

13-1012. Qualified privilege: Abuse of qualified privilege.

A communication is normally privileged when it consists of a good faith publication in the discharge of a public or private duty. There exists in the law a qualified privilege for communications such as the communication involved in this action. Consequently, for defendant to be liable to plaintiff, plaintiff must prove that defendant abused the privilege. Defendant abused the privilege if one of the following occurred:

[Defendant knew the statement was false] [or]

[Defendant acted with reckless disregard for the truth or falsity of the statement]

[or]

[Defendant published the communication for an improper purpose] [or]

[Defendant published the communication to a person to whom it was not reasonably necessary to publish it in order to accomplish the proper purpose for which the communication was made] [or]

[Defendant published the communication when it was not reasonably necessary to do so to accomplish the proper purpose for which the communication was made] [or]

[Defendant did not believe, or did not have reasonable cause to believe, that the communication was true] [or]

[....]

USE NOTES

The trial judge decides as a matter of law whether a qualified privilege exists: "The question whether an occasion gives rise to a qualified privilege is one for the court as an issue of law". *Stewart v. Ging*, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958). If the judge decides that a qualified privilege exists, "the question whether it was abused . is ordinarily for the jury". *Id.* at 274-275, 327 P.2d at 336. However, "where but one conclusion can be drawn from the the evidence", the court may determine as a matter of law that the privilege has been abused or that it constitutes a defense to the action. *Id.* at 275, 327 P.2d at 337; *Mahona-Jojanto, Inc. v. Bank of N.M.*, 79 N.M. 293, 295, 442 P.2d 783, 785 (1968). Thus, this instruction is to be given only when the court concludes as a matter of law that the facts give rise to a qualified privilege, and further concludes that there is a question of fact concerning whether the privilege has been abused.

The judge should select only those bracketed statements which are relevant to the evidence presented at trial. The listed occasions for finding an abuse of privilege are not intended to be exclusive. If appropriate, the court might conclude that additional or alternative grounds for proving abuse of privilege should be presented to the jury.