to willful or wanton conduct from which malice might be inferred.

In *Courtney v. Gault*, the alleged defamatory statement made was without any investigation in reliance upon a report made by a detective agency. The court held that negligence cannot take the place of actual malice to destroy the immunity from damages given to a privileged publication.

The judge correctly directed a verdict on the ground that the alleged defamatory statements were privileged and that there was insufficient evidence to authorize the jury to find that they were malicious.

AFFIRMED.