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No. 65144-7-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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ADIL LAHRICHI, REGINE CSIPKE, T. L., M. L., Y. L., A. L., Y. L.,  
AZIZA BENAZZOUZ,

Appellants,

v.

KEELIN A. CURRAN, ZAHRAA V. WILKINSON, MOLLY M.  
DAILY, STOEL RIVES, LLP, THOMAS D. MINO, TIMOTHY  
LONDERGAN, TIMOTHY PARKER, RALUCA DINU, DAN JIN,  
HENRY HU, HANNWEN GUAN, GIGOPTIX, and MICROVISION

Respondents.

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**BRIEF OF RESPONDENTS KEELIN A. CURRAN, ZAHRAA V.  
WILKINSON, MOLLY M. DAILY AND STOEL RIVES, LLP**

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**ORIGINAL**

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## I. INTRODUCTION

Respondents Keelin A. Curran, Zahraa V. Wilkinson, Molly M. Daily and Stoel Rives, LLP (hereinafter referred to as the “Attorneys”) are attorneys and a law firm that represented a party opponent of Appellant Adil Lahrichi in a prior action in U.S. District Court. Appellant Lahrichi and members of his family now seek to impose liability upon the Attorneys for actions allegedly performed during the course of that prior action. The Superior Court below properly dismissed all claims against the Attorneys under CR 12(b)(6) on the grounds that Appellants’ claims, even if proven, would nevertheless be barred by the doctrine of litigation privilege. The doctrine holds that actions taken by attorneys (as well as by parties and witnesses) during the course of litigation are absolutely immunized from liability provided that such actions were: (1) performed in the course of a prior judicial proceeding; and (2) were pertinent to the relief sought in the proceeding. All of the allegations against the Attorneys meet these two requirements. In addition, the policy purposes underlying litigation privilege would be furthered by dismissal of all claims against the Attorneys. The fundamental purpose of the doctrine is to encourage litigation attorneys to zealously represent their clients without fear of incurring liability to opposing parties. Failure to apply the privilege under the circumstances of this case would have a chilling effect

on the willingness of attorneys to zealously advocate, thus undermining the judicial process. Moreover, the privilege supports judicial efficiency by preventing disgruntled litigants from pursuing potentially endless derivative actions, precisely what Appellants are attempting here. Finally, the doctrine rests upon recognition that the judicial system provides adequate safeguards against alleged misconduct by attorneys in the course of litigation. Such safeguards were present in the prior federal action.

## **II. STATEMENT OF THE CASE**

### **A. Background to the Present Lawsuit and Procedural History.**

The present case arises from a previous lawsuit. In 2004, Appellant Adil Lahrichi filed an employment discrimination action against his employers, alleging religious and racial discrimination under state and federal law. *Lahrichi v. Lumera Corp.*, Case No. C04-2124 JCC (W.D. Wash. 2004) (hereinafter referred to as the “prior federal action”). That action is currently on appeal to the Ninth Circuit Court of Appeals, following entry of summary judgment in favor of the employers by the U.S. District Court. All of the Respondents (defendants below) in the present action were involved as either parties, witnesses, or attorneys in the prior federal action. CP 2-5, 7 (Complaint, ¶¶ 7-19, 34-35).

Appellants filed the Complaint on April 27, 2009. On August 8, 2009, the Attorneys filed a complaint seeking injunctive relief from the U.S. District Court wherein the prior federal action was litigated. *Curran v. Lahrichi*, Case No. C09-1227 JCC (W.D. Wash. 2009). The Attorneys sought to enjoin Appellants from continuing to prosecute the present action under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, which authorizes federal courts to enjoin state court proceedings in order to “protect or effectuate” their judgments. The Attorneys alleged that the issues raised by Appellants in the Complaint in the present action were previously raised and decided in the prior federal action. *See* CP 33-35 (Motion for Preliminary Injunction). The Superior Court below stayed the case pending the outcome of the suit for injunctive relief. CP 99-100 (Order Granting Motion to Stay of Certain Defendants, filed September 18, 2009).

The District Court denied the Attorneys’ request for injunctive relief, and dismissed the case, on November 19, 2009, CP 143-156. The District Court noted that the Orders in the prior federal action upon which the Attorneys relied were entered on motions to seal and retax on limited remand, after the Court had already granted summary judgment to the defendant employers. CP 146. Because of the unusual procedural posture, and because the issues raised by Appellant Adil Lahrichi arose

during the course of litigation in the prior federal action, the District Court concluded that Lahrichi had not had a full and fair opportunity to litigate his claims within the meaning of the relitigation exception. CP 152. The District Court also noted that “[a]ny doubts about the appropriateness of enjoining state court proceedings under the Anti-Injunction Act should be resolved in favor of permitting state courts to proceed.” CP 154 (quoting *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)). No issue concerning application of the doctrine of litigation privilege was before the District Court in the action seeking injunctive relief, as the court itself noted:

The Court finds it easy to understand the attorneys’ frustrations in this case, because litigation immunities will likely shield them from most tort liability. But the Court’s prognostications about the merits of Lahrichi’s state-court lawsuit are unequivocally outside the scope of the issues presented here. This federal court must only decide whether the state-court claims are precluded.

CP 154 (Order, p. 12 n. 4).

Following dismissal of their claims for injunctive relief by the District Court, the Attorneys promptly moved to lift the stay in the present action on November 20, 2009, CP 134-136, and the Superior Court entered an Order lifting the stay on December 9, 2009. CP 171-172.

On January 6, 2010, the Attorneys filed a motion to dismiss under CR 12(b)(6) and CR 12(b)(5).<sup>1</sup> CP 173-189. Co-respondents and co-defendants below filed motions to dismiss shortly thereafter. CP 196-208. The Superior Court granted the Attorneys' motion to dismiss on February 5, 2010, as follows:

Defendants' Motion to Dismiss Under CR 12(b)(6) is GRANTED. The allegations stated in the Complaint against Defendants Keelin A. Curran, Zahraa V. Wilkinson, Molly M. Daily And Stoel Rives, LLP are barred by the common law doctrine of litigation privilege or immunity. The rule of litigation privilege holds that actions taken by attorneys during the course of litigation are absolutely immunized from liability provided that such actions were performed in the course of a prior judicial proceeding and were pertinent or material to the relief sought in that proceeding. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). These Defendants were the attorneys and law firm that represented the former employer of Plaintiff Adil Lahrichi in an employment discrimination action in federal district court. All of the allegations stated in the Complaint against these Defendants concern actions that were allegedly performed in the course of that prior action, and that were pertinent to the relief sought in that action. Accordingly, all claims and causes of action asserted against these Defendants are hereby dismissed, with prejudice, in their entirety.

CP 307. The Superior Court denied Appellants' motion for reconsideration on February 26, 2010. CP 391.

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<sup>1</sup> The Attorneys subsequently withdrew the motion under CR 12(b)(5) after Appellants came forward with proper proofs of service. RP 7-8.

**B. Contents of the Complaint.**

The Complaint lists claims for “violation of Plaintiffs’ privacy, intentional and negligent dissemination of their information, libel and defamation, intentional misrepresentation of information to inflict harm on Plaintiffs, conspiracy to defame and harm Plaintiffs, breach of contract, breach of trust, exploitation, negligence and infliction of emotional distress, bad faith, fraud, malpractice, obstruction of the course of justice, perjury, intentional and malicious acts to harm Plaintiffs, misappropriation of others’ identity to inflict harm and obstruct justice, exploitation of privileges and trust to inflict harm on Plaintiffs, and intentional and bad faith acts to prevent Plaintiffs to [*sic*] mitigate ongoing damages.” CP 18 (Complaint, ¶ 101). The Complaint does not identify which of approximately 80 numbered paragraphs of factual allegations support each cause of action, nor does it make clear which causes of action are pleaded against which defendants. Appellant Adil Lahrichi stated in oral argument on the motions to dismiss that all of the claims were pleaded against all Respondents. RP 26.

The factual allegations that appear to be pleaded against the Attorneys fall into the following categories of alleged wrongful acts: (1) referring to evidence protected by a mediation confidentiality agreement and/or protective orders in depositions, and including such evidence in

pleadings<sup>2</sup>; (2) introducing defamatory evidence<sup>3</sup>; (3) abusive conduct during depositions<sup>4</sup>; (4) tampering with and/or concealing evidence<sup>5</sup>; (5) rehearsing questions with witnesses prior to depositions<sup>6</sup>; (6) delaying the course of litigation and filing frivolous motions<sup>7</sup>; and (7) impersonating Appellants' counsel while interviewing employees of the defendant employer.<sup>8</sup>

All of the allegations against the Attorneys are alleged to have taken place in the course of the prior federal action. Complaint ¶ 48 alleges actions that took place during mediation of the prior action. Complaint ¶¶ 51, 52, 58, 59, 62, 65, 66, 67, and 69 allege actions that took place in depositions or in preparation for depositions taken in the prior action. Complaint ¶¶ 53, 55, 56, 57, 60, 70, 71, 73, 74, 76, 77, 80 and 82 allege the filing of pleadings or other documents in the prior federal action. Complaint ¶¶ 61, 89, 92, 93, 94 and 95 contain allegations of delaying tactics by, for example, filing objections to pleadings, in the prior

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<sup>2</sup> CP 9-11, 13-14 (Complaint ¶¶ 51, 53, 55, 56, 59, 70, 71, 73, 76, 77, 80, 82, 85, 99).

<sup>3</sup> CP 9-15 (Complaint, ¶¶ 48, 55, 57, 60, 62, 65, 70, 73, 74, 77, 82, 86).

<sup>4</sup> CP 9 (Complaint ¶ 52).

<sup>5</sup> CP 9-11, 13 (Complaint ¶¶ 52, 55, 61, 70).

<sup>6</sup> CP 10-12 (Complaint ¶¶ 58, 62, 66, 67, 69).

<sup>7</sup> CP 11, 13, 16-17 (Complaint ¶¶ 61, 70, 89, 92, 93, 94, 95).

<sup>8</sup> CP 12 (Complaint ¶ 68).

action. Complaint ¶ 68 alleges the act of interviewing potential witnesses in the prior federal action. Complaint ¶ 86 alleges statements made directly to the U.S. District Court.

**C. Appellants' Suggestion that They Were Denied Sufficient Time to Prepare for the Hearing on Motion to Dismiss.**

Appellants claim that they had “insufficient time to respond to all three motions [to dismiss] and prepare for the oral hearing,” further stating as follows: “Respondents refused to change the hearing date of their motion to dismiss to give The LAHRICHIs time to respond. . . . After The LAHRICHIs filed their motion for extension, the [Attorneys’] counsel agreed to give The LAHRICHIs only a week extension on condition that The LAHRICHIs withdraw their motion for extension. The LAHRICHIs were forced to agree since they could not afford to lose more time for motion practice.” App. Br., p. 15 and n.8.

This description is inaccurate. Appellant Adil Lahrichi contacted the Superior Court, counsel for the Attorneys, and counsel for the other Respondents, by email on January 25, 2010, four days prior to the date originally set for hearing. In those emails, he requested an extension of “at least one week.” Counsel for the Attorneys immediately agreed to an extension of time, and were willing to stipulate to a longer extension. Because of the Court’s availability, however, it was ultimately agreed that

the hearing would be reset for February 5, 2010, i.e., one week after the original noting date. Appellants did not object, and, in fact, thanked undersigned counsel, by email, for their cooperation in rescheduling the hearing.<sup>9</sup> Appellants did not ask for additional time at the hearing, or suggest to the Superior Court at the hearing that they had been deprived of sufficient time to prepare.

### III. ARGUMENT

#### A. Standard of Review

Whether an absolute privilege applies is a question of law that is determined *de novo* by a reviewing court. *Wynn v. Earin*, 163 Wn.2d 361, 369, 181 P.3d 806 (2008); *see also, e.g., Demopolis v. Peoples Nat'l Bank*, 59 Wn. App. 105, 110, 796 P.2d 426 (1990).

Whether dismissal for failure to state a claim upon which relief can be granted was appropriate is likewise a question of law that an appellate court reviews *de novo*. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Under CR 12(b)(6), a plaintiff states a claim upon which relief can be granted if it is possible that facts consistent with the complaint could be established that would entitle the plaintiff to relief on the claim. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233

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<sup>9</sup> Respondents are happy to make all email correspondence between and among the parties and the Court concerning rescheduling of the hearing available for the Court's review, if the Court so desires.

P.3d 861 (2010). All facts alleged in the complaint are presumed true, however the court is not required to accept a plaintiff's legal conclusions as true. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

**B. Appellants Failed to State a Claim Against the Attorneys Upon Which Relief Can Be Granted Because the Claims Alleged are Barred by the Doctrine of Litigation Privilege.**

**1. Legal Standard for Application of the Doctrine.**

It has long been the rule in Washington that attorneys, witnesses, and parties may be immunized from civil liability for publishing defamatory matter under the common law doctrine of litigation privilege. *E.g., Abbott v. Nat'l Bank of Commerce*, 20 Wash. 552, 555, 56 P. 376 (1899). Such immunity is "absolute," meaning that "[t]he attorney's purpose in publishing defamatory matter, his belief in its truth, or even his knowledge of its falsity" is irrelevant. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). The doctrine was set forth in *McNeal* as follows:

Allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief. The defense of absolute privilege or immunity avoids all liability.

*Id.* (internal citation omitted). The privilege thus applies to attorney statements that are: (1) made in the course of a judicial proceeding; and (2) pertinent to the relief sought. *Id.*; *see also, e.g., Southcenter Joint Venture v. Nat'l Democratic Policy Committee*, 113 Wn.2d 413, 434, 780 P.2d 1282 (1989) (holding that litigation privilege applied to a witness statement because it was “made in the course of a judicial proceeding” and “pertained to the relief sought”).

Concerning the first requirement, the litigation privilege is not limited in its application to conduct before a judicial tribunal, but also applies “in conferences and other communications preliminary to the proceeding.” Restatement (Second) of Torts (hereinafter “Restatement”) § 586, *comment a* (1977) ; *see also Demopolis*, 59 Wn. App. at 109 (citing Restatement § 586, *comment a*, for the proposition that the litigation privilege “encompasses extrajudicial ‘pertinent’ statements”). “The institution of a judicial proceeding includes all pleadings and affidavits necessary to set the judicial machinery in motion. The conduct of the litigation includes the examination and cross-examination of witnesses, comments upon the evidence and arguments both oral and written upon the evidence, whether made to court or jury.” *Id.*

Concerning the requirement of pertinency, a statement is “pertinent” to the relief sought “if it has some relation to the judicial

proceedings in which it was used, and has any bearing upon the subject matter of the litigation.” *Demopolis*, 59 Wn. App. at 110. Such statements “need not be strictly relevant to any issue involved” in the litigation. Restatement § 586, *comment c*.

This Court may also consider whether the policy purposes underlying the privilege would be served by its application. *E.g.*, *Demopolis*, 59 Wn. App. at 111-12. The privilege, as applied to litigation attorneys, “is based upon a public policy of securing to them as officers of the court the utmost freedom in their efforts to secure justice for their clients.” *McNeal*, 95 Wn.2d at 267. As the Supreme Court recognized in *Wynn*, 163 Wn.2d at 378 (quoting *Butz v. Economou*, 438 U.S. 478, 512, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)):

Controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another . . . Absolute immunity is thus necessary to ensure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

The privilege also rests upon a recognition that attorneys are “subject to the supervision and discipline of the court,” and that the judicial system thus provides adequate safeguards against misconduct by attorneys in the course of litigation. *McNeal*, 95 Wn.2d at 267. In particular, “[u]nder CR 12(f), immaterial, impertinent or scandalous

matter may be stricken from the pleadings[, and t]he court may reprimand, fine and punish, as well as expunge from the records statements which exceed proper bounds.” *Id.* at 267-68. In addition, attorneys who misuse the privilege may be subject to professional discipline. *See Wynn*, 163 Wn.2d at 379, n. 3 (noting that “[s]uch professional discipline is no laughing matter. An attorney . . . may be subject to a range of discipline, including suspension from the practice of law, or, in egregious situations, disbarment.”).

## **2. Scope of the Litigation Privilege.**

The doctrine of litigation privilege arose originally in the context of defamation. It is not, however, limited to defamation claims. In *Bruce v. Byrne-Stevens & Associates Engineers, Inc.*, 113 Wn.2d 123, 132, 776 P.2d 666 (1989), the Supreme Court considered the scope of the privilege in the context of witness immunity as follows:

[T]here is nothing in the policy rationale underlying witness immunity which would limit its applicability to defamation cases. Witness immunity is premised on the chilling effect of subsequent litigation. The threat of subsequent litigation is the same regardless of the theory on which that subsequent litigation is based.

. . . [A] rule limiting witness immunity to defamation cases would be easy to evade by recasting one’s claim under other theories.

The Supreme Court went on to note the “large number of cases in a wide range of jurisdictions in which witness immunity has been granted to bar causes of action other than defamation.” *Id.* A similarly large number of cases have applied the litigation privilege to bar non-defamation causes of action against attorneys. See T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L.REV. 915, 927-28 (2004) (“The spectrum of legal theories to which the privilege has been applied includes negligence, breach of confidentiality, abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, civil conspiracy, interference with contractual or advantageous business relations, fraud, and, in some cases, malicious prosecution.”).

The purpose underlying witness immunity identified by the Supreme Court in *Bruce* – the chilling effect of subsequent litigation – applies equally to attorneys, who must be afforded “the utmost freedom in their efforts to secure justice for their clients.” *McNeal*, 95 Wn.2d at 267.<sup>10</sup> And, just as for witnesses, the threat to attorneys of subsequent litigation is the same regardless of the name a plaintiff chooses to give his or her cause of action.

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<sup>10</sup> The Restatement rules for attorney and witness immunity under the litigation privilege are substantively identical. Compare Restatement § 586 (attorney immunity) with Restatement § 588 (witness immunity).

*Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P.3d 931 (2004), provides an example of a Washington court applying the doctrine of litigation privilege to bar claims other than defamation pleaded against attorney defendants. In that case, the Court of Appeals held that claims for intentional interference with a business relationship, outrage, infliction of emotional distress, and civil conspiracy were barred. The plaintiff in *Jeckle*, a physician, claimed that the defendant attorneys and law firms obtained a list of his patients from a state Department of Health investigation, and used it to contact prospective clients for lawsuits against him. *Id.* at 377-38. The court held, following *McNeal*, that the doctor's claims were properly dismissed by the trial court under CR 12(b)(6) because they were "related to and were pertinent to the lawsuits the attorneys had filed" against the doctor. *Id.* at 386. As noted above, *Jeckle* is significant because it involved application of the litigation privilege to non-defamation causes of action. It is additionally significant, however, because the court applied the privilege to immunize *actions* taken by the attorney defendants, rather than limiting its scope to statements. *Id.* (noting that the plaintiff complained of the "acts" of "use of the Commission's file in [the plaintiff]'s deposition and the alleged use of the patients' names obtained from the file," and describing the doctrine as the "judicial action privilege"). Just as there is no reason to distinguish

between defamation and other causes of action for purposes of the privilege, actions, no less than statements, should be immunized by the privilege if they are alleged to have taken place in the course of a prior judicial proceeding and were pertinent to the relief sought.

As particularly relevant to the facts of the present case, the Court of Appeals has also recognized that the privilege may be applied to bar a claim for violation of privacy. *Kearney v. Kearney*, 95 Wn. App. 405, 414, 974 P.2d 872 (1999). In *Kearney*, the allegation was made that an attorney “filed documents with the court that contained transcripts of private conversations” in violation of the privacy act, RCW 9.73.060. *Id.* Similarly, here, Appellants’ central complaint is that the Attorneys invaded their privacy by failing to file confidential information under seal in the prior federal action. CP 30. In *Kearney*, the Court of Appeals held that there was no liability under the statute, noting “sound policy reasons for declining to read into the statute civil liability for filing these documents,” including the doctrine of litigation privilege:

Attorneys . . . enjoy immunity from civil liability during judicial proceedings to ensure that they have freedom to secure justice for clients. Thus, without so holding, we question whether individuals such as [the attorney defendants] could even be subject to civil liability for offering declarations or testifying about such private conversations.

*Id.* (internal citations omitted).

The Court of Appeals' dicta is consistent with holdings from other jurisdictions applying the litigation privilege to claims for violation of privacy and breach of confidentiality. For example, the Delaware Supreme Court applied the privilege to bar a claim for invasion of privacy in *Barker v. Huang*, 610 A.2d 1341, 1349 (Del. 1992), finding that "[t]he absolute privilege would be meaningless if a simple recasting of the cause of action from 'defamation' to 'intentional infliction of emotional distress' or 'invasion of privacy' could void its effect." Similarly, the Superior Court of Pennsylvania applied the privilege to a claim alleging breach of patient confidentiality by a doctor in pretrial communications with attorneys and in trial testimony, as follows: "[A]n extension of immunity evinces the strong public policy behind the privilege: to leave reasonably unobstructed the paths which lead to the ascertainment of truth . . . . Recognizing a cause of action for breach of confidentiality . . . will undermine this policy." *Moses v. McWillimas*, 379 Pa. Super. 150, 164, 549 A.2d 950 (1988).

**3. The Statements and Acts Complained Of Were Made in the Course of a Judicial Proceeding and Were Pertinent to the Relief Sought.**

Appellants' Complaint sets forth a lengthy list of causes of action, including "intentional and negligent dissemination of information," "libel and defamation," "intentional misrepresentation," "conspiracy to defame

and harm,” “breach of trust,” “negligence and infliction of emotional distress,” “fraud,” “breach of contract” and “violation of privacy.” CP 18 (Complaint, ¶ 101).<sup>11</sup> Appellants’ allegations against the Attorneys are not separately pleaded, making it difficult, in some instances, to determine to which defendants a particular factual allegation is intended to refer. It appears, however, that Appellants have alleged the following wrongful acts by the Attorneys: (1) referring to evidence protected by a mediation confidentiality agreement and/or protective orders in depositions, and including such evidence in pleadings ; (2) introducing defamatory evidence ; (3) abusive conduct towards Plaintiffs during depositions ; (4) tampering with and/or concealing evidence ; (5) rehearsing questions with witnesses prior to depositions ; (6) delaying the course of litigation and filing frivolous motions ; and (7) impersonating Plaintiffs’ counsel while interviewing employees of the defendant employer.<sup>12</sup>

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<sup>11</sup> The Complaint also lists claims that are not recognized causes of action for civil liability (“obstruction of the course of justice,” “perjury”), or for which the Attorneys, as counsel for a party opponent of Appellant Adil Lahrichi in the prior federal action, owed no duty to him (“bad faith,” “malpractice”), or which are too vague to state a cause of action (“exploitation,” “intentional and malicious acts to harm,” “misappropriation of others’ identity to inflict harm and obstruct justice,” “exploitation of privileges and trust to inflict harm,” “intentional and bad faith acts to prevent Plaintiffs to mitigate ongoing damages”). CP 18 (Complaint, ¶ 101).

<sup>12</sup> See p. 7 *supra* for citations to the Complaint.

Taking these allegations as true, the Complaint fails to state a claim upon which relief can be granted because all of the acts alleged fall within the scope of the litigation privilege doctrine. First, the Complaint fails to allege any wrongful act by the Attorneys that took place outside the course of the prior federal litigation. Many of the allegations against the Attorneys concern alleged failures to seal confidential information in filings with the U.S. District Court. See note 2 *supra*. The filing of documents with a court in the course of litigation is clearly an act that was made “in the course of a judicial proceeding.” *McNeal*, 95 Wn.2d at 267. See also Restatement § 586, *comment a* (“The institution of a judicial proceeding includes all pleadings and affidavits necessary to set the judicial machinery in motion.”). Likewise, Appellants’ allegations concerning conduct during depositions, treatment of evidence, etc., concern actions allegedly performed in the course of the prior litigation. See notes 3-8 *supra*. Indeed, the Complaint places Appellants’ allegations against the Attorneys within the context of the prior federal action. CP 7 (Complaint, ¶¶ 34-35). Tellingly, when asked by the Superior Court at the hearing on motions to dismiss, Appellant Adil Lahrichi was unable to specify any allegation in the Complaint that alleged action outside the scope of the prior action:

THE COURT: What part of your complaint is outside the litigation?

MR. LAHRICHI: The part first after the lawsuit was dismissed, and also within the lawsuits there were a lot of other event that we didn't bring to the court that we are still investigating today, your Honor, that had nothing to do with the judicial proceeding whatsoever.

RP 27-28. Appellant Lahrichi's reference to the "part first after the lawsuit was dismissed" appears to refer to the allegations of delay on Appellants motions to seal and retax in the prior federal action. *See* p. 7 and n. 7 *supra*. This alleged conduct is clearly within the scope of that prior action. Appellants' reference to "other event[s]" not included in the Complaint is essentially an admission that the Complaint itself fails to allege such actions.

The Complaint likewise fails to allege any wrongful act that, if proven, would not be "pertinent" to the prior litigation. *McNeal*, 95 Wn.2d at 267. As noted above, to meet this requirement, the actions alleged need only have "some relation" to prior judicial proceedings. *Demopolis*, 59 Wn. App. at 110. Appellants' primary complaint is that the Attorneys failed to properly seal confidential information concerning Appellant Adil Lahrichi and his family when filing documents with the U.S. District Court in the prior federal action. Information contained in filings has "some relation" to the proceeding in which it is filed.

Similarly, the treatment of evidence or preparation of witnesses, or conduct during depositions or in witness interviews, is related to the litigation pursuant to which it is conducted, whether or not it is “strictly relevant” to any issue in the litigation. Restatement § 586, *comment c*. The Superior Court properly found that the allegations contained in the Complaint described actions that were pertinent to the relief sought in the prior federal action.

**4. The Policy Purposes Underlying the Litigation Privilege Support its Application in this Case.**

Underlying the litigation privilege is “a public policy of securing to [attorneys] as officers of the court the utmost freedom in their efforts to secure justice for their clients.” *McNeal*, 95 Wn.2d at 267. In addition, the privilege promotes efficient use of judicial resources by “enhancing the finality of judgments and avoiding an unending roundelay of litigation.” *Wynn*, 163 Wn.2d at 377 (quoting *Silberg v. Anderson*, 50 Cal.3d 205, 214, 786 P.2d 365, 266 Cal. Rptr. 638 (1990)). And, the existence of remedial measures other than civil liability supports application of the privilege. *McNeal*, 95 Wn.2d at 267-68.

The policy purposes underlying the privilege would be served by its application in this case. The Attorneys are precisely the type of defendants the rule is intended to protect: counsel and a law firm that

represented a party opponent in prior litigation. Opening up attorneys to potential civil liability for the types of actions alleged by Appellants would run directly contrary to the public policy of securing to attorneys, as officers of the court “the utmost freedom” to advocate on behalf of their clients. *McNeal*, 95 Wn.2d at 267. Failure to apply the privilege here would thus result in the “chilling effect” warned against by the Supreme Court in *Bruce*, 113 Wn.2d at 132. *See also Wynn*, 163 Wn.2d at 378 (“Absolute immunity is . . . necessary to ensure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.”). In addition, application of the privilege would promote finality, and avoid “an unending roundelay of litigation.” *Id.* at 377.

Likewise, the safeguards against abuse of the privilege were present with respect to Plaintiffs’ allegations. All of the alleged acts took place in the course of the prior federal litigation, at a time when the Attorneys were subject to the discipline of the U.S. District Court. In addition, the District Court had the power to remedy any wrongful acts, and, in fact, the Complaint alleges that the court took such action. CP 18 (Complaint, ¶ 97) (alleging that the district court “requir[ed] many documents to be sealed and others to be redacted, including Defendants’ defamatory and offensive statements”).

Accordingly, all of the policies underlying the rule would be served by its application in this case. Because the two requirements identified in *McNeal* – that the alleged wrongful acts took place in the course of, and were pertinent to, prior litigation – are also met, all claims against the Attorneys are properly barred by the doctrine of litigation privilege.

**C. Appellants Fail to Set Forth Any Reason Why this Court Should Reverse the Decision Below.**

Appellants set forth numerous arguments for reversal. To aid the Court’s review, each section of Appellants’ argument is responded to separately.

**1. Section B.1 of Appellants’ Opening Brief.**

Appellants argue in Section B.1 of the opening brief that the Superior Court erroneously applied the applicable legal standard and erred by not making written findings concerning each one of Appellants’ claims. App. Br., pp. 20-21.<sup>13</sup>

Concerning the legal standard, Appellants argue that the Superior Court “treated Respondents’ motions to dismiss as motions for summary judgment, then overlooked that numerous disputed issues of material facts

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<sup>13</sup> Appellants also assert in this section that they were “deprived from discovery to amend their complaint and correct any shortcomings it might have.” App. Br., p. 21. This argument is repeated, in greater detail, later in the opening brief, and is addressed in Section III.C.9 *infra*.

[sic] exist and adopted the position of Respondents.” App. Br., p. 20. In fact, the Superior Court based its ruling on the contents of the Complaint, and did not consider matters outside the pleadings. CP 306-307; RP 30 (Court: “I’ve reviewed your complaint in detail. I do think it brings up only acts that were related to the [prior federal] lawsuit.”).

Moreover, even if the Superior Court had considered matters outside the pleadings, and ruled under the standard set forth in CR 56(c), it in any event did not “overlook that numerous disputed issues of material fact[] exist,” as Appellants assert. Appellants appear to be confusing a dispute as to the proper legal conclusions to be drawn from the Complaint with a dispute as to the truth of the factual allegations contained therein. Facts alleged in the complaint are presumed true on a motion under CR 12(b)(6). For purposes of the Attorneys’ motion, therefore, there were no disputed issues of fact. While the facts, as alleged in the Complaint, are presumed true, however, the court is not required to accept Appellants’ legal conclusions as true. *Haberman*, 109 Wn.2d at 120. Here, the Superior Court properly concluded that the facts, treated as true, nevertheless failed to state a claim that would not be barred by the litigation privilege. CP 307; RP 30-31.

Concerning Appellants’ second argument, they assert that the Superior Court “erred when it did not make findings regarding THE

LAHRICHIs distinct claims, assigned to [*sic*] The LAHRICHIs only a claim of invasion of privacy (RP 30 line 13-14), and dismissed all of The LAHRICHIs' claims under the litigation privilege." App. Br., p. 21. They further assert that the Superior Court's orders of dismissal did not contain "sufficient details to explain how it reached its decision to dismiss." *Id.*

Findings of fact and conclusions of law are not required on decisions of motions under CR 12. CR 52(a)(5)(B). Thus, it is not reversible error if a trial court fails to make findings on a motion to dismiss. As a factual matter, however, the Superior Court did make explicit findings that "[a]ll of the allegations stated in the Complaint against [the Attorneys] concern actions that were allegedly performed in the course of th[e] prior [federal] action, and that were pertinent to the relief sought in that action." CP 307.

Appellants are also incorrect that the Superior Court orally addressed only their claim for invasion of privacy at the hearing on motions to dismiss. Appellants citation in the above-quoted portion of their brief is to the Superior Court's statement that the Appellants' "main complaint seems is [*sic*] an invasion of privacy, that you signed a few different confidentiality agreements and you feel that – or you allege that those have been violated." RP 30. However, only seconds later, the Superior Court discussed Appellants' other claims as follows:

I think it squarely fits into all your allegations were made [*sic*] in the course of a judicial proceeding or things related to it, depositions or you – your complaints were that there were – they introduced defamatory evidence, they used evidence protected by mediation confidentiality agreements or protective orders, you allege abusive conduct towards the plaintiff during depositions, tampering with or concealing false evidence, rehearsing questions with witnesses for depositions and other – making frivolous motions, other things that all had to do with the lawsuit, so I do think it’s all made in the course of judicial proceedings and pertinent or material to the relief sought. I think the elements of the privilege are met here, and I will dismiss the case against all defendants.

CP 30-31. In short, findings were not required and the Superior Court, in any event, made factual findings in the order granting dismissal, and explained its decision as to each one of Appellants’ claims at the hearing on motion to dismiss.

**2. Section B.1.a of Appellants’ Opening Brief.**

Appellants assert in Section B.1.a of the opening brief that the litigation privilege “is not a blanket immunity,” but, rather, is “conditional and limited.” App Br., pp. 21-22. In fact, as discussed above, the privilege is “absolute” where it applies. *See* p. 10 *supra*. Appellants’ point thus appears to be merely that courts should apply immunities with caution. For all the reasons discussed in section III.B *supra*, the Superior Court correctly applied the litigation privilege to bar all claims against the Attorneys in this case.

### 3. Section B.1.b of Appellants' Opening Brief.

Appellants argue in Section B.1.b of the opening brief that “[t]he immunity litigation privilege is not applicable to the Companies-Agents’ breach of their non-disclosure confidentiality contracts.” App. Br., p. 23. They put forth two arguments in support of this assertion. First, they argue that “to simply place documents with that [confidential] information in sealed envelopes when filing them in court . . . which [*sic*] is a purely administrative or secretarial procedural act and not a judicial act.” App. Br., p. 24. Second, they argue that statutory law protecting certain categories of confidential healthcare information supersedes the litigation privilege. App. Br., p. 26.

#### *a.* Appellant’s argument re: “secretarial” acts.

Appellants assert that the alleged failures by the Attorneys to file confidential information under seal constituted “administrative” or “secretarial” acts that do not come within the scope of the litigation privilege, relying for this proposition on *Mauro v. County of Kittitas*, 26 Wn. App. 538, 539, 613 P.2d 195 (1980). App. Br., pp. 24-25. *Mauro* concerned the proper scope of judicial immunity in a case where a county clerk apparently failed to deliver a court order withdrawing a warrant to the sheriff’s office. 26 Wn. App. at 538-39. The court found that the failure to deliver the order was “a purely ministerial act of a clerk,” rather

than a “judicial act.” *Id.* at 540. However, the distinction between ministerial and judicial acts is one that arises within the law of judicial immunity, not the doctrine litigation privilege as it applies to attorneys. To fall within the scope of litigation privilege, statements or actions need only be (1) made in the course of a judicial proceeding, and (2) pertinent to the relief sought. *McNeal*, 95 Wn.2d at 267. As discussed in Section III.B.3 *supra*, both requirements are met with respect to the allegations against the Attorneys.

In addition, Appellants’ argument in this section is very much in tension with the rest of their briefing, wherein they repeatedly accuse the Attorneys of conspiring to “destroy” Appellant Adil Lahrichi (or similar language). For instance, on pages 7-8 of Appellants’ brief, they describe the alleged failure to file documents under seal in the prior federal action as part of a “ruinous campaign against the LAHRICHS,” hardly a description of mere “administrative” or “secretarial” action.

Finally, even if *Mauro* were applicable, the act of filing pleadings and other documents with a court is more analogous to a “judicial” than to a “ministerial” action. For instance, *Mauro* distinguished a prior case in which a prosecutor’s failure to furnish statutorily required minimum term information to the parole board was found to be encompassed by the prosecutor’s “function as an advocate,” and thus immunized. *Id.* at 540.

Similarly here, filing pleadings with the U.S. District Court in the prior federal action clearly falls within the Attorneys' function as advocates in that action.

*b.*        Appellants' argument regarding statutory protection of confidential information.

Appellants rely upon *Wynn v. Earin*, 163 Wn.2d 361, 181 P.3d 806 (2008), for the proposition that statutory protection of certain categories of confidential healthcare information supersedes the litigation privilege. App. Br., p. 26. In *Wynn*, the Supreme Court held that “the Health Care Information Act [ch. 70.02 RCW] prevails over the common law witness immunity rule.” 163 Wn.2d at 373. The court based its holding on findings that “provisions in the Health Care Information Act show that the legislature intended to override the witness immunity rule,” and “the underlying policy concerns of the Act show that its provisions outweigh the witness immunity rule.” *Id.* at 371, 372.

Appellants' argument fails for the simple reason that the Complaint does not allege facts that, if proven, would constitute a violation of the Health Care Information Act. In addition, the Act provides a cause of action only against health care providers or facilities that disclose information in violation of the Act's provisions. *See* RCW

70.02.170. Thus, there is no basis to find that the privilege is superseded in this case.

**4. Section B.1.c of Appellants' Opening Brief.**

Appellants argue in Section B.1.c of the opening brief that the Superior Court erred by dismissing their claims for “Contract Fraud, Bad Faith, Malpractice, and Negligence.” App. Br., p. 28. Appellants’ argument in this section consists of assertions that the elements of each of these claims has been properly pleaded against the Respondents. App. Br., pp. 28-30. Specifically with respect to Appellants’ malpractice claim, they cite authority for the proposition that such claims may be brought by persons who were not clients of defendant attorneys. App. Br., pp. 30-31.

Neither argument is relevant to the Superior Court’s order dismissing Appellants’ claims under CR 12(b)(6). Whether or not Appellants’ have properly pleaded the elements of their claims, dismissal is appropriate because the claims pleaded, even if proven, would nevertheless be barred by the litigation privilege. Similarly, whether or not malpractice actions may be brought against attorneys by parties other than formerly represented clients of those attorneys is immaterial to whether such a malpractice cause of action would in any event be barred by the litigation privilege. *E.g., Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP*, 175 F.3d 14, 18 n.7 (1st Cir. 1999) (holding that litigation

privilege barred malpractice claim, and finding it therefore “unnecessary to consider the district court’s alternative basis for dismissing the malpractice claim, that [the plaintiff] has failed to identify any cognizable legal duty owed to him by the defendants.”).<sup>14</sup>

**5. Section B.1.d of Appellants’ Opening Brief.**

Appellants argue in Section B.1.d of the opening brief that the Superior Court erred by finding that the litigation privilege barred the claims alleged in the Complaint “without reviewing any of the statements and determining whether they were pertinent to the relief sought.” App. Br., p. 31. The Complaint provided sufficient information, however, for the Superior Court to properly conclude that the acts alleged against the Attorneys were pertinent to the relief sought in the prior federal action. For instance, allegedly confidential information produced in the course of the prior federal action that is included in filings with the court or used in depositions clearly “has some relation to the judicial proceedings in which it was used.” *Demopolis*, 59 Wn. App. at 110.

