FEBRUARY 2000 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS

Torts

QUESTION

Lee, who had been a party in a bench trial before judge Bright, was dissatisfied with the outcome of the case. After the trial was concluded, Lee held a press conference and told Reporter:

> Judge Bright is a very unfair judge. In a recent trial in which I was involved in his court, he clearly didn't understand what was going on. I've heard he's often drunk on the bench.

These remarks were published verbatim in the local newspaper. Judge Bright lost his bid for reelection. Judge Bright sued Lee and Reporter for defamation, alleging that he lost the election as the result of the publication of Lee's remarks. Both defendants moved to dismiss on the ground that the complaint failed to state a cause of action for defamation. The court denied the motion.

Attorney offered to act as a consultant to Lee and Reporter. He agreed to advise them on law and strategy and to help them prepare their case and obtain expert witnesses. He also offered to be an expert witness, but said he would not be their lawyer in the actual trial. Lee and Reporter agreed to hire Attorney and to pay him for his services, both as a consultant and as an expert witness, a contingent fee based on the outcome of the case.

At the trial the court ruled (a) that Lee's statements about judge Bright were not defamatory; (b) that, in any event, both Lee's statements and Reporter's publication of the statements were privileged; and (c) that, as a matter of law, judge Bright did not suffer any damage.

1. Were each of the trial court's rulings correct? Discuss.

2. What, if any, ethical issues arise as a result of the terms under which Attorney undertook to assist Lee and Reporter? Discuss.

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ANSWER A

l. The Trial Court's Rulings

(a) Lee's Statements Were Not Defamatory

A statement is defamatory if it would lead a reasonable person to lower his opinion about the reputation of another. Statements of fact or opinions that, if true would constitute facts, may be defamatory. Pure opinions, however, are not defamatory because a reasonable person who hears an opinion would not lower his own belief or opinion as to the other person's reputation.

Here, Lee made three statements:
(1) "Judge Bright is a very unfair judge"
(2) "[H]e clearly didn't understand what was going on"
(3) "I've heard he is often drunk on the bench."

The first two appear to be mere opinions, while the third appears to be defamatory.

(i) The First Two Statements

Lee's first two statements are nothing more than Lee's opinion about Judge Bright. While it might be possible to argue that the assertion of Judge Bright's "unfair[ness]" or "understand[ing]" has some factual basis, it would appear from the context that the statements are mere opinion that the court correctly ruled were not defamatory.

(ii) The Third Statement

The statement that Judge Bright is "often drunk on the bench," however, is factual and defamatory (if false). The fact that Lee predicated the statement with "I've heard" does not protect Lee because repetition of what the speaker has "heard" subjects the speaker to liability for defamation, especially where the speaker repeats the statement without basis in fact.

Furthermore, the statement concerned Judge Bright's fitness in his trade or profession. A judge's sobriety and judicial temperament are essential to the position. As such, the statement is slander per se, and its reporting by Reporter is libel per se.

Accordingly, the court erred in holding that the third statement was not defamatory.

(b) Privilege

Speakers may be protected from liability for defamation by a privilege. Privileges may be absolute or qualified, i.e., they can be forfeited if abused.

Here, it is possible that Lee could attempt to invoke the absolute privilege for statements in legal proceedings. However, because the statements were made after the trial was concluded and at a press conference, and not during trial testimony, this privilege would not apply.

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Lee also might attempt to invoke a "public interest" privilege for statements deemed to be in the interest of the public at large. He might argue that the public had a right to know of Judge Bright's unfitness to serve. This argument, however, is better addressed in terms of the New York Times and Gertz analysis requiring both proof by plaintiff of falsity and defendant's malice with respect to public figures and/or matters of public concern, rather than under privilege concepts. If that were the case, because Judge Bright was a public official running for office, he had the burden of proving both falsity and that Lee and Reporter acted with reckless disregard.

Reporter could argue that he was protected by a qualified privilege of fair reporting of a public meeting. That privilege protects a report that accurately describes a statement made during public proceedings such as a town hall meeting. This privilege may well have protected Reporter since the statement by Lee was made at a press conference, rather than privately.

The court, therefore, erred in holding that Lee was protected by a privilege.

(c) Damage

In a defamation action, general damages are presumed where, as here, there has been slander per se and libel per se. However, where the plaintiff is a public official or public figure, he must prove falsity and malice before he can recover damages (including special, general and punitive damages).

Here, however, it is not clear whether Judge Bright was seeking damages and, if so, whether the statements caused them. To the extent Judge Bright was seeking general damages and was able to show falsity and malice, he should recover them. Special damages, however, would be more troublesome since it would be very difficult to prove that his loss of the election was actually or proximately caused by the statements.

