



Prepublication/Prebroadcast Review Committee Memo:

The Effective Use of the Fair Report Privilege

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THE EFFECTIVE USE OF THE FAIR REPORT PRIVILEGE

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*This article addresses some common questions that arise when considering application of the fair report privilege. However, because **the privilege is based in state law, reporters need to verify how the privilege is applied in their particular state before relying on it. The complete answer to each question below depends upon each state’s individual laws and the facts of the particular case.***

Please note that this article does not constitute legal or business advice. It is intended to serve as a source of general guidelines and legal information only and is not a substitute for legal advice on a specific situation. Legal and business advice should always be obtained from local counsel for specific facts and circumstances.

Question 1: What *is* the fair report privilege?

Answer: The common law fair report privilege² in defamation actions affords a qualified³ or conditional state law privilege to the media when they republish fair and accurate accounts of a

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² This privilege is also known as the “fair and accurate report privilege” and the “official proceedings privilege.”

³ In most states, the fair report privilege is not “qualified” in the usual sense; the defendant need not believe the truth of the defamation and does not lose the privilege by disseminating it too widely. *See, e.g., Rosenberg v. Helinski*, 616 A.2d 866, 872 (Md. 1992) (“qualified or conditional privileges in defamation cases are forfeited only upon a showing of actual malice; that is, a defendant who makes statements with knowledge of their falsity or with reckless disregard for the truth is not protected.”).

In some states, the privilege is absolute, rather than qualified. *See Karedes v. Village of Endicott*, 254 F.Supp.2d 276, 289 (N.D.N.Y. 2003) (under New York law, if a report is fair and true, the privilege is “absolute, and is not defeated by the presence of malice or bad faith”); *Tonnessen v. Denver Pub. Co.*, 5 P.3d 959, 964 (Colo. Ct. App. 2000) (Colorado common law privilege exists even if the reporter of the defamatory statements believes or knows them to be false); *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 984 P.2d 164, 166 (Nev. 1999) (absolute privilege). *But cf., Wilkow v. Forbes, Inc.*, 2000 WL 631344, *4 (N.D. Ill. 2000) (Illinois appellate courts disagree as to whether the fair report privilege can be overcome, and the Illinois Supreme Court has not addressed this issue); *First Lehigh Bank v. Cowen*, 700 A.2d 498, 502 (Pa. Super. 1997) (Pennsylvania law affords absolute immunity for defamatory statements contained in pleadings, if relevant to the proceedings in which they are made; statements about them made outside the judicial proceedings are subject to a qualified privilege only); *Orso v. Goldberg*, 665 A.2d 786, 789 (N.J. Super. A.D. 1995) (“[t]he fair-report privilege, if not an absolute privilege, is much broader than many other conditional privileges. The privilege will be held to protect the media publisher even though the publisher does not personally believe the defamatory words he reports to be true and even when he knows them to be false.”).

public or official proceeding, *i.e.*, judicial proceedings, legislative sessions, judicial hearings, or official news conferences.⁴ It acts as an exception to the general rule that liability may be imposed for the republication of a defamatory statement.⁵ By definition, the fair report privilege is available only to republishers—those reporting someone else’s defamation.

The privilege permits the publication of false and defamatory statements uttered in judicial and other official public proceedings. In some jurisdictions, it may be extended to cover pleadings filed in litigation, and statements made by the police during an official investigation. The news organization that reports the statement will be protected from liability for defamation *if* the story fairly and accurately recounts the statements made.

The test for fairness and accuracy is an objective one.⁶ It is not necessary that the account be exact in every detail, so long as it conveys to the persons who read it a substantially correct account of the proceedings being reported.⁷ While errors and omissions are not necessarily fatal, the privilege is defeated if those errors and omissions, read objectively, tend to mislead readers regarding the statements contained in the initial publication.⁸

At least three purposes stand behind the fair report privilege. First, it protects the public’s interest to know what occurs at public meetings.⁹ Second, the reporter serves as an agent for the persons who had a right to attend, and informs them of what they might have seen had they attended themselves.¹⁰ Finally, by providing for public scrutiny of proceedings, it provides for the proper administration of justice.¹¹

⁴ *Magnusson v. New York Times Co.*, 2004 WL 1447694 (Okla. 2004) (not yet published opinion); 50 Am. Jur. 2d Libel and Slander § 316 (2003).

