Intra-Corporate Communications: Sufficient Publication for Defamation or Mere Corporate Babbling

Daven G. Lowhurst
Intra-Corporate Communications: Sufficient Publication For Defamation or Mere Corporate Babbling?

by Daven G. Lowhurst*

I
Introduction

This note analyzes the following hypothetical problem in the law of defamation. The president of General Motors Corporation (G.M.) suspects that a particular vice president, I.M. DeFamed, has been engaging in illegal stockmarket transactions in G.M. stock. Based on this suspicion and with little concrete evidence, the president decides to discharge Ms. DeFamed. She has, however, been very popular among G.M. employees for supporting employee concerns during union contract negotiations. The president contacts one of his personnel relations employees in order to defuse this unpopular management decision before it reaches G.M. employees. The president directs this employee to send out a circular to all G.M. employees informing them that Ms. DeFamed has been discharged for engaging in illegal stockmarket transactions. This employee, acting in the ordinary course of his duties, complies by sending out the circular to 100,000 G.M. employees.

Assuming the circular is libelous, the doctrine of respondeat superior would make the president personally responsible and would impose liability on G.M. as well. However, the courts in several states would deny Ms. DeFamed the opportunity to pursue her grievance against the corporation by finding that the libelous circular was not published to a third person as is required for a successful defamation action. The popular vice president’s reputation has been harmed in the eyes of 100,000 persons without recompense.

The tort of defamation protects an individual’s interest in

* Member, Third Year Class. The author gratefully acknowledges the assistance of Professor John L. Diamond, Hastings College of the Law, and Gregg Eskenazi and Michael Hoffman, Third Year Class, in the preparation of this note.
sound reputation and good name. When an individual's reputation has been harmed by the statements of another, he or she is entitled to seek legal redress against both the person making the defamatory statement and, if the statement was made in the ordinary course of business, against the person's employer as well.

A successful defamation suit requires that the allegedly false and defamatory statement be communicated to a person other than the individual who claims to have been wronged. This is the "publication" requirement. Courts have taken divergent paths in determining whether a communication between co-employees, made in the ordinary course of business, constitutes a publication. Some courts have adopted what will be referred to as the "no-publication rule"—that such a communication is not a sufficient publication where the defendant is the corporate or individual employer of the co-employees. Other courts have criticized this rule in an effort to support the traditional theory underlying defamation actions—that a sufficient publication occurs as soon as any third person has understood the statement as defamatory, regardless of the defendant's status.

This note examines this split of authority. It compares the cases and arguments advancing the no-publication rule with the cases and arguments advancing the traditional view. The note first discusses dictations to stenographers and then addresses all intra-corporate communications. The note concludes that since the no-publication rule precludes the defamed person from receiving compensation for a defamatory statement, the traditional theory underlying defamation is better suited to deal with defamatory communications in the corporate context.

II
The Tort of Defamation

"Defamation is... that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."
However, a statement defamatory of another does not subject its publisher to liability for defamation unless the statement is false. Since the gravamen of the tort is damage to the plaintiff's name and reputation in the eyes of the community, the false and defamatory matter must be communicated to someone other than the person defamed. The legal term of art for a defamatory communication to a third person is "publication." Thus, if the defamatory words are communicated by the speaker to no one but the plaintiff, no publication occurs, and consequently no right of action for defamation arises regardless of how derogatory, insulting, or scandalous the words may be.

In many instances, a defendant is not held liable for defamation even though he admittedly published a false and defamatory communication to a third person. This results from the existence of a privilege that immunizes the defendant's acts from liability in order to protect society's interest in the free flow of information and ideas:

[hereinafter cited as PROSSER & KEETON]. See R. HEUSTON, SALMOND ON TORTS 142 (16th ed. 1973); RESTATEMENT (SECOND) OF TORTS § 559 (1977). Defamation is composed of libel and slander, two forms of action which distinguish the means by which the defamatory matter is published to a third person. Generally, libel refers to written or printed words but has been extended to include any publication embodied in a relatively permanent, physical form. On the other hand, slander generally refers to oral communications. See PROSSER & KEETON § 112, at 785-88; M. NEWELL, SLANDER AND LIBEL 1 (4th ed. 1924); RESTATEMENT (SECOND) OF TORTS § 577 comment a (1977).


6. PROSSER & KEETON, supra note 3, § 113, at 797; see M. NEWELL, supra note 3, at 218. Publication of defamatory matter is its intentional or negligent communication to one other than the person defamed. Ranous v. Hughes, 30 Wis. 2d 452, 461, 141 N.W.2d 251, 255 (1966); RESTATEMENT (SECOND) OF TORTS § 577 (1977).

7. J. TOWNSHEND, supra note 5, at 146. The plaintiff may, however, have an action for the intentional or negligent infliction of emotional distress, neither of which require publication. See generally PROSSER & KEETON, supra note 3, §§ 12, 54.

8. "Immunity" is a more accurate term than "privilege" since the defendant is in effect immunized from liability for a defamatory communication rather than privileged to defame. But since courts more frequently use the term privilege, this term will be used throughout this note.

9. The significance of privileges was diminished to some extent by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), where the United States Supreme Court recognized a constitutional privilege based on the rights of freedom of the press and speech guaranteed by the first amendment. The privilege operates by altering the nature of the defendant's fault required to sustain a defamation recovery. Generally, to be liable for defamation, the false and defamatory communication must have been made with knowledge of the communication's falsity, in reckless disregard of its truth or falsity, or negligently. RESTATEMENT (SECOND) OF TORTS § 580B (1977). However,
The defense of privilege arises in those situations in which
the public interest in permitting persons to speak or write
freely without being restrained by the possibility of a suit for
defamation outweighs the policies behind the law of defama-
tion which imposes broad liability for the publication of false
matters tending to injure the reputation of others . . . . In
these situations the courts recognize the defense of privilege
. . . which may be absolute or qualified.10

Absolute immunity, that is, immunity notwithstanding the
defendant's purpose and motive, has been limited to those situa-
tions where social policy favors complete and uninhibited
freedom of expression.11 Absolute privilege has been extended
only to defamatory statements made: (1) during judicial pro-
ceedings; (2) during legislative proceedings; (3) by executive of-
ficers of government in the discharge of their governmental
duties; (4) with the consent of the plaintiff; (5) between hus-
band and wife; or (6) when required by law.12

Most privileged defamatory publications enjoy only a quali-
fied or conditional privilege, arising where society's interest in
encouraging the free flow of information is significant but not
substantial enough to afford a defense to one who defames ma-
liciously or for any other inappropriate reason.13 Instead, soci-
ety's interest dictates that the publisher shall be protected only
to the extent that he communicates in good faith. These quali-
fied privileges have been extended: (1) where the defendant
publishes defamatory matter for the protection or advance-

New York Times held that where the plaintiff is a public official or public figure alleg-
ing a false and defamatory communication concerning his or her conduct or fitness in
that capacity, the defendant's communication must have been made with either
knowledge of its falsity or reckless disregard of its truth or falsity; mere negligence is
insufficient. Prosser & Keeton, supra note 3, § 113, at 804-08; Restatement (Sec-
ond) of Torts § 580A (1977).

