M E M O R A N D U M:
ANALYSIS OF THE "LEGAL PROCEEDINGS PRIVILEGE"

To: DLM

From: CEF

Date: January 1, 200x

Question: *Do the Defendants have an absolute or qualified privilege to defame Plaintiffs by distributing pleadings from a court case in which the Plaintiffs were involved but the Defendants were not in order to cause the Plaintiffs harm?*

Answer: *No, but the courts will probably apply a qualified privilege to the Defendants anyway. Absolute privilege is rigidly defined to include only the parties and participants in a lawsuit. Qualified privilege attaches, generally, to only the media and other news distribution personnel. Qualified privilege does not attach when (1) the information distributed is false, and (2) the distributor acts with actual malice.*

Even though the Defendants should not be held to have any privilege from defamation, the conservative courts in Texas will probably ignore precedent and allow the Defendants to claim a qualified privilege but deny them an absolute privilege.

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1.0 Summary of Case Facts

The Plaintiffs are an individual and his insurance underwriting business. Plaintiffs were involved in a lawsuit that was filed by a competitor alleging improper business practices. The lawsuit was baseless (as determined by the Texas Board of Insurance upon the request for a review by our clients - the current Plaintiffs) and was used as a stalling technique by the competitor to delay repayment of loans due to our clients. The competitor terminated the lawsuit prior to discovery. The pleadings in that case contained serious allegations of improper business conduct and could have caused serious damage to Plaintiffs' reputations and solvency. The media did not cover the case and any damage to the Plaintiffs from that lawsuit was limited.

The Defendants in this case are an individual and his insurance underwriting business. The Defendants were not parties to the aforementioned lawsuit, nor were they involved in the prior lawsuit in any capacity at all. Defendants obtained copies of the pleadings in the aforementioned case against the Plaintiffs. The Defendants then distributed copies of the pleadings to our clients' business partners and major customers. These distributions were often made anonymously, but have been traced to the Defendants by postage meter stamp identification.

The damage to the Plaintiffs caused by the distribution of these pleadings has been considerable. The damage includes termination of profitable business relationships and the loss of major customers. The Defendants have caused Plaintiffs to incur millions in monetary losses and has placed a severe stain on their business reputation.

Plaintiffs brought this lawsuit against Defendants alleging defamation, tortuous interference with contract, and intentional infliction of emotional distress.

1.1 Summary of Defendants' Claim That They Are Protected By the Legal Proceedings Privilege

Defendants claim in their Response to Plaintiff's Original Petition, that the act of distributing court pleadings is covered by either an absolute or qualified privilege. Defendants rely on two doctrines for this claim. First, that court pleadings cannot make the basis for a defamation case. Second, that the media's right to fair reporting of case proceedings and allegations cannot make the basis of a defamation case.

First, an analysis of the absolute privilege attaching to court proceedings is required. This issue will be covered generally and then specifically discuss two important cases that have addressed a similar issue to the one explored in this memorandum.

Second, an analysis of the media's qualified privilege to report on lawsuits and the allegations contained therein is required.

2.0 Analysis of the Absolute Privilege Attached To Legal Proceedings

The defendants in this case assert that the publication of the lawsuits was absolutely privileged. This is a case of first impression in this state. No other case law has dealt specifically with this fact scenario. The question presented to the court is whether a person or business entity not associated with the relevant lawsuit in any way has the right to copy the defamatory pleadings which he knows or believes to be false and distribute them to the defamed party's clients and partners in order to end those business relationships with the defamed party. The case law in Texas suggests that this malicious publication of lawsuit pleadings should not be covered by the legal proceedings privilege.

The absolute privilege that is granted to judicial proceedings extends only to statements made by the judge, jurors, counsel, parties, or witnesses, and the privilege attaches to all aspects of the judicial proceedings. Village of Bayou Vista v. Glaskox, 889 S.W.2d 826, 829 (Tex.App.-Houston [14th Dist.] 1995, n.w.h.); James v. Brown, 637 S.W.2d 914, 916 (Tex. 1982). This absolute privilege has been contained to the above listed parties because lawsuits often contain defamatory statements that are untrue. In the interest of justice the parties listed above must be protected from lawsuits for defamation when they seek or administer justice in our society. Defendants do not have this absolute privilege protecting their publication of pleadings from a lawsuit to which they were neither party nor participant. Defendants were neither seeking justice from the courts nor were they participating in the administration of justice when they distributed the petitions.

