

*This exam was previously submitted as an answer to the California Bar Exam July 2009 PT B. It received a score of 55. The exam has been reviewed by the Bar Exam Doctor. We feel that if the student re-wrote the exam using the comments provided, their score could improve.*

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MEMORANDUM

To: Laura Evans  
From: Applicant  
Date: July 30, 2009

Re: Williams v. Golub (Good.)

Thank you in advance for allowing me to assist you with this task. Below you will find an analysis (try and avoid spelling mistakes) of both absolute and qualified privileges which can be listed as affirmative defenses in Mr. Golub's Answer. It is important that you know that there are only two types of privileges: absolute and qualified. If an absolute privilege is found, then there is no liability – even with malice. However, if the qualified privilege applies and malice is found, then the privilege does not apply (nice setup. Try and show them you know the tone to use too...objective).

I. THE LETTER FROM MR. GOLUB TO MR. CAMPBELL MAY BE COVERED BY THE ATTORNEY CLIENT PRIVILEGE BECAUSE THE CLIENT HAD NOT LEFT THE FIRM AT THE TIME THE LETTER WAS SENT TO THE CLIENT AND IT WAS MADE IN FURTHERANCE OF LITIGATION

Columbia Civil Code Section 47(b) provides that an attorney's communications during a judicial proceedings or official proceedings are absolutely privileged (don't forget the third prong – authorized by law). It does not matter whether communication was made with malice or the intent to harm. The application of the privilege does not depend on motives, moral, ethics or intent. The 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 statement made to initiate official action (ok..but try and say this more clearly). *Kashian v. Harriman*

JUDICIAL PROCEEDINGS (better heading needed – try and use a sentence – use your facts).

In *Auden*, a defamation suit was filed against a defendant who made unflattering statements about the plaintiff at his deposition. (First introduce the reason for the case in

your library – then summarize the facts) The suit was dismissed because the court found that an absolute privilege existed. The court interpreted the term “judicial proceeding” cited in Code Section 47(b) and found that an absolute privilege in judicial proceedings when the defendant can prove that the publication was: (1) 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; (4) involved litigants or other participants authorized by law. *Auden v. Fox and Peters* (ok but try and can be more specific – don’t just repeat the law)

(1) The statement made by Mr. Galub to Mr. Campbell was in a judicial proceeding

In *Auden*, the court explained that if the defamatory publication is made in furtherance of the litigation it is appropriate for courts to define liberally the scope of the term “judicial proceeding” and the persons who should be regarded as litigations or other participants. *Auden v. Fox and Peters* (ok – you see how it looks better if you put the law first – similar to IRAC used for essays)

In our case, Mr. Galub ran a five attorney firm and hired Ms. Williams under the belief that she would be an asset to the firm. However, Mr. Galub quickly realized that she had not had the proper experience needed to work as a litigation in his firm. Upon learning that Ms. Williams was leaving his firm and taking Mr. Campbell as a client, he decided that it was in the client’s best interest to notify the client of his concerns because he was still under a duty to represent Mr. Campbell. (Right, but could have been less wordy - think in your mind, not on your paper) At that time, no substitution of attorney had been filed and the client had not been notified him of changing counsel. Mr. Galub believed it was in his best interest in furtherance of the litigation matter to contact the client and notify him accordingly.

Here, Mr. Galub was acting as present counsel for Mr. Campbell after reviewing Ms. Williams letter of resignation. The letter was in furtherance of litigation because he feared that Ms. Williams alone could not handle the case. The case began years earlier with his firm. She was not as experienced with paralysis type cases and his firm had invested a lot of time and money into the case. (what about counter arguments?)

However, even though Mr. Galub was writing his client to inform her of the situation, there was no judicial proceeding taking place. (what could you have said to show it was not in furtherance of litigation? Other reasons Mr. Golub wrote the letter??) (Need to conclude better – remember use the analysis in the other cases!)