11. Prosser & Keeton, supra note 3, § 114, at 815-16.
12. Id. at 816-24. Although it is possible that the communication made by the de-
endant in the context of this note would be sufficient to establish one of the afore-
mentioned situations giving rise to an absolute privilege, such a situation need not be
considered here since the defendant would not be liable in any jurisdiction if an abso-
lute privilege applies. The result is the same as if there had been no publication of the
defamatory matter. For further discussion of the applicability of absolute privilege to
defamation actions, see id.; Restatement (Second) of Torts §§ 585-592A (1977).
13. Ranous v. Hughes, 30 Wis. 2d 452, 466-67, 141 N.W.2d 251, 258 (1966). The
concept of qualified or conditional privilege has been widely accepted as affording
protection in those situations where a defamatory communication is not absolutely
privileged but is nevertheless protected.
ment of his or her own lawful interests;\(^\text{14}\) (2) where a defendant publishes defamatory matter for the protection or advancement of a lawful interest of another;\(^\text{15}\) (3) where the publisher and the recipient of the defamatory communication have a common interest in the communication, and the communication is reasonably calculated to protect or further that interest;\(^\text{16}\) (4) where the communication is made to someone who may reasonably be expected to take official action to protect a public interest, or where a defendant publishes the defamatory matter while engaged in public discussion on a subject of legitimate public interest;\(^\text{17}\) or (5) where reports of judicial, legislative, executive, or administrative proceedings are not afforded an absolute privilege.\(^\text{18}\)

The distinguishing feature of a qualified privilege is that it is indeed qualified: if one abuses it, one loses it.\(^\text{19}\) The privilege may be lost where a publisher does not reasonably believe either that the publication is necessary to protect the interest involved\(^\text{20}\) or that the interest to be protected justifies the publication.\(^\text{21}\) The privilege also may be lost by the use of language which is either beyond what is reasonably necessary to protect the interest\(^\text{22}\) or is more intemperate or abusive than warranted by the occasion that prompted the publication.\(^\text{23}\) Finally, the privilege may be abused and thereby forfeited if the publisher of the false and defamatory matter is motivated to make the

---

15. Prosser & Keeton, supra note 3, § 115, at 826-28; Restatement (Second) of Torts § 595 (1977).
17. Restatement (Second) of Torts § 598 (1977); Prosser & Keeton, supra note 3, § 115, at 830-32.
18. Prosser & Keeton, supra note 3, § 115, at 836-38. This privilege is based on the public interest in the reporting of judicial, legislative, and administrative proceedings and the recognition that an individual reporting such proceedings to the public "is merely a substitute for the public eye." Id. at 836.
19. See Restatement (Second) of Torts § 599 (1977); Prosser & Keeton, supra note 3, § 115, at 832-35. See generally, Hallen, Excessive Publication in Defamation, 16 Minn. L. Rev. 160 (1932).
21. Id. at 826-28.
22. Id. at 826.
defamatory statement solely by spite or ill will, or if the communication was made with knowledge of falsity or with reckless disregard for the truth.

III
Respondeat Superior

Courts consistently have held that an employee can be held accountable for his or her own torts. Under the doctrine of respondeat superior, a corporation, as a separate legal entity, may also be liable for the tortious conduct of its employees.

Assuming an employee is personally liable for a defamatory statement, this doctrine imposes liability on the employee’s corporate employer in four situations: (1) where the employee, in making the statement, was carrying out express orders or acting pursuant to express authority of the corporation; (2) where the employee, in making the statement, was acting pursuant to implied authority of the corporation; (3) where the statement was subsequently ratified by the employer; or (4) where the employee, in making the statement, was acting within the scope of his employment.


As long as the employee is acting within the scope of his duties, the corporation can be held liable for the employee’s tort even if the corporation had no knowledge of the employee’s tort, did not authorize the particular act, and even gave the employee direct instructions to refrain from engaging in such an act. Gillis v. Great Atl. & Pac. Tea Co., 223 N.C. 470, 474, 27 S.E.2d 283, 286 (1943). Otherwise, “an employer could
The underlying rationale for the doctrine is that a duty rests upon every man to conduct his affairs so as not to bring injury upon another, and this duty exists regardless of whether “he” is an individual or a corporation, or whether “he” carried out his affairs himself or with the aid of an employee or agent. Respondent superior has been applied uniformly to defamation actions where there is a corporate employer/employee relationship, even where the employee communicated with actual malice.

However, regardless of the identity of the entity ultimately liable, a successful defamation plaintiff must first establish publication to a third person. This publication requirement has led to confusing and inconsistent decisions addressing corporate and individual liability for the defamatory communications of employees.

IV

Decisions Favoring the No-Publication Rule

A. The Stenographer Cases

The no-publication rule has its roots in early cases where corporations were absolved of liability for defamatory dictations from one employee to another. The inaugural case advancing the no-publication rule is *Owen v. Ogilvie Publishing Co.* In that case, a plaintiff sued a corporation after its general manager, in carrying out the corporation’s business, dictated a letter to one of the corporation’s stenographers expressing a suspicion that the plaintiff had taken money from the cash drawer. According to the court, the issue was whether there was a publication by the corporation. The court held that the stenographer was not to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. It was a part of the manager’s duty avoid all liability for the torts of his employees by the simple expedient of instructing them not to commit them.” *Id.* at 476, 27 S.E.2d at 287.

32. See, e.g., *Houston Printing Co. v. Jones*, 282 S.W. 854 (Tex. Civ. App. 1925). Malice of the employee is imputed to the employer because “the act having been done for [the employer’s] benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.” *Lothrop v. Adams*, 133 Mass. 471, 480-81 (1882).
33. See supra text accompanying notes 5-7.
34. 32 A.D. 465, 53 N.Y.S. 1033 (1898).
to write letters for the corporation, and it was the duty of the stenographer to take such letter in shorthand, copy it out and read it for the purpose of correction. The manager could not write and publish a libel alone, and we think he could not charge the corporation with the consequences of this act, where the corporation, in the ordinary conduct of its business, required the action of the manager and the stenographer in the usual course of conducting its correspondence. . . . [T]he act of both servants was necessary to make the thing complete. The writing and the copying were but parts of one act, i.e., the production of the letter. 

Thus, the Owen court held that a defamatory dictation transmitted between corporate employees acting within the scope of their employment is not a publication sufficient to establish corporate liability for defamation. The court embraced what will be referred to in this note as the "one corporate act theory" to support its holding: since the allegedly defamatory communication was between employees of the same corporation engaged in the performance of a single corporate act, there was no third person to whom the defamatory communication had been published. Thus, where a corporation is merely "speaking to itself," the publication requirement will not be satisfied unless the defamatory matter is communicated to a third person independent of the corporation.

The Owen court explicitly left undecided the issue of whether a publication occurs where the relationship between the person dictating and the stenographer, rather than being one of co-employees of a common master, is that of master and servant, that is, where the person dictating is the individual employer of the stenographer.

Several courts have followed Owen although they have relied upon different rationales to reach the same conclusion. Basing their holdings on the one corporate act theory advanced in

35. Id. at 466-67, 53 N.Y.S. at 1034.
36. Id. at 466, 53 N.Y.S. at 1034. The court explained:

It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons. They were both employed by a common master, and were engaged in the performance of duties which their respective employments required.

Id.
INTRA-CORPORATE COMMUNICATION

Owen, courts in Alabama, Georgia, New York, North Carolina, and Virginia have held that the dictation from one corporate employee to another, if made during the performance of their duties of employment, does not constitute publication.

A second rationale supporting the no-publication rule was advanced in Cartwright-Caps Co. v. Fischel & Kaufman, in which the court held that the dictation of an allegedly libelous letter from the president of a corporation to one of the corporation's stenographers did not constitute publication. The court offered only a pragmatic rationale, which will be referred to in this note as the "business necessity theory," for its decision:

It is inconceivable how the business of the country, under the present conditions, can be carried on, if a business man or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated.

