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# Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers

T. Leigh Anenson, J.D., LL.M.\*

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“The first thing we do, let’s kill all the lawyers.”  
— William Shakespeare, *Henry VI*, Part II, Act 4, Sc. 2

## I. INTRODUCTION

Lawsuits filed against litigation lawyers by their clients’ adversaries primarily seek vengeance.<sup>1</sup> 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,”<sup>2</sup> 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.<sup>3</sup>

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1. 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).

2. 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.

3. 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*

## II. DOCTRINE OF ABSOLUTE IMMUNITY

“[T]he 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.”<sup>4</sup> 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.<sup>5</sup>

All but two states<sup>6</sup> recognize absolute immunity for lawyers involved in litigation with “very little variation” from state to state.<sup>7</sup> The Restatement formulation, adopted in nearly every state, describes the litigation privilege as follows:

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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).

4. R.J. Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3, 23 (1987).

5. *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).

6. 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).

7. *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).

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.<sup>8</sup>

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.<sup>9</sup>

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.”<sup>10</sup> 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.<sup>11</sup>

### 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.<sup>12</sup> The privilege arose soon after the Norman Conquest

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8. RESTATEMENT (SECOND) OF TORTS § 586 (1977); *see, e.g.*, Finkelstein, Thompson & Loughran v. Hemisphere 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).

9. *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).

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

11. 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. Kuehl*, 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. 1997CA00131, 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).

12. *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);

and the introduction of the adversary system in the eleventh century.<sup>13</sup> Courts have aptly declared that the doctrine of absolute immunity is “as old as the law.”<sup>14</sup>

The first opinion dismissing a lawsuit against an attorney by applying the doctrine of absolute immunity was rendered in 1606.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.”<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup>

*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

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).

13. 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).

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

15. *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.

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

17. *Id.*

18. *Id.*

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

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

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.<sup>21</sup>

The American adoption of absolute immunity followed soon after independence from Britain.<sup>22</sup> In the earliest reported cases, American judges relied on the privilege rules that were well established in English jurisprudence.<sup>23</sup> 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.<sup>24</sup> Notwithstanding their initial break with tradition, American courts eventually returned the doctrine to its English roots and the policies justifying its creation.<sup>25</sup>

#### 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.<sup>26</sup>

The court further explained:

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

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

23. 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.

24. 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.").

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

26. *Surace v. Wuliger*, 495 N.E.2d 939, 944 (Ohio 1986); see also *KEETON ET AL.*, *supra* note 9, § 114, at 776 ("[T]hat 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.").

Although the result may be harsh in some instances and a party to a lawsuit may possibly be harmed without legal recourse, . . . [s]ufficient 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.<sup>27</sup>

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.<sup>28</sup> In fact, the Supreme Court of California declared the litigation privilege to be “the backbone to an effective and smoothly operating judicial system.”<sup>29</sup> 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.”<sup>30</sup> 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.<sup>31</sup>

27. *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)).

28. 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).

29. *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)).

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

31. As Lord Mansfield declared more than 200 years ago, “[n]either 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); Cassondra 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*



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.<sup>32</sup> 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.<sup>33</sup>

In pursuing the role of advocate, an attorney is especially prone to being vilified, along with his or her client, by the party opponent.<sup>34</sup> Additionally, “[t]he 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.”<sup>35</sup> Indeed, an attorney has an ethical obligation to do so.<sup>36</sup> The adversarial nature of our system of justice also “fosters the hired gun or mercenary role of the lawyer.”<sup>37</sup> Thus, courts have consistently

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*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).

32. *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: ‘[J]udges 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)).

33. *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).

34. See *Hayden*, *supra* note 1, at 1043 (recognizing that, by the very nature of their jobs, “[l]itigators 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)).

35. *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.

36. See MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101 (1979).

37. *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”).

acknowledged that “[a]n essential ingredient of zealous representation is the freedom to err in favor of the client.”<sup>38</sup>

The attorney’s obligations to the client, moreover, not only demand zealous representation,<sup>39</sup> 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.<sup>40</sup>

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.”<sup>41</sup> 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.<sup>42</sup> The attorney may also be subject to intrusive discovery proceedings questioning his or her motives, strategies, and work product.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> If parties could file retaliatory lawsuits and cause the removal of their

38. 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).

39. See MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101, EC 7-4 (1979).

40. 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).

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

42. 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)).