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<sup>14</sup> In any event, the Attorneys did not owe Appellant Adil Lahrichi a duty of care in the prior federal action. Under *Trask v. Butler*, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994), a duty is owed by an attorney to a non-client only if the non-client was an intended beneficiary of the attorney’s services. Appellant Lahrichi, as a party-opponent of the parties represented by the Attorneys in the prior federal action, was not such an intended beneficiary.

Moreover, to the extent review is hampered by the lack of a record from the prior federal action, this Court considers whether the purposes and policies of the privilege would be served by a finding of pertinency. *Id.* at 111-12. In *Demopolis*, an attorney was alleged to have falsely accused an opposing party of having a prior perjury conviction. *Id.* at 107. The accusation was allegedly made in a hallway outside the courtroom where the parties were engaged in trial. *Id.* The Court of Appeals determined that pertinency was a “close question,” and turned to the policies underlying the privilege, in particular the presence or absence of judicial safeguards. The court founds that such safeguards were absent because the defamatory statement was made under circumstances such that the trial court could not strike the statement or impose sanctions. *Id.* at 113.

In the present case, however, the judicial safeguards underpinning the privilege were present. Filing documents, conduct during depositions, and presentation of evidence are actions taken “subject to the supervision and discipline of the court.” *McNeal*, 95 Wn.2d at 265. Indeed, the Complaint states that the District Court, in fact, took remedial action in response to some of the actions alleged by “requiring many documents to be sealed and others to be redacted, including Defendants’ defamatory and offensive statements.” CP 18 (Complaint, ¶ 97). Unlike in *Demopolis*,

therefore, a finding of pertinency under the circumstances of this case would serve the purposes and principles underlying the privilege. *See also* Section III.B.4 *supra*.

**6. Section B.1.e of Appellants' Opening Brief.**

Appellants argue in Section B.1.e of the opening brief that the litigation privilege does not protect against “violations of the law.” App. Br., p. 33. The main thrust of Appellants’ argument in this section appears to be that violations of statutes – in particular ch. 9A.72 RCW – fall outside the scope of immunity. Chapter 9A.72 concerns criminal charges for perjury. A civil cause of action for perjury, however, is not recognized in Washington. *Dexter v. Spokane County Health District*, 76 Wn. App. 372, 375-76, 884 P.2d 1353 (1994).

Appellants also argue generally that litigation immunity should not be permitted “to trespass federal and state laws and the Constitution, and violate civil rights of individuals and due process under the premise of judicial proceedings,” relying upon *Lallas v. Skagit County*, 167 Wn.2d 861, 225 P.3d 910 (2009), and *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). App. Br., pp. 33-34. Both those cases address issues concerning the scope of judicial immunity. *Lallas*, like *Mauro* (see discussion, pp. 27-29 *supra*), concerned whether actions taken by a County employee acting (or, as in *Mauro*, failing to act) at the direction of

a judge constituted judicial action that was immunized. 167 Wn.2d at 864-66. The issue in *Taggart* was whether certain actions of a parole board were subject to quasi-judicial immunity by virtue of being functionally comparable to judicial action. 118 Wn.2d at 204-205. Neither decision should have any bearing on the proper resolution of the present case.

**7. Section B.1.f of Appellants' Opening Brief.**

Appellants argue in Section B.1.f of the opening brief that the entity Respondents, including Stoel Rives LLP, are not protected by the immunity. They assert that “Stoel Rives are [*sic*] liable for the [Attorneys]’ wrongful actions because the [Attorneys] are their agents and employees. Stoel Rives had the duty to supervise and control the [Attorneys] and stop them from committing their wrongful actions.” App. Br., p. 39. Appellants fail to set forth any independent source of liability for Stoel Rives, however, and the Complaint fails to allege any wrongful actions by the firm apart from the actions alleged to have been committed by its employees, the Attorneys. For all the reasons discussed in section III.B *supra*, the Superior Court properly dismissed all claims against the Attorneys. Accordingly, all claims were properly dismissed against Stoel Rives, as well.

**8. Section B.3 of Appellants' Opening Brief.**<sup>15</sup>

Appellants argue in Section B.3 of the opening brief that the Superior Court erred by stating that Appellants' remedy, if any, is with the U.S. District Court that presided over the prior federal action. App. Br., p. 43. Appellants also argue in this section that the Superior Court erred by dismissing the claims of Appellant Adil Lahrichi's family, who were not parties to the prior federal action. App. Br., p. 45.

Appellants' first argument is based on the following comment by the Superior Court to Appellant Adil Lahrichi at the hearing on motions to dismiss:

Sir, I listened to you. I completely understand that you're upset. I think your remedy is with Judge Coughenour. However, maybe – maybe the time has passed, I don't know, but I don't think your remedy is bringing a new lawsuit. I think this is squarely in the litigation privilege and immunity. It's exactly why that immunity applies, so that you don't get a whole second lawsuit that is derivative from it.

RP 30. As that quotation makes clear, the Superior Court did not base its holding on a finding that Appellants have a remedy available to them in U.S. District Court, as Appellants suggest. Rather, the court concluded that Appellants' remedy, if any, was not to bring a new lawsuit. As the

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<sup>15</sup> The arguments set forth in Section B.2 of the opening brief concern grounds for dismissal of Appellants' claims against other Respondents, and are not addressed here.

court correctly noted, “[i]t’s exactly why that immunity applies.” RP 30. Appellants nevertheless apparently believe that they must be afforded a remedy in some court for the claims they allege against the Attorneys. That is incorrect. The effect of an “absolute” immunity is to bar claims, regardless of whether those claims would otherwise be meritorious. *McNeal*, 95 Wn.2d at 267.

Appellants’ alternative argument in Section B.3 of the opening brief is that the Superior Court “erroneously granted immunity to Respondents for harming other Appellants, including minors, who were not even parties to Lahrichi’s federal discrimination lawsuit.” App. Br., p. 45. The other Appellants in addition to Adil Lahrichi are his family members. It is immaterial for purposes of applying the litigation privilege that only Adil Lahrichi himself was a party to the prior federal action because Appellants make no attempt to differentiate themselves with respect to the harm allegedly suffered or the actions of the Attorneys that allegedly caused such harm. The only allegation concerning the other Appellants is the alleged failure to file confidential information under seal in the prior federal action, i.e., the same action that is alleged to have harmed Appellant Lahrichi himself. As discussed in Section III.B *supra*, this, and all, wrongful acts alleged fall within the scope of the privilege.

Appellants made a similar argument in the U.S. District Court in opposition to Appellants' motion for preliminary injunction. Under the relitigation exception to the Anti-Injunction Act, parties in privity with a party to a prior lawsuit are bound by the preclusive effects of the prior lawsuit if their interests are "so similar to a party's that that party was his virtual representative in the prior action." CP 149 (U.S. District Court Order, p. 7). Although the U.S. District Court denied the Attorneys injunctive relief, it found that there was privity between Adil Lahrichi and his family members:

Lahrichi has made no effort to differentiate the harms that he believes he suffered personally from those of his family, and often lumps all plaintiffs together. The factual basis for the harms complained of stems from the attorneys' conduct in litigating the prior lawsuit – a lawsuit prosecuted only by Lahrichi – and is identical for all state-court plaintiffs.

The same is true in this case. Appellants have not sought to differentiate themselves with respect to the harms alleged or the factual allegations pleaded against the Attorneys. There is no reason to conclude that the litigation privilege immunizes the Attorneys against allegations that they filed confidential information unsealed with respect to one Appellant, but not with respect to the others.<sup>16</sup>

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<sup>16</sup> In this section of their brief, Appellants assert, as a legal proposition, that "[t]he litigation privilege does not afford immunity [continued . . .]

**9. Section B.4 of Appellants' Opening Brief.**

Appellants argue in Section B.4 of the opening brief that “The LAHRICHIs were deprived of discovery, which is essential for The LAHRICHIs to amend their complaint. RP 16, at lines 10-11; RP 25 at lines 13-23. There are several matters regarding Respondents’ actions, which occurred during, outside, and after the discrimination lawsuit that require depositions of Respondents.” App. Br., p. 47. In the citations to the Report of Proceedings contained in that quotation, Appellant Adil Lahrichi argued to the Superior Court as follows:

I have not submitted (Inaudible) for everything that has happened, it would be quite a huge complaint.

. . . .

And in drafting my complaint, your Honor, it might not have been the best complaint that has ended up in this court. I have done the best effort that I could with the fact that I know. I put a lot of perspective to the court to understand the process. I’m not such person who’s been trained in law to be able to figure out which statement how best to convince the court.

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[. . . continued from previous] to Respondents for injuring non-parties to the litigation,” citing to *McNeal*, 95 Wn.2d at 268. App. Br., p. 45. *McNeal* does not support the proposition for which it is there cited, however. The portion of the case cited contains a discussion as to whether the legislature intended to create a cause of action for violation of RCW 4.28.360, which provides that complaints filed in personal injury cases shall not contain a statement of damages, a question that is not at issue in this case.

All I'm asking you today is permission to be able to move forward and to plead my case, whatever the outcome would be.

RP 16, 25.

As an initial matter, the proper mechanism for including additional claims in a complaint is via a motion to amend under CR 15. Appellants never moved to amend below. More importantly, however, as Appellants' briefing makes clear, they were not requesting permission simply to amend. Rather, they requested permission to conduct discovery in order to uncover additional facts that they hoped would allow them to amend the Complaint. App. Br., p. 47. ("The LAHRICHIs were deprived of discovery, which is essential for The LAHRICHIs to amend their complaint."). Appellants apparently believe that discovery, in particular depositions of the Attorneys, will give rise to cognizable claims. App. Br., p. 47. In order to survive a motion under 12(b)(6), however, Appellants must be able to state a claim upon which relief can be granted without the benefit of discovery. Appellants have no right to put the Attorneys through burdensome depositions (and other discovery) in the hopes that they will thereby uncover a good faith basis on which to plead their case.

**10. Section B.5 of Appellants' Opening Brief.**

Appellants argue in Section B.5 of the opening brief that the Superior Court erred by dismissing their claims as barred by the litigation

privilege because the Attorneys' "credibility is at issue," and "[w]hen the credibility of a witness is at issue, dismissal of the case is improper."

App. Br., p. 48. In support of this argument, Appellants claim that the Attorneys "submitted a false affidavit to claim improper service." *Id.* The affidavit referred to is a declaration by Douglas Bolter, an Office Clerk in the mail room of Stoel Rives, LLP, submitted by the Attorneys in support of their motion to dismiss under 12(b)(5).

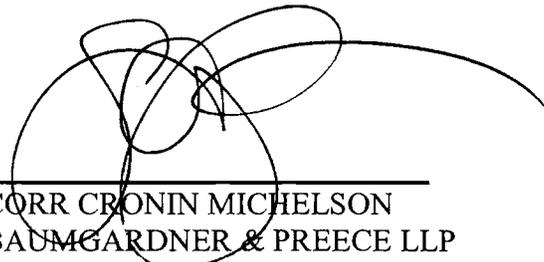
Appellants' accusation that the declaration was "false" is without basis. Mr. Bolter recounted therein that two large envelopes were hand-delivered to the Stoel Rives mail room on July 20, 2009, and were subsequently routed to one of the Attorney Respondents and to the managing partner of the firm. CP 190-191. The Attorneys' argued, correctly, that service on Stoel Rives through its mailroom is not proper under RCW 4.28.080(9). CP 185-186. Appellants filed a declaration in response by an individual named Yussuf Ali Ahmed stating that service of the summons and complaint was hand-delivered to the personal assistant of Stoel Rives' managing partner on August 11, 2009. CP 264-65. There is no contradiction between the declarations of Mr. Bolter and Mr. Ahmed. Rather, it appears that service was attempted on two separate occasions: once through the mailroom by unknown persons and once by Mr. Ahmed. Certainly, there is nothing to suggest that Mr. Bolter's affidavit was

“false.” Moreover, the Attorneys withdrew the motion under CR 12(b)(5) when Appellants came forward with declarations of service. RP 7-8. The Court thus did not rule on the motion, and did not consider the declaration of Mr. Bolter in ruling on the Attorneys motion to dismiss under CR 12(b)(6).

#### **IV. CONCLUSION**

For all the foregoing reasons, the Attorneys respectfully request that this Court affirm the Superior Court’s dismissal under CR 12(b)(6).

Respectfully submitted this 8th day of November, 2010,

A handwritten signature in black ink, appearing to be 'W. Cronin', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

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Stoel Rives, LLP

No. 65144-7-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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ADIL LAHRICHI, REGINE CSIPKE, T. L., M. L., Y. L., A. L., Y. L.,  
AZIZA BENZAOUZ,

Appellants,

v.

KEELIN A. CURRAN, ZAHRAA V. WILKINSON, MOLLY M.  
DAILY, STOEL RIVES, LLP, THOMAS D. MINO, TIMOTHY  
LONDERGAN, TIMOTHY PARKER, RALUCA DINU, DAN JIN,  
HENRY HU, HANNWEN GUAN, GIGOPTIX, and MICROVISION

Respondents.

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**APPENDIX OF NON-WASHINGTON AUTHORITIES  
SUPPORTING  
BRIEF OF RESPONDENTS KEELIN A. CURRAN, ZAHRAA V.  
WILKINSON, MOLLY M. DAILY AND STOEL RIVES, LLP**

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**ORIGINAL**

CASES

*Barker v. Huang*, 610 A.2d 1341 (Del. 1992)

*Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP*, 175 F.3d 14  
(1st Cir. 1999)

*Moses v. McWillimas*, 379 Pa. Super. 150, 549 A.2d 950 (1988)

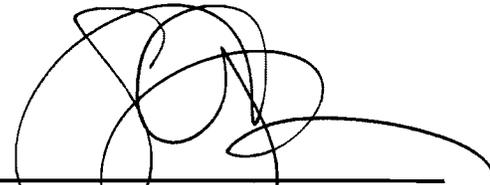
OTHER AUTHORITIES

Restatement (Second) of Torts § 586

Restatement (Second) of Torts § 588

T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for  
Litigation Lawyers*, 31 PEPP. L.REV. 915 (2004)

Respectfully submitted this 8th day of November, 2010,



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Zahraa V. Wilkinson, Molly M. Daily and  
Stoel Rives, LLP

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Defendants Keelin A. Curran, Zahraa V. Wilkinson, Molly M. Daily and Stoel Rives, LLP herein.

On November 8, 2010, I caused a true and correct copy of the foregoing document to be (1) delivered via legal messenger for filing with the Clerk of Court; and (2) duly served on the following parties via U.S. Mail, postage prepaid:

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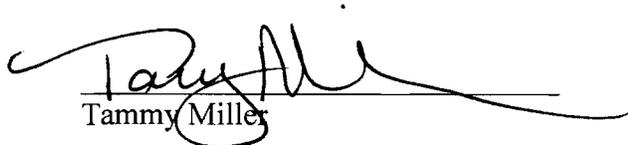
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I declare under penalty of perjury under the laws of the State  
of Washington that the foregoing is true and correct.

DATED: November 8, 2010 at Seattle, Washington.

  
Tammy Miller



LEXSEE 610 A2D 1341

**ELLEN BARKER, Plaintiff Below, Appellant, v. PETER S. HUANG and  
INSURANCE CORPORATION OF AMERICA, Defendants Below, Appellees.**

**No. 103, 1991**

**SUPREME COURT OF DELAWARE**

*610 A.2d 1341; 1992 Del. LEXIS 231*

**December 12, 1991, Submitted**

**June 11, 1992, Decided**

**SUBSEQUENT HISTORY:** **[\*\*1]** Rehearing Denied July 27, 1992. Mandate July 27, 1992. Released for Publication September 14, 1992.

**PRIOR HISTORY:** Court Below: Superior Court of the State of Delaware in and for New Castle County. C. A. No. 90C-MY-250

**DISPOSITION:** Affirmed in Part, Reversed in Part, and Remanded.

**COUNSEL:** Bruce L. Silverstein (Argued) and Ben T. Castle of Young, Conaway, Stargatt & Taylor, Wilmington, for Plaintiff Below-Appellant.

Victor F. Battaglia (Argued) and Francis S. Babiarz of Biggs & Battaglia, Wilmington, for Defendant Below-Appellee, Peter S. Huang, M.D.

F. Alton Tybout (Argued) of Tybout, Redfearn & Pell, Wilmington, for Defendant Below-Appellee, Insurance Corporation of America.

**JUDGES:** Before HORSEY, MOORE and HOLLAND, Justices.

**OPINION BY:** HORSEY

**OPINION**

**[\*1342]** HORSEY, Justice:

This is an appeal from Superior Court's grant of summary judgment in favor of defendants, Dr. Peter S. Huang ("Huang") and Insurance Corporation of America ("ICA"). The plaintiff, Ellen Barker ("Barker"), filed a complaint in Superior Court, seeking damages for defamation of character, libel, slander, tortious invasion of privacy, wrongful use of civil proceedings, abuse of process, intentional infliction of emotional distress, outrageous **[\*\*2]** conduct and civil conspiracy to engage in each of the foregoing torts. The defendants moved for summary judgment and for dismissal, on grounds of absolute privilege. Accompanying her response to defendants' motions, Barker filed a supporting affidavit, alleging statements by Huang which would not be protected by an absolute privilege. We affirm Superior Court's decision finding meritless Barker's claims against Huang as originally stated in her complaint, and Barker's claims against ICA. However, we find Superior Court to have erred by failing to properly consider Barker's affidavit as a motion to amend her complaint, raising new claims against Huang to which Huang has asserted no defense. To the extent that Barker's affidavit makes a claim of defamation arising from statements made by Huang unprotected by an absolute privilege, summary judgment was inappropriate. We therefore reverse in part, and remand.

**[\*1343]** *Background*

In June 1987, defendant Huang, a Wilmington, Delaware, physician, was sued in Superior Court by four former patients, charging him with various intentional torts arising from an alleged series of sexual assaults. *Rochen v. Huang*, C.A. No. 87C-JN-96 ("the [\*\*3] *Rochen* litigation"). Defendant ICA was at that time Huang's medical liability insurance carrier. Defendant Huang, represented by an attorney provided by ICA, later filed a counterclaim against the *Rochen* plaintiffs, alleging that they had conspired to falsely accuse Huang of sexual assault. Barker was not a party to the *Rochen* litigation. However, in support of defendant's counterclaim, Huang alleged in a deposition that Barker had conspired with the *Rochen* plaintiffs against Huang. The *Rochen* pleadings were ordered to be placed under seal on July 15, 1987. That order was vacated, however, on September 14, 1988. Shortly thereafter, on September 25 and 27, 1988, a Wilmington newspaper, *The News Journal*, published two articles concerning the *Rochen* suit and Huang's counterclaim implicating Barker. Both articles referred to Huang's allegation, as contained in his pleadings and deposition testimony, that Barker was conspiring against Huang. One article reported that Huang claimed Barker was carrying out a "vendetta" against him because she was bitter over his having stopped a medical study that she was coordinating with him. The article also reported [\*\*4] that Huang claimed that Barker had slept with Huang in an effort to persuade him to continue the study. Similar articles in other newspapers followed, as did radio and television broadcasts. Shortly before the *Rochen* trial was to begin, the court, on Huang's motion, dismissed the counterclaim with prejudice. Barker filed this suit in May 1990.

On July 10, 1990, Huang, without answering the complaint, filed a motion for summary judgment under Superior Court Rule 56(b). Huang asserted that any statements he had made regarding Barker had been made exclusively during the course of legal proceedings, in the course of the *Rochen* counterclaim, and were therefore protected by an "absolute privilege." Nearly contemporaneously, ICA filed a motion under Rule 12(b)(6) to dismiss the complaint for failure to state a claim.

Shortly thereafter, when Barker served Huang with interrogatories, Huang moved for a protective order barring discovery. Huang asserted that discovery should be postponed until resolution of his motion for summary judgment, and that Barker's interrogatories requested

material protected by the attorney-client privilege. On July 20, 1990, defendant Huang filed a pleading [\*\*5] styled as an amended motion for dismissal and summary judgment, in which he restated his prior motion but sought in the alternative to dismiss the complaint for failure to state a claim for relief.

On August 29, 1990, Barker filed a "Consolidated Response to Defendants' Pending Motion for Dismissal, Summary Judgment and for a Protective Order," with supporting affidavit, ostensibly to counter Huang's defense of absolute privilege. In her affidavit, Barker averred (arguably for the first time)<sup>1</sup> that Huang had, "on at least one occasion," made numerous defamatory statements about plaintiff while being interviewed by a newspaper reporter. Barker alleged that these interviews "occurred wholly outside of the course of any judicial proceeding," and that many of Huang's statements were "wholly unrelated to any issue involved in any judicial proceeding."

1 Barker argues on appeal that the complaint provided sufficient notice that Huang made statements which would not be subject to the defense of absolute privilege. Her complaint, however, makes no allegation that Huang gave interviews to the news media or that Huang made any defamatory statements other than in the course of the counterclaim. See I.B. below.

[\*\*6] On October 30, 1990, Superior Court held a recorded office conference on the defendants' then pending motions for dismissal, summary judgment, and a protective order. Barker there asserted that a Chinese newspaper had published, in Chinese, an interview with Huang, portions of which were later republished by the *News Journal*. Barker argued that the information in the Chinese newspaper was not derived from [\*1344] court records; Barker implied that this was the interview to which she had referred in her earlier affidavit.

Later, on January 2, 1991, Barker served Huang with a request for admission. Attached to the request were three pages of text printed in Chinese, from an October 1988 issue of a publication called the *World Journal*. Plaintiff requested that Huang admit that the articles "accurately report the substance of two interviews of Huang that were conducted by the author of the two articles." Huang objected to the request and declined to respond on the ground that the request was irrelevant and vague.

By order dated February 22, 1991, the Superior Court granted defendants' motions for summary judgment 2 on all of Barker's claims. The court found that the defendant Huang's [\*\*7] motions for protective orders were therefore moot. Barker then docketed this appeal.

2 The Superior Court treated defendants' motions as being for summary judgment because Barker's response raised materials outside the pleadings, *i.e.*, her affidavit. Super. Ct. Civ. R. 12(b).

### I. Barker's Defamation Claims

Barker first contends that Superior Court erred in granting summary judgment with respect to her defamation claims against Huang. There are two parts to this claim, which must be examined separately. First, Barker argues that the court's grant of summary judgment of her claim that Huang made defamatory statements during the course of the *Rochen* litigation was in error because the court failed to give her an opportunity through discovery to establish facts in support of the applicability of a "sham litigation" exception to Huang's defense of absolute privilege. Second, Barker argues that the court's grant of summary judgment of her claim that Huang made defamatory statements wholly outside the judicial [\*\*8] context was in error because Huang had failed to come forward with any denial of having made such statements. Where Superior Court grants summary judgment, "the scope of our review is . . . unqualified." *Merrill v. Crothall-American*, Del. Supr., A.2d , No. 297, 1991, Walsh, J. (April 21, 1992).

#### A. Statements Allegedly Made By Huang in the Course of the *Rochen* Litigation

Superior Court found that the defense of absolute privilege was plainly applicable to the defamatory statements allegedly made by Huang in the course of the *Rochen* litigation, and that Barker had failed to "present an exceedingly strong factual showing [necessary] in order to defeat the operation of the privilege."

Barker argues that the court erred in placing upon her, as the non-moving party, a burden of coming forward with evidence in support of the applicability of the "sham litigation" exception when Huang, the moving party, had failed to come forward with any denial. Barker argues in the alternative that even if a burden of production had correctly shifted to her, that burden

should have been excused by her lack of opportunity to undertake discovery. *See Mann v. Oppenheimer & Co., Del. Supr., 517 A.2d 1056 (1986).* [\*\*9]

Huang responds that no "sham litigation" exception to the absolute privilege exists under the law of Delaware; he argues, in the alternative, that if such an exception does exist, Barker failed to carry the appropriately heavy burden of coming forward with specific facts to establish a material question of fact as to whether Huang's *Rochen* counterclaim was a sham.

\* \* \*

Generally, defamation is subject to liability. *Tatro v. Esham, Del. Supr., 335 A.2d 623, 625 (1975)*. However, affirmative defenses to a prima facie case exist for statements made in certain contexts where there is a particular public interest in unchilled freedom of expression. *See Read v. News-Journal Co., Del. Supr., 474 A.2d 119, 120 (1984)* (qualified privilege for publication of fair reports of judicial proceedings). *See also Dairy Stores, Inc. v. Sentinel Publishing Co., N.J. Supr., 516 A.2d 220 (1986); Irwin v. Cohen, Conn. Supr., [\*1345] 490 A.2d 552 (1985); Supry v. Bolduc, N.H. Supr., 293 A.2d 767 (1972)*. One such defense is the "absolute privilege." *Tatro, 335 A.2d at 625-626*. The absolute [\*\*10] privilege is a common law rule, long recognized in Delaware, that protects from actions for defamation statements of judges, parties, witnesses and attorneys offered in the course of judicial proceedings so long as the party claiming the privilege shows that the statements issued as part of a judicial proceeding and were relevant to a matter at issue in the case. *Klein v. Sunbeam Corp., Del. Supr., 94 A.2d 385, 392 (1953)*. *See Hoover v. Van Stone, D. Del., 540 F. Supp. 1118, 1121 (1982); Nix v. Sawyer, Del. Supr., 466 A.2d 407, 410 (1983); Short v. News Journal, Del. Supr., 212 A.2d 718, 719 (1965)*. However, statements made outside of the course of judicial proceedings, such as those made during a newspaper interview concerning judicial proceedings, are not accorded the protection of the absolute privilege. *Id.*

Barker's argument for the existence of a sham litigation exception under Delaware law is premised on the Superior Court's opinion in *Nix v. Sawyer, Del. Supr., 466 A.2d 407 (1983)*. In *Nix*, the foundation of the plaintiff's defamation claim was a verified complaint [\*\*11] and supporting sworn affidavits which had been filed by the *Nix* defendants in another action. *466 A.2d at*

410. The defendants countered by filing a motion to dismiss based on the absolute privilege. The plaintiffs urged the *Nix* court "to adopt an exception in cases where the lawsuit advanced is proven to be a sham," citing for this proposition the case of *Cooper v. Armour*, 2d Cir., 42 F. 215 (1890). *Id.* at 411. The *Nix* court held that the plaintiffs there had failed to make "an exceedingly strong factual showing [necessary] in order to defeat operation of the privilege." The *Nix* court did *not* hold, however, that a sham litigation exception exists in Delaware. Instead, it merely stated in effect that, *even if* such an exception to the absolute privilege exists, it was not applicable to the facts then before the court. Our reading of *Nix* thus indicates that the court did not, as Barker claims, affirmatively adopt the exception. In fact, the *Nix* court even pointed out that plaintiffs' reliance on *Cooper* was questionable when it noted that "the proposition for which plaintiffs cite the [*Cooper*] decision, [\*\*12] is at best, only implied." *Id.*, at 411, n.5.

The well-recognized policy supporting the absolute privilege militates against creation of a sham litigation exception. *See Read*, 474 A.2d at 120.

The purpose served by the absolute privilege is to facilitate the flow of communication between persons involved in judicial proceedings and, thus, to aid in the complete and full disclosure of facts necessary to a fair adjudication. To accomplish this goal, the privilege protects judges, parties, attorneys, witnesses and other persons connected with litigation from the apprehension of defamation suits, thus permitting them to speak and write freely, without undue restraint. Moreover, the protection afforded by the privilege is absolute; so long as the statement is pertinent to, and made in the course of, a judicial proceeding, *even a showing of malice* will not divest the statement of its immune status.

*Hoover v. Van Stone*, D. Del., 540 F. Supp. 1118, 1122 (1982) (emphasis added) (citations omitted). As the *Nix* court pointed out, "the interest in encouraging a litigant's unqualified candor as it facilitates the search for truth is deemed [\*\*13] so compelling that the privilege attaches even where the statements are offered maliciously or with knowledge of their falsity." 466 A.2d at 411. *See Butz v. Economou*, 438 U.S. 478, 512-13, 98 S.Ct 2894, 2913-14, 57 L.Ed.2d 895, 919-20 (1978); *Petyan v. Ellis*, Conn. Supr., 510 A.2d 1337 (1986); *Circus Circus Hotels, Inc. v. Witherspoon*, Nev. Supr., 657 P.2d 101 (1983).

To allow claims of defamation in the context of judicial proceedings to proceed to costly discovery in an attempt to ferret out facts purporting to show a sham nature to the litigation would largely defeat the purpose of the privilege. Moreover, sufficient sanctions already exist to deter and punish frivolous litigation. *See, e.g.*, Super. Ct. Civ. R. 11. We therefore hold that no "sham litigation" exception to the defense [\*\*1346] of absolute privilege exists under the law of Delaware. Other states have similarly held. *See, e.g.*, *Keys v. Chrysler Credit Corp.*, Md. Ct. App., 494 A.2d 200, 204 (1985) ("even the intentional and wrongful bringing or maintaining of litigation will not destroy the absolute [\*\*14] privilege that attends the litigation"). Barker's claim that Superior Court erred when it summarily rejected her reliance upon the "sham litigation exception" for failing to present an "exceedingly strong factual showing to defeat operation of the privilege" is therefore moot. *See Irwin v. Cohen*, Conn. Supr., 490 A.2d 552, 555 (1985).

#### B. Statements Allegedly Made By Huang Outside the *Rochen* Litigation

However, this holding does not dispose of the matter. Barker also argues on appeal that Superior court erred in granting summary judgment of her claims that Huang made defamatory statements wholly outside of judicial proceedings. As to such claims, Barker argues, no sham litigation exception is necessary, because the defense of absolute privilege is inapplicable by its terms. Huang responds, however, that Barker never fairly asserted below any claims to which the defense of absolute privilege would be inapplicable, and cannot retroactively defeat summary judgment by asserting such claims for the first time on appeal. We must therefore first determine whether in fact Barker ever asserted any claims below regarding allegedly defamatory statements made [\*\*15] *outside* the judicial context.

Huang contends that Barker's complaint gave him notice only of claims regarding statements made in the course of litigation. Huang further contends that Barker's affidavit contained only "vague references to non-judicial statements" and failed to put him on notice of any such claims, in the absence of a request by Barker to amend her complaint. Barker, on the other hand, contends that her complaint can fairly be read to allege that Huang made defamatory statements outside of judicial proceedings, such as would not be covered by the absolute privilege. We find neither party's position to be

well taken.

After careful examination of Barker's complaint, we find nothing in it from which one could fairly infer that plaintiff complained of any defamatory statements made outside the judicial context. The newspaper articles quoted in Barker's complaint, which are alleged to be the defamatory publication; each by their own words profess to be reports of court documents, rather than of direct interviews. One article even notes that "Huang has declined comment on the case." We conclude that Barker's complaint asserts against Huang only defamation claims [\*\*16] arising from litigation and thus covered by the defense of absolute privilege. The remaining question then, is the effect of Barker's affidavit.

In *Johnson V. Mateer*, the Court of Appeals for the Ninth Circuit examined a District Court's grant of summary judgment against a plaintiff asserting civil rights violations by state employees. 9th Cir., 625 F.2d 240 (1980). The District Court had found that the plaintiff's vague complaint had only alleged claims which had been previously adjudicated and which were therefore barred by collateral estoppel. The plaintiff had raised other claims in an affidavit filed in response to the defendants' motion for summary judgment. The Court of Appeals reversed, stating:

[Plaintiff's] failure to articulate the basis for his civil rights claim at the pleading stage should not have been fatal to his claim, as his affidavit filed in opposition to the motion for summary judgment made factual allegations regarding property deprivation and harassment . . . . The district court should have construed the affidavit as a request pursuant to *rule 15(b) of the Federal Rules of civil procedure* to amend the pleadings out of time and should [\*\*17] have determined whether, based on the contents of the affidavit read with the complaint, triable issues of fact existed.

*Id.* at 242. See also *Rossiter v. Vogel*, 2d Cir., 134 F.2d 908, 912 (1943) ("where facts appear in affidavits upon motion for a summary judgment which would justify an [\*1347] amendment of the pleadings, such amendment should not be prevented by the entry of a final judgment"); 6 Moore's Federal Practice P56.10. Superior Court Civil Rule 15 is precisely the same as its counterpart in the Federal Rules. *Filliben v. Jackson*, Del. Supr., 247 A.2d 913 (1968).

With these authorities in mind, we examine Barker's affidavit. The affidavit states, in part:

. . . On at least one occasion after May 25, 1988; Huang was interviewed (at least twice) by a newspaper reporter, and in the course of the interviews, Huang made numerous false and defamatory statements about me. Not only were the interviews events that occurred wholly outside of the course of any judicial proceeding, but many of Huang's false and defamatory statements about me were wholly unrelated to any issue involved in any judicial proceeding.

Huang's characterization [\*\*18] to the contrary notwithstanding, we find this portion of Barker's affidavit to have fairly stated a claim that Huang made defamatory statements outside of the judicial context. See *Diamond State Tel. Co. v. University of Delaware*, Del. Supr., 269 A.2d 52, 58 (1970); *Klein v. Sunbeam Corp.*, Del. Supr., 94 A.2d 385, 391-92 (1953); *Pfeifer v. Johnson Motor Lines, Inc.*, Del. Super., 89 A.2d 154, 156-57 (1952).

"The purpose of summary judgment is to avoid' the delay and expense of a trial where the ultimate fact finder, whether judge or jury, has nothing to decide. Thus, entry of summary judgment is proper only where there are no material factual disputes." *Merrill v. Crothall-American, Inc.*, Del. Supr., A.2d , No. 297, 1991, Walsh, J. (April 21, 1992) (citation omitted). The Superior Court treated the above quoted passage from Barker's affidavit as merely an attempt to provide facts to holster the claims made in her complaint regarding defamatory statements made in the course of litigation. However, Barker's affidavit, fairly read, alleged new claims, i.e., that Huang had made defamatory statements outside [\*\*19] of the judicial context. *Johnson*, 625 F.2d 240. <sup>3</sup> Huang's only asserted defense, the absolute privilege, would not apply to such statements. *Hoover v. Van Stone, D. Del.*, 540 F. Supp. 1118, 1123 (1982). <sup>4</sup> Accordingly, Barker's un rebutted affidavit was sufficient to establish the existence of a material issue of fact, and Superior Court's grant of summary judgment of Barker's claims of defamatory statements made outside the judicial context was in error. *Id.* On remand, we direct Superior Court to grant Barker leave to amend her complaint to include these claims as made in her affidavit.

3 We note that defendant Huang, but not ICA, confused the proceedings below by filing a Rule

56 motion in response to the complaint, when the more appropriate motion was to dismiss under Rule 12(b) for failure to state a claim. Huang's incongruous and untimely motion, before answer, precipitated plaintiff's affidavit, and thus a disorderly record.

4 In *Hoover*, the Court noted the rationale for limiting the absolute privilege to the judicial context:

Dissemination of the contents of a complaint to the public or to third parties unconnected with the underlying litigation, . . . generally is not sufficiently related to the judicial proceeding to give rise to the privilege. Thus, distribution of the complaint to the news media, or to members of the defendants' trade, will not constitute a privileged occasion. This approach is consistent with the public policy underpinning the privilege itself. Allowing defamation suits for unqualified disclosure of defamatory statements to the news media or to competitors or customers of a party ordinarily will not inhibit the full exposition of facts necessary for an equitable adjudication.

540 F. Supp. at 1123.

#### [\*\*20] II. Barker's Non-Defamation Claims

Barker also argues that Superior Court abused its discretion in reaching *sua sponte* her claims of torts other than defamation, libel and slander and that having reached these claims, Superior Court erred in granting summary judgment on her claims of invasion of privacy and intentional infliction of emotional distress.

Huang's motion for summary judgment or dismissal, as amended, asserted only the affirmative defense of absolute privilege. Barker argues that the absolute privilege, regardless of whether it stands as a bar to her defamation claims, does not bar her [\*1348] other tort claims. Superior Court agreed, ruling that the absolute privilege would not extend to *all* of Barker's tort claims.<sup>5</sup> However, the court granted summary judgment *sua sponte* with respect to these claims, concluding that Barker had failed to make the required allegations necessary to sustain these torts.

5 The court stated:

. . . Plaintiff argues that . . . the affirmative defense of absolute privilege would not apply to extinguish plaintiff's claims for relief based on [non-defamation] torts. This would be true if plaintiff had made allegations of tortious conduct amounting to the alleged torts, but she did not.

[\*\*21] A. Superior Court's Exercise of Discretion in Reaching the Merits of Barker's Non-Defamation Claims, *Sua Sponte*

We first examine Barker's claim that Superior Court abused its discretion in reaching her non-defamation claims.

Barker's complaint simply alleges facts relating to the *Roche* counterclaim coupled with a laundry list of legal theories:

By their wrongful acts complained of herein, Defendants Huang and ICA are liable to plaintiff for defamation of character, libel, slander, tortious invasion of her privacy, wrongful use of civil proceedings, abuse of process, intentional infliction of emotional distress, the tort of outrageous conduct, and civil conspiracy to engage in each and every one of the foregoing torts.

Huang's hybrid motion, denominated for summary judgment and/or for dismissal for failure to state a claim, not objected to, generally asserted that plaintiff's complaint failed to plead a claim for relief. ICA's more classic motion, simply to dismiss, asserted that the complaint failed to state a cause of action. The two motions thus were sufficient notice to plaintiff that all of her claims were called into question. Moreover, it is appropriate for [\*\*22] a court to act *sua sponte* in the interests of judicial economy. *See Bank of Delaware v. Claymont Fire Company No. 1, Del. Supr., 528 A.2d 1196, 1199 (1987)*. Therefore we decline to find Superior Court to have abused its discretion in reaching the merits of Barker's non-defamation tort claims, *sua sponte*.

