Civil Practice and Procedure

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An Equal and Opposite Reaction: The Expanding Application of the Absolute Attorney Litigation Privilege

Counsel representing plaintiffs in actions against lawyers continue to be creative in conjuring new theories to assert against their clients' former attorneys. As a result, the absolute attorney litigation privilege has been expanded to protect defendant lawyers. Claims against attorneys now often include those brought by adverse parties in litigation whom the defendant attorney did not represent, and against whom the defendant attorney had successfully litigated. Courts have expanded the privilege beyond its original protection against defamation lawsuits related to communications made at, or preliminary to, a judicial proceeding. Most recently, in *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, the court found that the privilege applies to any action taken by an attorney in the underlying litigation so long as the conduct is "pertinent" to the representation of the client in the underlying litigation.

Basics of the Attorney Absolute Litigation Privilege

The Restatement of Torts describes the litigation privilege as follows:

> 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.

Restatement (Second) of Torts § 586 (1977) (emphasis added).

On its face, the Restatement only immunizes an attorney when the alleged tortious act was defamation, and only when there is a judicial proceeding. However, Illinois courts have expanded the scope of the privilege to effectuate its important public-policy role.

Nine years ago, this publication featured an article on the expanding attorney's absolute privilege. Adnan A. Arain, *Fraud, Deceit and the Expanding Doctrine of Attorney's Absolute Privilege*, *IDC Quarterly*, Vol. 16 No. 4 (Fall 2006). At that time, the author accurately predicted that the doctrine would continue to expand its application. Recent decisions have noted that the privilege would be meaningless if a party could merely recast its cause of action to avoid the privilege's effect.

Public policy limits the scope of the privilege, but cases continue to apply this public policy in novel settings. The courts have since applied the privilege to communications to a potential adversary that occurred prior to litigation. *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 833 (1st Dist. 2006). The privilege has been applied to claims for negligent infliction of emotional distress and breach of contract. *See Johnson v. Johnson & Bell, Ltd.*, 2014 IL App (1st) 122677. Notably, the privilege has very recently been applied to a complaint filed by an attorney's opponents in prior litigation,

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alleging intentional infliction of severe emotional distress and strict liability for ultrahazardous activity, and seeking punitive damages. *O'Callaghan*, 2015 IL App (1st) 142152.

Public Policy of Absolute Privilege

An attorney is obligated to zealously advocate for their client. *See* Ill. R. of Prof'l Conduct, Preamble: a Lawyer's Responsibilities (2010) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.") Ours is an adversarial system, likely to create animosity between parties as well as statements and conduct that might otherwise be compensable under tort law. The absolute privilege allows a lawyer to zealously advocate for a client without fear that such conduct will subject the lawyer to potential liability.

To allow attorneys to meet their ethical duties to their clients, the absolute attorney litigation privilege is intended to provide attorneys with "the utmost freedom in their efforts to secure justice for their clients." *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 701-02 (1st Dist. 2000) (internal quotation marks omitted) (citing Restatement (Second) of Torts § 586, comment a, at 247). This privilege also encourages and promotes a full and frank consultation between an individual and a legal advisor. *Popp v. O'Neil*, 313 Ill. App. 3d 638, 642-34 (2d Dist. 2000). The privilege also fosters a free flow of honest information to a court or disciplinary tribunal. *Edelman v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 165-66 (1st Dist. 2003). Courts have also noted that limiting the privilege could "frustrate an attorney's ability to settle or resolve cases favorably for his client without resorting to expensive litigation or other judicial processes." *Atkinson*, 369 Ill. App. 3d at 833.

Additionally, the mere threat of a lawsuit arising out of a lawsuit may create a conflict between lawyer and client, as the lawyer's zealous advocacy may expose him or her to liability. This second suit, arising out of the lawyer's representation in the first, might put him or her in a position where in order to defend against the derivative suit, he or she might be pressured to disclose conversations made with the client or make the client a witness. The broad discovery rules might additionally require disclosure of attorney work product. With this important concern in mind, especially as of late, Illinois courts have regularly expanded the scope of the privilege to protect attorneys from such claims.

Courts often note the existence of remedies and sanctions within the confines of the original judicial process as an additional rationale for the absolute litigation privilege, which discourages and bars litigation about litigation. *Harris Trust & Savings Bank v. Phillips*, 154 Ill. App. 3d 574, 585 (1st Dist. 1987). As a consequence, courts are reticent to apply the privilege in instances where an attorney is acting as a third party with no connection to the lawsuit. *Stein v. Krislov*, 2013 IL App (1st) 113806, ¶¶ 35-36 (finding the privilege inapplicable under circumstances where there are no safeguards against abuse of the privilege, *i.e.*, where the authorities do not have the ability to discipline the attorney). Courts have also held that "there is no civil cause of action for misconduct which occurred in prior litigation." *Harris Trust*, 154 Ill. App. 3d at 585. Courts therefore insist that parties attempt to redress injuries from misconduct in judicial proceedings in the same litigation through inherent judicial powers such as sanctions. *Id.*