43. See *id.* at 389.

44. 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).

45. See, e.g., *Asia Inv. Co. v. Borowski*, 184 Cal. Rptr. 317, 323 (Ct. App. 1982) (“[T]he 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).

adversary's counsel on that basis, the judicial process would be compromised.<sup>46</sup>

In Oregon, a court of appeals recognized this fundamental policy by granting an attorney absolute immunity from a claim of malicious prosecution.<sup>47</sup> 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.<sup>48</sup> 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 th[e] case. He stated that their relationship was severed as to a number of pending cases.<sup>49</sup>

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.<sup>50</sup> Instead, it is meant to protect their innocent clients "who would suffer if a remedy for such a wrong existed."<sup>51</sup>

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46. 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").

47. *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 "[i]f 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").

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

49. *Id.* at 1177.

50. 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 inquiries 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.

51. *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).

The existence of remedies other than a cause of action for damages provides the third rationale for absolute immunity.<sup>52</sup> 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.<sup>53</sup> Courts impose penalties pursuant to Federal Rules of Civil Procedure 11, 26, and 37.<sup>54</sup> While courts are imposing monetary sanctions with greater frequency,<sup>55</sup> other punishments under these

52. 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).

53. *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).

54. 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.

55. 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 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

rules have included reprimands, orders for attorneys to attend continuing legal education classes, and even suspensions from practice.<sup>56</sup> Attorneys who are held in contempt of court may also face long-term professional repercussions.<sup>57</sup> 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.<sup>58</sup>

Professional grievance proceedings subject litigators to a jury of peers in the legal community.<sup>59</sup> Simply subjecting an attorney to an inquiry regarding his or her compliance with the professional responsibility codes has adverse consequences.<sup>60</sup> 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.<sup>61</sup>

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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).

56. See 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 3.1:204-1 (2d ed. 1992).

57. 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.

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

59. 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).

60. 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).

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

## 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.<sup>62</sup> 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.<sup>63</sup>

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,<sup>64</sup> recent cases logically extend immunity to other claims as well.<sup>65</sup> The spectrum of legal theories to which the privilege has been applied includes negligence,<sup>66</sup> breach of

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

63. *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").

64. 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.

65. *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. . .").

66. 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.*

confidentiality,<sup>67</sup> abuse of process,<sup>68</sup> intentional infliction of emotional distress,<sup>69</sup> negligent infliction of emotional distress,<sup>70</sup> invasion of privacy,<sup>71</sup> civil conspiracy,<sup>72</sup> interference with contractual or advantageous business relations,<sup>73</sup> fraud,<sup>74</sup> and, in some cases, malicious prosecution.<sup>75</sup> 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.<sup>76</sup> As one scholar put it, “[a]s 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.’”<sup>77</sup>

No court has yet applied absolute immunity, however, to either state or federal statutory causes of action.<sup>78</sup> Recognizing that the application of

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

68. *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).

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

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

71. *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).

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

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

74. *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).

75. 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)).

76. *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).

77. *Hayden*, *supra* note 1, at 998 (quoting 2 RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 17.8 (3d ed. 1989)).

78. 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

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.<sup>79</sup>

### 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.<sup>80</sup>

Nevertheless, courts have allowed other participants in the litigation process to be shielded by absolute immunity for their conduct. In extending

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.

79. 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 “[t]he 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).

80. *See* *Mallen & Roberts*, *supra* note 1, at 399 n.56 (1978) (“[T]he 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”).



the litigation privilege to the conduct of an expert witness,<sup>81</sup> the Supreme Court of New Hampshire declared that “[i]mmunity 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.’”<sup>82</sup>

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.<sup>83</sup> 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.”<sup>84</sup>

Because the privilege is afforded to all individuals or entities involved in the litigation process,<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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

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

83. *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.*

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

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

86. 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).

87. 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).

### 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.<sup>88</sup> 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.<sup>89</sup> Early American cases likewise applied the privilege outside the justice system to proceedings such as a church meeting<sup>90</sup> and a hospital grievance hearing.<sup>91</sup>

Modern courts have followed that tradition by acknowledging the privilege in alternative dispute resolution settings such as mediation and arbitration.<sup>92</sup> In fact, any quasi-judicial proceedings qualify as grounds to invoke the litigation privilege, including administrative proceedings<sup>93</sup> and professional discipline proceedings.<sup>94</sup> In determining whether the litigation privilege applies, courts assess whether the particular proceeding is

88. 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).