B. Superior Court's Resolution of Barker's Non-Defamation Claims on their Merits

In determining the merits of Barker's non-defamation claims, Superior Court found the absolute privilege not a bar to such claims, but granted Huang and ICA summary judgment on all of them. Applying a Rule 12(b)(6)-style analysis, the court found that Barker had failed to allege sufficient facts to state a claim under any of her asserted

theories. On appeal, Barker apparently abandons her claim below of wrongful use of civil proceedings, abuse of process and conspiracy, and contends only that Superior court committed legal error in granting summary judgment of her claims of invasion of privacy and intentional infliction of emotional distress. Here again, our review of such claims is *de novo*. *Merrill*, A.2d at .

#### 1. Barker's Non-Defamation Claims Regarding Statements [\*\*23] Allegedly Made by Huang in the Course of the *Rochen* Litigation

As a preliminary matter, we must first examine Superior Court's holding that the defense of absolute privilege would not apply to Barker's non-defamation claims.

In *Hoover v. Van Stone*, the United States District Court for the District of Delaware, interpreting Delaware law, granted summary judgment of the defendants' counterclaim. *D. Del.*, 540 F. Supp. 1118, 1120 (1982). The counterclaim charged plaintiff with defamation, tortious interference with contractual relationships, abuse of process, and barratry, arising from plaintiff's disclosure to certain of defendants' customers of the existence of the suit and details underlying the complaint. The court held that the absolute privilege admitted of a broader application than merely those actions denominated solely in defamation. The court stated:

Defendants argue that even if the absolute privilege bars an action for defamation, it does not preclude the prosecution [\*1349] of the three other counts contained in the counterclaim. These counts, however, are all predicated on the very same acts providing the basis for the defamation claim. Application [\*\*24] of the absolute privilege solely to the defamation count, accordingly, would be an empty gesture indeed, if, because of artful pleading, the plaintiff could still be forced to defend itself against the sage conduct regarded as defamatory. Maintenance of these kindred causes of action, moreover, would equally restrain the ability of judges, parties, counsel and witnesses to speak and write freely during the course of judicial proceedings. As one court has observed: "if the policy, which in defamation actions affords an absolute privilege or immunity to statements made in judicial and quasi-judicial proceedings is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label."

*Id.*, at 1124 (citations omitted) (quoting *Ranier's Dairies v. Raritan Valley Farms, N.J. Super.*, 117 A.2d 889, 895 (1955). See *Deaile v. General Telephone Co. of California*, 115 Cal. Rptr. 582 (1974). See also *Restatement (Second) of Torts*, § 652F (privileges to publish defamatory matter also apply to the tort of invasion of privacy); § 46, comment g (conduct, otherwise [\*\*25] extreme and outrageous, may be privileged).

We find that Superior Court's ruling, limiting the application of the absolute privilege to Barker's defamation claim, was erroneous as a matter of law. The absolute privilege would be meaningless if a simple recasting of the cause of action from 'defamation' to 'intentional infliction of emotional distress' or 'invasion of privacy' could void its effect. *Hoover*, 540 F. Supp. 1118. However denominated, Barker's claim is that Huang intentionally made derogatorily false statements about her, and that she has been harmed thereby. To the extent that such statements were made in the course of judicial proceedings, they are privileged, regardless of the tort theory by which the plaintiff seeks to impose liability. We therefore hold that Barker's claims of invasion of privacy and intentional infliction of emotional distress, to the extent that they complain about statements made by Huang during the course of the *Rochen* litigation, are barred by the absolute privilege. *Id.* Barker's claim, that Superior Court erred in granting summary judgment of her claims that Huang made statements in the judicial context which invaded [\*\*26] her right to privacy and constituted an intentional infliction of emotional distress, is therefore moot.

#### 2. Barker's Non-Defamation Claims Regarding Statements Allegedly Made by Huang Outside the *Rochen* Litigation

However, as with Barker's defamation claims, the absolute privilege as applied to Barker's other claims acts as a bar of liability only with regard to statements made during the course of judicial proceedings. As we held in section I above, Barker's complaint and affidavit, viewed together, fairly make out claims that Huang made tortious statements outside the judicial context. We must therefore examine Barker's claim that Superior Court erred in granting summary judgment of her privacy and emotional distress claims to the extent that they relate to statements made by Huang outside the judicial context.

#### a. Invasion of Privacy

The tort of invasion of privacy was originally adopted by this Court in the case of *Barbieri v. News-Journal Co.*, *Del. Supr.*, 189 A.2d 773, 774 (1963). Following Professor Prosser, we therein delineated the four varieties of the tort: (1) intrusion on plaintiff's physical solitude; (2) publication of private matters violating [\*\*27] the ordinary senses; (3) putting plaintiff in a false position in the public eye; and (4) appropriation of some element of plaintiff's personality for commercial use. *Id.* at 774. See *Avallone V. Wilmington Medical Center, Inc.*, *D. Del.*, 553 F. Supp. 931, 938-39 (1982).

Barker contends that Superior Court erred in finding that she had failed to allege sufficient facts to state a claim of invasion by Huang of her right to privacy. [\*\*1350] Barker argues that her complaint and affidavit have adequately stated a claim under either of the first two varieties of the tort of invasion of privacy listed above.<sup>6</sup> We disagree.

<sup>6</sup> Because not asserted by Barker as error, we will not examine whether Barker's complaint stated a cause of action in any other variety of invasion of privacy.

The first variety of the tort of invasion of privacy is denominated in the Restatement as intrusion upon seclusion. *Restatement (Second) of Torts § 652B* states:

One who intentionally intrudes, physically or otherwise, [\*\*28] upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Furthermore, *comment c to § 652B* states, "The defendant is subject to liability . . . only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." Thus, the *sine qua non* of this variety of the tort of invasion of privacy is clearly *intrusion*.

Reading Barker's complaint and affidavit together, and after putting aside those claims barred by the absolute privilege, we understand Barker to claim only that Huang participated in newspaper interviews in which he intentionally made false allegations of conspiracy against Barker, and that such statements "exposed her to

invasions of her privacy. . . ." This is not sufficient. At most, Huang's actions, as alleged by Barker, may have drawn unwanted public attention to Barker, but such acts do not trigger liability under Prosser's first denominated variety of the tort of invasion of privacy. *Avallone*, 553 F. Supp. at 939. [\*\*29]

Barker also contends that she has fairly alleged a claim under the second variety of the tort of invasion of privacy, involving unwanted publicity. *Restatement (Second) of Torts § 652D* states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

The Superior Court found that Barker had failed to make allegations amounting to a claim of invasion of privacy because the newspaper articles, which, Barker claims, disclose private and personal details of her life, were not published by Huang, and because their subject was a matter of legitimate public concern, i.e., a lawsuit.

Barker argues that the Superior Court erred in narrowly limiting liability to those who actually "publish," and in finding Huang's accusations of a conspiracy involving Barker to be a matter of public concern. It is not necessary to reach this question, however, because of a more basic deficiency in Barker's allegations with regard to this tort. The Restatement notes that § 652D [\*\*30] provides for tort liability involving a judgment for damages for publicity given to *true statements of fact*." (emphasis added). This variety of the tort of invasion of privacy thus acts as a counterpart to the tort of defamation, rather than as a duplicate. *Restatement (Second) of Torts § 652D*. It provides liability for the publicization of true but private facts--acts which would not be covered by defamation, since truth is an absolute defense to a defamation action. Barker's pleadings complain only of *false* accusations by Huang and therefore fail to state a cognizable claim under the "unwanted publicity" variety of the tort of invasion of privacy.

Accordingly, we find Barker's contention that

Superior Court erred in granting summary judgment on her claims of invasion of privacy to be without merit.

#### b. Intentional Infliction of Emotional Distress

Barker next claims that Superior Court erred in granting Huang summary judgment with respect to her claim of intentional infliction of emotional distress. Superior Court found that Barker had [\*1351] made no allegations of behavior stating such a cause of action. Barker argues that this holding impermissibly intrudes on the jury's role [\*\*31] of determining whether the behavior in question is in fact extreme or outrageous. We need not resolve this question, however, because once again we find a more basic flaw in Barker's view of the law.

In *Grimes v. Carter*, *Cal. App.*, 50 *Cal. Rptr.* 808, 813 (1966), the California District Court of Appeal, in refusing to recognize an independent claim for intentional infliction of emotional distress arising from defamatory statements, explained the relationship between defamation and emotional distress:

It is elementary that, although the gravamen of a defamation action is injury to reputation, libel or slander also visits upon & plaintiff humiliation, mortification and emotional distress. In circumstances where a plaintiff states a case of libel or slander, such personal distress is a matter which may be taken into account in determining the amount of damages to which the plaintiff is entitled, but it does not give rise to an independent cause of action on the theory of a separate tort. To accede to the contentions of the plaintiff in this case would be, in the words of Prosser, a step toward "swallowing up and engulfing the whole law of public defamation." If [\*\*32] plaintiff should prevail in her argument it is doubtful whether any litigant hereafter would file a slander or libel action, post an undertaking and prepare to meet substantial defenses, if she could, by simply contending that she was predicating her claim solely on emotional distress, avoid the filing of such bond and render unavailable such substantial defenses as for example, justification by truth.

Other courts have refused to allow a cause of action for intentional infliction of emotional distress where the gravamen of the complaint sounded in defamation. See *Dworkin v. Hustler Magazine, Inc.*, *C.D. Cal.*, 668 *F. Supp.* 1408, 1420 (1987) ("Without such a rule, virtually any defective defamation claim . . . could be revived by

pleading it as one for intentional infliction of emotional distress; thus, circumventing the restrictions, including those imposed by the Constitution, on defamation claims," interpreting California, New York, and Wyoming law); *DeMeo v. Goodall*, *D.N.H.*, 640 *F. Supp.* 1115, 1117 (1986) (cause of action for intentional infliction of emotional distress may not be maintained concurrently with a defamation action, interpreting [\*\*33] New Hampshire law); *Wilson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *N.Y.A.D.*, 490 *N.Y.S.2d* 553, 555 (1985) ("It would be improper to allow plaintiff to evade the specific prerequisites for a libel action by presenting his cause of action in terms of the generalized tort of intentional infliction of emotional distress"); *Flynn v. Higham*, *Ct. App. Cal.*, 197 *Cal. Rptr.* 145, 148 (1984) ("to allow an independent cause of action for the intentional infliction of emotional distress based on the same acts which would not support a defamation action, would . . . render meaningless any defense of . . . privilege").

The tort of intentional infliction of emotional distress is well recognized in Delaware. *Mattern v. Hudson*, *Del. Super.*, 532 *A.2d* 85 (1987). See *Correa v. Pennsylvania Mfrs. Ass'n Ins. Co.*, *p. Del.*, 618 *F. Supp.* 915, 928 (1985). However, we hold with the great weight of foreign precedent that an independent action for intentional infliction of emotional distress does not lie where, as here, the gravamen of the complaint sounds in defamation. *Grimes*, 50 *Cal. Rptr.* at 513; [\*\*34] *Dworkin*, 668 *F. Supp.* at 1420. Accordingly, Barker's claim that Superior Court erred in granting summary judgment of her claim of intentional infliction of emotional distress is without merit.

#### III. Barker's Claims Against ICA

Finally, Barker claims that Superior Court erred in granting summary judgment on her claims against ICA.<sup>7</sup> As the [\*1352] Superior Court noted, however, plaintiff's cause of action against ICA is based solely on the fact that ICA provided Huang with an attorney who signed Huang's *Rochen* counterclaim. Barker's affidavit raised no new claims against ICA. Barker has thus made no claim that ICA was a part of any allegedly tortious conduct outside of the judicial context.

<sup>7</sup> Superior Court converted ICA's motion to dismiss for failure to state a claim to a motion for summary judgment in light of Barker's affidavit. ICA argues on appeal that its motion to dismiss

should not have been so converted, since Superior Court did not rely on any facts presented in Barker's affidavit in reaching its disposition. ICA's argument may have considerable merit. However, we do not reach the issue due to ICA's failure to cross-appeal.

[\*\*35]

The absolute privilege extends to attorneys involved in litigation. *Nix v. Sawyer*, Del. Super., 466 A.2d 407, 413 (1983); *See Hoover v. Van Stone*, D. Del., 540 F. Supp. 1118 (1982); *Tatro v. Esham*, Del. Super., 335 A.2d 623, 626 (1975); *Restatement (Second) of Torts* §

586. Therefore, ICA was entitled to the protection of the absolute privilege. Neither Barker's complaint nor her affidavit makes out any claims against ICA that are not defeated on their face by the absolute privilege. Accordingly, Barker's claim that Superior Court erred in granting summary judgment on her claims against ICA is without merit.

\* \* \*

Affirmed in part, Reversed in part and Remanded, for further proceedings consistent herewith.



LEXSEE 175 F3D 14

MAX HUGEL, Plaintiff, Appellant, v. MILBERG, WEISS, BERSHAD, HYNES & LERACH, LLP, GOLD, BENNETT & CERA, LLP, SHAPIRO, HABER & URMY, LLP, AND WOLF, POPPER, LLP, Defendants, Appellees.

No. 98-1653

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

*175 F.3d 14; 1999 U.S. App. LEXIS 7250*

April 13, 1999, Decided

**PRIOR HISTORY:** [\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE. Hon. Steven J. McAuliffe, U.S. District Judge.

**DISPOSITION:** Affirmed.

**COUNSEL:** Andrew D. Dunn with whom Daniel E. Will was on brief for appellant.

William L. Chapman with whom Pamela E. Phelan was on brief for appellees.

**JUDGES:** Before Lynch, Circuit Judge, Coffin and Campbell, Senior Circuit Judges.

**OPINION BY:** COFFIN

#### OPINION

[\*15] COFFIN, *Senior Circuit Judge*. Appellant Max Hugel contends that he was defamed by allegations in a complaint filed in a federal securities fraud lawsuit (the "*Presstek* litigation") to which he was not a party. He brought suit in state court seeking damages for defamation and [\*16] legal malpractice. The defendants, four law firms, removed the case to federal court and then moved to dismiss. Concluding that neither of Hugel's claims was viable, the district court granted the motion.

The court wrote a thoughtful opinion recognizing that certain aspects of the defamation claim were close, but explaining that the privilege given by New Hampshire law to statements made in judicial proceedings protected the challenged allegations. We agree with the court's reasoning on that issue, [\*\*2] and see no need to reiterate its analysis. We add only a few brief comments. We also hold that, because the privilege bars any civil damages based on protected statements, the district court properly dismissed the malpractice claim as well.

#### A. Defamation Claim

As the district court recognized, New Hampshire law provides "very broad protection" to statements made in the course of judicial proceedings. *See* Order at 9. A statement falls outside the privilege only if it is "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety," *McGranahan v. Dahar*, 119 N.H. 758, 408 A.2d 121, 126 (N.H. 1979) (citation omitted),<sup>1</sup> and all doubts are to be resolved in favor of pertinency and application of the privilege, 408 A.2d at 127. It is the breadth of this protection that persuaded the district court that the privilege applied to all of the challenged statements, though some of them "approach the protective limit of the privilege." Order at 8.

<sup>1</sup> The standard is expressly "not conditioned on the actor's good faith," *McGranahan*, 408 A.2d at

124, because the public's interest in judicial proceedings "is so vital and apparent that it mandates complete freedom of expression without inquiry into a defendant's motives," *id.* (quoting *Supry v. Bolduc*, 112 N.H. 274, 293 A.2d 767, 769 (N.H. 1972)). The court noted that the pertinence standard would have the effect of excluding from protection "statements made needlessly and wholly in bad faith," *see id.*, but occasionally would protect malicious statements because they were pertinent to the proceeding, *see id.*

[\*\*3] We agree with the district court that certain of the objectionable statements -- in particular, those alleging organized crime links -- were connected only obliquely to the underlying fraud charges. These allegations, however, were contained in a background description of the intimate association between Hugel and a key *Presstek* litigation defendant, Robert Howard. The two men served together as president and vice president of Howard's company, Centronics, and they allegedly engaged in reciprocal stock manipulations for each other's benefit on five occasions. The additional allegation that Hugel was involved in organized crime reasonably may be viewed as more than an attempt to establish "guilt by association." In light of Hugel's close relationship with Howard, the allegation that Hugel had serious criminal ties, combined with the assertions that Centronics had dealings with Las Vegas casinos that were linked to organized crime or "frequently subject to federal organized crime investigations," reinforces an inference that Howard was involved in ongoing, illegal activities. Such an inference is relevant to whether Howard knowingly participated in the securities fraud charged [\*\*4] in the *Presstek* lawsuit. Though characterizing Hugel as an organized crime figure may have been at the margin of relevance,<sup>2</sup> we cannot say that the statements [\*\*17] were so "palpably irrelevant" that, giving them the benefit of any doubt, they fell outside the privilege.<sup>3</sup>

2 In seeking to support his argument that the challenged statements were irrelevant to the *Presstek* litigation, Hugel cites a case that presents a useful contrast because -- unlike the allegations here -- the statements clearly fell into the "palpably irrelevant" category. In *Nguyen v. Proton Technology Corp.*, 69 Cal. App. 4th 140, 81 Cal. Rptr. 2d 392 (Cal. Ct. App. 1999), a pre-litigation letter from a law firm concerning

potential unfair competition claims reported that one of the employees allegedly engaged in the unfair acts had been in prison "for repeatedly and violently assaulting his wife." Hugel's alleged ongoing involvement in criminal activities against a backdrop of securities fraud perpetrated by Hugel and Howard is a far cry from such an extraneous statement.

3 Hugel asserts that the district court applied an incorrect standard because it found only that the allegations concerning Hugel "might be" or "could be" pertinent to the claims in the underlying securities litigation, rather than determining unconditionally that they were relevant. The findings conform to the *McGranahan* standard, which requires a court to determine whether a reasonable person "can" doubt their irrelevancy or impropriety. The court's conclusion that the statements "might be" or "could be" pertinent is equivalent to a conclusion that a reasonable person "can" find them to be so. The ruling also reflects the directive in *McGranahan* to resolve doubts in favor of applying the privilege. *See 408 A.2d at 127.*

[\*\*5] We wish to emphasize that, in rejecting appellant's defamation claim, we do not condone quick resort to reputation-harming allegations at the far reaches of relevancy. Here, the defendants' decision to file an amended complaint deleting all references to Hugel raises some question as to their level of certainty regarding the original statements.<sup>4</sup> *Fed. R. Civ. P. 11 (b)(3)* imposes a duty on attorneys to certify that, "to the best of [their] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the allegations and other factual contentions in a pleading have evidentiary support. Ensuring the integrity of their representations is a serious responsibility that attorneys may not take lightly, and we caution against the deliberate or careless use of unsubstantiated allegations, notwithstanding their relevance.

4 Hugel's attorney acknowledged at oral argument, however, that he had told the defendants that a suit might not be filed if the allegations were withdrawn. The decision to withdraw the allegations therefore may not have reflected lack of confidence in them but simply a judgment that their usefulness was offset by the greater risk and/or costs of litigation.

[\*\*6] B. *Legal Malpractice Claim*

Although the absolute privilege for statements made in judicial proceedings was recognized in *McGranahan* in the context of a defamation claim, the language of that opinion, subsequent case law, and policy considerations make it clear that the privilege bars any civil claim for damages based on statements protected by the privilege. In *McGranahan*, the court noted "the general rule . . . that statements made in the course of judicial proceedings are absolutely privileged *from civil actions*, provided they are pertinent to the subject of the proceeding," 408 A.2d at 124 (emphasis added). The court reiterated this general statement of the rule in another defamation case, *Pickering v. Frink*, 123 N.H. 326, 461 A.2d 117, 119 (N.H. 1983),<sup>5</sup> and recently confirmed it in a case raising claims of, *inter alia*, negligence, fraud, and intentional infliction of emotional distress, *see Provencher v. Buzzell-Plourde Ass.*, 142 N.H. 848, 711 A.2d 251, 255 (N.H. 1998) (citing *McGranahan* and *Pickering*).<sup>6</sup> We thus think it clear that the Supreme Court of New Hampshire views the privilege to extend [\*\*7] to any civil claim arising from statements made in the course of a judicial proceeding.

5 The *Pickering* court stated: "New Hampshire law recognizes that certain communications are absolutely privileged and therefore immune from civil suit." 461 A.2d at 119. The opinion also repeated, almost verbatim, the statement of the rule specifically with respect to statements made in the course of judicial proceedings, as quoted above from *McGranahan*. *See id.*

6 The court in *Provencher* stated, *inter alia*: "Statements made in the course of judicial proceedings constitute one class of communications that is privileged from liability in civil actions if the statements are pertinent or relevant to the proceedings." 711 A.2d at 255.

In addition to the explicit language to that effect, the policy underlying the privilege requires that civil claims other than for defamation also be extinguished. The rule's absolute bar "reflects a determination that the potential harm to an [\*\*8] individual is far outweighed by the need to encourage participants in litigation, parties, [\*18] attorneys, and witnesses, to speak freely in the course of judicial proceedings." *McGranahan*, 408 A.2d at 124. This policy would be nullified if individuals barred from bringing defamation claims could seek damages under

other theories of liability. Moreover, as the district court observed, Hugel's malpractice claim is, in essence, a claim that he was defamed by allegations in the *Presstek* complaint. In these circumstances, Hugel's malpractice claim unquestionably is barred by the privilege. *Compare Blanchette v. Cataldo*, 734 F.2d 869, 877 (1st Cir. 1984) (holding that similar privilege under Massachusetts law bars any civil action based on the statements); *Correllas v. Viveiros*, 410 Mass. 314, 572 N.E.2d 7, 13 (Mass. 1991) ("A privilege which protected an individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort.").<sup>7</sup>

7 We find it unnecessary to consider the district court's alternative basis for dismissing the malpractice claim, that Hugel has failed to identify any cognizable legal duty owed to him by the defendants.

[\*\*9] C. *Certification*

Hugel moved to certify both the defamation and legal malpractice issues to the New Hampshire Supreme Court, claiming that each implicates an unresolved question of state law. We disagree that there is any uncertainty warranting certification.

As discussed in Section A on the defamation issue, the standard for evaluating statements made during the course of judicial proceedings is clear: an absolute privilege attaches if the statements are "pertinent to the subject of the proceeding," *see McGranahan*, 408 A.2d at 124. Hugel's assertion that certification is necessary because the New Hampshire Supreme Court has not had occasion to provide further guidance on the standard misses the mark. As the district court recognized, "when state law is sufficiently clear to allow [a federal court] to predict its course, certification is both inappropriate and an unwarranted burden on the state court." Order at 11 n.2 (citing *Armacost v. Amica Mut. Ins. Co.*, 11 F.3d 267, 269 (1st Cir. 1993)). *See also Marbucco Corp. v. Suffolk Construction Co.*, 165 F.3d 103, 105 (1st Cir. 1999) ("It is inappropriate . . . to use certification [\*\*10] 'when the course state courts would take is reasonably clear.'") (quoting *Porter v. Nutter*, 913 F.2d 37, 41 n.4 (1st Cir. 1990)). The New Hampshire court cannot be charged with failure to make its standard reasonably clear. Although we may err in applying that standard, we act within the range of discretion entrusted to us.

The malpractice issue as we have resolved it involves a similarly straightforward application of unambiguous state case law. There is no need for certification.

*Accordingly, the judgment of the district court is affirmed.*



LEXSEE 379 PA SUPER 150

**Pearlena MOSES, Appellant, v. Daniel T. McWILLIAMS, Esq., Marvin Krane,  
M.D., and Albert Einstein Medical Center. Pearlena MOSES, Appellant, v.  
UNDERWRITERS ADJUSTING COMPANY**

**Nos. 02062 Philadelphia 1985, 02063 Philadelphia 1985**

**Superior Court of Pennsylvania**

**379 Pa. Super. 150; 549 A.2d 950; 1988 Pa. Super. LEXIS 2892**

**September 16, 1987, Argued**

**September 28, 1988, Filed**

**PRIOR HISTORY:** [\*\*\*1] Appeal from the Order of the Court of Common Pleas of Philadelphia County, Civil at No. 4356 February Term, 1983.

Appeal from the Order of the Court of Common Pleas of Philadelphia County, Civil at No. 3167 September Term, 1982.

**DISPOSITION:** The orders of the trial court are affirmed.

**COUNSEL:** William Marvin, Philadelphia, for appellant.

H. Robert Fiebach, Philadelphia, for McWilliams, appellee.

Howard M. Cyr, III, Philadelphia, for Krane, appellee.

S. David Fineman, Philadelphia, for Albert Einstein Medical Center, appellee.

**JUDGES:** Cirillo, President Judge, and Brosky, Olszewski, Del Sole, Montemuro, Tamilia, Kelly, Popovich and Johnson, JJ. Cirillo, President Judge, files a concurring and dissenting Opinion in which Olszewski and Tamilia, JJ., join. Del Sole, J., files a concurring statement.

**OPINION BY: MONTEMURO**

**OPINION**

[\*154] [\*\*952] This is a consolidated appeal from four orders issued by the Philadelphia County Court of Common Pleas dismissing the complaints of appellant Pearlena Moses in two separate actions in trespass, one against appellee Underwriters' Adjusting Company (Underwriters), the other against appellees Albert Einstein Medical Center (Albert Einstein), Dr. Marvin Krane, and Daniel T. McWilliams, Esq. <sup>1</sup> Both [\*\*\*2] cases arose from a medical malpractice action filed by appellant following a hysterectomy she underwent in the summer of 1977.

<sup>1</sup> This consolidated appeal was originally heard by a three-judge panel of this Court. That panel determined that because the case involved issues both of first impression and of great societal importance, it should be certified for en banc review.

In July of 1977, appellant was admitted to the emergency room at Albert Einstein. There, an intern diagnosed her as suffering from pelvic inflammatory disease. She was released with instructions to take a prescription for antibiotics. Her condition worsened, necessitating her admission to another hospital where she came under the care of appellee Dr. Marvin Krane. On

July 7, 1977, he performed a total hysterectomy on her and continued to treat her until he released her to the care of her private physician in November 1977. Appellant then brought suit against Albert Einstein Medical Center, alleging that the care she received there had been negligent [\*\*\*3] and had necessitated the hysterectomy.

In the consolidated actions now before us, appellant alleges <sup>2</sup> that, in the malpractice action, Albert Einstein hired Underwriters to manage its defense of the case. Underwriters, in turn, retained appellee Daniel T. McWilliams to represent Albert Einstein. Underwriters wrote to Dr. Krane and asked that he contact its representatives to discuss appellant's medical condition. Neither appellant nor her attorney were notified of this request. Dr. Krane [\*155] complied with the request and, in conversations with both an Underwriters employee and with McWilliams, revealed information that he had gained in the course of his treatment of appellant.

2 Because we here review an order granting a motion for judgment on the pleadings, we accept as true all of appellant's well-pleaded averments of fact. *See Capanna v. Travelers Insurance Co.*, 355 Pa. Super. 219, 513 A.2d 397 (1986).

Appellant claims that she first became aware of Dr. Krane's involvement [\*\*\*4] in the case when her attorney was notified by Mr. McWilliams that he intended to call Dr. Krane as an expert witness at trial. Appellant's counsel informed Dr. Krane at that time that his communications with Mr. McWilliams were unauthorized and should cease immediately. Despite this injunction, Dr. Krane continued to meet with defense counsel, allowed McWilliams to review and copy portions of appellant's patient file, and testified at trial as a fact witness. <sup>3</sup>

3 The Honorable Stanley M. Greenberg of the Philadelphia Court of Common Pleas ruled that Dr. Krane could not testify as an expert witness, but might do so as a fact witness.

Appellant contends that as her treating physician Dr. Krane had a duty to refrain both from taking any actions which would be adverse to her interests in the malpractice litigation and from making any disclosures to other parties of information gained in the course of his treatment of her, unless authorized to do so either by her or by law. She also alleges that Dr. Krane had

knowledge [\*\*\*5] of or should have known of the provisions of the Interprofessional Code, the American Medical Association Principles of Medical Ethics, and the [\*\*953] Hippocratic Oath, all of which provide for the maintenance of confidentiality between physician and patient. Appellant argues that because Dr. Krane ignored these provisions, and breached the confidence gained in treating her, he should be liable in tort for breach of the physician/patient privilege. She further asserts that Albert Einstein, McWilliams and Underwriters should be liable for inducing that breach. Accordingly, our initial inquiry on appeal, a question of first impression, is whether a treating physician's unauthorized and judicially unsupervised communications with his patient's adversary in a medical malpractice action are actionable as a breach of physician/patient confidentiality. Appellant argues, first, that a general [\*156] cause of action for breach of the physician/patient confidentiality should exist; second, that a physician's judicially unsupervised and unauthorized communications with a patient's adversaries in litigation should give rise to that cause of action; and, third, that in such a context the defense [\*\*\*6] of absolute privilege should not be available to the physician. <sup>4</sup> Appellant's last two questions presented concern her claim for defamation and are intertwined with the physician/patient confidentiality theory. She argues that the trial court erred in granting summary judgment before depositions were concluded, and also that the appellees should not be accorded the absolute privilege defense where the patient's confidentiality rights have been breached. We affirm the trial court's orders.

4 We need not concern ourselves with appellant's first argument that a general cause of action for breach of the physician/patient confidentiality should exist. The issue, as framed, is too broad. We need only to focus on the narrow factual context of this case. We note, however, that a majority of jurisdictions that have considered the broad issue of whether to recognize a general cause of action for a physician's breach of confidentiality have allowed such a claim. However, our research has revealed no court from any jurisdiction that has allowed recovery against a physician for breach of confidentiality under facts similar to those alleged in this case. *See, e.g., Hague v. Williams*, 37 N.J. 328, 181 A.2d 345 (1962); *Fedell v. Wierzbieniec, M.D.*, 127 Misc.2d 124, 485 N.Y.S.2d 460 (1985). When the cause of action has been recognized, it

is in cases where there have been *extra-judicial* disclosures of confidential information or in cases, such as those involving custody, where the plaintiff's physical condition has not been in issue. See, e.g., *Horne v. Patton*, 291 Ala. 701, 287 So.2d 824 (1974) (physician disclosed confidential information to plaintiff's employer); *MacDonald v. Clinger, M.D.*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982) (psychiatrist revealed confidential information to plaintiff's wife); *Doe v. Roe*, 93 Misc.2d 201, 400 N.Y.S.2d 668 (1977) (psychiatrist, without plaintiff's consent, published a book containing verbatim accounts of plaintiff's feelings); *Schaffer v. Spicer*, 88 S.D. 36, 215 N.W.2d 134 (1974) (in a custody case, psychiatrist gave to the attorney of the patient's ex-husband an affidavit containing information with regard to his patient's mental health, which was deemed inadmissible at hearing); *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958) (doctor revealed information about plaintiff to another doctor for the purpose of conveying the information to the parents of a woman contemplating marriage to plaintiff).

[\*\*\*7] We first consider appellant's claim for breach of confidentiality and do so in light of the standard applicable [\*157] for review of a judgment on the pleadings: <sup>5</sup> We accept as true all well-pleaded averments of fact and will uphold the trial court's decision only "in cases which are so free from doubt that trial would clearly be a fruitless exercise." *Capanna v. Travelers Insurance Co.*, 355 Pa.Super. 219, 226, 513 A.2d 397, 401 (1986). We find that within the narrow factual context of this case, appellant has failed to state a cause of action for breach of confidentiality. To find otherwise would undermine several well-established principles of this Commonwealth. We must keep in mind that when Dr. Krane made his disclosures, appellant had voluntarily instituted a medical malpractice action against Albert Einstein and had thereby placed in issue her medical condition. Given a patient's qualified right to privacy in his or her medical records and an individual's reduced expectation of privacy as a result of filing a civil suit for personal injuries in conjunction with policies supporting both the physician/patient privilege statute <sup>6</sup> and the [\*\*\*8] absolute immunity from [\*\*954] civil liability granted to witnesses in judicial proceedings, we will not recognize the cause of action for breach of confidentiality *as pled in this case.* <sup>7</sup>

5 As to the claim for breach of confidentiality against Dr. Krane, the trial court granted a judgment on the pleadings, not summary judgment. See Trial Court Opinion at 3, 5.

6 42 Pa.C.S. § 5929.

7 Our tort law has evolved such that every alleged wrong or injury does not have a legal remedy. Cf. W. Prosser and W. Keeton, *The Law of Torts* § 1 (5th ed. 1984) ("[t]here are many interferences with the plaintiff's interests, including negligently causing mere mental suffering without physical consequences . . . , for which the law will give no remedy . . ."). Before we grant relief to a plaintiff, we must reflect upon the principles and policies of this Commonwealth that will be affected by creating a new cause of action. We do not find that this case warrants establishing a new cause of action. If Dr. Krane has behaved unethically, the medical profession can discipline him as would the legal profession reprimand a lawyer who had violated the Code of Professional Responsibility. See, e.g., *Coralluzzo v. Fass*, 450 So.2d 858 (Fla.1984) ("whether [a doctor] has violated the ethical standards of his profession is a matter to be addressed by the profession itself").

[\*\*\*9] Appellant argues that a physician's duty to maintain confidentiality outside of formal court proceedings is based upon the fiduciary nature of the physician-patient relationship, [\*158] the constitutional right of privacy, and the ethical principles of the medical profession.

We first note that a patient's right to confidentiality is less than absolute. In order for a disclosure to be actionable at law, the disclosure must be made without legal justification or excuse. The law is replete with statutory justifications for disclosure that are deemed to outweigh the patient's right to confidentiality. For example, a physician has a duty to report otherwise confidential information relating to wounds or injuries inflicted by deadly weapons (18 Pa.C.S.S. § 5106), contagion ( 53 Pa.S.A. § 24663), child abuse ( 11 Pa.S.A. § 2204), and medical history in cases of adoption ( 23 Pa.C.S.A. § 2909). While the existence of reporting requirements is not controlling on the issue before us, it indicates the appropriateness of balancing the competing interests at stake when we evaluate the scope of the physician-patient privilege and the physician's duty of

non-disclosure.

In *In Re June 1979 Allegheny County Investigating Grand Jury*, 490 Pa. 143, 415 A.2d 73 (1980), [\*\*\*10] then Chief Justice Eagen, writing for a three-judge plurality, concluded that "[d]isclosure of confidences made by a patient to a physician, or even of medical data concerning the individual patient could, under certain circumstances, pose such a serious threat to a patient's right not to have personal matters revealed that it would be impermissible under either the United States Constitution or the Pennsylvania Constitution." *Id.*, 490 Pa. at 149-153, 415 A.2d at 77-78. However, as evidenced by the plurality's decision not to protect from discovery the particular medical records in that case,<sup>8</sup> the constitutional right to privacy concerning [\*159] medical information is qualified. In that case, the court acknowledged that there would be "a limited invasion of privacy" but considered it "justified under the circumstances." *Id.*, 490 Pa. at 152 n. 11, 415 A.2d at 78 n. 11. See also *Denoncourt v. Commonwealth State Ethics Commission*, 504 Pa. 191, 470 A.2d 945 (1983) (the constitutional right of privacy is not absolute).

<sup>8</sup> In *In Re June 1979 Allegheny County Investigating Grand Jury*, 490 Pa. 143, 415 A.2d 73 (1980), a subpoena was issued for certain tissue sample reports as part of an investigation involving the use and misuse of county facilities, funds, employees, and equipment. The reports would allow the grand jury to determine the names of the patients whose tissue had been submitted for testing. The supreme court concluded that the patients' physician-patient privilege and right to privacy were not offended by the subpoena.

[\*\*\*11] Additionally, in tort law we recognize a right to privacy that is not constitutionally based. In *Forster v. Manchester*, 410 Pa. 192, 189 A.2d 147 (1963), our supreme court defined the right as an "interest in not having [one's] affairs known to others." *Id.*, 410 Pa. at 194-98, 189 A.2d at 149-50. The invasion of privacy is actionable when there is an unreasonable and serious interference with one's privacy interest.<sup>9</sup> Nonetheless, [\*\*955] an individual's right to privacy is clearly qualified when that individual has filed suit for personal injuries. *Forster*, *supra*. In *Forster*, a plaintiff who was suing for personal injuries allegedly sustained in an automobile accident, was placed under surveillance by

a private detective hired by defendant's insurance carrier. The purpose of the investigation was to record plaintiff's daily activities to ascertain the freedom of movement of her limbs. Because she felt the surveillance was invasive, plaintiff instituted suit against the detective for invasion of privacy and intentional infliction of emotional distress. Our supreme court found reasonable [\*\*\*12] the manner in which the investigation was conducted and denied recovery on the invasion of privacy claim. The Court stated that

[i]n determining the extent of the interest to be protected, we must take cognizance of the fact that appellant has made a claim for personal injuries . . . . It is not uncommon for defendants in accident cases to employ investigators to check on the validity of claims against them. *Thus, by making a claim for personal injuries [\*160] appellant must expect reasonable inquiry and investigation to be made of her claim and to that extent her interest in privacy is circumscribed.*

*Id.*, 410 Pa. at 196-97, 189 A.2d at 150 (footnote omitted) (emphasis added). See also *Glenn v. Kerlin*, 248 So.2d 834, 836 (La.App.1971) (although that jurisdiction recognizes a right to privacy and makes the invasion of that right actionable, once plaintiff has filed a suit for personal injuries and then attempts to recover in tort for allegedly wrongful disclosures by his doctor, plaintiff "no longer may claim the sanctity of his privacy"). In *Forster*, the supreme court concluded that that there is "much social utility [\*\*\*13] to be gained" from investigation of claims because "[i]t is in the best interests of society that valid claims be ascertained and fabricated claims be exposed." 410 Pa. at 197, 189 A.2d at 150. The words of the supreme court in *Forster* are equally applicable to the case at bar. When Dr. Krane made his disclosures, appellant had already commenced a medical malpractice action wherein she alleged personal injuries. With the filing of suit, appellant's privacy expectations were reduced to the extent that she could anticipate that her claims would be investigated. It is in society's best interest that malpractice claims be investigated at the earliest possible stage to determine their validity.