Finally, at least one court has advanced two additional rationales for the no-publication rule. In Freeman v. Dayton Scale Co., a former employee sued a corporation for an allegedly libelous letter dictated by a corporate employee to a corporate stenographer. Even though the defendant was a corporation, the court, in dictum, chose to extend the no-publication rule to individual defendants. The court first determined that the dictation of a libelous letter to a stenographer does not constitute sufficient publication because

the stenographer, if a coemployee in a corporation, has no dis-

38. Central of Ga. Ry. v. Jones, 18 Ga. App. 414, 414, 89 S.E. 429, 429 (1916) (stenographer and agent to whom an allegedly libelous letter was mailed, both employed by the same corporation, are not third persons).
42. 113 Miss. 359, 74 So. 278 (1917).
43. Id. at 363, 74 So. at 279-80. The court also denied the plaintiff's claim against the corporation on the grounds that the letter was a privileged communication. Id. at 363, 74 So. at 279.
44. 159 Tenn. 413, 19 S.W.2d 255 (1929).
tinct third party entity, and, if an employee of an individual, is a confidential instrumentality only of the libelant, not recognized, when engaged in the performance of this mainly mechanical duty, as possessing an independent third party personality.45

Thus, the court held that where the defendant in a defamation action is a corporation, and the dictation involves two of its employees, there is no publication under the "one corporate act theory."46 Where the defendant is an individual and the dictation is from an individual employer to an employee, the court held that there is similarly no publication under what will be referred to in this note as the "mechanical process theory," which provides that because stenography is a mechanical process involving little cognitive thought, stenographers are to be considered dictation devices rather than third persons.47

The court advanced an additional rationale for its finding of no publication: "[A]s a practical proposition, it should be said, to the credit of those engaged in [stenography], that experience demonstrates that their loyalty and fidelity is universally such that communications confided to them are not disclosed."48 Under what will be referred to in this note as the "confidentiality theory," the court thus proposed that where material is dictated to a stenographer, the expected response of the stenographer is non-disclosure, resulting in no harm to the defamed person. Applying the one corporate act and confidentiality theories, the court in Freeman concluded that no publication occurred from the dictation.49 Freeman has been followed by several other courts.50

In summary, several cases have held that dictations to stenographers in the ordinary course of business are not publications sufficient to support an action for defamation. Many of

45. Id. at 421, 19 S.W.2d at 258.
46. Id. See supra text accompanying notes 34-35.
47. 159 Tenn. at 421, 19 S.W.2d at 258. See W. ODGERS, LIBEL AND SLANDER 161 (5th ed. 1911).
48. Id., 19 S.W.2d at 258.
49. Id., 19 S.W.2d at 258.
these cases have limited this rule to corporate defendants,\textsuperscript{51} but other cases have extended this reasoning to individual defendants.\textsuperscript{52}

In support of the no-publication rule, the courts have advanced four rationales. First, under the one corporate act theory, dictation from one corporate employee to another constitutes one act of the corporation and consequently does not constitute publication to a third person.\textsuperscript{53} Second, under the business necessity theory, business would be severely impaired if a businessperson was subjected to a defamation action for every defamatory statement communicated solely to a stenographer.\textsuperscript{54} Third, under the mechanical process theory, stenography is a mechanical process in which the stenographer is unaware of the defamatory matter being dictated, and thus no harm can occur from the dictation.\textsuperscript{55} Finally, under the confidentiality theory, experience has shown that stenographers maintain the confidentiality of any matter dictated to them, thereby precluding any harm from the dictation.\textsuperscript{56} These four rationales will be considered in examining the following cases in which the no-publication rule has been extended to non-stenographic situations.

B. The Intra-Corporate Communication Cases

Many cases have applied the reasoning set forth in the stenographer cases and have held that a defamatory communication between a corporation’s employees is not a publication supporting an action for defamation.\textsuperscript{57} These “intra-corporate communication” cases, like the preceding stenographer cases, have inconsistently applied the no-publication rule without considering the defendant’s status as an individual or a corporation.

The most frequently cited case extending the no-publication rule to intra-corporate communications is \textit{Prins v. Holland-North American Mortgage Co.}\textsuperscript{58} In \textit{Prins}, an employee sued his corporate employer for libel after one employee sent an alleg-

\footnotesize{
\textsuperscript{51} See supra notes 34-43 and accompanying text.
\textsuperscript{52} See supra notes 44-50 and accompanying text.
\textsuperscript{53} See supra notes 34-41 and accompanying text.
\textsuperscript{54} See supra notes 42-43 and accompanying text.
\textsuperscript{55} See supra notes 44-47 and accompanying text.
\textsuperscript{56} See supra notes 48-49 and accompanying text.
\textsuperscript{57} See infra notes 61-78 and accompanying text.
\textsuperscript{58} 107 Wash. 206, 181 P. 680 (1919).
}
edly libelous letter from the corporate headquarters to another corporate office. The letter was read by two corporate employees acting within the scope of their employment. The court held:

Agents and employés [sic] of this character are not third persons in their relations to the corporation . . . [but] are a part and parcel of the corporation itself, so much so, indeed, that their acts within the limits of their employment are the acts of the corporation. For a corporation, therefore, acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives cannot be a publication of the libel on the part of the corporation. It is but communicating with itself . . . . It is not the publication of a libel for a person to write and mail a libelous letter to the person libeled if he gives it no further publication; and, for a much stronger reason, it is not a publication of a libel for one person to write a libelous letter to himself which he exhibits to no other person. It must follow that a corporation, although it can act only through officers and agents, is not guilty of publishing a libel when it writes a libelous letter at one of its branch offices and mails it to another.\(^59\)

Thus, the court adopted the one corporate act theory established in \textit{Owen}\(^60\)—that a dictation from one employee to another constitutes a single corporate act and thereby precludes the existence of a publication. But the court extended the theory to encompass not just dictations, but any communication between employees of the same corporation: "[W]hen [an officer and stenographer] each acts in his line of duty to the common employer, plainly the acts of the [officer] are to be accorded the same legal effect as the acts of the [stenographer]."\(^61\) The court in \textit{Prins} distinguished the case from \textit{Gambrell v. Schooley},\(^62\) which held that, in the context of an individual defendant, dictation to a stenographer was not sufficient publication.\(^63\) Thus, the \textit{Prins} court held that a communication between employees of the same corporation, if made within the scope of their employment, is not a publication supporting an action for defamation against a corporate defendant.

\(^{59}\) \textit{Id.} at 208-09, 181 P. at 680-81.
\(^{60}\) \textit{Owen}, 32 A.D. at 466-67, 53 N.Y.S. at 1034. \textit{See supra} notes 34-36 and accompanying text.
\(^{61}\) \textit{Prins}, 107 Wash. at 211, 181 P. at 681.
\(^{62}\) 93 Md. 48, 48 A. 730 (1901). \textit{See infra} notes 81-93 and accompanying text.
\(^{63}\) \textit{Prins}, 107 Wash. at 210-11, 181 P. at 681.
With one exception, all the intra-corporate communication cases adopting the no-publication rule rely directly or indirectly on Prins. Cases that follow the Prins holding have been decided in Alabama, Florida, Georgia, Louisiana, and McDaniel v. Crescent Motors, Inc., 249 Ala. 330, 31 So. 2d 343 (1947), a corporation's traffic manager allegedly slandered one of its bus drivers in front of two other managers. Two prior Alabama Supreme Court decisions had found a sufficient publication on similar facts. See Berry v. City of N.Y. Ins. Co., 210 Ala. 369, 98 So. 290 (1923); Ferdon v. Dickens, 161 Ala. 181, 49 So. 888 (1909). Nonetheless, the McDaniel court chose to limit those decisions and follow Prins by distinguishing McDaniel on the facts: in the two prior decisions, the plaintiff had not been an employee of the defendant at the time of the defamation, whereas the plaintiff in McDaniel was an employee of the defendant corporation. The court stated that these two prior cases do not apply when the managers of a corporation discuss among themselves complaints in respect to an employee of that corporation. The question we are dealing with is one of publication and not that of a qualifiedly privileged communication, which loses its effect as privileged by malice. We do not reach the matter of privilege, malice or any other question until there is a publication.

249 Ala. 332-33, 31 So. 2d at 345. It should be noted that the distinction in McDaniel between a plaintiff who is an employee of the defendant corporation (no publication) and a plaintiff who is not an employee (publication) has no logical or theoretical justification. Whether or not there has been a sufficient publication is determined solely by whether or not the defamatory matter was communicated to a third person; the status of the plaintiff should be completely irrelevant.