Defendants testified that they had substantial doubts about the veracity of the allegations in the lawsuits yet they mailed copies of those lawsuits to Plaintiffs customers and business partners anonymously. They did this in order to deprive their competitor of a client. This type of action is defamatory and actionable.

Now, an analysis of the two leading cases regarding the absolute privilege is required. The two cases are Levingston and Hill. Both cases involve the question of whether delivery of pleadings by the plaintiff to a news media organization waives the judicial proceedings privilege against libel. The two courts, inevitably, reached different conclusions and the Texas Supreme Court has yet to decide the issue.

These cases discuss the competing standards and limits of the absolute privilege. More importantly, they also discuss what happens when a party to a lawsuit distributes case pleadings to the media with the express intent to defame the other party in the lawsuit. If a party to a lawsuit, who is covered by an absolute privilege, is prohibited from distributing pleadings in order to defame their opponent, then the Defendants in the present case have no claim to any privilege at all.

2.1 Levingston: Our Friend

In Levingston, the court allowed recovery in a libel action where the plaintiff had filed a lawsuit alleging defamatory statements, which he knew to be false and then, turned over the petition to a newspaper. 688 S.W.2d 192 (Tex.App.-Beaumont 1985, ref'd n.r.e.). The plaintiff hoped the paper would publish the defamatory statements so that the defendant's reputation would be harmed and a bond for which the defendant had applied would be denied. The court cited De Mankowski v. Ship Channel Development Co. 300 S.W.118, 122 (Tex.Civ.App.-Galveston, no writ) which held:

> "The privilege afforded a litigant which exempts him from liability for damages caused by false charges made in his pleadings, or in the court in the course of a judicial proceeding, cannot be enlarged into a license to go about in the community and make false and slanderous charges against his court adversary and escape liability for damages caused by such charges on the ground that he had made similar charges in his court pleadings."

Levingston, at 196. The court then held that the plaintiff had stepped out of the umbrella of privilege. Id., at 196-197.

2.1.1 Comparing and Distinguishing Levingston and the Present Case

The similarities between Levingston and the present case are obvious. A person distributed court pleadings that he knew to be false in order to cause the defamed party harm. There is also an important point upon which the present case and Levingston can be distinguished: in Levingston, the defaming person was a party to the lawsuit where the defamatory documents originated. In Levingston, the individual was automatically assumed to hold the privilege because he was a party to the lawsuit. The court then ruled that the individual had abused the privilege and that by his malicious actions lost the right to claim said privilege.

In the present case, the Defendant was not a party to, nor a participant in, the case from which the defamatory pleadings originated. In addition, the evidence shows that by their own admission, the Defendants doubted the validity of the charges in the defamatory pleadings. Compared to Levingston, the present Defendants carry even greater culpability for defamation because the Defendants (1) knew or believed the allegations to be false, (2) distributed the allegations – not to impartial news organizations, but to targeted individuals and groups in order to harm their relationships with the Plaintiffs, and (3) carried out these actions with the intent to cause harm to the Plaintiffs.

2.1.2 Regretfully, Levingston Was Decided Incorrectly

Luckily, we can distinguish the present case from Levingston on this basis because if the Texas Supreme Court should hear this issue, Levingston will probably be overturned (*see Section 3.3.1 for a discussion of the Texas Supreme Court and its political/legal philosophy*). Levingston was wrongly decided because the issue revolved around an ***absolute*** privilege. The Levingston court limited the scope of the absolute privilege by attaching a condition that reduced the absolute privilege to a qualified privilege. The Levingston court attached an actual malice standard to the exercise of an absolute privilege.

Neither the Texas Supreme Court nor any other Texas court (prior to Levingston) has ever wavered in referring to the legal proceedings privilege as anything but an "absolute" privilege. By reducing the legal proceedings privilege to a qualified privilege by attaching an actual malice condition, the Levingston court has tried to overturn a legal precedent set in Texas legal stone. It is far more likely that the Texas Supreme Court will follow the interpretation of the Hill court.

