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## THE LITIGATION PRIVILEGE: ITS PLACE IN CONTEMPORARY JURISPRUDENCE

*Louise Lark Hill\**

### I. INTRODUCTION

Historically, lawyers have been immune from civil liability for statements related to litigation which may injure or offend an opposing party during the litigation process.<sup>1</sup> This protection is referred to as the “litigation privilege,”<sup>2</sup> which originated in medieval English jurisprudence and continues to be recognized in the United States today.<sup>3</sup> The rationale supporting the litigation privilege is that the integrity of the adversary system outweighs any monetary interest of a party injured by her adversary.<sup>4</sup> Remedies other than lawsuits are available to parties

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1. See Douglas R. Richmond, *The Lawyer's Litigation Privilege*, 31 AM. J. TRIAL ADVOC. 281, 284 (2007).

2. This privilege is also referred to as the “judicial proceedings privilege,” the “judicial privilege,” or the “defamation privilege.” See *Messina v. Krakower*, 439 F.3d 755, 760 (D.C. Cir. 2006); *Buchanan v. Minn. State Dep't of Health*, 573 N.W.2d 733, 736 (Minn. Ct. App. 1998); *Bochetto v. Gibson*, 860 A.2d 67, 71 (Pa. 2004).

3. See T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 918-20 (2004). In either 1497 or 1569, the privilege was first applied in an English case. *Id.* at 918-19 n.12 (citing R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 109 & n.48) (dating the first case applying the privilege as a 1497 case); cf. 8 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 376 (1925) (dating the same case as a 1569 case). However, the first case in which a lawsuit was dismissed against a lawyer by application of the privilege was in 1606. Anenson, *supra*, at 919. In that case, a lawyer was accused of slander when, during trial, he asserted that his client's adversary was a convicted felon. *Brook v. Montague* (1605) 79 Eng. Rep. 77, 77 (KB). The court determined that even if the lawyer's statement was false, his attempt to discredit a witness was protected by absolute immunity. *Id.*

4. See Thomas Borton, Comment, *The Extent of the Lawyer's Litigation Privilege*, 25 J. LEGAL PROF. 119, 121 (2001). Policy considerations behind the litigation privilege include:

(1) promoting the candid, objective and undistorted disclosure of evidence; (2) placing the burden of testing the evidence upon the litigants during trial; (3) avoiding the chilling effect resulting from the threat of subsequent litigation; (4) reinforcing the finality of judgments; (5) limiting collateral attacks upon judgments; (6) promoting zealous advocacy; (7) discouraging abusive litigation practices; and (8) encouraging settlement.

who feel they have been damaged “by malicious statements or conduct during litigation.”<sup>5</sup> For instance, misconduct in a judicial proceeding can be addressed through procedural rules or a court’s contempt power,<sup>6</sup> as well as the disciplinary abilities of court systems and bar associations.<sup>7</sup> Often used in response to defamation claims, the privilege has been noted to be “the backbone to an effective and smoothly operating judicial system.”<sup>8</sup> Eradicating the privilege “would dissuade attorneys from zealously representing their clients and might reduce access to the courts.”<sup>9</sup>

This Article will address the litigation privilege as it currently exists and examine several relevant contemporary cases. Cases in which the litigation privilege was successfully raised will be addressed, as well as one case in which a lawyer, rather than pursue the litigation privilege, chose to use a lack of duty defense. The latter case will be reviewed from the perspective of the litigation privilege, and this Article will propose that if the litigation privilege had been used, the outcome may have been different. While extolling that the use of the privilege is an important protection for lawyers, the reader will be reminded of its limits. The reader will also be reminded of the need for lawyers to be vigilant in the practice of law and mindful of concomitant duties and responsibilities.

## II. COMPONENTS OF THE LITIGATION PRIVILEGE

There are two categories of communications privileges. They are either absolute or conditional (qualified).<sup>10</sup> The primary distinction between the two is that the absolute privilege confers immunity regardless of motive, whereas conditional privileges are defeated if they

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Clark v. Druckman, 624 S.E.2d 864, 870 (W. Va. 2005) (citations omitted); Lance J. Schuster, Taylor v. McNichols: *Expanding the Litigation Privilege*, ADVOCATE, Feb. 2011, at 38, 39 (“A lawyer should not be worried about being sued for the motions she files, the allegations she makes, or the questions she asks in a deposition or at trial.”).

5. Oran F. Whiting, *Litigation Privilege Immunizes Lawyers from Fraud Actions*, ABA (Aug. 8, 2013), [http://apps.americanbar.org/litigation/litigationnews/top\\_stories/080813-litigation-privilege.html](http://apps.americanbar.org/litigation/litigationnews/top_stories/080813-litigation-privilege.html).

6. Penalties can be imposed under the *Federal Rules of Civil Procedure* as well as under state procedural rules. These can include monetary sanctions, reprimands, orders to attend continuing legal education classes, or suspension of one’s law license. See Anenson, *supra* note 3, at 925-26.

7. See generally Barbara Busharis, *The Florida Supreme Court Extends the Litigation Privilege*, TRIAL ADVOC. Q., Spring 2007, at 6.

8. Tuff-N-Rumble v. Sugar Hill Music Publ’g Inc., 49 F. Supp. 2d 673, 680 (S.D.N.Y. 1999) (quoting Peterson v. Ballard, 679 A.2d 657, 660 (N.J. Super. Ct. App. Div. 1996)).