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

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

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

92. 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).

93. 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. Sullivant*, 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).

94. 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).

“functionally comparable to a trial.”<sup>95</sup> Additionally, the Restatement summarizes the scope of the litigation privilege as “all proceedings before an officer or other tribunal exercising a judicial function.”<sup>96</sup>

#### D. Protection Only for “Pertinent” Conduct?

Some commentators have noted that the greatest expansion of the litigation privilege lies in the definition of relevance.<sup>97</sup> Unlike its English counterpart,<sup>98</sup> the American rule of relevance was restrictive, initially requiring evidentiary relevance for an attorney to take advantage of absolute immunity.<sup>99</sup> American courts, however, eventually abandoned the idea of

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95. *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).

96. 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).

97. *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).

98. 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.*

99. *See, e.g., Lawson v. Hicks*, 38 Ala. 279, 286 (1862) (“[W]e 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).

legal relevance.<sup>100</sup> Currently, consistent with the English rule, there need be only “some connection” between the conduct and the case for the privilege to attach.<sup>101</sup>

### 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.”<sup>102</sup> “The inquiry is whether the publications [or actions] relate to the interests of the client.”<sup>103</sup>

Because evidentiary relevance is not required,<sup>104</sup> absolute immunity has been invoked to bar claims based on statements that had been stricken as irrelevant from pleadings and other court documents.<sup>105</sup> Therefore, the irrelevance of the material does not necessarily defeat a claim of absolute privilege.<sup>106</sup>

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.”<sup>107</sup> Another court described the requisite

100. 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).

101. 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).

102. 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*).

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

104. *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).

105. *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) (“[T]he 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).

106. *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).

107. *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.”).

nexus between the conduct and the litigation as a “liberal rule,” explaining that” [t]he 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.”<sup>108</sup> Therefore, only those actions with no connection at all to the litigation are unprivileged.<sup>109</sup>

While the standard is easier stated than applied,<sup>110</sup> almost all states have a presumption in favor of protection; any doubts as to relevance are resolved in favor of the attorney.<sup>111</sup> Given the broad reading of the term, “[c]ourts rarely [find] lawyers’ statements irrelevant.”<sup>112</sup>

## 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.”<sup>113</sup> Courts throughout the nation recognize that “[m]uch 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.”<sup>114</sup> As a result, the inquiry typically centers on

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108. *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.”).

109. *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).

110. *See Andrie*, *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).

111. *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) (“[A]ll 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).

112. *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).

113. *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).

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

whether the “activities [were] directed toward the achievement of the objects of the litigation.”<sup>115</sup>

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.<sup>116</sup> 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,<sup>117</sup> to further settlement of the case,<sup>118</sup> or to present evidence. Some courts also grant absolute immunity to attorneys attempting to impugn the credibility of an opposing party or witness.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup> 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.”<sup>122</sup>

115. *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”).

116. *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”).

117. *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).

118. *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 Andrie, supra* note 92, at 1080.

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

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

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

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

In contrast, a Wisconsin court invoked absolute immunity to protect an attorney who had called his client's adversary a "deadbeat" to opposing counsel.<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup>

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.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup>

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

124. *Id.*

125. *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).

126. 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.

127. *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).

128. *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).

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

130. *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.

Another illegitimate purpose is an attorney's use of existing litigation to secure a business advantage for his or her client.<sup>131</sup> 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.<sup>132</sup>

The cases of *Troutman v. Erlandson* and *Converters 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.<sup>133</sup> 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.<sup>134</sup>

In examining whether the "means" are sufficiently connected to the "ends" to justify application of the litigation privilege, courts lack consistency as well.<sup>135</sup> 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.<sup>136</sup>

Courts also reject the application of the litigation privilege when the conduct in question had no apparent connection at all to furthering the lawsuit.<sup>137</sup> 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

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

132. 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).

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

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

135. 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.

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

137. 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.



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.<sup>138</sup>

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.<sup>139</sup> In the name of constructing their cases, attorneys have been found immune from lawsuits for making false misrepresentations, manufacturing evidence, and presenting perjured testimony.<sup>140</sup>

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.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup>

The case of *Post v. Mendel* from the Supreme Court of Pennsylvania suggests, however, a stricter application.<sup>144</sup> The attorney in the case sought to institute a disciplinary proceeding against opposing counsel and a contempt hearing for perjury against an adversarial witness.<sup>145</sup> Although the conduct of both the witness and opposing counsel had occurred during existing litigation, the court denied the attorney absolute immunity on the

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

139. *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.”).