⁵ *Darakjian v. Hanna*, 840 A.2d 959, 963 (Sup. Ct. NJ 2004).

⁶ *Fortenbaugh v. New Jersey Press, Inc.*, 722 A.2d 568, 573 (N.J. Super. A.D. 1999).

⁷ *Id.*

⁸ *Id.*

⁹ *Darakjian*, 840 A.2d at 963.

¹⁰ *Id.*

¹¹ *Cowley v. Pulsifer*, 137 Mass. 392, 394 (Mass. 1884) (Justice Holmes).

Question 2: What actions are covered by the fair report privilege?

Answer: A reporter should never assume that the fair report privilege applies to *every* proceeding involving the government. Generally speaking, the privilege protects the media when they report someone else's defamatory statements in a court proceeding, a city council meeting, or a legislative hearing.

Application of the privilege becomes unclear when it is extended to documents, pleadings, informal government disclosures, or other matters that fail to fit neatly under the umbrella of "official proceedings."

In determining the character of a proceeding for the purpose of ascertaining whether or not a report thereof is privileged, the nature of the proceeding, rather than the character of the officer before whom it is had, is the important criterion.¹² Under the rule, a qualified privilege is generally accorded to reporting of the proceedings of a public body.¹³ The privilege also includes the reporting of the contents of an official document, so long as their account is reasonably accurate and fair, even if the official documents contain erroneous information.¹⁴

The fair report privilege has been applied to the contents of a reprimand letter issued by a contractor of the National Cancer Institute, a government agency, to one of the contractor's employees, as well as to a fair and accurate report of the public remarks of a member of Congress.¹⁵ Furthermore, it has been held that the defense of qualified privilege is available with respect to an accurate report of proceedings at a meeting which was called in an attempt to induce a judge to convene a grand jury to investigate local law enforcement,¹⁶ and to a report of statements made by a candidate for office at a forum conducted by a chamber of commerce.¹⁷

However, not all information released by city or state officials to the media may fall within the ambit of the fair and accurate report privilege.¹⁸ In some jurisdictions, a threshold requirement for application of the privilege for reports of official proceedings or records has been said to be

¹² 50 Am. Jur. 2d Libel and Slander § 316 (2003) (citing *Phoenix Newspapers v. Choisser*, 312 P.2d 150 (Ariz. 1957)).

¹³ *Id.* (citing *Kelly v. Daro*, 118 P.2d 37 (Cal. Ct. App. 1941); *Swede v. Passaic Daily News*, A.2d 36 (N.J. 1959)).

¹⁴ *Id.* (citing *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501 (Fla. Ct. App. 1993)).

¹⁵ *Id.* (citing *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991), *cert. denied*, 501 U.S. 1212 (1991)).

¹⁶ *Id.* (citing *Borg v. Boas*, 231 F.2d 788 (9th Cir. 1956)).

¹⁷ *Id.* (citing *Phoenix Newspapers v. Choisser*, 312 P.2d 150 (Ariz. 1957)).

¹⁸ *Id.* (citing *Ferguson v. Clausen*, 785 P.2d 242 (N.M. Ct. App. 1989)).

that the reported information be attributable to a proceeding or record which is official in nature, and information which has failed to meet this requirement has not gained protection of the privilege.¹⁹ This does not mean that each quote or statement must be specifically attributed to an official document or proceeding. Rather, it is necessary only that, when considered in context, it is clear that the article is quoting, paraphrasing or otherwise drawing upon official documents or proceedings.²⁰ Furthermore it has been stated that only reports of official statements or records made or released by a public agency are protected by the privilege.²¹ Statements made by lower level employees that do not reflect official agency action cannot support the privilege.²²

The extent of the privilege differs in every state. For example, in Pennsylvania, the fair report privilege has been applied to the reporting of school township board workers' compensation hearings.²³ However, it may not apply to the reporting of statements made in a recess forty-five minutes *after* the board's hearing.²⁴ In Ohio, the privilege was extended to the reporting of statements made by an investigator of a fire at a local school to the media identifying one of the plaintiffs as a suspect in the fire.²⁵ In Illinois, information provided by a county State's Attorney was held to be covered by the fair report privilege, as it accurately reported the statement of the State's Attorney and did not speculate on the implications of the statement.²⁶