(2) A connection existed because Mr. Galub’s concerns regarding Mr. Campbell’s cases and future representations by Ms. Williams. (Ok.)

The publication must have some connection or logical relation to the judicial proceeding. For that 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. *Auden v. Fox and Peters* (Good.)

Here, similar to *Auden*, the statements made were directly connected with the judicial proceedings regarding Mr. Campbell. His letter specifically referenced his concerns regarding her lack of experience of only handling a few trials, prior history of losing multiple cases and lack of funding. All statements concerning the litigation of Mr. Campbell's case. (Ok. But could have explained this better..easy points!) (Again, missing counter arguments by Ms. Williams! Easy facts to use ! ) (conclude better..apply the facts that meet the element and end on that note/)

(3) The statement made by Mr. Galub was made in the effort to help Mr. Campbell's case (Is this really the third element? I see what you're trying to do but keep it simple!)

In *Auden*, the court found that the deposition questions concerning the defendant's credibility would affect the outcome of the litigation and not done merely to defame. (Good.)

In our case, the statements made in the Jan 20 letter were made in an effort to persuade Mr. Campbell not to use Ms. Williams as his sole counsel because of her lack of skills and experience. If Mr. Campbell used Ms. Williams as his sole attorney instead of Mr. Galub's firm then the outcome of his case could be substantially effected. (Right.) Where are the counter arguments that could have been made by Ms. Williams??) (need to conclude better)

(4) The statements made involved Mr. Galub's right authorized right to speak with Ms. Campbell as his client as authorized by law. (again..keep it simple..try not to be creative...kiss method (keep it simple!)

In *Auden*, the court interpreted Civil Code Section 47(b) is confined to statements made by an attorney while performing representation for his client it does shield counsel from having their motives questioned and being subjected to litigation if some connection between the utterance and the judicial inquiry can be established. (good but could have been said better..wordy)The court concluded that so long as the lawyer was retained for litigation purposes, he is protected by the privilege.

In our case, Mr. Campbell hired Mr. Galub's firm to help with his paralysis case. The statements made by Mr. Galub to Mr. Campbell regarding Ms. Williams skills were made in an effort to provide the best result from litigation of his client's case. (Missing points..missing analysis re whether Mr. Golub was in fact counsel of record when the statement was made...Easy points. Slow down! You're rushing through this and missing easy points)

Therefore, because no judicial proceeding took place, the first prong most likely is not satisfied to qualify as a judicial proceeding.

OFFICIAL PROCEEDING

Columbia Civil Code Section 47(b) also provides that an attorney's communications during an official proceeding may be absolutely privileged.

In *Dove Audio v. Stark Vernon & Ruxton*, the court reviewed a letter written to the attorney general's office regarding complaints for a failure to pay royalties to the artists. A defamation suit was filed against those who had written the letter. The court found that an attorney general constitutes an official proceeding within the meaning of Code Section 47(b) since it has a statutory responsibility to protect the assets of charitable trusts and public benefit corporations. In addition, the court held that a privilege extends to communications with private parties who share with defendant an interest in the investigation preliminary to the institution of the official proceeding.

A lawyer shall keep a client reasonably informed about the status of a matter. Col. PR Rule 1.4(a) A lawyer must also explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding their representation. Col. PR Rule 1.4(b) A lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer should consider other considerations such as moral, economic, social, and political factors, which may be relevant to the client's situation.

Similarly, the court may find here that Mr. Galub had a statutory responsibility and duty to act in the best interests of his client. He had a duty to contact his client and inform him of the possible pitfalls of using Ms. Williams as sole counsel. Because of the responsibilities involved by an attorney with his client an absolute privilege should apply.

In *Kashian v. Harriman*, the court reviewed a cause of action for defamation made against a prominent businessman and civil leader. The statement was made in a letter made to the attorney general concerning unfair business practices involving the plaintiff. The letter was then published in a the local newspaper. The court found that the letter made to the attorney general was privileged. The court found that while the statement was not an official proceeding, it was covered by the absolute privilege because it was an official proceeding authorized by law.

