

**2552 INVASION OF PRIVACY: PUBLICATION OF A PRIVATE MATTER:
CONDITIONAL PRIVILEGE**

(Note: Inquire in question 1 whether the (plaintiff)'s right to privacy was violated. See suggested question at Wis JI-2550.)

Question 2 asks whether (defendant), in publicizing a matter concerning (plaintiff)'s private life, abused (his) (her) privilege.

Under certain circumstances, a person has a privilege to publicize a matter concerning the private life of another. However, the privilege does not protect the (defendant) if it is abused.

In this case, (defendant) had the privilege of publicizing a matter concerning (plaintiff)'s private life for the reason that (insert the purpose for which the court has determined a conditional privilege exists - e.g., employer advising other employees of reason of termination of plaintiff fellow employee). However, it is for you to determine whether (defendant)'s privilege to publicize a private matter about (plaintiff) was abused under the circumstances of this case.

(Select appropriate paragraphs.)

[1. An abuse of (defendant)'s privilege occurred if (he) (she) at the time of publicizing the private matter knew that such statements were false or publicized them in reckless disregard of their truth or falsity.

(Give that portion of Wis JI-Civil 2511 that deals with reckless disregard of truth or falsity in defamation, adapting it where necessary.)]

[2. An abuse of privilege occurred if (defendant) publicized a private matter concerning the (plaintiff) solely from spite or ill will. However, ill will or spite does not abuse the privilege if the statements were made for the purpose (insert purpose for which court has determined a conditional privilege exists.)]

[3. An abuse of (defendant)'s privilege occurred if (defendant) publicized the private matter to persons who had no interest in or connection to (insert purpose).

In some cases, the statements, to be effective, must be made at a time and place where third persons are present and likely to overhear the statements. That does not constitute an abuse of the privilege. However, the privilege is abused if the statements are unnecessarily made in the presence of third persons even though the information is given to the party who is entitled to receive it.]

[4. An abuse of (defendant)'s privilege occurred if (he) (she) did not reasonably believe that publicizing the private matter was necessary to accomplish the purpose for which the privilege was given, that is (insert purpose).

The facts and circumstances available to (defendant) at the time the private matter was publicized must have been sufficient to cause a person of reasonable caution and prudence to believe that such action, in its entirety, was necessary to accomplish the purpose for which the privilege was given.]

[5. An abuse of (defendant)'s privilege occurred if (he) (she) publicized private matters necessary for the purpose (insert purpose) and then publicized additional private matters not necessary to accomplish that purpose.]

[6. If the (defendant) publicized private matters believed by (him) (her) to be true and then added statements known by (him) (her) to be false, the privilege would be abused:]

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (defendant) abused (his) (her) privilege in publicizing the private matter.

SPECIAL VERDICT

Question 1: Did (defendant) violate (plaintiff)'s right of privacy by _____?

Answer: _____
Yes or No

Question 2: If you answered "yes" to question 1, then answer this question: Did (defendant) abuse (his) (her) privilege in publicizing a private matter concerning the (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 1998. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is to be used with Wis JI-Civil 2550.

Wis. Stat. § 895.50(3) recognizes a defense of conditional privilege which "shall be interpreted in accordance with the developing common law of privacy, with due regard for maintaining freedom of communication, privately and through the public media." Also see Zinda v. Louisiana Pacific Corp., 149 Wis.2d 913, 931, 440 N.W.2d 548 (1989).

Circumstances which give rise to conditional privilege for defamation claim can also apply to an invasion of privacy claim. Zinda, supra, citing Restatement, Second, Torts § 652G at 401.

Once it is determined by the court that a conditional privilege applies, the burden of proof shifts to the plaintiff to show abuse. Calero v. Del Chemical Corp., 68 Wis.2d 487, 499, 228 N.W.2d 737 (1975).

Abuse of a conditional privilege results in its loss. Ranous v. Hughes, 30 Wis.2d 452, 468, 141 N.W.2d 251 (1966). Five occasions giving rise to abuse of conditional privilege as stated in the Restatement, ©2003, Regents, Univ. of Wis.

Second, Torts §§ 600 - 605A and adopted in Zinda, supra, at 925 are as follows: (1) The defendant knew the matter to be false or acted in reckless disregard as to the truth or falsity. (2) The defamatory matter is published for some purpose other than for which the privilege is given. (3) The publication is to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege. (4) The publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given. (5) The publication includes unprivileged matter as well as privileged matter.

The jury determines whether the defendant abused the privilege unless the facts are such that only one conclusion can be reasonably drawn. Zinda, supra, at 926.