Scope of the Absolute Privilege

This area of law is quickly evolving. In order to understand the scope of the privilege, the following must be determined: what causes of action are protected by the privilege; in what setting or forum may the privilege be raised;

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what is deemed to be relevant to the litigation for purposes of the privilege; whether the privilege covers statements and conduct both before and after the lawsuit; and whether the privilege covers only statements or includes conduct. *O'Callaghan*, 2015 IL App (1st) 142152, ¶¶ 24-31. When determining whether the absolute privilege should be applied to a particular communication or conduct, the courts consider whether the public policy considerations weigh in favor of expanding the privilege. *Popp*, 313 Ill. App. 3d at 642.

While the absolute privilege originally protected attorneys only from lawsuits for defamation, recent cases have expanded the privilege to other causes of action. In Illinois, the list of legal theories to which the privilege has been applied includes negligent infliction of emotional distress and breach of contract. *Johnson*, 2014 IL App (1st) 122677, ¶ 17. The privilege has also been applied to invasion-of-privacy suits. *McGrew v. Heinold Commodities, Inc.*, 147 Ill. App. 3d 104, 114 (1st Dist. 1986). As noted above, the privilege has been expanded to prevent plaintiffs from circumventing the privilege by pleading alternative causes of action. *Johnson*, 2014 IL App (1st) 122677, ¶ 17 (finding that the privilege would be meaningless if a party could merely recast its cause of action to avoid the privilege's effect).

The privilege has been liberally applied in various settings. The communications must relate to proposed or pending litigation. *Golden v. Mullen*, 295 Ill. App. 3d 865, 870 (1st Dist. 1997). The privilege applies to communications made before, during, and after litigation. *Edelman*, 338 Ill. App. 3d at 165; *see also Stein*, 2013 IL App (1st) 113806, .33 ¶The privilege extends to out-of-court communications between opposing counsel .*Dean v. Kirkland*, 301 Ill. App. 495, 510 (1st Dist. 1939). The privilege has been found applicable to communications between attorneys representing different parties suing the same entities. *Libco Corp. v. Adams*, 100 Ill. App. 3d 314, 317 (1st Dist. 1981). Additionally, out-of-court communications between an attorney and his or her client pertaining to pending litigation are privileged. *Weiler v. Stern*, 67 Ill. App. 3d 179, 183-84 (1st Dist. 1978). Illinois courts have allowed attorneys to invoke the litigation privilege in quasi-judicial proceedings. *Richardson v. Dunbar*, 95 Ill. App. 3d 254, 261-62 (3d Dist. 1981). Furthermore, communications necessarily preliminary to a quasi-judicial proceeding are likewise privileged. *Parrillo, Weiss & Moss v. Cashion*, 181 Ill. App. 3d 920, 930 (1st Dist. 1989).

The courts limit the privilege to conduct that is relevant or pertinent to the litigation at hand. This pertinence requirement is not applied strictly, and the privilege will attach even where the defamatory communication is not confined to specific issues related to the litigation. *Libco Corp.*, 100 Ill. App. 3d at 317. Furthermore, all doubts should be resolved in favor of a finding of pertinence. *Skopp v. First Federal Savings of Wilmette*, 189 Ill. App. 3d 440, 447-48 (1st Dist. 1989). The determination of pertinence is a question of law for the court. *Skopp*, 189 Ill. App. 3d at 447-48. However, "[t]he privilege, while broad in scope, is applied sparingly and confined to cases where the public service and administration of justice require immunity." *Kurczaba*, 318 Ill. App. 3d at 706.

In deciding what conduct or statements are sufficiently related to the litigation, courts will assess the purpose of those statements or actions and decide if it was related to litigation goals. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 27. The privilege does not cover the publication of defamatory matter that has no connection whatsoever to the litigation. *Kurczaba*, 318 Ill. App. 3d at 702. The privilege is available only when the publication was "made in a judicial proceeding; had some connection or logical relation to the action; was made to achieve the objects of the litigation; and involved litigants or other participants authorized by law." *Id.*

While plaintiffs argue that the application of the privilege may leave litigants without recourse, or allow misconduct to go unchecked, the scope of the privilege is limited by the pertinence requirement. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 27. Further, an aggrieved party can seek redress from the trial court in the underlying matter for, among other things, sanctions pursuant to Illinois Supreme Court Rule 219(c). *Id*.

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The law is also clear that the courts are to weigh the public-policy value of the privilege against the harm to the aggrieved party. Weighing this public policy necessarily requires the court to assess how pertinent the communication or conduct was to the goals of the litigation, and thereby the social importance of that communication or conduct.

> The defense of privilege rests upon the idea "that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."