¹⁹ *Id.* (citing *Hughes v. Washington Daily News Co.*, 193 F.2d 922 (Ct. App. D.C. 1952)); *Phillips v. Evening Star Newspaper Co.* 424 A.2d 78 (D.C. Ct. App. 1980), *cert. denied*, 451 U.S. 989 (1981); *Kelley v. Hearst Corp.*, 157 N.Y.S.2d 498 (N.Y.A.D. 1956), *amended on other grounds*, 158 N.Y.S.2d 781, *reh'g and app. denied*, 163 N.Y.S.2d 937 (N.Y.A.D. 1957)). To be protected by the privilege, the statements must be attributable to an official document or proceeding. *Pittman v. Gannett River States Publishing Corp.*, 836 F. Supp. 377 (S.D. Miss. 1993) (specifically referring to privilege as embodied in Restatement 2d, Torts § 611).

²⁰ *Id.* (citing *Pittman*, 836 F. Supp. 377).

²¹ *Id.* (citing *Bufalino v. Associated Press*, 692 F.2d 266 (2d Cir. 1982), *cert. denied*, 462 U.S. 1111 (1983) (referring to privilege of Restatement 2d, Torts § 611)).

²² *Id.* (citing *Bufalino*, 692 F.2d 266).

²³ *DeMary v. Latrobe Printing and Publ'g Co.*, 762 A.2d 758 (Pa. Super. 2000).

²⁴ *Id.*

²⁵ *Sharma v. Hummer*, 2001 WL 460281 (Ohio Ct. App. 2001) (not reported in N.E.2d).

²⁶ *Hurst v. Capital Cities Media, Inc.*, 754 N.E.2d 429 (Ill. Ct. App. 2001), *appeal denied*, 763 N.E.2d 770 (Ill. 2001).

Question 3: Must a reporter quote a statement, or can the reporter simply paraphrase or summarize, in order to be protected by the privilege?

Answer: It goes without saying that a reporter should always strive to be accurate in what he or she intends to republish. Inaccurately reporting the official proceeding will likely defeat application of the privilege.

The basic rule, as stated in the Restatement of Torts 2d and as adopted in *some* jurisdictions, is:

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate *and complete or a fair abridgement of the occurrence reported*.²⁷

This rule contemplates and protects summaries of official actions or proceedings. As stated by the Appeals Court of Massachusetts, an article “need give only a ‘rough and ready summary that [is] substantially correct’ in order to qualify for the fair report privilege.”²⁸

Similarly, the Florida Court of Appeals held that articles accurately summarizing separable portions of documents from the Florida Bureau of Unemployment Compensation were covered by the fair report privilege.²⁹ “The fair reports privilege requires that, in order to be privileged, a news report of a public document must contain the substance of the subject the document undertakes to present, or any separable part thereof.”³⁰

Likewise, the Court of Appeals of New Mexico noted that a newspaper may summarize or abridge the contents of an official report.³¹ Additionally, according to the Fifth Circuit, a summary of substantial accuracy of governmental proceedings or an official report is all that is required:

It is not necessary that it be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings. Not only must the report be accurate, but it must be fair. Even a report that is accurate so far as it

²⁷ Restatement (Second) of Torts § 611 (1977) (emphasis added).

²⁸ *Salvo v. Ottaway Newspapers, Inc.*, 782 N.E.2d 535, 541 (Mass. App. Ct. 2003) (citations omitted).

²⁹ *Carson v. News-Journal Corp.*, 790 So.2d 1120 (Fla. Ct. App. 2001).

³⁰ *Id.* at 1121.

³¹ *Ferguson v. Clausen*, 785 P.2d 242 (N.M. Ct. App. 1989), *cert. denied*, 784 P.2d 419 (N.M. 1989).

goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it...³²

In *Dorsey v. National Enquirer, Inc.*, the Ninth Circuit held, “[s]ome flexibility is tolerated in deciding what is a fair report. A report is “fair and true” if, to the average reader, the report captures the “gist” or “sting” of the proceedings being reported upon. 973 F.2d 1431, 1439 (9th Cir. 1992) (citations omitted).