<sup>9</sup> An invasion of privacy occurs when there is an "interference with the interest of the individual in

379 Pa. Super. 150, \*160; 549 A.2d 950, \*\*955;  
1988 Pa. Super. LEXIS 2892, \*\*\*13

leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others." *Restatement (Second) of Torts § 652A comment b* (1977).

Similarly, the [\*\*\*14] Pennsylvania physician-patient privilege statute reflects the concept that there is a reduction in a patient's privacy interest and right to confidentiality when he or she files suit for personal injuries. The statute provides that:

[n]o physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, which shall tend to blacken the character of the patient, without consent of said patient, *except in civil matters brought by such patient, for damages on account of personal injuries.*

42 Pa.C.S. § 5929 (emphasis added). By enacting this statute, our legislature has weighed competing policies to determine at what point the physician-patient privilege is lost or [\*\*\*16] surrendered and has concluded that this loss or surrender occurs when a party institutes a civil action "on account of personal injuries." Appellant contends, however, that the statute sets forth the parameters of the *testimonial* privilege and that the exception does not apply outside of formal court proceedings. It was enacted, she argues, to balance a patient's right to privacy against the "unquestioned need for evidence [\*\*\*15] *in court.*" Brief of Appellant at 27 (emphasis added).

The statute should not be interpreted so narrowly that it encompasses only situations involving formal court proceedings. According to the canons of construction used in this Commonwealth, words in a statute are to be accorded their plain meaning. *Commonwealth v. Stanley*, 498 Pa. 326, 446 A.2d 583 (1982); 1 Pa.C.S. § 1903(a). Nothing in the physician-patient privilege statute evinces a legislative intent that the exception for "civil matters [\*\*\*956] brought by the patient" should apply only to disclosures made in a court-supervised setting. Patients waive the privilege when they institute civil actions for personal injuries. The statute applies to disclosures without reference to the stage in the proceedings at which they are made. The statute extends the privilege to the patient, not to the physician. *Romanowicz v.*

*Romanowicz*, 213 Pa. Super. 382, 248 A.2d 238 (1968). By filing actions for personal injuries, the plaintiff-patients waive their privilege and, in effect, implicitly consent to disclosures by their physicians concerning matters relating to the plaintiff-patients' [\*\*\*16] medical conditions.

Moreover, contrary to appellant's assertions, ethical considerations and the Commonwealth's medical licensing statutes do not provide a clear-cut source for recognizing a cause of action for breach under the facts as alleged in this case. The Hippocratic Oath does not serve as an absolute bar to disclosures: "Whatever in connection with my professional practice, or not in connection with it, I may see or hear in the lives of men *which ought not to be spoken abroad* I will not divulge . . . ." Similarly, the 1980 statement by the American Medical Association concerning a [\*\*\*162] doctor's release of confidential information is broad, provides little guidance, and does not in any event, prohibit Dr. Krane's actions: "A physician shall respect the right of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences *within the constraints of the law.*" Principle IV of the Medical Ethics of the American Medical Association (in effect at the time of Dr. Krane's disclosures). One of our central concerns in this case is to determine what "ought not to be spoken abroad" by a treating physician in the context of a medical [\*\*\*17] malpractice action and what are "the constraints of the law." *See generally* Gellman, *Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy*, 62 N.C.L.Rev. 255 (1984). Even the Current Opinions of the Judicial Council of the AMA do not absolutely bar disclosures of confidences. In fact, Section 5.07 states that "[a] physician should respect the patient's *expectations of confidentiality* concerning medical records that involve the patient's care and treatment." As we have already noted, an individual's expectations of confidentiality are diminished when that individual files a civil action for personal injuries. To allow recovery at law for conduct such as Dr. Krane's that occurred within the context of a judicial action voluntarily instituted by appellant would ignore the fact that appellant's privacy interest was diminished by her commencement of the malpractice suit.

Finally, Pennsylvania's medical licensing statute, 63 P.S. § 422.41, does not provide appellant with a basis for a cause of action. The statute proscribes "unprofessional

379 Pa. Super. 150, \*162; 549 A.2d 950, \*\*956;  
1988 Pa. Super. LEXIS 2892, \*\*\*17

conduct." <sup>10</sup> The only sanctions that can be imposed upon a physician for unprofessional [\*\*\*18] conduct are refusal, revocation or suspension by the board of the doctor's license. There is no provision for an independent cause of action against the doctor for money damages, nor is there any indication that the General Assembly intended to create one.

<sup>10</sup> Unprofessional conduct is defined to include that which is a "departure from or failing to conform to an ethical or quality standard of the profession." 63 P.S. § 422.41(8).

[\*163] The policy of granting immunity from civil liability in the context of judicial proceedings also compels a finding that appellant has failed to state a cause of action under the facts as alleged in this case. Dr. Krane's statements were absolutely privileged from civil liability because they were made "in the regular course of judicial proceedings and . . . [were] pertinent and material" to the litigation. See *Post v. Mendel*, 510 Pa. 213, 220, 507 A.2d 351, 355 (1986) (quoting *Kemper v. Fort*, 219 Pa. 85, 93, 67 A. 991, 994-95 (1907)). [\*\*\*19] See also *Hoover v. Van Stone*, 540 F.Supp. 1118, 1121 (D.Del.1982) ("[s]trict legal relevance need not be demonstrated; instead the allegedly defamatory statements must have only some connection to the subject matter of the pending action"). In the case at bar, there is no allegation that Dr. Krane's statements were not relevant or [\*\*957] not pertinent to the litigation. Furthermore, "communications pertinent to any stage of judicial proceedings are accorded an absolute privilege." *Pelagatti v. Cohen*, 370 Pa.Super. 422, 436, 536 A.2d 1337, 1344 (1988) (emphasis added). See also *Restatement (Second) of Torts § 588 comment b* (1977) (the privilege protects a witness "while engaged in private conferences with an attorney at law with reference to proposed litigation").

The United States Supreme Court, discussing the reasons supporting this policy of immunity, has stated:

The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law. . . . In the words of one 19th-century court, in damages suits against witnesses, "the claims of the individual [\*\*\*20] must yield to the dictates of public policy,

which requires that the paths which lead to ascertainment of truth should be left as free and unobstructed as possible." A witness' apprehension of subsequent damages liability might induce two forms of censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability.

[\*164] *Briscoe v. Lahue*, 460 U.S. 325, 330-333, 103 S.Ct. 1108, 1112-1114, 75 L.Ed.2d 96 (1983) (footnotes and citations omitted). See also *Collins v. Walden*, 613 F.Supp. 1306, 1314 (N.D.Ga.1985), *aff'd without opinion*, 784 F.2d 402 (11th Cir.1986) (the purpose of witness immunity is to ensure that the judicial process functions "unimpeded by fear on the part of its participants that they will be sued for damages for their part in the proceedings").

While it is true that immunity from civil liability in judicial proceedings has been applied most frequently in defamation actions, many courts, including those in Pennsylvania, have extended the immunity from civil liability [\*\*\*21] to other alleged torts when they occur in connection with judicial proceedings. See, e.g., *Brown v. The Delaware Valley Transplant Program*, 372 Pa.Super. 629, 539 A.2d 1372 (1988) (mutilation of a corpse, civil conspiracy, and assault and battery); *Pelagatti v. Cohen*, *supra* (interference with contractual relationship); *Thompson v. Sikov*, 340 Pa.Super. 382, 490 A.2d 472 (1985) (intentional infliction of emotional distress); *Passon v. Spritzer*, 277 Pa.Super. 498, 419 A.2d 1258 (1980) (malicious use and abuse of process and invasion of privacy); *Triester v. 191 Tenants Association*, 272 Pa.Super. 271, 415 A.2d 698 (1979) (disparagement of title). See also *Blanchette v. Cataldo*, 734 F.2d 869 (1st Cir.1984) (interference with contractual relationship); *Blake v. Levy*, 191 Conn. 257, 464 A.2d 52 (1983) (same); *Middlesex Concrete Products and Excavating Corp. v. Carteret Industrial Association*, 68 N.J.Super. 85, 172 A.2d 22 (1961) (same). Such an [\*\*\*22] extension of immunity evinces the strong policy behind the privilege: to leave reasonably unobstructed the paths which lead to the ascertainment of truth, *Briscoe*, *supra*, and to encourage witnesses with knowledge of facts relevant to judicial proceedings to give "complete and unintimidated testimony," *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 324, 275 A.2d 53, 56

(1971). Recognizing a cause of action for breach of confidentiality in the factual context of the case at bar will undermine this policy. As one court observed:

[\*165] [i]f the policy, which in defamation actions affords an absolute privilege or immunity to statements made in judicial and quasi-judicial proceedings is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label.

*Hoover v. Van Stone*, 540 F.Supp. 1118, 1124 (D.Del.1982) (quoting *Rainier's Dairies v. Raritan Valley Farms*, 19 N.J. 552, 117 A.2d 889, 895 (1955)) (case involving claims of defamation, tortious interference with contractual [\*\*\*23] relationships, abuse of process and barratry)). The court in *Hoover* also stated that:

[the counts of tortious interference with contractual relationships, abuse of process, and barratry] are all predicated on the very same acts providing the basis for the defamation claim. Application of [\*\*958] the absolute privilege solely to the defamation count . . . would be an empty gesture indeed, if, because of artful pleading, the plaintiff could still be forced to defend itself against the same conduct regarded as defamatory. *Maintenance of these kindred causes of action, moreover, would equally restrain the ability of judges, parties, counsel and witnesses to speak and write freely during the course of judicial proceedings.*

*Id.* (emphasis added).

Appellant argues that the cases where the absolute privilege has been extended beyond the defamation claim can be distinguished from the case at bar. She argues that "plaintiffs in those cases had no basis to complain of the fact that the communication was made . . . [.] their grievance went solely to the *content* of the communication." Brief of Appellant at 61. However, appellant's claim is based upon the content of Dr. Krane's communications, [\*\*\*24] not just the fact of communication. Appellant has lodged a claim against Dr. Krane because he disclosed information pertaining to

her medical condition, not merely because he [\*166] spoke with Mr. McWilliams and the insurance representative.<sup>11</sup>

11 It might be argued that while we should extend this blanket immunity to lay witnesses, a doctor should not be protected because of the unique relationship between doctor and patient; doctors should have a duty greater than lay witnesses to protect confidences that are revealed to them by virtue of their professional roles. We dismiss that argument as the United States Supreme Court dismissed a similar argument in *Briscoe v. Lahue*, *supra*. In that case, where police officers were being sued under 42 U.S.C. § 1983 which allows convicted persons to assert damage claims against police officers who gave perjured testimony at their trials, the Court noted that the immunity analysis rests on "functional categories," not on the status of the witness. 460 U.S. at 342, 103 S.Ct. at 1119. The judicial process depends on the functions of its various "players," and immunity is granted in order to facilitate the judicial process. A doctor-witness who is testifying as a fact witness performs the same function as any other witness: to present evidence through testimony to aid the tribunal in its truth-finding function. The functioning of the tribunal is seriously handicapped if witnesses, whether they be doctors or lay persons, fear liability from statements made by them that have some relation to the litigation.

[\*\*\*25]

Moreover, witness immunity should and does extend to pre-trial communications. The policy of providing for reasonably unobstructed access to the relevant facts is no less compelling at the pre-trial stage of judicial proceedings. As one federal district court has stated in a case involving claims of negligence, fraudulent and innocent misrepresentation, defamation and intentional infliction of emotional distress brought by a defendant-doctor in a malpractice action against another doctor who had prepared advisory medical reports for a plaintiff in anticipation of a malpractice action:

The overriding concern for disclosure of pertinent and instructive expert opinions before and during medical malpractice

actions is no less significant than the clearly recognized need for all relevant factual evidence during the course of litigation . . . . Physicians who wish to limit groundless malpractice suits obviously would support review of potential malpractice claims by fellow members of the medical profession. If doctors who provide expert reports are subjected to civil liability for the contents of their reports, fewer doctors will be willing to evaluate [\*167] potential malpractice [\*\*\*26] claims in advance of litigation. Rather, medical experts will only provide sworn expert testimony in medical malpractice cases that are in progress because witness immunity will protect those, and only those, statements. In the absence of expert review, then, meritless medical malpractice suits will be eradicated less frequently prior to filing. This result is neither desirable nor efficient.

*Kahn v. Burman*, 673 F.Supp. 210, 213 (E.D.Mich.1987) (citations omitted). The same principles apply to the case at bar. By granting immunity from liability to the doctor-potential witness for disclosures made that are relevant to the malpractice claim, the "paths which lead to ascertainment of truth" are left reasonably unobstructed, *Briscoe, supra*, 460 U.S. at 333, 103 S.Ct. at 1114. Meritless medical malpractice [\*\*959] claims can be disposed of at the earliest possible stage of litigation by allowing free access to material and relevant facts once a claimant has filed suit. Because the plaintiff's expectations of privacy have been reduced with the instigation of litigation, there is no breach of confidentiality. We therefore [\*\*\*27] recognize the absolute privilege as a bar to the claim for breach of confidentiality against Dr. Krane.

We note, as have other courts, that *ex parte* interviews are less costly<sup>12</sup> and easier to schedule than depositions, are conducive to candor and spontaneity, are a cost-efficient method of eliminating non-essential witnesses in a case where a plaintiff might have a number of treating physicians, [\*168] and allow both parties to confer with the treating physicians. *See, e.g., Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C.1983); *State of Missouri, ex rel. Stufflebam, M.D. v. Appelquist*, 694

*S.W.2d 882, 888 (Mo.App.1985)*. Moreover, as the district court in *Eli Lilly* pointed out, although the purpose of the physician-patient privilege is to promote open communication, "the privilege was never intended . . . to be used as a trial tactic by which a party entitled to invoke it may control to his advantage the timing and circumstances of the relevant information *he must inevitably see revealed at some time.*" 99 F.R.D. at 128 (emphasis added).<sup>13</sup> Further, the argument for preventing full disclosure of patient confidences [\*\*\*28] rests upon a policy that seeks to promote the health of the citizen. Informed diagnoses are to some extent impossible without complete candor by the patient concerning his life and habits. To encourage that candor, a cloak of confidentiality is placed upon communications by a patient to his doctor. Nevertheless, lifting that cloak when a patient puts his or her physical condition in issue by filing suit does not make it more likely that patients will cease communicating with their doctors when they seek treatment for illnesses. It is in a patient's best interest to be candid with his or her [\*169] doctor in order to obtain the most informed treatment possible.

<sup>12</sup> Cf. *Lazorick v. Brown*, 195 N.J.Super. 444, 480 A.2d 223 (1984). In that case, the New Jersey Superior Court held that plaintiff-patient could not prevent his adversaries in litigation from speaking privately with his current treating physicians about any unprivileged matter. The court stated that

the provision for admission at trial of videotaped depositions of a treating physician or expert witness, reflects the need to use less costly and time consuming means of producing evidence. It is not only costly to all parties to litigation but it may be impractical and inefficient to produce all treating doctors for depositions without knowing in advance whether their testimony will be useful or helpful in resolving disputed issues.

*Id.* at 454-55, 480 A.2d at 229.

[\*\*\*29]

<sup>13</sup> Professor Wigmore states an analogous

concern:

The injury to justice by the repression of the facts of corporal injury and disease is much greater than any injury which might be done by disclosure. And furthermore, the few topics -- such as venereal disease and abortion -- upon which secrecy might be seriously desired by the patient come into litigation ordinarily in such issues (as when they constitute cause for a bill of divorce or a charge of crime) that for these very facts common sense and common justice demand that the desire for secrecy shall not be listened to . . . .

The real support for the privilege seems to be mainly the weight of professional medical opinion pressing upon the legislature. And that opinion is founded on a natural repugnance to being the means of disclosure of personal confidence. But the medical profession should reflect that the principal issues in which justice asks for such disclosure are those -- personal injury and life and accident insurance -- which the patient himself has *voluntarily brought into court*. Hence, the physician has no reason to reproach himself with the consequences which justice requires.

8 Wigmore, Evidence § 2380(a) (McNaughton rev. 1961).

[\*\*\*30] Allowing *ex parte* interviews with treating physicians does not open the door to any and every disclosure by a doctor concerning a plaintiff's medical condition. Rather, disclosure should be limited to that which is pertinent and material to the underlying litigation. If disclosures are neither pertinent nor material, they will be inadmissible at trial. Moreover, by

issuing protective orders, a court can place restrictions on the scope of medical discovery without actually prohibiting *ex parte* interviews. For example, in the malpractice litigation underlying the instant action, the trial court issued an order to the effect that [\*\*\*960] Dr. Krane could testify on Albert Einstein Medical Center's behalf only as a fact witness, and not as an expert. See also *State of Missouri, ex rel. Stufflebam v. Appelquist, supra*.

Although a doctor who grants a private interview in connection with judicial proceedings would enjoy the judicial privilege protecting him from liability for defamation, he could lose that privilege by disclosing information that has no relation to the underlying action. Similarly, if a doctor makes statements clearly unrelated to a lawsuit, there [\*\*\*31] might be a cause of action stated against him for breach of confidentiality. We, however, need not make such a finding here because that issue is not before us. See *State of Missouri, ex rel. Stufflebam v. Appelquist, 694 S.W.2d at 889* (Hogan, P.J. concurring, noted that although a court might authorize *ex parte* interviews with a doctor, "the physician who grants the interview is still 'on his own' . . . in determining whether the scope of the questions . . . is so extensive as to require him to expose himself to liability . . ., [and] that a decision to grant an interview is not without risk, and must be strictly voluntary").

Because we find that appellant has not stated a cause of action for breach of confidentiality under the facts of the instant case, her claims for inducement of that breach must necessarily fail. Accordingly, we affirm the [\*170] trial court's orders dismissing appellant's claims for breach of confidentiality and inducement to breach.

We now turn to appellant's second group of questions involving the claim for defamation and find that the absolute privilege which protects statements made in a judicial context precludes appellant's [\*\*\*32] defamation claim. See *Pelagatti, supra, 370 Pa. Super. at 438, 536 A.2d at 1345; Post v. Mendel, supra, 510 Pa. at 220, 507 A.2d at 355*. Our discussion concerning the application of the absolute privilege to bar appellant's breach of confidentiality claim is equally applicable to the defamation claim.

Appellant also argues that the grant of summary judgment was premature in this case because she was unable to depose McWilliams concerning a conversation that he had had with Dr. Krane after the conclusion of the

trial in her medical malpractice action. Because McWilliams claimed the work product privilege during trial, both parties agreed to defer his deposition until after the disposition of the malpractice suit. We find that, again, conversations between Dr. Krane and McWilliams are covered by the absolute privilege accorded relevant statements made in the course of litigation. The litigation in the medical malpractice suit was not concluded, post-trial motions were still to be decided, and the law suit with which we are concerned was still pending.

We also note that appellant failed to allege which statements made [\*\*\*33] during the conversation were defamatory. Although she had not yet deposed McWilliams before filing her complaint, she had deposed Dr. Krane. A complaint for defamation must, on its face, identify specifically what allegedly defamatory statements were made, and to whom they were made. Failure to do so will subject the complaint to dismissal for lack of publication. *See Gross v. United Engineers and Constructors, Inc.*, 224 Pa. Super. 233, 235, 302 A.2d 370, 372 (1973); *see also Raneri v. DePolo*, 65 Pa. Commw. 183, 186, 441 A.2d 1373, 1375 (1982). Further, the trial court found that all the defamatory statements [\*171] that were alleged with specificity were made to privileged persons. Appellant did allege in her complaint that defamatory remarks were made to "other persons"; ostensibly, these were non-privileged communications. She has failed, however, to make to this Court, or to the trial court, any argument that these other persons actually could have existed. She only claims that failure to permit her to have access to McWilliams' records prevented her from obtaining corroborating information.

We find that [\*\*\*34] it would be unreasonable to draw the inference from the few facts with which appellant has presented us that defamatory statements were made in a non-privileged context. We hold therefore that [\*\*961] the trial court did not abuse its discretion in dismissing her claim for defamation.

The orders of the trial court are affirmed.

**CONCUR BY:** CIRILLO (In Part); DEL SOLE

**CONCUR**

DEL SOLE, Judge, concurring:

I join the majority in all respects save one. I agree

that when a patient files a lawsuit claiming personal injury, that patient has consented to the disclosure of relevant medical information by treating physicians. Therefore, there was no breach of the duty of confidentiality by Dr. Krane in this case. There being no breach of a duty, there can be no claim against the remaining defendants for inducing the disclosure. Also, I agree that judicial proceeding immunity would protect all of the defendants from claims for defamation.

I would not reach the issue of whether judicial proceeding immunity protects a person from liability for breaching a duty of confidentiality. It is not necessary to address that issue in this case. Also, since the claim in a breach of confidentiality case is based upon the fact [\*\*\*35] something was disclosed, not what was disclosed, I seriously question whether immunity would be available in those situations.

**DISSENT BY:** CIRILLO (In Part)

**DISSENT**

CIRILLO, President Judge, concurring and dissenting:

Because I disagree with the majority's resolution of the issues involved in this case, I respectfully dissent in part and concur in part. I agree with the majority's disposition of the defamation claim before us. I believe, however, that some cause of action should exist in this Commonwealth for a physician's breach of the duty of confidentiality to a patient. Because the majority finds that Moses is precluded from stating a claim for breach by her underlying medical malpractice action, it fails to reach this issue. I would hold that such a cause of action exists, and that Moses has alleged sufficient facts to make out a claim for breach.

In July of 1977, Pearlina Moses was admitted to the emergency room of Albert Einstein Medical Center, an appellee in this case. Moses was diagnosed by an intern as suffering from pelvic inflammatory disease, and treated for [\*172] that condition. Moses' symptoms worsened, and she was referred by her family doctor to appellee Dr. Marvin Krane, [\*\*\*36] who specialized in gynecology and obstetrics. Dr. Krane performed a total abdominal hysterectomy on Moses, removing both ovaries, the uterus, and the fallopian tubes. Dr. Krane continued to treat and monitor Moses after the surgery; she was released into the care of her family physician in

November of 1977. Moses then brought suit against Albert Einstein, alleging that the negligent care she had received there necessitated the total hysterectomy.

In her complaints, Moses alleged, *inter alia*, that because her treating physician, Dr. Krane, had agreed to help defense counsel in preparing the case for Albert Einstein Medical Center, he breached the duty of confidentiality owed to her as his patient. Moses also alleged that information given by Krane to the effect that she suffered from venereal disease, specifically gonorrhea, rather than pelvic inflammatory disease, was defamatory. Appellees Dr. Krane, Underwriters' Adjusting Company, Albert Einstein Medical Center, and Daniel T. McWilliams moved for summary judgment and for judgment on the pleadings. Those motions were granted by the trial court, and a consolidated appeal followed. After consideration of that appeal, a panel [\*\*\*37] of this court determined that because this case involves issues of first impression in this Commonwealth, and of great societal and legal import, it should be certified for en banc review.

Moses' allegations on appeal raise two issues before this court. Her first three arguments deal with the establishment of a cause of action in tort for a physician's breach of his confidential relationship with his patient. Moses argues, first, that such a cause of action should exist; secondly, that a physician's judicially unsupervised and unauthorized communications should give rise to that cause of action; and lastly, that in such a context the defense of absolute privilege should not be available to that physician. Moses' last two arguments concern her claim for defamation and are intertwined with the physician/patient confidentiality [\*173] theory. She argues that the trial court erred in granting summary judgment before depositions were concluded, and also that the appellees should not be accorded the absolute privilege defense where the patient's confidentiality rights have been breached.

The majority refuses to create a new cause of action in this Commonwealth for a physician's breach [\*\*\*38] of confidentiality in a physician/patient relationship. Instead, it confines itself to what it terms "the narrow factual context of this case." I am of the opinion that the policies and principles of this Commonwealth require the recognition of a cause of action for breach of the [\*\*962] physician/patient relationship. Further, I strongly disagree with the majority's conclusion that the filing of

the underlying tort action which placed the patient's condition in issue is sufficient to permit the ex parte disclosure of information revealed by the patient to his or her doctor as a result of that confidential relationship.

The issue of whether or not a patient should be accorded a cause of action for a physician's breach of confidentiality is a case of first impression in this Commonwealth. The majority of jurisdictions that have considered this issue have allowed the claim. Only one jurisdiction has held that the cause of action should not be available. In *Quarles v. Sutherland*, 215 Tenn. 651, 389 S.W.2d 249 (1965), the Tennessee Supreme Court refused to alter the common law rule existing in that state which held that neither a patient nor a physician had [\*\*\*39] a privilege to refuse to disclose in court or to a third person a communication of one to the other. *Id.* at 655, 389 S.W.2d at 251. After examining the statutes of that state, the court held that it could find nothing which would allow a cause of action in the face of the common law rule. It stated that that state's licensing statutes and statutes defining ethical conduct were merely administrative provisions. *Id.* at 656, 389 S.W.2d at 251-52. It held further that statutes concerning evidentiary privileges were just that, and did not bolster appellant's argument that a cause of action should exist. According to the court, "the [\*174] petitioner is trying to base a cause of action upon a rule of evidence." *Id.* at 657, 389 S.W.2d at 252.

After considering the case law from other jurisdictions, I would conclude that the better reasoned approach is to allow such a cause of action. I do not think that a claimant's argument in such a case would be based upon a rule of evidence. It is rather based upon a relationship that has for centuries been accorded the highest degree of sanctity [\*\*\*40] by the profession itself, as well as by society as a whole. In determining whether this relationship should give rise to a cause of action, I would follow the lead of the District of Columbia court in *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580 (D.C.App.1985), and examine Pennsylvania's licensing statutes, evidentiary rules and privileged communications statutes, common law principles of trust, and the Hippocratic Oath and principles of medical ethics. *Vassiliades*, 492 A.2d at 590. Moses had cited all these possible sources of public policy in her complaint.

The physician/patient relationship was first

articulated in the Fifth Century, B.C. in the Hippocratic Oath of the medical profession. It states in pertinent part that:

Whatever in connection with my professional practice or not in connection with it I see or hear in the life of men which ought not to be spoken abroad I will not divulge as recommending that all such should be kept secret.

As the Oath demonstrates, for over two thousand years, physicians have recognized a duty to protect the confidences of their patients, and society has tacitly relied upon that principle.

[\*\*\*41] The AMA's Principles of Medical Ethics, adopted in 1977, show the continuing vitality of this obligation. The principles provide that "[a] physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law."

Further, the Current Opinions of the Judicial Council of the AMA also reflects these values. Section 5.05 of the Opinions states:

[\*175] The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree . . . . The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.

Section 5.07 states:

Both the protection of confidentiality and the appropriate release of information in records is the rightful expectation of the patient. A physician should respect the patient's expectations of confidentiality concerning medical records that involve the patient's care and treatment.

[\*\*963] These ethical directives illustrate the manner in which the medical profession views the divulgence of [\*\*\*42] confidences made to a physician by his patient.

These considerations, however, are not merely ethical objectives to which the medical community aspires. Public policy<sup>1</sup> mirrors these considerations in licensing regulations and testimonial privilege statutes. State legislation codifies the result of society's balance of policies promoting full disclosure of patient confidences in a judicial setting, and protecting the patient's interest in complete non-disclosure. *See, e.g., Mull v. String*, 448 So.2d 952, 955 (Ala.1984). The narrow exceptions which seem to typify this type of legislation [\*176] illustrate the great weight attached to non-disclosure. *See, e.g., Hope v. Landau*, 21 Mass.App. 240, 241, 486 N.E.2d 89, 91 (1985). Testimonial privilege statutes as well as statutes concerning licensing of physicians have played a significant role in the acceptance by most states of the breach of confidentiality cause of action. *See Horne v. Patton*, 291 Ala. 701, 706, 287 So.2d 824, 827 (1973) (those states which had enacted a physician/patient testimonial privilege statute were almost uniform in [\*\*\*43] allowing the cause of action for breach of confidentiality, those which had not enacted such a statute were split on that issue); *see also Vassiliades, supra; Geisberger v. Willuhn*, 72 Ill.App.3d 435, 436, 28 Ill.Dec. 586, 588, 390 N.E.2d 945, 947 (1979); *Alberts v. Devine*, 395 Mass. 59, 65-66, 479 N.E.2d 113, 119 (1985); *MacDonald v. Clinger*, 84 A.D.2d 482, 484, 446 N.Y.S.2d 801, 803 (1982); *Piller v. Kovarsky*, 194 N.J.Super. 392, 396, 476 A.2d 1279, 1281 (1984); *Humphers v. First National Bank*, 298 Or. 706, 718-719, 696 P.2d 527, 535 (1985). *Accord Hammonds v. Aetna Casualty & Surety Co.*, 243 F.Supp. 793, 797 (N.D. Ohio E.D.1965) (applying Ohio law).

1 Although public policy is a somewhat elusive concept, the Ohio Supreme Court defined it succinctly in *Pittsburgh, Cincinnati, Chicago and St. Louis R.R. Co. v. Kinney*, 95 Ohio St. 64, 115 N.E. 505 (1916):

In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all the

circumstances of each particular relation and situation.

Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people -- in their clear consciousness and conviction of what is naturally and inherently just and right between man and man.

Public policy is the cornerstone -- the foundation -- of all Constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them.

*Id.* at 68, 115 N.E. at 507.

[\*\*\*44] Pennsylvania has a testimonial privilege statute which promotes the confidentiality of patient/physician communications. 42 Pa.C.S. § 5929 states:

**§ 5929. Physicians not to disclose information**

No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of said patient, except in civil matters brought by such patient for damages on account of personal injuries.

42 Pa.C.S. § 5929. The Commonwealth has also promulgated licensing statutes to provide its citizens with the best possible medical care. To this end, disciplinary or corrective measures may be imposed by the licensing board upon a physician if he or she is "guilty of immoral or unprofessional conduct. Unprofessional conduct shall

include departure [\*177] from or failing to conform to an ethical or quality standard of the profession . . . . The ethical standards of a profession are those ethical tenets which are embraced by the professional community in this Commonwealth." 63 P.S. [\*\*\*45] § 422.41(8) & (8)(i).

In Pennsylvania, therefore, ethical considerations are not merely aspirational, they present a duty to practicing physicians, although no legal liability attaches [\*\*964] statutorily as a result of the breach of that duty. We are then faced with the question of whether disciplinary sanctions such as suspension of a license are sufficient to protect the policies involved here. The majority indicates that disciplinary action should be adequate and appropriate. I disagree. Consideration of those policies indicates that more is needed than administrative sanctions, because more than health is involved.

It is true that the argument for preventing full disclosure of patient confidences centers on the health of the individual:

Any time a doctor undertakes the treatment of a patient, and the consensual relationship of physician and patient is established, two jural obligations (of significance here) are simultaneously assumed by the doctor. Doctor and patient enter into a simple contract, the patient hoping that he will be cured, and the doctor optimistically assuming that he will be compensated. As an implied condition of that contract . . . , the doctor warrants that [\*\*\*46] any confidential information gained through the relationship will not be released without the patient's permission.

*Hammonds*, 243 F.Supp. at 801. This promise may be justifiably relied upon by the patient. "Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every person has a right to rely upon this warranty of silence." *Id.* A patient lays bare the sanctum sanctorum of his physical and psychological self to his physician in his belief in the integrity of this promise. In many cases, he has no choice if he wishes to be healed. If the physician then breaks his vow, [\*178] and divulges these confidences, he outrages the very foundation of society's concept of the physician as healer.

379 Pa. Super. 150, \*178; 549 A.2d 950, \*\*964;  
1988 Pa. Super. LEXIS 2892, \*\*\*46

While it is obvious that effective medical treatment is essential to the health and well-being of both society and its members, the concern for confidentiality in the relationship goes beyond these considerations:

When a patient seeks out a doctor and retains him, he must admit him to the most private part of the material domain of man. Nothing material is more important or more intimate to man than the health [\*\*\*47] of his mind and body. Since the layman is unfamiliar with the road to recovery, he cannot sift the circumstances of his life and habits to determine what is information pertinent to his health. As a consequence, he must disclose all information in his consultations with his doctor -- even that which is embarrassing, disgraceful or incriminating. To promote full disclosure, the medical profession extends the promise of secrecy . . . . The candor which this promise elicits is necessary to the effective pursuit of health; there can be no reticence, no reservation, no reluctance when patients discuss their problems with their doctors. But the disclosure is certainly intended to be private.

*Hammonds*, 243 F.Supp. at 801-802. See also *Alberts*, 395 Mass. at 69, 479 N.E.2d at 118; *Hague v. Williams*, 37 N.J. 328, 335-36, 181 A.2d 345, 349 (1962); *Berry v. Moench*, 8 Utah 2d 191, 196, 331 P.2d 814, 817 (1958). Society is concerned not merely with the health of the community, but with the dignity and privacy of its members. That dignity and privacy are violated where [\*\*\*48] the fiduciary relationship between a patient and physician -- a relationship built on the highest expectation of trust -- is betrayed.

This court has already expressed its concern over the "total" care of the patient and our disapproval of any interference with the relationship between physician and patient. In *Alexander v. Knight*, 197 Pa.Super. 79, 177 A.2d 142 (1962), the plaintiff wife had suffered whiplash in a car accident. During litigation, her doctor released information without her consent to the doctor hired by defendant [\*179] to interview him. We adopted the trial court's opinion in that case. Even though that court did not find that incident necessary to the disposition of the

case, it was nonetheless disturbed by the actions of both doctors:

We are of the opinion that members of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients. They owe their patients more than just medical [\*\*965] care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary, and to attend court [\*\*\*49] when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation. The doctor, of course, owes a duty to his conscience to speak the truth; he need, however, speak only at the proper time . . . . [I]nducing . . . [the] breach of . . . a confidential relationship [between a doctor and patient] is to be and is condemned.

*Knight*, 177 A.2d at 146.<sup>2</sup> In this Commonwealth, then, public policy, or as the Ohio Supreme Court has defined it, the "clear consciousness and conviction of what is naturally and inherently just and right between man and man," *Pittsburgh, Cincinnati, Chicago and St. Louis R.R. Co. v. Kinney*, 95 Ohio St. 64, 68, 115 N.E. 505, 507 (1916), envisions that the physician owes a duty of a fiduciary, of trust and faith to his patient, and, in justice, the patient should reasonably be able to rely upon that duty.

<sup>2</sup> In *Knight*, we adopted the trial court's opinion. That opinion is not reported at 197 Pa.Super. 79, 177 A.2d 142, however. It may be found at 25 Pa.D. & C.2d 649.

[\*\*\*50] I would find, therefore, that there must be a legal remedy allowed the patient in such a case in order to emphasize the importance of the physician/patient relationship and to protect the dignity of the relationship as well as the health of the patient. Public policy in this Commonwealth and society's obvious valuation of the relationship in question demands this result.

[\*180] The next consideration must be to define the parameters of this cause of action so that they are

379 Pa. Super. 150, \*180; 549 A.2d 950, \*\*965;  
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inclusive enough to serve these purposes. Initially, I would note that I agree with those jurisdictions that have found that this claim is brought in tort, rather than in contract law. Relegating a plaintiff to a cause of action in contract would severely limit the damages which could be recovered. *MacDonald*, 84 A.D.2d at 486, 446 N.Y.S.2d at 804. Further, we have already recognized the importance of the fiduciary aspect of the physician/patient relationship in *Alexander v. Knight*, *supra*. Although that relationship is partially founded in a contract between patient and physician from which evolves a fiduciary duty and an expectation of confidentiality, [\*\*\*51] I am in agreement with the courts of Massachusetts and New York which have stated: "We believe that the relationship contemplates an additional duty springing from but extraneous to the contract, and that the breach of such duty is actionable as a tort." *MacDonald*, 84 A.D.2d at 486, 446 N.Y.S.2d at 804; *see also Alberts*, 395 Mass. at 69, 479 N.E.2d at 120 (contractual relationship gives rise to a duty of confidentiality).

As a cause of action in tort, the plaintiff must then establish the four elements of a prima facie case -- a duty, breach of that duty, causation, and damages. The duty arises out of the existence of the relationship between patient and physician. Moses has alleged the existence of that duty; she states in her complaint that Dr. Krane was her treating physician, and that those statutes and ethical considerations that we have discussed created a duty of confidentiality which should not have been violated. What we are concerned with here is not plaintiff's ability to show that a duty exists, but with defendant's justification for the breach. Those jurisdictions that have accepted the cause of action [\*\*\*52] for breach of confidentiality have noted that the duty is not absolute, since the statutory testamentary privilege is not absolute. Where disclosure of information is important for the safety of the individual or is in the public interest, then the doctor may reveal those confidences without liability. *See Humphers*, 298 Or. at 720, 696 P.2d at 535; *see [\*181] also Horne*, 291 Ala. at 709, 287 So.2d at 830; *Alberts*, 395 Mass. at 75, 479 N.E.2d at 124; *MacDonald*, 84 A.D.2d at 487, 446 N.Y.S.2d at 805; *Berry*, 8 Utah 2d at 196, 331 P.2d at 817; *accord Hammonds*, 243 F.Supp. at 801.

Further, as with the testimonial privilege, where the patient is shown to have consented to the disclosure, the physician may not be held liable for making it. *See*,

[\*\*966] *e.g., Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 590, 102 Ill.Dec. 172, 177, 499 N.E.2d 952, 957 (1986) *cert. denied sub nom. Tobin v. Petrillo*, U.S. , 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987); [\*\*\*53] *Alberts*, 395 Mass. at 75, 479 N.E.2d at 124; *Landau*, 21 Mass.App. at 241, 486 N.E.2d at 90; *Hague*, 37 N.J. at 336, 181 A.2d at 349; *Anker v. Brodnitz*, 98 Misc.2d 148, 150, 413 N.Y.S.2d 582, 585 (1979) *aff'd mem.*, 73 A.D.2d 589, 422 N.Y.S.2d 887 (1979). That consent may be expressly given, as in a writing. Here the issue revolves around the question of implied consent.