Like *Kashian*, there was no official proceeding involved when Mr. Galub sent a letter to his former client, Mr. Campbell. He did so for the best interests of his client. However, the law authorized an attorney to inform his client of any changes which may become about involving their case.

II. IF THE COURT FINDS NO ABSOLUTE PRIVILEGE EXISTS FOR THE LETTER, THEN A QUALIFIED COMMON INTEREST PRIVILEGE MAY EXIST TO INFORM THE CLIENT IN GOOD FAITH OF HIS FORMER EMPLOYEE'S ACTS

Columbia Civil Code Section 47(c) provides that a privileged publication exists for communications made to a person interested when requesting job performance or qualifications of an applicant for employment (since these are very important elements

try and use numbers – helps identify items more clearly). Col. Code Section 48 further states that a communication made with a good faith belief in its truth at the time it is published shall not constitute malice. (Right.)

In *Kashian v. Harriman*, the court defined malice as a state of mind arising from hatred or ill will, and can be proved by a 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. The court explained that it was not enough to show statements were inaccurate or even unreasonable. Negligence is not malice. The court reviewed the facts in its case and found that just because certain facts were untrue does not make it malicious. (Ok..but you need to say this better..need to connect the dots..why is the case law provided for you on this exam?)

Similarly, in our case, the fact that Mr. Galub failed to specify the correct fact on Ms. Williams losing streak does not amount to the level that is necessary to show malice. If, at best, it shows negligence for a failure to properly investigate all of his facts. It could be inferred however that Mr. Galub did have a hard time with Ms. Williams because she came to work late, failed to handle her caseload, have many victories, or write well, he still validly stated many true facts in his letter to her. Therefore, the standard of malice is not met. (You're missing the buzzwords why malice isn't found here!)

In *Rogers*, the plaintiff, a pilot, brought a suit for defamation against various insurance companies for a report made by them which he claimed the report injured his reputation. The court found that the report was privileged and ruled in favor of the defendant. The court found that while the defendant admitted to certain instances of misconduct, it would not amount to willful or wanton misconduct.

In addition, in *Courtney v. Gault*, the court found that when an alleged defamatory statement was made without any investigation the negligence alone could not destroy the immunity from damages to the privileged publication.

Similarly, in our case, the defendant, Mr. Galub took it upon himself to notify the client, a future semi employer of the plaintiff and informed him of Ms. Williams history with his firm. The letter had many true facts. The only fact at issue and which is the sole cause of action in Plaintiffs' Complaint is the statement concerning plaintiff's trial rate in that she lost every case which went to trial. Mr. Galub will admit that he was incorrect in stating that she had never won a trial. After conducting a further investigation into the matter, it appears that Ms. Williams did not win one case resulting in a verdict for 1.2 million dollars due to paralysis nerve damage. However, Mr. Galub had a privilege to inform the client/semi future employer of his former employee's acts to best of his knowledge. He did not intentionally say things to hurt her reputation to rise to the level of malice. Rather, it would only rise to the level of negligence and thus would still not destroy the privilege as similar to the ruling in *Courtney*. (ok)

(Where is your discussion for the "adequate relationship" element???? Lost points!!)

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However, because a client is not an employer of an attorney and rather just the principal in a principal/agent relationship then the privilege may not apply. (Where is your conclusion – you must always conclude. This sentence is just a conclusion for this prong.)

Therefore, the privilege may not apply.

**END OF EXAM**

Overall, you're definitely on the right path. It seems though you need to practice more tests. Try and look at model answers and follow their analyses. It helps to see if you could do the same analysis. Sometimes you could still get to the same result with a different path but usually there are still comment headnotes. You found the right elements but had trouble analyzing them in a clear and concise fashion. Try re-writing this test with my comments and then compare your answer with the model answer and you'll see how it all comes together.

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