In addition, the fair report privilege may also operate to protect misuse of punctuation which arguably alters the meaning of the original statement. In *LaComb v. Jacksonville Daily News*, an article reporting on the contents of an arrest warrant was covered by the fair report privilege.³³ The court held that although a semicolon was misused in a sentence listing the arrestees’ conduct, its use did not cause the article to fail the substantial accuracy test when compared to the warrant.

Question 4: What reports or statements by the police are covered by the fair report privilege?

Answer: The answer to this question is fact-dependant. In *Kelley v. Hearst Corp.*, a New York court found that a narration by a police officer of the acts of others concerning an investigation he was conducting, made in private to newspapers reporters, was not a public or official proceeding, and as such not privileged.³⁴ In contrast, a “pick-up order” and a missing persons report issued by a police department were covered by the fair report privilege in *Kenney v. Scripps Howard Broad. Co.* (8th Cir. Ct. of Appeals 2001).³⁵

In *McMillan v. Philadelphia Newspapers, Inc.*, an official police report stated that the plaintiff, a school bus driver, had been charged with a DUI, and the press heard an official police

³² *Doe v. Doe*, 941 F.2d 280, 289 -290 (5th Cir. 1991).

³³ *Lacomb v. Jacksonville Daily News Co.*, 543 N.E.2d 219 (N.C. Ct. App. 2001), *review denied*, 550 S.E.2d 778 (N.C. 2001).

³⁴ 157 N.Y.S.2d 498 (N.Y.A.D. 1956), *amended on other grounds*, 158 N.Y.S.2d 781, *reb’g and app. denied*, 163 N.Y.S.2d 937 (N.Y.A.D. 1957). *But see, Doe v. Daily News*, 25 Media L. Rep. 1673 (N.Y. Sup. 1997)(where court applied fair report privilege to newspaper articles reporting that police had doubts about alleged rape victim’s claim.)

³⁵ 259 F.3d 922 (8th Cir. 2001).

statement that the plaintiff was believed to be “under the influence of something.”³⁶ The Eastern District of Pennsylvania found that an article claiming that the plaintiff was responsible for a “drug-crazed...ride” was thereby protected by the fair report privilege.³⁷ The court noted that the attribution of plaintiff’s behavior to drugs substantially characterized the official report by the police in an accurate manner.³⁸

However, in *Maple Lanes, Inc. v. News Media Corp.*, an Illinois court refused to apply the privilege to a newspaper who quoted a sheriff as saying, “we are targeting businesses that supplement their income with cocaine and drug sales,” when in fact the sheriff had actually said, “we are targeting businesses *whose employees* are supplementing their income with cocaine and drug sales.”³⁹ The court reasoned that the original comment could be interpreted as referring to the entire business rather than individual employees, thereby altering its gist.⁴⁰

In *Bakhtiarnejad v. Cox Enterprises, Inc.*, the Georgia Court of Appeals held that a genuine issue of material fact as to whether a reporter fairly reported a police officer’s statements precluded summary judgment on a martial arts instructor’s defamation claim.⁴¹ The instructor was charged with sexually molesting a seven-year-old girl. A police detective told the reporter that the charges were based solely on the uncorroborated allegations of the child, and that the detective was not willing to go on the record as stating the accusations were true.⁴² However, these facts were omitted from the published article.⁴³

“Not all information released by city or state officials to the media falls within the ambit of the fair and accurate report privilege.”⁴⁴ Except where a report of an arrest is privileged, newspaper reports which falsely state that the plaintiff has been arrested have generally been held by the courts to state a cause of action for libel because they tend to injure the reputation of the person

³⁶ 2001 WL 267867 (E.D. Pa. 2001).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 751 N.E.2d 177 (Ill. Ct. App. 2001).

⁴⁰ *Id.*

⁴¹ 541 S.E.2d 33 (Ga. Ct. App. 2000).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Ferguson v. Clausen*, 785 P.2d 242, 246 (N.M. Ct. App. 1989).

who is the subject of the report, and tend to expose that person to disgrace, ridicule, or contempt.⁴⁵

Relatedly, while the news media have generally been found to possess a qualified privilege to report *actual* facts concerning the commission of a crime, the arrest of an accused person, and the charges brought against that person, this only applies *so long as* the report does not assert that the accused is guilty of the crime charged.⁴⁶

Question 5: If a reporter quotes or paraphrases a pleading filed with a court, does the privilege apply?