In United States Steel Corp. v. Darby, 516 F.2d 961 (5th Cir. 1975) (applying Alabama law), a corporation's employees prepared memoranda impugning the plaintiff's financial stability which were circulated to other employees. Like the court in McDaniel, the court in Darby recognized the prior Alabama Supreme Court decisions finding a sufficient publication in dictations to stenographers. Id. at 963. But having recognized the McDaniel limitation that there is no publication when the plaintiff is an employee of the defendant corporation, the court chose to follow Burney v. Southern Ry., 276 Ala. 637, 165 So. 2d 726 (1964) (a stenographer case):

While Darby was not a [U.S. Steel] employee, we do not read the Alabama Supreme Court's decision in Burney as limited to that situation. In our opinion Burney establishes that one of the essential elements of the defamation
Missouri, South Carolina, Wisconsin; cases that follow the cause of action—publication—was missing here. The district court properly granted summary judgment for [U.S. Steel]. Darby, 516 F.2d at 964. Having found the plaintiff not to be an employee of the defendant corporation, the McDaniel limitation became inapplicable, and the court should have been constrained to follow the precedents of Ferdon and Berry, both applicable where the plaintiff is not an employee of the defendant corporation. Instead, the Darby court chose to rely on Burney in which the plaintiff was an employee of the defendant corporation. But Burney relied on McDaniel for the very reason that the plaintiff was an employee of the defendant corporation; thus, both cases are inapplicable to, and should have been disregarded in Darby. Regardless of the insufficient grounds for the distinction set out in McDaniel, the court in Darby should have abided by McDaniel in applying Alabama law. 67. Biggs v. Atlantic Coast Line R.R, 66 F.2d 87 (5th Cir. 1933). The court, applying Florida law to a case involving letters sent between three managers of a corporation, recognized that although there was some authority allowing communications between officers of a corporation to be privileged, "to rest the decision on this ground would involve an inquiry as to the good faith of the defendant. As there was no publication of the libel, whether the communications were privileged is immaterial." Id. at 87. 68. In LuAllen v. Home Mission Bd. of S. Baptist Convention, 125 Ga. App. 456, 459, 188 S.E.2d 138, 140 (1972), a supervisor's written report criticizing an employee was passed on to a corporate committee in charge of reviewing employee performance. Having found that the report had not been published, the court expressly declined to decide whether the communication was privileged. Id. at 459-60, 188 S.E.2d at 140; Jackson v. Douglas County Elec. Membership Corp., 150 Ga. App. 523, 554, 258 S.E.2d 152, 153 (1979) (a letter sent from one employee of a corporation to another); George v. Georgia Power Co., 43 Ga. App. 596, 596-97, 159 S.E. 756, 757 (1931) (letter containing false statements regarding the salesman's efficiency and attentiveness was passed between agents of a corporation). The court expressly recognized the conflict of authority surrounding the issue of publication versus privilege and decided to adhere to its prior ruling in Central of Ga. Ry. v. Jones, 18 Ga. App. 414, 89 S.E. 429 (1916), but limited its applicability to corporate defendants: [T]he rule which would prevent the sending and receipt of the letter from being considered as a publication as to the corporation would not apply so as to protect the agents from liability as individuals, where it is shown that they conspired together, the one to write and the other to receive the letter, for the purpose of injuring a third person by false and malicious statements therein contained. George, 43 Ga. App. at 597, 159 S.E. at 757. The court then sustained the dismissal of the action against the corporation but reversed the dismissal against the individual defendants. Id. at 598, 159 S.E. at 757. In effect, the court held that with respect to the same communication, a publication had occurred by the individual employees but not by the corporation. The court provided no rationale. 69. Cangelosi v. Schwegmann Bros. Giant Super Mkts., 390 So. 2d 196, 198 (La. 1980) (store manager's statement in the presence of four supervisors); Commercial Union Ins. Co. v. Melikyan, 424 So. 2d. 1114, 1115 (La. Ct. App. 1982) (communication between two employees of a corporation). Interestingly, the Commercial Union court acknowledged Prosser's criticism that such an approach confuses publication with privilege, W. PROSSER, LAW OF TORTS § 113 (4th ed. 1971), but chose to follow Cangelosi. 424 So. 2d at 1115 n.1. 70. Hellesen v. Knaus Truck Lines, Inc., 370 S.W.2d 341, 344 (Mo. 1963) (letter written by an employee and placed in the corporation's files).
Prins holding and extend it to individual defendants have been decided in Missouri, Nevada, and Oklahoma; one case in Georgia reached the same conclusion as Prins even though the only defendant was an individual. Courts have also cited Prins as support for extending the no-publication rule outside the corporate context to a college and a church.


72. Flynn v. Reinke, 199 Wis. 124, 129-31, 225 N.W. 742, 744 (1929) (telegram sent over telegraph company's wires); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 289 (8th Cir. 1982), cert. denied, 459 U.S. 1205 (1983) (applying Wisconsin law) (letter sent from corporation engineer to a manager). It should be noted that the court in Halsell incorrectly followed the Wisconsin Supreme Court's holding in Lehner v. Associated Press, 215 Wis. 254, 259-60, 254 N.W. 664, 666-67 (1934), which held such a communication to be conditionally privileged. In fact, the defendants in Lehner never raised the issue of publication.

73. Ellis v. Jewish Hosp., 581 S.W.2d 850, 851 (Mo. Ct. App. 1979) (libel action against a hospital and its executive director when the director made false evaluations of a pharmacist's work and then incorporated them into the pharmacist's personnel file where they were read by hospital supervisors).

74. Jones v. Golden Spike Corp., 97 Nev. 24, 26-27, 623 P.2d 970, 971 (1981) (slander action against a corporation and its president for a statement made by the president). Since the action was brought against both a corporate and individual defendant, the court implicitly extended the holding in Prins to individual defendants.

75. Magnolia Petroleum Co. v. Davidson, 194 Okla. 115, 119, 148 P.2d 468, 471 (1944) (action for slander against a corporation and one of its employees for the employee's statement to other employees). The court stated that it did "not see any necessity of applying the qualified privilege rule to the conversation . . . for the reason that . . . the statements of [one corporate agent to another] could not be considered as a matter of law a publication." Id. at 119, 148 P.2d at 471. Since the Magnolia court held that there was no publication and since both an individual as well as a corporate defendant were charged with slander, it follows that the court implicitly extended the Prins holding to individual defendants.

76. King v. Schaeffer, 115 Ga. App. 344, 346-47, 154 S.E.2d 819, 821-22, aff'd, 223 Ga. 468, 155 S.E.2d 815 (1967) (action against a corporation's manager for his allegedly slanderous statements). Since the only defendant was an individual manager and since the court found no publication, the court reached the same conclusion as Prins in the case of an individual rather than a corporate defendant; the holding in Prins was not at issue because there was no corporate defendant. It is interesting that the court approvingly cited, inter alia, George v. Georgia Power Co., 43 Ga. App. 596, 159 S.E. 756 (1931), which reached a conclusion directly contradictory to King. George held that there was a publication by the individual defendant but not by the corporate defendant. Id. at 596-97, 159 S.E. at 757.

77. In Walter v. Davidson, 214 Ga. 187, 104 S.E.2d 113 (1958), a student sued a faculty member of a college for slander after the faculty member accused the student of committing theft in the student dormitory. The Georgia Supreme Court, referring to Central of Ga. Ry., 18 Ga. App. 414, 89 S.E. 429 (1918), stated that [t]he Court of Appeals has held that an accusation by an officer of a corporation dictated to his stenographer and addressed to another officer of that corporation against a third person is not slander because it is not published . . . .
Decisions Opposing the No-Publication Rule

Although many cases have applied the no-publication rule to defamatory dictations and other corporate communications, a growing body of case law has rejected the no-publication rule in favor of the traditional view which recognizes that a communication to anyone other than the person defamed satisfies the publication requirement in a defamation action.