9. Whiting, *supra* note 5.

10. See Borton, *supra* note 4, at 121.

are abused—for instance, when a defendant acts maliciously.<sup>11</sup> Complete immunity from civil action is provided for absolutely privileged communications “even though the statements are made with malice, because public policy favors the free and unhindered flow of information.”<sup>12</sup> The existence of absolute immunity is a question of law to be determined by the court.<sup>13</sup> With some exceptions, absolute immunity is recognized across the United States and has little variation from state to state.<sup>14</sup> However, some jurisdictions view the litigation privilege as an affirmative defense, while others view it as “a true immunity.”<sup>15</sup> As a true immunity, lawyers can move to dismiss an action filed against them or move for summary judgment, and if unsuccessful, they can typically immediately appeal.<sup>16</sup> If, instead, the litigation privilege acts as an affirmative defense, an immediate appeal is not readily available.<sup>17</sup>

Although the litigation privilege is recognized across the United States, there are numerous legal issues associated with its application, and the circumstances under which it applies are not consistent.<sup>18</sup> New Jersey and California’s recitations of the litigation privilege “are representative of the conceptions of most jurisdictions.”<sup>19</sup> They provide

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11. *Id.*

12. *Bushell v. Caterpillar, Inc.*, 683 N.E.2d 1286, 1287 (Ill. App. Ct. 1997). The privilege’s absolute bar to civil actions “reflects a determination that the potential harm to an individual is far outweighed by the need to encourage participants in litigation, parties, attorneys, and witnesses to speak freely in the course of judicial proceedings.” *McGranahan v. Dahar*, 408 A.2d 121, 124 (N.H. 1979). If those precluded from bringing defamation claims could recover under other liability theories, this “policy would be nullified.” *Hugel v. Milberg*, 175 F.3d 14, 17 (1st Cir. 1999).

13. *See Anenson, supra* note 3, at 918 n.11.

14. *Id.* at 917. Louisiana private lawyers do not have absolute immunity, but Louisiana prosecutors do. *See Richmond, supra* note 1, at 285. Georgia lawyers only have absolute immunity for statements made in pleadings, but are otherwise only granted qualified immunity, as are lawyers in Louisiana. *See Anenson, supra* note 3, at 917 n.6.

15. *Richmond, supra* note 1, at 285; *see also Borton, supra* note 4, at 124 (“The absolute litigation privilege is ‘most often used as a defense’ to civil claims brought against an attorney. . . . However, a substantial number of jurisdictions hold that the privilege provides an absolute immunity from suit altogether.” (quoting *Memorial Drive Consultants, Inc. v. ONY, Inc.*, No. 96-CV-0702E(F), 1997 WL 584315, at \*3 (W.D.N.Y. Sept. 3, 1997))). It is projected that the litigation privilege is used more as a defense than as a complete immunity from suit because the *Restatement (Second) of Torts* places it in chapter 25, entitled “Defenses to Actions for Defamation.” *RESTATEMENT (SECOND) OF TORTS* ch. 25 (AM. LAW INST. 1976); *see also Anenson, supra* note 3, at 947 n.234.

16. *See Richmond, supra* note 1, at 286. Under the collateral order doctrine, certain orders “may be immediately appealed as final even though they do not end the related litigation.” *Id.* at 286 n.34. However, since application of the doctrine is a matter of law, resolution of its applicability may be slow, turning on factual matters and requiring discovery. *Id.* at 287.

17. *Id.* at 286.

18. *See Anenson, supra* note 3, at 927.

19. *Borton, supra* note 4, at 122.

that “[t]he absolute privilege applies to ‘any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.’”<sup>20</sup> However, questions surround the scope of each of these elements.<sup>21</sup>

### A. *Applicable Claims*

While the litigation privilege originated to protect lawyers from suits for defamation and libel, over time, the immunity it provides has been extended to cover other claims, as well.<sup>22</sup> Therefore, in determining if the litigation privilege attaches in a particular matter, courts must determine which claims are protected by the privilege. It has been noted that some “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>23</sup> Expanding the litigation privilege’s protection beyond just defamation and libel, some courts have given protection to causes of action brought in “negligence, breach of confidentiality, abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, civil conspiracy, interference with contractual or advantageous business relations, fraud, and in some cases, malicious prosecution.”<sup>24</sup> These causes of action, which lie outside those contemplated by the rule as originally implemented, “prevent attorneys from circumventing the privilege by creative pleading.”<sup>25</sup>

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20. *Id.* (quoting *Hawkins v. Harris*, 661 A.2d 284, 289 (N.J. 1995)). This is in line with the approach of the *Restatement (Second) of Torts*, which provides that each party to private litigation 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 part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.” RESTATEMENT (SECOND) OF TORTS § 588.

21. *See Anenson, supra* note 3, at 927.

22. *See infra* note 24 and accompanying text.

23. Paul T. Hayden, *Reconsidering the Litigator’s Absolute Privilege to Defame*, 54 OHIO ST. L.J. 985, 998 (1993) (quoting RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 17.8 (3d ed. 1989)).

24. *Anenson, supra* note 3, at 927-28 (footnotes omitted); *see Whiting, supra* note 5 (“[A]t least 12 jurisdictions have abrogated the litigation privilege for claims of fraud by enacting statutes for that purpose.”).

25. *Anenson, supra* note 3, at 928.

### B. *Statements and Conduct*

In accordance with the initial protection from suits for defamation and libel it provided, the litigation privilege first applied to statements that were made during a judicial proceeding.<sup>26</sup> Over time, some jurisdictions expanded its protection to cover acts that occurred in the course of a legal proceeding, in addition to statements.<sup>27</sup> To this end, the privilege applied to acts that were communicative.<sup>28</sup> Therefore, in determining if the litigation privilege attaches in a particular matter, courts determine if immunity applies only to statements, or also includes conduct, and if so, the character of that conduct.<sup>29</sup> As noted in making a distinction between communicative and non-communicative conduct, “the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature.”<sup>30</sup>

In addition to communicative conduct, non-communicative conduct has also been protected. As the doctrine developed, some jurisdictions found no difference between communications and any form of conduct, and, therefore, extended the litigation privilege “to protect attorneys against civil actions which arise as a result of their conduct or communications in the representation of a client, related to a judicial proceeding.”<sup>31</sup> It has been asserted that “[i]f courts see fit to carve out non-communicative actions or conduct from the protections of the litigation privilege, those exceptions should be plain and the reasons supporting them easily explained.”<sup>32</sup>

### C. *To Whom the Privilege Attaches*

When analyzing the applicability of the litigation privilege, another issue that must be resolved is to whom the privilege attaches. Originally recognized to protect lawyers, many jurisdictions also use the privilege to protect other parties and witnesses. The *Restatement (Second) of Torts*

26. See Schuster, *supra* note 4, at 38.

27. See *id.*

28. See Richmond, *supra* note 1, at 287-88. For instance, a lawyer who physically assaults an opponent cannot use the litigation privilege as a shield from civil or criminal liability. *Id.* at 288.