Answer: Yes; however, the answer to this question may vary depending on the particular facts. Most jurisdictions provide that the privilege applies to false and defamatory material contained in pleadings, provided the statements are relevant to the proceedings in which they are made.⁴⁷ Statements are relevant to the proceedings if they have some relation to the proceeding.⁴⁸

If the pleading or deposition filed in a case has not yet been acted upon, *i.e.*, there has been no judicial action, some authorities hold that the fair report privilege does not apply, while others hold that it does.⁴⁹ The trend, however, has been to apply the privilege to “the report of pleadings filed in court which have not yet come before the judicial officer and upon which no judicial action has been taken.”⁵⁰

⁴⁵ *Id.* at 247 (citing *Dillard v. Shattuck*, 11 P.2d 543 (N.M. 1932); *Roscoe v. Schoolitz*, 464 P.2d 333 (Ariz. 1970); *Walker v. Associated Press*, 417 P.2d 486 (Colo. 1966); *Rimmer v. Chadron Printing Co.*, 56 N.W.2d 806 (Neb. 1953); *Luper v. Black Dispatch Pub. Co.*, 675 P.2d 1028 (Okla. Ct. App. 1983); *Auto West, Inc. v. Baggs*, 678 P.2d 286 (Utah 1984)). *But see* *Rosenberg v. Helinski*, 616 A.2d 866,872 (Md. 1992) (fair report privilege extends to expert witness’ reiteration of his testimony to reporters).

⁴⁶ *Gilbert v. WNIR 100 FM*, 756 N.E.2d 1263, 1273 (Ohio Ct. App. 2001).

⁴⁷ Restatement (Second) of Torts § 587 (1977).

⁴⁸ *Id.*

⁴⁹ *First Lehigh Bank v. Coven*, 700 A.2d 498, 500 (Pa. Super. 1997); *cf. Adams v. Peck*, 415 A.2d 292, 294 (Md. 1980) (“ordinarily an absolute privilege applies to a defamatory statement published in a document which is prepared for possible use in connection with a pending judicial proceeding but which has not been filed in that proceeding”).

⁵⁰ *Id.* at 501 (citing L. Eldredge, *The Law of Defamation*, § 79(b)(1), at 430 (1978)).

Question 6: If a reporter quotes a court clerk rather than the pleading, is that covered by the fair report privilege?

Answer: The safest course of action is for a reporter to quote the pleading itself. As noted above, most jurisdictions provide that the privilege applies to false and defamatory material contained in pleadings, provided the statements are relevant to the proceedings in which they are made.⁵¹ However, statements made outside the judicial pleadings are generally subject to a qualified privilege only.⁵²

As discussed above, if the pleading or deposition filed in a case has not yet been acted upon, *i.e.*, there has been no judicial action, some authorities hold that the fair report privilege does not apply, while others hold that it does.⁵³ The trend, however, has been to apply the privilege to “the report of pleadings filed in court which have not yet come before the judicial officer and upon which no judicial action has been taken.”⁵⁴

Question 7: In conclusion, what should every reporter know about the fair report privilege?

Answer:

1. Reporters will be protected from republishing defamatory statements *only if* the report fairly and accurately recounts the statements made.
2. A reporter should never assume that the fair report privilege applies to every proceeding involving the government or to every statement made by a government employee or official.
3. While summarizing and paraphrasing statements is permissible under the fair report privilege, a reporter should always strive to be accurate.
4. Verbatim statements contained within court pleadings are generally more protected than statements made outside the judicial pleadings.

⁵¹ Again, “relevant,” meaning they have some relation to the proceeding. Restatement (Second) of Torts § 587 (1977).

⁵² See *First Lehigh Bank*, 700 A.2d at 502 (extending the privilege even to initial pleadings where no judicial action had been taken).

⁵³ *Id.* at 500; *cf. Adams v. Peck*, 415 A.2d at 294.

⁵⁴ *Id.* at 501.

5. Reporters need to verify how the privilege is applied in their particular state before relying on it.
6. It may be necessary under your state law to identify the source of the statement being reported, *e.g.*, a pleading, a police statement, a public agency, or a court.