A. The Stenographer Cases

Several cases have held that a dictation containing defamatory material may constitute a sufficient publication to support an action for defamation. In Pullman v. Walter Hill & Co., an

Walter, 214 Ga. at 190, 104 S.E.2d at 115. The court held that as long as faculty members are acting within the scope of their duties to their collegiate employer, statements concerning thefts by students are not publications. Thus, the court by analogy applied the one corporate act theory supporting the no-publication rule in the context of a college. Because no publication results from a communication between two corporate employees, no publication can result from a communication between two faculty members of the same college when made in the scope of their employment with the college.

Since the defendant in Walter was an individual faculty member rather than the college, the court was extending the holding in Prins to individual defendants. An analytical problem arises because the precedential link between Walter and Prins is George; 43 Ga. App. 596, 159 S.E. 756. In George, the Georgia Court of Appeals adopted the holding but declined to extend Prins to individual defendants. Id. at 597, 159 S.E. at 757. If George had been followed by analogy in Walter, the result would have been a finding of no publication only with respect to the college; as to the defendant faculty member, there would have been a sufficient publication. Thus, the holdings of George and Walter are inconsistent regarding to whom the no-publication rule applies.

78. In Monahan v. Sims, 163 Ga. App. 354, 294 S.E.2d 548 (1982), the plaintiff, an applicant for priesthood, sued a bishop and a church for defamation when an accusation that the plaintiff was a homosexual and practiced black magic was passed from a reverend to the bishop and then to members of a commission on ministry. The court found that all persons who had communicated the accusation and all persons to whom the accusation had been communicated were acting under official church authority in an inquiry to determine the plaintiff's suitability for elevation to priesthood. The court held that there had been no publication of the allegedly defamatory accusation with which to hold either the bishop or the church liable, adding that "the malice with which communications may be made is immaterial where there is no legal publication of the defamatory information." Id. at 358, 294 S.E.2d at 551.

79. [1891] 1 Q.B. 524.
English case, a director of a company dictated an allegedly defamatory letter to a company stenographer. The letter was transcribed by the stenographer and then copied by a clerk and mailed to the plaintiff. The defendant argued the business necessity theory: if merchants cannot employ clerks to transcribe letters for them in the ordinary course of business, they cannot properly conduct business. Lord Judge Lopes responded that "the answer to this [argument] is very simple. I have never yet heard that it is in the usual course of a merchants' business to write letters containing defamatory statements." Thus, the court held that a sufficient publication had occurred with respect to both the stenographer and clerk.

Following the rule laid down in Pullman, the court in Gambrill v. Schooley held that the dictation of a libelous letter to a stenographer constituted a sufficient publication to support a defamation action against the person dictating the letter. The defendant advanced four arguments to support his contention that the dictation did not constitute a publication.

First, the defendant argued that stenographers function in a purely mechanical manner, and although the information dictated is received by the stenographer, the reception is "instantaneous only, and merely sufficient for their reduction to written characters . . . [and] there [is] no comprehension and no lodgment of their meaning in the brain of the [stenographer] . . . so that there was no such perception as is requisite to constitute publication." The court rejected the mechanical process theory advanced by the defendant, pointing out that a dictation produces as complete a perception of the dictator's thoughts in the mind of the stenographer as would a slower communication to a non-stenographer, especially since a professional stenographer must pay sufficiently close attention to assure accuracy in the dictation.

Second, the defendant argued that in view of the widespread use of stenographers and their necessary role in modern business, an exception should be made to the general rule that any communication to a third person constitutes publication. The

80. Id. at 530.
81. 93 Md. 48, 48 A. 730 (1901).
82. Id. at 49, 48 A. at 731.
83. Supra notes 44-47 and accompanying text.
84. Gambrill, 93 Md. at 49, 48 A. at 731.
court rejected the business necessity theory advanced by the defendant, stating that:

Apart from any precedent or authority, we can perceive no good reason why such an exception should be made to the rule. Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance, can make that legal which is illegal, nor make that innocent which would otherwise be actionable.

Third, the defendant argued that no harm results from a dictation to a stenographer because stenographers generally do not disclose dictated matter. The court rejected the confidentiality theory argued by the defendant:

Nor can the fact that the stenographer is under contractual or moral obligation to regard all his employer's communications as confidential alter the reason of the matter. This defense was made in Williamson v. Frer, L.R. 9 C.P. 393, where it was held that the unnecessary transmission by a post-office telegram of libelous matter which would have been privileged if sent in a sealed letter avoids the privilege; Lord Coleridge, C. J., saying, "Although the clerks are prohibited, under severe penalties, from disclosing the contents of telegrams passing through their hands, still there is a disclosure to them."

Finally, the defendant advanced the one corporate act theory presented in Owen: when the dictation occurs between two persons employed by a common master and engaged in the performance of duties required by their employment, the stenographer should not be regarded as a third person since the production of the letter constituted but one corporate act. Although the court distinguished Owen on the ground that Owen dealt with a corporate rather than individual defendant, the court voiced displeasure with Owen's holding:

[C]orporations are liable for all acts, whether willful or malicious, of their agents or servants, done in the course of their employment, and that actions for such injuries, including libel, could be sustained against corporations in any case where under similar circumstances such actions could be sustained against individuals for the acts of their servants.

85. Supra notes 42-43 and accompanying text.
86. Gambrill, 93 Md. at 49, 48 A. at 731.
87. Supra notes 44, 47-50 and accompanying text.
88. Gambrill, 93 Md. at 49, 48 A. at 731.
89. Supra notes 34-41 and accompanying text.
90. 32 A.D. at 466-67, 53 N.Y.S. at 1034-35.
91. Gambrill, 93 Md. at 50, 48 A. at 732.
The *Gambrill* court thus refuted all four rationales supporting the no-publication rule and held that a sufficient publication of the letter occurred. The court concluded that no privilege existed since the stenographer "had no conceivable interest in hearing or seeing the letters."92 Many courts have followed *Gambrill* without addressing directly the four theories supporting the no-publication rule.93 A few courts, however, have articulated specific objections.

1. *Mechanical process theory*

In *Globe Furniture Co. v. Wright*,94 the plaintiff sued a corporation for libel when one of its employees dictated and circulated a letter among other employees insinuating that the plaintiff had tampered with sales receipts. In rejecting the mechanical process theory, the court stated:

Some courts hold that communications such as the one we are considering are not actionable, because the stenographer or other employé, [sic] to whom the communication was made before it was mailed to the person for whom it was intended, is not a third person, within the technical meaning of such term, but is merely an impersonal facility used in making and transmitting the communication . . . . But we prefer to put our decision upon the ground that the occasion was conditionally privileged, that the letter was within the privilege, that there was no malice, and therefore that the letter is not actionable.95

By reaching the issue of privilege, the court implicitly recognized that a publication had occurred.