29. *Id.* at 287-90.

30. Rusheen v. Cohen, 128 P.3d 713, 719 (Cal. 2006) (citations omitted).

31. Schuster, *supra* note 4, at 38 (quoting Taylor v. McNichols, 243 P.3d 642, 652 (Idaho 2010)).

32. Richmond, *supra* note 1, at 289. In the Ohio case of *Hahn v. Satullo*, a lawyer was granted absolute immunity for conduct involving the receipt and failure to return a file containing material that was confidential. No. 01CV007246, 2002 WL 344530099, at \*1-2 (Ohio Ct. Com. Pl. Dec. 16, 2002).

recognizes an absolute privilege for private litigants, private prosecutors, criminal defendants, and witnesses, provided the material at issue has some relation to the proceedings.<sup>33</sup> However, what about the people with whom the lawyer works? Lawyers often work with other people, such as investigators and legal assistants. There is authority that indicates the agents of a lawyer are also protected by the litigation privilege,<sup>34</sup> provided that what they are doing is “at the attorney’s request.”<sup>35</sup> Therefore, a court must determine whom the privilege protects and whether this protection extends to the individuals with whom the lawyer works to further a case that is the subject of a judicial proceeding.

#### D. Type of Proceeding

The litigation privilege protects statements and some conduct that occur during judicial proceedings. While originally applicable to what would be considered “traditional litigation,” courts have expanded the reach of the privilege to judicial and quasi-judicial proceedings.<sup>36</sup> Statements made during settlement conferences, as well as statements made during pretrial discussions, have been protected.<sup>37</sup> Additionally, some courts have protected statements made during arbitration, mediation, administrative proceedings, and professional discipline matters.<sup>38</sup> The *Restatement (Second) of Torts* confines the litigation privilege to “all proceedings before an officer or other tribunal exercising a judicial function.”<sup>39</sup> It extends “to every step in the proceeding, from beginning to end,” including preliminary, pretrial, and post-trial phases of litigation.<sup>40</sup> Therefore, when analyzing the applicability of the litigation privilege, courts must determine if the

33. RESTATEMENT (SECOND) OF TORTS §§ 587–88 (AM. LAW INST. 1976).

34. See Richmond, *supra* note 1, at 299–301.

35. Hawkins v. Harris, 661 A.2d 284, 291 (N.J. 1995) (explaining that privilege protects a lawyer’s agents and employees who assist the lawyer and act at the lawyer’s direction).

36. Anenson, *supra* note 3, at 931.

37. See John L. Slimm, *The Litigation Privilege in Claims Against Attorneys*, N.J.L.J., Mar. 14, 2011, at 1, 1. However, prior to litigation, it has been asserted that for the privilege to be applicable, a judicial proceeding must be contemplated in good faith, and the mere possibility of litigation is not sufficient. See Richmond, *supra* note 1, at 304–05.

38. See Anenson, *supra* note 3, at 931. Some courts make a distinction between judicial and administrative determinations for purposes of applicability of the privilege. *Id.* at 932 & n.96.

39. RESTATEMENT (SECOND) OF TORTS § 586 cmt. d (AM. LAW INST. 1976).

40. Anenson, *supra* note 3, at 939–40. The litigation privilege extends “before, during and after trial.” *Id.* at 945. It has been recognized in, “*inter alia*, pleadings, requests for admissions, depositions, affidavits, inspection of records under court order, grand jury testimony, expert reports, in camera conferences attended by a judge, and pretrial conferences.” *Id.* at 940 (footnotes omitted). It has also been extended to informal proceedings such as “[i]nterviews with prospective or actual witnesses, statements made at private meetings, statements made in the judge’s chambers, and conduct relating to the investigation of a claim.” *Id.*

proceeding in which the statement or conduct occurred would fall within its scope. The court must discern when the reach of the litigation privilege commences and at what point it terminates.

### E. *Relationship to the Litigation*

To be protected, a statement or conduct must be related to the judicial proceedings in which it is made or occurs. According to the *Restatement (Second) of Torts*, it must have “some” relation to the proceeding<sup>41</sup>—a standard considered to be “liberal.”<sup>42</sup> It has also been said that “the ‘privilege should only be denied if the statement is so palpably irrelevant to the subject matter of the action that no reasonable person can doubt its irrelevancy.’”<sup>43</sup> Furthermore, legal relevance is not required.<sup>44</sup> Generally, for the privilege to attach, there need only be “some connection” between the case and the conduct,<sup>45</sup> arguably, “only those actions with no connection at all to the litigation are unprivileged.”<sup>46</sup> Therefore, in determining the applicability of the litigation privilege, a court must discern and apply the jurisdiction’s respective standard for a statement or conduct’s connection or relation to the judicial proceeding.

### F. *Achieving the Object of the Litigation*

In determining if statements or conduct are entitled to protection under the litigation privilege, courts examine their purpose along with the method used to achieve that goal.<sup>47</sup> There is no protection for “use of legal process in an improper manner or primarily to accomplish a purpose for which it was not designed.”<sup>48</sup> For instance, statements or conduct designed to gather evidence or to further settlement of the case are legitimate goals,<sup>49</sup> whereas an attempt to deprive a party of the

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41. RESTATEMENT (SECOND) OF TORTS § 587.

42. See Richmond, *supra* note 1, at 317-18.

43. Wendy L. Wilcox, *Applying the Litigation Privilege Before Trial*, L.A. L., June 2003, at 12, 12 (quoting Sacramento Brewing Co. v. Desmond, 89 Cal. Rptr. 2d 760, 765 (Ct. App. 1999)).

44. See Anenson, *supra* note 3, at 932-33.

45. *Id.* at 933.

46. *Id.* at 934; Borton, *supra* note 4, at 122 (“The English Rule provides litigants with a ‘true, absolute privilege without regard to the relevancy of the statements to the subject matter of the proceedings’ while the American rule requires that the defamatory statements possess some sort of relation to the proceedings or pertinence to the litigation in general.” (quoting Hawkins v. Harris, 661 A.2d 284, 288 (N.J. 1995))).