2.2 Hill: Our Nemesis

In Hill v. Herald-Post Publishing Co., the court declined to follow the earlier Levingston decision. 877 S.W.2d 774 (Tex.App.-El Paso 1994, aff'd in part and rev'd in part at 891 S.W.2d 638). The Hill court expressly declined to follow Levingston holding that it was wrongly decided and without support in Texas case law. Hill, at 783. The court held that the Levingston court relied improperly on the De Mankowski decision because DeMankowski was predicated on libelous statements made prior to *and after* the filing of the lawsuit. Hill, at 783. The court held that "the harm resulting to the defamed party by delivering a copy of the suit or motion in a pending proceeding to the news media could demonstratively be no greater than it would be if the news media reporters got a tip from someone or found the pleadings on their own." Hill, at 783. The court then held that the mere delivery of pleadings in pending litigation to members of the news media does not amount to a publication outside of the judicial proceedings, resulting in waiver of the absolute privilege. Id., at 783.

2.2.1 Comparing and Distinguishing Hill and the Present Case

Of course, the one major point of comparison between Hill and the present case is that defamatory pleadings were distributed to parties alien to the litigation. Happily, this is probably irrelevant to the present case.

Again, the present case is distinguishable on the basis that the legal proceedings privilege attached to an individual who was a party to the litigation. In the present case, Defendants were not parties nor were they even participants in the litigation where the defamatory pleadings originated.

In addition, the case is distinguishable on the grounds that the individual in Hill distributed the pleadings to a news organization that has an obligation to fairly report and verify allegations. In the present case, the defamatory pleadings were distributed to people with no obligation to verify the facts. Adding fuel to the fire, the Defendants often distributed the defamatory pleadings anonymously and included an anonymous letter rife with innuendo about the legitimacy of the allegations in the pleadings.

2.2.2 Regretfully, Hill Was Decided Correctly

Hill was decided correctly. The Hill court properly followed the solid precedent in Texas law that affirms the legal proceedings privilege is an absolute privilege and not a qualified privilege subject to mitigating limitations and conditions.

The Hill court's argument that no greater harm would have occurred had the media discovered the case's existence by another means is well taken. The only argument against the Hill court's decision is that the defamer profited by taking advantage of the legal system and created an injustice. But one major legal principle in our system is that not all wrongs have a remedy. In this instance, holding litigants responsible for defamatory statements and allegations in their pleadings could, worst case, cause massive litigation against plaintiffs who lost a case that received media attention.

Aside from its political/legal philosophy (*see Section 3.3.1*), it would still be difficult to envision the Texas Supreme Court creating a remedy for this legal loophole to defamation because the results of the remedy would be even more damaging to the legal system and its participants than the loophole.

2.3 The End Result: Absolute Privilege Would Attach If the Defendants Were Parties or Participants in the Litigation from Which the Defamatory Pleadings Originated

The obvious conclusion to this discussion of the legal proceedings privilege is that the Texas Supreme Court will not allow Levingston to stand and will follow the Hill court's analysis and decision on the issues.

Thus, it should be assumed that if the Defendants were parties or participants in the litigation from which the defamatory pleadings issued, the Defendants would receive an absolute privilege to distribute the pleadings to media organizations. Yet, these are not the circumstances in the present case.

The Defendants in the present case were neither parties nor participants in the legal proceedings from which the pleadings issued. Instead, the Defendants were completely alien to the litigation. The Defendants sought out the litigation and pleadings on their own, as the case had never received media attention. The Defendants did not distribute the pleadings to news organizations but instead distributed them to individuals and groups in business relationships with the Plaintiffs.

Thus, no absolute privilege attaches to the Defendants and their actions. At best, it could be argued that the Defendants were acting as their own media distribution service. Though this is a stretch for the Defendants to argue, it would be the only basis upon which the Defendants could meet the existing criteria for attachment of the

qualified privilege to defamation granted to the media when reporting on lawsuits and their allegations.