Most states have held that when a patient files a law suit in which her medical condition is placed in issue, she has impliedly consented to the disclosure of information which had been confidential. She has waived her privilege which prevents her doctor from testifying. *See 42 Pa.C.S. § 5929; Dennie v. University of Pittsburgh School of Medicine*, 638 F.Supp. 1005, 1008 (W.D.Pa.1986) (applying Pennsylvania law); *see also Bond v. District Court*, 682 P.2d 33, 38 (Colo.1984) (en banc); *Wenninger v. Muesing*, 307 Minn. 405, 407, 240 N.W.2d 333, 335 (1976); *Jaap v. District Court*, 623 P.2d 1389, 1391 (Mont.1981); [\*\*\*54] *Nelson v. Lewis*, 130 N.H. 106, 109, 534 A.2d 720, 722 (1987). The rationale behind this policy is that it is inconsistent for a patient litigant to base a claim upon his medical condition and then use the privilege to prevent the opposing party from obtaining and presenting conflicting evidence pertaining to that condition. *Bond*, 682 P.2d at 38.

The same considerations apply in a situation where a patient is attempting to bring a suit against her physician for breach of the duty of confidentiality. In a sense, this is similar to a medical malpractice action where the physician [\*182] being sued must be allowed to testify about the patient's condition in order to put his version of the facts before the jury. *Panko v. Consolidated Mutual Insurance Co.*, 423 F.2d 41, 44 (3rd Cir.1970) (applying Pennsylvania law). Other courts have handled these situations in similar manners. The majority of jurisdictions have held that a patient waives his right to a physician's full confidentiality when he puts his medical condition into issue in a law suit:

[An] . . . exception[] [to the physician's duty of confidentiality] [\*\*\*55] arises where . . . the physical condition of the patient is made an element of a claim . . . [even when] that claim has not yet been

379 Pa. Super. 150, \*182; 549 A.2d 950, \*\*966;  
1988 Pa. Super. LEXIS 2892, \*\*\*55

pressed to litigation . . . . [T]he same policy which during litigation permits, even demands disclosure of information acquired during the course of the physician-patient relationship allows the disclosure thereof to the person against whom the claim is being made, when recovery is sought prior to or without suit. At this point the public interest in an honest and just result assumes dominance over the individual's right of nondisclosure.

*Hague*, 37 N.J. at 336, 181 A.2d at 349. See also *Mull v. String*, 448 So.2d 952, 954 (Ala.1984); *Fedell v. Wierzbieniec*, 127 Misc.2d 124, 126, 485 N.Y.S.2d 460, 462 (Sup.1985); accord *Hammonds*, 243 F.Supp. at 800. Once a patient puts his condition into issue, he is recognizing that his dignity and privacy are no longer of paramount importance. The balance of concerns is settled on the side of disclosure. We are then faced with the question of how to resolve the balance when, although the patient has placed [\*\*\*56] his medical condition into issue, his physician, without his knowledge or actual consent, enters into an ex parte interview with the defendant's attorney.

I am persuaded by the reasoning of those jurisdictions which forbid such interviews because to sanction such interviews would be to vitiate the physician/patient privilege. While the testimonial privilege may be waived to a limited extent by the patient litigant's placing her medical condition [\*183] in issue, to say that the relationship is "waived" means nothing:

"Waiver" does not authorize a private conference between a doctor and a defense lawyer. It is one thing to say that a doctor may be examined and cross-examined by the defense in a courtroom, in conformity with the rules of evidence, [\*\*967] with the vigilant surveillance of plaintiff's counsel, and the careful scrutiny of the trial judge; it is quite another matter to permit, as alleged here, an unsupervised conversation between the doctor and his patient's protagonist . . . . [T]he mere waiver of a testimonial privilege does not release the doctor from his duty of secrecy and from his duty of loyalty in litigation

and no one may be permitted to induce the breach [\*\*\*57] of these duties.

*Hammonds*, 243 F.Supp. at 805. To approach the analysis from the perspective of "waiver" does not resolve the problem of how to balance competing interests here.

Some jurisdictions when faced with this question in an action for personal injuries or medical malpractice suits have held that ex parte interviews are proper. See *Arctic Motor Freight, Inc. v. Stover*, 571 P.2d 1006 (Alaska 1977); *Coralluzzo v. Fass*, 450 So.2d 858 (Fla.1984); *State ex rel. Stufflebam v. Appelquist*, 694 S.W.2d 882 (Mo.App.1985); *Lazorick v. Brown*, 195 N.J. Super. 444, 480 A.2d 223 (1984). Accord *Doe v. Eli Lilly & Co., Inc.*, 99 F.R.D. 126 (D.D.C.1983). There are several rationales behind this rule. Several of these jurisdictions have found that no statutory or common law prohibition against ex parte interviews exists, and so have refused to prohibit them in these situations. *Coralluzzo*, 450 So.2d at 859. Other courts have pointed out that no party has a proprietary right to evidence. *Appelquist*, 694 S.W.2d at 888; [\*\*\*58] accord *Eli Lilly & Co.*, 99 F.R.D. at 128. For the most part, however, jurisdictions which permit ex parte interviews have focused on time and cost restraints. They base their holdings on the misconception that ex parte interviews are less costly and time consuming than the alternative method, that is, formal [\*184] discovery. *Trans-World Investments v. Drobny*, 554 P.2d 1148, 1152 (Alaska 1976); *Lazorick*, 195 N.J. Super. at 454-455, 480 A.2d at 229; accord *Eli Lilly & Co.*, 99 F.R.D. at 128.

In *State ex rel. Stufflebam v. Appelquist*, *supra*, a Missouri court prohibited a judge from denying a motion to compel the plaintiff in a medical malpractice action to authorize the defendant's interview with one of his treating doctors. That court, quoting extensively from *Doe v. Eli Lilly & Co.*, *supra*, found that ex parte interviews were less costly than depositions and easier to schedule. It also found that such interviews were more conducive to spontaneity and candor, and therefore more desirable. According to the Missouri court, an ex parte interview was [\*\*\*59] a cost-efficient way in which to eliminate unnecessary witnesses. *Appelquist*, 694 S.W.2d at 888. See also *Lazorick*, 195 N.J. Super. at 455, 480 A.2d at 229; accord *Eli Lilly & Co.*, 99 F.R.D. at 128.

In *Lazorick v. Brown*, *supra*, the New Jersey

379 Pa. Super. 150, \*184; 549 A.2d 950, \*\*967;  
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Superior Court held that the plaintiff in a medical malpractice case should be required to sign a waiver allowing the defendant to discuss her condition with treating physicians citing the excessive cost of formal discovery. That court pointed out that the discovery rules were not the only methods by which discovery could be conducted. Further, the court refused to assume that defense counsel would take advantage of the absence of plaintiff's counsel at such an interview to elicit privileged information. *Lazorick*, 195 N.J. Super. at 455-56, 480 A.2d at 229. The court stated that even though it might be considered unjust for a doctor to "go over to another camp," that doctor should be allowed to serve justice as he saw it, or, as in this case, to help another doctor. *Id.* "The justice system should [not \*\*\*60] be made to] pay this price so that the doctor-patient relationship will not be bruised." *Id.* at 456, 480 A.2d at 230.

In *Doe v. Eli Lilly & Co.*, *supra*, the federal district court for the District of Columbia cited all these reasons in finding that a plaintiff was required to authorize the interview [\*185] between her treating physician and defense counsel. It went on to express concern over the possibility that the testimonial privilege, if extended to ex parte interviews, could become a trial tactic, allowing plaintiff's counsel to monitor the progress of the defense:

The privilege was never intended . . . to be used as a trial tactic by which a party entitled to invoke it may control to his [\*\*968] advantage the timing and circumstances of the release of information he must inevitably see revealed at some time.

*Eli Lilly & Co.*, 99 F.R.D. at 128.

The majority indicates that it, too, is concerned with time and costs. I, however, agree with those courts that have forbidden ex parte interviews of treating physicians by adverse parties, regardless of costs, on the basis that they are violative of public policy. [\*\*\*61] See *Mull*, 448 So.2d at 955; *Petrillo*, 148 Ill.App.3d at 593, 102 Ill.Dec. at 177, 499 N.E.2d at 957; *Wenninger*, 307 Minn. at 410-11, 240 N.W.2d at 337; *Jaap*, 623 P.2d at 1392; *Nelson*, 130 N.H. at 111, 534 A.2d at 723; *Smith v. Ashby*, 106 N.M. 358, 360, 743 P.2d 114, 116 (1987); *Stoller v. Moo Young Jun*, 118 A.D.2d 637, 637, 499 N.Y.S.2d 790, 791 (1986); *Anker*, 98 Misc. 2d at 152-153, 413 N.Y.S.2d at 584; *Loudon v. Mhyre*, 110 Wash.2d 675,

677, 756 P.2d 138, 140 (1988); accord *Manion v. N.P.W. Medical Center*, 676 F.Supp. 585, 594-95 (M.D.Pa.1987). I am aware that most of these cases involve evidentiary concerns rather than theories of liability in tort, but I would find their reasoning instructive and applicable to the present situation. The presence of plaintiff's counsel at an interview between the plaintiff's physician and defense counsel prevents the inadvertent disclosure of irrelevant [\*\*\*62] information which may overstep the boundaries of the privilege and lead to the discovery of embarrassing and harmful information. *Roosevelt Hotel Limited Partnership v. Sweeney*, 394 N.W.2d 353, 357 (Iowa 1986). *Wenninger*, 307 Minn. at 411, 240 N.W.2d at 337; *Nelson*, 130 N.H. at 111, 534 A.2d at 723; *Anker*, 98 Misc.2d at 152-153, [\*186] 413 N.Y.S.2d at 585; *Loudon*, 110 Wash.2d at 677, 756 P.2d at 140.

Further, I note, as did the Illinois court in *Petrillo v. Syntex Laboratories, Inc.*, *supra*, which I would find most persuasive, that concern with excessive discovery time and costs is also misplaced. Depositions are not the only way in which a defendant can conduct discovery aside from the ex parte interview. As the *Petrillo* court noted, methods of formal discovery may just as easily serve the purpose. *Petrillo*, 148 Ill.App.3d at 596-97, 102 Ill.Dec. at 183, 499 N.E.2d at 963; *Ashby*, 106 N.M. at 360, 743 P.2d at 116; [\*\*\*63] *Loudon*, 110 Wash.2d at 677, 756 P.2d at 140. I also am in disagreement with statements that refusal to allow ex parte interviews in some way presents a tactical advantage to the plaintiff. I do not believe that requiring compliance with formal discovery methods gives plaintiffs the ability to somehow uncover the defense's trial strategy, any more than it would in any other cause of action. As the Washington Supreme Court stated, "[T]he argument that depositions unfairly allow plaintiffs to determine defendants' trial strategy does not comport with a purpose behind the discovery rules -- to prevent surprise at trial." *Loudon*, 110 Wash.2d at 680, 756 P.2d at 142.

In any case, I agree with both the Illinois and the Washington courts that the time consumed as well as the costs involved in formal discovery do not create such a hardship here as to require us to allow ex parte interviews. I fail to see how allowance of ex parte interviews would in any way lead to truth in the litigation process. I agree with the Illinois court that the doctor's opinion in an ex parte interview should not differ from that expressed at a [\*\*\*64] deposition or in

interrogatories. *Petrillo*, 148 Ill.App.3d at 597, 102 Ill.Dec. at 183, 499 N.E.2d at 963; see also *Ashby*, 106 N.M. at 360, 743 P.2d at 116. Allowing an ex parte interview in no way balances properly the concerns of both parties and of public policy. I find that such concerns are more appropriately met by requiring that formal discovery methods be followed.

[\*187] Of course, counsel are free to agree to methods of discovery, if they so choose. I would note with approval the requirement of the Alaska Supreme Court in *Arctic Motor Freight* that "counsel . . . confer in good faith concerning discovery . . . , [that they] exchange information and comply with discovery requests 'in a manner demonstrating candor and common sense.'" *Arctic Motor Freight, Inc.*, 571 P.2d at 1009 (quoting *Trans-World Investments v. Drobny*, 554 P.2d at 1152). I am hard pressed to understand how that is to occur, however, in situations like the one presently [\*969] before us, where neither the appellant nor her counsel was aware of the interview, and where the patientlitigant's [\*65] physician rushes to the aid of defense counsel.

Further, I am convinced that ex parte interviews are improper because the rationales utilized by those jurisdictions allowing such interviews do not address the heart of the problem, that is, the violation of the fiduciary duty that a physician owes his patient. Any attempt to balance competing interests must take this into account.

Private nonadversary interviews of a doctor by adverse counsel would offer no . . . protection to the patient's right of privacy. The presence of the patient's counsel at the doctor's interrogation permits the patient to know what his testimony is, allays a patient's fears that his doctor may be disclosing personal confidences, and thus helps preserve the complete trust between doctor and patient which is essential to the successful treatment of the patient's condition.

*Weninger*, 307 Minn. at 411, 240 N.W.2d at 337. See also *Ashby*, 106 N.M. at 360, 743 P.2d at 116; *Loudon*, 110 Wash.2d at 679, 756 P.2d at 141. Beyond allowing for the successful treatment of the patient, the ability to be present, in [\*66] actuality or through counsel, preserves the trust of the patient in his or her chosen

physician. It removes the concern for trespass to the patient's dignity and psyche, a concern which strikes at the heart of this fiduciary relationship.

[\*188] The appellees, Dr. Krane, Albert Einstein, and Underwriters, all argue that these facts will not support Moses' claim for breach of confidentiality because any statements made in connection with litigation or pending litigation are absolutely privileged in a defamation context. *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 323, 275 A.2d 53, 56 (1971). Appellees argue that since the breach of confidentiality claim arises from the same set of facts which are asserted as giving rise to the defamation claim, the privilege should apply as a complete defense to that claim as well. They cite to us a series of cases from our own and other jurisdictions which they advance as having extended the concept of absolute privilege for statements arising in litigation to causes of action other than defamation, see, e.g., *Thompson v. Sikov*, 340 Pa.Super. 382, 490 A.2d 472 (1985) (statements [\*67] did not give rise to cause of action for intentional infliction of emotional distress because privileged under § 46, comment g, of *Restatement (Second) of Torts*); *Passon v. Spritzer*, 277 Pa.Super. 498, 419 A.2d 1258 (1980) (absolute privilege applied to allegedly libellous statements contained in petition for writ of habeas corpus); *Triester v. 191 Tenants Association*, 272 Pa.Super. 271, 415 A.2d 698 (1979) (statements did not give rise to cause of action for disparagement of title because privileged under *Restatement (Second) of Torts*, § 635).

At first glance, it would seem that appellees have set out a plausible argument for expansion of the privileges connected with defamation to the present cause of action. A closer examination of the cases cited and of the *Restatement (Second) of Torts*, upon which they in some part rely, negates this impression, however. The *Restatement (Second) of Torts* outlines the absolute privileges available in actions for defamation in sections 583 to 592A. These sections are given wider application by sections 635 (making the privileges available in actions for injurious falsehood) and [\*68] 652F (making the privileges available in actions for invasion of privacy), and apply to witnesses, jurors, parties to judicial proceedings, judges, legislators, administrative officers, husbands and wives, and attorneys at law. With [\*189] the exception of the section dealing with husbands and wives, these sections give to persons in the described roles a privilege to publish otherwise actionable material

as some part of a judicial or legislative proceeding in which the person who asserts the privilege is involved. *See id.* §§ 585-592. This "privilege," which is actually in the nature of an immunity from suit, *see* 3 *Restatement (Second) of Torts* § 585, Introductory Note, has the effect of providing insulation from liability for statements which are related to a judicial or legislative proceeding, but would be actionable [\*\*970] if made in another context. Nothing in the cases cited by appellees or in the Restatement sections outlining this immunity, however, addresses its applicability in situations where, due to a recognized and respected confidential relationship between the declarant and the individual who is the subject of the statements, the subject has a countervailing [\*\*\*69] privilege which would prohibit the declarant from making statements violative of his duty to the subject, even in court. The attachment, whether by common law tradition or legislative enactment, of such a privilege to the confidential relationship recognizes a public policy favoring the relationship which outweighs even the policy to promote truth-finding in judicial and legislative proceedings.

Appellees would have us hold that the absolute immunity doctrine is widening. I do not think it has widened so far as to encompass this cause of action which I would espouse. Consider the most recent cases appellees cite to us from this court, *Pelagatti v. Cohen*, 370 Pa.Super. 422, 536 A.2d 1337 (1987) and *Brown v. Delaware Valley Transplant Program*, 372 Pa.Super. 629, 632, 539 A.2d 1372, 1374 (1988). While these cases do hold that the immunity insulates attorneys from liability for intentional torts against third parties based upon actions which were performed in a judicial context, they do not stand for the proposition that the immunity would apply if the tort alleged were based upon actions taken by the attorney *against* [\*\*\*70] his own client. Thus appellees' arguments based on *Pelagatti* and *Brown* fail to convince us that the absolute immunity doctrine must swallow up any cause of action for breach of confidentiality [\*190] in a judicial setting. This is underlined by the Restatement section discussing the absolute liability for attorneys during a judicial proceeding. *Comment a to section 586* states, "The privilege stated in this Section is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice *for their clients.*" 3 *Restatement (Second) Torts* § 586 (1977) (emphasis added).

Further, an examination of these Restatement sections shows that public policy considerations behind the absolute privilege doctrine have, in most jurisdictions, been considered and discarded in favor of confidentiality in such situations. The doctrine of absolute privilege favors full disclosure on the part of witnesses or potential witnesses in a litigation setting:

This privilege exists in favor of counsel so that he will be permitted to represent his client's interests to the fullest extent . . . All persons involved in a judicial proceeding [\*\*\*71] are encouraged by this privilege to speak frankly and argue freely without danger or concern that they may be required to defend their statements in a later defamation action.

*Smith v. Griffiths*, 327 Pa.Super. 418, 423, 476 A.2d 22, 25 (1984). This was the rationale behind the *Pelagatti* decision. *Pelagatti*, 370 Pa.Super. at 436, 536 A.2d at 1344. In contrast, as has already been discussed, the public policy of this Commonwealth has attempted to balance the competing concerns of the desirability in a litigation setting of full disclosure by a physician against the patient litigant's desire for no disclosure whatsoever. The existence of a statute which provides for limited disclosure in a litigation context is illustrative of finding that balance in favor of limiting disclosure. The balance therefore favors the rights of the patient litigant. *See, e.g., Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 591 (D.C.App.1985) (existence of licensing statute, which prevents disclosure except for situations involving gunshot wounds, and evidentiary code, which precludes testifying except [\*\*\*72] in limited situations, found not applicable, illustrative of public policy encouraging [\*191] patient candor and physician confidentiality). Because we attach great weight to the fiduciary duty that the physician owes to his patient, we have found that a cause of action should exist where that confidence is breached, especially where the physician has engaged in ex parte conferences:

At the very heart of every fiduciary relationship, including that between a patient and his physician, there exists an atmosphere of trust and faith in the discretion [\*\*971] of the fiduciary. That being so, we find it difficult to believe that a physician can engage in an ex parte conference with the legal adversary of his

patient without endangering the trust and faith invested in him by his patient.

*Petrillo, 148 Ill.App.3d at 595, 102 Ill.Dec. at 182, 499 N.E.2d at 962.* To hold that an absolute privilege should exist here would be to advance the importance of disclosure over trust and faith, and would eviscerate the very relationship we have set out to protect.

I must point out that refusing to apply the doctrine of absolute privilege in this instance [\*\*\*73] in no way bruises the adversary system, a concern of the New Jersey court in *Lazorick v. Brown, 195 N.J.Super. at 456, 480 A.2d at 231*. In this Commonwealth, the balance achieved by the legislature will not be upset by any decision to join those jurisdictions which require formal discovery methods to be followed in situations where the physician/patient relationship is at risk. Obviously, a physician who has the consent of his patient would not be in danger of any suit here, *Baker v. Lafayette College, 350 Pa.Super. 68, 72, 504 A.2d 247, 249 (1986)*; see 3 *Restatement (Second) of Torts § 583 (1977)* (consent is a defense to defamation claim), and during formal discovery, sanctioned by the court, the patient has clearly given his consent. Such measures balance considerations, because they allow disclosure in controlled situations, and in doing so, protect the relationship to which our courts and legislature have attached such importance.

Further, because I would find that the physician/patient relationship is so important to society, I would also hold that inducing the breach should give rise to a cause of [\*192] [\*\*\*74] action in tort. See, e.g., *Alberts, 395 Mass. at 69, 479 N.E.2d at 119*; accord *Hammonds, 243 F.Supp. at 803*. Although I would not consider this to be a cause of action sounding strictly in contract, I note that tortious interference with contractual relations is also a basis for liability. See *Buczek v. First National Bank, 366 Pa.Super. 551, 557, 531 A.2d 1122, 1124 (1987)*. I would find this to be analogous to a cause of action for inducing the breach of confidentiality. Again, the physician stands in a fiduciary relation to his patient. See *Alexander, 177 A.2d at 146*. The Restatement (Second) of Torts finds that such an inducement is the basis for liability.

Section 874 defines the violation of a fiduciary duty as follows:

#### § 874. Violation of Fiduciary Duty

One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.

4 *Restatement (Second) of Torts, § 874* (ed. 1979). Comment c to that section states, "A person who knowingly assists a fiduciary in committing [\*\*\*75] a breach of trust is himself guilty of tortious conduct, and is liable for the harm thereby caused." The comment then cites to *Section 876 of the Restatement*, which says, in turn:

#### § 876. Persons Acting in Concert

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with another or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result, and his own conduct, separately considered, constitutes a breach of duty to the third person.

4 *Restatement (Second) of Torts, § 876* (ed. 1979). We find subsection b to be controlling here.

[\*193] Advice or encouragement to act acts as a moral support to a tortfeasor, and if the act encouraged is known to be tortious it has the same effect upon the liability of the advisor as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is [\*\*\*76] himself a tortfeasor, and is responsible for the consequences of the other's act. This is true when the act done is an intended trespass . . . when it is merely a [\*\*972] negligent act. The rule applies whether or not the other knows his

act is tortious . . . . It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.

*Id.* at comment d.

Considering Moses' allegations, then, in the light of this analysis, I would find that she has made out a cause of action for breach of confidentiality against Dr. Krane. Her complaint outlined licensing statutes and this Commonwealth's testamentary privilege statute, as well as the Hippocratic Oath, and ethical considerations of the AMA. She has alleged that Dr. Krane was her treating physician and had gathered information about her from their physician/patient relationship. She has further alleged that because of that relationship and because of these statutes and considerations, Dr. Krane had a duty to remain silent unless she gave her consent. She has alleged that Dr. Krane, without informing either counsel or herself, upon request by Underwriters, whom she alleges was hired [\*\*\*77] by Albert Einstein to represent it in the underlying medical malpractice action, provided them with information and documents, even going so far as to testify for them in that trial. I would reiterate that this case is in its preliminary stages. I would hold that the trial court erred in dismissing Moses' complaint on preliminary objections.

The remaining claims for inducement of breach were dismissed by the trial court on a motion for summary judgment. It is axiomatic that summary judgment may be granted only where there is no genuine issue of material fact. The moving party will then be entitled to summary [\*194] judgment as a matter of law. Summary judgment should be granted, however, only in cases where the right to such judgment is clear and free from doubt. *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 175, 507 A.2d 323, 331 (1986). Further, the reviewing court must take as true all well-pleaded facts in the non-moving party's pleadings, giving that party the benefit of all reasonable inferences to be drawn from those facts. *Curry v. Estate of Thompson*, 332 Pa. Super. 364, 368, 481 A.2d 658, 659 (1984). [\*\*\*78]

Taking as true all well-pleaded facts in Moses' complaint, I would find that she has made out a cause of action against Albert Einstein, Underwriters, and McWilliams for inducement of breach as well. Again, she has alleged in her complaint that Albert Einstein

hired Underwriters to represent it, and that Underwriters in turn hired McWilliams as counsel. She has also alleged that Underwriters, through an employee, contacted Dr. Krane, and that Underwriters arranged for McWilliams to speak with him. She alleged that all actions of the employees of Underwriters were done in the scope of their employment, and that McWilliams performed his duties with the consent, approval, knowledge and cooperation of Underwriters. She has further alleged that all three appellees initiated, promoted, requested, encouraged and gave financial support to the unauthorized communications of Dr. Krane.

The inference may be drawn from these facts that appellees intended to obtain from Dr. Krane information that he had obtained as a result of his fiduciary relationship with Moses. Further, because appellees knew that Dr. Krane was Moses' treating physician, one may draw the inference that they also knew [\*\*\*79] that they were inducing a breach of a fiduciary duty by requesting and obtaining that information. I think that Moses has pled sufficient facts to raise the question of whether appellees were performing a tortious act in concert with Dr. Krane, or giving substantial assistance to him by asking for information protected by the physician/patient relationship while being aware that divulging that information was possibly tortious. These [\*195] questions are for the jury to determine. I do not find the case to be free of doubt, or the outcome to be prescribed by law. I would hold that the trial court erred in granting summary judgment on the facts that are before us.<sup>3</sup>

3 We note also that Moses has alleged damages because of injury to her nerves and psyche, because of mental distress and embarrassment, shame, and humiliation.

[\*\*973] I would find, therefore, that the need of a patient's opponent in litigation to obtain all information relevant to the patient's physical condition does not necessarily weigh so heavily against [\*\*\*80] the desire of a patient to keep confidential the information disclosed during the physician/patient relationship that we must allow ex parte interviews with the physician involved as a result. I would not assign litigation costs and time much value. I would add to the balance, however, the public policy of this Commonwealth which has always accorded great importance to the confidentiality of certain fiduciary relationships.<sup>4</sup> This addition, I am certain,

would make the balance more even, if it did not, as it does to my mind, tip the scales to the side of the patient.

4 I also note my concern over what effect the majority's decision will have on similar confidential relationships, for example, the attorney/client relationship, or the accountant/client relationship.

In any event, I am of the opinion that these competing interests can best be served, not by permitting unauthorized or nonconsensual disclosure of information, but, as I have stated, through utilization of the discovery process provided for by the Commonwealth's [\*\*\*81] rules of court. The supervision and judgment of the trial court, allowing discovery of information and providing sanctions on misconduct, can best mitigate the effects of

a desire for disclosure on the one hand, and confidentiality on the other. Cost is no basis for violating the confidentiality of the relationship involved here.

I would find that the public policy of this Commonwealth requires that a patient litigant be permitted to bring a claim against his physician for breach of confidentiality, and that ex parte discovery methods are forbidden in cases in which the physician/patient relationship is integral, and may give [\*196] rise to a claim for that breach. I would therefore reverse the order of the trial court granting judgment on the pleadings and summary judgment for appellees on Moses' claims for breach of confidentiality and inducement of that breach, and remand for further proceedings in accordance with this opinion.



LEXSTAT RESTATEMENT TORTS § 586

Restatement of the Law, Second, Torts  
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Division 5 - Defamation

Chapter 25 - Defenses to Actions for Defamation

Topic 2 - Absolute Privileges

Title B - Absolute Privilege Irrespective of Consent

Restat 2d of Torts, § 586

§ 586 Attorneys at Law

**An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.**

**COMMENTS & ILLUSTRATIONS: Comment:**

*a.* The privilege stated in this Section is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege is absolute. It protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity. These matters are of importance only in determining the amenability of the attorney to the disciplinary power of the court of which he is an officer. The publication of defamatory matter by an attorney is protected not only when made in the institution of the proceedings or in the conduct of litigation before a judicial tribunal, but in conferences and other communications preliminary to the proceeding. The institution of a judicial proceeding includes all pleadings and affidavits necessary to set the judicial machinery in motion. The conduct of the litigation includes the examination and cross-examination of witnesses, comments upon the evidence and arguments both oral and written upon the evidence, whether made to court or jury.

*b. Prosecuting attorneys.* The rule stated in this Section is applicable to attorneys who participate in judicial proceedings, whether civil or criminal. It protects a prosecuting attorney as well as a defense attorney in a criminal action. So too, it affords protection to a prosecuting attorney while conducting an investigation before a grand jury, and this is true irrespective of the outcome of the investigation.

*c. Relation of statement to proceedings.* The privilege stated in this Section is confined to statements made by an attorney while performing his function as such. Therefore it is available only when the defamatory matter has some

reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it. Thus the fact that the defamatory publication is an unwarranted inference from the evidence is not enough to deprive the attorney of his privilege. So too, the publication of defamatory matter in a question to a witness may be within the privilege although the question is withdrawn or the witness is directed by the judge not to answer it. On the other hand, the privilege does not cover the attorney's publication of defamatory matter that has no connection whatever with the litigation.

*d.* Judicial proceedings include all proceedings before an officer or other tribunal exercising a judicial function, on which see § 585, Comments *c* and *f*. As indicated there, an arbitration proceeding may be included.

*e.* As to communications preliminary to a proposed judicial proceeding the rule stated in this Section applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

**REPORTERS NOTES:** As to the absolute privilege of attorneys in the conduct of the litigation itself, see *Munster v. Lamb*, 11 Q.B.D. 588 (1883); *Ginsburg v. Black*, 192 F.2d 823 (7 Cir. 1951), certiorari denied, 343 U.S. 934, 72 S.Ct. 770, 96 L.Ed. 1342, rehearing denied, 343 U.S. 958, 72 S.Ct. 1050, 96 L.Ed. 1358; *Theiss v. Scherer*, 396 F.2d 646 (6 Cir. 1968); *United States v. Hurt*, 543 F.2d 162 (D.C.Cir.1976); *Carpenter v. Ashley*, 148 Cal. 422, 83 P. 444 (1906); *Sussman v. Damian*, 355 So.2d 809 (Fla.App.1977); *Weiler v. Stern*, 67 Ill.App.3d 179, 23 Ill.Dec. 855, 384 N.E.2d 762 (1978); *Dineen v. Daughan*, 381 A.2d 663 (Me.1978); *Romero v. Prince*, 85 N.M. 474, 513 P.2d 717 (1973); *Irwin v. Ashurst*, 158 Or. 61, 74 P.2d 1127 (1938).

"Communications preliminary to a proposed judicial proceeding": Informal complaints to a magistrate or prosecuting attorney held absolutely privileged: *Vogel v. Gruaz*, 110 U.S. 311, 4 S.Ct. 12, 28 L.Ed. 158 (1884); *Gabriel v. McMullin*, 127 Iowa 426, 103 N.W. 355 (1905); *Kidder v. Parkhurst*, 85 Mass. (3 Allen) 393 (1862); *Wells v. Toogood*, 165 Mich. 677, 131 N.W. 124 (1911); *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909 (1942); *Schultz v. Strauss*, 127 Wis. 325, 106 N.W. 1066 (1906).

Preliminary communications with witnesses, in interviews before trial, and the like: *Watson v. M'Ewan*, [1905] A.C. 480; *Beresford v. White*, 30 T.L.R. 591 (1914); *Sriberg v. Raymond*, 544 F.2d 15 (1 Cir. 1976); *Adams v. Peck*, 415 A.2d 292 (Md.1980); *Smith v. Suburban Restaurants, Inc.*, 374 Mass. 528, 373 N.E.2d 215 (1978); *Lerette v. Dean Witter Organization*, 60 Cal.App.3d 573, 131 Cal.Rptr. 592 (1976); *Youmans v. Smith*, 153 N.Y. 214, 47 N.E. 265 (1897); *Zirn v. Cullom*, 187 Misc. 241, 63 N.Y.S.2d 439 (1946); *Chard v. Galton*, 277 Or. 109, 559 P.2d 1280 (1977) (settlement negotiation).

On the other hand, preliminary conversations between attorney and client were held only conditionally privileged in *Lapetina v. Santangelo*, 124 App.Div. 519, 108 N.Y.S. 975 (1908); *Kruse v. Rabe*, 80 N.J.L. 378, 79 A. 316 (1910).

The absolute privilege does not extend to a press conference. *Foster v. Percy*, Ind. , 387 N.E.2d 446 (1979); *Kennedy v. Cannon*, 229 Md. 92, 182 A.2d 54 (1962) (defense attorney); *Barto v. Felix*, 250 Pa.Super. 262, 378 A.2d 927 (1977) (public defender).

#### **CROSS REFERENCES:** ALR Annotations:

Libel and slander: privileged nature of communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement. 60 A.L.R.3d 1041.

Relevancy of matter contained in pleading as affecting privilege within law of libel. 38 A.L.R.3d 272.

Libel and slander: out-of-court communications between attorneys made preparatory to, or in the course or aftermath of, civil judicial proceedings as privileged. 36 A.L.R.3d 1328.

Libel and slander: privilege in connection with proceedings to disbar or discipline attorney. 77 A.L.R.2d 493.

Libel and slander: statements in counsel's argument to jury as privileged. *61 A.L.R.2d 1300*.

Libel and slander: findings, report, or like of judge or person acting in judicial capacity as privileged. *42 A.L.R.2d 825*.

Libel and slander: statements in briefs as privileged. *32 A.L.R.2d 423*.

Digest System Key Numbers:

Libel and Slander 38(5)

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Torts Intentional Torts Defamation Defenses Privileges Absolute Privileges



LEXSTAT RESTATEMENT TORTS § 588

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Restat 2d of Torts, § 588

§ 588 Witnesses in Judicial Proceedings

**A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.**

**COMMENTS & ILLUSTRATIONS: Comment:**

*a.* The function of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal must be based upon the facts as shown by their testimony, and it is necessary therefore that a full disclosure not be hampered by fear of private suits for defamation. The compulsory attendance of all witnesses in judicial proceedings makes the protection thus accorded the more necessary. The witness is subject to the control of the trial judge in the exercise of the privilege. For abuse of it, he may be subject to criminal prosecution for perjury and to punishment for contempt.

*b.* The rule stated in this Section protects a witness while testifying. It is not necessary that he give his testimony under oath; it is enough that he is permitted to testify. The privilege also protects him while engaged in private conferences with an attorney at law with reference to proposed litigation, either civil or criminal.

*c. Relation of statement to proceedings.* Testimony to be privileged need not be material or relevant to the issues before the court, nor does the fact that the testimony is offered voluntarily and not in response to a question prevent it from being privileged if it has some reference to the subject of the litigation. If the defamatory matter is published in response to a question put to the witness by either counsel or by the judge, that fact is sufficient to bring it within the protection of the privilege, notwithstanding the fact that it is subsequently adjudged to be inadmissible. On the other hand, a witness who persists in answering a question which has no reference to the proceeding after the judge has excluded it, is not within the privilege.

## Restatement of the Law, Second, Torts, § 588

*d.* Judicial proceedings include all proceedings in which an officer or tribunal exercises judicial functions, as to which see § 585, Comments *c* and *f*. As indicated there, an arbitration proceeding may be included.

*e.* As to communications preliminary to a proposed judicial proceeding, the rule stated in this Section applies only when the communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

**REPORTERS NOTES:** See, in support of this Section, *Seaman v. Netherclift*, 2 C.P.D. 53 (1876); *Todd v. Cox*, 20 *Ariz. App.* 347, 512 P.2d 1234 (1973); *Johnson v. Dover*, 201 *Ark.* 175, 143 S.W.2d 1112 (1940); *Thornton v. Rhoden*, 245 *Cal.App.2d* 80, 53 *Cal.Rptr.* 706 (1966); *Buchanan v. Miami Herald Pub. Co.*, 206 *So.2d* 465 (Fla.App.1968), modified in another regard 230 *So.2d* 9; *Veazy v. Blair*, 86 *Ga.App.* 721, 72 S.E.2d 481 (1952); *Aborn v. Lipson*, 357 *Mass.* 71, 256 N.E.2d 442 (1970); *Greenberg v. Ackerman*, 41 *N.J.Super.* 146, 124 A.2d 313 (1956); *Taplin-Rice-Clerkin Co. v. Hower*, 124 *Ohio St.* 123, 177 N.E. 203 (1931); *Felts v. Paradise*, 178 *Tenn.* 421, 158 S.W.2d 727 (1942); *Massey v. Jones*, 182 *Va.* 200, 28 S.E.2d 623 (1944).

Accord, as to volunteer witnesses, *Buschbaum v. Heriot*, 5 *Ga.App.* 521, 63 S.E. 645 (1909); *Weil v. Lynds*, 105 *Kan.* 440, 185 P. 51 (1919); *Beggs v. McCrear*, 62 *App.Div.* 39, 70 N.Y.S. 864 (1901); *Ginsburg v. Halpern*, 383 *Pa.* 178, 118 A.2d 201 (1955).

Accord, as to affidavits and depositions: *Dunbar v. Greenlaw*, 152 *Me.* 270, 128 A.2d 218 (1956); *Mezullo v. Maletz*, 331 *Mass.* 233, 118 N.E.2d 356 (1954); *Jarman v. Offutt*, 239 *N.C.* 468, 80 S.E.2d 248 (1954); *Dyer v. Dyer*, 178 *Tenn.* 234, 156 S.W.2d 445 (1941); cf. *Soter v. Christoforacos*, 53 *Ill.App.2d* 133, 202 N.E.2d 846 (1964).

On types of judicial tribunals, see *Tiedemann v. Superior Court*, 83 *Cal.App.3d* 918, 148 *Cal.Rptr.* 242 (1978); *Kipp v. Kueker*, *Mass.App.* , 386 N.E.2d 1282 (1979); *Devlin v. Greiner*, 147 *N.J.Super.* 446, 371 A.2d 380 (1977).

**CROSS REFERENCES:** ALR Annotations:

Libel and slander: privilege in connection with proceedings to disbar or discipline attorney. 77 *A.L.R.2d* 493.  
Testimony of witness as basis of civil action for damages. 54 *A.L.R.2d* 1298.