47. See Anenson, *supra* note 3, at 935.

48. Whiting, *supra* note 5.

49. See Anenson, *supra* note 3, at 935.



counsel of her choice would not be a legitimate goal.<sup>50</sup> Nor would a personal attack on an individual not aimed at securing a litigation benefit.<sup>51</sup> For the litigation privilege to attach, a court must find that the statement or conduct was not used for a purpose for which the litigation was not designed. Otherwise, the privilege “would effectively convert what is meant to be a shield of immunity into a sword.”<sup>52</sup>

### III. SELECTED CONTEMPORARY CASES

The litigation privilege has existed for centuries and continues to be used by lawyers as a defense to actions brought against them, typically by adversaries.<sup>53</sup> In 2014, numerous lawyers successfully used the privilege as a defense, with courts being receptive to its historic implementation. Representative of the litigation privilege’s reach are the cases of *Johnson v. Johnson & Bell, Ltd.*<sup>54</sup> and *Kimmel & Silverman, P.C. v. Porro*.<sup>55</sup> In both of these cases, lawyers escaped liability because the privilege protected their conduct during the litigation process. In the case of *Innes v. Marzano-Lesnevich*,<sup>56</sup> rather than use the litigation privilege, the defendants in that case chose to defend on the theory that no duty of care was owed to a client’s adversary—a defense that proved unsuccessful. It is possible that the defendants in *Innes* would have fared better by asserting the litigation privilege.

#### A. Johnson v. Johnson & Bell, Ltd.

In February 2014, the Illinois Appellate Court upheld the dismissal of plaintiff’s case for invasion of privacy, negligence, negligent infliction of emotional distress, and breach of contract, in which defendants contended that these claims were barred by the absolute litigation privilege, *res judicata*, and collateral estoppel.<sup>57</sup> In a prior lawsuit, a plaintiff had filed an unsuccessful personal injury claim against the retail store Target alleging injuries caused by a slip and fall at

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50. *Id.* at 936. Another impermissible goal, according to some courts, is using existing litigation to achieve a business advantage for a client. See *State-Wide Ins. v. Glavin*, 235 N.Y.S.2d 66, 67 (App. Div. 1962).

51. See *Post v. Mendel*, 507 A.2d 351, 356-57 (Pa. 1986). Absolute immunity does not protect lawyers “against claims alleging the pursuit of litigation for the unlawful, ulterior purpose of inflicting injury on the plaintiff and enriching themselves and their client, despite knowledge that their client’s claim lacked merit.” Whiting, *supra* note 5.

52. Anenson, *supra* note 3, at 936.

53. *Id.* at 917-19.

54. 7 N.E.3d 52 (Ill. App. Ct. 2014).

55. 53 F. Supp. 3d 325 (D. Mass. 2014).

56. 87 A.3d 775 (N.J. Super. Ct. App. Div. 2014).

57. *Johnson*, 7 N.E.3d at 55, 57.

a Target store. Prior to the trial on the personal injury matter, which was before the U.S. District Court for the Northern District of Illinois (“Northern District of Illinois”), a joint, final pretrial order was entered in the Northern District of Illinois’s electronic filing system that contained personal information about the plaintiff.<sup>58</sup>

While the personal injury matter was on appeal to the U.S. Court of Appeals for the Seventh Circuit (“Seventh Circuit”), the plaintiff became aware that her personal information had been disclosed in the final pretrial order, and she then moved for the district court to seal and redact certain documents, and for sanctions to be imposed against Target. The Northern District of Illinois granted the motion to seal and redact designated documents, but denied the motion for sanctions.<sup>59</sup> The plaintiff then filed a substantially similar motion in the Seventh Circuit to seal certain documents and for sanctions, which the Seventh Circuit granted with respect to sealing the designated documents.<sup>60</sup>

The plaintiff followed with an action in the Circuit Court of Cook County, Illinois, suing Target, the law firm representing Target, Johnson & Bell, Ltd., and two of the firm’s lawyers, Robert Burke and Jennifer Rose. The defendants successfully raised the litigation privilege as a defense. On appeal, the plaintiff claimed that the absolute litigation privilege did not bar her claims, but the appellate court disagreed.<sup>61</sup> Outlining the reach of the privilege, the appellate court stated the following:

An attorney 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 part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding. A private litigant enjoys this same privilege concerning a proceeding to which he is a party.<sup>62</sup>

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58. *Id.* at 54. The final pretrial order was prepared and signed by all the parties, including the plaintiff. *Id.* Documents were attached to the final pretrial order that included plaintiff’s social security number, financial information, medical information, and references to a minor. *Id.*

59. *Id.* at 55.

60. *Id.*

61. *Id.* at 55-57. The court also found that the other defenses raised by the defendants were well-founded. No civil cause of action exists for misconduct that occurs in prior litigation. The proper venue for raising such claims is the venue in which the misconduct occurred. *Id.* at 57 (“Plaintiff’s arguments regarding Target’s counsel’s alleged misconduct was heard in federal court, which was the proper venue. . . . The fact that neither court chose to assess sanctions against Target or its counsel does not provide an adequate basis for a civil action in state court based on the same conduct.”).

62. *Id.* at 56 (citing RESTATEMENT (SECOND) OF TORTS §§ 586–87 (AM. LAW INST. 1976)).

The appellate court further found that the absolute privilege applies to any matter involving an invasion of privacy, and, as such, it was applicable to the plaintiff's invasion of privacy claim.<sup>63</sup> The appellate court also found that the privilege was applicable to the plaintiff's other claims, as well. While Illinois had not previously addressed the litigation privilege's applicability to claims for negligent infliction of emotional distress or breach of contract, the appellate court went along with other courts that had found it to be applicable.<sup>64</sup> Otherwise, "[t]he absolute privilege would be meaningless if a simple recasting of the cause of action . . . could void its effect."<sup>65</sup> This case is indicative of the broadening reach of the litigation privilege in terms of the causes of action to which it applies and the people and entities that it protects.