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

141. 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).

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

143. *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).

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

145. *Id.*

ground that his goals were not related to the redress sought in the pending lawsuit.<sup>146</sup>

### 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.<sup>147</sup> Indeed, immunity for statements or actions taken during a judicial proceeding extends to every step in the proceeding, from beginning to end.<sup>148</sup> Accordingly, the preliminary and pretrial phases of litigation are regarded as judicial proceedings for purposes of applying the privilege.<sup>149</sup>

In addition, with a few exceptions,<sup>150</sup> 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.”<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup> While the particular context in which the conduct or communication arose is not conclusive,<sup>154</sup> it is a criterion courts consider in ultimately determining relevance.

146. *Id.*

147. *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).

148. 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.

149. See *Schneiderman*, *supra* note 106; see also 50 AM. JUR. 2D *Libel & Slander* § 146 (1984).

150. 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).

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

152. The Supreme Court of Ohio declared that “[t]he test is – pertinence to the occasion of the privilege.” *Bigelow v. Brumley*, 37 N.E.2d 584, 591 (Ohio 1941).

153. 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).

154. 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.”).

Formal proceedings (other than the trial process itself) in which absolute immunity has been recognized include, *inter alia*, pleadings,<sup>155</sup> requests for admissions,<sup>156</sup> depositions,<sup>157</sup> affidavits,<sup>158</sup> inspection of records under court order,<sup>159</sup> grand jury testimony,<sup>160</sup> expert reports,<sup>161</sup> in camera conferences attended by a judge,<sup>162</sup> and pretrial conferences.<sup>163</sup> Moreover, if the statement was testimonial in nature, a court is more likely to find the communication relevant to the litigation.<sup>164</sup>

The litigation privilege has also been extended to informal processes during pre- and post-trial proceedings.<sup>165</sup> Interviews with prospective or actual witnesses,<sup>166</sup> statements made at private meetings,<sup>167</sup> statements made in the judge's chambers,<sup>168</sup> and conduct relating to the investigation of a claim<sup>169</sup> 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.<sup>170</sup> Courts have even granted absolute immunity to attorneys for statements to the press.<sup>171</sup>

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155. 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).

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

157. 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).

158. Nix v. Sawyer, 466 A.2d 407 (Del. Super. Ct. 1983); Bird v. W.C.W., 868 S.W.2d 767 (Tex. 1994).

159. Kraushaar v. Lavin, 39 N.Y.S.2d 880 (Sup. Ct. 1943).

160. Buchanan v. Miami Herald Publ'g Co., 206 So. 2d 465 (Fla. Dist. Ct. App. 1968).

161. Rolla v. Westmoreland Health Sys., 651 A.2d 160 (Pa. Super. Ct. 1994); James v. Brown, 637 S.W.2d 914 (Tex. 1982).

162. Bell v. Anderson, 389 S.E.2d 762 (Ga. Ct. App. 1989).

163. Spoehr v. Mittelstadt, 150 N.W.2d 502 (Wis. 1967).

164. *See* Schneiderman, *supra* note 106 (citing cases).

165. *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)).

166. Ascherman v. Natanson, 100 Cal. Rptr. 656, 659 (Ct. App. 1972); Stucchio v. Tincer, 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).

167. Pettitt v. Levy, 104 Cal. Rptr. 650 (Ct. App. 1972).

168. 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).

169. Selby v. Burgess, 712 S.W.2d 898, 900 (Ark. 1986).

170. 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

Furthermore, all kinds of correspondence have been granted privileged status, including demand letters,<sup>172</sup> letters concerning settlement,<sup>173</sup> and letters notifying of a potential lawsuit.<sup>174</sup> 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<sup>175</sup> or if the letters otherwise fulfill a specific purpose of the litigation.<sup>176</sup> 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.<sup>177</sup>

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.<sup>178</sup> In contrast, courts have traditionally viewed written statements in correspondence as a single entity.<sup>179</sup> 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.<sup>180</sup> Other cases, however, treat written communications the same as oral communications.<sup>181</sup> 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.<sup>182</sup>

deposition).

171. *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).