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**Legal Topics:**

For related research and practice materials, see the following legal topics:  
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**ARTICLE:** Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers

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**SUMMARY:**

... The identity of the person who received a letter or heard a statement may also affect whether the communication is within the litigation privilege. ... " Other persons potentially lacking a direct connection to adversarial proceedings include an opposing party's business client, potential investors, potential clients of opposing counsel, customers of a client's competitor, a client's spouse, an opposing party's spouse, and the opposing party's employer. ... It is recognized that the mere threat of a lawsuit may impair an attorney's ability to put the interests of his or her client first, especially when the attorney's actions may be simultaneously strengthening a cause of action for the client's adversary. ... Questions requiring resolution in any given case may include the following: the types of claims for which the doctrine provides immunity; whether the doctrine protects conduct as well as statements; the kinds of legal proceedings in which the privilege will attach; what constitutes the condition of "relevance;" whether the privilege provides protection before and after, or only during, the lawsuit; and finally, whether the absolute immunity doctrine is considered a defense to or an immunity from suit. ... While the absolute immunity from civil liability originated to protect attorneys from lawsuits for defamation, recent cases logically extend immunity to other claims as well. ... Despite the overwhelming majority of jurisdictions that have adopted the Restatement formulation of absolute immunity, which is expressly limited to defamation theories, courts frequently expand the privilege to other causes of action to prevent attorneys from circumventing the privilege by creative pleading.

**HIGHLIGHT:** "The first thing we do, let's kill all the lawyers."

-- William Shakespeare, Henry VI, Part II, Act 4, Sc. 2

**TEXT:**

[\*916]

I. Introduction

Lawsuits filed against litigation lawyers by their clients' adversaries primarily seek vengeance. n1 Lawyers, however, are absolutely immune from civil liability for statements or conduct that may have injured, offended, or otherwise damaged an opposing party during the litigation process. This protection, often referred to as the "litigation privilege," n2 shields a litigator regardless of malice, bad faith, or ill will of any kind. It originated at the very beginning of English jurisprudence for the purpose of protecting the advocacy system and its participants, and it crossed the Atlantic Ocean to reach the shores of America after colonization.

This article examines the historical antecedents of the litigation privilege as well as the policies motivating its creation. It also provides a comprehensive description of the doctrine of absolute immunity, explores the circumstances in which it has been applied, and discusses potential legal issues that may affect its application in any given case. The analysis provides an overview of the doctrine throughout America and does not concentrate on any one state's articulation and application of the litigation privilege.

After considering the venerable jurisprudence of the doctrine, this article derives from that jurisprudence an analytical framework for future cases involving absolute immunity and details the determinants of the doctrine in light of their prominence in precedent. The paradigm is intended to assist in the development of the lawyer's litigation privilege and support its continued existence in the twenty-first century. n3

[\*917]

## II. Doctrine of Absolute Immunity

"The adversary system's penchant for conflict and drama, coupled with high stakes and behind-the-scenes confidences, seem to put even greater temptations on trial lawyers than on desk lawyers to use questionable tactics to secure victory." n4 As a result, an attorney involved in litigation is provided more protection from civil liability in performing advocacy functions than in performing any other duties on behalf of a client. n5

All but two states n6 recognize absolute immunity for lawyers involved in litigation with "very little variation" from state to state. n7 The Restatement formulation, adopted in nearly every state, describes the litigation privilege as follows:

[\*918]

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding. n8

The privilege applies regardless of malice, bad faith, or any nefarious motives on the part of the lawyer so long as the conduct complained of has some relation to the litigation. n9

Every state in the nation also recognizes that "the question of whether absolute privilege applies in a given case is necessarily one of law for the trial court to determine." n10 Requiring a judicial determination of absolute immunity allows courts to dismiss cases against attorneys at the earliest possible stage in the litigation, which furthers the public policy underlying the doctrine by inhibiting interference between an attorney and his or her client. n11

## III. Origins of Absolute Immunity

Common law courts have recognized absolute immunity for nearly 400 years. The origins of the litigation privilege have been traced back to medieval England. n12 The privilege arose soon after the Norman Conquest [\*919] and the introduction of the adversary system in the eleventh century. n13 Courts have aptly declared that the doctrine of absolute immunity is "as old as the law." n14

The first opinion dismissing a lawsuit against an attorney by applying the doctrine of absolute immunity was rendered in 1606. n15 In that case, the attorney was accused of slandering his client's adversary during a previous trial by asserting that the opponent was a convicted felon. n16 Even assuming that the attorney's assertion was false, the court held that the attempt to discredit the witness during the previous litigation was protected by absolute immunity. n17 The court declared: "[A] counsellor in law retained hath a privilege to enforce any thing which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false." n18

Centuries later, the doctrine of absolute immunity remained intact. In the 1883 case of *Munster v. Lamb*, an English court granted an attorney immunity from suit even assuming his conduct was "without any justification or even excuse, and from the indirect motive of personal ill-will or anger" toward his former client's adversary. n19 The court explained:

With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. n20

*Munster v. Lamb* was followed by *Henderson v. Broomhead*, which declared the following:

No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we [\*920] find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies. n21

The American adoption of absolute immunity followed soon after independence from Britain. n22 In the earliest reported cases, American judges relied on the privilege rules that were well established in English jurisprudence. n23 After the Civil War, however, courts in the United States began to articulate a narrower version of the doctrine of absolute immunity that modified the early English formulation. n24 Notwithstanding their initial break with tradition, American courts eventually returned the doctrine to its English roots and the policies justifying its creation. n25

#### IV. Public Policy of Absolute Immunity

The policy underlying the well-settled principle of absolute immunity was emphasized by the Supreme Court of Ohio as follows:

The most basic goal of our judicial system is to afford litigants the opportunity to freely and fully discuss all the various aspects of a case in order to assist the court in determining the truth, so that the decision it renders is both fair and just. While the imposition of an absolute privilege in judicial proceedings may prevent redress of particular scurrilous [actions] that tend to harm the reputation of the person [defamed], a contrary rule, in our view, would unduly stifle attorneys from zealously advancing the interests of their clients in possible violation of the Code of Professional Responsibility, and would clog court dockets with a multitude of lawsuits [based on actions taken] in other judicial proceedings. n26

The court further explained:

[\*921]

Although the result may be harsh in some instances and a party to a lawsuit may possibly be harmed without legal recourse, ... sufficient protection from gross abuse of the privilege is provided by the fact that an objective judge conducts the judicial proceedings and that the judge may hold an attorney in contempt if his conduct exceeds the bound of legal propriety. n27

As the foregoing decision emphasizes, courts have determined that the interest in preserving the integrity of the advocacy system outweighs any monetary interest of a party injured by the attorney of his or her adversary. n28 In fact, the Supreme Court of California declared the litigation privilege to be "the backbone to an effective and smoothly operating judicial system." n29 The Supreme Court of Pennsylvania also weighed the balance as follows: "Wrong may at times be done to a defamed party, but it is *damnum absque injuria*. The inconvenience of the individual must yield to a rule for the good of the general public." n30 Furthermore, because the privilege is designed to protect the adversary system itself by barring claims that would disrupt the litigation process or deter persons engaged in that process from performing their respective functions, all participants are granted its protection. n31

[\*922] The litigation privilege embodies three public policy goals for the protection of litigation lawyers. Primarily, the privilege protects the rights of clients who "should not be imperiled by subjecting their legal advisers to the constant fear of" lawsuits arising out of their conduct in the course of legal representation. n32 The logic is that an attorney preparing for litigation must not be "hobbled by the fear of reprisal by actions for defamation[.]" which may tend to lessen his or her efforts on behalf of clients. n33

In pursuing the role of advocate, an attorney is especially prone to being vilified, along with his or her client, by the party opponent. n34 Additionally, "the problem is exacerbated by the adversary system which encourages the diligent attorney to capitalize upon advantages and to attack the weaknesses of his [or her] opponent." n35 Indeed, an attorney has an ethical obligation to do so. n36 The adversarial nature of our system of justice also "fosters the hired gun or mercenary role of the lawyer." n37 Thus, courts have consistently [\*923] acknowledged that "an essential ingredient of zealous representation is the freedom to err in favor of the client." n38

The attorney's obligations to the client, moreover, not only demand zealous representation, n39 but also undivided loyalty. It is recognized that the mere threat of a lawsuit may impair an attorney's ability to put the interests of his or her client first, especially when the attorney's actions may be simultaneously strengthening a cause of action for the client's adversary. n40

When the threat of litigation becomes a reality, the ethical problem is amplified "if the attorney is still representing his [or her] client in ongoing litigation." n41 Another lawsuit creates the potential for a conflict of interest with the client should the attorney find it necessary to disclose client confidences for a successful defense. n42 The attorney may also be subject to intrusive discovery proceedings questioning his or her motives, strategies, and work product. n43 The mere possibility that the attorney may have an interest adverse to his or her client jeopardizes the attorney-client relationship and often leads to its termination. n44

The disruption and/or destruction of the attorney-client relationship justifies the second policy underlying the litigation privilege; that is, it furthers the administration of justice by preserving access to the courts. n45 If parties could file retaliatory lawsuits and cause the removal of their [\*924] adversary's counsel on that basis, the judicial process would be compromised. n46

In Oregon, a court of appeals recognized this fundamental policy by granting an attorney absolute immunity from a claim of malicious prosecution. n47 More significantly, the court allowed the attorney's client to pursue a counterclaim for intentional interference with the contractual relationship between the client and his attorney. n48 At trial, the attorney testified on behalf of his client:

[The attorney] stated that [the malicious prosecution suit] injected an adversary relationship between [himself and his client] and created a built-in conflict of interest between himself and his client. He testified to additional legal fees that [his client had] incurred as a result of his being named a defendant and the necessity of obtaining another counsel in the case. He stated that their relationship was severed as to a number of pending cases. n49

Thus, while incidentally removing the potential of civil liability, the actual purpose of the privilege is not to protect litigators or provide them with a license to lie, cheat, or steal. n50 Instead, it is meant to protect their innocent clients "who would suffer if a remedy for such a wrong existed." n51

[\*925] The existence of remedies other than a cause of action for damages provides the third rationale for absolute immunity. n52 These alternative remedies include a variety of sanctions that can be imposed by the court pursuant to the rules of civil procedure and the court's inherent contempt powers, as well as the potential for disciplinary proceedings through state and local bar associations. n53 Courts impose penalties pursuant to *Federal Rules of Civil Procedure* 11, 26, and 37. n54 While courts are imposing monetary sanctions with greater frequency, n55 other punishments under these [\*926] rules have included reprimands, orders for attorneys to attend continuing legal education classes, and even suspensions from practice. n56 Attorneys who are held in contempt of court may also face long-term professional repercussions. n57 In addition to deterring errant attorneys, court-imposed sanctions may actually provide more immediate relief and satisfaction to party opponents who desire their "day in court" than a separate civil action would provide. n58

Professional grievance proceedings subject litigators to a jury of peers in the legal community. n59 Simply subjecting an attorney to an inquiry regarding his or her compliance with the professional responsibility codes has adverse consequences. n60 For instance, attorneys defending against malpractice accusations are often confronted with questions in discovery regarding prior disciplinary proceedings. Furthermore, as compared to a civil action for damages, the penalty for an ethical violation is more severe because the litigator defending against a grievance proceeding faces risk to his or her livelihood in the form of a temporary or permanent license revocation, not just a mere monetary award paid by his or her malpractice carrier. n61

[\*927]

#### V. Legal Issues Affecting Application of Absolute Immunity

The doctrine of absolute immunity is articulated fairly consistent throughout the fifty states. However, the circumstances under which it applies are not. n62 While courts have been expanding the scope of the litigation privilege since its adoption in this country, attorneys (and others) seeking to assert it still confront various legal issues. n63

Questions requiring resolution in any given case may include the following: the types of claims for which the doctrine provides immunity; whether the doctrine protects conduct as well as statements; the kinds of legal proceedings in which the privilege will attach; what constitutes the condition of "relevance;" whether the privilege provides protection before and after, or only during, the lawsuit; and finally, whether the absolute immunity doctrine is considered a defense to or an immunity from suit.

#### A. Protection from what Claims?

While the absolute immunity from civil liability originated to protect attorneys from lawsuits for defamation, n64 recent cases logically extend immunity to other claims as well. n65 The spectrum of legal theories to which the privilege has been applied includes negligence, n66 breach of [\*928] confidentiality, n67 abuse of process, n68 intentional infliction of emotional distress, n69 negligent infliction of emotional distress, n70 invasion of privacy, n71 civil conspiracy, n72 interference with contractual or advantageous business relations, n73 fraud, n74 and, in some cases, malicious prosecution. n75 Despite the overwhelming majority of jurisdictions that have adopted the Restatement

formulation of absolute immunity, which is expressly limited to defamation theories, courts frequently expand the privilege to other causes of action to prevent attorneys from circumventing the privilege by creative pleading. n76 As one scholar put it, "as new tort theories have emerged, courts have not hesitated to expand the privilege "to cover theories, actions, and circumstances never contemplated by those who formulated the rule in medieval England.'" n77

No court has yet applied absolute immunity, however, to either state or federal statutory causes of action. n78 Recognizing that the application of [\*929] absolute immunity may depend upon the particular language of the statute at issue, cases applying absolute immunity pursuant to federal common law lend support to the proposition that the protection of litigation lawyers under the analogous state privilege should be extended to statutory claims as well. n79

#### B. Protection for Statements and Conduct?

A question related to the kinds of claims against which the absolute litigation privilege affords protection is whether immunity applies simply to statements or also encompasses conduct. For decades, commentators have noted the absence of cases considering the application of the litigation privilege to the actions of opposing counsel. n80

Nevertheless, courts have allowed other participants in the litigation process to be shielded by absolute immunity for their conduct. In extending [\*930] the litigation privilege to the conduct of an expert witness, n81 the Supreme Court of New Hampshire declared that "immunity for expert witnesses' "extends not only to their testimony, but also to acts and communications which occur in connection with the preparation of that testimony.'" n82

Similarly, a court in New Jersey ruled that a party could invoke absolute immunity to protect against a lawsuit based on his alleged words and actions. n83 As far back as the time of Lord Coleridge, C.J., one court explained that "the privilege of parties is confined to what they do or say in the conduct of a case." n84

Because the privilege is afforded to all individuals or entities involved in the litigation process, n85 litigation lawyers should receive similar treatment. Indeed, while not expressly addressing the extension of the privilege to include conduct, an Ohio trial court recently granted absolute immunity to an attorney for conduct associated with the receipt and alleged failure to return a file containing confidential material. n86 Furthermore, the fact that federal common law provides absolute immunity to the conduct of government attorneys in the performance of their advocacy functions supports the notion that the analogous litigation privilege under state law should apply both to conduct and statements. n87

[\*931]

#### C. Protection During what Kinds of Proceedings?

Courts have historically given a broad construction to the kinds of proceedings to which the litigation privilege attaches. n88 To be sure, common law courts on both sides of the Atlantic did not hesitate to expand the privilege from the traditional litigation setting into alternative fora. In seventeenth-century England, the court in *Lake v. King* applied the privilege to a parliamentary grievance proceeding. n89 Early American cases likewise applied the privilege outside the justice system to proceedings such as a church meeting n90 and a hospital grievance hearing. n91

Modern courts have followed that tradition by acknowledging the privilege in alternative dispute resolution settings such as mediation and arbitration. n92 In fact, any quasi-judicial proceedings qualify as grounds to invoke the litigation privilege, including administrative proceedings n93 and professional discipline proceedings. n94 In determining whether the litigation privilege applies, courts assess whether the particular proceeding is [\*932] "functionally comparable to a trial." n95 Additionally, the Restatement summarizes the scope of the litigation privilege as "all proceedings before an officer or other tribunal exercising a judicial function." n96

#### D. Protection Only for "Pertinent" Conduct?

Some commentators have noted that the greatest expansion of the litigation privilege lies in the definition of relevance. n97 Unlike its English counterpart, n98 the American rule of relevance was restrictive, initially requiring evidentiary relevance for an attorney to take advantage of absolute immunity. n99 American courts, however, eventually abandoned the idea of [\*933] legal relevance. n100 Currently, consistent with the English rule, there need be only "some connection" between the conduct and the case for the privilege to attach. n101

### 1. Protection Beyond Legal Relevance

According to the Restatement, the statements or conduct protected afforded by the litigation privilege must have "some reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it." n102 "The inquiry is whether the publications [or actions] relate to the interests of the client." n103

Because evidentiary relevance is not required, n104 absolute immunity has been invoked to bar claims based on statements that had been stricken as irrelevant from pleadings and other court documents. n105 Therefore, the irrelevance of the material does not necessarily defeat a claim of absolute privilege. n106

One court expressed the relevance requirement as encompassing any action that may "possibly or plausibly be relevant or pertinent [to the litigation], with the barest rationality, divorced from any palpable or pragmatic degree of probability." n107 Another court described the requisite [\*934] nexus between the conduct and the litigation as a "liberal rule," explaining that "the matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that no reasonable [person] can doubt its irrelevancy and impropriety." n108 Therefore, only those actions with no connection at all to the litigation are unprivileged. n109

While the standard is easier stated than applied, n110 almost all states have a presumption in favor of protection; any doubts as to relevance are resolved in favor of the attorney. n111 Given the broad reading of the term, "courts rarely [find] lawyers' statements irrelevant." n112

### 2. Potential Paradigm for Relevance Assessment

In deciding what is sufficiently connected to the lawsuit in order to invoke the protection of the privilege, courts often assess the action complained of against the purpose of the doctrine and apply the doctrine to protect attorneys from lawsuits that may inhibit them from "performing a duty they owe[] their clients." n113 Courts throughout the nation recognize that "much allowance should be made for the earnest though mistaken zeal of a litigant who seeks to redress his wrongs and for the ardent and excited feelings of the fearless, conscientious lawyer, who must necessarily make his client's cause his own." n114 As a result, the inquiry typically centers on [\*935] whether the "activities [were] directed toward the achievement of the objects of the litigation." n115

In determining what conduct is entitled to the protection of the litigation privilege, courts examine not only the purpose of the conduct, but also the method employed to achieve that goal. n116 As a result, while not explicitly acknowledging a dual-pronged approach, courts consider both the "ends" and the "means" in the absolute immunity analysis.

Some of the legitimate purposes acknowledged by the courts are statements or conduct designed to gather evidence, n117 to further settlement of the case, n118 or to present evidence. Some courts also grant absolute immunity to attorneys attempting to impugn the credibility of an opposing party or witness. n119 The extent to which courts will allow an attorney to justify his or her actions on this basis, however, is unsettled.

For example, one California court denied immunity to an attorney who had made reference to the criminal record of one of his client's former employees, who had been hired by the adversary, despite a pending unfair competition case regarding the employee's improper solicitation of customers. n120 Similarly, an Illinois appellate court reversed a lower court's finding of absolute immunity where an attorney had made reference to the plaintiff's adulterous conduct in an

interrogatory propounded in a former contract lawsuit. n121 A Washington court of appeals also refused to insulate an attorney by absolute immunity against a suit based on statements regarding a witness's credibility because doing so would "greatly extend the privilege's scope since credibility is frequently an issue in litigation." n122

[\*936] In contrast, a Wisconsin court invoked absolute immunity to protect an attorney who had called his client's adversary a "deadbeat" to opposing counsel. n123 The court held that the party's credibility had been impugned by the statement, which would bear on questions of liability and damages and affect the length of the trial. n124

However, if an attorney's actions were designed to deprive a party of its chosen counsel, courts refuse to recognize absolute immunity even if it is asserted under the guise of credibility. n125 Denying the protection of the privilege under these circumstances furthers the privilege's goals because, as discussed supra, interference between a client and his or her counsel is exactly what the litigation privilege is designed to prevent. n126 Courts do not recognize attempted interference with the attorney-client relationship as a legitimate litigation goal. Furthermore, allowing an attorney to invoke the privilege in this situation would effectively convert what is meant to be a shield of immunity into a sword. n127

In *Younger v. Solomon*, for instance, a California court of appeals held that absolute immunity did not protect a defense attorney who had sent discovery to the adversary that disclosed the fact that opposing counsel was the subject of a disciplinary investigation. n128 Likewise, in *Savage v. Stover*, an attorney who had made derogatory statements about his client's adversary and had advised the opposing attorney not to keep his client was denied absolute immunity by a New Jersey appellate court. n129 In another case, statements by a plaintiff's attorney to the defendants' business client that defendants were overcharging the client prior to filing a complaint were also denied absolute immunity. n130

[\*937] Another illegitimate purpose is an attorney's use of existing litigation to secure a business advantage for his or her client. n131 Thus, in addition to interfering with the attorney-client relationship, courts find that any attempt to provide a benefit outside the confines of the lawsuit (even if involving a related proceeding or a potential new case arising from the original litigation) is invalid, and absolute immunity is denied. n132

The cases of *Troutman v. Erlandson and Coverters Equipment Co. v. Condes Corp.* are illustrative. The attorney in the former case was denied immunity because he had notified a potential investor of his client's adversary about the litigation and the potential monetary award against the adversary. n133 In the latter case, the court rejected the attorney's reliance on the litigation privilege after the attorney had informed customers of his client's competitors about a lawsuit involving possible patent infringements. n134

In examining whether the "means" are sufficiently connected to the "ends" to justify application of the litigation privilege, courts lack consistency as well. n135 Certainly, if there is no other way for an attorney to pursue a valid litigation goal, the privilege will provide protection. For instance, a Delaware court, in determining that the litigation privilege attached to an attorney's attempt to gather evidence concerning an existing lawsuit, noted that the attorney had no other way to conduct an investigation in order to adequately prepare for trial. n136

Courts also reject the application of the litigation privilege when the conduct in question had no apparent connection at all to furthering the lawsuit. n137 For example, a personal attack on opposing counsel not aimed at securing any benefit in the litigation is not considered within the scope of the [\*938] litigation privilege. One attorney in Florida, for instance, was denied absolute immunity when he accused another attorney of mishandling client funds and expressed the desire to see him disbarred during a pending lawsuit. n138

The fact that courts are consistent in their recitals of "liberality" and the like in applying the litigation privilege suggests that a more lenient connection between the method employed and the object should suffice. n139 In the name of constructing their cases, attorneys have been found immune from lawsuits for making false misrepresentations, manufacturing evidence, and presenting perjured testimony. n140

Courts have also protected attorneys who have made personal, derogatory remarks about opposing counsel by

invoking the litigation privilege, so long as the criticism was related to some object of the litigation. n141 Consequently, personal animosity between counsel incident to an otherwise legitimate litigation goal may come within the umbrella of protection. For example, during a discovery dispute in the course of litigation, a Florida court granted the protection of the privilege to an attorney when his derogatory comments about opposing counsel concerned the production of documents. n142 Although recognizing that the attorney's statements that the opposing attorney was "a damned liar" had been intemperate and unprofessional, the court deemed them within the scope of absolute immunity. n143

The case of *Post v. Mendel* from the Supreme Court of Pennsylvania suggests, however, a stricter application. n144 The attorney in the case sought to institute a disciplinary proceeding against opposing counsel and a contempt hearing for perjury against an adversarial witness. n145 Although the conduct of both the witness and opposing counsel had occurred during existing litigation, the court denied the attorney absolute immunity on the [\*939] ground that his goals were not related to the redress sought in the pending lawsuit. n146

### 3. Circumstances Influencing Relevance Decision

To better understand the doctrine and its limits, an assessment of the circumstances in which absolute immunity has been granted is necessary. As an initial matter, the limitation of "relevance" does not mean that the conduct protected by absolute immunity must occur within the confines of the courtroom. n147 Indeed, immunity for statements or actions taken during a judicial proceeding extends to every step in the proceeding, from beginning to end. n148 Accordingly, the preliminary and pretrial phases of litigation are regarded as judicial proceedings for purposes of applying the privilege. n149

In addition, with a few exceptions, n150 the privilege is typically "not limited to the pleadings, the oral or written evidence, [or] to publications in open court or in briefs or affidavits." n151 In assessing whether the actions of counsel are within the scope of the privilege, nonetheless, courts often focus on the occasion in which the behavior occurred. n152 Courts may consider whether the action complained of occurred as part of formal judicial proceedings as opposed to during informal extra-judicial communications or actions during the litigation. n153 While the particular context in which the conduct or communication arose is not conclusive, n154 it is a criterion courts consider in ultimately determining relevance.

[\*940] Formal proceedings (other than the trial process itself) in which absolute immunity has been recognized include, *inter alia*, pleadings, n155 requests for admissions, n156 depositions, n157 affidavits, n158 inspection of records under court order, n159 grand jury testimony, n160 expert reports, n161 in camera conferences attended by a judge, n162 and pretrial conferences. n163 Moreover, if the statement was testimonial in nature, a court is more likely to find the communication relevant to the litigation. n164

The litigation privilege has also been extended to informal processes during pre-and post-trial proceedings. n165 Interviews with prospective or actual witnesses, n166 statements made at private meetings, n167 statements made in the judge's chambers, n168 and conduct relating to the investigation of a claim n169 have all been deemed within the scope of the litigation privilege. Additionally, courts have held that actions taken by attorneys during a deposition break or immediately following a deposition are protected by the privilege. n170 Courts have even granted absolute immunity to attorneys for statements to the press. n171

[\*941] Furthermore, all kinds of correspondence have been granted privileged status, including demand letters, n172 letters concerning settlement, n173 and letters notifying of a potential lawsuit. n174 Courts are more apt to determine that particular kinds of letters are pertinent if the court deems them a customary part of the litigation process n175 or if the letters otherwise fulfill a specific purpose of the litigation. n176 Certain courts have also applied absolute immunity on the basis that the statements in question were previously testified to at trial or could have been used as evidence at trial. n177

If the conduct in question is a communication, whether the statement was oral or written may affect a finding of

relevance. Spoken statements are typically tested for relevance by matching each individual statement per se with the proceeding. n178 In contrast, courts have traditionally viewed written statements in correspondence as a single entity. n179 As such, a few extraneous sentences will not destroy the privilege so long as the letter otherwise purports to accomplish a purpose of the litigation. n180 Other cases, however, treat written communications the same as oral communications. n181 Thus, some courts view writings as a group of individual statements that must each independently be pertinent to the proceeding for the privilege to apply. n182

[\*942] For purposes of determining relevance, whether the communication or conduct at issue was voluntary or merely responsive may be another factor in the calculus. n183 Finally, even the attorney's belief in the relevance of his or her actions has been considered in the application of absolute immunity. n184

#### 4. Relevance Requirement Extends to Third Persons

The identity of the person who received a letter or heard a statement may also affect whether the communication is within the litigation privilege. Therefore, regardless of the relevance of its contents, whether the privilege attaches to correspondence also depends on the status of the addressee and his or her relationship to the litigation.

Statements between counsel have a better possibility of being deemed pertinent to the case than those addressed to others. n185 One appellate court in Illinois explained that "discussions between attorneys representing opposing parties should not be discouraged," as "such discussions have a tendency to limit the issues or to settle the litigation, thereby saving the time of the court." n186 Some courts have held, moreover, that it is not necessary for the attorneys to be in an adversarial position toward one another for the conduct or communication to be protected. n187 For example, in one case the Supreme Court of South Carolina opined that attorneys with the same interests should be able to "freely and frankly discuss their client's business ... by word of mouth ... or by letter," and "thereby evaluate and determine the client's rights." n188 Otherwise, the court cautioned that "the [\*943] rights of all clients before the courts [will be] seriously endangered and the administration of justice [will be] handicapped." n189

When the correspondence is addressed or circulated to persons other than attorneys involved in the litigation, however, this may destroy the privilege. n190 Courts have indicated that "the privilege may be lost by unnecessary or unreasonable publication to one for whom the occasion is not privileged." n191 Circumstances indicating an abuse of the litigation privilege by excessive publication have been found when "the letter was published to those who did not have a legitimate role in resolving the dispute, or ... to persons who did not have an adequate legal interest in the outcome of the proposed litigation." n192

Third persons deemed to have a sufficient relationship to the case have included an escrow holder who was sent a letter meant to secure some benefit from the agent during litigation regarding the property, n193 an existing n194 or prospective client, n195 a co-party, n196 potential witnesses, n197 a particular addressee consistent with a court order, n198 an insurance company indemnifying one of the parties to the litigation, n199 an oral lessee who had claimed under an opposing party in a dispute regarding a tract of land, n200 members of a creditor's committee in a bankruptcy proceeding, n201 all persons interested in an estate during its administration, n202 a judge and all [\*944] opposing counsel who had made an appearance in the case, n203 the news media, n204 and a court administrator responsible for the administration of justice. n205

In a recent New Jersey case, a trial court even granted immunity to an attorney who had contacted the local authorities in an effort to have his client's adversary arrested for murdering his wife. n206 In applying absolute immunity, the court found it important that the attorney had been representing his client in litigation concerning alleged defects in an airbag that had allegedly killed the plaintiff's spouse, and that the attorney had been defending against the case on the basis of lack of causation. n207

Moreover, the Supreme Court of Utah held that an attorney who sent a demand letter to opposing counsel with courtesy copies to all adversarial parties enjoyed absolute immunity. n208 While the court found the fact that the letter

was delivered directly to the opposing parties was "problematic" and not "necessary to effectuate the purpose of pursuing settlement," it nevertheless upheld the application of the privilege due to the strong public policy of encouraging free and open communication. n209

Using one letter to secure multiple goals by copying all interested parties, however, may be deemed outside the scope of the privilege. For instance, during trial an attorney had addressed a letter to opposing counsel that accused him of unethical trial conduct regarding his facilitation of perjury by a witness, and had copied the letter to the trial judge, the witness, and the state disciplinary board. n210 The Supreme Court of Pennsylvania found that the attorney's conduct was outside the ambit of absolute immunity. n211

In reaching its conclusion, the court reasoned that the letter "did not state or argue any legal opinion" or request a ruling from the judge. n212 The fact that the letter had instigated a disciplinary proceeding did not cloak it with immunity because the court determined that copying such complaints to the judge was not in the regular course of procedure. n213 Therefore, the court concluded that the letter had been published to persons "who would have had no direct interest in [those other] proceedings." n214 Other persons [\*945] potentially lacking a direct connection to adversarial proceedings include an opposing party's business client, n215 potential investors, n216 potential clients of opposing counsel, n217 customers of a client's competitor, n218 a client's spouse, n219 an opposing party's spouse, n220 and the opposing party's employer. n221

#### E. Protection Before or After the Litigation?

In addition to being immune at all stages of the litigation - before, during, and after the trial - an attorney may be accorded immunity before or after the litigation. n222 The Restatement explains that allowing the privilege prior to litigation "is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to [obtain] justice for their clients." n223

Nevertheless, for an attorney to be afforded privileged status prior to the proceedings, those proceedings must be "contemplated in good faith and [be] under serious consideration." n224 In considering which actions meet this [\*946] standard, some courts consider the temporal proximity between the conduct and the initiation of the lawsuit. n225 As cautioned in the Restatement, "the bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered." n226 Because there are no safeguards, such as contempt of court, to control an attorney's conduct prior to the initiation of a lawsuit, one court noted that "caution is warranted lest we countenance "a privilege for a lawyer to be bumptious and unrestrained in all matters vaguely related to litigation and regardless of whether the communication is calculated to advance or to retard justice or the [potential] proceeding." n227

In one case, a Massachusetts court denied an attorney absolute immunity because a letter he had drafted on instructions from his client did not indicate that a judicial action was then contemplated. n228 Rather, it only suggested that future entries in his client's restaurant by the addressee would be treated as a trespass. n229 Accordingly, the court concluded that a judicial proceeding had not been contemplated seriously and in good faith at the time the communication had been made. n230

The privilege is available, however, even if an attorney does not ultimately represent the client during the subsequent litigation. n231 Absolute immunity has also been found to protect an attorney who never had a client n232 and when no lawsuit was filed at all. n233

[\*947]

#### F. Protection as Defense to Liability or Immunity from Suit?

Given its placement in the Restatement under "defenses," n234 it is not surprising that the litigation privilege is used as

a defense more often than it is used as a complete immunity from suit. n235 As a result, one appellate court overruled an attorney's request for relief in mandamus after the attorney had been denied summary judgment despite asserting the doctrine of absolute immunity. n236 While acknowledging confusion as to the scope of the litigation privilege, the court determined that the history and use of the privilege demonstrated that it was never intended to offer immunity from suit, but only to serve as an affirmative defense. n237 Therefore, the court rejected the attorney's argument that the privilege would be lost by having to defend against a claim for civil liability at trial. n238

Other courts have reached the opposite conclusion. Relying on the federal common law immunities granted to government attorneys, these courts have allowed an interlocutory appeal upon the denial of absolute immunity. The District of Columbia Court of Appeals explained as follows:

The determining consideration is that the judicial proceedings privilege is more than a defense to liability. The privilege is intended to "afford[] an attorney absolute immunity from actions in defamation for communications related to judicial proceedings." The essence of an immunity from suit is "an entitlement not to stand trial or face the other burdens of litigation." n239

[\*948]

#### VI. Conclusion

What is the lesson when the time-honored principle of absolute immunity maintains its role as a doctrinal defender of our advocacy system? The lesson is quite simple: Attorneys should plead it and judges should heed it. n240

While the doctrine of absolute immunity has not been a model of clarity, the common law's characteristic inductive methods of analysis have exposed various substantive principles, some of which are identified in this article. These principles should provide some guidance to litigation lawyers in their quest to secure client satisfaction.

The appraisal and analysis of these cases should also assist judges in the difficult task of applying the absolute immunity doctrine in a way that will fairly balance the competing interests involved and achieve the purposes for which the doctrine was originally created. It must be emphasized that if the protection afforded by the privilege is to have any meaning, a decision about an attorney's absolute immunity from liability should be made as early in the case as possible. Preferably, the issue of immunity should be determined before the attorney is ethically compelled to withdraw from the underlying case or the original client seeks other counsel.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Counsel General Overview Torts Intentional Torts Defamation Defenses Privileges Absolute Privileges Torts Procedure Multiple Defendants Concerted Action Civil Conspiracy General Overview

#### FOOTNOTES:

n1. See Richard K. Burke, "Truth in Lawyering": An Essay on Lying and Deceit in the Practice of Law, 38 *Ark. L. Rev.* 1, 20-21 (1984) (discussing peculiar hostility directed by lay persons toward lawyers); Paul T. Hayden, Reconsidering the Litigator's Absolute Privilege to Defame, 54 *Ohio St. L.J.* 985, 1043 (1993) ("Litigators will often make others angry, and that anger may spawn purely retaliatory legal actions."); John B. Lewis & Lois J. Cole, Defamation Actions Arising from Arbitration and Related Dispute Resolution Procedures - Preemption, Collateral Estoppel and Privilege: Why the Absolute Privilege Should be Expanded, 45 *DePaul L.*

*Rev. 677, 678 (1996)* (stating that participants in litigation countersue as a means of visiting retribution); Ronald E. Mallen, *Legal Malpractice: Controlling The Odds*, 20 *Trial* 24, 26-27 (1984); Sandra C. Segal, Comment, *It Is Time to End the Lawyer's Immunity from Countersuit*, 35 *UCLA L. Rev.* 99, 128 (1987) ("spite and desire for revenge fuel many countersuits"); see also Ronald E. Mallen & James A. Roberts, *The Liability of a Litigation Attorney to a Party Opponent*, 14 *Willamette L.J.* 387, 387 (1978).

n2. While recognizing that the terms "privilege" and "immunity" have not necessarily been accorded the same meaning, they will be used interchangeably for purposes of this article. See Richard K. Burke, *Privileges and Immunities in American Law*, 31 *S.D. L. Rev.* 1, 2 (1985) (defining privilege as a "special favor, advantage, recognition or status" and immunity as a "special exemption from all or some portion of the legal process and its judgment"). In other words, if the litigator's conduct is considered privileged, then this article will assume that the attorney would be immune from civil liability.

n3. While statistical evidence concerning the type and amount of professional liability claims is "largely unavailable" and the data that does exist is "limited and of doubtful quality," Segal, *supra* note 1, at 120-22, it is estimated that, by 1978, lawsuits instigated by party opponents constituted 20% of all claims filed against litigation lawyers. Mallen & Roberts, *supra* note 1, at 387 n.1. The trend continued in the 1980's, when lawyers faced an ever-increasing number of countersuits, Deborah Graham, *Lawyers Are Facing More Suits Complaining of Abuse of Process*, *Legal Times*, Jan. 17, 1983, at 3, and a "steady stream of litigants" pursued remedies against the attorneys of their former adversaries. Segal, *supra* note 1, at 120; see also Stewart R. Reuter, *Physician Countersuits: A Catch-22*, 14 *U.S.F. L. Rev.* 203, 223-24 (1980) (noting that countersuits instituted by physicians to avenge a previous medical malpractice lawsuit have achieved relatively little success).

n4. R.J. Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 *Ariz. St. L.J.* 3, 23 (1987).

n5. See E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 *Tex. L. Rev.* 575, 578-79 (1961). Lawyers are provided only a qualified privilege for legal advice that harms a third person. See *Restatement (Second) of Torts* 772 (1977); *Kurker v. Hill*, 689 *N.E.2d* 833, 839 (*Mass. App. Ct.* 1998) (ruling that the litigation privilege does not encompass an attorney's conduct in counseling his or her clients or assisting them in business affairs); see also *Sodergren v. Johns Hopkins Univ. Applied Physics Lab.*, 773 *A.2d* 592 (*Md. Ct. Spec. App.* 2001). Only actions taken in good faith and without malice are protected by a qualified privilege. See, e.g., Segal, *supra* note 1, at 130-32; see also *Scholler v. Scholler*, 462 *N.E.2d* 158, 163 (*Ohio* 1984).