In *Ostrowe v. Lee*,96 a libel suit was launched against the defendant after he dictated a letter to his secretary accusing the plaintiff of larceny. The court held that publication occurs through a dictation—at least where the stenographer reads and transcribes the notes from the dictation:

Publication there still is as a result of the dictation, at least where the notes have been examined or transcribed . . . . Very often a stenographer does not grasp the meaning of dictated words till the dictation is over and the symbols have been read

---

92. Id.
94. 265 F. 873 (D.C. Cir. 1920).
95. Id. at 876.
96. 286 N.Y. 36, 175 N.E. 505 (1931).
The author who directs his copyist to read, has displayed the writing to the reader as truly and effectively as if he had copied it himself. There is publication of a libel if a stenographer reads the notes that have been taken by another. Neither the evil nor the result is different when the notes that he reads have been taken by himself.97 Although Ostrowe involved a private stenographer, nothing suggests that the holding would be inapplicable to a corporate stenographer.98

Perhaps the most stinging criticism of the mechanical process theory was unleashed by the court in Rickbeil v. Grafton Deaconess Hospital,99 where an allegedly libelous letter was dictated by a hospital manager to his stenographer. The court stated:

To hold that a stenographer is not an individual but a mere cog in the machine because of modern development necessitated by the changes in business methods is a derogation of human personality, and not in harmony with the modern conception of the dignity of labor.100

Thus, the court acknowledged that stenographers are not mere dictation devices incapable of any comprehension. Although the plaintiff must always prove that the recipient of the defamatory communication understood the communication as defamatory of the plaintiff, if the plaintiff can satisfy this burden, the stenographer should not be deemed a mere mechanical device. To deny the plaintiff any redress where a stenographer is shown to have understood a communication as defamatory of the plaintiff on the grounds that the stenographer is incapable

97. Id. at 38-40, 175 N.E. at 505-06.
98. In Bradley v. Connors, 169 Misc. 442, 7 N.Y.S.2d 294 (Sup. Ct. 1938), the defendant argued that the Ostrowe court’s rejection of the no-publication rule should be limited to cases where an individual dictates to his or her own stenographer and that the no-publication rule should be retained where a corporate employee dictates to a corporate stenographer. The Bradley court rejected this argument on the grounds that if the stenographer has read and understood the defamatory matter, “whether he or she is a corporate stenographer or the stenographer of a private individual, in fairness and reason, should not be the deciding factor.” Id. at 444, 7 N.Y.S.2d at 296. The Bradley court thus affirmed and extended the holding in Ostrowe, implicitly rejecting the holding in Owen.
99. 74 N.D. 525, 23 N.W.2d 247 (1946).
100. Id. at 540, 23 N.W.2d at 255. The court held that “the dictating of this letter by the manager to the stenographer and her transcription of her notes into the written instrument constitutes publication . . . whether the relationship be that of master and servant or of coemployees of a corporation.” Id. at 542, 23 N.W.2d at 256.
of understanding the communication as defamatory is not only a *non sequitur* but is also a miscarriage of justice.

2. *Business necessity theory*

The *Rickbeil*\(^{101}\) court expressly rejected the business necessity theory, stating that:

A man's personal right to be free from defamation of character . . . is surely not dependent upon the supposed cold necessities of business, so that to sacrifice rights of individuals to supposed business necessity becomes controlling in the determining of human relations. The personal rights of the individual to be free from defamation of character are paramount to any exigencies of business and the stenographer who types and the office-boy who copies are individuals with personalities even if mere employees, whether the relationship of master and servant exists or whether all parties concerned are employees of an employer common to each.\(^{102}\)

3. *Confidentiality theory*

The confidentiality theory was rejected in *Berry v. City of New York Insurance Co.*,\(^{103}\) where an employee of a corporation dictated an allegedly libelous letter to a corporate stenographer. The court held that:

[O]ne who receives a dictation, takes notes, reduces same to typewriting, may be influenced in his or her estimate of the character of a person by libelous matter therein. On principle a man is as much entitled to protection in the esteem of a stenographer as of any one else.\(^{104}\)

In *Nelson v. Whitten*,\(^{105}\) the court similarly stated that there is no basis for the belief that a communication made to one occupying a stenographer position would be less injurious to plaintiff than if it were made to any other of defendant's employees.\(^{106}\)

\(^{101}\) 74 N.D. 525, 23 N.W.2d 247.

\(^{102}\) Id. at 529, 23 N.W.2d at 255.

\(^{103}\) 210 Ala. 369, 98 So. 290 (1923). This case was later limited by *McDaniel v. Crescent Motors, Inc.*, 249 Ala. 330, 31 So. 2d 343 (1947), which adopted the no-publication rule where a plaintiff is an employee of a defendant corporation; cf. *Berry* where the plaintiff was not an employee of the defendant insurance company.

\(^{104}\) 210 Ala. at 371, 98 So. at 292.

\(^{105}\) 272 F. 135 (E.D.N.Y. 1921).

\(^{106}\) Id. at 136.
4. One corporate act theory

In Berry, the court found that the one corporate act theory ignores the essential nature of the libel. The agent who dictates the letter causes it to be written, and, so read, is for the moment the alter ego of the principal. The injury does not consist in the loss of esteem by an absent and may be corporate employer. The evil effect is in the loss of esteem by the stenographer in person, and not in any relation to the chief agent nor the common employer.

In Lux-Brill Productions v. Remco Industries, the defendants argued that "the dictation of the letter to the stenographer is not a publication thereof inasmuch as both the president and the stenographer are employees of the same corporate defendant." The court questioned the soundness of its prior holdings in Owen v. Ogilvie Publishing Co. and Wells v. Belstrat Hotel Corp. that no publication occurs as against a corporation under the one corporate act theory where a libelous letter is dictated by an employee of the corporation to a corporate stenographer. Instead, the court embraced its holding in Ostrou— that there is a sufficient publication when an individual dictates a letter to his or her stenographer:

Certainly if an individual businessman, in the seclusion of his private office, publishes, for the purpose of a libel suit, whatever he dictates to his own stenographer, then no logical reason can be urged why a corporation should not be liable to the same degree when one of its officers, through whom alone it can only act, within the scope of his authority, dictates a libelous statement to his fellow employee who reads and transcribes the notes of such dictation. Any rule that would treat the stenographer of a corporation differently from the stenographer of a private businessman, with reference to the publication of a libelous statement, would not be sound or just. A continuation of the rule of law enunciated in the cases of [Owen] and [Wells] would create a special immunity for corporations and their officers and employees. A sanctuary would

---

107. 210 Ala. 369, 98 So. 290.
108. Id. at 371, 98 So. at 292.
110. Id. at 698, 265 N.Y.S.2d at 441.
111. 32 A.D. 465, 53 N.Y.S. 1033 (1898). See supra notes 34-36 and accompanying text.
113. Lux-Brill, 48 Misc. 2d at 698-99, 265 N.Y.S.2d at 441-42.
114. 256 N.Y. 36, 175 N.E. 505.
be created behind which a corporation and its officers and employees could libel others with impunity. This court cannot believe that the law intended to subject the individual businessman to actions in libel while insulating corporations from similar suits predicated solely upon the fictional device that publication is accomplished when an individual dictates to his own stenographer and no publication results from the dictation of the same libel by a corporate officer to a corporate stenographer.  

The court also relied on *Kennedy v. James Butler, Inc.*, which held that a publication occurred in a defamation action against a corporate defendant where corporate employees distributed a libelous circular to the managers of its retail stores. Analogizing intra-corporate communications to intra-corporate dictations, the court reasoned:

If a corporate defendant can be said to have published a libel by circulating it among its own employees, who are the managers of its stores, . . . then surely a dictation of that same libel by a corporate officer to one of its stenographers who reads and transcribes her notes of such dictation, must perforce be a publication. A corporate stenographer is no less a corporate employee than its store managers.

Since the theory behind publication suggests that a dictation to a stenographer is indeed a sufficient publication, it is important to examine what has motivated several courts to apply the no-publication rule in the context of dictations. One reason may be their belief that dictations are not privileged communications since the stenographer generally has no interest in the dictated matter and is merely the means by which another’s words reach the ultimate recipient of the communication. If dictations fall outside the realm of privileged occasions, then the issue of publication becomes crucial. Assuming that a court is correct in classifying an allegedly defamatory dictation as unprivileged, if the dictated matter is understood by the stenographer as defamatory, then a finding of publication will result in a judgment for the plaintiff, and a finding of no publication will result in a judgment for the defendant.

---


116. 245 N.Y. 204, 156 N.E. 666 (1927).

117. *Id.* at 207, 156 N.E. at 667.