### B. Kimmel & Silverman, P.C. v. Porro

In September 2014, the U.S. District Court for the District of Massachusetts ("District of Massachusetts") adopted a Report and Recommendation of a magistrate judge finding that the absolute litigation privilege protected the defendants in an action for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud.<sup>66</sup> In a prior lawsuit ("Porro Lawsuit"), defendants David P. Angueira, Esq. and the law firm of Swartz & Swartz, P.C. (collectively, "Swartz defendants") represented the defendants Jacqueline Porro, Esq. and Michael Porro in litigation against the plaintiffs, Kimmel & Silverman, P.C. and Craig Kimmel, Esq. (collectively, "Kimmel").<sup>67</sup> The Porro Lawsuit was settled pursuant to a Settlement Agreement. As part of that Settlement Agreement, the Swartz defendants were precluded from disclosing certain confidential information that they had obtained.<sup>68</sup>

Subsequently, the Swartz defendants represented Krista Lohr in litigation against Kimmel ("Lohr Lawsuit"). In the Lohr Lawsuit, the Swartz defendants filed documents that Kimmel argued contained confidential information, which the Swartz defendants were precluded from disclosing under the Settlement Agreement in the Porro Lawsuit.<sup>69</sup> In the action Kimmel brought against the Swartz defendants, Kimmel contended that their filing of the alleged confidential information, among other things, constituted a breach of contract, breach of the implied

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63. *Id.*

64. *Id.*

65. *Id.* (quoting *Barker v. Huang*, 610 A.2d 1341, 1349 (Del. 1992)).

66. *Kimmel & Silverman, P.C. v. Porro*, 53 F. Supp. 3d 325, 328-29 (D. Mass. 2014).

67. *Id.*

68. *Id.* at 329.

69. *Id.*

covenant of good faith and fair dealing, and fraud.<sup>70</sup> The Swartz defendants claimed that their disclosure of any alleged confidential information in the Lohr Lawsuit was protected as a matter of law under various theories, one of which was the absolute litigation privilege.<sup>71</sup>

In reviewing the contentions of the parties, the District of Massachusetts was “constrained to agree” with the Swartz defendants that none of the claims against them were actionable because of the absolute litigation privilege.<sup>72</sup> In addressing the scope of the absolute litigation privilege, the court stated the following:

“Under Massachusetts law, an attorney’s statements are absolutely privileged ‘where such statements are made by an attorney engaged in his function as an attorney whether in the institution or conduct of litigation or in conferences and other communications preliminary to litigation.’” . . . “The privilege ‘is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.’” . . . Thus, it “shields an attorney from civil liability for statements made in the course of litigation.”<sup>73</sup>

The court noted that, in addition to applying to statements made in the course of litigation, “the privilege applies to an attorney’s conduct in carrying out tasks associated with the litigation process.”<sup>74</sup> Thus, the Swartz defendants’ statements made during the Porro Lawsuit, and their actions in filing deposition transcripts and engaging in a chain of emails during the course of litigation in the Lohr Lawsuit, were protected from liability under the absolute litigation privilege.<sup>75</sup>

Kimmel contended that, “[w]hile the privilege serves a specific purpose—to secure freedom of expression for attorneys in pursuit of their clients’ interests—that purpose is subsumed here by an underlying contractual obligation,” which was the nondisclosure preclusion in the Porro Lawsuit Settlement Agreement.<sup>76</sup> However, the court did not agree. Although the issue of contractual obligation supremacy had not been addressed in Massachusetts previously, the court held that “[c]ourts that have addressed the question directly have ruled that the litigation privilege does not yield to a litigant’s obligations under a pre-existing

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70. *Id.*

71. *Id.* at 329-30, 340.

72. *Id.* at 342.

73. *Id.* (citations omitted) (quoting *Blanchette v. Cataldo*, 734 F.2d 869, 877 (1st Cir. 1984); *Bartle v. Berry*, 953 N.E.2d 243, 249 (2011)).

74. *Id.*

75. *Id.* at 343.

76. *Id.*

contract.”<sup>77</sup> Therefore, the court concluded that “both the applicable case law and the policy behind the absolute litigation privilege compel the conclusion that the Swartz defendants cannot be held liable for any such violation.”<sup>78</sup>

### C. Innes v. Marzano-Lesnevich

In April 2014, the New Jersey Superior Court, Appellate Division, upheld a \$700,000 verdict in an action brought by a non-client against an opposing party’s lawyer and her law firm.<sup>79</sup> Madeline Marzano-Lesnevich and her law firm, Lesnevich & Marzano-Lesnevich, represented Maria Jose Carrascosa in a divorce proceeding against her husband, Peter Innes. Previously, Carrascosa had been represented by Mitchell Liebowitz, at which time Innes and Carrascosa executed an agreement containing travel restrictions for their toddler daughter, Victoria. Innes was represented by Peter Van Aulen. The agreement contained a provision that the U.S. and Spanish passports of Victoria, who had dual citizenship, were to be held in trust by Liebowitz.<sup>80</sup> Carrascosa subsequently discharged Liebowitz and retained Marzano-Lesnevich, who then received the case file, including Victoria’s U.S. passport, from Liebowitz.<sup>81</sup> Marzano-Lesnevich gave Victoria’s U.S. passport to Carrascosa, and, using that passport, Victoria traveled to Spain the next month and has remained there since.<sup>82</sup> Innes successfully

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77. *Id.*

78. *Id.* at 344.

79. *Innes v. Marzano-Lesnevich*, 87 A.3d 775, 779 (N.J. Super. Ct. App. Div. 2014). At trial, a jury awarded Innes \$700,000 and Victoria \$250,000. *Id.* This \$950,000 malpractice verdict against Marzano-Lesnevich and her firm was said to “set out ‘a new standard of responsibility by a matrimonial lawyer to her nonclient.’” Matthew S. Marrone, *Million Dollar Verdict Against NJ Lawyer for Enabling Child Abduction Sets “New Standard of Responsibility to Nonclient,”* DRI TODAY (June 9, 2011, 3:56), <http://dritoday.org/post/Million-Dollar-Verdict-Against-NJ-Lawyer-for-Enabling-Child-Abduction-Sets-New-Standard-of-Responsibility-to-Nonclient.aspx> (quoting Walter Lesnevich, counsel and husband of Marzano-Lesnevich).