3.0 An Analysis of the Qualified Privilege to Defamation Granted to the Press

Outside parties to litigation are generally not granted a privilege to distribute defamatory information emanating from the litigation. The exception to this is the media. The media have been granted a qualified privilege to report on lawsuits and the allegations contained therein.

In discussing the media's qualified privilege, the first topic explored should be the parameters of the privilege and to whom the privilege extends. Second, a discussion of the actual malice standard as a means to defeat the privilege is required.

3.1 The Media's Qualified Privilege Is Not Common Law – It Came From the Legislature

No privilege to disseminate potentially defamatory allegations and statements emanating from a lawsuit ever existed for persons or entities alien to a lawsuit. The absolute privilege for lawsuit parties and participants discussed above has a long history in the common law granting protection to the litigants, attorneys, and witnesses from litigation for defamation based on their statements in court. The Texas Legislature expanded the privilege attaching to court proceedings to the media, but the media's privilege is not absolute – it is a qualified privilege.

The Texas Legislature passed a statute protecting the Press' right to publish accounts of judicial proceedings that are now codified at Tex.Civ.Prac. & Rem. Code Ann. §73.002 (Vernon 1986). This statute provides that a libel suit cannot be based on a fair, true, and impartial account by a newspaper of judicial proceedings. Langston v. Eagle Publishing Co., 719 S.W.2d 612, 615 (Tex.App.-Waco 1986). But this privilege for newspapers is not absolute. Newspapers are granted only a qualified privilege. Langston, at 624; Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 884 (Tex. 1970).

3.2 The Qualified Privilege Is Lost If the Statements Are False, Defamatory, and Published With Actual Malice

The qualified privilege is lost by proof that the defendant was acting with actual malice when he published the false and defamatory statement. Id. Malice sufficient to beat the qualified privilege means publication with knowledge that it was false or with reckless disregard of whether it was false. Langston, at 624; Dun and Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896, 600 (Tex. 1970).

By granting newspapers a qualified privilege, the legislature was obviously granting the newspapers a larger right to publish statements made in judicial proceedings than is granted to the public at-large. Simple logic points to the fact that states could not impose greater restrictions on speech for the press than the general public enjoys, if so, it would be clearly unconstitutional; yet, the states can enhance the media's right to publish potentially defamatory information in order to secure a free and vigilant press without enhancing the right of the general public to do the same. Obviously, with the statute the legislature enhanced the media's protection against defamation suits while holding the general public's liability for defamation at a lower threshold.

The case law also seems to support the proposition that newspapers have an expanded right to publish statements made in judicial proceedings than enjoyed by the general public. The publication by a newspaper of an article or item, ***which might otherwise be actionable***, is privileged and not subject to a libel action, provided it is a fair, true, and impartial account of a judicial proceeding or a fair comment on a matter of public concern. Hill v. Herald-Post Publishing Co, Inc., 877 S.W.2d 774, 778 (Tex.App.-El Paso 1994, aff'd in part and rev'd in part at 891 S.W.2d 638) (emphasis added). This implies that private parties or other entities may be liable for the same actions taken by a newspaper. This is an important point with significant justification.

Newspapers do a public service in disseminating information in our society. Newspapers have the duty to research the information given them to assure, within reasonable bounds, the truth and veracity of the information prior to publication. This is the application of the actual malice standard. If a newspaper fails to verify potentially defamatory facts, the newspaper can be held liable for defamation because they acted intentionally or with a reckless disregard for the truth. The appellant attempts to apply this actual malice privilege protecting newspapers to his actions in this case. The only cases cited by the defendant deal with media defendants. This is an improper application of the privilege.

3.2.1 The Strict Actual Malice Standard Does Not Apply to Non-Media People or Entities

First, the actual malice standard does not apply to non-media persons or entities. Prior to the granting of the actual malice privilege to the media, the court defined the standard for both newspapers and private parties. The court held in Sutton v. AH Belo & Co. that:

> "If pleadings and other documents can be published to the world by anyone who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news. The public have no rights to any information in private suits until they come up for public hearing or action in open court, and, when any publication is made involving such matters, they possess no privilege, and the publication must rest on either non-libelous character or truth to defend it."