At least one court has expressed concern as to how the business of the country . . . can be carried on, if a business man or corporation must be subject to litigation for every letter containing a statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated.\textsuperscript{119}

Wishing to protect dictations and realizing that dictations may not be privileged communications, the courts may have created their own artificial privilege by finding no publication. Unfortunately, this artificial privilege is an \textit{absolute} rather than \textit{qualified} or \textit{conditional} privilege because where there is no publication, malice on the part of the alleged defamer is irrelevant; the defamer is off the hook regardless of the circumstances and his motivations.

Dictations in the ordinary course of an individual's or a corporation's business are not situations to which absolute immutiny traditionally has been extended.\textsuperscript{120} Thus, application of the no-publication rule affords defamers protection beyond that traditionally available to them. Although the law should not unduly hamper ordinary business transactions, there is little social interest in protecting malicious dictations. A privilege which immunizes a publisher when a dictation is made in good faith (i.e., a qualified privilege) is far more appropriate than application of the no-publication rule which immunizes a publisher from liability for all communications (i.e., an absolute privilege). The problem that must be addressed is how to extend a qualified privilege to a situation where the recipient of the dictation has no interest in the truth or falsity of the dictated matter.\textsuperscript{121}

\textsuperscript{119.} Cartwright-Caps Co. v. Fischel & Kaufman, 113 Miss. 359, 74 So. 278 (1917). The court used this argument to bolster its holding that there had been no publication. However, this argument is far more persuasive for invoking a qualified privilege than for ruling that no publication has occurred. \textit{See supra} notes 13-25 and accompanying text.

\textsuperscript{120.} \textit{See supra} notes 11-12 and accompanying text.

\textsuperscript{121.} One solution to this problem was proposed in England in Edmondson v. Birch & Co., [1907] 1 K.B. 371, 23 T.L.R. 234, a case which held that where defamatory communications are dictated to a stenographer and copied by another clerk on a privileged occasion, the publication to the stenographer and clerk are likewise privileged. Collins, Master of the Rolls, stated:

\begin{quote}
[W]here there is a duty . . . as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege [i.e., the defamer] is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons [i.e., stenographers],
\end{quote}
In Ostrowe,\textsuperscript{122} the court addressed the privilege issue in the context of a dictation. The court recognized and quoted English cases “to the effect that publication to a stenographer, unless impelled by actual malice, is protected by a privilege whenever privilege attaches to the principal communication to which it is an incident.”\textsuperscript{123} Several courts have taken the view that dictations should be qualifiedly privileged when made in good faith and in the usual course of business.\textsuperscript{124} This approach represents a fair compromise between an individual’s right to be free from harm to his or her reputation and society’s interest in promoting productive business transactions. For this reason, the no-publication rule, which in effect affords an absolute privilege, should be abandoned.

B. The Intra-Corporate Communication Cases

Several courts have extended the no-publication rule set forth in the stenographer cases to any case involving a communication between corporate employees.\textsuperscript{125} Since the stenographer cases were based upon one or more of the four theories supporting the no-publication rule, a determination of the applicability of the no-publication rule to intra-corporate commu-
Communications must begin with an appraisal of these theories in the context of intra-corporate communications.

1. Mechanical process theory

The mechanical process theory\(^{126}\) is based on the premise that stenography is a mechanical process, precluding the stenographer from comprehending the defamatory matter. Aside from the argument against the validity of this premise,\(^{127}\) the premise is inapplicable in situations not involving a stenographer. A stenographer who copies and types a letter to be read by some other person may arguably be carrying out his or her duties in a mechanical manner. This argument, however, does not apply to other employees who, in the course of their employment, may hear a statement or read a letter from another employee. While the stenographer is not concerned with the substantive content of the dictation, an employee to whom a statement or letter is directed is concerned with the substantive content of the communication and will undoubtedly pay sufficient attention to comprehend the communication. The recipient must understand the meaning of a given communication, and to engage one's mental faculties to this end is not a mechanical process. Thus, the mechanical process theory cannot support the no-publication rule in cases where the recipient of the communication is not carrying out stenographic services.

2. Business necessity theory

The business necessity theory\(^{128}\) is based on the premise that since stenographers have become such an ubiquitous and integral component of business transactions, the flow of business would be severely hampered if a businessperson or corporation were subjected to a defamation action every time a defamatory communication was made to an employee or co-employee in the ordinary course of business. This argument is admittedly compelling and is in all likelihood valid. However, the real issue with respect to the business necessity theory involves a determination of the type of protection which should be invoked to encourage the smooth flow of commerce. It is submitted that a qualified privilege, conditioned on the publisher's good faith, is the proper protection. A qualified privilege would enable em-

---

126. See supra notes 44-47 and accompanying text.
127. See supra notes 82-84 and accompanying text.
128. See supra notes 42-43 and accompanying text.
ployees to communicate with each other without fear of defaming another—as long as the communication was made in good faith and in the ordinary course of business. Only when employees abused the privilege by communicating with actual malice, would they be liable for their defamatory statements.

3. Confidentiality theory

The confidentiality theory\textsuperscript{129} is based on the premise that experience indicates that stenographers maintain the confidentiality of any matter dictated to them. The strongest argument against this theory is that even if the stenographer discloses the communication to no other person, the stenographer is still a third person in whose eyes the plaintiff's reputation has been injured.\textsuperscript{130} This argument applies with equal force to the intra-corporate communication cases. Whether the recipient of the defamatory communication is a stenographer or another employee, if the recipient understands the communication as defamatory, the plaintiff's reputation has been harmed to some degree, and an action for defamation should not be denied. If employee A communicates defamatory matter to employee B, the relevant issues are whether employee B understood the communication as defamatory and whether employee B disclosed the communication to anyone else. If employee A, the defendant, can establish that employee B did in fact maintain the confidentiality of the communication, then the issue of damages will focus solely upon harm to the plaintiff's reputation based upon the publication to employee B.

4. One corporate act theory

The one corporate act theory\textsuperscript{131} is based on the premise that, in an action against a corporation for a defamatory communication between two of its employees in the ordinary course of business, the communication constitutes a single corporate act such that neither employee is considered a third person. Since the defamatory matter is deemed never to have left the confines of the corporation, there is no publication to a third person; rather, the corporation is regarded as having spoken only to itself. Since the theory only applies where the defendant is a corporation, it follows that the one corporate act theory is inap-

\textsuperscript{129} See supra notes 44, 48-49 and accompanying text.
\textsuperscript{130} See supra notes 4-6 and accompanying text.
\textsuperscript{131} See supra notes 34-36 and accompanying text.
applicable in intra-corporate communication cases where the defendant is an individual employer or employee.

Thus, none of the four theories can support the no-publication rule where the sole defendant is an individual. The rule is equally inapplicable in cases where the corporation and its employee/defamer are joined as co-defendants. An employee is not immunized from liability merely because the one corporate act theory is adopted to exonerate the corporation. But even where the sole defendant is a corporation, application of the no-publication rule is unwarranted.

VI
In Favor of the Traditional Theory

Under the doctrine of respondeat superior, a corporation is held accountable for the torts of its employees acting in the ordinary course of business. Since corporations have far greater assets with which to pay adverse judgments, it is not surprising that the corporation is joined as a defendant. In fact, the corporation is usually the sole defendant in defamation actions arising out of communications made in the ordinary course of the corporation's business. The no-publication rule is inconsistent with the doctrine of respondeat superior because the rule yields an opposite conclusion where a defamatory communication is transmitted between corporate employees. Under the no-publication rule, if employee A was acting within the scope of his employment at the time he made the defamatory communication to employee B, then the corporation would not be liable under the one corporate act theory since employee B is not regarded as a third person. Under the doctrine of respondeat superior, however, if employee A was acting within the scope of employment at the time of the defamatory communication, then the corporation would be liable. Thus, the one corporate act theory precludes the court's analysis from reaching the doctrine of respondeat superior. It is unlikely that the courts ap-

134. See supra notes 26-33 and accompanying text.
plying the one corporate act theory desired to eliminate the doctrine of respondeat superior only where the alleged tort is defamation and only in the context of intra-corporate communications, but that is the result of the no-publication rule's application.