80. The court opinion quotes the agreement, in part, as follows:

Neither . . . Carrascosa nor . . . Innes may travel outside of the United States with Victoria . . . without the written permission of the other party. To that end, Victoria[’s] . . . United States and Spanish passport [sic] shall be held in trust by Mitchell A. Liebowitz, Esq. Victoria[’s] . . . Spanish passport has been lost and not replaced, and its loss was reported to the Spanish Consulate in New York . . . Carrascosa [sic] will file an application for a replacement Spanish passport within [twenty] days of today.

*Innes*, 87 A.3d at 780-81.

81. When informed that Carrascosa had retained the Lesnevich firm, Liebowitz wrote: “As you may know, I am holding her daughter’s United States Passport. I would prefer if you arranged for the original file to be picked up by messenger with the messenger acknowledging receipt of the passport.” *Id.* at 781.

82. *Id.* at 779. The defendants filed a third party complaint seeking contribution against Carrascosa, Mitchell Liebowitz, and Peter Van Aulen. Both Liebowitz and Van Aulen successfully

sued Marzano-Lesnevich and Lesnevich & Marzano-Lesnevich for negligence and was awarded damages for emotional distress.<sup>83</sup>

When sued by Innes, Marzano-Lesnevich did not raise the litigation privilege as a defense. Rather, her primary defense was that she owed no duty to Innes, a non-client.<sup>84</sup> It has been asserted that “[c]ases 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.”<sup>85</sup> This is because “[t]he policies supporting the denial of a duty . . . are the same as those supporting the application of absolute immunity.”<sup>86</sup> Apparently, this was the tactic chosen by the defendants in this case. However, with respect to the assertion that the defendants owed no duty to Innes, the court disagreed.<sup>87</sup>

In New Jersey, “the lawyer’s duty of effective and vigorous representation of his client is tempered by his corresponding duty to be fair, candid and forthright.”<sup>88</sup> In fact, “attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorneys’ representations and the non-clients are not too remote from the attorneys to be entitled to protection.”<sup>89</sup> New Jersey courts have also recognized that “[p]rivacy between an attorney and a non-client is not necessary for a duty to attach ‘where the attorney had reason to foresee the specific harm which occurred.’”<sup>90</sup> Additionally, there may be liability to a non-client if the non-client is owed an independent duty.<sup>91</sup> In *Innes*, the court determined that, despite the fact that defendants made no affirmative representation to honor the

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moved for summary judgment, which was upheld on appeal. *Id.* at 783-84. Van Aulen did not commit legal malpractice in his representation of Innes. *Id.* Liebowitz had no duty to safeguard Victoria’s passport after he was discharged by Carrascosa. *Id.*

83. See *Firm Representing Divorcing Wife Is Liable to Husband for Releasing Child’s Passport*, 30 ABA/BNA LAW. MANUAL PROF’L CONDUCT 260, 260 (2014). Innes also filed a criminal complaint for interference with custody against Carrascosa, who was convicted and is currently incarcerated. *Id.* at 261.

84. See *Innes*, 87 A.3d at 784. Defendants also claimed the agreement had been repudiated by the parties and that Marzano-Lesnevich made no representations on which Innes reasonably relied. *Id.*

85. Anenson, *supra* note 3, at 927 n.66.

86. *Id.*

87. *Innes*, 87 A.3d at 785.

88. Davin, L.L.C. v. Daham, 746 A.2d 1034, 1046 (N.J. Super. Ct. App. Div. 2000).

89. Petrillo v. Bachenberg, 655 A.2d 1354, 1359-60 (N.J. 1995). New Jersey case law permits “legal malpractice claims by nonclients.” Marrone, *supra* note 79.

90. Estate of Albanese v. Lolio, 923 A.2d 325, 332-33 (N.J. Super. Ct. App. Div. 2007) (quoting Albright v. Burns, 503 A.2d 386, 389 (N.J. Super. Ct. App. Div. 1986)).

91. Estate of Fitzgerald v. Linnus, 765 A.2d 251, 257 (N.J. Super. Ct. App. Div. 2001).

Carrascosa/Innes agreement, they owed a duty to Innes.<sup>92</sup> The opinion of the court states: “If [defendants] were unwilling to abide by the agreement, they were obligated to so advise Van Aulen or Liebowitz. Simply giving the passport to Carrascosa was a breach of defendants’ duty, even if they believed in good faith that the Agreement had been ‘repudiated.’”<sup>93</sup> Furthermore, “it was entirely foreseeable that Carrascosa’s possession of Victoria’s passport would facilitate her ability to remove her daughter from the country”<sup>94</sup>—an act that was “a ‘substantial factor’ in bringing about the damages plaintiffs claim to have suffered.”<sup>95</sup>

#### IV. APPLYING THE LITIGATION PRIVILEGE TO *INNES*

The defendants did not assert the litigation privilege in *Innes*; rather, they unsuccessfully asserted that, since the plaintiffs were non-clients, there was no duty of care owed to them.<sup>96</sup> However, had the litigation privilege been asserted as a defense or an immunity, it is possible that the outcome of the case would have been different. Looking at the components of the litigation privilege, there is room for arguing its applicability to the circumstances of the *Innes* case.

##### A. *Applicable Claim*

Innes’ claims against Marzano-Lesnevich and her firm appear to be within the scope of causes of action to which the litigation privilege has been found to attach. As mentioned above, courts have extended the litigation privilege to cover actions brought in negligence, and both the intentional and negligent infliction of emotional distress.<sup>97</sup> Additionally, some courts also include legal malpractice claims within the protection

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92. *Innes*, 87 A.3d at 785.

93. *Id.* The court also considered the release of Victoria’s passport to be a breach of the *New Jersey Rules of Professional Conduct* (“RPC”). Rule 1.15 of the *RPC* requires lawyers to appropriately safeguard property of clients or third parties in their possession. NEW JERSEY RULES OF PROF’L CONDUCT r. 1.15 (N.J. SUPREME COURT 2015). As Victoria’s father, Innes had a competing claim to her passport, and “defendants were not free to dispose of the passport as they saw fit.” *Innes*, 87 A.3d at 786.