172. *E.g.*, Striberg 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, McClellan & Fish, 668 N.E.2d 1329 (Mass. App. Ct. 1996).

173. 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).

174. Richards v. Conklin, 575 P.2d 588 (Nev. 1978).

175. *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").

176. *See* Izzi v. Rellas, 163 Cal. Rptr. 689 (Ct. App. 1980) (seeking to set aside default judgment).

177. *See, e.g.*, Woodruff v. Trepel, 725 A.2d 612 (Md. Ct. Spec. App. 1999).

178. *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)).

179. *See id.* (citing, *inter alia*, Richeson v. Kessler, 255 P.2d 707 (Idaho 1953)).

180. *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).

181. *See* Goger, *supra* note 153 (citing Savage v. Stover, 92 A. 284 (N.J. 1914)).

182. *See id.*

For purposes of determining relevance, whether the communication or conduct at issue was voluntary or merely responsive may be another factor in the calculus.<sup>183</sup> Finally, even the attorney's belief in the relevance of his or her actions has been considered in the application of absolute immunity.<sup>184</sup>

#### 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.<sup>185</sup> One appellate court in Illinois explained that “[d]iscussions between attorneys representing opposing parties should not be discouraged,” as “[s]uch discussions have a tendency to limit the issues or to settle the litigation, thereby saving the time of the court.”<sup>186</sup> 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.<sup>187</sup> 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.”<sup>188</sup> Otherwise, the court cautioned that “the

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183. 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).

184. 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.

185. See, e.g., *West v. Maint. Tool & Supply Co., Inc.*, 89 S.W.3d 96 (Tex. Ct. App. 2002).

186. *Dean v. Kirkland*, 23 N.E.2d 180, 188 (Ill. App. Ct. 1939).

187. *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).

188. *Rodgers*, 7 S.E.2d at 517.

rights of all clients before the courts [will be] seriously endangered and the administration of justice [will be] handicapped.”<sup>189</sup>

When the correspondence is addressed or circulated to persons other than attorneys involved in the litigation, however, this may destroy the privilege.<sup>190</sup> Courts have indicated that “the privilege may be lost by unnecessary or unreasonable publication to one for whom the occasion is not privileged.”<sup>191</sup> 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.”<sup>192</sup>

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,<sup>193</sup> an existing<sup>194</sup> or prospective client,<sup>195</sup> a co-party,<sup>196</sup> potential witnesses,<sup>197</sup> a particular addressee consistent with a court order,<sup>198</sup> an insurance company indemnifying one of the parties to the litigation,<sup>199</sup> an oral lessee who had claimed under an opposing party in a dispute regarding a tract of land,<sup>200</sup> members of a creditor’s committee in a bankruptcy proceeding,<sup>201</sup> all persons interested in an estate during its administration,<sup>202</sup> a judge and all

189. *Id.*

190. For a listing of cases concerning correspondence sent to someone other than the alleged defamed party, see Gulbis, *supra* note 130.

191. *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).

192. *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).

193. *Sriberg v. Raymond*, 544 F.2d 15 (1st Cir. 1976) (applying Massachusetts law); *Larmour v. Campanale*, 158 Cal. Rptr. 143 (Ct. App. 1979).

194. *Weiler v. Stern*, 384 N.E.2d 762 (Ill. App. Ct. 1978).

195. *Popp v. O’Neil*, 730 N.E.2d 506 (Ill. App. Ct. 2000); *Samson Inv. Co. v. Chevallier*, 988 P.2d 327 (Okla. 1999).

196. *Trachsel v. Two Rivers Psychiatric Hosp.*, 883 F. Supp. 442 (W.D. Mo. 1995) (applying Missouri law).

197. *Youmans v. Smith*, 47 N.E. 265 (N.Y. 1897); *Russell v. Clark*, 620 S.W.2d 865 (Tex. App. 1981).

198. *Vanderkam v. Clarke*, 993 F. Supp. 1031 (S.D. Tex. 1998) (applying Texas law).

199. *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).

200. *Romero v. Prince*, 513 P.2d 717 (N.M. Ct. App. 1973).

201. *Friedman v. Alexander*, 433 N.Y.S.2d 627 (App. Div. 1980).