The court may have erred in holding that Judge Bright suffered no general damages.

2. Ethical Issues for Attorney

Attorney's actions appear to have implicated several ethical issues.

(a) Acting As Consultant

An attorney may assist persons acting pro se without also acting as trial counsel, though typically only when the person is indigent. Doing so, however, does not relieve the attorney from his ethical duties; he is still acting as a lawyer for a client, just not as trial counsel. Thus, Attorney cannot evade his professional obligations by calling himself a "consultant."

(b) Conflicts Between Clients

An attorney owes a duty of loyalty to his client, and cannot allow the interests of another client impair his representation. An attorney should not represent two parties on the same side of a case unless a disinterested lawyer would determine that there is no actual conflict between them and that the parties should consent to joint representation.

Here, it does not appear that there would be any conflicts between representing both Lee and Reporter, except to the extent Reporter has defenses that would not be available to Lee and which might expose only Lee to what might otherwise be joint and several liability.

Under these circumstances, where there is only a potential conflict, Attorney, if he reasonably believed he could represent both simultaneously, should have fully disclosed the potential conflicts and obtained their consent in writing. If the conflict became actual, then he should have withdrawn and let each seek separate counsel.

(c) Conflict in Role

An attorney owes his client a duty of competence, i.e., to act with the knowledge, skill and thoroughness necessary for the representation.

As part of that duty, Attorney should have not agreed to act in the dual role of consultant and testifying expert. Doing so risks the disclosure of client confidences while testifying, thereby breaching the separate duty to maintain client secrets. Instead, a competent attorney would recommend that a separate testifying expert be retained.

(d) Fee

Professional rules tolerate contingent fee arrangements. In California, such agreements must be in writing, set forth the percentage, set forth what expenses are to be deducted, set forth whether the expenses are deducted before or after the percentage is applied, state that the percentage is negotiable, and explain how fees not included in the percentage are to be paid. (ABA rules do not require the last two items.)

Here, the agreement to pay Attorney as a consultant was required to be in conformance with these rules.

Furthermore, it is improper to pay an expert witness fee through a contingent fee based on the outcome of the case. Doing so violates the duty of candor to the court by presenting an interested expert.

(e) Agreement in Writing

Finally, even aside from the contingency, the retainer agreement between Attorney and Lee and Reporter, since it likely would have exceeded $1,000 in fees, should have been in writing since it is unlikely that Attorney had previously provided the same services previously or had otherwise previously represented them. That writing required a description of the Attorney's services, the fee, a description of what the clients were expected to do and what expenses and other charges were to be included or paid.

ANSWER B

1. Trial court's rulings.

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Before addressing the trial court's three specific rulings, it is helpful to consider generally the elements of defamation - the tort on which Judge Bright is suing.

Defamation consists of (i) a defamatory statement of fact, (ii) of or about the plaintiff, (iii) in an intentional or negligent publication, that (iv) causes damage. Here, factor (ii) is not in dispute - Lee mentioned Judge Bright by name in his remarks to Reporter, which were published verbatim. Nor is there really any issue here as to element (iii) - Lee "published" the information by telling a third party, namely, Reporter, and Reporter published it in the local newspaper.

Were Lee's statements defamatory?

The trial court ruled that Lee's statements were not defamatory. The trial court was, at least in part, incorrect.

As indicated, a statement is defamatory if it is a statement of fact that somehow relates to the plaintiff's reputation. Lee made three separate statements to Reporter. He first told Reporter that Judge Bright "is a very unfair judge." The trial court was correct that this was not defamatory. Firstly, it is essentially a pure statement of opinion. It is not a statement of fact. It is the type of statement that people make all the time about judges, especially in connection with elections. Although a lawyer, as an officer of the court, should probably avoid making such a statement, Lee was simply a party to a trial before Judge Bright, and is free to make such a statement. Secondly, it is probably not a defamatory statement because whether Lee believes Judge Bright to be very unfair does not directly injure Judge Bright's reputation. The statement merely reflects Lee's overall opinion of Judge Bright, and does not cast direct doubt on his ability or integrity, at least standing alone.

Lee's second statement to Reporter was that in the bench trial involving Lee, Judge Bright "clearly didn't understand what was going on." The trial court again correctly determined that this statement was not defamatory. Again, this is essentially an expression of Lee's opinion, although here it does relate to one particular trial, rather than to Lee's overall opinion of Judge Bright. But for that reason, the statement is less defamatory than the first statement discussed above - it merely reflects that in one particular trial, Judge Bright didn't understand the case. This is often true of judges who have little time to deeply understand every case that comes before them. Although an attorney would probably have to be more circumspect in making such statements, Lee was free to do so.