The Restatement of Torts grants an attorney the qualified privilege "purposely to cause another not to perform a contract, or enter into or continue a business relation, with a third person by giving honest advice ... ." *Restatement (First) of Torts* 772 (1939). For a description of other actions that are provided a qualified privilege, see *Restatement (Second) of Torts* 594 (speech protecting publisher's interest), 595 (speech protecting recipient or third party's interest), and 596 (speech protecting those with common interest). See generally Orrin B. Evans, *Legal Immunity for Defamation*, 24 *Minn. L. Rev.* 607 (1940) (comparing various immunities). But see Hayden,

supra note 1, at 1053-55 (arguing that only judges and witnesses should continue to receive absolute immunity and that litigators and parties should receive only qualified immunity).

n6. Georgia lawyers are protected by absolute immunity from statements made in pleadings, but only by qualified immunity for all other conduct in the performance of a legal duty. *Ga. Code Ann. 51-5-7(2)*, 51-5-8 (Harrison 1982). Louisiana lawyers (and witnesses) receive only qualified immunity. *La. Rev. Stat. Ann. 14:49*, 14:50 (West 1986) (stating that judges and legislators receive absolute immunity).

n7. See Hayden, supra note 1, at 991-92 n.37. Of the forty-eight states acknowledging and applying the lawyer's litigation privilege, forty-two states derive the rule from their common law with the remaining six codifying the rule by statute. See *Cal. Civ. Code 47(b)* (West 1993); *Mont. Code Ann. 27-1-804(2)* (1991); *N.D. Cent. Code 14-02-05(2)* (1991); *Okla. Stat. Ann. tit. 12, 1443.1*; tit. 21, 772 (West 1983); *S.D. Codified Laws 20-11-5(2)* (Michie 1987); *Utah Code Ann. 45-2-3(2)* (1988).

n8. *Restatement (Second) of Torts 586* (1977); see, e.g., *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332 (D.C. 2001); *Kennedy v. Zimmermann*, 601 N.W.2d 61 (Iowa 1999) (following Restatement); see also *50 Am. Jur. 2d Libel & Slander 193* (1989).

n9. See, e.g., *Fink v. Oshins*, 49 P.3d 640, 643 (Nev. 2002) (explaining that the privilege applies even when defamatory statements are made with "knowledge of their falsity and personal ill will toward the plaintiff") (quoting *Circus Circus Hotels v. Witherspoon*, 657 P.2d 101, 104 (Nev. 1983)); see generally W. Page Keeton et al., *Prosser and Keeton on the Law of Torts 114*, at 816-17 (5th ed. 1984).

n10. *Surace v. Wuliger*, 495 N.E.2d 939, 944 (Ohio 1986).

n11. Because absolute immunity is a question of law determined by the court, a case may be dismissed at the pleadings stage of the litigation if the doctrine applies. See *Vacchiano v. Kuehnl*, No. CA 7398, 1981 Ohio App. LEXIS 13035 (Nov. 19, 1981) (stating that a plaintiff's allegation that the matter complained about was irrelevant to the previous litigation is insufficient to prevent the application of the immunity doctrine); cf. *McCarthy v. Yempuku*, 678 P.2d 11 (Haw. Ct. App. 1984) (denying summary judgment because record failed to show precise relationship of attorneys, clients, and actions necessary for absolute immunity determination). But see *Converters Equip. Corp. v. Condes Corp.*, 258 N.W.2d 712 (Wis. 1977) (denying dismissal on pleadings which indisputably asserted that conduct occurred during course of judicial proceedings because complaint alleged lack of relevance). In contrast, the earliest possible resolution of a lawsuit defended on the basis of qualified immunity is summary judgment. See *Dawson v. Rockenfelder*, No. 1997 CA00131, 1998 Ohio App.

LEXIS 757 (Feb. 9, 1998) (granting an attorney's motion for summary judgment based on his affidavit that his actions toward the opposing party were not motivated by malice).

n12. See Hayden, *supra* note 1, at 1018 (citing R.H. Helmholz, *Select Cases on Defamation to 1600* (1985) and Frank Carr, *The English Law of Defamation*, 18 *L. Q. Rev.* 255, 263-67 (1902)); see also *Post v. Mendel*, 507 A.2d 351, 353-55 (Pa. 1986) (detailing history of doctrine of absolute immunity).

The first English case to apply the privilege was decided in 1497. R.C. Donnelly, *History of Defamation*, 1949 *Wis. L. Rev.* 99, 109 n.48 (1949); Hayden, *supra* note 1, at 1013 n.175 (1993); cf. 8 William S. Holdsworth, *A History of English Law* 376 (1926) (dating same case 1569); Theodore F.T. Plucknett, *A Concise History of the Common Law* 497 n.3 (5th ed. 1956) (same); David R. Cohen, Note, *Judicial Malpractice Insurance? The Judiciary Responds to the Loss of Absolute Judicial Immunity*, 41 *Case W. Res. L. Rev.* 267, 272 (1990) (dating the first English case to advance absolute immunity for judges in the early fourteenth century).

n13. See Marion Neef & Stuart Nagel, *The Adversarial Nature of the American Legal System: A Historical Perspective*, in *Lawyer Ethics* 73, 76-79 (Allan Gerson ed., 1980).

n14. *Randall v. Brigham*, 74 *U.S.* (7 *Wall.*) 523, 536 (1868) (endorsing the doctrine of absolute judicial immunity).

n15. *Brook v. Montague*, 79 *Eng. Rep.* 77, 77 (*K.B.* 1606). For a thorough discussion of the early English cases applying the litigation privilege, see Hayden, *supra* note 1, at 1015-17.

n16. *Brook*, 79 *Eng. Rep.* at 77.

n17. *Id.*

n18. *Id.*

n19. *Munster v. Lamb*, 11 *Q.B.D.* 588, 599 (1883).

n20. *Id.* at 605; see also *Rex v. Skinner*, 98 Eng. Rep. 529 (1772).

n21. *Henderson v. Broomhead*, 157 Eng. Rep. 964, 968 (Ex. Ch. 1859) (Crompton, J., concurring).

n22. See Hayden, *supra* note 1, at 1017-18.

n23. See, e.g., *Marsh v. Elsworth*, 36 How. Pr. 532, 535 (N.Y. Sup. Ct. 1869) (citing *Brook v. Montague*, 79 Eng. Rep. 77 (K.B. 1606)); *Mower v. Watson*, 11 Vt. 536, 540-41 (1839) (citing *Buckley v. Wood*, 76 Eng. Rep. 888 (K.B. 1591) and *Hodgson v. Scarlett*, 171 Eng. Rep. 362 (C.P. 1817)). For a comprehensive list of American cases in which lawyers cited early English privilege precedent, see Hayden, *supra* note 1, at 1017-18.

n24. The English and American versions of absolute immunity are discussed and compared *infra* in Section V, Part D. See also Hayden, *supra* note 1, at 1018 ("English law still exerts a strong influence, and it is not possible to assess the modern American privilege without taking account of that influence.").

n25. See discussion *infra*, Section V.D.

n26. *Surace v. Wuliger*, 495 N.E.2d 939, 944 (Ohio 1986); see also Keeton et al., *supra* note 9, 114, at 776 ("That conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation.").

n27. *Surace*, 495 N.E.2d at 943 (quoting *Justice v. Mowery*, 430 N.E.2d 960, 962 (Ohio Ct. App. 1980) (affirming judgment in favor of attorney pursuant to the doctrine of absolute immunity)).

n28. The litigation privilege owes its existence to a balancing test between competing interests. See *Restatement (Second) of Torts* 586, introductory note (1977) (discussing conflicts of interest between individual defamed and well-being of legal system). But see Hayden, *supra* note 1, at 1020 (indicating that judges put their

"thumb on the scales" in adopting absolute immunity for litigation lawyers).

n29. *Silberg v. Anderson*, 786 P.2d 365, 370 (Cal. 1990) (quoting *McClatchy Newspapers, Inc. v. Superior Court*, 234 Cal. Rptr. 702, 707 (Ct. App. 1987)).

n30. *Greenberg v. Aetna Ins. Co.*, 235 A.2d 576, 578 (Pa. 1967) (quoting *Kemper v. Fort*, 67 A. 991, 995 (Pa. 1907)) (italics added).

n31. As Lord Mansfield declared more than 200 years ago, "neither party, witness, counsel, jury, nor judge, can be put to answer, civilly or criminally, for words spoken in office." *King v. Skinner*, 98 Eng. Rep. 529, 530 (1772); see also Van Vechten Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 *Colum. L. Rev.* 463, 474 (1909) (citing *Skinner* as a "comprehensive rule" regarding the litigation privilege); cf. Developments in the Law: Defamation, 69 *Harv. L. Rev.* 875, 922-23 (1956) (collecting cases) (suggesting that courts have applied the doctrine of absolute immunity more strictly to lawyers than to other protected parties or individuals). Thus, the litigation privilege extends to all persons authorized "to achieve the objects of the litigation," including attorneys, parties, witnesses, and judges. Thomas Borton, Comment, The Extent of the Lawyer's Litigation Privilege, 25 *J. Legal Prof.* 119, 122 (2001); see Hayden, *supra* note 1, at 1053-55; see also *Bradley v. Hartford Accident & Indem. Co.*, 106 Cal. Rptr. 718 (Ct. App. 1973) (refusing to extend the litigation privilege to an insurance company employee who made statements outside the courthouse in a pending action); *Van Eaton v. Fink*, 697 N.E.2d 490 (Ind. Ct. App. 1998) (extending immunity to legal assistant of attorney); Cassandra E. Joseph, The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity, 12 *Ohio St. J. on Disp. Resol.* 629 (1997).

For more on the issue of who can invoke the litigation privilege, see Annotation, Libel and Slander: Absolute Privilege in Respect of Pleadings or Other Judicial Matters As Available to One Who Is Neither a Party, an Attorney for a Party, nor a Witness, but Who Causes the Inclusion of the Defamatory Matter, 144 A.L.R. 633 (1943), and Annotation, Libel and Slander: Privilege of Statements Made During Trial by One Not on the Witness Stand or Acting As Attorney for Another, 44 A.L.R. 389 (1926).

n32. *Youmans v. Smith*, 153 N.Y. 214, 220 (1897); see also *Theiss v. Scherer*, 396 F.2d 646 (6th Cir. 1968); *Umansky v. Urquhart*, 148 Cal. Rptr. 547, 549 (Ct. App. 1978) (explaining that the threat of countersuits causes an unnecessary chilling effect on lawyers); cf. Cohen, *supra* note 12, at 269 ("The reason most often emphasized is that fear of reprisal would undermine judicial independence from the interests of litigants: "Judges must be free to act without fear of harassment by dissatisfied litigants.") (quoting Frank Way, A Call for Limits to Judicial Immunity: Must Judges Be Kings in Their Courts?, 64 *Judicature* 390, 392 (1981)).

n33. *Russell v. Clark*, 620 S.W.2d 865, 868 (Tex. Civ. App. 1981). A century ago, one court explained:

An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save that client by all expedient means - to protect that client at all hazards and costs to all others ... is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other.

Showell Rogers, *The Ethics of Advocacy*, 15 *Law Q. Rev.* 259, 269 (1899) (quoting Lord Brougham).

n34. See Hayden, *supra* note 1, at 1043 (recognizing that, by the very nature of their jobs, "litigators will often make others angry, and that anger may spawn purely retaliatory legal actions"). See generally William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...*, 15 *Law & Soc'y Rev.* 631, 645 (1980-81) ("Of all of the agents of dispute transformation lawyers are probably the most important" given that they have "considerable power over their clients.").

As many lawyers are aware, they do not typically make sympathetic defendants and, as a result, many lawyers will pressure their insurance companies to settle because they fear adverse publicity from a trial. See Segal, *supra* note 1, at 127 (citing David W. Christensen & Jody L. Aaron, *Litigating Legal Malpractice Claims - The Plaintiff's Perspective*, 65 *Mich. B.J.* 538, 541 (1986)).

n35. Mallen & Roberts, *supra* note 1, at 388. Scholars explain that the nature of the advocacy process itself produces frustration and dissatisfaction due to the monopoly exercised by attorneys, the esoteric nature of court processes and discourse, burdensome pre-trial procedures, minimal courtroom time, and court overload and delay by the adversary. See Felstiner et al., *supra* note 34, at 631, 648. Another situation leading to countersuits is when the parties perceive that their property interests in the dispute have been expropriated by lawyers and the state. See *id.* at 648.

n36. See Model Code of Prof'l Responsibility DR 7-101 (1979).

n37. Gerber, *supra* note 4, at 4-5 (comparing "the Continental inquisitional system where judges investigate the facts and question witnesses at trial" with "the Anglo-American adversary method [that] pits parties [and their attorneys] against each other before a usually passive judge or jury").

n38. See Mallen & Roberts, *supra* note 1, at 390. Given its origin as a defense to defamation, it is probably not a coincidence that the "freedom to err" rationale is the same as the rationale posited for freedom of speech. The Restatement specifies that the litigation privilege "is based upon [the] public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." *Restatement (Second) of Torts* 586 (1979).

n39. See Model Code of Prof'l Responsibility DR 7-101, EC 7-4 (1979).

n40. See *Twelker v. Shannon & Wilson, Inc.*, 564 P.2d 1131 (Wash. 1977); see also James M. Johnson, Note, Libel and Slander: Immunity of Counsel for Defamatory Matter Published in a Judicial Proceeding, 35 *N.C. L. Rev.* 541, 543 (1956-57).

n41. See *Mallen & Roberts*, supra note 1, at 388.

n42. See *id.* at 388-89 (citing Bruce D. Campbell, Comment, Counterclaiming for Malicious Prosecution and Abuse of Process: Washington's Response to Unmeritorious Civil Suits, 14 *Willamette L.J.* 401 (1978)).

n43. See *id.* at 389.

n44. In a recent case in Ohio, for instance, an attorney felt compelled to withdraw as counsel after his former client's adversary instigated litigation against him. See *Hahn v. Satullo*, No. 01CVH07-7246 (Franklin County Ct. Com. Pl. Jan. 15, 2003) (Decision and Entry Granting Defendants' Motion for Reconsideration Filed 12-20-02) (indicating that lawsuit initiated by party opponent caused attorney to withdraw as counsel in the original case).

n45. See, e.g., *Asia Inv. Co. v. Borowski*, 184 *Cal. Rptr.* 317, 323 (Ct. App. 1982) ("The policy behind [California] Civil Code section 47 ... is to afford litigants the utmost freedom of access to the courts to secure their rights and defend themselves without fear of being harassed by retaliatory lawsuits."); *Lyddon v. Shaw*, 372 *N.E.2d* 685 (Ill. App. Ct. 1978); see also *Kemper v. Fort*, 67 A. 991, 994 (Pa. 1907) (stating that this privilege is an integral part of public policy which permits "all suitors (however bold and wicked, however virtuous and timid) to secure access to the tribunals of justice with whatever complaints, true or false, real or fictitious," they seek to adjudicate).

n46. See *Babb v. Superior Court*, 479 P.2d 379, 382-83 (Cal. 1971) (explaining that retaliatory litigation "may well necessitate the hiring of separate counsel to pursue the original claim" and predicting that the "additional risk and expense thus potentially entailed may deter poor plaintiffs from asserting bona fide claims").

n47. *Erlandson v. Pullen*, 608 P.2d 1169 (Or. Ct. App. 1980), cited in Segal, supra note 1, at 124.

In *Realco Services, Inc. v. Holt*, 479 F. Supp. 880 (E.D. Pa. 1979), the district court denied a motion to join the adversary's attorney as a third party defendant, reasoning as follows: "Joinder of counsel ... would inject unnecessary and unmanageable complications into the case. Issues of attorney-client and work product privilege would all but stall the discovery process... . Furthermore, the attorney-client issues would create serious difficulties at trial." *Id.* at 886; see also *Commercial Standard Title Co. v. Superior Court*, 155 Cal. Rptr. 393, 400 (Ct. App. 1979) (denying cross complaint against plaintiff's attorney on the grounds that "if suit were to be permitted against the current acting attorney for plaintiff ... [it] would effectively allow a defendant to require plaintiff's now-sued attorney ... to recuse himself").

n48. *Erlandson*, 608 P.2d at 1172.

n49. *Id.* at 1177.

n50. In his article entitled *Reconsidering the Litigator's Absolute Privilege to Defame*, supra note 1, Professor Hayden calls for the elimination of absolute immunity. His opinion is premised, in part, on the idea that the privilege is intended to protect attorneys from inquires into their mental processes. See *id.* at 1028. Because attorneys are already subject to the same inquiries from their own clients, Professor Hayden concludes that absolute immunity is unnecessary and unfairly discriminates against "a certain class of plaintiffs." *Id.* When viewed as protecting the client, however, Professor Hayden's conclusion that the litigation privilege should be abolished falls with his premise.

n51. *Mallen & Roberts*, supra note 1, at 393; cf. Todd A. Ellinwood, "In The Light of Reason and Experience": The Case for a Strong Government Attorney-Client Privilege, 2001 *Wis. L. Rev.* 1291 (2001); Thomas F. O'Neil III & Adam H. Charnes, The Embryonic Self-Evaluative Privilege: A Primer for Health Care Lawyers, 5 *Annals Health L.* 33 (1996); Alfreda Robinson, Duet or Duel: *Federal Rule of Evidence 612* and the Work Product Doctrine Codified in Civil Procedure Rule 26(B)(3), 69 *U. Cin. L. Rev.* 197 (2000).

n52. *Mallen & Roberts*, supra note 1, at 393; see also *Story v. Shelter Bay Co.*, 760 P.2d 368 (Wash. Ct. App. 1988) (holding that the privilege does not extend to statements made in situations where there are no safeguards against abuse); cf. *Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP*, 175 F.3d 14, 14 (1st Cir. 1999) (applying New Hampshire law) (holding attorney absolutely immune even though the plaintiff was not a party to the initial lawsuit); *Surace v. Wuliger*, 495 N.E.2d 939 (Ohio 1986) (applying absolute immunity despite the fact that the plaintiff had no remedy in the first action).

n53. See Hayden, *supra* note 1, at 1025-42; see also *Post v. Mendel*, 507 A.2d 351, 355 (Pa. 1986). To assist in alleviating the possible injuries that may result from an absolute privilege, courts have listed the appellate process and the requirements of notice and a hearing as safeguards inherent in the judicial process. See *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 117 A.2d 889, 894 (N.J. 1955), cited in Casey L. Jernigan, Comment, The Absolute Privilege Is Not A License To Defame, 23 *J. Legal Prof.* 359, 361 (1999); see also 28 U.S.C. 1912 (2000); 28 U.S.C. 1927 (2000); *Fed. R. App. P.* 38; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-61 n.33 (1975) (listing approximately twenty-five federal statutes allowing attorney fees).

n54. *Federal Rule of Civil Procedure 11* was amended to curtail abusive attorney practices. See Judge Schwarzer, Sanctions Under The New Federal Rule 11 - A Closer Look, 104 F.R.D. 181, 181 (1985). The rule is primarily invoked to punish frivolous lawsuits. See Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 *Nw. U. L. Rev.* 943, 954 n.41 (1992) (noting that Rule 11 has also been used for discovery violations). It requires attorneys to certify their belief, after a reasonable investigation, that factual representations contained in documents filed with the court are well-grounded and "not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Fed. R. Civ. P. 11(b)*.

*Federal Rule of Civil Procedure 26* is used to punish discovery abuses and requires attorneys to certify that "to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is ... not interposed for any improper purpose, such as to harass ... ." *Fed. R. Civ. P. 26(g)*.

*Federal Rule of Civil Procedure 37* provides that sanctions may be imposed for failure to cooperate with an adversary's discovery requests. *Fed. R. Civ. P. 37*.

n55. Rule 11 provides, in pertinent part, that the court shall impose an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the document. *Fed. R. Civ. P. 11(c)*. Similarly, Rule 26 states that the court "shall impose ... an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation ... ." *Fed. R. Civ. P. 26(g)*. Given that one of the purposes of these rules is to provide compensation, see Schwarzer, *supra* note 54, at 201, courts have not been hesitant to utilize the economic remedies provided by the rules against litigators. See Fred Strasser, Sanctions: A Sword is Sharpened; Attorneys Must "Think Twice," *Nat'l L.J.*, Nov. 11, 1985, at 1.

Courts also have inherent powers to impose financial penalties on attorneys in litigation. See Michael Scott Cooper, Comment, Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power, 26 *UCLA L. Rev.* 855, 856-57 (1979); see also *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991) (affirming an award of one million dollars against a law firm for pattern of litigation abuse which had been imposed under inherent court power to punish litigation conduct); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980) (ruling that inherent power extends to allow courts to tax expenses against party's counsel).

n56. See 1 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* 3.1:204-1 (2d ed. 1992).

n57. One example is required disclosure on pro hoc vice applications and to existing and future clients that may be affected by any prior contempt citations.

n58. See Segal, *supra* note 1, at 145.

n59. See *Izzi v. Rellas*, 163 Cal. Rptr. 689, 694 (Ct. App. 1980) (suggesting disciplinary actions as an effective alternative to countersuits). Judges, however, rarely use referral to the local bar as a method of controlling attorney conduct. See Timothy McPike, How to Reform Errant Lawyers, 24 Judges J. 22, 24 (1985) (citing findings from the ABA's Standing Committee on Professional Discipline).

n60. Litigators who engage in conduct or communications that may subject them to countersuits may run afoul of several ethical prohibitions found in the American Bar Association's Model Rules of Professional Conduct or the American Bar Association's Model Code of Professional Responsibility. The Model Rules and the Model Code, inter alia, prohibit lawyers from engaging in conduct known to be illegal or fraudulent, Model Code of Prof'l Responsibility DR 7-102(A)(7) (1979); from making false statements of fact, *Id.* at DR 7-102(A)(5); Model Rules of Prof'l Conduct R. 4.1(a) (1992); from using the process to harass, embarrass, or injure another, Model Rules of Prof'l Conduct R. 4.4 (1992); see also Model Code of Prof'l Responsibility DR 7-102(A)(1) (1979); from dishonesty, fraud, deceit, or misrepresentation, Model Rules of Prof'l Conduct R. 8.4 (1992); see also Model Code of Prof'l Responsibility DR 1-102(A)(4) (1979); from conduct that is prejudicial to the administration of justice, Model Rules of Prof'l Conduct R. 8.4 (1992); see also Model Code of Prof'l Responsibility DR 1-102(A)(5) (1979); from alluding to matters that are not relevant or supported by the evidence, Model Rules of Prof'l Conduct R. 3.4(e) (1992); see also Model Code of Prof'l Responsibility DR 7-106(C)(1)-(2) (1979); from engaging in conduct disruptive to the tribunal, Model Rules of Prof'l Conduct R. 3.5(c) (1992); see also Model Code of Prof'l Responsibility DR 7-106(C)(1) (1979); and from making extrajudicial statements that are likely to prejudice a proceeding, Model Rules of Prof'l Conduct R. 3.6 (1992); see also Model Code of Prof'l Responsibility DR 7-107 (1979).

n61. See Segal, *supra* note 1, at 144 (discussing penalties for trial misconduct in disciplinary proceedings).

n62. The "proper scope of the lawyer's immunity remains unsettled." *Id.* at 120.

n63. See Burke, *supra* note 2, at 3 (explaining that the privileges and immunities in American law have "provided fodder for the academic and judicial grist mills for years" but concluding that "the product of the mills

has provided little nourishment, much less enlightenment").

n64. Not until the twentieth century did courts even consider extending the privilege to claims other than defamation. See generally Hayden, *supra* note 1, at 988-1002. Some scholars attribute the expansion of absolute immunity to the ingenuity of modern litigants who resourcefully frame their pleadings with creative legal theories. See Mallen & Roberts, *supra* note 1, at 398.

n65. See, e.g., *Mem'l Drive Consultants, Inc. v. Ony, Inc.*, No. 96-CV-0702E(F), 1997 U.S. Dist. LEXIS 14413, at 8 (W.D.N.Y. Sept. 3, 1997) (applying Massachusetts law) ("While the privilege is most often used as a defense to defamation claims that have been brought against an attorney, the privilege has been interpreted to be an absolute privilege that insulates attorneys from all forms of civil liability."); *Buckhannon v. U.S. West Communications, Inc.*, 928 P.2d 1331, 1334-35 (Colo. Ct. App. 1996) (stating that the lawyer's litigation privilege barred suit based on an in-house attorney's statements to a disability insurance carrier "regardless of the tort theory"); *Brown v. Del. Valley Transplant Program*, 539 A.2d 1372, 1374 (Pa. Super. Ct. 1988) (noting that absolute immunity "bars actions for tortious behavior by an attorney other than defamation...").

n66. Mallen & Roberts, *supra* note 1, at 389-90 (citing cases from California, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Missouri, New York, Oklahoma, Oregon, Pennsylvania, and Texas); see also *Laub v. Pesikoff*, 979 S.W.2d 686 (Tex. Ct. App. 1998).

Cases dismissing negligence claims by parties against opposing counsel often do not rely on absolute immunity but on the conclusion that an attorney owes no duty to an adversary of his or her client. See, e.g., *Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP*, 175 F.3d 14, 18 (1st Cir. 1999) (applying New Hampshire law) (noting that the trial court rejected a negligence claim because the plaintiff failed to identify any cognizable legal duty owed by the attorney to the plaintiff). The policies supporting the denial of a duty, however, are the same as those supporting the application of absolute immunity. See *id.*

n67. *Moses v. McWilliams*, 549 A.2d 950 (Pa. Super. Ct. 1988).

n68. E.g., *Twyford v. Twyford*, 134 Cal. Rptr. 145 (Ct. App. 1976); *Bennett v. Attorney Gen. of Mich.*, 237 N.W.2d 250 (Mich. Ct. App. 1976).

n69. E.g., *Lerette v. Dean Witter Org., Inc.*, 131 Cal. Rptr. 592 (Ct. App. 1976).

n70. *Brown v. Del. Valley Transplant Program*, 539 A.2d 1372, 1374 (Pa. Super. Ct. 1988).

n71. E.g., *Lambdin Funeral Serv. Inc. v. Griffith*, 559 S.W.2d 791 (Tenn. 1978); *Wolfe v. Arroyo*, 543 S.W.2d 11 (Tex. Civ. App. 1976).

n72. *Laub v. Pesikoff*, 979 S.W.2d 686 (Tex. App. 1998).

n73. E.g., *Bledsoe v. Watson*, 106 Cal. Rptr. 197 (Ct. App. 1973); *Brown*, 539 A.2d at 1374-75.

n74. E.g., *Pettitt v. Levy*, 104 Cal. Rptr. 650, 652 (Ct. App. 1972); *Janklow v. Keller*, 241 N.W.2d 364 (S.D. 1976); see also *Keohane v. Stewart*, 882 P.2d 1293, 1300 (Colo. 1994) (granting absolute immunity to expert witness from conspiracy to defraud claim).

n75. States are divided as to whether the doctrine of absolute immunity extends to claims for malicious prosecution. See Mallen & Roberts, *supra* note 1, at 398; Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 *S. Tex. L. Rev.* 421, 446 (2001); Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 *Yale L.J.* 1218 (1979); see also Keeton et al., *supra* note 9, 114, at 816-17; cf. Legal Services Corporation Act, 42 *U.S.C.* 2996e(f) (2001) (denying legal service lawyers immunity from abuse of process and malicious prosecution claims).

In California, for instance, a party may sue opposing counsel for malicious prosecution, but the requirement of a "favorable termination" avoids conflicts of interest during the pendency of the underlying action. See Mallen & Roberts, *supra* note 1, at 399 n.54 (citing *Pettitt v. Levy*, 104 Cal. Rptr. 650, 652 (Ct. App. 1972)); see also *Cent. Ice Mach. Co. v. Cole*, 509 N.W.2d 229, 232 (Neb. Ct. App. 1993). Louisiana, one of the few states where attorneys receive only the benefit of qualified immunity during litigation, also eliminates the conflict of interest situation by requiring adversaries to delay the filing of claims against opposing counsel until the underlying lawsuit has ended. See Hayden, *supra* note 1, at 1051 (citing *Loew's, Inc. v. Don George, Inc.*, 110 *So. 2d* 553 (La. 1959) and *Calvert v. Simon*, 311 *So. 2d* 13, 17 (La. Ct. App. 1975)).

n76. See *Thornton v. Rhoden*, 53 Cal. Rptr. 706, 719 (Ct. App. 1966) ("The salutary purpose of the privilege should not be frustrated by putting a new label on the complaint."); *Doe v. Nutter, McClennen & Fish*, 668 *N.E.2d* 1329, 1333 (Mass. App. Ct. 1996) (concluding that litigation privilege would be valueless if an attorney could be subject to liability for his or her statements under an alternative theory).

n77. Hayden, *supra* note 1, at 998 (quoting 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* 17.8 (3d ed. 1989)).

n78. The only court to have considered the issue refused to apply absolute immunity to bar a federal claim, citing insufficient precedent as its reason for denying the defense. See *Hahn v. Satullo*, No. 01-CV-007246 (Franklin County Ct. Com. Pl. Dec. 16, 2002) (Decision and Entry Partially Granting Defendants' Summary Judgment Motion Filed 7-24-2002). Refusing to immunize an attorney and his law firm against a federal statutory claim, the court stated on pages three and four of its opinion:

Initially, Defendants argue that since their acts were performed as attorneys attempting to represent their clients, they possess either absolute or qualified immunity. However, given the supremacy of federal law, and that they appear to be relying upon Ohio common law as the basis of their absolute and qualified immunity defenses, it is not clear how Ohio common law absolute or qualified immunity can enable Defendants to avoid liability under the [Fair Credit Reporting Act]. In any event, Defendants have not provided this Court with any legal authority which would allow them to do so.

*Id.* at 3-4.

n79. The federal courts have consistently protected government litigators against federal statutory claims by the application of absolute immunity. See *Imbler v. Pachtman*, 424 U.S. 409 (1976); see also *Briscoe v. LaHue*, 460 U.S. 325 (1983) (protecting witnesses); *Stump v. Sparkman*, 435 U.S. 349 (1978) (protecting judges). Indeed, federal courts have found support for their application of attorney immunity under federal law in the long-standing state law rules of immunity. See *Auriemma v. Montgomery*, 860 F.2d 273, 277 (7th Cir. 1988); *Barrett v. United States*, 798 F.2d 565, 572-73 (2d Cir. 1986) (collecting state immunity cases). The courts have explained that "the rationale behind the common law rule is that the needs of litigants and their advocates in the judicial process require that advocates be able to vigorously present their clients' cases without having to fear being sued ... ." *Barnett*, 798 F.2d at 572-73; see also *Auriemma*, 860 F.2d at 273.

For a comparison of the lawyer's litigation privileges under state law to those similar privileges granted to government actors under federal law, see T. Leigh Anenson, *Attorney Liability Under the Fair Credit Reporting Act: The Limits of Zealous Representation*, 23 B.U. Ann. Rev. Banking & Fin. L. (forthcoming Spring 2004).

n80. See Mallen & Roberts, *supra* note 1, at 399 n.56 (1978) ("The courts have never directly examined the question of whether an attorney's "conduct" that does not involve any verbal or written statements, but is related to the proceedings, would be covered by the privilege.").

While the act of filing court papers has been held to be within the realm of absolute immunity, this "act" has been deemed to constitute a publication of a "statement" related to the proceedings. See *Albertson v. Raboff*, 295 P.2d 405 (Cal. 1956) (*lis pendens*); *Frank Pisano & Assoc. v. Taggart*, 105 Cal. Rptr. 414 (Ct. App. 1972) (mechanic's liens); see also *Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP*, 175 F.3d 14, 16 (1st Cir. 1999) (applying New Hampshire law) (noting that "privilege bars any civil damages based on protected

statements").

n81. See *Provencher v. Buzzell-Plourde Assocs.*, 711 A.2d 251, 256 (N.H. 1998); see also Hanna, *supra* note 75, at 446.

n82. *Provencher*, 711 A.2d at 256.

n83. *Middlesex Concrete Prod. & Excavating Corp. v. Carteret Indus. Assoc.*, 172 A.2d 22 (N.J. Super. Ct. App. Div. 1961). It is unclear, however, whether all conduct qualifies for protection. Certainly criminal conduct is not afforded immunity. Intentional physical acts, moreover, are also unlikely to qualify for protection. See *Panzella v. Burns*, 169 A.D.2d 824 (N.Y. App. Div. 1991) (holding that only statements were privileged in lawsuit between attorneys due to one attorney punching the other attorney in the face in the judge's chambers after a verbal altercation); cf. *Gregory v. Thompson*, 500 F.2d 59, 61 (9th Cir. 1974) (applying California law) (noting that judge was found civilly liable for assault and battery when he "forced Gregory out the [courtroom] door, threw him to the floor in the process, jumped on him, and began to beat him").

In *Brown v. Delaware Valley Transplant Program*, a court held an attorney absolutely immune from a claim for assault and battery and mutilation of a corpse. 539 A.2d 1372, 1375 (Pa. Super. Ct. 1988). However, the lawsuit against the attorney was for his role in securing a petition for his client to harvest the organs, not due to the attorney having any physical contact with the body. *Id.*

n84. *Seaman v. Netherclift*, L.R. 1 C.P.D. 540, 545 n.19 (Div. Ct. 1876) (emphasis added).

n85. See *supra* note 31 and accompanying text.

n86. See *Hahn v. Satullo*, No. 01CVH07-7246 (Franklin County Ct. Com. Pl. Jan. 16, 2003) (Decision and Entry Denying Defendants' Motion For Reconsideration Filed 1-7-2003); *Hahn v. Satullo*, No. 01CVH07-7246 (Franklin County Ct. Com. Pl. Dec. 16, 2002) (Decision and Entry Partially Granting Defendants' Summary Judgment Motion Filed 7-24-2002).

n87. See *Auriemma v. Montgomery*, 860 F.2d 273, 275-76 (7th Cir. 1988) (listing cases where attorneys were granted immunity based upon their conduct); *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978) (holding that prosecutor was absolutely immune from suit that claimed that he destroyed and falsified evidence);

see also Burke, *supra* note 2, at 5 (explaining that legislative immunity pursuant to the Speech and Debate Clause of the U.S. Constitution has also been applied to certain kinds of legislative conduct).

n88. See Hayden, *supra* note 1, at 994-98. It is important to note that for the privilege to apply during litigation the court must have had subject matter jurisdiction over the controversy. See *Kent v. Conn. Bank & Trust Co., N.A.*, 386 So. 2d 902 (Fla. Dist. Ct. App. 1980).

n89. *Lake v. King*, 85 Eng. Rep. 137, 138 (K.B. 1679); see also Hayden, *supra* note 1, at 994-95.

n90. *McMillan v. Birch*, 1 Binn. 178 (Pa. 1806).

n91. See *Thorn v. Blanchard*, 5 Johns. 508, 530 (N.Y. 1809).

n92. See William J. Andrie, Jr., Note, Extension of Absolute Privilege to Defamation in Arbitration Proceedings - *Sturdvant v. Seaboard Service System, Ltd.*, 33 *Cath. U. L. Rev.* 1073 (1984); Gary D. Spivey, Annotation, Privileged Nature of Communications Made in Course of Grievance or Arbitration Procedure Provided for by Collective Bargaining Agreement, 60 A.L.R. 3d 1041 (1974); see, e.g., *W. Mass. Blasting Corp. v. Metro. Prop. and Cas. Ins. Co.*, 783 A.2d 398 (R.I. 2001) (extending absolute immunity to arbitration proceedings).

n93. See Borton, *supra* note 31, at 122; Note, Defamation - Absolute Privilege in Administrative Proceedings, 97 *U. Pa. L. Rev.* 877 (1949); W. E. Shipley, Annotation, Privilege Applicable to Judicial Proceedings as Extending to Administrative Proceedings, 45 A.L.R. 2d 1296 (1956); see also *Frisk v. Merrihew*, 116 *Cal. Rptr.* 781, 783 (Ct. App. 1974) (school board); *Goodley v. Sullivan*, 108 *Cal. Rptr.* 451, 454 (Ct. App. 1973) (hospital review board); *White v. United Mills Co.*, 208 S.W.2d 803 (Mo. Ct. App. 1948) (state labor commission); *Lambdin Funeral Serv., Inc. v. Griffith*, 559 S.W.2d 791 (Tenn. 1978).

One court in California proposed the following guidelines for determining the kinds of proceedings within the protection of the privilege:

(1) whether the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts,

(2) whether it is entitled to hold hearings and decide the issue by the application of rules of law to the

ascertained facts and, more importantly,

(3) whether its power affects the personal or property rights of private persons.

*Ascherman v. Natanson*, 100 Cal. Rptr. 656, 659 (Ct. App. 1972); see also *Parrillo, Weiss & Moss v. Cashion*, 537 N.E.2d 851, 854-55 (Ill. App. Ct. 1989) (listing six powers to be considered as factors in determining whether tribunal will be accorded judicial status for purposes of applying absolute immunity).

n94. See Wendy Evans Lehmann, Annotation, Testimony Before or Communications to Private Professional Society's Judicial Commission, Ethics Committee, or the Like, as Privileged, 9 A.L.R. 4th 807 (1981).

n95. *Odyniec v. Schneider*, 588 A.2d 786, 792 (Md. 1991); see also *Corbin v. Wash. Fire & Marine Ins. Co.*, 278 F. Supp. 393, 398 (D.S.C. 1968), aff'd, 398 F.2d 543 (4th Cir. 1968) (stating that the scope of absolute immunity should be extended to all "indispensable" proceedings quasi-judicial in character and function); *Moore v. Conliffe*, 871 P.2d 204, 210 (Cal. 1994) (finding private arbitration to be the functional equivalent of a court proceeding); cf. *Burke*, supra note 2, at 8 (noting that courts have consistently expanded the constitutional privilege against self-incrimination found in the Fifth Amendment to proceedings other than criminal cases).

n96. *Restatement (Second) of Torts* 586 cmt. d (1977); cf. *Lincoln v. Daniels*, 1 Q.B. 237 (1962) (holding that objective of tribunal must be to arrive at a judicial decision as opposed to an administrative determination).

The Federal common law's grant of immunity to government attorneys closely parallels state law by protecting government attorneys in the exercise of their advocacy (as opposed to their investigative or administrative) functions. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Barbera v. Smith*, 836 F.2d 96, 101 (2d Cir. 1987).

n97. *Hayden*, supra note 1, at 998 ("The most important factor in the broadening of the absolute privilege, however, has been neither the expansive reading of the term 'judicial proceeding,' nor the application of the privilege to other torts, but rather an exceedingly liberal construction of the necessary connection between the statement and the proceeding.").