94. *Id.* at 784.

95. *Id.* at 790. The jury returned a verdict of \$700,000 for Innes and \$250,000 for Victoria. Pre-judgment interest, counsel fees, and costs were also awarded. *Id.* at 779. The Superior Court of New Jersey, Appellate Division, however, reversed the part of the judgment awarding emotional distress damages, pre-judgment interest and counsel fees to Victoria, due to a lack of evidence, but affirmed all aspects of the judgment that applied to Innes. *Id.* at 800-01.

96. *See supra* notes 84-86 and accompanying text.

97. *See supra* note 24 and accompanying text.

of the privilege.<sup>98</sup> Had the defendants asserted the litigation privilege, they could have argued that the causes of action asserted by the plaintiffs fell within its scope. Courts “have been expanding the scope of the litigation privilege since its adoption in this country.”<sup>99</sup> In New Jersey, “if an immunity applies and bars civil liability, it trumps any theory of negligence.”<sup>100</sup> It is likely that defendants would have been successful in meeting this aspect of this element of the privilege.

Something that might have been problematic to Marzano-Lesnevich and her firm, however, is that, in New Jersey, “the litigation privilege does not protect an attorney from a claim by his or her client based upon statements the attorney made in the course of a judicial proceeding where . . . it is alleged that the attorney breached his duty to the client by failing to adhere to accepted standards of legal practice.”<sup>101</sup> In *Innes*, the court found that Marzano-Lesnevich’s act of turning over Victoria’s passport to Carrascosa breached one of the *New Jersey Rules of Professional Conduct* (“RPC”).<sup>102</sup> The court stated the following:

RPC 1.15(a) requires a lawyer to appropriately safeguard the property of clients or third parties in his or her possession. RPC 1.15(b) obligates a lawyer to promptly notify a third party of receipt of property in which the third party has an interest. “Except as stated in this *Rule* or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any . . . property that the client or third person is entitled to receive.” The clear import of these *RPCs* is that, in light of the Agreement and Innes’s competing claim to the passport as Victoria’s father, defendants were not free to dispose of the passport as they saw fit.<sup>103</sup>

A breach of this legal standard may have been problematic for the defendants. Although plaintiffs were non-clients, the court found they were owed a duty of care.<sup>104</sup> Furthermore, Rule 1.15(a) of the *RPC* applies not only to clients, but to third parties, as well. This breach of an

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98. See Richmond, *supra* note 1, at 296. Injurious falsehoods, deceit, and “even racketeering” have been found to be within the scope of the privilege in some jurisdictions. *Id.* at 297.

99. Anenson, *supra* note 3, at 927.

100. Slimm, *supra* note 37, at 3 (restating the holding of the court in *Malik v. Rutenberg*, 942 A.2d 136, 139 (N.J. Super. Ct. App. Div. 2008)).

101. *Buchanan v. Leonard*, 52 A.3d 1064, 1069 (N.J. Super. Ct. App. Div. 2012).

102. *Innes v. Marzano-Lesnevich*, 87 A.3d 775, 785-86 (N.J. Super. Ct. App. Div. 2014).

103. *Id.* (citations omitted). In affirming that the defendants’ motion for summary judgment was properly denied, the court stated that “[w]hile ‘a cause of action for malpractice cannot be based exclusively on the asserted breach of’ an RPC, ‘it is clear that the [RPC] may be relied on as prescribing the requisite standard of care and the scope of the attorney’s duty to the client.’” *Id.* at 785 (quoting *Gilles v. Wiley* 783 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001)).

104. See *supra* note 92 and accompanying text.



accepted standard of legal practice may have been an obstacle to the litigation privilege's applicability. With a duty of care comes responsibilities, and breaching one of the *RPC* rules by failing to safeguard property may have precluded application of the litigation privilege.

### B. *Statements and Conduct*

In determining if the litigation privilege attaches to a particular matter, courts must determine if immunity applies only to statements or also includes conduct, and if it does not apply to conduct, the character of that conduct. In the instant case, what caused the harm for which Innes recovered was the act of turning Victoria's passport over to Carrascosa.<sup>105</sup> In New Jersey, an absolute privilege applies to "any communication."<sup>106</sup> Whether the act of turning over Victoria's passport was communicative would determine the applicability of the privilege. Arguably, all conduct imparts some interchange or message and is communicative in its essential nature. However, even if the act is found not to be communicative, there would be an issue as to whether this was a non-communicative action for which an exception should be carved out, entitling the defendants to the litigation privilege's protection.<sup>107</sup> This would be an issue for the court to determine.

### C. *To Whom the Privilege Attaches*

As initially established, the litigation privilege protected lawyers from civil liability for statements that offended an opposing party during litigation.<sup>108</sup> Over time, the category of individuals protected expanded beyond just advocates.<sup>109</sup> In the instant case, with the defendants being opposing counsel and her law firm, they clearly fall within the scope of entities entitled to the protection of the litigation privilege. Thus, there is little doubt that the court would find that the privilege attaches to Marzano-Lesnevich, personally, and to her firm, Lesnevich & Marzano-Lesnevich, since they fall into the category of "litigants or other participants authorized by law."<sup>110</sup>

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105. See *supra* note 93 and accompanying text.

106. See *supra* note 20 and accompanying text.

107. See *supra* notes 31-32 and accompanying text.

108. See *supra* note 1 and accompanying text.

109. See *supra* note 35 and accompanying text.

110. See *supra* note 20 and accompanying text.

#### D. *Type of Proceeding*

It is also likely the court would find the conduct at issue to have occurred within a “judicial or quasi-judicial” proceeding, enabling the privilege to attach.<sup>111</sup> In New Jersey, “[w]hether in the process of drafting, settlement discussions, depositions, motion practice, arguments at trial or on appeal, the privilege . . . appl[ies].”<sup>112</sup> It extends “before, during and after trial.”<sup>113</sup> In the instant matter, although a divorce complaint had not yet been filed, the conduct occurred “during the prelude to contentious matrimonial proceedings” when Carrascosa and Innes were separated and represented by counsel.<sup>114</sup> It is likely a court would find that this was the type of proceeding in which the privilege would attach.