The trial court incorrectly ruled on Lee's third statement. Lee's third statement was that Lee heard Judge Bright is often drunk on the bench. This is not a statement of opinion, like the first two of Lee's statements. Moreover, this does directly relate to Judge Bright's reputation and character. A charge that a judge is drunk on the bench and simply not giving his attention to the cases before him is quite serious and directly related to the judge's character. Therefore, the trial court incorrectly decided that this statement was not defamatory.

Were the statements privilege?

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The trial court ruled that the three statements discussed above, even if they were not defamatory, were privilege. The trial court was incorrect.

Privilege as to Lee. Lee might try to assert one of several privileges. First, Lee might argue that his statements were protected by a judicial proceedings privilege. Statements made in connection with a judicial proceeding (e.g., statements of a witness, or statements of lawyers in opening or closing arguments) are absolutely privileged. There is good reason for this privilege to exist - otherwise, the courts would be clogged with countless defamation claims based on charges made during the conduct of civil trials. However, here, although Lee was a party to a case before Judge Bright, he made his statements (i) after the case was over and (ii) not to the court, but to a reporter. The judicial proceedings privilege will not attach under these circumstances, because the statements were not made in connection with an ongoing proceeding. (The result would be different had Lee shouted his opinions from the witness stand.)

Second, Lee might argue that he is protected by the "interested in the transaction" privilege. If a defendant has a legitimate interest in a transaction, he may be privileged if he makes certain comments. For example, this type of privilege may apply if an employer gives an employment reference for a former employee. Here, Lee might argue that he was interested in the case before Judge Bright (he was a party, after all), and that therefore this privilege attaches. However, Lee would be wrong. The case before Judge Bright is over, and anyway Lee made the statement not to someone who requested honest information but to Reporter at a press conference that Lee himself called. Therefore, this privilege will not protect Lee.

Lee will also argue a constitutional privilege. Under New York Times, a public official in a defamation claim must prove both (i) falsity and (ii) actual malice. Actual malice means that the defendant knew that the statement was false, or recklessly disregarded its truth or falsity. As a preliminary matter, there is a question whether New York Times will apply to Lee. Lee is an individual, and the New York Times standard is usually applied to media defendants.

Assume that the standard does apply to Lee. Lee's first two statements, as discussed above, were not even defamatory. His third statement ("I've heard he's often drunk on the bench") was defamatory. In order for the judge to succeed on his defamation claim, he must show both falsity and actual malice. There is no indication in the facts given that Lee was in fact true regarding this charge. Therefore, it appears that Judge Bright will be able to establish the falsity of the statement. (Judge Bright, as a public official, does come under the New York Times standard.)

Judge Bright will probably also be able to show that Lee recklessly disregarded the truth or falsity of the statement. This is not an objective standard, but a subjective one - did the defendant have evidence that tended to indicate that his statement was, in fact, false? Here, Lee participated in a bench trial before the judge. He did not himself notice that the judge was drunk at his trial. Rather, he simply "heard" from unnamed sources that the judge was often drunk. Given the unreliable nature of this information, and given Lee's firsthand knowledge of the

Judge's behavior (where the judge apparently was not drunk), Lee acted with reckless disregard of the truth or falsity of his statement.

Privilege as to Reporter. For the same reasons as discussed above in connection with Lee, the judicial proceedings privilege and the interested in the transaction privilege will not apply.

Reporter may also argue that he was protected by the fair and neutral reporting privilege. This privilege protects a journalist who simply reports what is said at a public meeting, if he does so in a fair and neutral manner. Reporter will not succeed on this privilege claim. Lee's statements were made at a private press conference, not a public meeting.

The analysis for the constitutional privilege is largely the same as above, for Lee. Here, the New York Times standard clearly applies to Reporter, who is a media defendant. However, it is not clear that Reporter knew that the statement about the judge's drinking was false. Moreover, unlike Lee, who had personally observed the judge in a trial, the Reporter apparently had not. Although it may objectively be unreasonable for a reporter to relate the hearsay statements of his source, it cannot be said that Reporter was subjectively aware of information that would tend to show that the statement was false. Therefore, as to Reporter (but not Lee), the constitutional privilege does apply.

Did the Judge suffer any damage?

In a libel case, special damages need not be proven. In a slander case, special damages must be proven, unless the slander is a slander per se.