For criticism of the generosity of modern courts in applying the privilege, see 1 Hazard & Hodes, supra note 56, at 1.1:205 and Charles W. Wolfram, *Modern Legal Ethics* 5.6 (1986).

n98. The case of *Munster v. Lamb* exemplifies the English standard. In *Munster*, the court granted an attorney immunity from a lawsuit arising out of his arguments during a prior trial despite the fact that the court found the statements were "without any justification or even excuse, and from personal ill-will or anger" towards

the adversary of his former client and "were irrelevant to every issue of fact which [was] contested before the tribunal." *Munster v. Lamb*, 11 Q.B.D. 588, 599 (1883). The court concluded that absolute immunity protected the attorney because "the words were uttered with reference to, and in the course of, the judicial inquiry which was going on ... ." Id.

n99. See, e.g., *Lawson v. Hicks*, 38 Ala. 279, 286 (1862) ("We find numerous and conclusive authorities, which, in the clearest manner, put the qualification, that only those communications, occurring in the course of judicial proceedings, are absolutely privileged, which are relevant.") (emphasis added); see also Van Vechten Veeder, supra note 31, at 474 (comparing English and American doctrines). See generally Developments in the Law: Defamation, supra note 31, at 922-23 n.313 (citing cases).

One case to apply the evidentiary relevance requirement denied immunity to an attorney who had filed a lawsuit for trespass and had alleged in the pleadings that "the defendant was subject and accustomed to biting and worrying sheep" and that "said defendant is reported to be fond of sheep, bucks, and ewes, and of wool, mutton, and lambs." *Gilbert v. People*, 1 Denio 41, 42-44 (N.Y. 1845), discussed by Hayden, supra note 1, at 1001. Later cases abandoning the legal relevance requirement reached the opposite decision. See *Johnston v. Schlarb*, 110 P.2d 190, 195 (Wash. 1941) (granting the privilege even though statements had been stricken as irrelevant from other court documents); *Sch. Dist. v. Donahue*, 97 P.2d 663, 666 (Wyo. 1940) (granting the privilege even though statements had been stricken from the pleadings as irrelevant).

n100. American courts have not required evidentiary relevance for more than sixty years. See Developments in the Law: Defamation, supra note 31, at 922-23 n.313 (noting that the last American case to require evidentiary relevance was decided in 1939).

n101. Hayden, supra note 1, at 1000-02 (explaining the evolution of the American rule of relevance and concluding that "most American courts have come quite close to the English standard"); see also David W. Carroll, Defamation - Absolute Immunity, 15 Ohio St. L.J. 330 (1954).

n102. *Restatement (Second) of Torts* 586 cmt. c (1977); see also *Silberg v. Anderson*, 786 P.2d 365, 369 (Cal. 1990) (requiring "some connection or logical relation to the action"); *Hawkins v. Harris*, 661 A.2d 284, 289 (N.J. 1995) (quoting *Silberg*).

n103. Mallen & Roberts, supra note 1, at 395 (citing *Dineen v. Daughan*, 381 A.2d 663 (Me. 1978)).

n104. See *Kirshner v. Shinaberry*, 582 N.E.2d 22, 23 (Ohio Ct. App. 1989) (cautioning courts to avoid using the term "relevancy" so as not to confuse the term with legal relevance).

n105. See, e.g., *Stewart v. Hall*, 83 Ky. 375 (1885) (holding that the fact that the matter was eventually excluded from evidence by the trial court did not destroy its privileged character); *Simon v. Potts*, 225 N.Y.S.2d 690, 702-03 (N.Y. Sup. Ct. 1962) ("The Courts have consistently held that even where libelous material was stricken as impertinent in the original proceeding, the privilege remained for the benefit of the party charged with libel."); *School Dist. v. Donahue*, 97 P.2d 663 (Wyo. 1940).

n106. See generally M. Schneiderman, Application of Privilege Attending Statements Made in Course of Judicial Proceedings to Pretrial Deposition and Discovery Procedures, 23 A.L.R. 3d 1172 (1969) (collecting cases). Conversely, at least one court concluded that the mere fact that the statements were "read in evidence" in prior proceedings was not conclusive of its relevance for purposes of applying the privilege. See *Lawson v. Hicks*, 38 Ala. 279 (1862).

n107. *Grasso v. Mathew*, 564 N.Y.S.2d 576, 578 (N.Y. App. Div. 1991), quoted in Borton, *supra* note 31, at 123. But see *Kurczaba v. Pollock*, 742 N.E.2d 425, 441 (Ill. App. Ct. 2000) ("The privilege, while broad in scope, is applied sparingly and confined to cases where the public service and administration of justice require immunity.").

n108. *Irwin v. Newby*, 282 P. 810, 812 (Cal. Ct. App. 1929); see also *Boyd v. Bressler*, 18 Fed. Appx. 360, 365 (6th Cir. 2001) (applying Ohio law) ("Ohio courts construe the absolute privilege with great liberality to assure that parties or their attorneys are not deterred from prosecuting the action vigorously for fear of personal liability.").

n109. See *Irwin*, 282 P. at 812; *Wright v. Lawson*, 530 P.2d 823 (Utah 1975) (denying absolute immunity to an attorney whose letter alleged improprieties in a shareholders' meeting because the contents of the letter had no relationship to the pending litigation, which concerned a corporate acquisition agreement).

n110. See Andrlé, *supra* note 92, at 1077 ("The precise limits of absolute privilege attached to judicial proceedings are not clear."); cf. Burke, *supra* note 2, at 16-19 (noting that there is a problem with defining what acts are protected under the implied immunities granted to government attorneys and judges); Cohen, *supra* note 12, at 274-75 (discussing the difficulty with categorizing judicial acts for purposes of judges' absolute immunity).

n111. See Keeton et al., *supra* note 9, 114, at 818; Robert D. Sack, Libel, Slander & Related Problems 269

(1980); Jonathan M. Purver, Annotation, Relevancy of Matter Contained in Pleading as Affecting Privilege Within Law of Libel, 38 A.L.R. 3d 272 (1971); see also *Singh v. HSBC Bank USA*, 200 F. Supp. 2d 338, 340 (S.D.N.Y. 2002) (holding that attorneys are accorded absolute immunity under New York law if "by any view or under any circumstances," their actions are pertinent to the litigation); *Greenberg v. Aetna Ins. Co.*, 235 A.2d 576, 577-78 (Pa. 1976) ("All reasonable doubts (if any) should be resolved in favor of relevancy and pertinency and materiality."). But see Burke, supra note 2, at 20-23 (advocating a presumption against absolute privilege and arguing that the burden of justifying the application of the privilege should be on its proponent).

n112. Hayden, supra note 1, at 1001; see, e.g., *Richeson v. Kessler*, 255 P.2d 707, 709 (Idaho 1953) (stating that "only in extreme cases" will the litigation privilege be defeated because of lack of relevance).

n113. *Fletcher v. Maupin*, 138 F.2d 742, 742 (4th Cir. 1943) (applying Virginia law); see also *Post v. Mendel*, 507 A.2d 351, 355 (Pa. 1986).

n114. *Myers v. Hodges*, 44 So. 357, 362 (Fla. 1907).

n115. *Pettitt v. Levy*, 104 Cal. Rptr. 650, 654 (Ct. App. 1972). But see *Bell v. Lee*, 49 S.W.3d 8, 11 (Tex. App. 2001) (holding that the privilege applies if conduct has some relation to proceeding, "regardless of whether it in fact furthers the representation").

n116. See, e.g., *Olszewski v. Scripps Health*, 69 P.3d 939, 949 (Cal. 2003) (requiring that the communication and its object have a "connection or logical relation").

n117. *Hoover v. Van Stone*, 540 F. Supp. 1118 (D. Del. 1982) (applying Delaware law); *Russell v. Clark*, 620 S.W.2d 865 (Tex. Civ. App. 1981).

n118. *O'Neil v. Cunningham*, 173 Cal. Rptr. 422 (Ct. App. 1981); *Chard v. Galton*, 559 P.2d 1280 (Or. 1977); cf. *Coleman v. Gulf Ins. Group*, 718 P.2d 77 (Cal. 1986) (holding that filing an appeal to gain the benefit of delay and coerce a settlement for a lower amount was not an abuse of process), cited in Segal, supra note 1, at 104, 111, 121, 134, 138; *Drasin v. Jacoby & Meyers*, 197 Cal. Rptr. 768, 770 (Ct. App. 1984) (ruling that filing a meritless suit to force settlement was not a "collateral purpose" necessary to succeed under an abuse of process claim).

Promoting the settlement of disputes is another basis courts have advanced for extending absolute immunity beyond the traditional litigation setting to alternative fora. See *Gen. Motors Corp. v. Mendicki*, 367 F.2d 66, 67, 71-72 (10th Cir. 1966), cited in Andrlé, supra note 92, at 1080.

n119. *Buschbaum v. Heriot*, 63 S.E. 645 (Ga. Ct. App. 1909); *Spoehr v. Mittelstadt*, 150 N.W.2d 502 (Wis. 1967).

n120. *Nguyen v. Proton Tech. Corp.*, 81 Cal. Rptr. 2d 392 (Ct. App. 1999).

n121. *Maclaskey v. Mecartney*, 58 N.E.2d 630, 635-38 (Ill. App. Ct. 1944).

n122. *Demopolis v. Peoples Nat'l Bank of Wash.*, 796 P.2d 426, 431 (Wash. Ct. App. 1990).

n123. *Spoehr*, 150 N.W.2d at 502.

n124. *Id.*

n125. But see *Dean v. Kirkland*, 23 N.E.2d 180 (Ill. App. Ct. 1939) (granting absolute immunity despite the fact that statements by defense attorney were designed to induce the plaintiff's attorney to withdraw from the case because statements amounted to reiteration of the defense).

n126. Accordingly, it appears that when two objects of the litigation - one legitimate and one illegitimate - could support an attorney's actions, certain courts will deny the privilege's protection.

n127. Cf. Melvyn I. Weiss, A Practitioner's Commentary on the Actual Use of Amended Rule 11, 54 *Fordham L. Rev.* 23, 25-27 (1985) (commenting that Rule 11 was being used as an adversarial tactic and highlighting one dilemma of the advocacy system: Any shield against abuse of process may become a sword).

n128. *Younger v. Solomon*, 113 Cal. Rptr. 113, 121 (Ct. App. 1974); see also *Nguyen v. Proton Tech. Corp.*, 81 Cal. Rptr. 2d 392 (Ct. App. 1999) (holding that absolute immunity did not apply to letter referencing criminal record of competitor's employee during litigation claiming that employee was improperly soliciting client's customers on behalf of competitor).

n129. *Savage v. Stover*, 92 A. 284 (N.J. Sup. Ct. 1914), aff'd, 94 A. 1103 (N.J. 1915).

n130. *LanChile Airlines v. Conn. Gen. Life Ins. Co.*, 731 F. Supp. 477, 479-80 (S.D. Fla. 1990) (applying Florida law) (affording protection only to "necessary" preliminary statements); cf. *Doe v. Nutter, McClennan & Fish*, 668 N.E.2d 1329, 1331-35 (Mass. App. Ct. 1996) (dismissing case and awarding attorney fees when the court determined that opposing counsel in the original case had filed the subsequent lawsuit against the attorney in order to deprive the client of its chosen counsel). See generally Vitauts M. Gulbis, Annotation, Attorneys' Statements, to Parties Other Than Alleged Defamed Party or Its Agents, in Course of Extrajudicial Investigation or Preparation Relating to Pending or Anticipated Civil Litigation as Privileged, 23 A.L.R. 4th 932 (1983); *Schneiderman*, *supra* note 106.

n131. See *Troutman v. Erlandson*, 593 P.2d 793 (Or. 1979); *Converters Equip. Corp. v. Condes Corp.*, 258 N.W.2d 712 (Wis. 1977).

n132. See, e.g., *Post v. Mendel*, 507 A.2d 351, 352-57 (Pa. 1986). But see *Thomas v. Ford Motor Co.*, 137 F. Supp. 2d 575 (D.N.J. 2001) (providing absolute immunity to defense attorney in civil suit who contacted police, coroner, and prosecutor to induce a criminal investigation of the plaintiff).

n133. *Troutman*, 593 P.2d at 794-96.

n134. *Converters Equip. Corp.*, 258 N.W.2d at 714-17.

n135. Borrowing the analytical framework provided by constitutional law, it is unclear whether the required connection is more akin to a rational basis standard or a least-restrictive-means analysis.

n136. *Hoover v. Van Stone*, 540 F. Supp. 1118 (D. Del. 1982) (applying Delaware law).

n137. See *State-Wide Ins. Co. v. Glavin*, 235 N.Y.S.2d 66 (App. Div. 1962) (ruling that alleged reasons given by attorney for commencing action had no relevance to the issue of negligence).

It is not clear how willing courts are to supply a litigious motive when none is asserted or to consider a valid purpose in order to retroactively account for an attorney's conduct. A related question is whether the inquiry regarding the litigation goal is subjective or objective. See *Borden v. Clement*, 261 B.R. 275, 283 (Bankr. N.D. Ala. 2001) (applying Alabama law) (denying privilege to statements "which the party making them could not reasonably have supposed to be relevant"). Another unresolved area involves conduct with multiple purposes and whether the asserted purpose of the conduct must have been the primary purpose or whether any valid objective supports application of absolute immunity.

n138. *Sussman v. Damian*, 355 So. 2d 809, 810-12 (Fla. Dist. Ct. App. 1977).

n139. See *Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP*, 175 F.3d 14, 17 (1st Cir. 1999) (applying New Hampshire law) (affirming dismissal of case based on absolute immunity and concluding that trial court applied the correct standard in deducing whether statements "might be" or "could be" relevant). But see *Thompson v. Frank*, 730 N.E.2d 143, 145 (Ill. App. Ct. 2000) ("In light of the complete immunity provided by an absolute privilege, the classification of absolutely privileged communications is necessarily narrow.").

n140. Segal, *supra* note 1, at 116-17 (collecting cases).

n141. An increasing number of cases involving the litigation privilege arise between lawyers themselves. See Werner Pfennigstorf, *Types and Causes of Lawyers' Professional Liability Claims: The Search for Facts*, 1980 *Am. B. Found. Res. J.* 255, 261; see also *Friedman v. Stadum*, 217 Cal. Rptr. 585, 588 (Ct. App. 1985) (proclaiming the lawyer versus lawyer controversies "ridiculous catfights"); cf. Cohen, *supra* note 12, at 303 (noting that more lawsuits have been filed against judges with the erosion of judicial immunity).

n142. *Sussman*, 355 So. 2d at 810-12.

n143. *Id.* at 810; see also *Kraushaar v. Lavin*, 39 N.Y.S.2d 880, 882-85 (Sup. Ct. 1943) (indicating that absolute immunity could have protected an attorney who accused opposing counsel of unethical conduct during

inspection of records if the statements had related to the inspection).

n144. See *Post v. Mendel*, 507 A.2d 351, 352-57 (Pa. 1986).

n145. Id.

n146. Id.

n147. *DeBry v. Godbe*, 992 P.2d 979, 983-84 (Utah 1999) (stating that if statements made outside the actual trial proceedings were not entitled to the privilege, the policy supporting the privilege would be undermined).

n148. See Keeton et al., *supra* note 9, 114, at 819; see also Hayden, *supra* note 1, at 992-93; Mallen & Roberts, *supra* note 1, at 394-96.

n149. See *Schneiderman*, *supra* note 106; see also 50 *Am. Jur. 2d Libel & Slander* 146 (1984).

n150. See *Sparks v. Ellis*, 421 S.E.2d 758, 762-63 (Ga. Ct. App. 1992) (holding that a letter written after initiation of suit was not within the scope of the litigation privilege because it was not contained in regular pleadings); *Barto v. Felix*, 378 A.2d 927 (Pa. Super. Ct. 1977) (noting that although statements in briefs are privileged, counsel's reiterations of the contents of his brief at a press conference were not privileged because the remarks were not made at a judicial proceeding); *Watson v. Kaminski*, 51 S.W.3d 825, 826-28 (Tex. App. 2001) (stating that the absolute privilege does not extend to an attorney's communications outside of judicial proceedings at all, but nevertheless extending it to a letter referencing proposed litigation).

n151. *Larmour v. Campanale*, 158 Cal. Rptr. 143, 144 (Ct. App. 1979).

n152. The Supreme Court of Ohio declared that "the test is - pertinence to the occasion of the privilege." *Bigelow v. Brumley*, 37 N.E.2d 584, 591 (Ohio 1941).

n153. See Gulbis, *supra* note 130; see also Thomas J. Goger, Annotation, Libel and Slander: Out-of-Court Communications Between Attorneys Made Preparatory to, or in the Course or Aftermath of, Civil Judicial Proceedings as Privileged, 36 A.L.R. 3d 1328 (1971).

n154. See *Helfand v. Coane*, 12 S.W.3d 152 (Tex. Ct. App. 2000); see also *Fin. Corp. of Am. v. Wilburn*, 234 Cal. Rptr. 653, 659 (Ct. App. 1987) ("A document is not privileged merely because it has been filed with a court or in an action.").

n155. *Rader v. Thrasher*, 99 Cal. Rptr. 670 (Ct. App. 1972); *St. Paul Fire & Marine Ins. Co. v. Icard, Merrill, Cullis & Timm, P.A.*, 196 So. 2d 219 (Fla. Dist. Ct. App. 1967); *Kemper v. Fort*, 67 A. 991, 994 (Pa. 1907). But see *Kurczaba v. Pollock*, 742 N.E.2d 425 (Ill. App. Ct. 2000) (holding that an amended complaint is not part of a judicial proceeding until leave of court has been granted).

n156. *Twyford v. Twyford*, 134 Cal. Rptr. 145 (Ct. App. 1976).

n157. *Marshall v. Am. Fed'n of Gov't Employees, AFL-CIO*, 996 F. Supp. 1319 (W.D. Okla. 1997) (applying Oklahoma law); *O'Brien v. Alexander*, 898 F. Supp. 162 (S.D.N.Y. 1995) (applying New York law); *Rader v. Thrasher*, 99 Cal. Rptr. 670 (Ct. App. 1972); *Sussman v. Damian*, 355 So. 2d 809 (Fla. Dist. Ct. App. 1977); *Beezley v. Hansen*, 286 P.2d 1057 (Utah 1955).

n158. *Nix v. Sawyer*, 466 A.2d 407 (Del. Super. Ct. 1983); *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994).

n159. *Kraushaar v. Lavin*, 39 N.Y.S.2d 880 (Sup. Ct. 1943).

n160. *Buchanan v. Miami Herald Publ'g Co.*, 206 So. 2d 465 (Fla. Dist. Ct. App. 1968).

n161. *Rolla v. Westmoreland Health Sys.*, 651 A.2d 160 (Pa. Super. Ct. 1994); *James v. Brown*, 637 S.W.2d 914 (Tex. 1982).

n162. *Bell v. Anderson*, 389 S.E.2d 762 (Ga. Ct. App. 1989).

n163. *Spoehr v. Mittelstadt*, 150 N.W.2d 502 (Wis. 1967).

n164. See *Schneiderman*, *supra* note 106 (citing cases).

n165. See, e.g., *Krouse v. Bower*, 20 P.3d 895 (Utah 2001); *Kauzlarich v. Yarbrough*, 20 P.3d 946 (Wash. Ct. App. 2001); see also *Albertson v. Rabolf*, 295 P.2d 405, 409 (Cal. 1956) (holding that absolute immunity applied even though the conduct occurred "outside the courtroom and no function of the court or its officers [was] invoked"). But see *Jernigan*, *supra* note 53, at 361 ("Under Connecticut law, the privilege is narrow in that it does not protect communications made outside of formal judicial or administrative proceedings, even when they concern such proceedings.") (citing *AroChem Int'l, Inc. v. Buirkle*, 968 F.2d 266 (2d Cir. 1992) (applying Connecticut law)).

n166. *Ascherman v. Natanson*, 100 Cal. Rptr. 656, 659 (Ct. App. 1972); *Stucchio v. Tincher*, 726 So. 2d 372 (Fla. Dist. Ct. App. 1999); *Hawkins v. Harris*, 661 A.2d 284, 289 (N.J. 1995). But see *Robinson v. Home Fire & Marine Ins. Co.*, 59 N.W.2d 776 (Iowa 1953) (applying only qualified privilege to an interview with a prospective witness).

n167. *Pettitt v. Levy*, 104 Cal. Rptr. 650 (Ct. App. 1972).

n168. *Martirano v. Frost*, 255 N.E.2d 693, 694 (N.Y. 1969); *Dougherty v. Flanagan, Kelly, Ronan, Spollen & Stewart*, 535 N.Y.S.2d 422 (App. Div. 1988). But see *Demopolis v. Peoples Nat'l Bank of Wash.*, 796 P.2d 426, 430-31 (Wash. Ct. App. 1990) (holding statement made during a trial recess impugning party's credibility unprivileged).

n169. *Selby v. Burgess*, 712 S.W.2d 898, 900 (Ark. 1986).

n170. *Gibson v. Mut. Life Ins. Co.*, 465 S.E.2d 56 (N.C. Ct. App. 1996) (deposition break); *W. States Title Ins. Co. v. Warnock*, 415 P.2d 316 (Utah 1966) (in-office discussion following deposition).

n171. E.g., *Johnston v. Cartwright*, 355 F.2d 32 (8th Cir. 1966) (applying Iowa law); *Jones v. Clinton*, 974 F. Supp. 712 (E.D. Ark. 1997) (applying Arkansas law); *Prokop v. Cannon*, 583 N.W.2d 51 (Neb. Ct. App. 1998); *Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220 (Tex. Ct. App. 2000). But see *Green Acres Trust v. London*, 688 P.2d 617 (Ariz. 1984) (attorney's statements to press relating facts in complaint denied privileged status because statements did not enhance judicial function and were not in furtherance of litigation).

n172. E.g., *Sriberg v. Raymond*, 544 F.2d 15 (1st Cir. 1976) (applying Massachusetts law); *Larmour v. Campanale*, 158 Cal. Rptr. 143 (Ct. App. 1979). See generally *Doe v. Nutter, McClennan & Fish*, 668 N.E.2d 1329 (Mass. App. Ct. 1996).

n173. *O'Neil v. Cunningham*, 173 Cal. Rptr. 422 (Ct. App. 1981); *Vodopia v. Ziff-Davis Pub. Co.*, 663 N.Y.S.2d 178 (App. Div. 1997); *Zirn v. Cullom*, 63 N.Y.S.2d 439 (Sup. Ct. 1946). But see *State-Wide Ins. Co. v. Glavin*, 235 N.Y.S.2d 66 (App. Div. 1962).

n174. *Richards v. Conklin*, 575 P.2d 588 (Nev. 1978).

n175. See *Michaels v. Berliner*, 694 N.E.2d 519, 523 (Ohio Ct. App. 1997) (ruling that courtesy letter sent to inform opposing counsel that the opposing party would be moving to disqualify him was absolutely immune because that kind of letter is "generally sent in the regular course of preparing for a motion").

n176. See *Izzi v. Rellas*, 163 Cal. Rptr. 689 (Ct. App. 1980) (seeking to set aside default judgment).

n177. See, e.g., *Woodruff v. Trepel*, 725 A.2d 612 (Md. Ct. Spec. App. 1999).

n178. See Goger, *supra* note 153, at 1328 (citing *Dean v. Kirkland*, 23 N.E.2d 180 (Ill. App. Ct. 1939) and *W. States Title Ins. Co. v. Warnock*, 415 P.2d 316 (Utah 1966)).

n179. See *id.* (citing, inter alia, *Richeson v. Kessler*, 255 P.2d 707 (Idaho 1953)).

n180. See, e.g., *Joseph v. Larry Dorman, P.C.*, 576 N.Y.S.2d 588 (App. Div. 1991) (ruling that letter between attorneys during litigation was absolutely privileged without describing its contents).

n181. See Goger, *supra* note 153 (citing *Savage v. Stover*, 92 A. 284 (N.J. 1914)).

n182. See *id.*

n183. See *Borden v. Clement*, 261 B.R. 275, 283 (Bankr. N.D. Ala. 2001) (applying Alabama law) (noting that the absolute privilege does not protect slanderous imputations that are "plainly irrelevant" and "voluntarily made"); *Buschbaum v. Heriot*, 63 S.E. 645 (Ga. Ct. App. 1909).

n184. See *Schneiderman*, *supra* note 106 (citing cases); see also *Borden*, 261 B.R. at 283 (denying privilege to statements "which the party making them could not reasonably have supposed to be relevant"); *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332 (D.C. 2001).

A court's inquiry into an attorney's state of mind regarding relevance appears inconsistent with applying the doctrine regardless of malice or bad faith. In fact, depending on the weight a court gives this criterion, examining the subjective intent of an attorney could be considered simply a proxy for determining the existence of good faith motives. See Hayden, *supra* note 1, at 1046-47 ("The cases also indicate, commonsensically, that evidence tending to go to the pertinence of the defamatory statement to the proceedings may also be relevant in assessing the lawyer's lack of malice or ill will.") (citing cases); see also *Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP*, 175 F.3d 14, 16 (1st Cir. 1999) (applying New Hampshire law). Consequently, absolute privilege may equate to merely a qualified privilege, and an attorney could lose the advantage of an early dismissal on the pleadings.

n185. See, e.g., *West v. Maint. Tool & Supply Co., Inc.*, 89 S.W.3d 96 (Tex. Ct. App. 2002).

n186. *Dean v. Kirkland*, 23 N.E.2d 180, 188 (Ill. App. Ct. 1939).

n187. *Bradley v. Hartford Accident & Indem. Co.*, 106 Cal. Rptr. 718 (Ct. App. 1973); *Libco Corp. v. Adams*, 426 N.E.2d 1130 (Ill. App. Ct. 1981); *Spoehr v. Mittelstadt*, 150 N.W.2d 502 (Wis. 1967); see also *Rodgers v. Wise*, 7 S.E.2d 517 (S.C. 1940) (protecting attorney letter to associate representing same client).

n188. *Rodgers*, 7 S.E.2d at 517.

n189. *Id.*

n190. For a listing of cases concerning correspondence sent to someone other than the alleged defamed party, see Gulbis, *supra* note 130.

n191. *Sullivan v. Birmingham*, 416 N.E.2d 528, 530 (Mass. App. Ct. 1981). But see *Romero v. Prince*, 513 P.2d 717 (N.M. Ct. App. 1973) (holding that a copy of a letter sent to a third party who had nothing to do with the pending legal proceeding did not defeat application of the absolute privilege where the letter was made during a judicial proceeding and its contents were reasonably related to the proceeding).

n192. *Krouse v. Bower*, 20 P.3d 895, 900 (Utah 2001); see also *Kurczaba v. Pollock*, 742 N.E.2d 425, 441 (Ill. App. Ct. 2000) (refusing to extend the privilege to third persons who received court documents but had no participation or legal interest in the action).

n193. *Sriberg v. Raymond*, 544 F.2d 15 (1st Cir. 1976) (applying Massachusetts law); *Larmour v. Campanale*, 158 Cal. Rptr. 143 (Ct. App. 1979).

n194. *Weiler v. Stern*, 384 N.E.2d 762 (Ill. App. Ct. 1978).

n195. *Popp v. O'Neil*, 730 N.E.2d 506 (Ill. App. Ct. 2000); *Samson Inv. Co. v. Chevaillier*, 988 P.2d 327 (Okla. 1999).

n196. *Trachsel v. Two Rivers Psychiatric Hosp.*, 883 F. Supp. 442 (W.D. Mo. 1995) (applying Missouri law).

n197. *Youmans v. Smith*, 47 N.E. 265 (N.Y. 1897); *Russell v. Clark*, 620 S.W.2d 865 (Tex. App. 1981).

n198. *Vanderkam v. Clarke*, 993 F. Supp. 1031 (S.D. Tex. 1998) (applying Texas law).

n199. *Izzi v. Rellas*, 163 Cal. Rptr. 689 (Ct. App. 1980); *O'Neil v. Cunningham*, 173 Cal. Rptr. 422 (Ct. App. 1977); *Lopinski v. State Farm Mut. Ins. Co.*, No. L-96-078, 1996 Ohio App. LEXIS 5728, at 1 (Dec. 20, 1996); *Chard v. Galton*, 559 P.2d 1280 (Or. 1980).

n200. *Romero v. Prince*, 513 P.2d 717 (N.M. Ct. App. 1973).

n201. *Friedman v. Alexander*, 433 N.Y.S.2d 627 (App. Div. 1980).

n202. *Theiss v. Scherer*, 396 F.2d 646 (6th Cir. 1968) (applying Ohio law).

n203. *Simon v. Potts*, 225 N.Y.S.2d 690 (Sup. Ct. 1962).

n204. *Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 239 (Tex. App. 2000) ("The mere delivery of pleadings in pending litigation to members of the news media does not amount to a publication outside of the judicial proceedings, resulting in [a] waiver of the absolute privilege.").

n205. *Rady v. Lutz*, 444 N.W.2d 58 (Wis. Ct. App. 1989) (discussing a letter accusing the plaintiff of filing frivolous lawsuits and harassing public officials).

n206. *Thomas v. Ford Motor Co.*, 137 F. Supp. 2d 575 (D.N.J. 2001) (applying New Jersey law).

n207. *Id.*

n208. *Krouse v. Bower*, 20 P.3d 895 (Utah 2001).

n209. *Id.* at 900-01.

n210. *Post v. Mendel*, 507 A.2d 351, 353-57 (Pa. 1986) (allowing protection only for actions that "play an integral role in pursuing the ordinary course of justice").

n211. *Id.*

n212. *Id.* at 356.

n213. *Id.*

n214. *Id.* at 357.

n215. *LanChile Airlines v. Conn. Gen. Life Ins. Co.*, 731 F. Supp. 477, 479-80 (S.D. Fla. 1990) (applying Florida law) (stating that protection is afforded only to "necessary" preliminary statements). See generally Gulbis, *supra* note 130; *Schneiderman*, *supra* note 106.

n216. *Troutman v. Erlandson*, 593 P.2d 793 (Or. 1979).

n217. *Kurczaba v. Pollock*, 742 N.E.2d 425, 441 (Ill. App. Ct. 2000).

n218. *Converters Equip. Corp. v. Condes Corp.*, 258 N.W.2d 712 (Wis. 1977).

n219. *Golden v. Mullen*, 693 N.E.2d 385 (Ill. App. Ct. 1997).

n220. *Thompson v. Frank*, 730 N.E.2d 143 (Ill. App. Ct. 2000).

n221. *Lykowski v. Bergman*, 700 N.E.2d 1064 (Ill. App. Ct. 1998).

n222. See *Buckhannon v. U.S. West Communications, Inc.*, 928 P.2d 1331, 1334 (Colo. Ct. App. 1996) (finding conduct "preliminary to a proposed judicial proceeding ... related to the proceeding, and [] thus absolutely privileged."); see also *Cummings v. Kirby*, 343 N.W.2d 747, 748-49 (Neb. 1984) (holding attorney absolutely immune from suit for calling a trial witness a "crook" after verdict was rendered); *Prokop v. Cannon*, 583 N.W.2d 51 (Neb. Ct. App. 1998) (finding statements to press after lawsuit dismissed protected); *Seltzer v. Fields*, 244 N.Y.S.2d 792 (N.Y. App. Div. 1963) (holding that privilege applies to communications that are relevant now or in the future), aff'd, 198 N.E.2d 3 (N.Y. 1964). But see *Timmis v. Bennett*, 89 N.W.2d 748 (Mich. 1958) (holding that the mere fact that attorney contemplated bringing an action for damages did not bring communications within the scope of absolute immunity because immunity applied only during trial or other judicial proceedings); *Kenny v. Cleary*, 363 N.Y.S.2d 606 (App. Div. 1975) (holding that the privilege attaches only once litigation is commenced); *Rosen v. Brandes*, 432 N.Y.S.2d 597, 601 (Sup. Ct. 1980) (holding that litigation privilege protects only statements made after litigation is commenced). See generally Lewis & Cole, supra note 1, at 727 (arguing that absolute immunity should be extended to post-arbitration conduct).

n223. *Restatement (Second) of Torts* 586 cmt. a (1977). The Supreme Court of Utah expressed a similar rationale in applying the privilege to a demand letter sent prior to filing suit: "Because the purpose of the privilege is to promote the resolution of disputes, it should be interpreted to encourage this end. It therefore follows that the privilege must also encourage candid, forthright settlement communications that take place prior to the filing of [a] suit." *Krouse v. Bower*, 20 P.3d 895, 899 (Utah 2001).

n224. Borton, supra note 31, at 123 (quoting the *Restatement (Second) Of Torts* 586 cmt. e (1976)); see

*Yang v. Lee*, 163 F. Supp. 2d 554 (D. Md. 2001) (applying Maryland law); see also *Kirschstein v. Haynes*, 788 P.2d 941, 952 (Okla. 1990) (requiring "actual subjective good faith belief that litigation is seriously contemplated" in order for the litigation privilege to apply); cf. *Smith v. Suburban Rests., Inc.*, 373 N.E.2d 215 (Mass. 1978) (holding that absolute immunity applied even though no judicial proceeding had been intended). But see *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332 (D.C. 2001) (ruling that application of absolute immunity depends on attorney's state of mind and not on whether the client is seriously considering litigation).

n225. See *Jones v. Clinton*, 974 F. Supp. 712 (E.D. Ark. 1997) (applying Arkansas law) (holding statements made less than three months before litigation immune); cf. *Uni-Service Risk Mgmt., Inc. v. N.Y. State Ass'n of Sch. Bus. Officials*, 403 N.Y.S.2d 592 (App. Div. 1978) (holding statements made two months before lawsuit not privileged).

n226. *Restatement (Second) of Torts* 587 cmt. e (1977); see also *Kirschstein*, 788 P.2d at 953 ("No public policy supports extending a privilege to persons who attempt to profit from hollow threats of litigation."). For cases applying the privilege prior to litigation, see Hayden, supra note 1, at 992-93 n.44 (citing cases from courts in Arkansas, Colorado, Maryland, New Jersey, and Texas). See also *Wollam v. Brandt*, 961 P.2d 219 (Or. Ct. App. 1998) (discussing letter by employee's attorney advising employer's attorney of potential lawsuit); *Crain v. Smith*, 22 S.W.3d 58 (Tex. Ct. App. 2000) (discussing letter by counsel for owner of property subject to liens demanding release of liens).

n227. *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 341 (D.C. 2001) (citing Charles W. Wolfram, *Modern Legal Ethics* 5.6, at 231 (1986)).

n228. *Smith v. Suburban Rests., Inc.*, 373 N.E.2d 215, 218 (Mass. 1978).

n229. *Id.*

n230. *Id.*

n231. See *Lerette v. Dean Witter Org., Inc.*, 131 Cal. Rptr. 592, 594-95 (Ct. App. 1976); *Richards v. Conklin*, 575 P.2d 588 (Nev. 1978).

n232. *Samson Inv. Co. v. Chevaillier*, 988 P.2d 327 (Okla. 1999) (addressing an attorney communication seeking clients); see also *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692 (8th Cir. 1979) (applying Iowa law) (remanding to permit amendment of the pleadings in order to consider circumstances surrounding letter that was sent to potential parties to class action).

n233. *Krishnan v. Law Offices of Preston Henrichson, P.C.*, 83 S.W.3d 295 (Tex. Ct. App. 2002).

n234. The absolute litigation privilege is contained within Chapter 25, entitled "Defenses to Actions for Defamation." *Restatement (Second) of Torts* 582, 586 (1977).

n235. See Borton, *supra* note 31, at 124; see also Burke, *supra* note 2, at 31 (explaining that certain privileges are considered "defenses" as opposed to "immunities"); Shipley, *supra* note 93 (explaining that existence of privilege is ordinarily regarded as a defense, which is not available on demurrer or other preliminary attack upon the pleadings). Compare *Simon v. Potts*, 225 N.Y.S.2d 690, 704 (Ct. App. 1962) (noting conflict of case law on the issue of who bears the burden of showing relevance and pertinence, and placing the burden on the plaintiff to allege irrelevance in the complaint), with *Maclaskey v. Mecartney*, 58 N.E.2d 630 (Ill. App. Ct. 1944) (denying absolute immunity because attorney failed to allege the relevance of his conduct in his answer).

n236. *In re Michael B. Lee*, 995 S.W.2d 774, 776-78 (Tex. Ct. App. 1999).

n237. *Id.* (ruling that absolute immunity is a non-appealable interlocutory order given legislative enactment specifying the finality of orders on other immunities).

n238. *Id.*; accord *Celebrezze v. Netzley*, 554 N.E.2d 1292, 1295-96 (Ohio 1990) (explaining that a denial of absolute immunity is not a final appealable order because it is a "defense to liability" and not an "immunity from suit").

n239. *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 340 (D.C. 2001) (citing *Armeja v. Gildar*, 541 A.2d 621, 623 (D.C. Cir. 1988) and *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

n240. As an alternative to absolute immunity, the court may dismiss the subsequent case on the basis of waiver, estoppel, or an exhaustion-styled defense. It bears repeating that the absolute immunity doctrine was intended to eliminate vexatious litigation that would inhibit an attorney's ability to defend his or her client when there are otherwise sufficient safeguards in the judicial process to protect against abuse of power. As a result, courts have precluded a plaintiff from asserting a claim because he or she did not seek a remedy in the original action. *Beatty v. Republican Herald Publ'g Co.*, 189 N.W.2d 182 (Minn. 1971) (precluding a subsequent claim because plaintiff did not make an effort to obtain a protective order as authorized by the rules of civil procedure); *Jones v. Records Deposition Serv. of Ohio, Inc.*, No. L-01-1333, 2002 Ohio App. LEXIS 2295 (May 10, 2002) (denying a party the right to file a separate lawsuit based on the disclosure of confidential documents because the issue could have been resolved by using the discovery rules in the underlying civil action); cf. *Simon v. Potts*, 225 N.Y.S.2d 690 (Sup. Ct. 1962) (rejecting the argument that defendant had waived the right to avail himself of privilege because he had two letters successfully stricken from files in a probate proceeding).