In rejecting the no-publication rule, it has been stated:

The fact that a corporation is an artificial entity, and therefore can act only through its agents, does not give it any added immunity for its torts. Corporate agents are just as much individual human beings as are the agents of natural persons. The same rules should apply to both.\textsuperscript{135}

Another court said that it could perceive no good reason why immunity from liability for defamation communicated by one agent to another should be accorded to an enterprise conducted in the corporate form and denied to an enterprise conducted by an individual or a partnership. The argument that a communication between agents of the same corporation is not a communication to a third person is not impressive in dealing with such a subject as defamation and would apply with almost equal force as between two agents of the same individual or partnership . . . . The defense of privilege is widely available in appropriate instances and, we think, furnishes as great protection as ought to be allowed.\textsuperscript{136}


\textsuperscript{136} Bander v. Metropolitan Life Ins. Co., 313 Mass. 337, 348-49, 47 N.E.2d 595, 602 (1943). Accord Arsenault v. Allegheny Airlines, Inc., 485 F. Supp. 1373, 1379 (D. Mass.), aff'd, 636 F.2d 1199 (1st Cir. 1980); Pirre v. Printing Devs., Inc., 468 F. Supp. 1028, 1041 (S.D.N.Y.), aff'd, 614 F.2d 1290 (2d Cir. 1979). In Pirre, the defendant tried to distinguish between the status of corporate employees, arguing that a defamatory communication to an officer as opposed to an ordinary corporate employee is not a communication to a third person and thus does not constitute a publication. In response, the court said it could find no distinction between communications to corporate officers and ordinary corporate employees:

While corporate officers may be, as defendant contends, the embodiment of the corporation, they remain individuals with distinct personalities and opinions, which opinions may be affected just as surely as those of other employees by the spread of injurious falsehoods. It is this evil that the law of
The defense of privilege is indeed widely available. In reconciling the interests of the corporation with the interests of the defamed, one court stated:

Admittedly, corporations, like other business forms, have a legitimate interest in free communications between their officers and employees on business-related matters. This interest, however, is adequately—and exclusively—protected by the qualified privilege attaching to such communications . . . . Questions of privilege should not be confused with the issue of publication.¹³⁷

Many courts have embraced this analysis by finding a publication but recognizing the existence of a qualified privilege.¹³⁸

VII

Conclusion

The no-publication rule in defamation can be traced back to cases involving dictation to stenographers.¹³⁹ A rule that began as an attempt by some courts to protect what was considered a necessary business function has been expanded in some states into a broad rule affording absolute protection for all communications between corporate employees.¹⁴⁰ Commerce is undoubtedly furthered when businesspersons are allowed to communicate without fear of a defamation action. Unfortunately, businesspersons can be protected only at the expense of lessening the protections afforded potential defamation plain-

¹³⁷ See supra notes 34-56 and accompanying text.
¹³⁸ See supra notes 57-78 and accompanying text.
tiffs. Moreover, there is an inverse relationship between these interests: as businesspersons receive more protection from defamation suits, potential plaintiffs necessarily become less protected from harm to their reputations.

The interests of businesspersons must be balanced against the competing interests of potential plaintiffs. The no-publication rule provides what is in effect an absolute privilege to defame because a finding of no-publication aborts the analysis before the issue of malice is ever reached. One's right to be free from injury to reputation—the sole purpose of the tort of defamation—is thereby left unprotected.

Absolute privileges have only been extended to a few situations where society's interest in the free flow of information is so great that nothing is permitted to interfere with the transmission of such information. Communications between corporate employees, even if directly furthering the corporation's business, are not occasions of such societal importance that the right of persons to be free from injuries to their reputations should be totally abrogated.

Rather, communications between corporate employees made within the scope of employment should receive a qualified privilege. Potential plaintiffs receive protection from defamatory communications not made in good faith on the theory that a person's right to be free from harm to reputation takes precedence over society's interest in encouraging the transmission of statements that are reckless or knowingly false. Businesspersons are still protected from defamation suits as long as they transmit information in good faith.

The courts that have adopted the no-publication rule have afforded businesspersons greater protection than is warranted. Granting an absolute privilege in the form of the no-publication rule violates both the traditional theory behind the tort of defamation and the policy underlying the doctrine of respondeat superior. Instead of the no-publication rule, a traditional analysis of publication approximating the following should be applied:

1. Did the employee make the allegedly false and defamatory communication to a person other than the plaintiff?142

   A. If the answer is no, there has been no publication and

141. See supra notes 11-12 and accompanying text.
142. See supra notes 5-7 and accompanying text.
consequently no liability. This is appropriate since the plaintiff's reputation has not been harmed. The analysis terminates here.

B. If the answer is yes, there has been a publication regardless of whether or not the recipient of the communication is a co-employee. The analysis proceeds.

2. Is the communication absolutely privileged?  
   A. If the answer is yes, the employee/defamer is not liable, and the corporation cannot be liable either. The analysis terminates here.
   
   B. If the answer is no, the analysis proceeds.

3. Is the communication qualitatively privileged?  
   A. If the answer is no, the employee/defamer is liable. As to the corporation's liability under respondeat superior:  
      (1) If the employee/defamer was acting within the scope of employment at the time of the communication and in the actual performance of his or her duties of employment, and the communication related to the matter in question, the corporation is liable as well.
      
      (2) If the employee/defamer was not acting within the scope of employment, the corporation is not liable.
   
   B. If the answer is yes, was the privilege lost by abuse?  
      (1) If the employee/defamer exceeded the scope of the privilege, then he or she is liable. As to the corporation's liability, if the employee/defamer was acting within the scope of employment at the time of the communication and in the actual performance of his or her duties of employment, and the communication related to the matter in question, the corporation is liable as well.
      
      (2) If the employee/defamer did not exceed the scope of the privilege, the privilege immunizes the employee from liability. The corporation would also be immunized from liability since its employee is not liable.

Returning to the hypothetical with which this note began, this analysis would produce the following results: because the president of G.M. ordered the distribution of an allegedly defamatory circular to persons other than Ms. DeFamed, namely

143. See supra notes 11-12 and accompanying text.
144. See supra notes 13-18 and accompanying text.
145. See supra notes 26-33 and accompanying text.
146. See supra notes 19-25 and accompanying text.
100,000 G.M. employees, there has been a publication regardless of the fact that the recipients of the communication were co-employees of Ms. DeFamed. Since the occasion for the communication was not one to which an absolute privilege applies,\textsuperscript{147} the focus should be on possible existence of a qualified privilege.\textsuperscript{148} The president and the 100,000 G.M. employees may have had a common interest in the communication, and the circular may have been reasonably calculated to protect or further that interest.\textsuperscript{149} If no such common interest existed, the president would be liable for the circular should it prove to be defamatory. G.M. would also be liable under the doctrine of respondeat superior\textsuperscript{150} since the president was acting within the scope of corporate duties. If such a common interest existed, the court should focus on whether or not the privilege was abused.\textsuperscript{151} If the privilege was abused, perhaps because the president acted in reckless disregard of the truth or falsity of the circular, the president and G.M. would be jointly liable for the circular. If the privilege was not abused, both the president and G.M. would be immunized from liability.

This analysis will reconcile society's interest in the free flow of business information with the individual's right to be free of harm to reputation.

\textsuperscript{147} See supra notes 10-12 and accompanying text.
\textsuperscript{148} See supra notes 13-25 and accompanying text.
\textsuperscript{149} See supra note 16 and accompanying text.
\textsuperscript{150} See supra notes 28-33 and accompanying text.
\textsuperscript{151} See supra notes 13-25 and accompanying text.