64 S.W. 686, 687 (Tex.Civ.App.-Beaumont 1920, no writ).

3.2.2 A Communication Loses Its Privileged Status When Used Outside of Judicial Proceedings

Second, a communication loses its privileged status when it is used outside of the judicial proceedings. Out-of court communications, in order to be privileged, must bear some relationship to the to the judicial proceeding and must be in furtherance of the attorney's representation. Hill, at 782. As noted in Sutton, pleadings should not be published to the world unless they are true or non-libelous. The legislature enacted a statute to help protect newspapers that distributed this information when they found it to be sufficiently backed by objective evidence. But newspapers must present the evidence in a fair and impartial way, or they lose the privilege. Private parties were never granted this privilege as newspapers were. Thus, by taking the pleadings outside of the judicial proceedings and distributing the defamatory lawsuits for his own gain, the appellant loses the right to claim any privilege regardless of whether it is absolute or qualified.

3.2.3 Public Policy Dictates That Private Non-Media Parties Should Not Be Granted a Privilege to Disseminate Defamatory Information Advanced In The Course of a Lawsuit

Third, from a public policy standpoint, private non-media parties should not be granted any privilege when distributing defamatory pleadings outside of the relevant judicial proceedings. As the courts noted, lawsuits that allege false charges could be circulated with impunity. This would allow the dishonest an advantage in business, politics, and in any arena where reputation is important. If a person cannot prove the truth of an allegation, they should have no right to repeat it, but should be required to allow the court system to administer justice and make the final determination before that person is allowed to publicize the result. The granting of a privilege to pleadings for non-media parties would be subject to great abuse, could cause the destruction of innocent persons' and businesses' reputations, and as such, would create great injustices.

3.3 No Privilege Should Be Attached To the Defendants' Actions – But the Court Will Probably Grant Them a Qualified Privilege Anyway

For the purposes of the present case, there is no credible argument that the Defendants were parties to the original lawsuit from which the defamatory pleadings originated. Thus, the Defendants have no legitimate claim to an absolute privilege. Since the courts have kept the absolute privilege tightly confined to litigation parties and participants, it is almost inconceivable that a court would extend the absolute privilege to the Defendants.

Nor are the Defendants in a media or media-related business. The Defendants are an insurance underwriting business and its owner. In addition, the Defendants did not distribute the information in a normal news format. Instead, the Defendants often distributed the defamatory pleadings anonymously and included a defamatory letter about the Plaintiffs which was also anonymous. The recipients were not the public at large, but were instead a carefully selected list of the Plaintiffs' largest customers and business partners.

No legitimate argument exists that would identify the Defendants as media entities and, thus, the normal standards for defamation should apply – not the standards of the media with the qualified privilege.

That having been said, the courts will probably allow the qualified privilege to attach to the Defendants' actions requiring the Plaintiffs to defeat the privilege. Plaintiffs will be required to prove the falsity of the claims and that the Defendants acted with actual malice when distributing the defamatory information.

Why would a court apply this stricter standard? This is only a guess, but since this is a case of first impression in Texas the trial judge will want to cover his bases as the case climbs the appellate ladder. The facts are relatively cut and dry, and though one can never predict the verdict of a jury, there is a substantial likelihood of a verdict in the Plaintiffs' favor. In order to protect the validity of the verdict in the face of a very conservative Texas Supreme Court, the trial court will desire to apply a stricter standard than may actually be required.

The stricter media standard for defamation would allow a decision by the appellate courts to sustain the verdict even if they reduced the standard to non-privileged defamation. A stricter standard would foreclose the defendants from making a credible appeal on this issue if the verdict were in the Plaintiffs' favor.

3.3.1 A Discussion of the Political Philosophies of the Texas Supreme Court and the Relevant Lower Appellate Courts

This section has been included for purposes of legal strategizing.

While not indicting anyone's ideas, judicial integrity, or fidelity to the law, few can legitimately argue that the personal political and legal philosophies of judges do not enter into court decisions. Therefore, in order to provide a comprehensive analysis of this issue and its chances for success before the Texas courts, a discussion of the philosophical demographics of the Texas Supreme Court and the lower appellate courts is essential.