Here, Lee's initial statement was slander, because it was delivered orally. Thus according to the general rule, the judge would have to prove special damages here.

However, the statement also constitutes slander per se. It relates to the judge's ability to carry on his profession in a sober manner. This is one of the categories of statements that is considered to be slander per se. (It might also be characterized as a statement tending to reflect moral turpitude on the part of the judge, but this is probably too great a stretch.)

As to Reporter, Reporter's publication in the local newspaper was libel. Judge Bright does not need to show special damages for libel.

Special damages consist of an actual injury to business, a contract, etc. Here, the judge would argue that he lost the election, and these are special damages, even if special damages needed to be. proven. However, they do not, so the judge will be able to maintain his defamation claim.

It should be noted that the judge may continue to try to seek damages for his loss of a job. However, it is fairly speculative to say that Lee's statement caused this particular injury. Unless

the judge can produce evidence at trial that his injury was actually caused by the statement, he may not be able to recover for his lost job.

2. Ethical issues involving Attorney.

A preliminary issue is who, if anyone, was Attorney representing? Attorney indicated that he would not be the trial attorney for the case. He therefore may argue that he was merely a "consultant" and not subject to any ethical obligations.

Attorney's argument here will be rejected. Attorney met with Lee and Reporter about their case. He received confidential information from the defendants communicated to aid in their case. Furthermore, he agreed to "advise them on law and strategy and to help them prepare their case." This is clearly the role of an attorney. Attorney was acting as a lawyer for Lee and Reporter, and cannot get around the ethical rules and obligations by calling himself a "consultant."

Attorney offered to be an expert witness at the trial. Because Attorney really was an attorney for Lee and Reporter, this raises a potential conflict of interest issue, namely, that a lawyer was serving as a witness. This may confuse the fact finder.

Under the ABA rules, a lawyer may nevertheless be a witness if (i) his testimony relates to a minor, undisputed matter, (ii) his testimony relates solely to the fact of representation, (iii) not being a witness would cause undue hardship to a client, or (iv) the other side simply may call him as a witness (but if the other side does and his testimony will be prejudicial, he must withdraw). Here, it does not appear that Attorney's expert testimony will relate to minor, undisputed issues or solely to the fact of representation. He will apparently be called in the case-in-chief for Lee and Reporter, so (iv) does not apply. The facts do not indicate that Attorney is needed as a witness to avoid undue hardship. Therefore, it is inappropriate for Attorney to function as an expert witness.

Under the California rule, which applies only to jury trials, Attorney can testify under (i) and (ii), above, which as indicated do not apply. He can also testify if he discloses the conflict to his clients and gets their written consent. Attorney did not do so here, so has violated an ethical obligation.

Attorney is being paid on a contingency fee basis. Again, it is for his services as an attorney, although he has characterized himself as a consultant and a witness. Contingency fee arrangements are acceptable, but they must be in writing, they must state the contingency percentage, and they must state how expenses are to be calculated. Furthermore, in California, they must advise the client that the fee is negotiable. Attorney did none of these things here, so is in violation of his ethical obligations.

Attorney is representing both Lee and Reporter. An attorney may represent multiple parties, despite a conflict or apparent conflict, if (a) it is reasonable to do so, (b) he discloses the conflict, and (c) gets (written) client consent. At the outset of the lawsuit, it was probably

acceptable for Attorney to meet jointly with Lee and Reporter and agree to work with both of them. As discussed above, the claims and defenses against Lee and Reporter are quite similar. However, also as discussed above, Reporter, who had no firsthand knowledge of Judge Bright, may be able to succeed on his constitutional privilege claim, because he did not act with reckless disregard to truth or falsity. Lee does not have this claim. There is thus a potential conflict between Lee and Reporter. It may not be serious enough to prevent outright the joint representation, but at the very least Attorney should have followed the disclose/consent procedure. Attorney did not do so, and is therefore in violation of another ethical rule.

Finally, Attorney indicated that he would not represent Lee and Reporter in the actual trial. In some sense, Attorney withdrew from active representation, although he still offered his services as an "expert." An attorney can withdraw from a representation, but should not do so if it will materially prejudice his client's case. Here, Attorney indicated at the outset that he would help up to trial, so he probably can permissibly avoid being trial counsel. However, Attorney has an obligation to help Lee and Reporter find adequate trial counsel in time for that counsel to prepare for the case. Attorney also must turn over his clients' files to the trial attorney so that he can act as an attorney for the trial.

If Attorney did not help Lee and Reporter find suitable trial counsel, and/or he did not turn over his files to trial counsel prior to trial, then Attorney will have breached yet another ethical obligation.