#### E. *Relationship to the Litigation*

For the privilege to attach, the statement or conduct at issue must have some relation to the proceedings.<sup>115</sup> Applying this liberal standard to the instant case, this requirement would certainly be met.<sup>116</sup> As noted by the court: “It suffices to say that the instant litigation centered on the October 2004 agreement . . . executed by Innes and Carrascosa as it related to restrictions upon travel with Victoria.”<sup>117</sup> The act of handing Victoria’s passport to Carrascosa was indeed related to the underlying litigation.

#### F. *Achieving the Object of the Litigation*

For the litigation privilege to attach, the court must find that the conduct at issue was for the purpose of achieving a legitimate goal, rather than for an improper purpose.<sup>118</sup> Interestingly, this element might be difficult for the defendants to overcome but for the fact that Marzano-Lesnevich’s conduct was negligent rather than intentional. In the instant case, it was not asserted that releasing Victoria’s passport was done for an illegitimate, ulterior purpose—allowing the child to be taken to Spain. This is so even though the court determined that it was foreseeable that release of Victoria’s passport to Carrascosa would facilitate the child’s

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111. *Id.*

112. Slimm, *supra* note 37, at 3.

113. Anenson, *supra* note 3, at 945.

114. *Innes v. Marzano-Lesnevich*, 87 A.3d 775, 780 (N.J. Super. Ct. App. Div. 2014).

115. *See supra* note 41 and accompanying text.

116. *See supra* note 42 and accompanying text.

117. *Innes*, 87 A.3d at 780.

118. *See supra* note 48 and accompanying text.

removal from the country.<sup>119</sup> The law surrounding “legitimate purposes” in the context of the litigation privilege has been described as “unsettled”<sup>120</sup> and as “lack[ing] consistency.”<sup>121</sup> Although an illegitimate goal was determined to be foreseeable by the defendants, it does not follow that this equates to lack of a legitimate goal objective. Again, if this negligent act is not subject to protection, it would hollow the litigation privilege and its mandate.

## V. CONCLUSION

Had the defendants in *Innes* asserted the litigation privilege, they may have realized more success than with the defense of lack of duty of care. Since it was premised on a negligence claim, the underlying case against Marzano-Lesnevich and her firm would come within the scope of causes of action to which the litigation privilege attaches. Whether Marzano-Lesnevich’s act of turning over the passport was communicative may have been an obstacle. However, it can be asserted that this test is met under the premise that all conduct is in some way communicative. And even if the communicative test is not met, in a number of jurisdictions, those acts which have been deemed “non-communicative” have also been protected.<sup>122</sup> As counsel for an adverse party, Marzano-Lesnevich and her firm clearly would have been entities to which the privilege would attach.

Just as the *Innes* case appears to meet the litigation privilege’s criteria for an applicable claim, designated conduct, and protected person status, the other aspects of the privilege also appear to be met. The offending act—relinquishing Victoria’s passport—occurred during the prelude to contentious matrimonial proceedings, so the proceeding would be the type to which the privilege would apply. Furthermore, the act was related to the lawsuit and did not appear to be done for an illegitimate, ulterior purpose, unless it would be determined that the “litigant’s purpose” test is not met since the harm done was foreseeable. Another possible hurdle could be New Jersey’s preclusion of the use of the privilege when an attorney breaches a duty by failing to adhere to applicable legal standards.<sup>123</sup> Here, the court found breach of a professional duty, but the act which occasioned this was itself the

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119. See *supra* note 94 and accompanying text.

120. Anenson, *supra* note 3, at 935.

121. *Id.* at 937. It has been suggested that due to recitals about “liberality” in applying the privilege, “a more lenient connection between the method employed and the object should suffice.” *Id.* at 938.

122. See *supra* notes 30-32 and accompanying text.

123. *Buchanan v. Leonard*, 52 A.3d 1064, 1069 (N.J. Super. Ct. App. Div. 2012).

offending negligence by Marzano-Lesnevich, so the privilege may well have attached due to the underlying purpose of the doctrine.

In *Innes*, the litigation privilege was not raised as a defense or an immunity. Had it been, some questions would have surrounded its underlying applicability, although it might have been successful. As *Johnson* and *Kimmel & Silverman* illustrate, one must not lose sight of the fact that, when properly implemented, the litigation privilege remains an important protection for lawyers from retaliatory lawsuits by opposing parties. Because “lawyers are commonly sued by adversaries,” the need for the privilege is “substantial.”<sup>124</sup> This is a protection that is not only important for lawyers, but also important for the proper functioning of our adversarial system.

In approaching an analysis of the litigation privilege, it is important to remember that the litigation privilege is “as old as the law.”<sup>125</sup> As a firmly grounded common law doctrine, recent times have seen the litigation privilege expand, ensuring that lawyers “can carry out their ethical responsibilities on behalf of their clients without fear of retaliatory lawsuits.”<sup>126</sup> However, there are limits to the protections of the privilege. Although frequently described as having a broad or liberal applicability, there are bounds within which the doctrine operates, with its applicability being a question of law for the courts.<sup>127</sup>

There is little indication that the scope of the litigation privilege is waning. Although not limitless, it offers significant protection for lawyers, perhaps even emboldening them in their litigation tactics. It must be remembered that the privilege was never intended to function as a sword, but rather as a shield to protect lawyers in furthering their legitimate litigation goals. The protected conduct of the lawyer must be used for a purpose for which the litigation is designed. Failure to follow this mandate could have a negative impact on the legal profession and undermine the integrity of the adversarial system itself.

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124. Richmond, *supra* note 1, at 284. While data about professional liability claims is lacking, it is estimated that in the late 1970s, twenty percent of all claims filed against litigation lawyers were by party opponents—a trend that continued in the years that followed. Anenson, *supra* note 3, at 917 n.3 (citing Ronald E. Mallen & James A. Roberts, *The Liability of a Litigation Attorney to a Party Opponent*, 14 WILLAMETTE L.J. 387, 387 n.1 (1978)).

125. Anenson, *supra* note 3, at 919 (quoting *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1868)).

126. Schuster, *supra* note 4, at 39.

127. See *supra* note 13 and accompanying text.

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