202. *Theiss v. Scherer*, 396 F.2d 646 (6th Cir. 1968) (applying Ohio law).

opposing counsel who had made an appearance in the case,<sup>203</sup> the news media,<sup>204</sup> and a court administrator responsible for the administration of justice.<sup>205</sup>

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.<sup>206</sup> 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.<sup>207</sup>

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.<sup>208</sup> 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.<sup>209</sup>

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.<sup>210</sup> The Supreme Court of Pennsylvania found that the attorney's conduct was outside the ambit of absolute immunity.<sup>211</sup>

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.<sup>212</sup> 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.<sup>213</sup> Therefore, the court concluded that the letter had been published to persons "who would have had no direct interest in [those other] proceedings."<sup>214</sup> Other persons

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203. *Simon v. Potts*, 225 N.Y.S.2d 690 (Sup. Ct. 1962).

204. *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.").

205. *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).

206. *Thomas v. Ford Motor Co.*, 137 F. Supp. 2d 575 (D.N.J. 2001) (applying New Jersey law).

207. *Id.*

208. *Krouse v. Bower*, 20 P.3d 895 (Utah 2001).

209. *Id.* at 900-01.

210. *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").

211. *Id.*

212. *Id.* at 356.

213. *Id.*

214. *Id.* at 357.

potentially lacking a direct connection to adversarial proceedings include an opposing party's business client,<sup>215</sup> potential investors,<sup>216</sup> potential clients of opposing counsel,<sup>217</sup> customers of a client's competitor,<sup>218</sup> a client's spouse,<sup>219</sup> an opposing party's spouse,<sup>220</sup> and the opposing party's employer.<sup>221</sup>

### *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.<sup>222</sup> 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.”<sup>223</sup>

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.”<sup>224</sup> In considering which actions meet this

215. *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.

216. *Troutman v. Erlandson*, 593 P.2d 793 (Or. 1979).

217. *Kurczaba v. Pollock*, 742 N.E.2d 425, 441 (Ill. App. Ct. 2000).

218. *Converters Equip. Corp. v. Condes Corp.*, 258 N.W.2d 712 (Wis. 1977).

219. *Golden v. Mullen*, 693 N.E.2d 385 (Ill. App. Ct. 1997).

220. *Thompson v. Frank*, 730 N.E.2d 143 (Ill. App. Ct. 2000).

221. *Lykowski v. Bergman*, 700 N.E.2d 1064 (Ill. App. Ct. 1998).

222. 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).

223. 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).

224. *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



standard, some courts consider the temporal proximity between the conduct and the initiation of the lawsuit.<sup>225</sup> As cautioned in the Restatement, “[t]he 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.”<sup>226</sup> 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.’”<sup>227</sup>

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.<sup>228</sup> Rather, it only suggested that future entries in his client’s restaurant by the addressee would be treated as a trespass.<sup>229</sup> 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.<sup>230</sup>

The privilege is available, however, even if an attorney does not ultimately represent the client during the subsequent litigation.<sup>231</sup> Absolute immunity has also been found to protect an attorney who never had a client<sup>232</sup> and when no lawsuit was filed at all.<sup>233</sup>

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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).

225. *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).

226. 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).

227. 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)).

228. Smith v. Suburban Rests., Inc., 373 N.E.2d 215, 218 (Mass. 1978).

229. *Id.*

230. *Id.*

231. *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).

232. Samson Inv. Co. v. Chevallier, 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).

233. Krishnan v. Law Offices of Preston Henrichson, P.C., 83 S.W.3d 295 (Tex. Ct. App. 2002).

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

Given its placement in the Restatement under “defenses,”<sup>234</sup> 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.<sup>235</sup> 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.<sup>236</sup> 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.<sup>237</sup> 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.<sup>238</sup>

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.”<sup>239</sup>

234. The absolute litigation privilege is contained within Chapter 25, entitled “Defenses to Actions for Defamation.” RESTATEMENT (SECOND) OF TORTS §§ 582, 586 (1977).

235. 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 Maclasky 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).

236. *In re Michael B. Lee*, 995 S.W.2d 774, 776-78 (Tex. Ct. App. 1999).

237. *Id.* (ruling that absolute immunity is a non-appealable interlocutory order given legislative enactment specifying the finality of orders on other immunities).

238. *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”).

239. Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc., 774 A.2d 332, 340 (D.C. 2001) (citing *Arneja v. Gildar*, 541 A.2d 621, 623 (D.C. Cir. 1988) and *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

## 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.<sup>240</sup>

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.

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240. 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).