3.3.1.1 The Texas Supreme Court: Conservatives in Action

The Texas Supreme Court is currently an extremely conservative Republican court. This is actually one of the most conservative courts in the United States. A majority of their contributions come from defense attorneys (though that is evening out as the Republican Party takes over all higher state judicial positions). Conservatives tend to treat new torts with disdain and though this issue could have come before the court since the inception of the common law system in Texas, it did not. This issue remains a case of first impression and the Texas Supreme Court is likely to treat it as a new tort and grant the Defendants some protection.

Since the Conservatives tend to limit laws on a strict basis, they are usually loath to create new torts or to expand existing law to cover new fact situations. They prefer to rely on the legislature to fill the holes within the law except in the most egregious cases.

The Texas Supreme Court should not, based on precedent and logic, apply a stricter standard for the Plaintiffs to prove defamation against the Defendants in the present case. Yet, it is highly likely that they will be guided more by philosophy than precedent

and grant the Defendants' actions the same qualified immunity the media holds. Their fundamental belief being that if the legislature disagrees with their position, the legislature is free to change their decision.

3.3.1.2 The Appellate Courts: A Roll of the Die

Prior to reaching the Texas Supreme Court, the case will be appealed and assigned to either the Fourteenth District Court of Appeals or the First District Court of Appeals. [*In a relatively unique situation, Houston, Texas is served by two separate sister appellate courts that both decide law for a single jurisdiction. A case appealed in Houston is randomly assigned to one of the two courts. The opinions of both courts are equally binding on the same population causing considerable confusion when there is a divergence of opinion between the courts.*]

The Fourteenth District Court of Appeals is philosophically identical to the Texas Supreme Court. It is extremely conservative and will probably mirror the actions described above for the Supreme Court.

The First District Court of Appeals is much more moderate than the other two courts discussed. It is truly moderate with a shifting majority that allows a much greater potential for success in the present case. The First District has a considerable record for reversals by the current incarnation of the Texas Supreme Court. The general opinion is that the First District is much more likely to apply the law using precedent instead of philosophy. If a normal defamation standard is achieved in the trial court, the First District is the best hope for the standard and verdict to be affirmed. This could be short-lived, as the Texas Supreme Court will probably reverse the decision either through a full hearing on the issue or through an attachment to its writ decision. [*Another unique situation in Texas law is that the Texas Supreme Court reviews every case that it is petitioned to hear. The cases that are not accepted for argumentation before the court still receive a review by the Supreme Court that looks at the facts of the case and the application of the law held in the lower appellate court's opinion. The court will then attach a "writ" classification that shows whether the court fully agrees with, partially agrees with, is indifferent to, or disagrees with the lower court's application and interpretation of the law. The Supreme Court may also include an extremely abbreviated opinion reversing or upholding a part of the appellate court's opinion along with the writ history without hearing argumentation from the parties.*]

3.3.1.3 Potential Trial Strategies Regarding Defendants' Claims of Privilege

Obviously, the easiest way to win at the trial level is with a less strict standard. Yet, this would probably end in a reversal and retrial. If it is believed that the Defendants will settle the case without appeal if the trial court finds the Defendants liable, then a true battle for the lower standard should be waged.

Yet the Defendants would be foolish not to appeal a verdict against them based on the lower standard. With the makeup of the appellate courts and the Supreme Court, they stand an excellent chance of success. The best-case scenario would result in the trial court applying the stricter qualified privilege standard to the Defendants and still receive a jury verdict favoring the Plaintiffs. If this occurred, the chance of appeal and reversal on this issue would be practically non-existent for the Defendants. The Plaintiffs, though, would still be able to roll the die with an appeal seeking the reduction of the standard to that consistent with normal, unprivileged defamation.

Thus, the final question to be answered is whether the Plaintiffs will prevail under the stricter standard.

All Remaining Parts of This Brief Have Been Excluded As They Either:

1. ***Continue to Exhibit Writing, Research, and Analysis Skills Exhibited by the Materials Provided; and/or,***

2. ***Contain Information That Is Too Specific to the Case to Allow for the Continued Anonymity of the Case and/or the Parties.***