Edelman, 338 Ill. App. 3d at 164 (quoting W. Keeton, Prosser & Keeton on Torts § 114, at 815 (5th ed. 1984)).

Regardless of how pertinent the contents of the statement are to the litigation at hand, the courts analyze the relationship between the recipient of that correspondence or statement and the litigation. Therefore, a separate issue arises when the conduct or statement was directed at a third party who was not involved in the lawsuit. In general, statements between counsel for the parties in the underlying litigation will be considered pertinent to the litigation, as compared to statements to third parties. *See Dean*, 301 Ill. App. at 510 (holding that out-of-court communications between attorneys are protected). "Discussions 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." *Id.* Notably, the privilege has been applied where attorneys are not in an adversarial relationship with one another. *See Libco Corp.*, 100 Ill. App. 3d at 317 (holding that the privilege applied where an attorney sent allegedly defamatory correspondence to another attorney not involved in the litigation at issue).

However, when a statement is made to a third party not deemed to have a sufficient relationship to the dispute, the court may deny application of the privilege. *Kurczaba*, 318 Ill. App. 3d at 708 (refusing to extend the privilege to third persons who received a filed complaint, but had no participation or legal interest in the lawsuit). However, the courts have found that some third parties do have a sufficient relationship to the litigation, including a prospective client. *Popp*, 313 Ill. App. 3d at 643

Recently, and in the most recent expansion of the privilege, the Illinois Appellate Court, First District, held that an attorney's conduct, as opposed to written or verbal statements, is protected by the privilege. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 27. In *O'Callagahan*, the underlying dispute arose out of a complaint filed against a condominium association by a unit owner for the growth of black mold. The underlying lawsuit named the association's counsel as defendants. *Id*. ¶ 4. Ultimately, the majority of the case was dismissed, including the claims against the attorneys. *Id*.

The plaintiffs then filed an action against the attorneys for intentional infliction of emotional distress and strict liability for ultrahazardous activity and sought punitive damages. *Id*. ¶ 8. The plaintiff claimed that the attorneys failed to disclose an expert report regarding the manner in which the mold should have been handled and withheld other information that allowed the attorneys to pursue a non-meritorious defense that prolonged the underlying litigation and further manipulated the testimony of expert. *Id*. Further, the plaintiffs alleged that the defendant attorneys directed a containment barrier be removed which required the plaintiffs to obtain a court order to have the barrier re-erected. *Id*. ¶ 9.

The defendant attorneys filed a motion to dismiss pursuant to Section 2-615 of the Illinois Code of Civil Procedure. *Id*. ¶ 10. The trial court granted the motion to dismiss. *Id*. ¶ 12. In affirming the dismissal, the appellate court found that "[a]lthough Illinois generally follows the restatement, it appears that our supreme court has never expressly adopted [section 586] and all of its language." *Id*. ¶ 27. Therefore, while section 586 of the Restatement references only

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defamation, the court expanded the privilege to encompass conduct because it furthered Illinois policy to do so. *Id.* (citing *Ripsch v. Goose Lake Ass'n*, 2013 IL App (3d) 120319, ¶ 27). The court noted a trend in the case law on the litigation privilege that policy is furthered by disregarding arbitrary distinctions. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 17. Because the conduct alleged against the defendant attorneys all related, or was "pertinent," to the representation of the clients in the underlying litigation, the privilege applied and the case was properly dismissed. *Id*.

Manner to Assert the Privilege

Although a defendant generally must plead an affirmative defense or face forfeiture, this privilege may be raised in a motion. *Fillmore v. Walker*, 2013 IL App (4th) 120533, ¶ 28. The litigation privilege may be raised as an affirmative defense that may be determined in a section 2-619 motion. *Harris v. News-Sun*, 269 Ill. App. 3d 648, 651 (2d Dist. 1995). Additionally, a defendant may properly raise an affirmative defense in a section 2-615 motion if the defense is apparent from the face of the complaint. *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 291 (2010). In *O'Callaghan*, the appellate court held that the privilege was properly raised in a section 2-615 motion, but that it could also have been filed as a section 2-619 motion. In preparing and filing a motion raising the absolute litigation privilege, careful review of *O'Callaghan* should be undertaken to determine under which section, or both, the motion should be brought and whether an affidavit is required.

Conclusion

The absolute litigation privilege should not be seen as a license for attorneys to violate the rules of the court or the Rules of Professional Conduct. In particular, counsel should follow Rules 3.1 (duty to only advance meritorious claims), 3.2 (duty to expedite litigation), 3.3 (candor to the tribunal), 3.4 (fairness to the opposing party), and 3.5 (decorum before the tribunal). What the absolute litigation privilege does provide is a defense to a civil action for statements made and conduct taken by an attorney in litigation. Counsel for plaintiffs will continue to assert an ever-expanding array of claims, and the privilege provides one additional defense in the panoply of defenses available to attorneys.

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